Harbor. This is discussed in part A of this Section. In addition, the group asks the Board to grant NS trackage rights to run through trains from 65th Street to Bronx Oak Point and the Hunts Point Market; to grant trackage rights to NS allowing it to serve the NEC to Connecticut and Massachusetts; to transfer to NS Conrail freight rights through the Pennsylvania Railroad Tunnels through midtown Manhattan, and to require CSX to establish an intermodal terminal at Harlem River Hard. Additional conditions which the group requested in a November 24 filing addressing Applicants' North Jersey Shared Assets Operating Plans are largely embellishments of the earlier requested conditions. They add a demand that the Shared Assets Area Operator cooperate with NJ Transit and Metropolitan Transit Authority to allow for the introduction and expansion of passenger routes and services.

The Tri-State Transportation Campaign's requests for conditions are not supported by evidence, are not related to a consequence of the Transaction, and consequently should be denied.

6. Resource Warehousing & Consolidation Services, Inc. (RWCS-3)

Resources Warehousing & Consolidation Services, Inc. (RWCS) has intermodal facilities located on the southern terminus of a north/south rail line owned and served by the New York Susquehanna & Western Railroad (NYS&W), which is owned by the Delaware Ostego Corporation.

While supporting the Transaction and not anticipating "difficulty in ultimately achieving satisfactory service options or commitments", RWCS demands use the conditioning power of the Board to require what it claims should be equal access to both NS and CSX rail service to and from its terminal facilities. RWCS-3 at 2. In fact, however, RWCS will be provided the

dual access it seeks. Orrison RVS at 128. It can only be served now, and in the future, by NYS&W. It will be able to connect to NS via Passaic Junction off the Southern Tier on the Conrail lines allocated to NS; and to CSX via a connection to be built from North Bergen to Little Ferry. Id. at 128.

C. Private Holdings In The Shared Assets Areas

Each of the three Shared Assets Area Agreements contains a Section 6, which, together with the definitions provided in the Agreement, defines the responsibility for making and financing shared capital improvements. See CSX/NS-25, Vol. 8C at 82-85, 121-24, 162-65. These provisions also permit, in certain carefully defined cases, one or the other of CSX and NS to make capital improvements on their own and have them as their private property, in the same cases subject to a right of the other to "buy-in" and in other cases ("Operator Facilities") without such right. The provisions are a balanced set of rules which provide for the making of capital improvements on jointly shared facilities on an equitable basis, while preserving opportunities for private investment and use. Sharing of essential facilities and competition to provide additional facilities to serve shippers are thus both promoted. There also are certain existing facilities in Shared Assets Areas which are to be set aside for use by one or the other of CSX or NS. See CSX/NS-20, Ex. 13, CSX Operating Plan, Sec. 4.5.1., Vol. 3A at 213-33; Section 6(j) of North Jersey S.A.A. Operating Agreement, CSX/NS-25, Vol. 8C at 85; Items 1(C) and 2(C) to Schedule 1 to Transaction Agreement, CSX/NS-25, Vol. 8B at 85-86, 88-90.

In an astounding submission, CMA proposes that a condition be imposed to the effect that within Shared Assets Areas no private facilities may exist and that all facilities must be shared

by the two carriers. CMA-10 at 34-35. CMA seeks the imposition of such conditions with respect to all preexisting bulk facilities as well as any and all future facilities to be constructed in the Shared Assets Areas:

> Lest there be any doubt, it is necessary for the Board to make clear that facilities constructed in the future in the shared asset areas will be open to both CSX and NS. Otherwise, the benefit of joint access in the SAAs will diminish over time as existing facilities are retired and new facilities are constructed.

CMA-10 at 24.

While put forward in the name of competition, the proposal is so anti-competitive that it is hard to imagine its suggestion by a group ostensibly devoted to free-market principles.[42] The proposal embodies the following notions: First, that by creating Shared Assets Areas the parties, like it or not, bring it about that everything in them must be held in common by the two carriers. Second, that neither CSX nor NS should, using its private funds, build a new facility, not interfering with the joint use of shared assets, to serve customers in a Shared Assets Area without permitting the other to use. Adopting those notions would prevent CSX and NS from executing their operating plans, would stifle innovative and progressive initiatives by CSX and NS, and would reduce service to the lowest common denominator. The Applicants have carefully adjusted the balance between what must be done collectively and what may be done individually. There is no reason to destroy that balance and every reason to maintain it. The condition should be rejected as baseless and itself anti-competitive.

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[42] A similar proposal is made by Congressman Kucinich who proposes to "nationalize" all rail facilities in and around Cleveland, apparently to meet environmental objectives. Submission of Congressman Dennis J. Kucinich (unnumbered).

D. Public Input and Governance

A few parties have proposed that the Board impose as a condition the requirement that certain public entities or officials participate in the governance of the Shared Assets Area. For example, the Delaware Valley Regional Planning Commission ("DVRPC"), advocates, without providing any details, that the Board prescribe "an official mechanism" for public input into the management of the shared assets area. DVRPC-2 at 4. Similarly, the South Jersey Transportation Planning Organization, while supporting the Transaction, "urges the STB and the railroads to consider . . . that a public voice should be prescribed in the governance and maintenance of the Shared Assets Areas." SJTPO-1 at 2. Congressman Robert Menendez of New Jersey would go further and have the Board designate "an impartial party to represent the public interest in the Shared Assets Areas and act as an arbitrator" in managing the Shared Assets Area. Comments of Congressman Robert Menendez (unnumbered) at 6.

All these requests should be rejected. Public authorities will be listened to and consulted, of course, and CSX and NS expect to have significant outreach to, and communications with, the public authorities and officials as appropriate.[43] The precise form and content, however, of these communications and interfaces can hardly be prescribed or formatted by the Board. In some cases, informal or formal, advisory roles may be appropriate, although certainly not governance roles. The proposals that the Board designate public officials to undertake

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[43] For example, CSX and NS have proposed procedures for meetings and cooperation with the New Jersey Department of Transportation and the New Jersey Transit Corporation to discuss major issues. See discussion in Section XVII. The timing, designation of representatives, etc., in coordinating with such public bodies, however, must necessarily be left to the parties involved.

management decisions as to operations in the Shared Assets Areas, or be involved in tie-breaking or other deadlock mechanisms, would neither contribute to the safe and efficient operation of the new rail systems, nor accord with Board policy and precedent.

E. Operations

Several parties in their comments on the Primary Application expressed concern that the Shared Assets Areas concept is "novel" and "untried" and that the CSX and NS Operating Plans did not provide sufficient detail on how the Applicants would operate in the SAA's. The Port Authority of New York and New Jersey (Port Authority), seeking assurance that CSX and NS could operate efficiently and meet the Port Authority's needs in the North Jersey SAA, filed a motion (NYNJ-13) asking the Board to require Applicants to file detailed operating plans for the NJSAA. In response, the Board ordered the Applicants (individually or collectively) to file a more detailed plan for the NJSAA in order to demonstrate that their proposed operations were feasible and would not unduly impact passenger and commuter operations. Decision No. 44.

Accordingly, on October 29, 1997, CSX and NS jointly filed a coordinated operating plan for the NJSAA (CSX/NS-119).[44] That plan set forth more fully the CSX and NS train service that would be available on Day One of operations and explained the role of the CSAO in the NJSAA (and other SAA's). The plan described the traffic flows to and from the NJSAA,

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[44] New York/New Jersey Foreign Freight Forwarders & Brokers Association, Inc. asks the Board to require Applicants to provide a detailed statement of the management and operations plan for the assets located within the New York/New Jersey Shared Assets Area. Because Applicants have already complied with the Board's Decision No. 44, served October 15, 1997, requiring detailed operating plans for the North Jersey Shared Assets Area, the association's request has already been complied with and is therefore moot.

the major blocking patterns that would affect the NJSAA, and the proposed capital improvements both within the NJSAA and throughout the CSX and NS systems that would benefit customers shipping to and from the NJSAA. Yard operations and local yard assignments, including service of local customers, were also included. The submission provided a fuller explanation of the purpose of the CSAO, identified the operating rules (NORAC) that would apply in the SAA's, including the NJSAA, and specified that there would be one dispatcher for the entire NJSAA area, located in Mt. Laurel, NJ. The plan also identified all freight trains scheduled to operate over Amtrak and NJT lines and provided existing passenger train schedules to demonstrate that proposed freight operations in the NJSAA would not unduly interfere with passenger service. The plan also provided details on the implementation processes that CSX and NS have underway to assure a smooth transition. The sponsors of the Plan submitted to depositions on November 19, 1997.

On November 24, 1997, five parties responded to the NJSAA plan -- the Port Authority, APL, Amtrak, NJT and Tri-State Transportation, Inc.[45] Significantly, the **Amtrak** and **NJT** comments are mostly positive. Amtrak acknowledges that most of its concerns are adequately addressed in the plan and that the only remaining concern -- the scheduling of certain freight trains outside Amtrak's current window for freight operations -- is currently the subject of negotiations between Amtrak and the Applicants, and will not require STB intervention.

On the basis of Applicants' submission, NJT has withdrawn two of its previously filed requests for conditions. Its remaining requests basically seek reassurance or clarification of

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[45] See NYNJ-18; APL-8; NRPC-9; NJT-12; Submission of Tri-State Transportation, Inc. (unnumbered).

commitments contained in the plan. Applicants affirm that two of NJT's remaining concerns will be met: (1) locomotives operating over NJT lines will be equipped with ATC/PTS equipment compatible with NJT requirements (see CSX/NS-119 at 11, 125; Orrison/Mohan Dep., Nov. 19, 1997, at 116-17; see also Orrison RVS at 154), and (2) NORAC operating rules will govern through the foreseeable future (see Response to NJT's Third Set of Interrogatories, CSX/NS-112 at 6; Orrison RVS at 154). NJT's final concern -- that there be close coordination of the implementation of the plan --does not require imposition of any condition by the Board. Applicants' recently filed Safety Integration Plan for the SAA's, and various other submissions explain the close coordination and careful steps being taken in the implementation planning process to assure smooth transition.

Tri-State's comment reiterates its request for shared access east of the Hudson River -- which issue has been addressed above -- and further seeks assurances that CSX and NS will pursue carload freight and not abandon such traffic in the interests of developing intermodal traffic. As carload freight is the lifeblood of the railroad industry, no condition for the carriers to pursue such traffic is needed. Orrison RVS at 156-57. However, Tri-State's request that CSX and NS be required to conduct a study for the State of New Jersey to discover "untapped potential" for carload traffic and that the Board "assign" CSX and NS specific target levels for developing carload freight traffic is beyond the scope of this proceeding. While CSX and NS seek to attract and compete for additional carload freight traffic in the New Jersey area in the normal course of business, there is no justification for the Board to impose such a requirement on them. Business development is appropriately conducted through private industry and not administrative order.

The **Port Authority** comment is an extraordinary effort to find fault for the sake of finding fault. The verified statement of its witness consisted of a list of insignificant "flaws" and "discrepancies" including criticism that the schematic drawings of the area (used to indicate yard usage and not to depict line ownership) did not accurately reflect trackage rights and the term "high quality" was not defined. Many of the points raised are basically objections to any deviation from existing Conrail practices. For example, several of the Port Authority's points concern changes in operations at Oak Island Yard and the CSX and NS blocking strategies. As explained more fully in Mr. Orrison's statement, when Conrail previously downsized Oak Island as a cost-cutting measure, cars were sent out of route, resulting in added transit time for customers' traffic. Orrison RVS at 159. CSX's and NS' proposed operations, which include restoration of the use of the Oak Island hump processor to full capacity and new blocking strategies, will be more customer-oriented and will reduce car days for a significant amount of traffic. Id.

APL's comment basically boils down to two issues. First, APL is dissatisfied with section 2.2(c) of the Transaction Agreement providing for the assumption of Conrail's rail transportation contracts by CSX and NS. APL would prefer renegotiating its existing contract. That issue is addressed elsewhere in this Narrative (Part IX).

APL's second issue is that it questions whether CSX and NS will provide the same "tightly coordinated" service for APL that Conrail does today. Under the guise of concern that the railroads are not aware of the complexity of operations in the congested NJSAA area, APL suggests that CSX and NS would not be able to provide the same service without further congestion and delay. The idea that CSX and NS cannot coordinate operations in the NJSAA

is nonsense. Applications are experienced rail carriers well versed in operating in areas equally or more congested and complex than the NJSAA -- Chicago, for example.

Moreover, the premises of many of APL's anticipated problems are unfounded. For example, although the proposed CSX service between APL and CSX's proposed new 59th Street intermodal facility in Chicago will be better than existing Conrail service, APL complains that this service is speculative because the terminal is not now completed. The terminal will be completed in plenty of time for Day One operations, and even if it were not, CSX has a fully adequate backup plan via the 63rd Street facility. Orrison RVS at 170-71. Similarly, APL frets without cause that CSX will not be able to perform the "filet and toupee" operation that Conrail currently performs. CSX is well versed in that operation (although it calls it "stack hubbing") and already has included it in its intermodal operating plan. Orrison RVS at 172. Finally, APL complains that CSX and NS did not heed APL's prior input in preparing the NJSAA operating plan; but the fact of the matter is that at meetings between APL and CSX, APL wanted to discuss rates, not operations, and did not respond to operational proposals made by CSX. Section IX; Rutski RVS at 20-23.

F. Summary and Conclusions

As the foregoing discussion makes abundantly clear, neither Board precedent nor policy supports the numerous comments and/or inconsistent and/or responsive applications seeking, as a condition to Board approval of the primary application, that CSX and NS reshape or create new Shared Assets Areas and other shared arrangements, in addition to those voluntarily negotiated and carefully crafted by them. The protestants in this group have blithely ignored

the clear directive of the Board in this case in its Decision No. 40 (decided October 1, 1997) that requests for conditions must meet the "specific criteria" established by Board precedent, and that petitioners must present substantial evidence to establish that "without imposition of the conditions [approval of the primary application] will harm their ability to provide essential services and/or competition." Decision No. 40 at 2.

As noted earlier, if requests of this nature were to be granted, rail mergers and consolidations would be prohibitively complex and expensive. Indeed, if the Board were to require extensions of, or addition to, Shared Assets Areas as proposed by several of the parties, the economics of the Conrail acquisition would be so dramatically and drastically changed, and so undermine the pro competitive structure contemplated by the Transaction Agreement, that the structure could well be rendered commercially impracticable and/or operationally infeasible.

The Shared Assets Areas as negotiated by CSX and NS will affirmatively promote the public interest. These Shared Assets Areas are an integral part of the overall Transaction set forth in the Application, and are part and parcel of the creation of numerous new single-line routes between the Northeast and Southeast and the Northeast and Midwest. As the previous discussion reviewing these comments and/or inconsistent and/or responsive applications on an area by area basis demonstrates, the CSX/NS acquisition -- and indeed the voluntary Shared Assets Areas themselves -- are likely to improve the competitive positions of most, if not all, of these complainants by affording new rail transportation options, and providing better, more reliable, and more competitive transportation services. There has been no evidence offered that in any way justifies restructuring the underlying Transaction by imposing the conditions sought by these protestants.

IX. THE BOARD SHOULD NOT IMPOSE ANY CONDITION DISAPPROVING SECTION 2.2(c) OF THE TRANSACTION AGREEMENT RELATING TO CONRAIL'S RAIL TRANSPORTATION CONTRACTS OR ANY OTHER PROVISION OF THE DOCUMENTATION AND CORPORATE STRUCTURE OF THE "CONTINUING CONRAIL."

A. Section 2.2(c) of the Transaction Agreement Provides a Logical Method for Ensuring Continued Service Pursuant to the Terms of the Existing Contracts.

Section 2.2(c) of the Transaction Agreement provides an orderly and logical method for allocating the existing Rail Transportation Contracts of Conrail. It treats the contracts as equally binding upon the rail carrier and upon the shipper; simplifies the task of assimilating parts of a single railroad into the systems of two other railroads; and facilitates the process of implementation and smooth transition from a separate, unitary Conrail into a Conrail the operation of whose routes are allocated between the two railroads.

The system of allocation prescribed by Section 2.2(c) is logical. Where only CSX can perform single line service to fulfill a contract, CSX will provide it. CSX/NS-25, Vol. 8B at 26, § 2.2(c)(iii)(C)(bb). Where only NS can provide single line service to fulfill a contract, NS will provide it. *Id.* § 2.2(c)(iii)(C)(aa). Where neither can provide single line service (the so-called "one to two" situations) the shipper's contract price is protected even though the contract becomes a joint line contract, and a pre-agreed division is applied. All non-price provisions of the contract are to be observed as well. (Subsection (x) of the sections just cited.) *See also id.* at 27, § 2.2(c)(iv).

Where both CSX and NS can provide single line service, performance of the contracts will be, as a totality, divided 50-50 between them. *Id.* at 27-28,

§§ 2.2(c)(iii)(C)(cc)(z), (dd) (z), (ee), (z), and (f). There is, however, a presumption against dividing performance of any contract between a single origination and destination between the two carriers. Id. at 28, § (c)(iv). Performance of those contracts will be allocated by mutual agreement between CSX and NS, contract by contract, or, in appropriate cases, by allocating performance of a portion of a contract that involves the entirety of all movements from one particular origination point to a particular destination point[1] to one carrier, and other such portions to the other carrier. In the case of multi-origination/destination contracts, all special provisions -- e.g., volume incentives, commitments, etc., based on total moves between all pairs covered by the contract -- will be preserved for the benefit of the customer. Id. at 28, § 2.2(c)(v).[2]

It is this last aspect of the transaction, dealing with contracts where both carriers can provide single line service, that has given rise to most of the specific shipper comments.[3] Some of these comments have to do with uncertainty; shippers do not know which of the two railroads will perform their contract.[4] Other commentors want the Board to allow them to terminate their existing contracts immediately upon the commencement of separate operations by CSX and NS.

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[1] Sometimes called a "lane." There is a presumption that service responsibility on such a lane will not be divided between the two carriers. Id. at 28, § 2.2(c)(iv).

[2] Revenues and expenses from these contracts will be pooled so that a failure to divide the responsibility for performance perfectly equally will not affect the 50-50 split. Id. at 26, 28, §§ 2.2(c)(iii)(C) and 2.2(c)(iv).

[3] CMA-10 at 35-36; ISRI-6 at 12; NITL-7 at 38.

[4] ISRI-6 at 12; NITL-7 at 38.

At the moment, of course, it would be inappropriate for CSX's and NS's marketing departments to see the contracts in their totality without the consent of the shippers subject to any confidentiality provisions in the contracts. So the shippers must either show their contracts voluntarily to CSX and NS (obtaining any necessary consent of Conrail) or await the Control Date when Conrail's books and records will become available to CSX and NS. As a practical matter, however, since a rough 50-50 division of all of the contracts for which single-line service may be provided by either of the two carriers must be made before an operational division of any can be made, it is hard to give any of the shippers an assurance as to which contracts will be allocated for performance to which carrier. An operational division will have to await the Control Date and some time thereafter, until CSX and NS have studied at least the great bulk of the contracts.

B. Applicant's Settlement Agreement with NITL Reasonably Addresses the Claims of Parties Concerning Section 2.2(c).

Applicants' settlement agreement with NITL contains a provision that reasonably addresses and accommodates the concerns expressed by parties with respect to Section 2.2(c). The agreement provides a remedy to shippers that have contracts that could be allocated to either NS or CSX under Section 2.2(c) and that are dissatisfied with the service provided to them by the carrier to whom the contract was allocated. Such shippers, of course, may at any time express their service complaints directly to the carrier, and can seek that carrier's agreement to improving the service or transferring performance of the contract to the other carrier. In addition, under the agreement, if those shippers remain dissatisfied after six months' experience with that carrier's service, they may submit those complaints to

expedited binding arbitration, and if the arbitrator finds sufficient merit to the complaint, the arbitrator may require performance of the contract to be transferred to the other carrier.

This provision is a reasonable accommodation of the concerns of shippers regarding the allocation of existing transportation contracts to one carrier rather than the other. Even without this provision, Applicants believe that the fact that shippers in this category can switch to the other carrier after their contracts expire will give the carrier having the contract strong incentive to provide good service -- certainly more than exists today. This provision will enhance that incentive powerfully. Even if the arbitration is not invoked, the fact that it can be invoked should provide ample assurance to shippers that NS and CSX will service their needs more than adequately.

Having negotiated this provision for shippers, NITL now supports Applicant's plan for the allocation of contracts under Section 2.2(c) in all respects, including price aspects of contracts as well as service aspects. There is no reason for the Board to go beyond this agreement and grant various other requests for overturning that plan. Those requests are not justified on various grounds we will discuss below. The fact that they go beyond an agreement Applicants' have reached with the country's leading association of shippers, however, makes them problematic as a threshold matter. This kind of private settlement by railroads and shipper representatives of matters of concern to shippers is something the Board and the ICC have frequently encouraged. If it reasonably accommodates those concerns, as Applicants submit, the Board should be satisfied.

C. The Rationale for Contract Opening in UP/SP Provides a Reason for Upholding Section 2.2(c).

There is no occasion to open up the contracts on the basis of the Board's opinion in UP/SP. In UP/SP, in its original August 6, 1996 order approving the transaction, and in a later order clarifying and laying down particular procedural rules for the application of the contract opening order in the August 6, 1996 order, the STB provided that half of a defined group of the SP contracts should be opened up to competition from BNSF. *UP/SP*, Decision No. 44, Finance Docket No. 32760 (decided August 6, 1996), slip op. at 106, 146 (original order); *Id.*, Decision No. 57. But the purpose of that action was to help rectify a massive two-to-one situation, one covering thousands of miles of SP's routes upon which trackage-rights were awarded to BNSF. In order to make BNSF a credible and viable source of competition to UP/SP on those trackage-rights routes, it was necessary to afford it an opportunity to compete for substantial densities of traffic on these essential routes. *UP/SP*, Decision No. 44, Finance Docket No. 32760 (decided August 6, 1996), slip op. at 106. Accordingly, the Board, in effect, released a number of shippers from their SP contracts so that BNSF could compete with UP/SP and seek by solicitation to establish a core of customers to give adequate density to support its trackage rights service.[5]

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[5] The City of Indianapolis (CI-5 at 14); (CI-6 at 14) urges that transportation contracts relating to the shippers in Indianapolis, where a 2-to-1 "fix" is being effected through trackage rights be opened up, for reasons similar, the City contends, to those which led the Board to open up the contracts on the trackage rights routes which were created in favor of BNSF in the UP/SP case. This is, of course, an entirely different argument and theory from that of the parties whose positions we analyze in this part. The Applicants do not believe, however, that such an action is necessary in Indianapolis, and reply to the City's arguments in that regard in Section IV.

Here, there will be no similar reason for opening up the contracts. If anything, the effect of Section 2.2(c) affirmatively accomplishes the purposes that the Board was pursuing in UP/SP. It will do this by starting up CSX's and NS's separate operations of the Conrail routes each with its own inventory of existing contracts allocated for performance between CSX and NS in a way that (a) promotes single-line service wherever possible; (b) provides for an efficient and economical joint line service where single-line service is not available; and (c) provides each railroad with an equal density of movements from the stock of Conrail contracts that can be performed on a joint line basis by them. This will promote an orderly start of their operations.

D. Efforts By Shippers to be Released From Price Terms Should be Rejected.

The basic argument made by most of the shippers and organizations challenging Section 2.2(c) is that they wish to have CSX and NS competitively bid on new contracts effective on "Day One" of the separate operations.[6] Those efforts of shippers to revisit the price and other terms of their contracts should be rejected. A number of the Conrail shippers ask that the railroads be released from their commitments to the shippers and that the shippers generally be released from their commitments under the contracts. CMA and other shippers go further and urge that the railroads be bound by their part of the agreements but that the shippers be free to escape from theirs.[7]

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[6] Commentors making this argument include APL Limited (APL-4, Rhein V.S. at 2); NYK Line (North America) Inc. (unnumbered at 1-2); and Eastman Kodak Company (EKC-2 at 8).

[7] Commentors proposing this extreme remedy include, APL Limited (APL-4, Rhein V.S. at 7); Chemical Manufacturers Association, and Society of the Plastics Industry, Inc.

These requests should be denied on a number of bases:

1. The Shippers Sought and Obtained Contract Terms Which Were Mutually Acceptable.

The shippers gave Conrail a commitment to pay certain prices for specific transportation services over a period of time. Those rates and the length of time they were to remain binding were satisfactory to the shippers, or they would not have made such an agreement. The shippers gave up their rights to obtain a lower price; Conrail gave up its right to seek a higher price during the time period and within the bounds of the commitment specified in the contracts. Presumably, if Conrail remained independent and unitary the shippers would be perfectly willing to pay the prices as agreed upon. The shippers should be held to their bargains; CSX and NS are willing to fulfill Conrail's part of the bargain.

Another issue which should be considered concerns other agreements related to, incorporated in, or made in conjunction with, rail transportation contracts: [[[

]]] By and large, rail transportation contracts are limited to a few arrangements on price, service and volume. However, some are part and parcel of some broader understanding. The overall arrangement may include capital investment by the carrier, up-front incentive payments to the shipper, concessions on disputes over performance by the shipper of earlier commitments, volume commitments in "out years," and so on. The variations are legion. In many cases, the rate and volume commitments are memorialized in the rail transportation contract, with the other

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(CMA-10 at 35-36); E.I. Dupont De Nemours and Company, Inc. (DUPX-10 at 6); NYK Line (North America) Inc. (unnumbered at 1-2); National Industrial Transportation League, U.S. Clay Producers Traffic Association, Inc. and the Fertilizer Institute (NITL-7 at 38, fn.11).

arrangements included in other documents, yet they are all part and parcel of the same business deal. [[[

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Allowing customers to walk away from long term business commitments that compensated Conrail for investments made in consideration for those commitments is plainly unfair. In short, giving any party a unilateral right to walk away from its part of a complex, structured bilateral deal would present particular aspects of unfairness.

2. The Application Provides Benefits to Conrail's Customers But Does Not Justify Benefits of a Windfall Nature.

The Application provides numerous public benefits. As the contracts which can be performed by NS or CSX expire, there will be direct competition for renewals or new contracts. Single line service will be introduced throughout most of the Northeastern United States in connection with movements to and from the Southeastern United States. The shipping public will be relieved from Conrail's historic concentration on east-west movements as its preferred traffic base. Direct rail competition between Class I carriers will be introduced into a broad area in Pennsylvania, New York and New Jersey and between a number of city pairs where such competition had not existed in years. The indirect effects of this new competition will be felt even more broadly. See Kalt R.V.S. at 14-15.

However, the benefits that the Applicants have agreed to provide do not include windfalls. Releasing Conrail customers from their agreements would be just that. Just as all Conrail contracts will be performed by one or both of CSX or NS or by the continuing Conrail -- be they transportation contracts or other agreements -- the Applicants expect

Conrail's contractual counterparties to do the same. There is, of course, no proposal to let other parties who have done business with Conrail and made commitments to it to escape from their contracts. As among the rail transportation contracts themselves, the effect of letting Conrail's counterparties to its contracts out of their agreements would be random, depending on the expiration date of the contract. Those whose contracts were deliberately written over a longer time horizon would have a larger windfall. Under the CMA's one-way street approach, they would have protected themselves against rate increases but put themselves in a position to see if they could negotiate the rates downward.

3. Contract Shippers Will Realize Competitive Benefits Immediately Upon Consummation of the Transaction.

It is misleading to say that the introduction of competition by the two carriers for moves that either can handle is unduly postponed by Section 2.2(c). Some of the traffic will not be under contract or will be under contracts expiring close to the Closing Date and will be immediately available to move under the service of the winner of a competitive negotiation process. The remainder of the contracts will be performed by the carrier to which each is allocated under Section 2.2(c) in a competitive atmosphere; each carrier will be performing the service knowing full well that it is not the only Class I carrier to which the customer may look at the end of the contract. During the remaining term of the contract, the customer may propose an extension of the contract to be awarded to the present service provider subject to a competitive proposal from that provider; or some similar transaction; and the competitive response from the other carrier will influence the outcome of that proposal. To the extent that contracts do not cover the entirety of the shipper's needs for rail

transportation, each of the two carriers is free to bid for it if it can perform the movements. CSX/NS-25, Vol. 8B at 29, § 2.2(c)(vi). The atmosphere will become competitive after the Board's approval and Section 2.2(c) will not postpone full competition materially.

E. Section 2.2(c) Assists the Carriers in Their Implementation of the Integration of their Allocated Portions of Conrail.

It would unacceptably and dangerously complicate the initial operations of the portions of Conrail allocated to the two systems for the Board to impose a condition making Section 2.2(c) unenforceable or giving the shippers carte blanche to terminate their contracts. The task of integrating the allocated portions of Conrail into the two carriers' systems, while not to be viewed in the "Chicken Little" spirit of the CMA and some other filings, is still a daunting and serious one. The two carriers are devoting substant al efforts, and will continue to devote them on a continuing basis through and after the Closing Date, toward effecting as smooth a transition as possible. They do not propose to have this transaction result in the difficulties experienced by the Union Pacific Railroad in the last half of 1997, whether one believes that those difficulties are traceable to the SP merger or not.

The Rebuttal Verified Statements of John Orrison, Christopher Jenkins and L.I. Prillman make it plain that foreknowledge of the allocation of the major contracts of Conrail for rail transportation services, so that a viable detailed "Day One" operating plan can be worked out, is essential to a smooth transition. After that, as the contracts one by one come to an end, and one by one potential new rail shippers are attracted to the new service and old ones chose competitive alternatives, operating adjustments reflecting shifts in business can be made on an incremental basis over time, not all on a single day. Thus there will be a reasonable transition period, and there will be time for the carriers to adjust. A complete

upset of business on Day One, coupled with the physical and operational reconfiguration of the two systems that is necessary in the implementation of the Transaction, could easily lead to a chaotic situation. Planning for adequate crews and training them would be jeopardized. Locomotive availability could be adversely affected. Train schedules and car supply would be left in doubt. All of these factors could have a negative effect on operations on and after "Day One" of the division and allocation of Conrail's routes, exposing those operations to contention and delay. Orrison R.V.S. at 7-11; Jenkins R.V.S. at 2; Prillman R.V.S. at 2-3.

The two carriers are prepared to shoulder the burdens of dividing the operations of Conrail on the terms provided for in their application. It would not be appropriate for the Board to add to their burdens by making all of the traffic which could in concept be moved by either of them, but which is covered by unexpired contracts, open to reallocation at the will of the shippers on Day One of the implementation of the transaction. The carriers will allocate the allocable contracts between them on a basis which will make planning possible and will not only promote appropriate densities for their movements but will add to the efficiency of their respective operations and to the smoothness of operations in the Shared Asset Area -- where many of the "50-50" contracts have origination or destination points -- and elsewhere.

F. APL's Concerns, to the Extent they Really Concern Service Issues, Will Be Addressed.

Only one shipper, APL, has raised issues concerning the quality of service that will be afforded under the division of contracts contemplated by Section 2.2 (c).[8] Those

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[8] One other party, NYK Line (North America) Inc., says "me too" to APL's concerns (undesignated at 1-2).

issues are combined in APL's Comments (APL-4) with an *ad hominem* attack on CSX, and a CMA-style request to opt out of APL's contract's price terms. CSX submits[9] that the position of APL is both overreaching and contradictory:

First, APL wishes to be released from its transportation contract with Conrail forthwith upon implementation of the Transaction, so that it may have the benefit of head-to-head price competition between CSX and NS from Day One. APL-4 at 4 Rhein V.S. at 2. APL apparently wants to seek lower prices than what Conrail, which APL calls its "partner" (APL-4, Rhein V.S. at 2, 14-15 -- and *passim*), charged it, and additional service conditions to those it negotiated with Conrail.

Second, while seeking lower prices for transportation, APL presumably wants to keep its dollar-a-year lease on the South Kearny, NJ, intermodal terminal, a lease which runs [[[.]]] Document APL 010200-010234 at § 3. This is despite the fact that the Lease declares that it and the transportation contract are [[[ ]]] Id. at § 27. Indeed, an interrogatory answer on the part of APL confirms [[[

[9] NS does not view it as appropriate to respond to APL's comments regarding CSX. NS, if the Transaction is approved, will be (as CSX will be) able and most interested in serving APL and all of Conrail's intermodal customers.

.]]] APL-9,

Response to Interrogatories, at 3-5.[10]

Third, APL expresses grave fears as to what will happen to it if it does business with CSX -- because CSX has affiliates which compete with APL in (a) the provision of intermodal services to customers (CSXI) and (b) in the carriage of ocean freight (Sea-Land). APL-4, Rhein V.S. at 5. Horrific predictions are made as to what CSX may do to APL's business if any part of the Conrail contract is allocated to it. APL-4, Rhein V.S. at 21; Courtney V.S. at 11-15. One would have expected that this fear would have led APL to a declaration that it does not wish to do business at all with CSX. But no. APL is "not suggesting that we can't do business with CSX. We can and we will." APL-4, Rhein V.S. at 6. But it will need special contract clauses in the CSX contract. *Id*. The exact nature of the clauses that will overcome the harrowing problems that APL claims to foresee is not spelled out. And, of course, it wants the price provisions of the Conrail contract firmed up. APL-4, Rhein V.S. at 21.

The real concerns of APL are about price, though given the Most Favored Nation Clause in its Conrail contract, it is not easy to see why. In a recent filing, APL says the following:

> APL is optimistic and believes that these operational problems can be resolved through negotiations between APL and CSXT and APL and NS. However, negotiations will not take place as long as Applicants continue

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[10] Amazingly, APL has classified this interrogatory response, which reveals no commercial information but simply sets forth its contentions and position, as "Highly Confidential." It is rare that the contentions of a party as a matter of law or contract interpretation are viewed as so sensitive. Perhaps the sensitivity is due to some comprehension of the extreme nature of the position being advocated.

to apply Section 2.2(c) of the Transaction Agreement to the contract between APL and Conrail. APL-8 at 5.

In other words, APL wants to be released from the Conrail contract before it will discuss service issues. This is similar to the approach that it took in discussions with CSX in the Spring and Summer of 1997; CSX wished to talk about service; APL wished to talk about rate reductions and contract enhancements. *See* Rutski R.V.S. at 23.

So what APL wants is lower prices, some tougher contract clauses, and to keep [[[ ]]] It thus asks for a larger windfall than even the CMA asks for. All this is put forward in the name of requiring that "Applicants respect APL's Conrail contract rights." APL-4, Rhein V.S. at 7.[11]

Applicants will respect APL's contract rights. Section 2.2 (c) has as its purpose the enforcement and upholding of contracts, not their abrogation. Applicants ask that APL remember that a contract is a two-way, not a one-way street. The Applicants will perform the contract and provide single-line service between each of the origination-destination pairs identified in the Baumhefner Verified Statement in connection with APL's international services from East Asia/Pacific Rim. They will honor the rates sight unseen. They will live up to all of Conrail's commitments to service in the contract. They will provide "Domestic" service within the States identified in the Conrail contract, on the price basis identified in the contract and subject to any service provisions in the contract. They will provide any other service covered by the contract. And as to service not provided for in the contract, they will

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[11] [[[.]]] APL makes no argument based on it; its argument is based on its notions of policy and on the alleged "service problems" it enumerates.

compete to provide solutions. *See* CSX/NS-25, Vol. 8B at 29, Section 2.2(c)(vi).) CSXT is prepared to give any appropriate guarantees that it and its affiliates will not discriminate in its service to APL in favor of service to CSXI or to Sea-Land. APL needs to step forward and identify the guarantees and assurances it wishes. Its responses so far have been entirely generic. See APL-6 at 6-7.

The reasons for this vagueness are not surprising to those who are familiar with the intermodal business. The concerns expressed by APL about dealing with CSX, on the basis of CSX's affiliation with Sea-Land and CSXI,[12] are grossly overblown. The intermodal industry is rife with similar opportunities for conflicts of interest. But the traditions of the industry, and the practices of CSX and NS, are to respect their clients and to behave in an ethical manner. Competition requires no less from them. See Rutski R.V.S. at 15-17.

APL (APL-4, Rhein V.S. at 20-21) claims that APL's "Third Party Intermodal" business ("TPI") would be at risk if it worked with CSXI, since "CSXI would simply refuse [to handle the business], and go after the business itself" directly with the APL customer. But, as the Rutski Rebuttal Verified Statement makes plain, CSXI regularly deals with major TPI service providers. These include Express Systems Intermodal (ESI), an affiliate of the ocean carrier OOCL, as well as TPI's whose traffic is controlled by ESI. Another major CSXI customer providing TPI service is Greater Southern Transportation Corp., which is owned by NYK of Japan, a major ocean cargo company. This TPI business is burgeoning and 1997 volume is substantially ahead of 1996. *Id.* at 18.

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[12] CSX Intermodal Inc. ("CSXI") is CSX's intermodal company. It works with CSXT, unaffiliated railroads, and other transportation providers and intermediaries in providing intermodal transportation services. Rutski R.V.S. at 16.

If CSXI acted unreasonably in its dealings with unaffiliated ocean carriers, it would hardly be a prospering entity handling freight for the international ocean freight vessel community. Approximately 40% of CSXI's intermodal business comes from international ocean shipping customers, excluding Sea-Land. *Id.* at 18. There are numerous letters of support in the Primary Application from international steamship freight lines for the CSX/NS joint acquisition of Conrail, including letters from Crowley American Transport, Inc.; Hanjin Shipping Co.; Matson Intermodal Systems, Inc.; MOL Intermodal; National Shipping Company of Saudi Arabia; NOL (USA) Inc. (which is the American affiliate of APL's new parent company, Neptune Orient Lines) and Nissan North America.

The fact of the matter is that all major U.S. railroads provide domestic service which is competitive to the APL domestic container service. *See* Rutski R.V.S. at 15. Thus, in the domestic service, APL is as much a competitor of NS and, indeed, of Conrail and UP -- its present largest rail service providers -- as it is of CSX. *Id.* at 17. Working with customers who are also your competitors is a major part of what rail-based carriers do day in and day out. The very nature of intermodal service, and the structure of the intermodal industry, brings this about. Rutski R.V.S. at 15. At the truck/rail competitive level, CSXI and NS are both capable of selling a premium service to a customer who is on one hand a major highway competitor and on the other a high-growth customer. CSXI's business with two top motor carriers in the United States, J.B. Hunt and Schneider, is dramatically up in 1997 over a 1995 base. *Id.* at 17. APL's emphasis on conflict of interest is an attempt to appeal to emotions on a basis which ignores the facts of life in the industry. An intermodal service provider that behaved as APL claims CSXI behaves (or would behave)

would not last long. CSX will not favor its affiliates over the needs of APL or its other customers and can give APL appropriate assurances of that.

APL demands immediate solutions for a host of real or imagined service difficulties that it envisions, and it wants an immediate decision as to which of CSX and NS will perform service between which sets of pairs under the contract. For a number of the origination-destination pairs, moving between Chicago and cities where the only rail intermodal service is provided by one or the other of CSX or NS, the answer as to which carrier will provide the service is obvious under the terms of Section 2.2(c). As to the others, as explained above, the process of allocating the contracts -- or origination-destination pairs -- that can be performed by either of CSX or NS between the two of them under Section 2.2(c) cannot be made final until all of them become available to CSX and NS to review. At that stage there can be a division of them that will provide efficient service and will avoid the problems that were encountered following the UP/SP merger.

Applicants are willing and anxious to have the advice of APL in the allocation of the service responsibilities under the contract and in implementation planning. The adversarial spirit that runs through APL's filing is its own, not that of CSX. CSX views APL as a new customer of great significance and will treat it as such. It views whatever allocation of the Conrail contract that is made to it as a stepping stone to a greater part of APL's business. Just as Conrail was flexible in responding to new challenges by APL, CSX expects to be flexible. APL has stated that it has not had an opportunity to meet with CSX to discuss operating issues. Response to Interrogatories, APL-6 at 6. But in fact, on three occasions, there have been meetings between CSX and APL. Rutski R.V.S. at 20-22. CSX

viewed these meetings as meetings to discuss service issues and some discussion about service issues took place. But APL was primarily interested in renegotiating price and contract terms. CSX was not -- and could not be -- responsive to such a request at that time, given § 2.2(c) of the Transaction Agreement. The Rutski Rebuttal Verified Statement of gives the details of the times and places of these meetings and the matters discussed. Rutski R.V.S. at 20-22. The service design materials that CSXI supplied to APL at their most recent meeting are reproduced in Vol. 3 together with other materials prepared in connection with the APL-CSXI meetings. The assertion that CSX is nonresponsive on service issues is not so.

Continuing the pretense of APL that CSX is unwilling to discuss service issues, the APL filing raises a number of issues of detail as to the succession of CSX and NS to the responsibility of performing Conrail's contract with APL. We will provide short answers to the principal ones; detailed answers can and will be worked out in the implementation process.

First, the Baumhefner Verified Statement sets forth a number of anticipated line-haul service problems. APL-4, Baumhefner V.S. at 8-17. But an examination of them makes it plain that to the extent they are problems at all, they have to do with the capacity of Conrail's lines -- the same lines on which the services were performed under the contract which APL looks back on with great fondness. But additional resources are available to the Applicants than were available to Conrail to perform the contracts, in times of difficulty, or on a regular basis. CSX is in the process of upgrading the "B&O" line from the Chicago area to Ohio to provide superior service over a combination of the B&O routing with the

Conrail Water Level Route from Cleveland to the North Jersey Shared Assets Area. This and other examples of those additional routes which CSX will bring to the picture, are set forth in the Rebuttal Verified Statement of John Orrison in this response, at 9.

The issues raised by APL would exist, if they are real, once the two railroads begin separate operations of Conrail's routes, regardless of how the APL-Conrail contract was disposed of, or even whether it was abrogated totally. If these problems were real, they would not be made to go away by the two railroads engaging in auction bidding to re-price the Conrail contracts on Day One, which clearly is APL's primary objective. The Orrison Rebuttal Verified Statement at 164-67 makes it plain that CSX can give excellent service under the APL contract, as can NS. NS anticipates that its service to APL and other intermodal shippers will be superior to Conrail's and it expects to market those services aggressively.

Second, Chicago is APL's gateway of choice in its intermodal movements from East Asia and the Pacific Rim to the Northeastern United States. APL contends that the Chicago interchange and switching handling of its shipments, if CSX is involved, will be delayed as compared with Conrail's handling because of the difference in switching and yard arrangements and resources in Chicago available to CSX from those currently available to Conrail. See Baumhefner R.V.S. at 12-14 and Exhibit C. But the Rebuttal Verified Statement of John Orrison, at pages 164-67, makes it plain that there will be no delays as compared to Conrail's handling in CSX's handling in Chicago, and that, indeed, better transit times should be available via CSX. NS also expects that its transit times through Chicago will be better than Conrail's.

Third, concern is also expressed by APL about the operations in the North Jersey Shared Assets Area, where important operations affecting APL will be handled; the Board has already required a special report from CSX and NS as to their operations, and the continuing operations of Conrail, there. Decision No. 44. CSX and NS are committed to do everything possible to make sure that operations in that and the other Shared Assets Areas are handled excellently. For the reply of CSX and NS to further concerns raised by APL and others about the special report, *see* Orrison R.V.S. at 150-178, and Mohan R.V.S. at 26-53.

Fourth, APL expresses concern as to whether CSXT or CSXI will be in charge of the service to be performed for APL, to the extent responsibility for performance of the Conrail contract is allocated to CSX. Baumhefner R.V.S. at 14-15. Under the Transaction Agreement, the responsibility for any performance of the Conrail contract involving APL that is not allocated to NS will be allocated to CSXT. However, consistent with CSX's organizational structure, CSXI will provide customer relations functions with respect to the service to be rendered to APL.

Fifth, concerns are also expressed as to the administration of the APL contract once responsibility for service is placed in two hands. It is feared that administration of the contract's "Most Favored Nation" (MFN) clause may cause inappropriate sharing of commercial information between CSX and NS. APL-4, Rhein V.S. at 18. Since the service to be rendered to APL largely breaks down into a number of pre-defined lanes, where the presumptive service arrangements under § 2.2(c) will be that a single carrier will provide the service in a particular lane, it should not require any sharing of information to see whether a

situation in violation of the MFN clause occurred. But if this is not the case and if rates charged by one or the other of CSX and NS to APL have to be compared to the rates that both of them charge to other customers, there are conventional devices for dealing with such problems. *See* Rutski R.V.S. at 20. A public proceeding with a myriad of other issues is not the best place to canvass issues at this level of detail.

The Applicants are pleased to have the expression of APL's concerns that are set forth in its filings. It is unfortunate that these concerns have been expressed in a forensic setting and in forensic terms, rather than in consultation in the implementation process. Three sessions that have been already held between CSX and APL to provide APL an opportunity to discuss operational and implementation concerns. Neither abandonment of Section 2.2(c) of the Transaction Agreement nor release of APL from its contract should be a precondition to further talks. In any event, the expression of these concerns is none the less welcome. To the extent that APL's goal is to have the contract set aside and APL released from its commitments under it, they are not valid, for the reasons stated earlier and in this part.

APL voluntarily entered into a long-term contract with Conrail. It obviously thought that it was to its advantage to bind Conrail to that contract, including the price level and the MFN clause [[[ ]]] In exchange for that commitment, it also bound itself. CSX and NS are proposing to step into Conrail's shoes. They will be bound by Conrail's agreed price and by the MFN clause which Conrail agreed to, and there is no reason why APL should not be bound also. Indeed, APL has the benefit of the MFN clause in the Conrail contract which it negotiated itself, and with the

coming of competitive Class I rail alternatives for single line service on most of the lanes covered in the Conrail-APL contract, it will, by reason of the MFN clause, receive the benefit of price competition over and above what it might have expected when the contract was signed -- if indeed it believed that Conrail would last forever as a stand-alone company. The basic concerns of APL, expressed to CSX outside of the present forensic setting, have been about rate reduction and enhancements to its contract. But the contract it made with Conrail, with its MFN clause, is in fact a better contract in the post-Transaction setting than in the time of a unitary Conrail. To the extent that the concerns listed by APL are not really smokescreens for concern as to price, and to the extent that they in fact pose real contract administration or operational issues, they will be addressed and resolved.

APL makes three alternative "concentric-circle" requests for relief:

First, APL requests that Section 2.2(c) be disallowed across the board. Its evidence does not address that in any different way than does CMA and this broad request should be denied for the reasons already expressed.

Second, APL requests that in any event Section 2.2(c) should be disallowed in the context of intermodal service. There is no evidence presented bearing on this, and no rationale for singling out intermodal service is provided.

Third, APL requests that Section 2.2(c) should be disallowed as to APL.

This third request is what APL's filing is, of course, really about. There is no reason why APL should be relieved from its pricing and other commitments in its contract. CSX and NS are prepared to discharge Conrail's obligations under the contract. If there are any fine-tunings necessary to give APL the level of service it received from Conrail, they

can be addressed. Providing that fine-tuning by additional concessions on the part of CSX and NS should hardly give APL the right to conduct an auction for lower prices during the contract term in favor of APL.[13]

G. No Other Issues of Any Substance Have Been Raised As to the Documentation of the "Continuing Conrail" and the Overall Structural Documentation of the Transaction.

With the exception of Section 2.2(c) of the Transaction Agreement, which deals with the existing Conrail Rail Transportation Contracts, dealt with in subparts A through F of this Section IX, and the issues as to the enforceability of anti-assignment clauses in trackage rights and other agreements evidencing the assets of Conrail which will be allocated for use by CSX and NS as part of the Transaction (Section VI), there are few if any challenges to (i) the structure of the ownership by CSX and NS of Conrail Inc., (ii) the allocation of the assets of its subsidiary, CRC, as NYC Allocated Assets and as PRR Allocated Assets, and their respective operation by CSXT and NSR, (iii) the retention by CRC of its other assets and their shared or joint use by CSXT and NSR, (iv) the treatment of the liabilities and obligations of CRC, or (v) the basic corporate structure of the Transaction.

A few issues have been raised which will be identified by the party raising them.

New York Cross Harbor Railroad. -- This operator of a car float between Brooklyn and Bayonne, NJ, which has filed an antitrust suit against Conrail, expresses concern as to whether it will be in a position to execute on any judgment it obtains against

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[13] NYK Lines supports APL's position, as do several letters attached to the APL submission. None of these parties raise any new or different arguments apart from those put forward by APL.

Conrail in that suit. NYCH-3 at 8-11. It expresses the view that the documentation of the Transaction presented in the Primary Application, including the Transaction Agreement and related documents (CSX/NS-25, Vols. 8B & 8C) is satisfactory to it. *Id.* at 10. But it claims that statements made by NS's witness William Romig and CSX's witness William Sparrow at their joint deposition cast doubt on the provisions of the contractual agreements just mentioned. *Id.*

CSX and NS do not believe that Messrs. Romig and Sparrow intended to detract in any way from the promises and structures relating to the obligations of Conrail set forth in the Application and structural documents in the Application. But in any event, CSX and NS can confirm that they have no intent to depart from the provisions as to Conrail's obligations made in the Transaction Agreement and related documents set forth in their Application, or any pertinent statement on the matter set forth in the Application. NYCH has indicated that those provisions are satisfactory to it. This should completely satisfy the point raised by NYCH.

New York State. -- The State of New York (NYS) raises an issue as to the responsibility of CSX and NS for the performance of contractual agreements between Conrail on the one hand and New York State and its political subdivisions on the other, regarding various matters concerning the Conrail lines within New York State. A condition is sought by NYS to the effect that CSX and NS be ordered by the Board to confirm a joint obligation for the performance of all such contractual obligations. NYS-10 at 6, para. 4.

Again, this matter is clearly dealt with in the Application. As described in NYS's comments, the obligations in question appear to relate predominantly to specific rail lines of

Conrail in New York State. *See* NYS-10, Utermark R.V.S. at 5. All rail lines of Conrail in New York State will be either NYC Allocated Assets or PRR Allocated Assets. As such, the contracts will be allocated in the same manner as are the routes to which they pertain; the contracts relating to the NYC Allocated Assets being allocated to NYC and those to the PRR Allocated Assets to PRR. *See* Transaction Agreement, Section 2.2(e)(i), CSX/NS-25, Vol. 8B at 29. In turn, under the Operating Agreements between NYC on the one hand and CSX on the other and between PRR on the one hand and NSR on the other, all obligations under those contracts will be the respective responsibilities of CSXT, as to the NYC routes, and NSR, as to the PRR routes. *See* section 11.1 of the two operating agreements, CSX/NS-25, Vol. 8B at 140, 178. That is certainly an appropriate disposition of the matter since the obligations as to those lines should be the responsibility of the operating railroad. Thus, the appropriate operating railroad will have full responsibility for the fulfillment of all contractual obligations to the State of New York, or, indeed, to any other party, relating to the lines allocated to it. No condition in this regard is appropriate or necessary.

X. APPLICANTS' OPERATING PLANS PROVIDE A SOUND BASIS FOR REALIZATION OF THE TREMENDOUS PUBLIC BENEFITS OF THE TRANSACTION.

The success of this Transaction, and the realization of nearly $1 billion in public benefits (CSX/NS-18 at 16), will depend upon the smooth integration and implementation of the carriers' Operating Plans. The filings of many parties to this proceeding appear to ignore this fundamental point and request wide-ranging conditions that, if ordered by the Board, would not only harm Applicants but also jeopardize the tremendous public benefits that otherwise would be realized as a result of the Transaction. Narrowly crafted conditions that address separate harm caused by the Transaction should not have a material impact on the anticipated public benefits of the Transaction. But the aggregate effect of the conditions sought by parties whose claims reflect the desire for private gain at the expense of the public interest could significantly reduce the public benefits of the Transaction.

In order for an operating plan to work, operations planners must know from the outset the volume and flows of traffic that they will be called upon to transport, and the basic network over which they will operate. The corollary of these principles, however, is that once the operating plan has been developed, significant changes to these fundamental underlying assumptions will adversely affect and even jeopardize the benefits to be derived from the plan.

More than 160 parties have filed comments or responsive applications in this proceeding. While those seeking conditions ask the Board to condition approval of the Transaction upon granting some specific request that will benefit the requester, they typically

fail to demonstrate any reasonably anticipated harm resulting from the Transaction. The volumes of requests include all kinds of broad-based conditions that, if granted, would change the traffic base and network structures upon which CSX and NS developed their Operating Plans. Three particular types of requests, if granted, would completely distort both the traffic base and the network for which CSX and NS each planned their operations.

First, some requesters ask that all Conrail contracts be "opened up," so that they are no longer binding on the shippers on or after the Control Date. This would mean that the volume of traffic that would be moving on each of the two systems, and the flows of that traffic, would be virtually unknown until close to the date when CSX and NS must begin operating the Conrail assets. Throwing into question the responsibility for handling significant volumes of traffic on or about Day 1 would put operations planning at serious risk. Significant shifts in the CSX and NS customer base that would result from granting such conditions would affect the traffic volumes, traffic patterns and even crew and equipment requirements, resulting in an imbalance of resources that would undermine the efficiencies and service improvements contained within the Plans. Orrison RVS at 7-11. See Section IX, supra for a more complete analysis of the implications of changing the treatment of Conrail's customer contracts.

Second, certain local government and communities groups -- including the City of Cleveland and the Four Cities Consortium (East Chicago, Hammond, Gary and Whiting, IN which are located in northwestern Indiana near Chicago, IL) -- have expressed concern about the impact of increased train operations in their communities and have asked that CSX and NS reroute their traffic away from the cities. Congressmen Louis Stokes (unnumbered)

and Dennis Kucinich (Subnumber 74) and the Ohio Attorney General (OAG-4 at 36-42) support the City of Cleveland. Congressman Kucinich's specific concerns are addressed in the Rebuttal Verified Statement of John Orrison. Orrison RVS at 81-84.

CSX and NS are willing to work with these communities to the extent possible to mitigate the impacts of increased traffic. However, because the cities are located in or near major rail and industrial hubs, it is commercially and operationally impractical to reroute major traffic flows away from these areas.

The City of Cleveland asks that CSX and NS reroute traffic away from Cleveland and consider reallocating rail lines within Cleveland. Cleveland has long served as a rail hub, and Conrail has concentrated its traffic flows through the city. The CSX and NS Operating Plans call for moving the major East-West flows of goods over the high speed, high capacity routes through Cleveland. Use of these routes is essential for both railroads to attract and maintain time-sensitive traffic. See Orrison RVS at 78-81; Friedmann RVS at 33-36.

Efficient operations over a major rail network depend on balancing all resources, including equipment and manpower, across the system. Rerouting major segments of traffic would impact the distribution of equipment and manpower and the availability of adequate facilities, as well as the efficient interchange with other carriers, undermining the efficient operations that have been designed.

Routing traffic away from Cleveland would be detrimental to CSX's and NS' customers and would erode the competitiveness of the rail transportation these carriers could provide. The added transit time that would result from such rerouting would fail to meet the

production schedules of hundreds of CSX and NS industrial customers who rely on just-in-time delivery of parts and supplies and would also impair rail service to local Cleveland customers. Reduced efficiency and reliability of rail transportation would translate into greater customer reliance on truck transportation, thereby undermining an important objective of the CSX and NS Operating Plans and eroding the public benefits of the Transaction. In sum, rerouting of traffic flows away from Cleveland is not commercially or operationally feasible. See Orrison RVS at 78-85; Friedmann RVS at 36, 38-40.

Moreover, the potential alternatives for reallocating routes and rerouting rail traffic within Cleveland entail disproportionate expense and/or pose operating problems that would create fundamental disruptions in the CSX and NS rail systems. See Friedmann RVS at 37.

The Four Cities request a condition that would require CSX and NS to amend their respective Operating Plans, insofar as they involve the movement of freight traffic across northwestern Indiana, to incorporate the Four Cities' Alternative Routing Plan. FCC-9 at 4. Significantly, the Four Cities do not deny that there will be public benefits flowing from the Transaction, but express concern about the localized impact of the increased number of trains moving over line segments that traverse their communities. Their concerns focus on issues of safety, vehicular and pedestrian traffic delays at grade crossings, and other environmental effects that are addressed by the STB's Section of Environmental Analysis.

The FCC's proposed routings would significantly impact traffic flows through Chicago, negate the flexibility of CSX's planned alternative routings to various yards in the Chicago area and substantially impair CSX's ability to perform efficient interchange with

other carriers. Rooney/O'Connor RVS at 10-11. The FCC's proposal would involve the rerouting of additional traffic onto NS' only Midwest-Southeast route, aggravating congestion problems and threatening NS' ability to maintain time-sensitive schedules. Moon RVS at 10-11. Moreover, several connections would have to be constructed under the FCC's proposal, one of which (at Pine Jct.) would involve an at-grade crossing of the busiest rail line in the Four Cities area -- the Conrail Chicago to Toledo mainline. Moon RVS at 11. As improved traffic flow to, from and through Chicago and efficient connections with other carriers are key elements of the CSX and NS Operating Plans, adopting the FCC's alternative rerouting plan would completely disrupt operations in Chicago, which in turn would negatively impact the carriers' operations over major portions of their systems. Orrison RVS at 87; Moon RVS at 10-11.

Third, dozens of commentors are seeking trackage rights totalling more than 1,000 miles over lines that CSX and NS currently own or will be allocated for use in this Transaction. Traffic does not just move over line segments -- it moves over routes between origins and destinations. Any precipitous change in traffic over any single congested line segment creates a potential chokepoint for an entire traffic route, and could even impede the Operating Plan's successful implementation. Orrison RVS at 89.

Most of the requests for conditions sought in this proceeding, and particularly the requests for trackage rights, do not address actual harms caused by the Transaction. Rather, in the spirit of the holiday season, the commentors here have presented a Christmas "Wish List" of extravagant wants and desires that are wholly unrelated to any effects of this Transaction; in essence, they seek rights over new service routes as part of their own

strateg.c marketing plans. [[[

]]] [[[ ]]] Nevertheless, ISRR seeks trackage rights over six different line segments, totalling 126 miles. ISRR-4 at 14.

Two other applicants, NECR and IORY, essentially seek to double their size. IORY currently operates over approximately 475 miles, but now seeks to gain another 339 miles. Likewise, NECR operates over 343 miles and seeks an additional 256 miles of trackage rights. NECR-4 at 14 n.5. WLE likewise seeks expansive trackage and haulage rights to reach Chicago, Toledo and parts of West Virginia. WLE-4. HRRC asks the Board to order CSX to enter into a haulage arrangement -- a type of intercarrier arrangement that heretotore had been considered voluntary and unregulated. HRRC-10 at 10-14, 23-25.

Reasonable changes certainly can be accommodated, but not cataclysmic shifts. Effective Operating Plans can readily adapt to ongoing changes in market conditions and customer demands. The many requests filed in this proceeding do not represent normal incremental traffic gains and losses to traffic, but rather seek to change the fundamental traffic base and carrier networks contemplated in the Transaction. Caution must be taken to assure that all requests for conditions are evaluated in the light of the overall objectives and development of the Operating Plans.

Both CSX and NS are actively and painstakingly planning for implementation of their Operating Plans. Any onerous changes will put operations planning at serious risk, decreasing anticipated efficiencies, and eroding service and public benefits.

XI. REQUESTS FOR CONDITIONS RELATED TO POST-TRANSACTION SWITCHING CHARGES BY CSX AND NS SHOULD BE REJECTED AS IRRELEVANT TO ANY ALLEGED EFFECT OF THE PROPOSED TRANSACTION AND POTENTIALLY HARMFUL

A. Introduction.

As noted in the Introduction and Summary, supra, over 160 parties filed responses to the Primary Application. Only a small number of these parties even mentioned switching charges, and of those who did only fifteen asked that approval of the present Transaction be conditioned on particular switching charge arrangements. As will be shown below, none of these commentors have demonstrated that the Transaction will cause any harm that would justify the imposition of a switching charge condition.

Several commentors have requested as a condition to the Board's approval of the present Transaction that the Board prescribe a uniform (or "flat") switching charge on the Applicants' switching operations. Some of the commentors have asked for a condition that would affect only particular locations.[1] Some, however, have requested an across-the-board cap that would apply throughout the post-Transaction Northeast.[2] Rather surprisingly, other parties have apparently requested a cap that would apply throughout the Applicants' entire

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[1] Two commentors have requested a switching charge cap of $130 per car at particular locations. They are: the City of Indianapolis (CI-5 at 11-13) (requesting a $130 per car cap throughout Indianapolis); and General Mills (Comments of General Mills (unnumbered) at 1-3) (requesting a $130 per car cap in the Buffalo-Niagara area). As will be explained below, the $130 figure is derived from these commentors' belief that the switching rate adopted in UP/SP can simply be engrafted on the present Transaction.

The Erie-Niagara Rail Steering Committee requests a $156 per car cap in the Buffalo-Niagara area. ENRS-6, Fauth VS at 27-29. The basis of the $156 figure is explained in Section XI.F.3, infra.

[2] The Chemical Manufacturers Association (CMA) and the Society for the Plastics Industry (SPI) have limited their request for a $130 cap to locations "within Conrail territory." CMA-10 at 38.

post-Transaction systems -- notwithstanding the lack of any logical nexus between the Transaction and switching operations in areas of the country that Conrail does not serve.[3] Four other parties have requested conditions that do not specify particular monetary caps, but would nevertheless constrain privately negotiated pricing of switching services.[4]

The Board should deny all of these requests because they are inconsistent with applicable law. First, without exception, the commentors have failed to explain how their proposed conditions will redress harm specifically caused by the Transaction. The reason for this is simple -- there is no such harm. Thus, the commentors fail to meet the Board's basic threshold for the imposition of a condition. See Section III.C, supra. Second, the commentors have failed to provide any evidentiary basis for the prescription of any switching charges, much less for a switching charge that would be uniform throughout the post-

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[3] Five commentors (in two submissions) have requested such a condition, and each requests a $130 cap per car. See the submissions of the National Industrial Transportation League (NITL), U.S. Clay Producers Traffic Association (CPTA), and the Fertilizer Institute (FI) (NITL-7 at 48-50); and Shell Oil Company and Shell Chemical Company (SOC-3 at 7). One commentor, PPG Industries, has requested a cap of $150 throughout Applicants' systems. Comments of PPG Industries (unnumbered) at 4. The NITL request was modified by its Settlement Agreement with CSX and NS. See Section XI.E, infra.

[4] Indianapolis Power & Light Company (IP&L) has requested, as an alternative to other requested relief, a "cost-based" cap on switching, such that switching charges would equal cost, in Indianapolis. IP&L-3 at 32-33. Similarly, Jacobs Industries has requested that switching be required of CSX in Toledo "at no extra cost" so that Jacobs might have unencumbered access to long-haul shipping over NS. Comments of Jacobs Industries (unnumbered) at 3. Rochester Gas and Electric (RG&E) has asked the Board to "provide a simple, inexpensive procedure for determining a fair . . . switching charge" in Rochester and to require carriers to provide switching "at a price reasonably related to the cost" of such services. RG&E-1 at 9. Finally, the Genessee Transportation Council (GTC) has requested a switching charge in Rochester, NY, of 120% of the variable cost of performing such service. GTC, Midkiff VS at 32-33.

Transaction system. Reciprocal switching charges among railroads are determined by many different factors, which can vary widely from area to area.

There is no reason -- or need -- for the Board to delve into this complicated area. As part of a settlement with the NITL, the text of which is set forth at Appendix B to this Volume, CSX and NS have agreed, for a five-year period from the Closing Date, to establish a reciprocal switching charge of $250 between themselves at any point at which Conrail provides reciprocal switching as of the Closing Date, subject to annual RCAF-U adjustments. In addition, CSX and NS have agreed to keep these points open to reciprocal switching for at least ten years after the Closing Date. Applicants do not oppose any action by the Board that would be consistent with the terms of this agreement. As will be explained, this proposal also avoids the problems described above.

B. No Party Seeking a Switching Fee Condition Has Proven Harm Attributable to the Transaction that Could Justify Board Action.

In order to impose a condition on a Transaction such as this, the Board requires, at a minimum, a showing that the condition will redress some harm caused by the Transaction. See Section III.C., supra. Perhaps most important for present purposes, the Board has, in this very proceeding, admonished participants that any party seeking a condition bears the burden of proving by substantial evidence that the Transaction should be conditioned. See Decision No. 40, Finance Dkt. 33388, at 2. Thus, a party requesting a switching charge condition in this proceeding must affirmatively show by substantial evidence that, without the condition, the Transaction "will harm their ability to provide essential services and/or competition," id., and that there is "a nexus between the merger and the alleged harm for which the proposed conditions would act as a remedy." UP/SP at 178.

No commentor requesting the Board to impose a switching charge condition in this Transaction has produced any evidence -- much less substantial evidence -- as to how such a condition will remedy harms to be caused by the Transaction. Several of the commentors complain at length about their current circumstances, generally to the effect that current switching charges are higher than the particular commentor might like.[5] However, under Board precedent such complaints are irrelevant to proposed conditions; they simply do not identify harms caused by the Transaction.

C. The Commentors Do Not Satisfy Their Burden Merely by Relying on the Board's Decision In the UP/SP Transaction.

Several parties that requested explicit monetary caps on switching charges have simply relied on the UP/SP decision as precedent for the proposition that the Board may appropriately impose a $130 cap pursuant to Section 11324. Their proffered justification (such as it is) is that because the Board imposed a $130 cap in UP/SP, it should do so in this

[5] In particular, see the Comments of General Mills (unnumbered); the ENRS, ENRS-6, Fauth VS at 27-28; the CMA, CMA-10 at 39, and GTC, GTC-2, Midkiff VS at 32-33.

Transaction.[6] In fact, in certain cases, commentors that have asked for specific caps rely only on this argument.[7]

As several of these parties appear now to acknowledge,[8] the UP/SP decision is no authority for the requested prescription of switching charges in this case, for several reasons.

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[6] Ten commentors raised this argument, but, as will be explained below, four of them have since acknowledged in responses to discovery that they make no present contention as to whether the UP/SP decision carries precedential weight with respect to switching charges. See note 8, infra. PPG Industries, while admitting that "CR has a basic monopoly in its present territory," nevertheless urges a switching cap "as in the Union Pacific merger . . . not to exceed one hundred and fifty dollars." Comments of PPG Industries (unnumbered) at 4. The City of Indianapolis, by way of a verified statement, merely points out that the Board adopted the $130 figure in UP/SP. See CI-5, John W. Hall VS at 8. The NITL, along with the CPTA and the FI, which filed their comments jointly with NITL, writes that "[s]hippers in the East should have the same protections . . . as shippers west of the Mississippi." NITL-7 at 50. CMA along with SPI, points out in a footnote that the Board adopted the $130 figure in UP/SP. CMA-10 at 38 n.45. Shell Oil Company and Shell Chemical Company merely ask for a $130 condition "as the carriers adopted in the UP-SP merger." See SOC-3, David L. Hall VS at 7. Finally, ENRS points out, after arguing that Conrail's current rates in the Buffalo-Niagara area are too high, that a flat charge was imposed in UP/SP that is less that ENRS's proposed cap of $156. See ENRS-6, Fauth VS at 28.

[7] This is true of PPG Industries, the NITL, the CPTA and the FI. One commentor, General Mills, provides no support whatsoever for its requested $130 charge cap, except to suggest (without elaboration) that the fee "can be economically absorbed by all carriers doing business in [the Buffalo-Niagara] area . . . ." Comments of General Mills (unnumbered) at 4.

In the course of discovery it became clear that General Mills had no basis for its proposed $130 condition other than its observation of events in the West, the South, and the Midwest. Furthermore, General Mills has admitted that no harms would arise in the Buffalo-Niagara area that could be attributed to the Transaction. See Letter from Ron Olson, Vice-President of Grain Operations, General Mills, to John L. Bratten, Chairman, National Grain & Feed Association (Sept. 15, 1997) (included in Vol. 3).

[8] As mentioned, five parties have effectively withdrawn even the UP/SP argument. In response to discovery requests served by CSX, Shell Oil Company, Shell Chemical Company, the CMA, the SPI, and the City of Indianapolis have claimed to make no contention that "the Board's decision in UP/SP Control . . . insofar as it relates to the switching fee cap there imposed, is binding precedent on the Board in the present proceeding." See Interrogatory Responses, SOC-5 at 8; Interrogatory Responses, CMA-15/SPI-9 at 10; Interrogatory Responses, CI-7 at 14.

First, the $130 charge adopted by the Board in UP/SP was the result of private, arms-length negotiations between UP and the CMA. The Board in its decision merely accepted the agreement negotiated between the applicants in that case, and made no independent determination, based on evidence, that the imposition of a uniform $130 switching charge was necessary to make that transaction consistent with the public interest, as these parties are asking the Board to do in this case.

Equally important, both the basic nature of the UP/SP Transaction and the rationale for the switching charge agreed to in that case were fundamentally different from the instant Transaction. The rationale (and context) for the application of a uniform switching charge in UP/SP is not present here. As the Board and Applicants in the UP/SP recognized, the transaction proposed there threatened a very substantial loss of direct rail competition. The Board remedied that situation by granting to BNSF more than 4,000 miles of trackage rights. The purpose of the reciprocal switching charge in the CMA Agreement was to ensure that BNSF's operations over its trackage rights would provide an effective competitive remedy to the transaction's anticompetitive effects.

By contrast, this Transaction threatens no significant loss of rail competition; indeed, as has been shown repeatedly, it will create new rail competition on an unprecedented scale. Applicants have ensured that effective two-carrier competition will be retained at the very few 2-to-1 points involved in this case through haulage arrangements and/or short-distance trackage rights and cost-based joint facilities agreements. See generally CSX/NS-19, Vol. 2A, Hart VS at 146-49. There is simply no comparison between the competitive factors and 2-1 situations of this case, and those present in UP/SP.

Finally, regardless of what the parties to a previous, unrelated transaction agreed to, no commentor in the present proceeding has explained or provided any evidence as to why a rate condition that may have been appropriate for another system, serving other customers in a completely different part of the country with very different features would be appropriate, much less required, for the areas to be served by NS and CSX.

In summary, the $130 cap on switching charges adopted in UP/SP is irrelevant to the present proceeding.

D. Because Switching is a Complex and Variable Process, an Arbitrary Cap on Charges Will Cause Severe Practical Difficulties and Unforeseen Consequences.

The negotiation and pricing of switching services are extremely fact-sensitive undertakings. Reciprocal switching agreements are generally established through private negotiations between rail carriers. The geographic scope of these agreements and the level of the charges can be affected by the way in which the two carriers' systems overlap, the traffic that they handle, historical considerations, and other factors. Accordingly, the level of switching charges negotiated between one pair of carriers is likely different from the level of charges negotiated between another pair. And the level of charges may differ as between the same two carriers from one location to another. See Jenkins RVS at 10.

E. Applicants Have Entered into an Agreement with a Major Trade Association that Lowers Existing Switching Charges of Most Shippers Within Conrail Territory.

In addition to the arguments set forth above, the Board should consider Applicants' settlement with the NITL as dispositive of switching charges issues.

As an initial matter, it should be understood that Applicants have always planned merely "to step into Conrail's shoes." Applicants have never planned to curtail the switching service Conrail provides or to increase Conrail's switching charges. The proposed Transaction will not change current circumstances with respect to switching charges, much less cause any competitive harm that calls for a remedial condition. See Jenkins RVS at 9-10.

Nonetheless, in order to allay complaints of shippers and other parties, Applicants have reached agreement with the NITL on this issue. The NITL is the nation's oldest and largest shippers' organization. Its members include industrial corporations, manufacturers, retailers, shippers' associations, boards of trade, chambers of commerce, port authorities, and others concerned with purchasing freight transportation services. The NITL has long been an active and prominent representative of the shipping community before the Board and its predecessor.

Under the terms of the settlement, Applicants have made substantial concessions concerning reciprocal switching. The $250 charge, referred to in Section XI.A, supra, is the reciprocal switch rate generally prevailing between CSX and NS where they provide such services for each other. These concessions, acceptable to the largest organization of affected shippers, should lay to rest all complaints on the subject.

Under the terms of the settlement, the agreement is not subject to Board approval, but Applicants have agreed to state, and do here state, that they do not oppose action by the STB consistent with the terms of the Settlement.

F. Related Issues.

Although the foregoing discussion addresses all of the principal switching charge arguments raised by commentors, Applicants will address below certain related matters for purposes of completeness.

1. Applicants Have Confirmed that Certain Commentors Have Not Actually Requested Switching Conditions.

Applicants have verified that certain commentors who describe switching charges as problematic or intimate that the Board should take some action with respect to switching charges did not in fact mean to request any remedial switching charge condition. Counsel for ASHTA Chemicals, AK Steel, and American Electric Power Service Corporation have informed Applicants by letter that they intend to raise no argument with respect to switching charges.[9] Similarly, the Citizens Gas & Coke Utility and the Ohio Attorney General have admitted as much through their responses to Applicants' discovery requests.[10]

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[9] See Letter from Inajo Davis Chapelle, counsel for ASHTA Chemical, Inc., to Joseph D. West, counsel for CSX (Nov. 12, 1997) (included in Vol. 3); Letter from Frederic L. Wood, counsel for AK Steel Corporation, to Joseph D. West, counsel for CSX (Nov. 19, 1997) (included in Vol. 3); Letter from Michael F. McBride, counsel for American Electric Power Service Corporation, to Dennis G. Lyons, counsel for CSX (Nov. 7, 1997) (included in Vol. 3).

[10] See Objections of Citizens Gas & Coke Utility (unnumbered) at 1; Interrogatory Responses, OAG-6 at 3-4.

2. Certain Other Commentors Address Switching But Either Raise No Substantive Argument or Request No Condition At All; Therefore, Applicants Have Addressed All Switching Charge Arguments Raised by Any Commentor.

A small number of commentors make mention of switching charges, but provide no reason for any Board action with respect to them. For example, the Business Council of New York State, Inc., (BCNYS) merely writes, without elaboration, that "[t]o any extent possible the Board must ensure that the inordinately high switching charges found in the Port of New York . . . be set at reasonable levels." Comments of the BCNYS (unnumbered) at 2. Similarly, Dekalb Agra, Inc., "respectfully request[s] that [the Board] . . . take a pro-active stance in reviewing the impact of the control with special emphasis on: switch rates," among other things. Comments of Dekalb Agra, Inc. (unnumbered) at 2. Like the BCNYS, however, Dekalb does not explain why or how. The Southern Railway of New Jersey (SRNJ), in a rather confusing letter, apparently requests that Conrail discontinue switching at Vineland, New Jersey, so as to allow the Winchester & Western direct access to the SRNJ. While SRNJ does complain about Conrail's current switching charge, it does not appear to request the prescription of any switching charge condition. In any event, SRNJ identifies no harm to arise from the transaction and provides no reason why its request is justified. Finally, the Housatonic Railroad Company (HRRC) sets out an argument of sorts that the Transaction poses competitive harms of diverted traffic and therefore requests "an order establishing a switching charge" to be charged by NS for switching between Gypsum, Ohio and Cleveland, Ohio. HRRC-10 at 28. However, the HRRC does not explain what the charge should be, gives no guidance for calculating such a charge, no explanation why any existing charge is inappropriate, and no explanation why private negotiation of such a charge

-- the solution favored by Board precedent and national transportation policy -- should not be permitted. Under these circumstances, the Board need take no action with respect to these commentors.

After careful review of all the comments, responsive applications, and inconsistent applications filed in this proceeding, Applicants have found no other discussion of switching charges or requests for switching charge conditions.[11] Thus, the arguments heretofore presented address all requests for switching charge conditions raised by any commentor in these proceedings.

3. Finally, Certain Arguments Made Concerning the Buffalo-Niagara Area Are Incorrect and Misleading.

Finally, Applicants here address certain factual statements made by the ENRS by way of the verified statement of Gerald W. Fauth III. Mr. Fauth argues generally that Conrail charges in the Buffalo-Niagara area are currently too high. While that fact in itself is not of legal significance (because Conrail's current charges are not an effect of the Transaction), Applicants will here address Mr. Fauth's statements because they are incorrect and because they form the entire basis of the ENRS's requested switching charge of $156.

Mr. Fauth relies on an NS tariff which sets out the following charges: (1) $156 to "ALL EXCEPT [other listed customers]", (2) $250 to CSXT, and (3) $459 to Conrail.[12] It

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[11] One commentor, the Philadelphia Belt Line Railroad (PBL), has asked for switching access for the Canadian Pacific Railway in the Philadelphia Shared Assets Area. PBL asks that these rights be offered on "equal, non-discriminatory" terms through "equitable switch rates. . . ." PBL-10 at 2. However, because PBL's request raises issues peculiar to the Applicants' Shared Assets Areas proposals, PBL has been dealt with in detail in Section VIII, supra.

[12] Tariff NS 8001 at 30th Revised page 32 (included in Vol. 3).

is from the term "ALL EXCEPT" that Mr. Fauth infers that $156 has become the rate "generally established by NS in the Buffalo area . . . ." ENRS-6, Fauth VS at 28. This claim, however, is erroneous and rests on a seriously misleading interpretation of the tariff. The phrase "ALL EXCEPT", despite its inclusive ring, includes only a few NS-served customers. Indeed, the very tariff upon which Mr. Fauth relies indicates that NS charges other rates to numerous other shippers in the Buffalo-Niagara area, including $250 per car to CSX and $459 per car to Conrail. See Weatherholz RVS at 1-2. Thus, $156 is not and never has been the "generally established" rate of any carrier in Buffalo. For these reasons, ENRS's requested condition fails not only to meet the Board's legal threshold, but is also without factual foundation.

G. Summary.

For all the reasons stated above, it would be inappropriate for the Board to impose an arbitrary cap on switching charges -- i.e., one not agreed to by the parties to the switching arrangement -- or other limitation as a condition to approval of the Transaction. Such a cap would be inconsistent both with the Board's general policy of fostering market freedom and, because no party has identified any harm attributable to the Transaction, the Board's own exacting standards for imposing conditions under Section 11324. However, Applicants would not oppose any action by the Board that would be consistent with the terms of the NITL settlement.

XII. THE REQUESTS FOR CONDITIONS FILED BY PASSENGER AGENCIES SHOULD BE DENIED.

A number of passenger agencies and other parties with an interest in passenger issues have asked for broad conditions that would restructure the relationship between freight railroads and passenger railroads in the eastern United States. Moreover, the requested conditions are not related to any Transaction-related harm. For both of these reasons, the requests should be denied.

The State of Maine Department of Transportation, for example, requests that, to enhance passenger operations, the Board impose conditions which do the following:

> allow a means for attaining on-time performance for passenger trains; create a process to address the initiation of new or special services; establish standard and reasonable formulas for variable and fully allocated costs; create liability standards; and establish a means of allowing higher passenger train speeds.

Comments, Protests and Request for Conditions by State of Maine Department of Transportation (unnumbered at 4).[1] Many of the other parties ask for similar conditions. This proceeding plainly is not the proper forum for resolving differences of opinion between freight railroads and passenger agencies with respect to these matters.

If the Transaction is approved, CSX and NS will step into Conrail's shoes and will honor its contracts with passenger agencies. The Transaction will similarly have no effect on the contracts CSX and NS each entered into with passenger agencies before the Transaction. Yet, a number of passenger agencies have requested that the Board void or amend their existing contractual relationships with CSX, NS and/or Conrail in various ways. These complex contractual relationships set forth the rights and remedies available to the passenger

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[1] The State of Maine seeks these conditions even though it is not traversed by any rail line of CSX, NS or Conrail.

agencies with respect to all the matters about which they now complain. As explained below, there is no basis in law or policy for the Board to amend private contracts that were reached during arm's-length negotiations.

The requested conditions do not arise out of legitimate operational or economic concerns related to the Transaction. Rather, they are an effort to use the STB approval process to obtain advantages that the passenger agencies could not obtain either under their existing contracts with CSX, NS or Conrail, or through the normal process of arm's-length negotiation with them.

Although the Board is being asked to rewrite these private contracts assertedly in order to protect and promote passenger services, the effect would in fact be exactly the opposite. If freight railroads cannot enter into contracts with passenger entities with any assurance that the law will honor these contracts and enforce the provisions which enable the freight railroads to conduct their businesses safely and efficiently, freight railroads will not be inclined to renew their contracts with existing passenger agencies, to agree to service extensions to new routes, or to enter into contracts with new passenger agencies. The Board should not indulge the short-sighted opportunism of the passenger agencies.

CSX, NS and Conrail have worked in good faith with passenger agencies in the past, and they will continue to do so after the Transaction. The Board need not intervene.

A. National Railroad Passenger Corporation (Amtrak).

Amtrak takes no position on approval of the proposed transaction but seeks conditions if it is approved. Amtrak has requested Board oversight "to guard against any worsening of the on-time performance of Amtrak trains" and has also requested Board-enforced

cooperation in implementing higher speed service on its Empire and Detroit-Chicago corridors. NRPC-07 at 15.

Amtrak's requests for conditions should be rejected because its rights with respect to all the concerns it raises are governed by its existing contracts with CSX, NS and Conrail or by federal law. Each of the three contracts sets forth the rights and responsibilities of Amtrak with respect to Amtrak trains operating over lines owned by the freight railroads: Conrail entered into an Amended and Restated Off-Corridor Operating Agreement with Amtrak on April 14, 1996, effective through April 14, 2007; CSX recently entered into an Agreement with Amtrak on April 1, 1997, effective through March 31, 2002; and NS entered into an Agreement with Amtrak on May 1, 1997, effective through April 30, 2000. In addition, a separate agreement between Conrail and Amtrak, the NEC Freight Operating Agreement, dated October 1, 1986 ("NEC Freight Operating Agreement"), governs Conrail's exercise of its freight easement over Amtrak's Northeast Corridor ("NEC").

1. **Northeast Corridor.**

The NEC was owned by Conrail or its predecessors prior to 1976 when Conrail conveyed the NEC to Amtrak in accordance with the Final System Plan under the Regional Rail Reorganization Act of 1973. Conrail retained a Freight Service Easement over the NEC. As stated above, the NEC Freight Operating Agreement of 1986 governs Conrail's exercise of that freight easement.

CSX and NS have asked that the Board authorize them to conduct operations over the routes of Conrail, including the NEC, as fully and to the same extent as Conrail itself could.[2] Under the NEC Freight Operating Agreement, Conrail has the right to modify its scheduled and unscheduled freight service "subject to the physical limitations of the NEC, to Amtrak's speed, weight and similar operating restrictions and rules or safety standards, and to the needs of, and in particular to the adequacy, safety and efficiency of, Amtrak passenger train operations and commuter service." Sections 2.3(b) and (c) (included in Vol. 3). Upon the Control Date, the Conrail trains operating over the NEC will continue to operate as they did prior to control by CSX and NS. Because the Operating Plans of CSX and NS each propose to change the numbers and schedules of freight trains operating over the NEC, they have commenced to negotiate their proposals with Amtrak.

CSX and NS concur with Amtrak's stated expectation that all issues relating to use of the NEC will be resolved through negotiation before the Board must decide this case. CSX and NS are hopeful that the parties will be able to find an accommodation that will insure continued safe freight operation on the NEC, consistent with all parties' needs and goals. See Reistrup RVS at 5-6.

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[2] Amtrak opposes this prayer for relief with respect to operations over the Northeast Corridor. As explained in Section VI above, CSX and NS are "successor entities" which may succeed to Conrail's freight easement rights under the 1976 Freight Service Agreement. But, in any event, the Board has the authority to grant the relief requested under 49 U.S.C. § 11321(a), and, if necessary, should exercise that authority to override the anti-assignment provisions of the 1976 Freight Service Agreement and of the NEC Freight Operating Agreement between Conrail and Amtrak. The requested relief is very narrow. It would simply allow CSX and NS to step into the shoes of Conrail with respect to the freight easement over the Northeast Corridor. CSX and NS do not seek to alter the substantive terms of the agreements. In contrast, Amtrak is seeking to expand its substantive rights under its contracts through its requests for conditions.

Amtrak has apprised the Board of the ongoing negotiations concerning the NEC, and has appropriately not requested any condition with respect to the NEC as there is no basis for intervention by the Board at this time in the ongoing private contractual negotiations among CSX, NS and Amtrak.[3]

2. **Off-NEC Passenger Operations**.

Citing CSX's assertedly poor on-time performance record, and the fact that CSX proposes to increase freight traffic on a number of CSX and Conrail lines over which Amtrak operates, Amtrak requests that the Board impose "a five-year oversight condition to consider appropriate remedies for any degradation in the on-time performance of the CSX-operated Amtrak trains that is traceable to increased freight traffic resulting from the proposed transaction." NRPC-7 at 11-13. This request should be denied on at least five separate grounds.

Amtrak's request for a similar condition in the BN/SF proceeding was rejected by the Board and should be rejected in this proceeding as well. The Board gave three independent reasons in BN/SF for denying the oversight condition. First, the Board stated that "there is no reason to believe that Amtrak will experience merger-related harm." BN/SF at 97. Although Amtrak appears to have tailored the wording of its request in this proceeding in an effort to avoid this ground for denying the oversight condition, the tailoring does not save the request from the substance of the Board's reasoning: "It would be very difficult, and, after a

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[3] Pursuant to 49 U.S.C. § 24904(c)(2) (Section 402(a)(2) of the Rail Passenger Service Act, as amended), and Section 3.8 of the NEC Freight Operating Agreement (included in Vol. 3), certain contract disputes relating to use of the NEC may be submitted to the Board for resolution.

few years, it most likely would be impossible, to determine whether any particular traffic increases were or were not merger-related." Id.

Second, the Board stated that "Amtrak already has ample remedies for any harms it may experience in its ongoing relationships with BN and Santa Fe":

> In any event, Amtrak already has remedies under its court-enforceable contracts and under the Rail Passenger Service Act (RPSA) concerning on-time performance and other service issues. The RPSA includes requirements that Amtrak's trains shall have preference over freight traffic and that Amtrak's contracts with rail carriers shall include penalties for untimely performance. [Fn: We also note that Amtrak may file petitions regarding issues of priority with the Secretary of USDOT.] These avenues of relief provide adequate alternatives to Amtrak's requested conditions.

Id. This second ground for denial applies with equal force today.

Third, the Board concluded that it would not be appropriate to impose a performance standard on BN/SF and not on the other freight railroads. It would similarly be inappropriate to saddle CSX alone with such a condition.

In UP/SP, the Board likewise did not impose any oversight condition relating to Amtrak on-time performance.[4]

Amtrak negotiated the terms of an Agreement with CSX in the spring of 1997 with knowledge of the Board's decisions in BN/SF and UP/SP (and also of CSX's efforts to effectuate a control transaction with Conrail), and executed a five-year contract with CSX on April 1, 1997. That contract establishes incentive payments that can be earned by exceeding certain thresholds of on-time performance, and defines the specific causes of delay that will

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[4] In his comments Commissioner Owen did remind UP/SP of its obligation to afford priority to Amtrak as required by the RPSA. UP/SP at 250-51.

be taken into account in assessing on-time performance. Reistrup RVS at 7. If Amtrak believed that the terms CSX was willing to accept were not sufficient to protect it, Amtrak could have declined to enter into an agreement and could have submitted the dispute to the Board for resolution under 49 U.S.C. § 24308(a)(2). Amtrak did not do so. Now, only a few months after successfully completing an arm's-length negotiation with CSX, Amtrak asks the Board to step into this private contractual relationship and afford Amtrak certain unspecified remedies not provided for in the contract. This request is patently unfair and should be rejected.

A fourth ground for denying the condition is that implementing such a condition would intrude on the statutory jurisdiction of the Federal Railroad Administration ("FRA"). The RPSA, as amended, 49 U.S.C. § 24308(c), gives the Secretary of Transportation the authority to grant relief from the statute's grant of dispatching preference to Amtrak trains over freight trains. The Secretary has delegated his authority to grant this relief to the FRA, not to the Surface Transportation Board. See 49 C.F.R. Part 200 (1997).

Finally, Applicants' evidence demonstrates that there is no factual basis for requiring the Board to take such extraordinary action here. First, the on-time performance statistics that Amtrak presented were not computed consistent with the terms of Amtrak's contract with CSX which governs incentive payments (Appendix V to the 1997 Agreement, included in Vol. 3).[5] Reistrup RVS at 7. The on-time performance statistics presented by Amtrak do not take into account the reasons for delays to Amtrak trains. While such a methodology

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[5] Board involvement in on-time performance standards would necessarily involve the agency in compensation issues related to such performance.

may be useful to an Amtrak customer attempting to determine the likelihood that an Amtrak train will arrive at its destination on schedule, the methodology is not appropriate for determining whether CSX is providing good service to Amtrak. Pursuant to Amtrak's contract with CSX, Amtrak trains that are delayed due to factors beyond the control of CSX are not counted as late for purposes of calculating on-time performance. These factors include, among other things, delays due to: (1) Amtrak equipment failure; (2) Amtrak trains being operated at a power-to-weight ratio less than the ratio used to establish the scheduled running times; (3) switching Amtrak Express (freight) cars; (4) severe weather conditions; and (5) grade crossing accidents.

The actual on-time performance levels are substantially higher than Amtrak portrays them to be. NRPC-7, Larson VS at 16. During the past five years, Amtrak trains have had an 86% on-time performance rate over CSX's lines.[6] Reistrup RVS at 6-10. Despite CSX's efforts to improve its performance rate in 1997, its on-time performance of 85% for fiscal year 1997 (October 1996-September 1997) did not improve over its five-year average because of delays during the summer on the Washington, DC to Richmond, VA line segment resulting from repair work required after a derailment in Rosslyn, VA and major maintenance work and the upgrade of signalling unrelated to the derailment (which will in the long-term improve on-time performance on this line). In recent months, however, CSX's systemwide contract on-time performance rate was very good: 90% in September 1997,

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[6] CSX's contract performance rate is comparable to Conrail's. There is no basis for Amtrak's suggestion that the allocation to CSX of Conrail lines over which Amtrak operates will decrease its on-time performance on those lines.

84% in October 1997, and 90% in November 1997. On many days since the beginning of September, CSX has attained 100% on-time performance of Amtrak trains.[7]

Moreover, Amtrak suggests that certain traffic increases contemplated in CSX's Operating Plan may cause interference with Amtrak trains over certain line segments.[8]

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[7] It is not surprising that CSX's on-time performance rate may be lower than other carriers who may host Amtrak trains over shorter distances, or less complex routes. As small delays accumulate throughout a trip, the cumulative delay more often becomes significant on a longer trip than on a shorter trip. Even if the contract performance formulae were the same among all the railroads measured (which has not been demonstrated) it is misleading and inappropriate for Amtrak to use cumulative overall national averages (NRPC-7, Larson VS at 17) because of important differences in: distance traveled; densities of passenger and freight traffic over the lines; and physical and operational complexities among various routes. That is, performance comparisons should only be made where like things are being measured -- in terms of both criteria and conditions.

[8] Amtrak specifically identifies four line segments of concern.

Capacity on the Alexandria to Richmond line is addressed in connection with VRE's Comments and Request for Conditions.

The Richmond-Rocky Mount line segment has adequate capacity to handle the projected 5-6 train increase in freight traffic. Reistrup RVS at 8-9. The track is double and single main track with passing sidings and is equipped with a modern CTC signal system. One bottleneck on the line does exist at the Appomattox River Bridge, which is a main single track bridge with a slow order of 10 mph. CSX is presently planning a project (unrelated to the Transaction) to upgrade this bridge and increase speed over it which would improve performance over this line. Orrison RVS at 134; Reistrup RVS at 9. Even without the benefit of this improvement, however, Amtrak on-time performance over this segment in November 1997 was 89%.

With respect to the Sunset Limited between Pensacola and New Orleans, the westbound Sunset Limited has a good performance record. It is the eastbound Sunset Limited that has experienced significant delays, but these delays are primarily due to causes beyond the control of CSX. Reistrup RVS at 9. The eastbound Sunset Limited originates in Los Angeles, and chronically arrives late to CSX at New Orleans: an average of 8.7 hours late in September 1997, 4.9 hours late in October 1997, and 4.3 hours late in November 1997. It is thus impossible to maintain a scheduled slot for the eastbound Sunset Limited. The line segment between New Orleans and Pensacola is single track and has stretches of "dark territory." Once a westbound train is cleared to proceed, an eastbound train must wait for it to clear the segment. If the Sunset Limited shows up after a westbound train (including the

NRPC-7, Larson VS at 17-19. However, there is no meaningful risk of interference with Amtrak trains from the projected traffic increases over these or other line segments. CSX/NS-20, Vol. 3A at 269-75; CSX/NS-23, Vol. 6A at 128-36; Orrison RVS at 134; Reistrup RVS at 8. Similarly, traffic changes will have no identifiable adverse impacts on lines to be controlled by NS. Mohan RVS at 54-55.

3. Enforced Cooperation on Increasing Speed on the Empire and Detroit-Chicago Corridors.

Amtrak asserts that Amtrak and New York State jointly wish to increase the maximum passenger train speed on the Conrail line from Albany to Buffalo (Amtrak's "Empire Corridor") and request that the Board impose a condition on CSX "requiring it to cooperate with Amtrak and the State of New York in the development of high speed service at public expense between Albany and Buffalo." NRPC-7 at 13-14. Amtrak also expresses concern that additional NS and CP traffic on the Detroit-Chicago line could adversely affect planned higher speed passenger service over this corridor and requests the Board to impose a

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westbound Sunset Limited) is cleared, it must wait its turn, even though it has dispatching priority over the next freight train to show up. A significant number of the meets which have delayed the eastbound Sunset Limited have been with the westbound Sunset Limited. Freight traffic is predicted to increase by only 1-2 trains per day, an insignificant increase. Amtrak's complaint about the Sunset Limited, apart from being misleading, has nothing to do with the Transaction.

With respect to the Conrail line between Schenectady and Buffalo, CSX plans to upgrade this line to 79 mph for passenger trains where possible, which should improve the on-time performance on this line. CSX/NS-20, Vol. 3A at 273; Orrison RVS at 134; Reistrup RVS at 10.

similar condition requiring NS to cooperate with Amtrak and the State of Michigan[9] in development of this service. Id. at 14-15. These conditions are unwarranted for the reasons set forth below.

First, these requests are wholly unrelated to the proposed Transaction.

Second, CSX and NS would be willing to discuss in good faith projects to increase the speed of passenger service on the Empire Corridor and Detroit-Chicago Corridor, respectively, if these projects would not interfere with the freight operations of CSX and NS and if the projects were truly "at public expense." There are many costs associated with increasing the speed of passenger trains on tracks also used for freight trains, such as installation of cab signalling systems on all locomotives operating over the line, that should fairly be treated as part of the "public expense" of the project.

Third, Conrail's 1996 Agreement with Amtrak, to which CSX and NS will succeed, already requires such cooperation. Section 3.3(c) (included in Vol. 3) provides that "the parties shall cooperate in good faith with each other in providing service and equipment which will contribute to the success of Amtrak's Intercity Rail Passenger Service." At the same time, however, Section 3.2(a) of the Agreement (included in Vol. 3) provides in part that requests for modified or additional services "shall give due regard to Conrail's speed, weight and similar operating restrictions and rules and safety standards and to the avoidance of unreasonable interference with the adequacy, safety, and efficiency of Conrail's other railroad operations." A Board condition is not required to enforce this private contract.

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[9] The State of Michigan supports the Transaction, but encourages NS to continue negotiations with Amtrak and Michigan regarding higher speed passenger rail service on this route. Letter from Governor John Engler to Secretary Williams (Oct. 3, 1997).

Fourth, this condition, like the requested condition for oversight of Amtrak's on-time performance, could result in the Board's intruding on the jurisdiction of the FRA. Under 49 U.S.C. 24308(d), the Secretary of Transportation has the authority to grant relief when a rail carrier refuses to allow Amtrak trains to operate at accelerated speeds:

> If a rail carrier refuses to allow accelerated speeds on trains operated by or for Amtrak, Amtrak may apply to the Secretary for an order requiring the carrier to allow the accelerated speeds. The Secretary shall decide whether accelerated speeds are unsafe or impracticable and which improvements would be required to make accelerated speeds safe and practicable. After an opportunity for a hearing, the Secretary shall establish the maximum allowable speeds of Amtrak trains on terms the Secretary decides are reasonable.

The Secretary has delegated his authority to resolve disputes relating to accelerated speeds to the FRA, not to the Board. See 49 C.F.R. Part 201 (1997).

Fifth, as to the Empire Corridor, any such condition would be premature. In response to interrogatories propounded by CSX regarding plans and funding for the development of a higher-speed passenger service on the Empire Corridor, Amtrak acknowledged that plans are preliminary and that there is no federal or state funding for the service:

> Amtrak has no such "current plans," in the sense of operating or construction plans, decision papers, etc. . . . Amtrak's discussions with the State regarding such service have been preliminary in nature. . . . No funds have to Amtrak's knowledge been authorized or appropriated for such service.

Interrogatory Response, NRPC-8 at 4. It should be noted, however, that CSX plans to restore this track for 79 mph passenger service where possible. CSX/NS-20, Vol. 3A at 273. This improvement will provide benefit to intercity and commuter passengers in the

near future, while Amtrak and New York State may develop plans for further improvements. As to the Detroit-Chicago Corridor, Conrail has not been asked by Amtrak, made any specific plans, nor developed any agreements with Amtrak that would allow higher speed passenger operations over Conrail-owned portions of the line. Carey RVS at 2. Such plans and agreements are the proper subject of private negotiation, not Board-imposed conditions.

For all of these reasons, the requested condition of enforced cooperation relating to the development of higher speed passenger service on the Empire and Detroit-Chicago Corridors should be denied.

B. Chicago Metra.

Chicago Metra, the Commuter Rail Division of the Regional Transportation Authority of Northeast Illinois, serving the Chicago metropolitan area, complains that its Southwest Service commuter trains are frequently delayed as they traverse four interlockers. METR-6 at 2. They are, from north to south, CP-518, Belt Junction, Forest Hill and Chicago Ridge, which are controlled by four different freight railroads -- Conrail, the BRC, the BOCT (a wholly-owned subsidiary of CSXT), and the IHB respectively. Metra states that it believes that traffic will increase through two of the interlockers as a result of the Transaction -- Belt Junction and Forest Hill -- and that it fears traffic might increase through the other two as well. Accordingly, Metra requests: (1) that the Board "require NS to dispatch the CP-518 Interlocker in a manner that insures that no freight be given authority to proceed through the interlocker if there is potential for delay to an approaching Metra train"; (2) that the Board require CSX and NS to use their best efforts to obtain the BRC's agreement to transfer control of the Belt Junction interlocker to Metra, and failing such agreement, requiring CSX

and NS to fund their proportionate share of a grade separation; (3) that the Board void the contract governing the Forest Hill interlocker and transfer control of the interlocker from the BOCT to Metra; (4) that the Board void the contract governing the Chicago Ridge interlocker and transfer control of the interlocker from the IHB to Metra; and (5) that the Board impose a monitoring condition for five years.

CSX and NS fully expect that the implementation of their Operating Plans will result in smoother traffic flows through Chicago with less interference between trains (both freight and passenger) than exists today. Orrison RVS at 87-88. Metra grossly overreaches in seeking these conditions and they should be denied.

1. **CP-518.**

The CP-518 interlocker is currently controlled by Conrail. Metra explains that in a 1989 letter agreement, Conrail promised to give priority to Metra/N&W commuter trains operating through CP-518. METR-7, Stoner VS at 8. Metra claims that despite this agreement, the CP-518 interlocker has been, and continues to be, a major source of disruption of Metra's service, that it has made its concerns known to Conrail, but that Conrail has not given Metra trains sufficient priority to permit Metra to provide reliable service to its customers. Id. According to Metra, it will be unable to meet increased demands for commuter services until current problems are resolved. Id. But Metra has presented no evidence of any definite plans to increase services along its Southwest Service Corridor.

As explained above, Metra seeks a condition that would require NS to dispatch the CP-518 interlocker in a manner that insures that no freight would be allowed to proceed

through that interlocker if "there is a potential for delay to an approaching Metra train." METR-6 at 4. Metra's requested condition as to CP-518 should be denied.

Metra's complaints about the existing situation at CP-518 interlocker are not an appropriate basis for imposition of any condition. NS will step into the shoes of Conrail once the Transaction is approved, and will be bound by existing applicable agreements between Conrail and Metra as long as they are in force -- including agreements regarding priority to be afforded commuter trains. The delays attributable to Conrail freight interference at CP-518 are minimal. In 1996, only one in 75 Metra trains was delayed, equivalent to less than one delay per week. If these delays were averaged among all the Metra trains traversing CP-518, the amount of delay would total just over one-tenth of a minute per train, or about seven seconds. In 1996, 98.67% of Metra trains passed through CP-518 without Conrail-related delay. Friedmann RVS at 45.

NS is ready and willing to work with Metra toward alleviating any current problems at CP-518. As evidenced by Metra's lack of complaints about current NS dispatching of the Manhattan line, NS and Metra have enjoyed a cooperative relationship regarding operations over that line, which Metra leases from NS. NS intends to continue this cooperative relationship on the Manhattan line, as well as in regard to operations through the CP-518 interlocker.

2. **Belt Junction.**

The Belt Junction interlocker is controlled by the BRC. The shareholders of the BRC are: BNSF (16.68%), Conrail (16.67%), CSX (25%), Grand Trunk Western (8.33%), Illinois Central (8.33%), Missouri Pacific (now UP) (8.33%), NS (8.33%), and Soo Line

Railroad Company (8.33%). CSX/NS-18, Vol. 1 at 267, 283. After the Transaction, CSX and NS will together have a 50% share (including Conrail's share), and the remaining five carriers will have a 50% share. A condition requiring CSX and NS to use their best efforts to convince BRC to agree to transfer control of the interlocker to Metra would be futile as the transfer would not be in the interest of the other owners of the BRC, CSX or NS and thus not in the interest of an independent BRC. There is no reasonable possibility of obtaining such agreement.

As a backup, Metra requests that CSX and NS be required to fund their proportionate share based upon annual traffic volume of a grade separation to replace the interlocker. METR-6 at 6. This request makes no sense unless Metra is volunteering to fund the balance, which offer is not plain on the face of its submission. The Board cannot require the other shareholders of the BRC to fund the balance of the grade separation, as the Board may not impose a condition, whether trackage rights or a funding obligation, on carriers who are nonapplicants in the proceeding. See, e.g., UP/SP at 191. In addition, Metra has not offered any evidence whatsoever that an overpass would be operationally and economically feasible at Belt Junction.

Moreover, Metra has not offered credible evidence that the Transaction would cause delays at the Belt Junction interlocker that would justify such a major capital investment, or that the Transaction would increase delays at the interlocker at all. Metra says only that NS plans to route 8.7 additional trains per day through the interlocker, and that the interlocker has been a source of congestion in the past. METR-7, Stoner VS at 7. This paltry evidence of Transaction-related harm is plainly insufficient to justify the extraordinary relief requested

by Metra. Metra does not even bother to quantify the existing delay to its passengers assertedly caused by interference from freight trains at the Belt Junction interlocker. And, in any event, complaints about the existing situation at the Belt Junction interlocker are not an appropriate basis for imposition of a condition.

Finally, there is no reason to believe that Metra trains would experience fewer or shorter delays if Metra controlled the interlocker (or the other interlockers which Metra would like to control). Some delays at interlockers are unavoidable, even with dispatching priority, as demonstrated by the fact that Amtrak trains are often delayed at the Englewood interlocker controlled by Metra despite the fact that Amtrak trains have priority under federal law. Carey RVS at 2-3.

3. **Forest Hill Interlocker.**

The Forest Hill interlocker has been controlled by the BOCT (a wholly-owned subsidiary of CSXT) since 1914, pursuant to an agreement among the Chicago & Western Indiana Railroad Company, the BRC, the Wabash Railroad Company, the Baltimore & Ohio Connecting Railroad Company and the BOCT or their successors. Metra seeks to have the Board void that agreement and transfer control to Metra. This condition is unwarranted.

Metra greatly exaggerates the delay to its passengers at the Forest Hill interlocker. Reistrup RVS at 11-13. Metra asserts that "[i]n the past twelve months, Metra passengers have incurred 9,240 manhours of delay at the Forest Hill Interlocker." METR-7, Stoner VS at 3. A review of Metra's records of delays at the Forest Hill interlocker, however, reveals that almost half of this delay (4,482 man-hours in a year) was caused by factors other than CSX freight train interference or other CSX-avoidable causes. Reistrup RVS at 11-12.

Although the remaining 4,758 man-hours of delay in a year still sounds like a huge number, it is only 11 seconds per trip for each of Metra's 1,501,876 passengers[10] who passed through the interlocking during the year. Moreover, 2,763 of these man-hours of delay were related to a single incident on January 10, 1997 involving a switch failure and freight train interference. Id. While January 10, 1997 was admittedly a bad day for Metra commuters, the delay experienced at the Forest Hill interlocker during the rest of the year averaged less than five seconds per trip. Viewed in another way, of the approximately 385 Metra trains that operated through the Forest Hill interlocker each month during the past year, an average of only 2.4 (0.7%) trains per month were delayed due to CSX freight train interference or other CSX-avoidable causes. Id. It is difficult to believe Metra's claim that it is not getting dispatching priority through the interlocker when 99.3% of its trains pass through the interlocker without delay.

Nevertheless, CSX recognized that improvements could be made, and on November 28, 1997, completed a project to automate the interlocking. Orrison RVS at 114; Reistrup RVS at 12. As part of this project, the interlocker operator has been relocated from a tower at the interlocker to an office shared by the B&OCT and BRC dispatchers, which will facilitate coordination and thus traffic flow through the interlocker.[11] Id. These improvements, which will also promote safety, should more than offset any potential for delay from increased traffic through the interlocker as a result of the Transaction.

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[10] Metra provided this number for 1996. Interrogatory Response, METR-9 at 4.

[11] In addition, CSX has agreed to allow Metra to install snowblowers and/or melters on the switches, which will reduce mechanical problems during the winter months. Reistrup RVS at 12.

Metra trains are often delayed at Forest Hill when they meet other Metra trains at the end of the double track and because of signal problems on Metra's own line. The solution to a further reduction in Metra delays at Forest Hill thus lies in Metra's scheduling or the addition of double track, not in a change of control of the interlocker. Reistrup RVS at 12.

Nevertheless, CSX is willing to cooperate in good faith with Metra to ensure that CSX continues to subject Metra's passengers to the absolute minimum of delay. To this end, CSX has discussed with Metra the establishment of a Joint Review Committee consisting of representatives from Metra, the Belt Railway of Chicago, and CSX which would meet regularly to review operations through the Forest Hill and Belt Junction interlockers.

4. Chicago Ridge.

The Chicago Ridge interlocker is controlled by the IHB. The shareholders of the IHB are Conrail (51%) and the Soo Line Railroad Company (49%), a subsidiary of Canadian Pacific. CSX/NS 18, Vol. 1 at 285. Since 1994, when the interlocker was automated, the Chicago Ridge interlocker has been controlled by the IHB pursuant to an agreement among the IHB, B&OCT and NS. Orrison RVS at 114-15. That agreement provides preference to Metra trains. Metra seeks to have the Board void that agreement and transfer control to Metra. For the reasons stated above, this condition is unwarranted.

First, the Board has ruled that the IHB is not an applicant. "IHB is a railroad operated independently of the applicants." Decision No. 53 at 4. Accordingly, the Board does not have the authority to transfer control of the Chicago Ridge interlocker from the IHB to Metra as a condition in this proceeding.

Second, Metra admits that the "impacts of the transaction at Chicago Ridge Junction are less certain" than the impacts at Forest Hill and Belt Junction (METR-6 at 5), and as shown above, the impacts at Forest Hill and Belt Junction are far from clear themselves. And third, Metra has not presented any convincing evidence that Metra's trains presently suffer unacceptable delays as a result of biased control by the IHB. For all of these reasons, the condition should be denied.

5. **Oversight.**

The Board need not get into the business of monitoring interlockers in Chicago for undue delay to Metra trains. Metra has not shown that it is likely to be adversely affected by the Transaction. If, however, the Board requests reports confirming that operations are proceeding smoothly in Chicago, any problems relating to interference with Metra's trains could be addressed through that process. The maximum term of this oversight should be three years following the effective date of Control, not five.

C. **Metro-North Commuter Railroad Company (MNCR).**

In its Comments and Request for Conditions (MNCR-2), MNCR asks the Board to require NS to convey a 58 mile line between Suffern and Port Jervis, NY to MNCR, with NS retaining trackage rights. Alternatively, MNCR asks the Board to require a long-term extension of the existing trackage rights agreement between Conrail and MNCR.[12] MNCR claims that commuter passenger service is the main user of the line and that to justify future

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[12] Trackage Rights Agreement Between Metro-North Commuter Railroad Company, Metropolitan Transportation Authority, Connecticut Department of Transportation and Consolidated Rail Corporation, effective as of January 1, 1983 ("MNCR/CR Trackage Rights Agreement") (included in Vol. 3).

investments MNCR should own the line. MNCR also argues that if NS were owner of the line, its dispatching might not give proper consideration to the needs of commuter passenger service. MNCR-2, Nelson VS at 9.

There is no basis for MNCR's requested conditions. MNCR has made no showing that the proposed Transaction will have any adverse effect on its commuter operations. Upon approval of the Transaction, NS will step into Conrail's shoes, and will be bound by the terms of any applicable contracts between Conrail and MNCR as long as they are in force.

There is also no basis for MNCR's dispatching concerns. NJTRO and MNCR operate a coordinated commuter service between Port Jervis and Suffern, NY and Suffern and Hoboken, NJ. MNCR claims if the proposed Transaction is approved, "the dispatching function could be removed to a far-distant location." MNCR-2 at 5. This, according to MNCR, would result in a "hand off" of trains at Suffern, the end of NJTRO's track ownership. Therefore, it would be "far better" according to MNCR, if dispatching were to be retained at its current location. Id. at 6.

MNCR is mistaken in its assumption that NS will change the existing dispatching arrangements. NS has no such intention for the foreseeable future. Mohan RVS at 55. NJTRO controls dispatching on the Port Jervis to Hoboken line pursuant to an operating agreement with MNCR.[13] Furthermore, under Section 3.04(b) of the MNCR/CR Trackage

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[13] Section 3.03 of the Agreement for Operation by NJ Transit Rail Operations, Inc. ("NJTRO") of Certain Rail Passenger Service on the Main Line/Bergen County, and Pascack Valley Line for Metro-North Commuter Railroad Company, dated October 6, 1997 ("1997 Operating Agreement") (included in Vol. 3).

Rights Agreement, "[t]he scheduling and movement of METRO No. . . . rail passenger commuter trains shall take precedence over all other rail movements except Amtrak regularly scheduled revenue intercity passenger trains." Thus, MNCR's concerns that NS will relocate dispatching are unfounded.

Furthermore, as shown in the NS Operating Plan, the line between Port Jervis and Suffern has adequate capacity to accommodate projected increases in NS freight traffic. CSX/NS-20, Vol. 3B at 303-304.[14] MNCR acknowledges that the current level of freight activity on the line is nominal and that commuter operations have priority under the terms of the MNCR/CR Trackage Rights Agreement. In response to interrogatories propounded by NS, MNCR responded as follows:

> Metro-North has been advised by NJ Transit Rail Operations, Inc. that the current NJ Transit operating priorities are at the discretion of the train dispatcher on duty. As the current level of freight activity is nominal, freight trains are moved when a window between passenger trains is provided by the schedule. Moreover, the currently effective Trackage Rights Agreement between MNCR and Conrail provides that preference is to be accorded MNCR's commuter passenger trains.

Interrogatory Response, MNCR-3 at 2-3.

Whether the existing MNCR/CR Trackage Rights Agreement should be extended after it expires, or whether the line should be sold to MNCR are matters that would be subject

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[14] Between Suffern and Port Jervis there are three controlled sidings; one 15,594 feet in length, one 6,060 feet in length and one 24,182 feet in length, in addtion to yard trackage at Port Jervis. Mohan RVS at 56. The projected increase in freight traffic is small -- an average daily increase of three freight trains per day between Suffern and Campbell Hall and 4.1 trains per day between Campbell Hall and Port Jervis. Id.

solely to negotiation between Conrail and MNCR if this Transaction did not occur,[15] and should be the subject of negotiation between CSX and NS and MNCR if the Transaction is approved. In fact, CSX and NS have supported a five-year extension of the MNCR/CR Trackage Rights Agreement pending approval of the proposed Transaction. There is simply no basis for the Board to interfere in these matters and replace private negotiations with government fiat.

For the foregoing reasons MNCR's request for conditions should be denied.

D. New Jersey Department of Transportation and New Jersey Transit Corporation.[16]

The New Jersey Department of Transportation ("NJDOT") and the New Jersey Transit Corporation ("NJTC"), including NJTC's rail operating subsidiary New Jersey Transit Rail Operations, Inc. ("NJTRO") (collectively referred to herein as "NJT"), acknowledge the potential benefits of the transaction to rail shippers in New Jersey, but assert that certain conditions must be imposed to protect passenger transportation in New Jersey. NJT-8 at 3.

NJT complains that CSX and NS did not sufficiently take passenger operations into account in developing their Operating Plans. NJT-8 at 7-8. Although this complaint is not

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[15] MNCR has not contended that it had reached a binding agreement with Conrail regarding conveyance of the Suffern-Port Jervis line; MNCR asserts that it had negotiated a "tentative agreement" with Conrail. MNCR-2 at 3, Nelson VS at 8. In fact, the discussions between MNCR and Conrail were general and preliminary. At the time of these discussions, Conrail was neither offering the line for sale, nor soliciting offers for its purchase. Carey RVS at 3.

[16] The North Jersey Transportation Planning Authority (letter to Secretary Williams, October 21, 1997) and the South Jersey Transportation Planning Organization (SJTPO-1) support the submission of the New Jersey Department of Transportation and the New Jersey Transit Corporation.

related to any of the conditions NJT presently seeks, CSX and NS will respond to this contention so as to dispel any notion that the Transaction will have a harmful effect on the operations of NJT. The only line segment specifically identified by NJT as a potential problem is the 5.5-mile segment of the Conrail Lehigh Line between NK and Aldene, Conrail's main line from Pennsylvania.[17] NJT-8 at 8. This line will be part of the North Jersey Shared Assets Area ("NJSAA"). CSX and NS were well aware of the significant number of NJT trains operating over that segment. Because the transaction affords CSX and NS a number of alternative routes into the North Jersey area, CSX and NS were able to route their traffic so as to result in a projected decrease of about ten freight trains per day over that segment. CSX/NS-20, Vol. 3A at 277; CSX/NS-23, Vol. 6A at 139; CSX/NS-119 at 126; Mohan RVS at 58.

As explained in the Application, NS predicts a modest (three trains per day) increase in through freight traffic over the Southern Tier line which is owned and dispatched by NJT between Hoboken, NJ and Suffern, NY and dispatched by NJT between Suffern and Port Jervis, NY, but that modest increase will not affect NJT operations. CSX/NS-20, Vol. 3B at

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[17] NJT's claim of delay to its commuter trains over this line segment must be placed in context. NJT states that in 1996 "265 NJTRO trains experienced delays of more than five minutes due to Conrail dispatching, maintenance, or operating actions." NJT-8 at 8. Applicants have not attempted to ascertain whether this assertion is correct. In response to Applicants' interrogatory, however, NJT acknowledged that 16,152 NJTRO trains traversed the segment in 1996 without any reported delays or with delays of less than five minutes, and that 1,027 NJTRO trains traversed the segment with delays unrelated to Conrail's actions, a total of 17,444 NJTRO trains traversing the segment in 1996. Interrogatory Response, NJT-11 at 8. Thus, using NJT's own numbers, only 1.5 percent of NJT's trains on this segment experienced delays related to Conrail's operations of more than five minutes. That figure is hardly a reason for the Board to conclude that serious intervention is required to protect passenger service in New Jersey. Indeed, it argues for the opposite conclusion.

Figure D, 6-1; CSX/NS-23, Vol. 6A at 139; Mohan RVS at 59. The remaining lines used by both Conrail and NJT are used by Conrail only for local freight services. Neither CSX nor NS is predicting an increase in freight traffic over these lines during the three-year period covered by the Operating Plans. CSX/NS-20, Vol. 3A at 450; CSX/NS-23, Vol. 6A at 139-40, 174-75. Accordingly, there is no basis for NJT's suggestion that the transaction would result in increased interference between freight and passenger operations in New Jersey. CSX/NS-20, Vol. 3A at 277; CSX/NS-23, Vol. 6A at 138-41, 174-75; CSX/NS-119, Orrison and Mohan VS at 9-11, 121-130; Mohan RVS at 59. In fact, when NS presented proposals for scheduling NS freight trains over the Southern Tier between Port Jervis and Croxton and NK and Aldene, NJT agreed that the proposed schedules would not interfere with its passenger operations. Davenport RVS at 2. Furthermore, these freight schedules are flexible and can be adjusted to accommodate passenger services.

In its October 21, 1997 filing (NJT-8), NJT asked for six conditions. In light of the NJSAA Operating Plan (CSX/NS-119) filed with the Board on October 29, 1997, NJT has withdrawn its requests for a condition regarding additional capital expenditures on the NK-Aldene segment and for a condition regarding dispatching and maintenance resources in the NJSAA. The remaining four requested conditions are addressed below. CSX and NS had informed NJT before October 21, 1997 that they were willing to agree to NJT's terms with respect to three of the requested conditions. CSX and NS, however, did not reach an agreement with NJT regarding the subject of the fourth requested condition, the South Jersey Light Rail Transit Project.

1. **Coordination with NJT in North Jersey and South Jersey/Philadelphia Shared Assets Areas.**

NJT suggests that senior officials of CSX, NS and the Conrail Shared Assets Operator ("CSAO") should meet regularly with the Commissioner of Transportation of NJDOT or his designee to discuss the policy issues important to ensuring smooth operations of both freight and passenger services within the North Jersey and South Jersey/Philadelphia Shared Assets Areas. CSX and NS do not disagree. Indeed, CSX and NS previously offered to establish the following procedure for coordination:

> The parties agree to meet regularly, in accordance with a schedule to be established by the parties, to discuss major issues necessary to ensure the smooth operation of both the passenger and freight service within the New Jersey Shared Assets Areas. Present at these meetings will be the Commissioner of Transportation (or designee(s)), the senior CSAO official (or designee) in charge of the New Jersey Shared Assets Areas, and the senior official of each of CSXT and NSR (or designees) having responsibility for freight rail operations in New Jersey, including such operations in the New Jersey Shared Assets Areas. In the event that New Jersey representatives disagree with a solution to an issue of concern to NJDOT/NJT, arrived at by NSR, CSXT, and CSAO, the Commissioner of Transportation may confer with the President or Chief Executive Officer of CSXT and/or NSR to resolve such issues.
>
> In addition, the parties agree that close communications and cooperation at the operating level shall be maintained between NSR, CSXT, CSAO and NJT.

2. **ATC/PTS.**

NJT seeks a condition requiring CSX, NS and the CSAO to install a new technology -- Automatic Train Control/Positive Train Stop ("ATC/PTS") -- on their locomotives operating on or over NJT-owned properties. NJT-8 at 10-12. NJT represents that this on-board apparatus will be "responsive to the roadway equipment installed on all or any part

of Amtrak's Northeast Corridor as required by the Federal Railroad Administration ("FRA") regulations." NJT-8 at 12.

CSX and NS had offered prior to October 21, 1997 to install the requested on-board apparatus on locomotives operating over NJT-owned lines. Reistrup RVS at 14-15. CSX and NS reaffirmed this offer in the NJSAA Operating Plan, as NJT acknowledged in its comments on that Plan, but NJT professes that it is concerned that the offer was somehow conditional. NJT-12 at 5-6. CSX and NS's agreement to install the requested on-board apparatus on locomotives operating over NJT-owned lines, if asked to do so by NJT, is unconditional. However, as a general matter, CSX and NS are not unconditional in their support of ATC/PTS, and have no present plans to install the specific ATC/PTS technology being tested by NJT throughout their systems. There are presently a number of new signalling technologies being tested in the United States and abroad. These systems are not necessarily compatible with each other. The question of whether a new generation of signalling technology should be promoted nationwide, and if so, which of the many competing technologies should be chosen, must be resolved, but this proceeding is not, of course, the proper forum for resolution of this question.

3. **NORAC Operating Rules.**

NJT seeks a condition requiring Applicants to adopt Northeast Operating Rules Advisory Committee ("NORAC") Operating Rules presently in effect on all Conrail lines within the NJSAA for a period of three years after approval of the transaction. NJT-8 at 12-13. CSX and NS had offered prior to October 21, 1997 to retain NORAC Operating Rules within the NJSAA. CSX and NS reaffirmed this offer in the NJSAA Operating Plan,

as NJT acknowledged in its comments on that Plan, but NJT professes that it is concerned that the three-year term of the offer was not clearly stated. NJT-12 at 6. CSX and NS confirm here the representations of Messrs. Orrison and Mohan in their November 19, 1997 depositions (Exhibit A to NJT-12) that the NORAC rules will be retained in the NJSAA through the three-year period covered by the Operating Plan. See also Reistrup RVS at 15.

4. South Jersey Light Rail Transit Project.

NJT describes its plans for a new light rail transit service between Trenton and Camden over Conrail's Bordentown Secondary. NJT-8 at 17-22. NJT correctly states that the Bordentown Secondary will be part of the South Jersey/Philadelphia Shared Assets Area. NJT-8 at 17. NJT seeks a condition requiring CSX and NS to cooperate in the development of the South Jersey Light Rail Transit Project (the "Project"), and, in the event that the parties are unable to reach an agreement regarding the Project, requiring the parties to submit the dispute to the Board for resolution. NJT-8 at 17-18.

This condition is wholly unwarranted and should be denied for the following five reasons.

First, the condition has nothing to do with the Transaction. The proposed Project has no reasonable relationship to any effect from the transaction. The suggestion of Frank M. Russo (NJT-8, Russo VS at 4-5) that a commuter project in South Jersey would mitigate increased local truck traffic near intermodal terminals in North Jersey resulting from increased intermodal service is disingenuous at best. Furthermore, NJT's planning for this

Project commenced before this Transaction was even proposed, demonstrating that it is not a response to an effect from the Transaction.[18]

Second, Congress has not given the Board authority to decide disputes between freight railroads and commuter agencies regarding rights to and use of track, and the Board should not exercise its conditioning authority to decide such disputes which Congress has committed to resolution through private negotiations. Congress has given the Board the authority to decide disputes between Amtrak and other rail carriers, both with respect to Amtrak's use of the facilities of other carriers, 49 U.S.C. § 24308(a)(2), and with respect to use of the Northeast Corridor, 49 U.S.C. § 24904(c)(2), but Congress has not given the Board similar authority to decide disputes between freight rail carriers and commuter agencies. Under Section 1137 of the Northeast Rail Services Act of 1981 ("NERSA"),[19] which amended Section 506(i) of the RPSA, the ICC was given limited authority to decide disputes regarding rights to property subject to transfer from Conrail to a commuter authority under that Act. But when that limited authority was discharged, Section 506(i) was repealed, once again committing disputes between freight railroads and commuter authorities to resolution through private negotiation.[20] Although the federal government supports mass transportation

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[18] In response to Applicants' interrogatory, NJT stated that in April 1996 the NJTC Board of Directors "approved a contract, with a potential value of $42 million, to provide for the preliminary engineering, surveys, bridge and Right of Way ("ROW") inspections, environmental studies, business planning and bid package preparation required to produce a Design, Build, Operate and Maintain bid package for the SNJLRT. . . ." Interrogatory Response, NJT-11 at 6.

[19] Pub. L. 97-35 (Aug. 13, 1981), 95 Stat. 651-52 (formerly codified at 45 U.S.C. 586).

[20] Pub. L. 103-272 § 7(b) (July 5, 1994), 108 Stat 1379, 1386; see H.R. Rep. No. 103-80 at 585 (1994), reprinted in 1994 U.S.C.C.A.N. 818, 1402.

provided by state and local authorities through federal funding under the Urban Mass Transit Act of 1964, as amended, Congress has not granted the STB or any other federal agency the general authority to appropriate the property of freight railroads for mass transportation use.[21] NJT's invitation for unprecedented intrusion into a matter reserved for private contract should be rejected.[22]

Third, although CSX and NS are bound to fulfill Conrail's obligations to NJT, Conrail has no obligation to NJT with respect to the proposed South Jersey Light Rail Transit Project. Under the Transfer Agreement between Conrail and New Jersey Transit Corporation dated as of September 1, 1982, entered into pursuant to NERSA, Conrail agreed to grant NJTC "trackage rights over Conrail's rail lines to operate commuter service not operated on the Date of Transfer and which the Commuter Authority is legally authorized to operate at the time of such request," subject to the terms of a Trackage Rights Agreement to be negotiated between Conrail and NJTC. Section 2.07(c)(i) (included in Vol. 3). The

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[21] The STB has a very limited role with respect to transportation provided by a local governmental authority pursuant to 49 U.S.C. §§ 11102 and 11103 (governing the use of terminal facilities and switch connections and tracks by only certain entities).

[22] NJT explains in its Petition for Clarification or Waiver that the ICC had limited jurisdiction over commuter rail, and that the ICC Termination Act of 1995 further curtailed the Board's jurisdiction over commuter rail. NJT-4 at 3-5. Congress determined in the ICC Termination Act that "'[t]he Board's rail jurisdiction would be limited to freight transportation, because rail passenger transportation today [other than Amtrak] is now purely local or regional in nature and should be regulated (if at all) at that level.' H.R. Conf. Rep. No. 422, 104th Cong., 1st Sess. 167." NJT-4 at 4 n.3. Although the Board may not require subject matter jurisdiction in order to exercise its conditioning authority with respect to applicants in a control transaction, Congress's recent statement of its intent to entrust commuter rail to regional or local authorities and the absence of any express Board jurisdiction to order carriers to make their lines into commuter or light rail systems, counsels against any exercise of the Board's conditioning authority to require applicants to make lines open to new commuter or light rail operations.

proposed project is not "commuter service" within the meaning of the Transfer Agreement and NERSA, but "light rail" (rapid transit).[23] As NJT acknowledges, light rail equipment does not meet FRA safety standards; therefore, light rail and conventional rail (whether freight or passenger) cannot operate together on the same tracks. NJT-8, Russo VS, at 1-2. See also Reistrup RVS at 15-16. The Transfer Agreement thus granted no rights to NJT with respect to light rail.

It appears that NJT is well aware that it has no rights to operate light rail on Conrail's lines under the Transfer Agreement. In its description of Anticipated Responsive Application, NJT had stated that it anticipated seeking Board-ordered operating rights over

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[23] NERSA defines "commuter service" as "short-haul rail passenger service operated in metropolitan and suburban areas, whether within or across the geographic boundaries of a State, usually characterized by reduced fare, multiple ride, and commutation tickets, and by morning and evening peak period operations." 45 U.S.C. § 1104 (emphasis added).

Although the technology being proposed by NJT is commonly called "light rail," it is in fact a non-railroad mode of operation under federal law. The legal distinction between railroads and rapid transit operations (variously referred to through the last century as "street railroads," "street railways," "trolleys" and "subways" and more recently "light rail") has been clearly recognized since 1912 when the United States Supreme Court held that a street railroad operating between Council Bluffs, Iowa and Omaha, Nebraska was not subject to the Interstate Commerce Act of 1887 because it was not a "railroad" with the meaning of the Act. Omaha & Council Bluffs Street Railway Co. v. Interstate Commerce Comm'n, 230 U.S. 324 (1913).

More recently, and closer to New Jersey, the Third Circuit held in Felton v. Southeastern Pennsylvania Transportation Authority, 952 F.2d 59 (3d Cir. 1992), that employees of SEPTA's City Transit Division are not railroad employees within the meaning of the Federal Employers' Liability Act ("FELA"). The court specifically held that "commuter service" under NERSA does not include "transit service." Id. at 62-63.

See also 49 U.S.C. § 24902(a)(4) (Section 703(1)(C) of the Railroad Revitalization and Regulatory Reform Act of 1976), which distinguishes between "commuter rail passenger" and "rail rapid transit."

ten Conrail line segments. NJT-8 at 6. Subsequently, NJT stated that it concluded that it had adequate contractual rights (presumably under the Transfer Agreement) for all the contemplated new services but one, the South Jersey Light Rail Transit Project. As further evidence, in 1996, at the direction of the New Jersey State Senate, NJT studied the feasibility of instituting passenger service using the existing Conrail line or right-of-way between Trenton and Camden. NJT identified three options for the South Jersey Project: electrified light rail, diesel light rail, and diesel multiple units ("DMU"). NJ Transit, Burlington-Gloucester Transit System, Special Study No. 2, Camden-Trenton Rail Corridor (June 1996) (included in Vol. 3).[24] The light rail options are identified as "non-FRA Compliant" and the DMU option is identified as "FRA Compliant." Id., Table 1 at 10. In comparing the options, the report clearly stated that the light rail options would require acquisition of operating rights whereas the DMU option could "[o]perate under existing NJT/Conrail Agreement." Id. NJT's recitation of its rights under the Transfer Agreement to operate new commuter service at pages 6 and 7 of its Comments and Request for Conditions is thus very misleading as it suggests to the Board that, if the Board granted the requested condition, it would simply be fashioning the specific operating terms of existing rights, not granting rights where none existed at all.

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[24] What is missing from the study is an analysis of the option of constructing a separate track for the light rail service within the Conrail right-of-way. The study concluded that a separate 3.4-mile long track would have to be constructed for light rail operations from Pavonia Yard in Camden to CP Hatch because freight operations on that line are so heavy (a conclusion which was rejected in the operating plan NJT now offers), but did not analyze the feasibility of building separate track along the entire route. Theoretically, the separate track option appears to be the most compatible with freight operations. Whether this option is in fact feasible along this line is not known, however, because NJT did not analyze it.

Fourth, even if the Project qualified as "commuter service" under the Transfer Agreement, pursuant to Section 2.04 of the Trackage Rights Agreement Between New Jersey Transit Corporation and the Consolidated Rail Corporation, dated October 1, 1984, NJT's use of the Bordentown Secondary "shall not unreasonably interfere with Conrail's freight service." Conrail has stated, (Carey RVS at 7-10), and CSX (Orrison RVS at 141-44; Reistrup RVS at 16) and NS concur, that the proposed Project would unreasonably interfere with use of the Bordentown Secondary for freight operations. NJT essentially proposes to appropriate the exclusive use of the Conrail line, leaving only a late night "window" for freight operations. Id. Although Mr. Russo does not reveal the proposed hours of the freight window in his Verified Statement, the consultant's study on which he relies states that freight operations would have to be curtailed to the [[ ]] period from [[ ]] p.m. to [[ ]] a.m. R.L. Banks & Associates, "Planning to Accommodate Freight Operations in Conjunction with the Southern New Jersey Light Rail Transit System," dated June 16, 1997 (the "Banks Study") (included in Vol. 3).

The Bordentown Secondary is presently used by Conrail for local freight services, and under the CSX and NS Operating Plans, it would continue to be used for local freight services. However, CSX and NS should not be deprived of the opportunity to develop new business in this area, an area that has been served solely by Conrail for more than 20 years. Moreover, the Bordentown Secondary could provide an alternative through route from Philadelphia to North Jersey in the event of an emergency closing of the main lines.[25]

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[25] If for any reason the Delair Bridge became inoperable, the Bordentown Secondary would be the only rail access route for all of South Jersey.

Although CSX and NS have no present plans to upgrade the Bordentown Secondary to main line standards, CSX and NS should not be deprived of this potential use of this new line to which they are obtaining access through the Transaction.

Mr. Russo makes a valiant effort to persuade the Board that existing freight operations can be accomplished within the short freight window. NJT-8, Russo VS at 5-13. However, assuming for the sake of argument that Conrail's customers would be willing to accommodate switching during this narrow window in the middle of the night (which NJT has not ascertained) and that the scenario would otherwise actually work under perfect conditions, Mr. Russo makes it clear that there would be little if any tolerance for any deviation from perfect conditions, including the need to perform additional unscheduled service to freight customers. CSX and NS should not be saddled with this service-limiting burden as they commence their service to Conrail's customers in the Camden-Trenton corridor.

The Banks Study reveals how tenuous NJT's plan is. The Banks Study (at 1) acknowledges that [[

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The following passages from the Banks Study make clear just how challenging this plan would be for CSX and NS:

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In addition, as noted above, NJT's 1996 Special Study No. 2 concluded that freight operations near Pavonia Yard were so heavy as to require a separate 3.4-mile-long track for the light rail service from the yard to CP Hatch. The reason for rejection of this conclusion in Mr. Russo's operating plan is nowhere explained in NJT's papers. A condition should not be imposed if it is not operationally feasible.

Moreover, a condition should not be imposed if it would unduly reduce the benefits of the Transaction. CSX and NS have committed to improve existing freight service and to work to increase freight service. CSX and NS should not be deprived of the opportunity to develop additional business between Camden and Trenton. Although Mr. Russo states that NJT "would be prepared to offer accommodation for new freight customers as the need arises" (NJT-8, Russo VS at 10), it is far from clear that any accommodation would be feasible.

While NJT admits that it has no agreements with Conrail regarding the SJLRT, apart from some entry permits allowing NJT to enter the property for investigative work (NJT-11 at 7), NJT suggests optimistically that it has "received indications from Conrail that a reasonable accommodation, in light of the existing freight operation and the potential for future freight service on the line, could be made." NJT-8, Russo VS at 5. As explained by R. Paul Carey of Conrail, however, NJT has not yet proposed any operating plan to Conrail which meets Conrail's essential operating requirements. Carey RVS at 9 and Ex. 2. NJT's suggestion that CSX and NS are being unreasonable in failing to approve an operating plan acceptable to the current operator is thus without foundation in fact.

Fifth, were the Board to agree to involve itself in this matter, it would be miring itself in an intensely debated political issue within New Jersey. This Project was a significant issue in the recent elections in New Jersey including the gubernatorial election. Many citizens question whether the hefty price of the project is justified by its benefits. NJT's 1996 Special Study No. 2 estimated the cost at $314 million, but some newspaper articles have quoted the price at $450 million. Reistrup RVS at 16-17 and Ex. 1. Although NJT has

committed to spend about $42 million on studies for the Project, funding for the construction, operation and maintenance of the Project has not yet been secured.[26]

CSX and NS are cognizant of the investment NJT has made in studies for the Project. CSX and NS would be willing to continue the discussions NJT is having with Conrail. Carey RVS at 10; Reistrup RVS at 16. However, it appears that the most feasible options from the perspective of compatibility with freight operations are operating conventional commuter rail service on the line or constructing a separate track for light rail on the Conrail right-of-way. NJT's request for a condition requiring cooperation on the light rail project as proposed, with ultimate decision by the Board, should be denied for all of the reasons set forth above.

E. Southeastern Pennsylvania Transportation Authority ("SEPTA").[27]

In its Comments and Request for Conditions (unnumbered), SEPTA seeks to modify its Trackage Rights Agreement with Conrail, dated October 1, 1990, in three material respects and to impose the redrafted "contract" on CSX and NS, as successors to Conrail. Specifically, SEPTA requests the following amendments to its Trackage Rights Agreement: (1) that the Board void Section 8.01(b), providing that either party may terminate upon six months written notice, and replace it with a new Section 8.01(b) providing for a ten-year term; (2) that the Board void the provision of Section 3.02(b) giving Conrail the right to

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[26] NJT states that the Transportation Trust Fund ("TTF") Authority "is expected to adopt a funding and financing plan for the project in the first quarter of 1998." Interrogatory Response, NJT-11 at 5.

[27] A number of filings by Pennsylvania state and local authorities and officials note the importance of SEPTA to the Philadelphia area.

assume dispatching control of its own Trenton Line on sixty days written notice to SEPTA; and (3) that the Board amend Exhibits 1 and 2 by including the Conrail Harrisburg Line to Reading and the Conrail Morrisville Line between Dale and Morrisville as properties used jointly by SEPTA and Conrail.

In support of these requested conditions, SEPTA asserts that the transition from Conrail to CSX and NS may result in implementation difficulties and that changes in freight traffic may be greater than projected in the Operating Plans. SEPTA Comments at 4-6. As evidence for implementation difficulties, SEPTA points to the difficulties arising from the UP/SP merger. SEPTA provides no evidence in support of the suggestion that the CSX and NS Operating Plans do not accurately project traffic volumes in the three years following Board approval.

It requires no more than a statement of the relief requested and the basis therefor to determine that SEPTA has not shown that the requested conditions are related to any potential harm caused by the Transaction. SEPTA is attempting to use the fortuity of the Transaction to obtain terms more favorable than it was able to gain through arm's-length negotiations with Conrail or, to date, in negotiations with CSX and NS. Accordingly, the Board should deny SEPTA's requested conditions.

Although CSX and NS oppose the imposition of the requested conditions, CSX and NS are committed to establishing a long-term, mutually beneficial relationship with SEPTA. Because CSX and NS (either individually or through the Conrail Shared Assets Operator) would operate over SEPTA-owned lines, and because SEPTA would continue to operate over Conrail-owned lines, the parties have strong incentive to achieve a mutually beneficial

relationship. CSX and NS will succeed to, and honor, Conrail's obligations under the Trackage Rights Agreement. Moreover, CSX and NS are willing to discuss modifications to the Agreement.

No basis has been presented that could justify Board intervention in the arm's-length negotiations that will define this relationship for all the reasons set forth below and in Applicants' responses to similar requests by other passenger agencies for Board-imposed modifications to their contracts.

1. **The Term of the Agreement.**

Although Conrail and SEPTA each have the legal right under Section 8.01(b) to terminate the Trackage Rights Agreement upon six months notice (SEPTA Comments, Ex. A at 42-43), as a practical matter neither is likely to invoke the right as each needs some lines of the other to operate. Reistrup RVS at 17-18. SEPTA's suggestion that CSX and NS might be more likely than Conrail to cause termination of the Agreement is not supported by the realities of the Transaction. CSX and NS have informed SEPTA that they are not opposed in principle to replacing the termination provision with a fixed-term extension of the Agreement, but the sticking point to date has been extension of the Agreement's provisions governing liability apportionment. Carey RVS at 12-13; Reistrup RVS at 18-19. SEPTA seeks to have the Board decide this issue through the term extension without even apprising the Board that liability is the issue it is deciding.

SEPTA raises a legitimate concern about safe integration of railroad operations (Comments at 5-7), but the Board has addressed this concern by requiring CSX and NS to submit Safety Integration Plans, which expressly address SEPTA. SEPTA has not shown

how a ten-year term extension to its Trackage Rights Agreement would in any way promote safety during the transition. It is certainly not a narrowly tailored remedy for the concern.

2. Control of Dispatching on the Conrail Trenton Line.

Section 3.02(a) of the Trackage Rights Agreements provides that Conrail has the right to control dispatching on all Conrail-owned lines. SEPTA Comments, Ex. A at 6. Section 3.02(b), however, grants SEPTA the right to control dispatching on two segments of Conrail's Trenton Line, subject to Conrail's right to reclaim dispatching control upon sixty-days written notice:

> SEPTA shall exercise dispatching control of all trains on the Trenton Line (the former New York Short Line) from C.P. Newtown Junction (M.P. 6.2) to Neshaminy (M.P. 21.1), and on the Trenton Line (the former New York Branch) from Neshaminy (M.P. 21.1) to Trent (M.P. 33.0), except that Conrail, on sixty (60) days written notice, may assume such dispatching control.

SEPTA requests that the Board, as a condition to the approval of the Transaction, void Conrail's right to assume dispatching control on sixty days written notice, thus giving SEPTA a permanent right to control dispatching on the Trenton Line. SEPTA has not provided any justification for this condition.

Use of the Trenton Line will be granted to CSX. Consistent with CSX's overall policy not to change the operating practice and rules on Conrail lines on Day One, CSX does not have any plans at present to exercise its right under Section 3.02(b) to assume dispatching control. Reistrup RVS at 19. Even if CSX were to exercise this right sometime in the future, SEPTA's interests would remain fully protected. Section 3.02(a) of the Trackage Rights Agreement provides that Conrail may not exercise its dispatching rights "in

a manner which would unreasonably interfere with SEPTA's Trackage Rights." Moreover, Section 3.02(d) provides that "[t]he scheduling and movement of SEPTA passenger trains shall take preference over all freight train movements."

The CSX Operating Plan does not project any increase in freight traffic on the Trenton Line segments over which SEPTA operates. See CSX/NS-23, Vol. 6A at 177. SEPTA's request that it have permanent dispatching control on the Trenton Line thus bears no conceivable relationship to any potential harm from the transaction.[28] Notably, Conrail has recently rejected in no uncertain terms a request from SEPTA to surrender this important right of ownership. Carey RVS at 13. Simply stated, the Board's regulatory process is not the proper forum for SEPTA to seek a right that it cannot obtain from Conrail and that is wholly unrelated to the Transaction now before the Board. The Board does not ordinarily impose a condition that would put its proponent in a better position than it occupied before the transaction.

3. Proposed Light Rail Service on the Harrisburg and Morrisville Lines.

SEPTA does not make a serious effort to invoke the conditioning authority of the Board with respect to the potential expansion of its service, but, because the proposal would so seriously impair Applicants' freight operations, the proposal cannot go unanswered.[29] SEPTA states in its Comments at pages 7-8:

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[28] In saying this, CSX does not acknowledge that an increase in freight traffic would justify SEPTA's request.

[29] Use of these lines will be allocated to NS: CSX will have trackage rights over the Morrisville line.

> SEPTA's Proposal also recognizes the public interest associated with the extension of transit service into areas not currently serviced by the commuter system, particularly the Schuylkill Valley area along Conrail's Harrisburg line and throughout parts of Chester, Montgomery and Bucks counties along the Morrisville line. The incorporation of these lines into an extended Trackage Rights Agreement would ensure that SEPTA's plans for expansion into these areas could occur without disruption from the Proposed Transaction.

SEPTA reveals in Exhibit B to its Comments, an October 1, 1997 letter from Bernard Cohen to NS, CSX and Conrail (at 2), that it is proposing a "non-railroad mode of passenger operations" -- light rail, not commuter rail:

> Pursuant to the September 1, 1982 Transfer Agreement, SEPTA already has the right to operate commuter rail operations on these lines, subject only to an agreement on the use of such trackage rights. SEPTA believes this provision would survive the Takeover. The proposal by SEPTA to use a different mode of operation is one that is currently gaining favor around the nation because of the enormous cost savings of having a non-railroad mode of passenger operations.

This is all that SEPTA offers in support of a proposal that would essentially result in the appropriation by SEPTA of two line segments which are presently used for freight service and which will continue to be needed for freight service.[30] SEPTA asks for this extraordinary relief without providing even a shred of evidence that this condition would not interfere with the proposed freight operations over this line.[31] In Decision No. 33 at 3 (Sept. 17, 1997), in response to notice by NJT and VRE that they intended to seek certain operating rights, the Board ordered NJT and VRE "to submit evidence about the feasibility

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[30] As explained in connection with NJT's proposal for appropriation of Conrail's Bordentown Secondary line, light rail and conventional rail cannot operate on the same track.

[31] Use of these lines will be allocated to NS; CSX will have trackage rights over the Morrisville line.

of their proposed operations and whether they will interfere with freight operations over these lines." This direction plainly applies to SEPTA as well even though it was not expressly directed at SEPTA (as SEPTA did not clearly state the relief it might seek in its Description of Responsive Application, filed Aug. 21, 1997). SEPTA's request for this condition accordingly should be stricken.

SEPTA's Comments and discovery responses reveal that SEPTA could not begin to meet its evidentiary burden. Its plans are at the most preliminary stage -- it has not yet made any determination as to what mode of transportation it would use or whether it would operate on the same track as the freight trains or on a different track. It does not appear that there is any funding for these projects. Carey RVS at 13. Furthermore, it is not even clear that SEPTA has authority to seek rights over the 16 miles of the Harrisburg line that are in Berks County, as SEPTA has no statutory authority to operate in Berks County. Carey RVS at 14.

In addition, SEPTA has not shown any relationship whatsoever between the Transaction and the proposal.

Furthermore, as SEPTA seems to acknowledge in Mr. Cohen's letter of October 1, 1997, the Transfer Agreement (included in Vol. 3) between Conrail and SEPTA executed under NERSA only granted trackage rights to SEPTA for commuter rail, not the "non-railroad mode of passenger operations" SEPTA now proposes.[32] This Board simply has no role to play with respect to light rail or other non-railroad modes of passenger operations.

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[32] See the discussion of this point in NJT above.

But even if SEPTA does somehow have trackage rights for this light rail service, Section 3.02(f) of the Trackage Rights Agreement (SEPTA Comments, Ex. A at 8) requires that SEPTA's expansion of its passenger service "not unreasonably interfere with Conrail's existing or planned uses of Conrail Rail Properties." As shown above, SEPTA has not made this showing. Nor could SEPTA make this showing. According to Paul Carey of Conrail, "the operation of such services upon the Conrail Morrisville Line or Harrisburg Line (these are both vital main line arteries) could not be introduced without undue and unreasonable interference with present and future freight operations." Carey RVS at 13-14; Reistrup RVS at 20.

For all of these reasons, SEPTA's condition must be denied. Nevertheless, NS would not foreclose discussions with SEPTA about light rail service on a separate track within the rights-of-way of the Harrisburg and Morrisville lines, if presented with feasible proposals for such operations.

F. Northern Virginia Transportation Commission and Potomac and Rappahannock Transportation Commission ("VRE").

In its Comments and Request for Conditions (VRE-8 and VRE-9), VRE seeks "acquisition of operating rights" over certain lines presently owned by CSX, NS and Conrail. VRE-8 at 31-32. Based on this characterization of the relief it intended to seek in its Petition for Clarification or Waiver (VRE-5), filed on August 22, 1997, the Board ordered VRE "to submit evidence about the feasibility of [its] proposed operations and whether they will interfere with freight operations over these lines." Decision No. 33 at 3 (Sept. 17, 1997). VRE has failed to comply with the Board's order, and has only submitted evidence about

whether Applicants' freight operations will interfere with VRE's operations.[33] Accordingly, VRE's Comments and Request for Conditions should be stricken.

VRE's request for "acquisition of operating rights" is perplexing, however, because it already has "operating rights" pursuant to its Operating/Access Agreements with CSX, NS and Conrail.[34] Instead, it appears that VRE seeks to modify its operating rights, as defined in its Operating/Access Agreements with CSX and NS, in numerous material respects and to impose the redrafted "contracts" on CSX and NS. VRE also asks the Board to terminate the currently effective Operating Access Agreement between VRE and Conrail with respect to the line segment between RO interlocking in Arlington, Virginia and the Virginia Avenue interlocking in Washington, D.C. and to apply the terms of the redrafted "contract" with CSX to that line segment. In support of these requested conditions, VRE asserts that there are numerous provisions of its agreements with CSX, NS and Conrail that it has never liked,

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[33] In response to Applicants' interrogatory, VRE admitted that it "is without information enabling it to identify delays to freight trains caused by interference from VRE or other passenger trains." Interrogatory Response, VRE-10 at 9.

[34] Operating/Access Agreement Between CSX Transportation, Inc. and Northern Virginia Transportation Commission and Potomac and Rappahannock Transportation Commission Concerning Commuter Rail Service, dated January 10, 1995, effective through June 30, 1999.

Operating Access Agreement Between Norfolk Southern Railway Company and Northern Virginia Transportation Commission and Potomac and Rappahannock Transportation Commission, dated July 12, 1996, effective through July 15, 1998.

Operating Access Agreement Between Consolidated Rail Corporation and Northern Virginia Transportation Commission and Potomac and Rappahannock Transportation Commission Concerning Commuter Rail Service, dated December 1, 1989, renewed December 1, 1997, effective through December 1, 1998.

does not presently like, and, if freight traffic increases as projected in the Application on the CSX, NS and Conrail lines over which VRE operates, will like even less.

1. VRE's Conditions Are the Proper Subject of Private Contractual Negotiation.

VRE's requested conditions should be denied. Amendment of VRE's agreements with CSX, NS and Conrail is the proper subject of private contractual negotiation, not a request for conditions. The conditions VRE seeks are not fairly related to any possible harm to VRE from the Transaction. Even if the Board accepted VRE's claim that the proposed increases in freight traffic on the routes over which VRE operates might cause increased delay to VRE's trains, the relief VRE seeks is not narrowly tailored to address that harm. Conditions which would effect sweeping changes in the structure or practices of the railroad industry should not be imposed. VRE's rank opportunism, if indulged, would upset the careful balancing of interests between freight railroads and commuter agencies achieved through arm's-length negotiations, not just in northern Virginia, but throughout the country as well. CSX, NS and other freight railroads would be ill-disposed to renew their existing contracts with commuter agencies, to agree to service extensions to new routes, or to enter into contracts with additional commuter agencies, for fear that the fortuity of Board review of a control transaction would result in the voiding of important contractual protections necessary to conduct their freight businesses safely and efficiently.

VRE commenced providing commuter rail service in northern Virginia and the District of Columbia in the summer of 1992 over lines of CSX, NS and Conrail. VRE bemoans the fact that CSX, NS and Conrail were reluctant hosts, and accordingly drove a hard bargain in negotiating contractual provisions that would protect their freight operations

against interference from the new commuter operation. VRE-8 at 6. It is plain that VRE does not like the contracts it executed with CSX, NS and Conrail, and wishes that it had been able to strike a more favorable bargain. It is equally plain, however, that this Board should not exercise its conditioning authority in the unprecedented manner sought by VRE: it should not allow VRE to renege on its lawful contracts and should not unilaterally impose on CSX, NS and Conrail new "contracts" more to VRE's liking.

2. The Conditions Requested by VRE Are Not Fairly Related to Any Harm Caused by the Transaction.

VRE attempts to establish the required causal nexus with the Transaction by claiming that its request for a wholesale redrafting of its Operating/Access Agreements with CSX and NS is prompted by concerns about inadequate capacity caused by the Transaction. VRE-8 at 7-8.

But adequate capacity for passenger operations on the CSX RF&P Subdivision between Alexandria and Fredericksburg was a concern from the outset. CSX's current Operating/Access Agreement with VRE (included in Vol. 3) makes it clear that concerns about capacity for passenger operations are not caused by the Transaction:

> H. However, all parties acknowledge that the finite capacity of the Railroad's RF&P subdivision (particularly within the Corridor) presents a challenge to the concurrent operation of freight, commuter, and intercity passenger rail services. The Railroad has informed the Commissions that, in the Railroad's judgment, Railroad's ability to operate its freight service on its railroad lines is constrained by existing passenger rail service within the Corridor, and that the ability of the Commissions to provide reliable, on-time service within the Corridor is impaired by the finite capacity of the Railroad's RF&P Subdivision. In essence, the Railroad believes that it will not be possible to accommodate future growth of passenger service on its existing system and that a new course must be chartered.

Explanatory Statement, para. H. As explained below, however, there is sufficient capacity on the line to increase freight traffic by seven trains per day on the Fredericksburg-Alexandria line segment and by eleven trains per day on the Alexandria-Virginia Avenue line segment as predicted in the CSX Operating Plan (CSX/NS-20, Vol. 3A at 438, 448) without adversely impacting passenger operations.

VRE's capacity concerns with respect to the Alexandria to Manassas line are even more obviously unfounded. This line has excess capacity; it is double track and train movements are governed by centralized traffic control ("CTC"). The NS Operating Plan projects an increase of only 1.8 trains per day (for a total of only 9.6 trains per day) on the Alexandria to Manassas line. CSX/NS-20, Vol. 3B at 464. Although there will be modest changes in freight operations on this line, NS anticipates that these changes will not adversely impact passenger services due to ample capacity on the line.[35]

Accordingly, the conditions sought by VRE should be denied because they are designed not to address any harm from the Transaction, but to put VRE in a better position than it would have enjoyed absent the Transaction.

3. VRE's Factual Presentation is Misleading or Erroneous in Many Respects.

Even if VRE's litany of complaints about its existing service problems on CSX were accurate, it would show only that VRE is impermissibly attempting to use the Transaction to fix an existing situation (VRE-8 at 20-28). However, CSX does not agree that the

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[35] As VRE readily acknowledges, NS has worked with VRE to resolve problems as they have arisen. VRE-8 at 17. NS is committed to continuing these efforts so as to assure that its freight operations do not interfere with VRE's ability to provide reliable commuter services.

complaints about its service are warranted. CSX has always attempted to provide quality service to VRE. In the past, VRE has appreciated this effort, and has been willing to state its appreciation in writing. Reistrup RVS Ex. 2. The more significant errors in VRE's submission are addressed below.

First, VRE erroneously assumes that capacity on the CSX line is constrained by freight traffic, when in fact it is constrained by passenger traffic. An additional freight train does not "consume" the same amount of capacity as an additional passenger train. The RF&P line from Fredericksburg to Alexandria is double track (except for the bridge at Quantico) with CTC bi-directional signalling. There would be no question that this line would have more than adequate capacity if all the trains expected to operate over the line post-Transaction were freight trains. This is because freight trains operate throughout the day and night. Capacity constraints exist because 30 (12 VRE and 18 Amtrak) of the 46 trains presently on the line are passenger trains, most of which operate within the morning and evening rush hours. CSX is proposing to increase its freight service over the line from 16 trains to 23 trains. See CSX/NS-23, Vol. 6A at 180. Even with this increase, there will still be more passenger trains on the line than freight trains.[36] Reistrup RVS at 21-22.

Interference from other passenger trains is a bigger problem to VRE than interference from freight trains. This can be seen on the string line charts in John Orrison's Rebuttal

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[36] The number of passenger trains on the Alexandria to Richmond line segment was stated to be 22 in the Operating Plan spreadsheet, which reflects 1995 base counts. As Amtrak and VRE use present train counts in their discussion, we do so as well for purposes of this response.

Verified Statement (at 135 and Figure JWO-18).[37] The Amtrak and VRE trains are concentrated in the morning and evening rush hours, whereas the freight trains largely operate outside those periods. VRE delays are more pronounced during the evening rush hour when there is heavier Amtrak traffic than during the morning rush hour when Amtrak traffic is lighter. Amtrak trains have dispatching priority over both VRE and CSX trains under federal law, 49 U.S.C. § 24308(c). Another significant problem is that Amtrak's Auto Train blocks one of the two main lines at Lorton, Virginia for about 20-30 minutes each afternoon, although the delay can last for up to an hour when Amtrak has difficulty coupling segments of the train. Reistrup RVS at 22.

The analysis of Charles H. Banks presented by VRE also shows this to be the case. VRE-8, Banks VS. Although CSX questions many of the assumptions that underlie his calculations, taking his own numbers at face value, Mr. Banks reports in Tables 5 and 6 (Banks VS at 15A, 15B) that, during a 16-month period, 75 Fredericksburg-line VRE trains were delayed by interference from freight trains and 61 Fredericksburg-line VRE trains were delayed by interference from other passenger trains, and that 51 Manassas-line VRE trains were delayed by interference from freight trains and 88 Manassas-line VRE trains were delayed by interference from other passenger trains, for a total of 126 VRE trains delayed by interference from freight trains and 149 VRE trains delayed by interference from other passenger trains. Reistrup RVS at 22-23.

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[37] The string line charts presented by Charles H. Banks (VRE-8, Banks VS at 4A, 4B) are misleading in that they show trains going in both directions on the same chart, even though the line is double track. Reistrup RVS at 22 n.7.

Second, VRE overstates the delays to its commuter trains caused by CSX. CSX understands VRE's displeasure at the significant delays caused by the derailment in Rosslyn, Virginia on July 8, 1997, but that unfortunate incident should not be allowed to distort the overall record. A significant part of the fees VRE pays to CSX is directly tied to performance guarantees. The Agreement sets forth how on-time performance is calculated. It does not include delays not attributable to CSX, including delays attributable to Amtrak intercity operations, delays attributable to VRE's operator (Amtrak Commuter),[38] trains delivered late to CSX, and mechanical failure of VRE's equipment.[39] Using the contract measure, VRE has enjoyed very good on-time performance on CSX. Contract performance for 1996 was 94%. Contract performance for 1997 until the derailment in July was 95%. Performance since the track was restored on August 20 has been running at 97%. Reistrup RVS at 23.

CSX could have declared the derailment a force majeure disruption and terminated all VRE service, but CSX complied with VRE's request to continue service as best it could. In addition, at VRE's request, the interlocker where the accident occurred was not just repaired, but upgraded with high-speed turnouts, which upgrading extended the time to recover from the accident. Moreover, CSX suggested that maintenance work underway near Fredericksburg be suspended after the accident so as not to compound the delay to VRE

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[38] Amtrak Commuter operates VRE under contract with the Northern Virginia Transportation Commission and the Potomac and Rappahannock Transportation Commission.

[39] VRE also appears to be counting as "delayed" trains that miss their arrival time as published in VRE's public schedules, but are on time according to the running times agreed to in the Operating/Access Agreement.

trains, but VRE declined the suggestion. It is not sporting of VRE to now include this summer period in the on-time performance figures it cites to support the imposition of conditions on CSX. Reistrup RVS at 23-24.

Third, VRE's prediction that its on-time performance will drop to 81.1 percent after the Transaction is highly suspect. When properly analyzed it is seen that the moderate increase in the number of freight trains will not adversely affect VRE's on-time performance. Indeed, the improvements contemplated in the CSX Operating Plan will likely have a beneficial affect on VRE's performance. Reistrup RVS at 24.

The Board should start with a reasonable number for current on-time performance -- 95% or thereabouts. It should then look at the schedules of the CSX trains proposed in the Operating Plan, taking into account the fact that the line is double track. As explained in the Rebuttal Verified Statement of John Orrison, this analysis shows that there will not be interference. The Board should also take into account the effect of the recent improvements to the line, some funded by CSX and some funded by VRE, and the additional improvements planned for the line.

CSX has completed several capital improvement projects on portions of the Fredericksburg line and is continuing to improve the remaining portions. These projects, funded entirely by CSX, include: 1) replacing rail and ties, 2) improving the ballast shoulder, 3) upgrading relays to modern microprocessors; and 4) installing CTC bidirectional signalling. In addition, CSX has rebuilt the track through the old Potomac Yard in Alexandria, including a third track over portions of the segment; the funding for this project was shared by CSX, VRE and others. Reistrup RVS at 24.

One important improvement CSX has planned and will fund is the clearance and track upgrade of the Virginia Avenue Tunnel in the District of Columbia. The tunnel project will permit track speed to increase from the present 10 mph to 25 mph or more, allowing freight trains to travel much more quickly over the line segments used by VRE. Orrison RVS at 140. The increase in freight speeds will effectively increase the capacity of the line and alleviate a potential source of delays to VRE trains. The proposed improvement of the Virginia Avenue Tunnel is recognized by Amtrak and the FRA as having "a positive effect on passenger train performance south of Washington." The Northeast Corridor Transportation Plan, Report to Congress September 1997, Washington-Richmond Supplement Draft Report at V-7 (included in Volume 3). CSX will make every effort to plan its reconstruction of the Virginia Avenue Tunnel so that it will not interfere with freight and passenger service. If it turns out that some delays are unavoidable, CSX will work with VRE to minimize the delays.[40] Reistrup RVS at 25.

Other projects are also planned. CSX plans to construct a siding at Lorton which will allow Amtrak's Auto Train to be connected without blocking a main track. This project, which is in the engineering phase, will be publicly funded. Further modernization of

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[40] VRE takes CSX to task for clearing the Virginia Avenue Tunnel for automotive freight at the expense of potential temporary delays to its passengers during construction. VRE-8 at 28. VRE is short-sighted when it complains about delays during construction in light of the long-term benefits of the project to its service. VRE also criticizes CSX for not having completed a formal study of potential short-term delays to VRE during construction. But VRE admits that it conducted no studies of delays to freight or passenger trains during construction of the improvements discussed at page 7 of the verified statement of Mr. MacIsaac. Interrogatory Response, VRE-10 at 9 and 10. Rather, VRE will adapt its schedules as necessary and then inform its riders so that they can plan accordingly. Interrogatory Response, VRE-10 at 11. CSX will do the same.

interlockings is planned to be accomplished with mixed CSX/public funding. VRE is also commencing design of the expansion of the bridge at Quantico to accommodate a second track.[41] Id.

Fourth, CSX takes issue with the complaints about its management. With all due respect, CSX believes that these complaints are based largely on misunderstandings about rail operations. VRE is a very different organization from Amtrak, Metra, NJT, and SEPTA. VRE was only created in the late 1980s and did not begin commuter service until 1992. It does not own any of its own rail lines. The commuter service provided by VRE is operated by Amtrak Commuter under contract with VRE. Its ridership is small compared to that of the other commuter agencies. VRE is managed by persons who have business experience primarily, rather than railroading experience. VRE acknowledges that "VRE personnel's primary responsibility is to manage contracts for the operation of VRE's commuter rail service. . . . VRE relies upon its contractors to provide all expertise necessary for proper operation of the commuter rail service." Interrogatory Response, VRE-10 at 8. For example, no employee of VRE is qualified in CSX, NS and/or NORAC operating rules. Id. CSX believes that this lack of expertise in railroad operations contributes to misunderstandings about the cause of problems. To the extent that VRE complains that CSX

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[41] In addition, the Transaction will likely benefit VRE in two other respects. First, the CSX Operating Plan presented in the Application will assist CSX to meet its goal of operating a scheduled railroad. By adhering to schedules, train operations, both freight and passenger, will be improved. Orrison RVS at 140. Second, dispatching of the line segment from RO interlocking in Arlington, VA to the Virginia Avenue interlocking in Washington, D.C. is now controlled by Conrail. After the Transaction, dispatching control would be transferred to CSX. VRE's Fredericksburg-line trains would thus be under the control of one dispatcher for the entire trip and Manassas-line trains would be under the control of two rather than three dispatchers. Reistrup RVS at 25-26 n.10.

has not in the past had a representative close by who communicates regularly with it and can respond quickly to problems as they arise, Paul Reistrup, CSX Vice President - Passenger Integration is based in Washington, D.C. and will facilitate communications with VRE. Reistrup RVS at 26.

Fifth, VRE boldly suggests that CSX should not increase the number of freight trains on the Richmond to Washington line because there are a lot of passenger trains on the line, and because passenger trains serve the public interest better than freight trains (never mind who owns the line). VRE-8 at 28. But VRE does not suggest which line CSX should use instead, for good reason. There is no satisfactory alternative route. That is where the freight wants to go.

The CSX Operating Plan explains why there will be an increase in traffic on the Atlantic Coast Service Route, which includes the Fredericksburg to Virginia Avenue line segment. CSX/NS-20, Vol. 3A at 132-33. There are two principal reasons. First, the new ability to provide single-line service with fewer intermediate switches between the Southeast and the Northeast will result in a significant diversion of freight to rail from trucks currently moving over the heavily congested I-81, I-85 and I-95 corridors. This diversion causes a net reduction in air emissions and contributes to the safety of highway users. The second reason for the increase in freight traffic is that the clearance of the Virginia Avenue Tunnel will allow multi-level auto racks to travel down the Atlantic Coast Service Route from northeastern assembly plants to southeastern markets rather than travelling through Cleveland and Cincinnati, a route 655 miles longer. This shorter routing is not only economically efficient, but environmentally beneficial.

One could ask just as readily why VRE chose to conduct its passenger operations over a route with substantial freight traffic. Presumably, it is because that is where the people want to go. VRE's submission is like that of a cowbird -- which lays its eggs in the nests of birds of other species, who dutifully hatch the eggs and nurture the cowbird nestlings, only to have the cowbirds push the host's own eggs out of the nests.

Sixth, VRE claims that "[d]uring the maintenance season, CSX gives little or no regard to the operating schedule of VRE," and then states the numbers of trains delayed during the extraordinary period of the Rosslyn derailment. VRE-8 at 26. This claim is false and demonstrates VRE's lack of appreciation for CSX's efforts to accommodate it. Maintenance work on this line is regularly done at night to accommodate VRE and Amtrak operations, even though the Operating/Access Agreement permits maintenance work to be performed during the day, and indeed expressly states (Section 2.10) that maintenance work "will occasionally result in delays or cancellations of operations of the commuter rail passenger service." On all other CSX lines, CSX performs maintenance work during the daytime and curfews all traffic. The schedule for major maintenance work on the line has been set for 1998 and CSX will continue to perform this maintenance at night. Reistrup RVS at 26-27.

Seventh, CSX must take issue with VRE's charge that CSX is responsible for its ridership declines. Ridership declined significantly from mid-1996 to mid-1997 before the Rosslyn derailment on July 8 -- from an average of 7,656 boardings a day in Fiscal Year 1996 (VRE's fiscal year is from July through June (VRE-8 at 21)) to an average of 7,154 boardings a day in Fiscal Year 1997. VRE-8, Isaac/Taube VS, Att. 4. This decline

occurred when on-time performance was very good by any reasonable standard -- an average of 90.1% (VRE-8, Roberts VS, Att. 2), including delays not caused by CSX. VRE admitted in its response to Applicants' interrogatory that the opening of the new HOV lanes on I-95 and decline in employment in Crystal City, Virginia contributed to the decline in ridership during this period. Interrogatory Response, VRE-10 at 5. Other factors that have been cited as reasons for the drop-off are VRE's high fares and high parking costs. This spring, Stephen Roberts, VRE's Director of Operations, explained the ridership decline as follows: "The reason our numbers are less than they were a year ago is because people are making good decisions. It's cheaper to drive than take VRE. But that won't last forever." "Virginia Railway, a Service That's Losing Steam; Fare Cut Considered as Ridership Plunges," Washington Post (April 27. 1997). Reistrup RVS, Ex. 3.

4. The Real Dispute is Funding for Infrastructure Improvements.

Despite VRE's overreaching in its Comments and Request for Conditions, however, CSX is committed to work with VRE in good faith.

The crux of the dispute is funding for infrastructure improvements required to support passenger operations. CSX acquired the RF&P line in 1991 and has been making improvements since then. As improvements have been made, delays have decreased. VRE is attempting to shift funding for additional line improvements needed for its passenger service to CSX. Numerous improvements to increase the capacity of the line for passenger service are contemplated in the contract between CSX and VRE. The only difficulty for VRE is that VRE's contract requires VRE to fund them, whereas VRE, not surprisingly, would like the Board to make CSX fund them. VRE is asking the Board to mandate a

subsidy from CSX and to insulate VRE from market forces. It is not unfair to require VRE to fund improvements to the CSX line, as it agreed to do in its contract, because it is VRE's own trains that are creating capacity constraints.

The funding of VRE has been a matter of some controversy within the State of Virginia since VRE was first proposed. Although VRE has many supporters, notably its approximately 4,000 riders, many others question whether the government subsidy to VRE is the best use of the money. Reistrup RVS, Ex. 3. The Board should leave the resolution of the appropriate use of state and local budgets to the appropriate authorities in Virginia, and should leave the negotiation of funding for infrastructure improvements to CSX and VRE. Nothing about this Transaction requires the Board to take on a new role as arbiter of the appropriate level of public and private financing for commuter rail service.

CSX and NS have worked and will continue to work with VRE management to provide a quality commuter service for northern Virginia. VRE has had access to CSX and NS senior management. VRE has been involved in planning improvements that CSX has undertaken. CSX has offered VRE a ten-year extension to the Operating/Access Agreement to enable VRE to obtain long-term funding from bonding sources. NS has offered a five-year extension of its Operating/Access Agreement to 2002. CSX has also pledged to continue discussions on contractual amendments VRE desires, most notably a program of incremental infrastructure improvements and service expansions. NS is also committed to continue discussions on contractual amendments VRE desires. The Board has no basis for intervening in these private negotiations.

G. Other Parties with an Interest in Passenger Issues.

1. American Public Transit Association (APTA).

The American Public Transit Association (APTA), claims that the Board should impose procedures for resolution of future disputes between passenger and freight railroads, as well as conditions that will assure commuter agencies that future plans for expanded service will be accommodated.[42] Letter from William Millar to Secretary Williams (unnumbered). APTA makes broad, incorrect and unsupported assertions about the relationship between freight and commuter railroads in general.[43] APTA claims that the current relationship between commuter and freight railroads is unequal, and is concerned that the Transaction will perpetuate the existing relationship. According to APTA, the Board should use the proposed Transaction as an opportunity to promote cooperation between CSX and NS and commuter rail entities.

APTA's request for conditions should be denied. APTA's requests are an attempt to alter the relationship between commuter and freight railroads -- a relationship that existed

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[42] In regard to accommodation of passenger operations, APTA refers to proposed expansions by NJT and SEPTA. These proposals are addressed above in Section XI, Subsections D and E respectively.

[43] APTA's greatest concern about the proposed transaction is its impact on commuter railroads' ability to access railroad rights-of-way in their service area. APTA claims that "while some commuter railroads own their own ROW and receive rents from freight railroads for the right to operate over commuter lines to reach freight customers and terminals, many more make rent payments to freight railroads for the right to operate over freight lines in providing commuter rail service." APTA Comments at 3. In the territory in which Conrail operates this is not true. For example, SEPTA, Metro-North and NJT all own lines over which freight railroads operate and pay user fees. In addition, very few heavily used freight lines in that territory are used by commuter railroads. More often, there are separate tracks for commuter and freight operations. Mohan RVS at 59-61.

well-before the proposed Transaction. APTA has not shown that the proposed Transaction will cause any harm to commuter services. Furthermore, dispute resolution and access issues are, and should be, the subject of commercial negotiations, not Board intervention. Passenger and freight railroads negotiate in good faith and at arm's-length to arrive at contractual terms that are acceptable to each regarding such matters. These contractual terms define the business relationship between commuter and freight railroads and provide agreed-upon remedies for any disputes that arise as a result of that on-going relationship. There is no reason for the Board to impose conditions that would alter those relationships or the contracts underlying them.

For the foregoing reasons, APTA's request should be denied.

2. Empire State Passengers Association (ESPA).

The Empire State Passengers Association ("ESPA") is "an unincorporated association of volunteers dedicated to improving and expanding Amtrak, mass transit, and bus service in New York State." ESPA-1 at 1. ESPA seeks a number of conditions assertedly designed to protect and expand Amtrak's operations in New York State. ESPA seeks Board oversight relating to Amtrak's on-time performance, and seeks enforced cooperation from CSX on increasing Amtrak train speed on the Empire Corridor (from New York City to Albany, Buffalo and Niagara Falls). ESPA's requested conditions are similar, although not identical, to those requested by Amtrak. For all the reasons stated above in response to Amtrak's request for similar conditions, these requests should be denied.

In addition, ESPA seeks two conditions which were not requested by Amtrak, and which appear to be inconsistent with Amtrak's own plans. First, ESPA asks that the Board

require CSX to cooperate with respect to "additional frequencies and/or the flexibility to add additional seasonal, weekend, or special trains" on the Empire Corridor. ESPA-3 at 3. This condition is unrelated to the Transaction. In addition, federal law already provides Amtrak with the right to apply to the FRA for an order requiring CSX to allow the additional trains if CSX were to refuse to do so. 49 U.S.C. § 24308(e); 49 C.F.R. Part 200 (1997). Furthermore, Amtrak has stated that "it has no current plans for the addition of regularly-scheduled trains" on that line. Interrogatory Response, NRPC-8 at 5.

Second, ESPA asks that the Board require CSX to cooperate with respect to additional Amtrak station stops at Dunkirk and Lyons. In response to CSX's interrogatories, Amtrak explained that it had no such plans to add station stops at Dunkirk and Lyons and had no studies or analyses concerning any such plans. Interrogatory Response, NRPC-8 at 6. ESPA's condition should be rejected as unrelated to the Transaction, based on speculation, and not consistent with the plans of Amtrak.[44]

3. Environmental Law & Policy Center.

The Environmental Law & Policy Center of the Midwest, a nonprofit environmental advocacy organization based in Chicago, envisions a regional, high-speed rail network to provide passenger service between major midwest cities, and urges the Board to be mindful of the needs of rail passengers. Letter from Kevin Brubaker to Secretary Williams (unnumbered). A detailed response is not required. The Center raises a number of issues

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[44] Board involvement in the decision whether to add Amtrak station stops would require the Board to review ridership studies, engineering feasibility studies and the like. Dunkirk, for example, is on the route of only one Amtrak train -- the Lakeshore Limited between Chicago and New York. Both the eastbound and westbound Lakeshore Limited pass through Dunkirk at about 4 a.m. each morning.

which are adequately addressed in responses to other commenters. One requested condition not sought by any other commenter -- to transfer Amtrak's rights of access to state departments of transportation or any other party designated by Amtrak in the event that Amtrak is not in a position to continue to use them -- is beyond the authority of the Board.

4. **Entities with an Interest in MARC.**

Two citizens groups in the Baltimore area -- the Baltimore Area Transit Association (Official Response of the Baltimore Area Transit Association, dated October 15, 1997) and the Citizens Advisory Committee of the Metropolitan Planning Organization for the Baltimore Region[45] (Position of the Citizens Advisory Committee (unnumbered)) -- and the West Virginia State Rail Authority[46] have expressed concern that the Transaction not adversely affect MARC. This concern was, of course, shared by MARC and the State of Maryland and was an important issue in the negotiations which resulted this fall in the execution of a new agreement between CSX and the Maryland Mass Transit Administration for the continued operation of MARC and which resulted in the support of the State of Maryland for the Transaction (MDOT-2). The Board may be confident that MARC and the State of Maryland adequately protected their own interests. Certainly nothing in the

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[45] The Citizens Advisory Committee also expresses concern about Amtrak service on the NEC. As explained in the response to Amtrak, Amtrak is well able to protect passenger service on the NEC without intervention by the Board.

[46] It appears that the comments of WVRSA may have been rescinded. A letter from the Governor of West Virginia (Vol. 3) to the Board expresses the support of the State for the Transaction without qualification and appears to indicate that the comments of the WVRSA are no longer in effect. In any event, the arguments do not afford any basis for action on the part of the Board.

submissions provides any basis for believing that the Board should second-guess MARC and the State of Maryland on this matter.

5. National Association of Railroad Passengers.

Ross B. Capon, the Executive Director of the National Association of Railroad Passengers, a membership organization that works to promote rail passenger service, submitted a verified statement covering a broad array of issues. Verified Statement of Ross B. Capon (unnumbered). Mr. Capon criticizes CSX for a number of asserted failings to promote rail passenger service. For example, he criticizes CSX for the agreement it just executed with MARC, even though MARC, and the Governor of Maryland, were quite pleased with the agreement, which includes new passenger service to Frederick. See Letter of Governor Parris N. Glendenning in support of the transaction, MDOT-2.

Mr. Capon also expresses solicitude for the health of the Canadian Pacific. Mr. Capon need not be concerned as the Canadian Pacific has protected its own interest in this matter by reaching accommodations with CSX and NS.

Finally, Mr. Capon expresses concern about the effect of increased freight traffic on certain existing and potential Amtrak lines. With respect to Amtrak's existing routes, this issue was addressed above in response to Amtrak's Comments and Request for Conditions. With respect to potential new routes, Amtrak has not suggested that it wishes to expand to new routes; this issue is thus too speculative to address.

6. State of New York.

The State of New York seeks certain conditions to ensure that the Transaction does not adversely affect commuter and intercity passenger service. Specifically, New York asks for a 10-year oversight condition. NYS-10 at 5. The response of CSX and NS to this and similar requests for an oversight condition is presented in Section XXI. New York also asks for assurance that CSX and NS will honor Conrail's obligations under its contracts. NYS-10 at 6. CSX and NS have affirmed previously that, upon STB approval of the Transaction and assumption of service, they will assume all legally binding contractual obligations with respect to passenger service which are in effect on the effective date of change in control. Finally, New York also supports the submission of Metro-North Commuter Railroad Company. Id. CSX and NS address this submission in Section XII.C. above. CSX and NS are engaged in ongoing discussions with the State of New York regarding passenger and other issues and will continue these discussions.

7. Northeast Ohio Four County Regional Planning and Development Organization on behalf of Metro Regional Transit Authority (MRTA).[47]

The Northeast Ohio Four County Regional Planning and Development Organization has filed comments on behalf of Metro Regional Transit Authority (MRTA-1) and will be referred to as MRTA. MRTA is concerned that the proposed Transaction will impact "future commuter rail operations in Ohio . . . absent conditions to ameliorate this potential harm." MRTA-1 at 1-2. MRTA also claims that it has been pursuing creation of a rail

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[47] The City of Akron supports the submission of MRTA. Letter from Mayor Donald Plusquellic to Secretary Williams (unnumbered).

transportation system to link the cities of Canton, Akron and Cleveland, OH. Id. at 2. One of the proposed regional commuter rail routes in Northeast Ohio would involve the Conrail mainline connecting Cleveland and Hudson (the "Subject Line"), a line which NS would operate under the proposed Transaction. According to MRTA, because the proposed Transaction will end the working relationship between Conrail and MRTA and make the Subject Line part of the NS system, MRTA seeks a condition that would guarantee it commuter rail operating rights over the Subject Line. Id. at 4.

The requested condition should be denied for two reasons. First, MRTA has not shown that proposed commuter operations in the geographical area encompassing the cities of Canton, Akron and Cleveland will suffer any harm as a result of the proposed Transaction. MRTA itself bases its request on an alleged need to lessen a "potential harm." Id. at 2. There is presently no commuter service on the Subject Line. MRTA admits that development of a commuter rail transportation system connecting these three cities is only in very preliminary stages.[48] MRTA makes no claim that an agreement exists between Conrail

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[48] MRTA notes that there is currently a proposed allocation pending in Congress for an Major Investment Study to study the impact of commuter rail, specifically in the Canton-Akron-Cleveland (CAC) corridor. MRTA-1 at 3. In support of its requested condition, MRTA attaches correspondence dated October 14, 1997 from the Kenneth A. Hanson, Akron Metropolitan Area Transportation Study (AMATS) to MRTA. This correspondence evidences the fact that the Subject Line is only one option for the future development of commuter rail service in the CAC corridor. Mr. Hanson explains that:

> [T]he AMATS Policy Committee officially endorsed the concept of Canton-Akron-Cleveland (or CAC) passenger rail service at their meeting on January 22, 1997. At this meeting, the Policy Committee amended the AMATS Statement of Long Range Public Transportation Needs for the CAC project and indicated that the most probable alignment for this service (pending the completion of a Major Investment Study) includes the CSX (Sandyville Local) trackage between Canton and Akron, the Summit County Port Authority

and MRTA regarding commuter operations over the Subject Line. In fact, Conrail and MRTA do not even have an understanding regarding future development of commuter operations over the Subject Line. Carey RVS at 11-12.

Second, future development of a proposed commuter rail system should be the subject of negotiation between interested parties, not Board imposed conditions.[49] NS has not refused to discuss possible future development of commuter rail service in Northeast Ohio with MRTA. NS has participated in discussions with MRTA staff and consultants. MRTA acknowledges the fact that "NS has been responsive to the invitations for dialogue concerning the use of this line for passenger service." MRTA-1 at 3. NS is willing to continue this dialogue, and MRTA has not presented any evidence to the contrary.

For the foregoing reasons, MRTA's request for conditions should be denied.

8. Rhode Island Department of Transportation.

The Rhode Island Department of Transportation states that the massive public investment in the NEC for passenger rail operations must be protected, and asks the Board to require CSX to commit to protect that investment, particularly on the Rhode Island and Massachusetts portions of the NEC. Comments and Request for Conditions by the Rhode Island Department of Transportation (unnumbered). Such a condition is not required. As shown in CSX's Operating Plan (CSX/NS-20 Vol. 3A at 447), CSX plans to maintain

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trackage between Akron and Hudson, and CONRAIL trackage between Hudson and Cleveland.

[49] As explained in Section B above (NJT), Congress determined in the ICC Termination Act that rail transportation, other than Amtrak, is local or regional in nature and regulation, if any, should be conducted on a local level.

without change the limited number of freight trains (a maximum of 4) Conrail presently operates over portions of the NEC in Massachusetts. Conrail does not operate over the NEC in Rhode Island at all and CSX has no plans to initiate service over that line. There is thus no basis for Rhode Island's concern that the Transaction would have an adverse effect on the NEC in Rhode Island and Massachusetts.

XIII. CONDITIONS REQUESTED BY OTHER RAILROADS SHOULD BE REJECTED.

Strong support for the Transaction and the benefits it offers the Nation's transportation system has been expressed by a wide array of rail carriers. Some one hundred have provided statements supporting the Application's approval.[1/]

Moreover, a number of railroads that submitted notices of intent to file responsive applications subsequently reached settlements, thereby eliminating the need for them to make those filings or for the Board to consider the issues they would have raised. Those parties include major carriers such as Canadian Pacific and Canadian National, as well as many shortlines. See Section II. Together with the agreements that have been reached with other parties, these settlements reflect Applicants' determination not only to address genuine intramodal competition issues but also to ensure that Applicants' expanded rail networks will work smoothly and efficiently with connecting lines. See also id.

Several railroads, however, seek additional relief from the Board. As discussed above, the Board will impose a condition only to address an effect of the transaction before it, only if it is narrowly tailored to remedy an adverse impact that transaction will have on competition or essential rail services, and only if it would not cause unreasonable operating problems for the applicants or frustrate their ability to obtain anticipated public benefits. See Section III.C.; see also 49 C.F.R. § 1180.1(d) (1996). The Board and its predecessor have closely scrutinized requests for conditions under these

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1/ Eighty-four railroads submitted support statements that were filed together with the Application. See CSX/NS-21, Vol. 4A; CSX/NS-33, Vol. 4F. Others have subsequently expressed support in separate filings with the Board.

standards, whether the harm alleged is a loss of competition or a threat to essential rail services.[2/] None of the railroad parties' requests for conditions satisfies those standards.

A. Class I Railroads.

1. Canadian National Railway.

While it reached settlements with CSX and NS resolving its principal concerns, CN filed a responsive application in Sub-No. 81 for trackage rights to Detroit Edison's plant at Trenton, MI. CN-13. CN's subsidiary Grand Trunk Western Railroad ("GTW") also filed a notice of exemption for construction necessary to serve that facility. Those filings ask the Board to grant CN/GTW access within the Detroit Shared Assets Area. As explained in Section VIII.4, there is no justification for granting such access and the CN/GTW requests should be denied.

2. Illinois Central Railroad.

Illinois Central Railroad ("IC") seeks two conditions. First, it asks the Board to order that CSX sell it approximately two miles of CSX mainline near Memphis, TN, which is the subject of the responsive application in Sub-No. 62 (IC-5). Second, it seeks a condition requiring CSX to maintain gateways that favor IC and prescribing CSX's divisions for joint rates over those gateways. See IC-6 at 2-3. Both requests should be denied.

[2/] The criteria for establishing competitive harm are discussed in Section III.C. The criteria for an essential services claim are set forth at 49 C.F.R. § 1180.1(c)(2)(ii). They emphasize that the preservation of essential services is the concern, "not the survival of particular carriers," and that essential services are involved only if "there is sufficient public need for the service and adequate alternative transportation is not available." Id.

a. CSX Should Not Be Required to Divest Its Leewood-Aulon Line, Which is a Critical Link for Access to Western Railroads at Memphis.

IC's principal request is that the Board order divestiture of a line that CSX and its predecessors have owned and operated for more than a century. That line is east of Memphis, between Leewood (MP F-371.4) and Aulon (MP F-373.4).[3]

IC is seeking to reverse a landlord-tenant relationship that has existed since the early years of this century. The line between Leewood and Aulon was built by a CSX predecessor in the nineteenth century. Orrison RVS at 36.[4] From its construction, it has been part of an east-west route through Memphis that runs from the Mississippi River to Nashville and points beyond. Id. at 36-38.

That route -- in which the Leewood-Aulon line is an essential segment -- serves the gateway with Western carriers at Memphis. Id. All traffic moving over the Memphis gateway must move over the Leewood-Aulon line. Id. at 38. The line through Memphis is part of a CSX mainline. Id.

IC's predecessor built a north-south line through Memphis running parallel to the Mississippi River. As originally constructed, IC's route did not use the Leewood-Aulon

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[3] A map showing the location of the Leewood-Aulon line and other CSX lines near Memphis is provided as Figure JWO-8 in the Orrison RVS; that map also shows the lines of IC and other railroads in the Memphis area.

[4] See also Edward W. Hines, Corporate History of the Louisville & Nashville Railroad and Roads in its System (1905) at 303-04, 314-17 (excerpt in Vol. 3); Historical Development of the Louisville & Nashville Railroad System (1926)(excerpt in Vol. 3).

track.[5/] While it later obtained rights to use a segment of what is now the CSX line, IC kept its own line along the river as its primary route until the 1980s. Orrison RVS at 36-38.

By an agreement dated January 22, 1907, two CSX predecessors (Louisville & Nashville Railroad and Nashville, Chattanooga and St. Louis Railway) granted IC and one of its predecessors (Yazoo and Mississippi Valley Railroad) trackage rights between Leewood and Aulon. Orrison RVS at 35-36; see also IC-5 at 18; IC-6, McPherson VS at 7. The 1907 Agreement also provides certain other operating rights. See IC-5 at 19. It continues in effect to this day, although it has been amended to address switching to industries on the lines involved. UP, which connects with CSX at Memphis, also has rights to use the Leewood-Aulon line. See id. at 7, 19.

Under the 1907 Agreement, CSX dispatches all movements on the Leewood-Aulon segment, as it does on the rest of its Memphis-Cincinnati mainline. Orrison RVS at 36. Since late 1996, that dispatching has been handled by CSX's Traffic Control System in Jacksonville. Id. at 36.

IC now uses its trackage rights over the Leewood-Aulon line as part of its north-south mainline between New Orleans and Chicago. IC-5 at 19; IC-6, McPherson VS at 8. IC portrays CSX's use of the line as involving only local traffic. IC-5 at 10; IC-6, McPherson VS at 10. That seriously mischaracterizes the Leewood-Aulon line's role in the CSX system.

[5/] Id.; see also IC-5, Ex. 1D (1907 map showing IC connections at Leewood and Aulon as "proposed" new lines.

CSX's line through Memphis -- including the Leewood-Aulon segment -- is an important route for long-haul traffic between the east and west. CSX Memphis traffic is classified in Nashville, and from there other CSX mainlines reach to Chicago, to Cincinnati, to Birmingham and to Atlanta, as well as to many points beyond. Orrison RVS at 38.

CSX has daily, around-the-clock train movements through Memphis that include five scheduled in-bound through trains (as well as one local train five days a week) that use the Leewood-Aulon track for setting off and picking up cars for interchange with UP, BNSF and IC. Id. at 38-39. CSX also has five daily out-bound through freight trains that use the Leewood-Aulon track. Id. In addition, two UP (former Cotton Belt) through freight trains use the Leewood-Aulon line to reach CSX's Leewood Yard. Id. Moreover, separate from these scheduled movements, CSX has an average of five extra in-bound through freight trains per week at Memphis and three extra outbound. Id.

IC's effort to downplay the significance of this line to CSX -- and to the efficient movement of traffic between east and west through CSX's Memphis interchanges with BNSF and UP -- cannot obscure these facts. CSX also projects that its already substantial cross-country traffic through Memphis will increase following consummation of the Transaction. See CSX/NS-20, Vol. 3A at 212-13, 457.[6] Indeed, CSX predicts it will

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[6] IC's characterization of the 2.3 train/day increase in traffic on CSX's Nashville-Memphis line projected in the Operating Plan as "modest" (IC-5 at 10) clearly strains, as that represents an increase of nearly 23 percent. IC also acknowledges that CSX's gross tonnage on the western (Memphis) portion of that line will increase 8% post transaction. Id. at 10 & n.7. Those projections, of course, are only for the normal year three years following consummation, and do not take into account any other traffic growth.

(continued...)

have at least 4,400 trains per year, carrying approximately 300,000 cars, that will use the Leewood-Aulon line as part of such a transcontinental interchange. Orrison RVS at 39.

As CSX's Operating Plan states, the

> Memphis Gateway Service Route will ... provide efficient single-line service between the Memphis gateway and important eastern markets, including Boston and New York. This improved service route will particularly benefit shippers of auto parts, finished motor vehicles and chemical route via Memphis to or from Western carriers.

CSX/NS-20, Vol. 3A at 127. It also "will create new opportunities for intermodal traffic" (id. at 29), which will offer significant efficiencies and reduce long-haul truck movements. See also Section XV.

IC proposes that the Board force CSX to divest ownership and control of the Leewood-Aulon line to IC, which would then grant CSX and UP rights to operate over it. IC-5 at 19; IC-6, McPherson VS at 19. IC also proposes to control all dispatching for that line. IC-5 at 19; IC-6, McPherson VS at 19.

IC's request should be denied. The history of this line makes clear that the landlord-tenant relationship IC is complaining about is a preexisting condition unrelated to the proposed transaction. IC is -- and for more than 90 years has been -- a tenant on the line. Throughout the same period, CSX and its predecessors have been the line's owner and

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[6/](...continued)

Nor is there any significance to the fact that the Operating Plan does not foresee significant changes in CSX's Memphis terminal as a result of this transaction. See IC-5 at 10. That merely reflects CSX's expectation that anticipated traffic increases can be accommodated by existing CSX Memphis operations; it certainly does not mean that all existing and projected east-west traffic could be handled efficiently if IC were to take over control and dispatching of the Leewood-Aulon line.

have controlled dispatching over it. The Transaction will not alter IC's status as tenant or its ability to use the line pursuant to the 1907 Agreement. Conrail does not operate anywhere near Memphis -- or for that matter anywhere in Tennessee.

IC's responsive application must therefore be denied under the settled rule that conditions will not be imposed to deal with longstanding issues not created by the transaction under review. See UP/SP at 145; BN/SF at 56 (citing BN/Frisco at 952). Nothing takes IC's request outside that rule's operation.

IC's arguments about the importance of the Leewood-Aulon line to its own operations certainly cannot do so. While IC has come to use the line as part of its north-south route, it has done so only as a trackage rights tenant, and the Transaction will in no way alter that. IC argues that this somehow gives CSX a "chokehold on IC's operations in Memphis." IC-6, McPherson VS at 11. Even if that were so, IC ignores the fact that it put itself into that position by paring its system down to one that relies on trackage rights over a CSX line to close a gap in IC's single north-south mainline. It did so by selling or abandoning other IC lines that could have provided alternative north-south routes.[7/] Moreover, it agreed to limit use of its own line along the Mississippi River -- its primary route through Memphis for some eighty years after it obtained trackage rights between

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7/ When the consolidation of Gulf, Mobile & Ohio Railroad ("GM&O") into IC was approved, the resulting carrier (Illinois Central Gulf Railroad) owned over 9,000 miles of mainline track. Illinois Cent. G. R.R. -- Acquisition -- Gulf, M. & O. R.R. et al., 338 I.C.C. 805, 808 (1971), sustained sub. nom. Kansas City S. Ry. v. United States, 346 F. Supp. 1211 (W.D. Mo. 1972) (3-judge court), aff'd mem., 409 U.S. 1094 (1973). Both IC and GM&O had lines between Chicago and New Orleans, and the consolidated railroad had multiple north-south routes. See 346 F. Supp. at 1216 (map). IC now operates only 2,217 miles of main line; a subsidiary operates 630 miles of mainline that IC sold in 1985 and reacquired in 1996. See IC-5 at 5-6, 22-23.

Leewood and Aulon -- as part of an agreement with the Memphis Area Transit Authority. See IC-6, McPherson VS at 8. Thus, to the extent there is any "chokehold" on IC at Memphis, it is not only a "'longstanding problem[ ] ... not created by the merger'" (UP/SP at 145) but also a problem of IC's own making.

Nor can IC's claims regarding alleged delays to its trains justify forced divestiture of CSX's line. While issues did arise immediately after CSX transferred dispatching for the Leewood-Aulon to its Jacksonville facility in late 1996, CSX promptly took steps to remedy those problems after learning of them. Orrison RVS at 39-40. IC has been given access to CSX's Train Management System to input data for IC trains; that system now automatically issues IC crews bulletins scheduling IC train movements over the line, without any need to contact a CSX dispatcher. Id.

CSX has also established a 24-hour dedicated phone line at its dispatching center to handle calls from IC about the Leewood-Aulon line. Id. CSX has given its dispatchers special orientation regarding IC operations over this segment, as well as other instructions, designed to facilitate the movement of IC's trains. Id. at 40. The CSX field general manager has attempted to meet with IC to discuss these matters as well, but IC has shown little interest in such discussions. Id. While it is possible IC's reluctance to discuss these matters directly with CSX field personnel reflects some misguided litigation stratagem, the more likely conclusion is that IC knows the earlier problems have been fully resolved and that no real issue remains.

The facts also demonstrate that IC trains are not experiencing any unwarranted delays on the line. Most IC trains move between Leewood and Aulon in 6 minutes. Id. at

40. The overall average is higher (30 minutes) because it includes IC trains serving local industries with switch connections along that line.[8] But even that figure is telling, in that the total average delay is the same for both IC and CSX. Id. There thus is no merit to any suggestion CSX favors its own trains over IC's.

CSX shares IC's interest in the efficient scheduled movement of trains through Memphis. See id. at 36-38. However, IC is seeking to ensure that its own schedules take precedence over any needs of CSX or UP in the area (see IC-5 at 12, 19-20), and that is no justification for requiring divestiture by CSX. IC's use, as part of its sole north-south mainline, of a line two other railroads also operate over is a situation of IC's own making. Nor can divestiture be justified based on IC's extended claims regarding its efficiency and need for scheduled operations. E.g., IC-6, McPherson VS at 2-7. While a healthy operating ratio is admirable, it does not give IC a license to expropriate another railroad's property.

Moreover, as described above, the Leewood-Aulon line is part of a CSX mainline that today carries substantial traffic in interchange with BNSF and UP. The Board and its predecessor have recognized the importance of Memphis as a gateway for such east-west movements.[9] Indeed, CSX's ability to use several east-west gateways -- including

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[8] CSX records the duration of a train on the line according to the times it enters at Leewood and exits at Aulon or vice versa. Orrison RVS at 40. While that can amount to a relatively long period for a train that enters the line to reach local industries, most of such a train's time in this area is spent on industry leads and switch tracks, not the main line itself. Id.

[9] See, e.g., UP/SP, at 15 (noting Memphis as one of the "major midwest gateways" served by MPRR and as one of the points at which SSW "connects with major eastern rail carriers"); BN/Frisco, 360 I.C.C. 777, 811 (1980); Chicago & North Western Ry. -- Control -- Chicago, R.I. & Pac. R.R., 347 I.C.C. 556, 587 (1974).

Chicago, St. Louis, Memphis and New Orleans -- will greatly enhance the flexibility and efficiency of such traffic flows. See CSX/NS-19, Vol. 2A at 23 24 (Kalt VS); CSX/NS-20, Vol. 3A at 42-45.

Requiring CSX to divest a critical segment of east-west mainline to IC would inevitably interfere with use of the Memphis gateway to the west. By its own admission, IC's interest is in north-south flows through Memphis, although it obviously concluded it was willing to employ trackage rights on the CSX east-west mainline as part of that route. See IC-5 at 9; IC-6, McPherson VS at 8-9; IC-6, Skelton VS at 8-9. IC's very effort to downplay or ignore the substantial volume of east-west through train movements over the Leewood-Aulon line strongly indicates that it does not appreciate the needs of east-west traffic here.

As the Board is well aware, the ability of the two Western rail systems to move traffic smoothly across gateways to CSX and NS will be critical to efficient operation of the Nation's rail network. The Board should not accept a condition, such as this, that would create an impediment to CSX's use of the Memphis gateway for that purpose.[10/]

b. IC's Gateway/Rate Condition Should Not Be Imposed.

IC has also requested that the Board impose a condition requiring CSX to "join with IC in market competitive joint rates via IC's Illinois gateways (Chicago, East St. Louis and Effingham)" under certain conditions. IC-6 at 2. That condition would also dictate

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[10/] Even if IC had not failed to offer any valid justification for divestiture of the Leewood-Aulon line, the operating problems that such relief would create for CSX -- and its ability to achieve the benefits of this transaction -- would compel that IC's responsive application be denied. See, e.g., UP/SP at 157-58; BN/SF at 93; BN/Frisco at 951-52.

CSX's portion of such rates, making it equal "on a per mile basis" to CSX's revenue on "its preferred long-haul route." Id.

IC's objective is obvious: it wants to preserve its long haul by freezing existing gateways, and to preserve its own revenues by limiting CSX's divisions. Neither goal warrants Board relief.

This latest effort to resurrect gateway and rate conditions should be rejected. As the Board's predecessor concluded, such traffic protective conditions are inefficient, anticompetitive and contrary to the public interest.[11] What IC proposes here would have the same harmful effects. It would eliminate incentives for the use of more efficient, competitive routes that CSX is able to offer over other gateways. Moreover, conditions such as those IC asks the Board to impose lock railroads into inflexible operations that can create inefficiencies as market conditions change. Kalt RVS at 55-56. Such gateway and rate restrictions can also discourage carriers from developing beneficial service innovations. Id.

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[11] IC's request is contrary to numerous decisions, reaching back more than a decade, that have rejected traffic protective conditions and have held that the free market -- not regulatory intervention -- best ensures that efficient routings will be used. See, e.g., Seaboard Air Line R.R. -- Merger -- Atlantic Coast Line R.R., Finance Docket No. 21215 (Sub-No. 5) at 15-16 (served Mar. 27, 1995); CSX Corp. -- Control -- Chessie Sys., Inc. and Seaboard Coast Line Indus., 363 I.C.C. 521, 578-79 (1980), aff'd sub nom. Brotherhood of Maintenance of Way Employees v. ICC, 698 F 2d 315 (7th Cir. 1983); Norfolk & W. Ry. -- Control -- Detroit, T. & I. R.R., 360 I.C.C. 498, 527 (1979), aff'd in part and rev'd in part sub nom. Norfolk & W. Ry. v. United States, 639 F.2d 1096 (4th Cir. 1981). See also UP/MP at 565-66 (traffic protective conditions "remove incentives for efficient operations by keeping carriers from pricing more efficient routes at lower rates" and "hamper carrier efforts to rationalize their systems by freezing existing junctions and interchanges") (citing Traffic Protective Conditions, 366 I.C.C. 112, aff'd in relevant part sub nom. Detroit, Toledo & Ironton R.R. v. United States, 725 F.2d 47 (6th Cir. 1984)).

Indeed, IC's proposal would do far more than just freeze existing IC-CRC interchange patterns. The condition sought would govern not only current IC-CRC traffic but all traffic moving to or from any station on the lines of CSX or its shortline connections -- including existing CSX traffic that is interchanged with other carriers over other gateways. See IC-6 at 2. Moreover, it would prescribe CSX's division for all such movements. Id.

IC's proposal thus goes well beyond even the repudiated DT&I conditions; it does so as well in asking the Board to impose a formula to cap CSX's divisions. See IC-6 at 2.[12/] Such regulatory intervention would be contrary not only to Board precedent but also to sound economic policy. See Traffic Protective Conditions, 366 I.C.C. at 115-26; Kalt RVS at 55-56.

IC contends that its proposed condition is necessary "to assure that adequate transportation service to the public will be provided." IC-6, Skelton VS at 5. Its argument -- apart from invoking UP's recent operating problems and the Penn Central bankruptcy -- is that CSX will economically close the IC gateways because of "cash flow demands," forcing traffic over allegedly "less efficient CSXT-IC routes via New Orleans and Memphis." Id. at 9. As Professor Kalt explains, however, there is nothing to suggest that either CSX or NS will take such inefficient actions. Kalt RVS at 55.

Moreover, IC itself recognizes its concerns are speculative. It concedes that an alternative to its condition would be to address any problems if and when they actually arise. IC-6, Skelton VS at 10. There is no reason why IC should not be left to its statutory

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[12/] The DT&I conditions preserved the status quo. By contrast, IC's condition would impose new constraints for the future.

remedies, nor any justification for its routes and divisions to be given any greater protection than Congress determined to provide thereby. See 49 U.S.C. § 10705.

IC's desire to have its traffic protected by regulatory order is familiar. It sought similar relief -- including the same formula for setting divisions -- in BN/SF. See BN/SF at 15-16.[13] The ICC rejected that request, noting IC admitted "that the harm it fears runs counter to the rational behavior predicted by economic theory." Id. at 94. The same is true here, and for the reasons set forth above, the Board should reject IC's current request as well.

B. Class II Railroads.

1. Bessemer & Lake Erie Railroad.

Bessemer & Lake Erie Railroad ("B&LE") filed a responsive application in Sub-No. 61, as well as comments requesting conditions. See BLE-7; BLE-8. B&LE's filings are discussed above in Section VIII. As demonstrated there, B&LE's requests for conditions and responsive application should be denied.

2. Elgin, Joliet & Eastern Railway, Transtar Inc. and I&M Rail Link.

Elgin, Joliet & Eastern Railway ("EJE"), its parent Transtar Inc. ("Transtar") and I&M Rail Link ("I&M") filed a responsive application in Sub-No. 36 seeking to acquire Conrail's interest in the Indiana Harbor Belt Railroad ("IHB"). At the present time, IHB is,

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[13] See also ICC Finance Docket No. 32549, Request by Illinois Central Railroad Company for Imposition of Condition to Preserve Competitive Routing (IC-12) at 4 (filed May 10, 1995).

as the Board found in Decision No. 53, an independent rail carrier, having its own management and employees, operating in the Chicago area including adjacent Indiana. Its stock is owned 51% by Conrail and 49% by CP/Soo.

The Primary Application contemplates that the 51% block of stock will remain owned by Conrail and will be voted by Conrail in accordance with certain provisions of an agreement set forth in the application, CSX/NS-25, Vol. 8C at 693ff. Of course, the remaining 49% of the stock will remain held by CP/Soo. Under the agreement, CSX and NS will cause Conrail to exercise the voting power of its stock interest to elect an equal number of directors of IHB as between the nominees of CSX and those of NS. Id. at 698. Dispatching of trains over the IHB will continue to be the responsibility of IHB itself and will be performed locally in the Chicago area. Id. at 699. While CSX has the power to nominate the General Manager of IHB, subject to NS approval not to be unreasonably withheld, and Conrail is to vote its stock toward electing the person so nominated as General Manager, NSC has the right under certain circumstances to cause a replacement General Manager to be nominated. Id. at 698. Likewise, while CSX can direct Conrail with respect to Conrail's rights as a stockholder of IHB in matters coming before the stockholders relating to dispatching, NS can object to any mistreatment of it in connection with dispatching, can cause an arbitration in the event of a dispute over dispatching, and can request in the arbitration that NS replace CSX as having the right to direct Conrail in connection with shareholder matters relating to dispatching. Id. at 699-700.

No provision of the agreement is to be deemed to authorize or direct the taking of any action that would be a violation of a fiduciary duty owed by a controlling stockholder

to a corporation or to the other stockholders. Id. at 701. At the present time the only other stockholder of IHB is CP/Soo.[14]

The Primary Application also contains a verified statement of John W. Orrison (CSX/NS-19, Vol. 2A at 453ff) outlining CSX's operating plan for the Chicago area. The plan contemplates expedited movement of traffic through Chicago by classifying and pre-blocking merchandise traffic to go through Chicago without switching. The pre-blocking is to be effected at various identified points on CSX's system. Id. at 456. Similar activities on the part of western carriers for traffic moving eastward through Chicago are to be encouraged. Id. at 457. CSX plans to use the Belt Railway of Chicago ("BRC") for its westbound flows and encourage eastbound flows to move on the IHB. Id. at 458-59. CSX will rehabilitate the IHB's Blue Island Yard. CSXT will pay for that project out of its own pocket even though NS and CP/Soo, as owners in the IHB, will each have a greater economic interest than CSX.[15]

The EJE and I&M have submitted a Responsive Application (EJE-10) seeking to require the sale to them of Conrail's 51 percent interest in the IHB.[16]

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[14] The agreement contains other provisions relating to the respective behavior of Conrail, CSX and NS apart from the capacities of CSX and NS with respect to directing the actions of Conrail as a shareholder of IHB; in other words, as to the private property rights of Conrail, CSX and NS. Id. at 703-06.

[15] CP/Soo's economic interest in the IHB as stockholder is 49%. That of NS, which has a 58% economic interest in Conrail, will amount to an economic interest of 29.58% as an indirect stockholder in IHB. CSX's economic interest as an indirect IHB stockholder will be 21.42%.

[16] The concept of divestiture of the IHB is supported by the Illinois DOT (IDOT-2, Brown VS at 2-3) (although it does not refer to any particular proposal for a divestee, endorsing only a "neutral carrier"). At one time the IC (IC-2) and the WCL (WC-3) filed (continued...)

That responsive application should be denied. The submission of EJE/I&M does not demonstrate any competitive harm resulting from the Transaction in connection with the process of interconnecting the operations of the railroads that serve Chicago. It amounts to an attempted grab by two railroads having little interest in the efficient operation of railroads connecting in the Chicago Terminal area.

a. The Transaction Will Not Unduly Concentrate Control Over Switching Services in Chicago.

i. EJE and I&M Mischaracterize the Processes of Interchange Among Carriers in the Chicago Area, Ignoring Interchange Functions Apart From the Operation of the Three Traditional Intermediate Switching Railroads.

Recognizing that their responsive application must first show that it will remedy some competitive harm resulting from the Transaction, EJE/I&M go to great pains to find some "harm" that the Board might associate with the Transaction. To do this, EJE/I&M and others attempt to obfuscate matters by blurring a complicated set of switching and interchange relationships in Chicago, and then attempting to portray the transfer of Conrail's ownership interest in two traditional intermediate switching carriers to CSX and NS as giving either CSX by itself, or CSX and NS jointly, dominance in Chicago. EJE-10 at 10.

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[16] (...continued)
Notices of Intent indicating they might seek to acquire, by themselves or with others, the Conrail ownership in the IHB. No such applications were filed, however, although WCL suggests that "neutrality" conditions be imposed upon the dispatching functions of IHB by separating them from the owners of the property. WC-10 at 9-10. Also supporting divestiture or "neutral operation" of some sort are Detroit Edison (DE-2), Indiana Port Commission (IPC-2), Northern Indiana Public Service Company (NIPS-2), Prairie Group (Unnumbered) and A.E. Staley (Unnumbered).

By imprecise use of the term "switching," EJE/I&M endeavor to convey the impression that there is a broad category of operations related to the interchange of cars at Chicago that can only be performed by the three carriers, The Baltimore and Ohio Chicago Terminal Railroad Company (BOCT),[17] BRC and IHB, commonly thought of as the "intermediate switching carriers." That is not so.

An intermediate switching carrier may be understood to mean a carrier providing facilities or service, or both, to enable one line haul carrier to deliver cars to another line haul carrier with which the first does not connect. It is the responsibility of the delivering line haul carrier to get the cars to the next line haul carrier. If their tracks do not connect, the delivering carrier selects, and in effect retains as its agent, an intermediate switching carrier to perform the delivery. Booth RVS at 5. Any carrier, large or small, can perform intermediate switching service.

Industry switching is often performed by a carrier serving a local customer. The carrier switching the industry places empty cars from, and delivers loaded cars to, the line haul carrier. This is typically done under a set of industry conventions relating to matters such as car hire responsibility and loss/damage liability. Typically, the line haul carrier pays the switch carrier's switching charge (i.e., "absorbs" it). Booth RVS at 6.

What the Responsive Application overlooks is that cars can be interchanged between line haul carriers at interchange tracks which each reaches. This, of course, is accomplished without handling by any third carrier. Moreover, two trunk lines that do not

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17/ A 100%-owned subsidiary of CSXT.

connect can also accomplish delivery of cars between themselves by using overhead trackage rights over a third carrier (or more than one carrier) to reach a point of interchange.

In the complex network of rail lines that comprise the Chicago Terminal all of these arrangements are used. Many of the trunk lines deliver directly to one another -- either where they connect directly or by using trackage rights over other carriers, large and small. Booth RVS at 6.

A look at the practices of the two major proponents of divestiture of the IHB or of imposing conditions on it -- EJE and WCL -- is instructive. WCL connects directly with CP/Soo at the latter's Schiller Park Yard, without using trackage rights; with CSXT's subsidiary BOCT at Barr Yard; with Conrail via trackage rights to Conrail's Ashland Avenue Yard; with IC over trackage rights to IC's Markham Yard; with EJE at Leithon, IL, outside of the Chicago Terminal area; with NS via direct delivery to NS' Calumet Yard; "with UP directly at Leithon, Illinois, for delivery by EJE to Proviso" in the case of unit trains, and with CN/GTW, directly at Blue Island Yard for certain trains. It is only in the case of exchanging traffic with I&M (which has no substantial presence in the Chicago area),[18] Burlington Northern, and, for certain traffic, UP and CN/GTW, that WCL uses the services of BRC or IHB as an intermediate switching carrier. Interrogatory Response, WC-12 at 14-16. Thus WCL uses intermediate switching carriers only for a few of the possible interconnections at Chicago.

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[18] I&M is a newly organized railroad, which began operations only in April 1997. It has scant operations in the Chicago area, entering the city only via a METRA commuter line, its nearest yard of any substance, is apparently in Davenport, Iowa. EJE-10, Brodsky VS at 2-3.

As to the EJE, it itself makes the point that it does not deliver or receive cars from other carriers in its line haul operations in downtown Chicago, having no presence there at all. EJE-10, Turner VS at 3. It loops around Chicago at a usual distance of about 35 miles in a semicircle from Waukeegan, IL to Northwest Indiana, coming into contact with any of the three traditional intermediate switching carriers only close to the end of its line in Indiana. Id. Its connections with the line haul carriers are essentially on its own line looping around Chicago. Thus, it uses the other intermediate switching carriers very little if at all.

The impression EJE/I&M attempts to create, one of all the trunk lines being dependent on three intermediate switch carriers, is thus quite misleading.

ii. Even Taking What EJE/I&M Consider to Be the Three Traditional Intermediate Switching Carriers by Themselves, the Transaction Does Not Provide for Any Further Concentration of Control of Switching Operations in Chicago.

The picture painted by EJE and I&M is that CSX will gain dominance over switching movements in Chicago. As demonstrated above, a distorted analysis of the effectuation of interchange between carriers in Chicago has been furnished by EJE/I&M. Other interests, who wish to see the succession to the old Conrail's ownership of 51% of the IHB stock handled differently from that which the parties negotiated, focus on the alleged growing power of the eastern railroads over the three intermediate switching carriers vis-a-vis western railroads. See, e.g., IDOT-2, IC-2, DE-2, IPC-2. These contentions would be without merit even if a narrow circle were drawn around the three intermediate switching carriers.

We take the three one by one. Obviously the situation with respect to the BOCT will remain unchanged after the Transaction -- it historically has been a wholly-owned subsidiary of CSXT and its predecessors and it will remain a wholly-owned subsidiary of CSXT. Indeed, some of the opponents of the Transaction say that BOCT is not an intermediate switching carrier at all (see WC-10 at 3), although a contested arbitration between CSX and WCL has rejected this contention.[19/]

EJE/I&M exhibits a touch of schizophrenia in describing CSXT's wholly-owned subsidiary, the BOCT. On the one hand, EJE/I&M describes its function as an intermediate switching carrier, and attempts to portray it as just like BRC and IHB. Yet, on the other hand, EJE/I&M portrays the company as a mere extension of CSXT, operated exclusively as an extension of CSXT.[20/] EJE-10, Turner VS at 7, 8 and 12. EJE/I&M's tactic is to describe a nonexistent, simplistic world in Chicago in which the only links between trunk lines are three "switching lines" controlling passage through the Terminal; and then to portray CSX as dominating those lines. In actual fact, CSXT does control the BOCT, a separate Illinois corporation with its own labor agreements, financial accounts, etc. But CSX has never contended that BOCT is operated with the same degree of independence as IHB and BRC. Nothing in the Transaction affects CSXT's control of BOCT in the slightest. EJE/I&M do not allege otherwise.

19/ See the discussion and citation in the next part of this Section XIII, discussing the Responsive Application of WCL.

20/ WC takes a similar approach. WCL-10 at 10 and McCarran VS at 5.

Next, the BRC is owned by eight railroads and is operated independently by a separate management team. Conrail's 16-2/3% ownership interest will be transferred to PRR for control by NS under the Transaction Agreement giving NS a 25% share -- equal to that of CSX. See CSX/NS-25, Vol. 8B at 90; Booth RVS at 6-7.[21] BRC receives trains for switching today from all owners and from a number of non-owners, including WCL. Id. All owners of the BRC (i.e., all the larger roads) are obligated to accept delivery of cars at the BRC's Clearing Yard, so any carrier that reaches Clearing Yard can deliver to any owner. For this reason, and because of the BRC's efficient hump operation there, Clearing Yard is a popular facility for interchange.

Ownership of the BRC is currently balanced between Eastern and Western roads. That balance is unaffected by the Transaction. NS will acquire Conrail's interest in the BRC, bringing its ownership share up to that of its primary rail competitor, CSX. To the extent that relative ownership interests matter, the Eastern roads gain no votes and CSX's

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[21] The interests in the BRC, which has 12 shares of stock outstanding, before and after the Transaction are as shown in the following table:

BRC Shares

	Pre Transaction	Post Transaction
CSX	3	3
NS	1	3
BNSF	2	2
Conrail	2	0
UP	1	1
CP/Soo	1	1
CN/GTW	1	1
IC	1	1

primary competitor achieves equal voting power, thus weakening any influence CSX might have had as the largest BRC owner at the present time.

Ownership of EJE is unaffected by the Transaction. Some consider EJE an "intermediate switch carrier" or at least a "switch carrier" if forced to label it according to its primary operating role.[22/] EJE does function in some ways more like IHB than like a trunk line. Even EJE admits that it competes with IHB. EJE-10 at 8-9. Debating whether EJE is an "intermediate switch carrier" or not, of course, proves nothing except in the simplistic EJE/I&M view of Chicago.

Virtually all, if not all, carriers with lines in the Chicago area serve industries and perform industry switching. Many, including EJE, serve as a bridge between two other carriers either by permitting others to operate over their right of way, making yards available, or by performing intermediate switching service themselves. Booth RVS at 8. Apart from Conrail, the ownership of these carriers is wholly unaffected by the Transaction.

We turn to the IHB. The Transaction brings it about that the major Eastern railroads, of course, decline from three railroads to two (as have the principal Western railroads). As a whole, the Eastern railroads gain no additional power as to the IHB; they still have a bare majority of the stock of the IHB. Conrail will continue to own the 51% block of the stock, but its two owners will, according to their internal agreement submitted to the Board, direct the voting of that block. Because the two are fierce competitors of each other, one can anticipate that they will not permit either one of them to obtain undue

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[22/] The Primary Application so refers to the EJE, putting it in the same category as BOCT, BRC and IHB. See CSX/NS-25, Vol. 8B at 108.

advantage. While CSX is given certain specific powers with respect to the 51% block of IHB stock, there are numerous checks and balances in the agreement. The power of either of them and perhaps, because of their diffuse interests, the collective power of the two, will be less than that which Conrail currently enjoys by itself. The same 49% owner will be still there and the CSX/NS agreement expressly acknowledges the fiduciary duty owed by the 51% owner to it.

iii. IHB Operates as an Independent Entity And Will Continue to Operate Independently.

The IHB, owned 51% by Conrail and 49% by CP/Soo, is operated as an independent company with responsibilities to its majority and minority shareholders. The Board has held in Decision No. 53, decided November 7, 1997, that:

> IHB operates a separate railroad with over 800 employees from its offices in Hammond, IN. Its labor agreements are separate from those governing Conrail employees, and are separately negotiated by IHB. Its day-to-day operations are under the direction and control of a general manager who is an IHB employee. IHB operates as a switching carrier for most major railroads operating from and to the Chicago area. The commercial relationships of Conrail and IHB as interconnecting railroads are governed by agreements negotiated at arm's length, as they are with other railroads with whom IHB connects. Conrail does not dictate to or unilaterally exercise dominion over IHB.
>
> IHB is a railroad operated independently of the applicants. (Page 4.)

The same will be true after the Transaction. IHB will continue to operate as an independent entity. It will have its own operating, financial, mechanical, engineering and labor relations functions. Importantly, IHB dispatching will be conducted by IHB employees

who will be responsible to IHB management. There is nothing in the CSX/NS agreement or the operating plans to the contrary.

The change of ownership of the IHB is apt to make the IHB more efficient and responsive rather than less responsive to the needs of its users than it was under Conrail's majority ownership. First, CSX proposes unilaterally, out of its own pocket, to make substantial improvements on the facilities of the IHB by upgrading Blue Island Yard. Second, one of the difficulties in making the Chicago Terminal flow smoothly is difficulty in communication. A single train must often traverse several carriers' lines to get to the destination yard. Each line is generally dispatched by its owner. Dispatchers for different roads typically do not coordinate their efforts with one another. To help reduce the inefficiencies that follow from lack of communications, in 1997, BOCT relocated its dispatchers to the BRC's Clearing Yard where they are now co-located with BRC dispatchers. Merely being in the same dispatching complex has improved coordination between these two teams. Reardon RVS at 1-2. CSX will propose after the implementation of the Transaction, that IHB relocate its dispatching team to the BRC dispatching complex so that the IHB team too can benefit from improved communication and that BRC and BOCT dispatching can benefit as well.

iv. No Other Major Carrier Has Complained About the Transaction's Disposition of Conrail's IHB Shares.

Without question, Chicago is a crucial rail hub. Any change that threatened the disastrous outcomes described by EJE/I&M (and to a lesser extent by WCL) would unquestionably engender widespread outrage and complaint. Yet, the silence of other roads

reaching Chicago is deafening. Even those actively participating in this proceeding have not made the disposition of Conrail's ownership of IHB an issue.

BNSF has attended many of the depositions in this case and is clearly well informed. CN, CP and UP -- all of whom could not afford to put their Chicago operations at risk -- support the Transaction. [[

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]]] Document EJE-02-HC-00001/00003 (Vol. 3). WCL and IC have their agendas, but have not made IHB ownership an issue; WCL asks only for neutrality conditions. Indeed, the only rail carriers who seem to have any concern are the two that want to force a sale.

b. EJE's Responsive Application Would Waste an Opportunity To Improve Operations in Chicago.

i. Chicago is Crucial to Rail Operations Nationwide.

The Board is well aware of the importance of the Chicago Terminal to rail operations nationwide. Every major carrier reaches Chicago and interchanges directly or indirectly with every other major carrier there. Key intermodal operations originate, terminate and link to rail and highway carriage at Chicago.

In spite of -- or more realistically, because of -- its importance, operating problems have persisted within the Chicago Terminal from time immemorial. While Chicago works, the complaints about train delays, dispatching foul-ups, and the like, raised by various parties can be repeated for just about every carrier's operations on, or across,

another's lines. Reardon RVS at 5. The Board should not waste an opportunity to improve operations in Chicag by forcing a sale of Conrail's interest in the IHB.

ii. This Transaction Brings a Real Opportunity and a Real Plan To Improve Rail Service Through Chicago.

CSX is committed to investing tens of millions of dollars in capital improvements in the Chicago area, including track and signal work. Naturally, these improvements will be made because they benefit CSX. But other carriers will also benefit. More efficient routings, made possible by new connections, will relieve congestion for all railroads. Every railroad that operates over the IHB will benefit. Even those that do not operate on the IHB, but who today are delayed by railroads that do, will benefit. And, those who today want to cross lines blocked by those who wait for clearance from the roads that will operate over the IHB will benefit as well.

All this simply reflects an inherent characteristic of a network: improvements in one place will benefit the network as a whole -- and its users generally.

A forced sale of Conrail's interests in IHB would waste this opportunity to expedite through movements at Chicago and thus to reduce congestion. CSX cannot be expected to make such substantial capital investments in a property in which it has absolutely no ownership interests. Further, CSX's operating plan, which anticipates major use of the IHB's hump facility at Blue Island Yard, may have to be reevaluated if CSX's access route to Blue Island over the IHB will remain as delay-filled as it is today. The consequences of changing the CSX Operating Plan to increase use of BOCT's flat switching Barr Yard, the BRC's Clearing Yard, a combination of the two, or some other alternative has not been worked out but clearly puts at risk CSX's ability to operate efficiently through Chicago.

iii. A Forced Sale of Control of IHB to EJE/I&M Has No Public Benefits.

The EJE/I&M take-over involves no synergies and reduces competition: EJE offers no operational synergy with the IHB. Their lines meet only in one sector in Indiana, and there is no substantial benefit from merging their operations. Orrison RVS at 25-31. EJE/I&M acknowledge this. EJE-10, Turner VS at 3.

EJE's operations are largely devoted to avoiding the areas in which the three historic intermediary switching carriers operate; it provides an alternative to them. EJE-10 at 8-9. So EJE brings few if any synergies to the marriage with IHB. On the other hand, it is an admitted competitor of IHB. Id. So we have a combination of no operating synergies and a potential reduction in competition.

EJE brings no substantial useful yard facilities into the picture with IHB. EJE's major yard, Kirk Yard, is not well situated as an interchange yard for the line haul carriers. It is located at the far eastern end of the Chicago Terminal. Furthermore, as EJE/I&M essentially admits it is an industry support yard for the nearby steel mills. EJE-10, Danzl VS at 3.

If possible, I&M brings even less to the picture. All that can be said of it is that it is not a competitor to IHB. It has no substantial yard facilities anywhere near the Chicago area; its nearest yard is in Davenport, Iowa. EJE-10, Brodsky VS at 4. It has only been in existence since April of 1997. It is hard to discern the purpose of its joinder with EJE in this regard, unless it was felt necessary that a line-haul carrier that was not a competitor of IHB be brought in to improve appearances.

EJE/I&M Have No Operating Plan: Astoundingly, EJE/I&M have offered no operating plan for IHB. They acknowledge that IHB would be operated pretty much as it is today. EJE-10, Exhibit 15. EJE/I&M's claim that they could not get the documents necessary to describe their planned operations from CSX or NS is specious. First, EJE (as the ALJ ruled) never attempted to obtain discovery from the correct party, IHB. IHB has been a party to this case, separately represented by counsel, since June 1997. Second, the information demanded would have been only of limited value in preparing an operating plan. Third -- and most compelling -- EJE has been operating in the Chicago area since it was formed in 1888. It must know enough about operations in Chicago to develop and submit a plan to the Board.[23/] If after a century of operations in the Chicago area it has no ideas on the subject, must rely upon forensic discovery to put forward a plan, and suggests that it likes things just as they are, it scarcely warrants belief. If EJE cannot tell -- or more precisely chooses not to tell -- the Board what it plans, its responsive application deserves no consideration at all. Applicants submit that the EJE/I&M Responsive Application should be summarily rejected if only for that reason. The Board deserves to know what the ill-defined venture between EJE and I&M plans to do with this important part of the nation's most important rail hub.

The Claimed Joint Venture with I&M Is Contrived, Hastily Thrown Together and Designed as Window Dressing: The Board should view with great skepticism the joint venture between EJE and I&M. The arrangement appears to have been put together to make

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[23/] I&M is a start-up carrier. Its protestations of ignorance about Chicago operations are at least credible. [[

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the EJE's grab for a bargain basement priced control of IHB look more legitimate.[24/] EJE/I&M told the Board little about the arrangements between them.

When notices of intent to file responsive applications were filed on August 22, 1997, EJE filed alone (EJE-3); I&M was nowhere to be seen. When, on October 1, 1997, EJE filed with the Board its "Verified Statement of No Significant Environmental Impact" (EJE-7) with respect to the prospective Responsive Application, I&M was still nowhere to be seen. When the joint Responsive Application appeared on October 21, 1997, the joint venture offered no agreement to explain how it would jointly control the IHB stock -- and no explanation at all concerning the mutation of EJE's August 22 and October 1 solo filings into an October 21 joint filing.

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]] Thus, the timing of I&M's appearance on the scene remains obscure, although it seems to be quite recent.

The manner in which the two parties, EJE and I&M, came to the decision to file a joint application is mysterious and indeed smacks of the miraculous. It appears that the possibility of spontaneous generation, long abandoned in the biological sciences, may be

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[24/] If divestiture were ordered and if agreement on price could not be reached, the Board would set the price. But EJE/I&M would be free to walk away at no cost to themselves if the price was not entirely to their satisfaction.

present nonetheless in the making of corporate deals. [[

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Thus, how the EJE/I&M joint venture was conceived, who proposed it to whom, and its motivation, all remain swathed in mystery. The motivations of the parties to

form the joint venture are covered by the veils of the attorney-client privilege. All that we can infer is that the place of conception was a lawyers' office in Chicago.

The joint application forecast that the parties would put together a stockholders' voting agreement but no form of one was provided. EJE-10 at 6. [[

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As to the purchase price of the 51% block of stock, which the Responsive Application said that EJE and I&M would have no difficulties in raising, [[

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The arrangements between the two carriers appear to be extraordinarily loose, to say the least. [[

]] The Responsive Application does not seem to fit the profile of a serious one, thought out and negotiated between businessmen. The contrast between what the Board is being offered in this Responsive Application and in the detailed agreement between CSX and NS (CSX/NS-25, Vol. 8C, at 693) relating to IHB in the Primary Application is striking. Such an ill-considered and ill-defined proposal as that of EJE/I&M hardly deserves serious attention.

c. EJE's Complaints About The Transaction's Effect on its Commercial Switching Business are Unfounded.

Aside from the feeble contention that the public interest will be adversely affected when CSX and NS acquire control over Conrail's 51 percent interest in the IHB, EJE proceeds to voice a laundry list of "concerns" about how the Transaction will harm its commercial switching business. In doing so, it unabashedly admits that it is IHB's competitor -- without regard for the implications of such an admission upon its demands to acquire control of that competitor.

i. IHB Will Continue To Set "Prices" Independently.

Today IHB sets its switching charges independently. It will continue to do so after CSX and NS inherit joint control over Conrail's 51 percent of the stock. Any worries EJE may have on that score simply boil down to a competitor's fear of competition.

ii. Any Incentive for a Trunk Line Owner of IHB To Favor IHB Over Other Competing Switch Carriers is Lessened by the Transaction.

EJE argues that IHB's new owners will prefer to work with IHB to perform industry switching in connection with their own line haul operations. EJE-10 at 9. Thus, EJE argues, EJE will lose switching business from those rail customers that it serves in competition with IHB. Id.

In the first place, if this were a problem it would not be a new one. EJE's General Manager (M.S. "Mel" Turner) testified in his verified statement that Conrail has favored the IHB in choosing an intermediate switching carrier in Chicago (EJE-10, Turner VS at 10) [[

.]] In any event, EJE's clever solution to this "problem" is, of course, to control its competitor to prevent CSX and NS from favoring it.

EJE/I&M seem to have forgotten that the Board protects competition -- not competitors. It does not grant benefits to competing carriers to immunize them from the market place effects of transactions presented to it; and it does not restructure the transportation network to equalize the competitive posture of industries in the markets in which they compete.

In any case, EJE's competitive effects arguments are flat wrong. Economics dictate that a trunk line will not accept a lower level of service from a partially-owned subsidiary if an independent switch carrier can perform better. The competitive marketplace

and the ever-increasing service demands of customers mandate this. Conrail's current willingness to favor EJE on movements where EJE can provide better service (see EJE-10 at; Danzl VS at 9) offers real world proof of that economically logical principle. And, this is in a world where Conrail controls IHB through 51 percent ownership. After the transaction, neither CSX nor NS will have that large an economic interest in IHB. See n.15, above. Any alleged "incentive" to favor IHB will be cut drastically.

iii. EJE's Complaint About Its Difficulty in Competing With IHB for Jointly Served Shippers is Tidily "Fixed" by Its Proposed Acquisition of IHB.

EJE makes no attempt to deny -- and readily admits -- that it and IHB directly compete to serve a number of shippers. EJE-10 at 8-9. These shippers would lose one of the two rail options available to them today if the responsive application were granted. [[

]] By creating 2-to-1 shippers without offering a solution EJE ensures that it will not lose out in the market place. But it also ignores a considerable body of Board and ICC precedent.

d. EJE/I&M Have Failed To Meet Their Burden of Proof That Any Public Harm of Any Sort Will Come As a Result of the Transaction.

EJE/I&M have presented the Board with an application for an order compelling the sale of privately held property, and vesting in them the control of an important part of the Chicago Terminal and its operations. EJE/I&M should, and do, carry a very heavy burden of proof. The Board should expect and require that burden of proof be met in their case in

chief. The principal failure of proof is the most fundamental one -- that there is no showing that the new arrangements, provided for in the Primary Application, as to the Conrail stock ownership in IHB will be contrary to the public interest. Instead, IHB will continue to be operated as a neutral carrier.

EJE's General Manager, Mel Turner, was the primary witness supporting EJE's and I&M's effort to show that CSX would dominate the IHB and "would not operate it neutrally." EJE-10, Turner VS at 10-11; [[

]][25/]

Mr. Turner's opinion ignored the fact that NS and CP/Soo were in the picture as IHB stockholders whereas they were not as to the BOCT, a 100%-owned subsidiary of CSXT. Asked why NS would put up with such behavior by CSXT, or why CP/Soo would put up with it, in each case Turner responded [[ ]] Turner Dep. at 8-10. Contrary to the clear text of the agreement between CSX and NS, it was Mr. Turner's understanding that [[.]] Id. at 13. Mr. Turner had never [[

]] Id. at 10, 25. His only knowledge of the matter was his [[ ]] Id. at 10. That understanding is, of course, contrary to the agreement that has been filed with

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25/ To put the shoe on the other foot, it was established at the depositions that [[

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the Board. Mr. Turner's opinion, based solely on analogy from his notions as to how CSX has operated a 100%-owned subsidiary which, of course, was not governed by a stockholders' agreement or by the constraints of a minority interest, is unsupported by any familiarity with the actual arrangements for post-Transaction operation in this case. It is not of any probative value.

Besides "CSX domination" one other concern was raised -- that "IHB operations after the transaction will lead to a reduced emphasis on intermediate switching services for smaller railroads in Chicago." EJE-10, Turner VS at 11. That concern too was without proof or foundation. That opinion was based, according to Turner's deposition, on [[

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William Brodsky, President of I&M (and of its affiliate, Montana Rail Link) gave his opinion (EJE-10, Brodsky VS at 6-9) that there would be a troublesome concentration of control in Chicago terminal switching under the primary application. [[

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How the I&M would be prejudiced by the Primary Application was left in obscurity by Brodsky at his deposition. [[

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I&M's concerns about prejudice to it in Chicago as a result of the Transaction are hardly borne out by any evidence.

Thus, the "proof" that there would be a diminution in attention to local switching movements and a domination of IHB by CSX was no proof at all. EJE/I&M have failed in other regards to prove their case:

- They have offered no plan on how they would operate IHB.
- They have offered no report on the environmental impacts of their joint proposal.
- They have offered no insight into financing.
- They have offered no details of their alleged joint venture.
- They have offered no real evidence that competition will be affected by the Primary Application.
- They have offered no solutions for the two-to-one situations the Responsive Application would create.

This Responsive Application appears to resemble a lottery ticket more closely than an application worthy of serious consideration.

3. Wisconsin Central Ltd.

Wisconsin Central (WCL), a class II rail carrier operating in Wisconsin, Michigan (Upper Peninsula), Minnesota and Illinois, has filed comments (WC-10) and a related Responsive Application (WC-9) seeking a Board order compelling BOCT to sell to WCL its Altenheim subdivision -- a line of approximately 7.6 miles in the Chicago Terminal area, abutting the end of WCL's main line to Chicago.

It should be noted at the outset that WCL has trackage rights today over the Altenheim subdivision.

WCL in addition seeks the imposition of two conditions:

First, that CSXT be required, in effect, to merge its wholly-owned subsidiary, BOCT, into CSXT. A formal upstream merger was WCL's proposal in its Notice of Responsive Application filed in August 1997 (WC-2 at 4) but the present proposal is that CSXT is to be required to conduct direct interchange in the Chicago Terminal area apart from BOCT and without the use of BOCT as an intermediate switching carrier. WC-10 at 8.

Second, "that dispatching over the IHB in the Chicago Terminal should be provided by a neutral carrier -- a carrier other than one of the IHB owners." WC-10 at 9,10. (This last proposal has been discussed to some extent in connection with the discussion of the EJE/I&M Responsive Application seeking to acquire the 51% block of the stock of IHB currently owned by Conrail, above.)[26]

None of the requests of WCL has any merit. None of them addresses a condition that is Transaction-related. None of them has anything to do with any threat to competition posed by the Transaction. Each of them is an attempt to pursue longstanding goals of WCL which it has pursued in the past -- in some cases, in vendettas that have been pursued through lengthy litigation.

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[26] WCL is represented before the Board by the same law firm which represents EJE and I&M, a firm apparently served in some brokerage or other deal-making relationship in putting the combination of EJE and I&M together. See Section XIII.B.2.b.iii., above.

a. WCL Has Not Justified the Extraordinary Relief of a Forced Sale of a Line of Railroad.

WCL already has trackage rights over the line of railroad that it wants to acquire forcibly against its owner's will. It can use those trackage rights to go anywhere in Chicago that it could go if it owned the Altenheim subdivision. That is not enough for it, and never has been enough. The line's value was clear to WCL even before its birth as an operating carrier. Almost from the moment of its conception, WCL has coveted BOCT's Altenheim subdivision. On July 25, 1987, even before it commenced operations as a spin-off of the Soo Line's Wisconsin routes, WCL's president wrote to CSX stating:

> We desire to make arrangements with the CSX system for interchange at Chicago, and also for trackage rights on the BOCT to effect interchange with other carriers in the Chicago Terminal. WC will not operate a yard at Chicago, but will operate with pre-blocked trains from its terminal at Fond du Lac, Wisconsin directly to and from the yards of the connecting carriers.

That letter identified the trackage rights requested as follows:

> Concerning trackage rights, we request overhead rights between Franklin Park and Blue Island, between Forest Park and Blue Island, and between Western Ave. Junction and connection with the St. Charles Air Line at Union Island . . . Booth RVS, Attachments.[27]

While WCL has attempted to portray CSX as manipulating BOCT to the continuing detriment of WCL in particular and Western carriers in general, the fact is that BOCT granted to WCL the route it so badly needed to effect interchange with other carriers, including trackage rights over the Altenheim Subdivision. The rights granted gave WCL

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[27] The segment between Forest Park and Blue Island is the Altenheim Subdivision. The remaining rights were not granted.

extremely effective access to BRC's Clearing Yard for Chicago interchange with numerous carriers. The rights also gave WCL direct access to IC (via 16th Street) and to Conrail and CN/GTW (via Brighton Park). Without those trackage rights, WCL would have been virtually forced to use BOCT's Barr Yard (and to pay BOCT's intermediate switching charge.) Booth RVS at 3. WCL's only other practical option would have been to obtain trackage rights over IHB from Forest Park to IHB's Blue Island Yard or to BRC's Clearing Yard. That alternative would not have been as operationally desirable for WCL because IHB's McCook Line from Forest Park to Blue Island Yard was (and remains) a very heavily used line with serious congestion problems. Id. at 3-4. With those trackage rights, WCL's interchange with owners of BRC (and others who chose to use BRC's facilities) was facilitated and WCL was able to operate at lower costs. Id. at 4.[28]

Now, after greatly assisting WCL in establishing its operations in Chicago (including helping WCL reach CSXT's arch-rival, NS) BOCT and CSX find themselves confronting a demand that BOCT's property be expropriated by its tenant.

The decisions of the Board and its predecessor teach that even where a competitive problem is caused by a transaction, the preferred remedy is trackage rights rather than the more extreme remedy of line transfers. See UP/SP at 157-63, 179 (granting trackage rights in lieu of divestiture). A fortiori, where trackage rights already exist and no

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[28] Of course BOCT receives trackage rights fees for WCL's operations, and these have generally been paid without protracted dispute. However, by denying WCL's request, BOCT's attractiveness to WCL as an intermediate switch carrier to roads other than CSXT would have risen greatly, and the intermediate switch charges would greatly have exceeded trackage rights fees.

purpose of correcting a competitive problem caused by the Transaction is presented, no line transfer should be ordered.

b. WCL Cites No Competitive Injury Associated With the Transaction Which the Forced Sale Would Remedy and Its Interest in Acquiring the Altenheim Subdivision Long Predates the Transaction.

WCL's interest in purchasing the Altenheim subdivision dates back at least as far as 1989. The parties first met in late November of that year and exchanged correspondence for some time thereafter. Booth RVS at 4-5 and Attachments. However, the value CSX and BOCT then attached to the line was too high for WCL. A January 30, 1990 letter from CSXT to WCL indicated that the parties were far apart on price. Booth RVS Attachments. A proposal of substantially more than WCL's original indication of interest was made by WCL in January 1992, but it was not accepted. Booth RVS Attachments. WCL appears not to have raised the issue again until its Responsive Application. Now, it seeks the right to purchase at a price to be set by the Board -- but presumably wishes to reserve the right to turn down the purchase if the price is too high.

Not only does WCL's interest in the line pre-date the Application, so too do the complaints which it raises seeking to establish some "need" related to the Transaction. Its complaints about dispatching by the BOCT (WC-9, Scott VS at 3) are admittedly focussed on the past and the present. Its dissatisfaction with the maximum allowable speed on the line (WC-9, McCarran VS at 9) today obviously expresses no more than an attack on the status quo. WCL's description of the operating advantages it says it could achieve on its existing line between Chicago and Fond du Lac, WI, if it could acquire BOCT's yard facilities at 48th Street (WC-9, McCarran VS at 14), has nothing to do with the Transaction.

WCL's complaints about the status quo -- even if they had any merit -- are not "competitive injury" resulting from a transaction, the sort that the Board addresses in control proceedings. WCL today can reach all the other carriers it could reach by buying the line in question. WCL as owner of the Altenheim subdivision would not reach a single additional carrier that it does not reach today by using trackage rights.

Straining in an attempt to find something that might happen in the future to complain of and to link to the Transaction, WCL offers up a litany of past actions relating to the BOCT, attempts to portray them as malicious, and then extrapolate forward -- all without finding a link to the Transaction. WC-10 at 3-4. Thus, mutually beneficial interchange agreements between CSX and major western roads relating to interchange through BOCT are portrayed as extortionate. Booth RVS at 9. CSXT's position (endorsed by the ICC and the United States Court of Appeals for the D.C. Circuit) that it is not required to treat cars delivered to BOCT as delivered to CSXT, is presented by WCL as a strategy to force other carriers to use the BOCT as an intermediate carrier. WCL's argument ignores the fact that CSXT does accept interchange from the Belt Railway at BRC's Clearing Yard today. Booth RVS at 8.

WCL complains about congestion, and difficulties it has had operating over the Altenheim subdivision. As is usually the case in crowded areas, the tenant complains of the dispatching and suggests bias in favor of the line owner. Obviously, WCL would prefer to dispatch the Altenheim subdivision and let other railroads complain of its dispatching. On discovery, WCL admitted that it never made any complaint in Court or to the Board as to the quality or impartiality of BOCT's dispatching or its track maintenance in connection with the

Altenheim subdivision. Interrogatory Response, WC-12 at 5-10. So any problems appear to have been sub-acute. WCL acknowledges (WC-10; McCarran VS at 3) that rail line congestion is a problem throughout Chicago.

c. Even If They were Relevant, WCL's Stated Plans for Improvement of the Altenheim Subdivision are Vague and Speculative.

WCL expresses some ideas as to what it might do with the Altenheim subdivision. It attempts to tempt the Board into a divestiture order by parading a list of capital expenditures, including double stack clearance, across the pages of its filing.[29] WC-10, McCarran VS at 13, 14. However, WCL has never even approached BOCT to express an interest in discussing clearance work. Reardon RVS at 6. If WCL wants the route cleared, and if WCL is truly willing to pay for that work, then there is no commercial reason why that cannot be done. (The engineering feasibility of such a project is unknown.) And, if CSX is persuaded that there is economic justification in the form of joint-line WCL-CSX doublestack traffic for CSX investment in clearances, then CSX is willing to consider sharing the cost. In any event, potential capital investment is not a justification for taking the property of A, and making A sell it to B, merely because that B might be able to do more with the property than A can do.

Finally, aside from a relatively small track upgrade proposal, WCL does not really represent to the Board that those investments would be made. On discovery, following

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[29] There appears to be no evidence of any desire of WCL to have double-stack clearance on the Altenheim Subdivision until its filing in this case. Reardon RVS at 6. Of course if there were real opportunities for double-stack intermodal service involving joint line WCL/CSX movements, CSX would welcome an opportunity to discuss an appropriately shared investment in clearance with its trackage-rights tenant.

a motion to compel, WCL has indicated that with respect to the investments in the 48th Avenue Yard to upgrade its condition and place it in expanded service, spoken of in its Responsive Application (WC-9 at 7-8), it has made no efforts toward determining an appropriate amount for investment in the Yard; it has made no efforts toward determining an appropriate schedule for making such investments; and it has no approval of any investment from its board of directors. Indeed, there is no resolution of WCL's board of directors authorizing the filing of the Responsive Application; the acquisition of the Altenheim subdivision; or any projects whatsoever to improve the physical condition of the Altenheim subdivision. Interrogatory Response, WC-14 at 8-10.

d. WCL's Responsive Application Calls in Question the Priorities for the Performance of Local Switching Industries on the Altenheim Subdivision.

The Rebuttal Verified Statement of Donald K. Reardon, President of BOCT, indicates that the present use of the Altenheim subdivision is essentially the handling of the switching movements for the eleven industries that are on the line and the movement of WCL's trains under trackage rights. Putting maintenance operations to one side, the only source of congestion and operational difficulty for the WCL movements, of which WCL complains, are the local switching operations. Reardon RVS at 3.

As that Rebuttal Verified Statement establishes, the effect of the Responsive Application on operations would be that instead of the switching work for the local industries having precedence over the trackage rights operations of WCL, the WCL operations would have precedence over the trackage rights operations of BOCT in serving the local industries.

The issue before the Board is not whether such a reversal of priorities would be consistent with the public interest if it were voluntarily proposed by the parties, though WCL has not made much of a case that it would be. The issue is, rather, whether it is necessary to condition the overall Transaction involving CSX, NS and Conrail on a forced sale which would have as its principal result a reordering of those operational priorities as between the WCL overhead movements and the services performed for the eleven local industries. To state that proposition is, we submit, to make its answer obvious.

e. WCL's Requested Condition That CSXT Merge BOCT Out of Existence or Perform Its Functions Itself is Merely a Re-hash of a Long-standing Dispute Between WCL, BOCT and CSXT over BOCT Intermediate Switching Charges.

WCL and BOCT have a long and contentious history of disputes over BOCT intermediate switching charges. In order to understand fully WCL's motivation in seeking this unprecedented condition, it is necessary to set out a short summary of that long-standing dispute.

A fuller description of this acrimonious matter is found in the opinion and award of arbitrator Sheldon Karon, dated June 10, 1996, found in Volume 3. In that award, BOCT's position was upheld completely and an award of $17,276,289.90 of damages, plus certain additional damages to be calculated, was made against WCL. Upon proceedings relating to the award in Federal District Court, Judge William Hart confirmed the arbitration award in the amount of $19,160,190.44, and remanded certain further issues to the arbitrator for the determination of additional damages. Baltimore & Ohio Chicago Terminal Railroad Co. v. Wisconsin Central Ltd., U.S.D.C., N.D. Ill., Civil Action No. 93C3519,

Memorandum Opinion and Order entered January 29, 1997, at 35-36, found in Volume 3. WCL has not paid the award and is continuing to contest it.

The background that appears from these decisions is this: After it was created in 1987, WCL entered into an agreement with BOCT and CSXT under which WCL would deliver and pick up trains at BOCT's Barr Yard. WCL agreed to pay BOCT's intermediate switching charge, except under certain circumstances which the arbitrator found did not apply. In fact, WCL paid the BOCT switch charges for over a year, at which time it stopped paying with no explanation. Efforts by BOCT to collect continued with numerous meetings between WCL and CSX management at high levels of both companies. Ultimately, when all efforts at resolution failed, and with statute of limitations issues looming, BOCT filed suit to collect. There ensued court litigation and a massive arbitration, lasting over four years. The result was a complete vindication of BOCT's position and an award of $20 million. Payment of the award has been resisted by WCL to the utmost and has not been made.

WCL's true agenda is to resolve the BOCT intermediate switch charge issue -- at least for the future. CSXT can perhaps be forgiven for believing that the other conditions sought by WCL have been contrived with the object of obtaining negotiating chips concerning the $20 million award.

Related issues are before the Board now in Docket No. 41995,[30/] brought by WCL, where it attempts to undermine the arbitration award by advancing a new legal theory

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30/ Wisconsin Central Ltd. -- Petition for Declaratory Order -- Certain Rates and Practices of The Baltimore & Ohio Chicago Terminal Railroad Company and CSX Transportation, Inc.

before the Board. It may well be that WCL hopes that it can achieve much of its goals in Docket No. 41995, here in this proceeding on an attenuated record within the context of a complex and wide-ranging Transaction.

BOCT's right to assess intermediate switching charges has been the subject of controversy before. Burlington Northern forcefully challenged BOCT and its then-parent Chessie System Railroads in the late 1970's but lost. See Burlington Northern Railroad Co. v. United States, 731 F.2d 33 (D.C. Cir. 1984) affirming I.C.C. Order, Review Board No. 1, Docket No. 37515, June 22, 1982. Today, carriers in Chicago recognize BOCT as a separate company and contract with it as such. Booth RVS at 2. While BOCT does not claim the sort of independence that BRC has, and which IHB has and will have after the Transaction, it is a switching carrier that performs switching functions and makes available facilities, and thus is entitled to compensation as such. Whatever dissatisfaction with that situation may exist, it is broadly accepted, and is fully in accord with long-established precedent. See Grand Trunk Western Railroad v. Pere Marquette Railway, 174 I.C.C. 427 (1931). The Transaction does not furnish any basis for the Board to revisit BOCT's status.

Historically, CSXT has paid BOCT charges for traffic delivered to BOCT for CSXT under various blocking agreements with Western roads. These agreements (which have varied in their details over time) have generally provided that when Western roads pre-block cars destined to CSXT via BOCT's Barr Yard, CSXT would pay the applicable BOCT intermediate switch charge. The effect of this has been to reward the blocking carriers for their efforts by freeing them from payment of any switching charges. The effect of pre-blocking is, of course, to diminish the amount of handling that is necessary in the

Chicago terminal area, to decrease congestion in that area and to expedite and facilitate movements through Chicago.

WCL attempts to portray these arm-length transactions, with such defenseless small businesses as the Burlington Northern and the Santa Fe, as if they were impositions on the Western carriers. In fact, these were mutually beneficial arrangements that were entered into voluntarily. Like WCL, each of these carriers had other options available to deliver traffic to CSXT, but by using these arrangements they avoided various costs and had the benefit of improved transit times for their common customers. Booth RVS at 9.

WC benefits from the use of BOCT facilities. The role of intermediate carriers has been discussed above in the material on the EJE/I&M Responsive Application. It need not be repeated. It should be clear that WCL benefits from the availability and use of BOCT's facilities. WCL prefers to bring a full train of cars destined to CSX in a single-crew move from its yard at Fond du Lac, WI, to BOCT's Barr Yard. There, when the train is yarded, WCL's crews go off duty, tieing up their locomotives on BOCT yard tracks. The locomotives are permitted to remain until a train for reverse movement is readied by BOCT Barr Yard crews. At that time, a WCL crew (the same or different depending on hours of service requirements) goes on duty at Barr Yard and departs. To accomplish this without the availability and use of BOCT's facilities, WCL would have to exercise its trackage rights over the BOCT's Altenheim subdivision and continue south on the BOCT (or some other carrier's line) to the BRC's Clearing Yard where it would incur charges from the BRC.

WCL has made a boasting point of the fact that it has no yard in Chicago. Booth RVS, Attachments -- (letter of July 25, 1987), presumably bringing it cost savings. If WCL did not benefit from using BOCT's Barr Yard, it could -- and would -- go elsewhere. The making of yard facilities available to other rail carrier customers is a function of intermediate switching carriers. It demonstrates, as the court and agency decisions and arbitrator's decision referred to above confirm, that BOCT is an intermediate switching carrier, furnishing WCL interchange facilities that it needs and otherwise would have to obtain elsewhere. There is no reason for the Board, in this proceeding or otherwise, to disturb the commercial relations BOCT has established between itself and its carrier customers.

f. WCL's Proposed Condition That IHB Be Dispatched By an Independent Operator is Unnecessary and Unrelated to the Transaction.

Applicants have demonstrated that IHB will continue to operate as a separate company, separately managed, with responsibilities to all of its shareholders. Control of IHB will be spread among three owners. The current minority shareholder, CP/Soo, will no longer face a unitary majority stockholder, the independent Conrail, but a Conrail which is controlled by two mutual rivals, CSX and NS. The largest economic interest in the IHB will be that of CP/Soo. An open agreement between CSX and NS will govern how Conrail will vote as stockholder on certain issues, but the fact remains that control of the IHB will be diluted, not concentrated, by the Transaction.

This demonstration alone suffices to address WCL's alleged concerns, but WCL's failure to establish a nexus between the relief sought and the Transaction bears some

brief additional comment.[31] Its complaint (WC-10 at 4) that the CSX Operating Plan describes only the uses CSX will make of the IHB is beside the point. Naturally, the CSX Operating Plan discusses CSX operations. To attribute an intent on CSX's part to dominate the IHB's operations or to assert that CSX will attempt to exclude other carriers merely from the fact that the CSX Operating Plan discusses CSX operations shows how farfetched the condition is.

It must be remembered -- as was established in discovery from other carriers having ties to WCL and making similar charges, through the same counsel, about CSX's intentions -- that one effect of the operating plans of CSX will be to diminish congestion in the Chicago terminal areas by encouraging pre-blocking and run-through operations. This will redound to the interest of all carriers and will free-up yard capacity at Barr Yard which can be used to serve the needs of local industries and of the smaller railroads, which may not be in a position to pre-block to the same extent as the major carriers. Orrison RVS at 31.

Just as there is no basis for requiring divestiture of Conrail's 51% stock interest in IHB, there is no basis for separating the power to govern IHB, including the power to select its management and its dispatchers, from its stock ownership. Ownership of an enterprise in our system generally carries with it the power to manage. The visions of abuse of that power by WCL, as by its apparent associates, EJE and I&M, are rank speculation; that speculation ignores the realities of the divided ownership of IHB (and of BRC) and ignores the beneficial effects of CSX's plans for Chicago operations.

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[31] This also addresses the concerns of Illinois DOT. IDOT-2 at 2.

C. Shortline Railroads.

1. Ann Arbor Railroad.

In its Responsive Application and Request for Conditions in Sub-No. 78, Ann Arbor Acquisition Corporation d/b/a Ann Arbor Railroad ("AA") advances an argument for the imposition of conditions to keep AA viable and to avoid the loss of essential services. AA-5. AA's argument is based upon the erroneous assumption that AA will lose approximately $3,350,000 in revenues as a result of the transaction. Additionally, AA claims that the Toledo-Chicago rail corridor is a 2-to-1 corridor, and asks the Board to impose conditions to resolve the alleged loss of competition on that corridor.

The conditions AA requests, if imposed, would result in a windfall to AA. AA will experience but a fraction of the diversions and revenue loss it contends it will lose. At most, AA may experience some reduced revenue, but that circumstance alone cannot support the imposition of conditions. As to the contention that the Toledo to Chicago is a "2-to-1" corridor, Applicants demonstrate conclusively that this is not the case.

AA asks the Board to require, as a condition of approval of the transaction, (1) that NS grant AA limited trackage rights[32] between Toledo, OH and Chicago, IL via Elkhart, IN; and (2) that AA be permitted to interchange traffic with CP at Ann Arbor, MI.

AA's contention that the Transaction will result in bankruptcy for AA is without merit, and essential services are not threatened by the transaction. AA's requests should therefore be denied.

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[32] AA uses the term "limited trackage rights" to refer to overhead trackage rights with the right to interchange with all rail carriers along the route. AA-5 at 5.

AA projects that it will lose approximately $500,000 in annual revenues from its participation in a three-carrier movement of sand originating at Yuma, MI and destined to Cleveland, OH because the traffic could be diverted post-transaction to TSBY-CSX.[33] While such a diversion may be possible post-Transaction, it by no means is certain. In his rebuttal verified statement, Mr. John Williams, who prepared NS's traffic study, explains why he believes this traffic will not be diverted. Williams RVS at 70-71.

AA also projects it will lose approximately $1,750,000 in annual revenue from its participation in automotive traffic. AA asserts that it will lose revenue for switching services performed in Toledo for NS and Conrail and for traffic originated by NS in Milan, Michigan and switched by NS to AA for movement to Toledo. Mr. Williams, however, believes that none of AA's $1,750,000 in automotive traffic revenue will be lost. Williams RVS at 73-75. AA has established its position in the marketplace based upon the reduced circuity its lines provide compared with those of NS, CSX or Conrail; its superior switching location adjacent to Chrysler's automotive plant in Toledo; and demonstrated shipper preference for its winning price/service bids for traffic. Id. at 71-73. The Transaction has no effect on any of these factors. Accordingly, AA's claimed revenue losses of $1,750,000 are not likely to occur, and even if they did they could not properly be said to result from the Transaction.

AA also argues that it will lose $300,000 in annual trackage rights fees from reduced CN use of AA between Diann, Michigan and Toledo, based on the mistaken belief that CN will have new trackage rights on the Conrail Detroit-Toledo route allocated to NS.

33/ TSBY is the Tuscola & Saginaw Bay Railway.

CN currently has rights for one train a day on the Conrail Detroit-Toledo route. CN has not asked for and, post-Transaction, will not receive expanded rights on this route. Thus if CN reroutes any traffic away from AA, that action cannot be said to result from the Transaction. Meador RVS at 3-4.

AA further contends that it will lose $800,000 in annual trackage rights fees from reduced NS use of AA between Milan and Toledo because NS will have a more direct route from Toledo to Chicago. While NS agrees that it may divert some traffic from AA's lines, this will be the result of NS acquiring the use of a more direct and cost-effective route. This will provide shippers with better, more economical rail service. Notably, however, the NS operating plan contemplates reduced use, but not elimination of its rights on the AA. Meador RVS at 5-6.

Even if AA were to lose the full $800,000 in annual trackage fees from reduced NS use of AA between Milan and Toledo, such a diversion of trackage rights revenue -- which will result in better, more economical rail service for shippers -- would not impair AA's financial viability. Williams RVS at 69. Nevertheless, diversions from a carrier not resulting in the loss of essential services is not a harm that calls for the imposition of conditions, as the Board and its predecessor have clearly held.

AA also points to a $412,000 investment it made to upgrade the Milan to Toledo line to accommodate the NS operations. As AA's own traffic moves over this route,[34] the entire investment cannot be attributed to NS trackage rights. Moreover, AA's operations decision to invest $412,000 in the Milan to Toledo line was a unilateral decision

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[34] Interrogatory Response, AA-6 at 6.

that it made without any guarantee by NS that it would continue to use this line at its current level.

In addition to trackage rights between Toledo and Chicago, AA asks the Board to grant a condition permitting CP to interchange traffic with AA at Ann Arbor in order to enable AA to further recoup its projected revenue losses. Since most of AA's claimed losses will not occur, and the ones that may will not threaten essential services, the requested condition is not justified. Moreover, as discussed in Mr. Meador's rebuttal verified statement, the requested condition is not workable. CP has negotiated a haulage agreement with NS over the Conrail line (allocated to NS) from Detroit to Chicago via Ann Arbor. Since this agreement is for overhead rights only, interchange with AA is not allowed. CP has indicated it intends to use these rights for time-sensitive traffic, which is not conducive to intermediate interchanges. Meador RVS at 10.

Finally, AA's claim that the corridor between Toledo and Chicago will become a "2-to-1 corridor" is false. CSX also operates between Toledo and Chicago. AA asserts that since NS will operate both Conrail lines connecting with AA, AA customers will lose competitive options to the Chicago gateway because all other rail routes are circuitous. However, as Mr. Meador explains, the CSX route is not circuitous. It is only 15 miles longer than the Conrail route from Toledo to Chicago. In addition, most of the CSX route is former B&O line, on which CSX is spending $200 million or more in capital to compete with the Conrail route. Meador RVS at 2-3.

2. R.J. Corman/Western Ohio Line.

R.J. Corman Railroad/Western Ohio Line ("RJCW") filed a responsive application in Sub-No. 63 requesting the Board to require that it be given "acquisition of ownership or trackage rights on Conrail's line of railroad between approximately milepost 54.4 and approximately milepost 52.1 in Lima, OH ...." RJC-6 at 1. That request should be denied. RJCW has not shown any competitive harm as a result of the Transaction; indeed, RJCW's competitive position will be unchanged.

RJCW is a Class III carrier that operates between Glenmore and Lima, OH and between Lima and the Indiana/Ohio border. RJC-6 at 3 and Ex. 1. RJCW obtained the right to operate over the Glenmore-Lima line on May 10, 1996, only a year and a half ago. Interrogatory Response, RJCW-7 at 9. That line's only connection at Lima is with Conrail. RJC-6 at 6. Traffic moving to or from the Glenmore-Lima line is switched by Conrail to CSX and NS. Id. That switching is done pursuant to Conrail tariff CR 8001. Interrogatory Response, RJCW-7 at 12. In order to reach CSX and NS, RJCW traffic must move over the two miles of line (milepost 54.4 to milepost 52.1) that are the subject of RJCW's responsive application. RJC-6 at 6.

Those two miles of Conrail line will be operated by CSX following consummation of the Transaction. See CSX/NS-18, Vol. 1 at 36; see also RJC-6 at 6. RJCW will be in the same competitive position before and after the Transaction. CSX will simply step into Conrail's shoes at Lima; RJCW will still have one connection there -- CSX instead of Conrail -- and will be able to move traffic to interchange with NS there through a switch movement, just as it does today.

RJCW contends it will be harmed by the Transaction because CSX will not have the same economic indifference as Conrail and will not offer a comparable switch charge for RJCW traffic to reach NS. RJC-6 at 6. It also contends CSX "will be free to either raise line-haul rates, diminish the level and frequency of interchange with RJCW or do both" if it controls the switch movement. Id.[35]

Those concerns are speculative and unfounded. Applicants have committed to maintaining existing Conrail switching charges at all points, such as Lima, where they will step into Conrail's shoes. See Section XI.E. RJCW has offered no basis upon which to conclude that CSX will increase its switch rate at some unspecified future date, nor has it shown that any potential increase would be unreasonable.[36]

RJCW also has no basis for contending that CSX's economic incentives with respect to the Lima switch charge will be different from Conrail's. The presumption under Board precedent and economic theory is quite to the contrary. See Section V.B.; see also Kalt RVS at 54-56.

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[35] This argument is reiterated in the verified statement of RJCW's President, M.W. Grubb, and the verified statement of Michael M. Fry, General Manager and President of Mercer Landmark, Inc., a RJCW shipper, both of which are attached to RJC-6.

[36] Certain statements in the responsive application appeared to suggest that RJCW might be making an essential services claim. See RJC-6 at 8. However, RJCW's discovery responses make clear that there is no essential services claim. RJCW admits that none of its shippers will lose rail service if the Primary Application is approved without the conditions sought by RJCW. Interrogatory Response, RJCW-7 at 6. In any event, RJCW's customers over the Glenmore-Lima line do have an alternate mode of transportation -- trucks. See, e.g., RJC-6, Fry VS at 2. In fact, no rail service was provided over the Glenmore-Lima line from November 1993 until RJCW received operating rights over it in May 1996. See Sub-Operating Agreement between RJCW and Spencerville-Elgin Railroad, Inc., RJC-00-P 000001 (Vol. 3).

In any event, it is clear that RJCW's request to acquire the Lima line is not related to the Transaction. RJCW sought to acquire the same two miles of line from Conrail before the Application was filed.[37] That prior acquisition effort demonstrates RJCW is pursuing preexisting commercial interests here, not seeking relief from any effect of the Transaction. Its request must accordingly be denied.

3. Elk River Railroad.

The Elk River Railroad, Inc. asserts that it is in the process of acquiring the necessary right of way to construct a 30-mile extension of its lines, to a connection with a Conrail line at Falling Rock, 10 miles north of Charleston, WV. ELKR-2 at 2. This project has been in progress for over five years. Eisenach RVS at 8. Elk River says that, prior to the announcement of the transaction proposal, it was discussing with Conrail the potential purchase by Elk River of Conrail trackage from Falling Rock, WV to Charleston, WV, which NS will operate and which is currently in need of substantial rehabilitation. Elk River asks the Board to require NS to negotiate in good faith for the sale of the Falling Rock-to-Charleston line and for reasonable interchange arrangements with NS and CSX for traffic moving to or from points beyond that trackage, all allegedly in accordance with Elk River's pre-application discussions with Conrail.

The condition Elk River seeks has nothing to do with the Transaction and therefore should not be granted as a condition to approval of the Application. Id. If the Transaction is approved, NS will simply step into the shoes of Conrail.

37/ See Interrogatory Response, RJCW-7 at 5. Those negotiations were put on hold after Conrail agreed to be acquired. Id.

NS is willing to work with Elk River to establish an interchange at Falling Rock or another agreed-to location if Elk River completes the construction of its proposed line extension. NS is also willing to work with Elk River to determine the best mix of ownership and rehabilitation responsibility for the line between Falling Rock and Charleston. Eisenach RVS at 8-9. These matters will depend on a variety of considerations, including the potential profitability to NS of the traffic Elk River proposes to haul south, and the feasibility of restoring the out of service track to reach coal reserves in the area, which is the reason Conrail has not abandoned the line between Charleston and Falling Rock already. However, there is no basis whatsoever for the Board to become involved in those matters in this proceeding.

Elk River also supports, but does not discuss, the request made by the "West Virginia Association for Economic Development" to grant CSX shared use of the West Virginia Secondary to permit Elk River a southern outlet to CSX, currently 57 miles away, should Elk River acquire the Conrail line in question to Charleston, WV. Elk River will in no way be harmed by NS's operation of the West Virginia Secondary; however, since Elk River already connects with CSX at Gilmer and Burnesville Jct., WV, those connections are not threatened by the Transaction. There is nothing about the proposed transaction to justify NS being ordered to grant Elk River an additional outlet to CSX. Eisenach RVS at 7-8. Therefore, Elk River's requested conditions should not be granted.

4. Gateway Western Railway and Gateway Eastern Railway.

Gateway Western Railway and Gateway Eastern Railway filed comments (GWWR-3) relating to the assignability of two trackage rights agreements. As Applicants demonstrate in Section VI, 49 U.S.C. § 11321(a) overrides any anti-assignment clauses that would frustrate the use of Conrail's rights and franchises as part of a transaction authorized by the Board. The Gateway railroads' requests must therefore be denied.

5. Housatonic Railroad.

Housatonic Railroad ("HRRC") is a Class III carrier that operates approximately 161.3 miles of rail lines; its lines run between Pittsfield, MA and Danbury, CT and from Derby, CT through Danbury to Beacon, NY. HRRC-10 at 4. HRRC acknowledges that "[t]he Board has traditionally exercised restraint in imposing conditions." Id. at 19. Nonetheless, HRRC seeks three conditions here.

First, HRRC supports approval of the New England Central Railroad ("NECR") request for trackage rights between Palmer, MA and Albany, NY for interchange with connecting carriers.[38] If those trackage rights are not granted, HRRC asks the Board to require CSX to enter into an arrangement pursuant to which CSX would haul HRRC traffic (a) from Pittsfield, MA to the Albany area for interchange with connecting carriers, including NS, CP Rail and Springfield Terminal Railroad, and (b) from Pittsfield to Palmer, MA for interchange at Palmer and intermediate points. HRRC-10 at 21-22.

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[38] NECR and HRRC have reached an agreement in principle under which NECR would haul HRRC traffic over these lines. HRRC-10 at 22 n.21.

HRRC currently interchanges with only one carrier -- Conrail -- at one location -- Pittsfield. HRRC-10 at 6, 10-11. The only change effected by the Transaction will be that HRRC will interchange with CSX rather than Conrail at Pittsfield. Id. HRRC's position thus will be unchanged. HRRC seeks conditions because it is afraid of NS transloading and competing with HRRC. See HRRC-10 at 12-14.

HRRC's request for access to Albany through haulage -- whether by CSX or under the requested NECR trackage rights -- is plainly designed to enhance rather than preserve HRRC's competitive position. Through such haulage, HRRC would greatly expand the number of carriers with which it connects, as well as the locations at which such connections occur. If that condition were granted, HRRC would go from having one connection at Pittsfield to having four in the Albany area (CSX, NS, CP Rail and Springfield Terminal Railroad), as well as two at Pittsfield (CSX and NECR), three at Springfield (CSX, Springfield Terminal and Connecticut Southern) and two at Palmer (CSX and NECR). See HRRC-10 at 22; Interrogatory Response, HRRC-11 at 12, 13.[39/]

As demonstrated in Section XIII.C.9, NECR has not established that it is entitled to trackage rights from Palmer to Albany. Nor has HRRC established that the Board should impose the alternative condition requiring CSX to provide HRRC haulage.

There is no substance to HRRC's claim that the Transaction will have anticompetitive effects on shippers and shortlines in New England. HRRC contends it needs haulage to Albany because its shippers will not benefit from the increased rail competition

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[39/] NECR would provide a connection for HRRC at Pittsfield only if the trackage rights it seeks were to be granted.

that will be created at the North Jersey Shared Assets Area. HRRC-10 at 10-14, 23-25.[40] However, as explained in Section VIII, the fact that new competition will be introduced at other locations does not constitute competitive harm warranting the imposition of conditions. In addition, there are sound policy reasons for refusing to grant conditions in these circumstances. See Kalt RVS at 12.[41]

Nor is there any merit to HRRC's claim that such haulage is necessary to prevent a loss of essential services. See HRRC-10 at 33. HRRC admits that none of its shippers will lose service as a result of the proposed transaction unless "HRRC goes out of business in which case all shippers will lose rail service." Interrogatory Response, HRRC-11 at 7. HRRC's essential services claims are unfounded and entirely speculative.[42]

The second condition HRRC seeks is that the Board require NS to charge CSX a "reasonable" switching charge for switching cars between Cleveland, OH and Gypsum, OH for existing limestone traffic originating on HRRC that is interchanged with CSX and

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[40] Exhibit 8 to HRRC-10 contains the verified statements of five shippers raising this same claim.

[41] HRRC also fails to recognize the extent to which shippers outside Shared Assets Areas will also benefit from their existence. See Kalt RVS at 13-17.

[42] HRRC alleges that even the loss of a small amount of its traffic "has the potential of jeopardizing [its] financial health." HRRC-10 at 33. It suggests that if it lost limestone traffic from Specialty Minerals, Inc., its financial viability might be threatened. Id. at 16-17. As described below, however, that limestone traffic is unlikely to be affected by this Transaction. HRRC has failed to offer any evidence that it would lose other business.

In response to discovery, HRRC claimed that it will lose a portion of its business from nine customers as a result of the merger, but stated that it cannot determine specific volumes of traffic loss "without a more detailed operating plan than Applicants have submitted and without projected pricing and other policies of Applicants which have not been disclosed." Interrogatory Response, HRRC-11 at 8-9. That response is not sufficient to demonstrate any potential traffic loss by HRRC.

terminates at Gypsum, OH. HRRC does not state what it would consider to be a "reasonable" switching charge for such movements, nor does it suggest any standard or methodology for determining one. Id. at 27-28. Nor does HRRC explain why the existing charge is inappropriate or why private negotiation of such a charge -- as favored by Board precedent and the national transportation policy -- should not be preferable. See Section XI.F.2.

HRRC claims this condition is necessary because the Specialty Minerals limestone traffic will go from being a two carrier movement (HRRC-CRC) to a three carrier movement (HRRC-CSX-NS). See HRRC-10 at 16-17, 27-28; HRRC-10, Exhibit 6.[43] HRRC contends this will cause service to deteriorate and rates to increase. HRRC-10 at 15-16. However, the change from a two-carrier to three-carrier movement does not warrant Board prescription of a switch charge. That change involves no reduction in competition because the movement will have the same number of rail options at origin and destination as it did prior to the Transaction.

In any event, there is no reason to assume HRRC shippers will be harmed by having a CSX-NS movement replace one on Conrail; CSX and NS have worked effectively together in the past in providing efficient joint-line service, and are committed to doing so in the future. See Orrison RVS at 120. See Section XVI.[44] Moreover, if HRRC's shipper

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[43] The traffic originates in Canaan, CT, where Specialty Minerals owns a mine and manufacturing facility, and terminates at the U.S. Gypsum Company at Gypsum, OH. HRRC-10, Exhibit 6. Post-Transaction, the traffic would move from HRRC to CSX at Pittsfield, MA to NS at Cleveland. Id.

[44] HRRC also asserts that its essential services claim supports the switch charge (continued...)

has a contract with Conrail, the contract and its terms will remain in place even though the movement becomes a joint-line over CSX and NS. See Section IX.A.

The third condition HRRC requests is that the Board require CSX to maintain through class and commodity rates to HRRC Connecticut and Western Massachusetts stations for plastic, lumber and other forest products at levels no higher than CSX maintains to former Conrail stations at those points. HRRC-10 at 29-30. HRRC also asks the Board to require CSX to maintain the same revenue divisions with HRRC as it currently has with Conrail. Id.

HRRC has failed to establish that any transaction-related harm would result if this condition is not imposed. HRRC claims that "CSX will in the future ... be able to harm the competitive position of HRRC and HRRC's lumber customers and to divert lumber and certain other commodity traffic from HRRC stations to CSX stations by maintaining lower through rates to CSX stations than are maintained to HRRC stations." HRRC-10 at 30. It also claims that Conrail generally equalized rates between HRRC stations and Conrail stations. Id.

HRRC's effort to lock in a special protected position for plastic and forest product movements on its lines must be rejected. Imposing conditions of this sort prevents railroads from adapting to change and implementing beneficial service innovations. Kalt RVS at 56. If rail carriers are prevented by regulatory order from adapting as markets change, inefficiencies are bound to result. Id.

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[44](...continued)
condition. See HRRC-10 at 33-34. As demonstrated above, however, there is no evidence that any essential rail service will be lost.

HRRC's ancillary request that its existing divisions with Conrail be frozen should also be denied. CSX will be assuming Conrail's existing agreements with HRRC, including its agreements regarding divisions, and will honor such existing contracts for the remainder of their term. See HRRC-10 at 32 (quoting CSX discovery response). Upon expiration of those agreements, CSX and HRRC should be allowed to negotiate new ones based on commercial conditions at that time. If future negotiations are not successful, there are statutory remedies. See 49 U.S.C. § 10705. There is no need for the Board to anticipate such issues now.[45]

6. Indiana & Ohio Railway.

Indiana & Ohio Railway ("IORY"), a class III railroad that provides service over 475 miles of track, filed a responsive application in Sub-No. 77 seeking trackage rights over eight track segments that would add an additional 339 miles. IORY-4 at 13-14. Specifically, IORY seeks the following:

1. overhead trackage rights between East Norwood, OH and Washington Court House, OH over the rail line currently owned by CSX;[46]

2. local trackage rights between Monroe, OH and Middletown, OH over the rail line currently owned by CRC (to be operated by NS);[47]

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[45] While HRRC invokes its essential services argument to support this condition as well (HRRC-10 at 33-34), as shown above that argument has no merit.

[46] IORY defines those "overhead" rights as including "the right to connect at Midland City with IORY's Greenfield branch." IORY-4 at 2 n.3.

[47] IORY defines "local" trackage rights as including (1) the right to operate trains over the lines described; (2) the right to interchange with all carriers (including shortlines) at all

(continued...)

3. local trackage rights between Sidney, OH and Quincy, OH over the rail line currently owned by CRC (to be operated by CSX);

4. local trackage rights between Sharonville, OH and Columbus, OH over the rail line currently owned by CRC (to be operated by NS);

5. local trackage rights between Quincy, OH and Marion, OH over the rail line currently owned by CRC (to be operated by CSX);

6. local trackage rights between Lima, OH and Fort Wayne, IN over the rail line currently owned by CRC (to be operated by CSX);

7. local trackage rights over CRC's Erie track in Lima, OH (to be operated by CSX); and

8. local trackage rights between Quincy, OH and Marysville, OH over the rail line currently owned by CRC (to be operated by CSX).

IORY-4 at 2-3.[48]

IORY claims the Board should grant these extensive trackage rights to ameliorate various alleged harms. However, IORY has not established any harm resulting from the Transaction that could justify such relief. Moreover, some of the requested rights would create serious operating problems for Applicants.

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[47](...continued)
junctions on the lines described; and (3) the right to serve all shippers, sidings and team tracks located on the lines described. IORY-4 at 3-4.

[48] In comments dated October 17, 1997, the City of Cincinnati opposed an anticipated IORY request for trackage rights over the NS Riverfront Running Track that had been listed in IORY's August 21 notice of its anticipated responsive application. However, IORY did not seek those particular rights in its responsive application, and the City's comments are therefore moot.

IORY and three affiliates are operated as the I&O Rail System.[49] That system has grown dramatically in the last year. When the I&O Rail System was acquired by RailTex in June 1996, it included only 230 miles of line. IORY-4, Burkart VS at 3. By October 1997, the I&O Rail System had more than doubled, to its current 475 miles. Id. at 2. Much of this expansion came in February 1997, when IORY purchased a portion of the former Detroit, Toledo & Ironton Railroad ("DT&I") lines from CN. Id. at 3.

IORY seeks to use this transaction as an opportunity to link the unconnected shortline carriers that it acquired in June 1996; to expand its reach still further; and to enhance its competitive position. It has no valid basis for doing so, and the Board should deny the conditions it requests.

a. IORY's Speculative Claims Do Not Justify Granting Trackage Rights over CSX's Line from East Norwood to Washington Court House.

IORY requests that the Board grant it overhead trackage rights on CSX's line between East Norwood and Washington Court House, with the right to connect at Midland City with IORY's Greenfield branch. IORY-4 at 2 & n.3. With those rights, IORY could connect its previously isolated Greenfield branch to other IORY operations for the first time.

IORY states it will use these rights as "an alternate route to CRC's highly congested Cincinnati-Springfield line over which IORY operates today pursuant to trackage rights." Id. at 4. However, it is clear that what IORY is seeking to remedy is a preexisting condition. IORY currently has trackage rights over the Springfield-Cincinnati line, and all

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[49] IORY's affiliates are Indiana and Ohio Railroad, Inc. ("INOH"), Indiana & Ohio Central Railroad, Inc. ("IOCR") and Cincinnati Terminal Railway Company ("CTER"). IORY-4, Burkart VS at 2.

that the Transaction will change will be to make NS its landlord rather than Conrail. See Section IX.A.

IORY nonetheless contends two harms will result from the Transaction that allegedly justify this condition. First, it asserts that the Transaction will exacerbate current delays on Conrail's Cincinnati-Springfield line, "jeopardizing [IORY's] ability to retain its time-sensitive traffic." Id. at 5; IORY-4, Burkart VS at 4. Second, it claims that CSX and NS will "have a strong incentive to delay IORY schedules, since they will be the beneficiaries of a shift of this traffic from IORY." IORY-4, Burkart VS at 4. Neither claim has merit.

To begin with, IORY overstates the risk to its "time-sensitive traffic." There are multiple strong incentives -- none of which IORY disclosed to the Board -- that should keep such traffic moving over IORY's lines.[50/]

[50/] [[[

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Moreover, the "time sensitive" traffic referred to by IORY is predominantly NS/GTW traffic handled in accordance with an IORY/GTW haulage arrangement. Contrary to IORY's assertion that NS will have an incentive to disadvantage IORY's traffic (IORY-4 at 10 & Burkart VS at 4-5), [[[

]]] As NS participates in this traffic south of Cincinnati, NS actually has a greater incentive to provide it with timely handling than does IORY. Moon RVS at 14.

IORY's claims regarding existing and potential delays also are unfounded. IORY contends the Transaction will cause substantial delays on the Cincinnati-Springfield line because NS will add 7.2 trains to a line that is already subject to delays. IORY-4 at 5. However, IORY and its predecessors GTW and DTI have successfully employed these trackage rights since Conrail was formed in 1976. NS is also a trackage rights tenant on the present Conrail Cincinnati Line. The Springfield-Cincinnati portion of Conrail's Cincinnati Line will accommodate IORY's movements in the future in the same manner as today. The additional trains projected by NS (IORY-4 at 5) equate to one train every 3.5 hours. The Cincinnati Line is equipped with sufficient sidings and/or second main track to handle this increase. Moon RVS at 14.

Today, NS trains as well as those of Conrail and IORY experience southbound congestion into Cincinnati and into CSX's Queensgate Yard. IORY-4 at 5 & Burkart VS at 4-5. That congestion will not change as a result of NS acquiring Conrail's line, nor will the creation of an "alternative route" eliminate it. The reason for the congestion is the area's geography. Cincinnati is a city of hills. All north-south railroads, including both the CSX and Conrail lines to Columbus, operate through an "hour glass" between East Norwood/NA Tower/Winton Place to the north and RH Tower/Hopple Street to the south, a distance of approximately 3.5 miles.

Conrail, whose line is the only one in the area affected by the Transaction, has no ownership south of NA Tower. CSX's East Norwood line and Conrail's Cincinnati Line meet at NA Tower -- the north end of the "hour glass" -- and southbound trains from either

are subject to the same potential for delays.[51] Entrance to the area of congestion, which affects the landlord as well as the tenant carriers, is owned by CSX. However, CSX's Operating Plan anticipates that trains in this area will experience less delay following the Transaction, due to the future availability of routing alternatives that do not include Cincinnati. Moon RVS at 15. Indeed, through reroutings and new blockings that will be made possible by the Transaction, CSX projects that it will handle approximately 400 fewer cars per day at Queensgate Yard post-Transaction. CSX/NS-20, Vol. 3A at 209.

IORY also cites delays accessing Queensgate Yard in Cincinnati -- which is a CSX yard, not a Conrail facility. IORY-4 at 5; Burkart VS at 4. Any alleged problems at Queensgate Yard are antecedent and unrelated to the control and operation of Conrail pursuant to the Transaction. Moreover, IORY's claims of delays there are highly misleading. The basis for them is a survey conducted during September 1997. IORY-4 at 5; IORY-4, Burkart VS at 4. However, September 1997 was not representative because CSX's Queensgate Yard control system was disabled in August 1997 by a lightening strike during an electrical storm. Orrison RVS at 44-45. All traffic using the yard -- not just IORY's -- experienced uncharacteristic delays for six to eight weeks while a new control system was installed and validated. See id. at 45.[52]

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[51] See also CSX/NS-20, Vol. 3A, Orrison VS at 20-21 & Fig. JWO-5 (describing and depicting "Cincinnati Hourglass" in pre-Transaction CSX system).

[52] Moreover, IORY itself was experiencing equipment and crew shortages in September 1997, as well as upgrading a major portion of its line, and sustained major delays in reaching Cincinnati as a result. Orrison RVS at 44. IORY's own delays caused its trains to reach Queensgate Yard off schedule and outside the normal window for making connections there with CSX. Id. As explained below, when such connections are missed, an additional CSX train must be run or the traffic must be held in the yard for the next day's connection.

An analysis of November 1997 train delays provides a more recent and more representative picture. That analysis shows that IORY experienced only minimal delays due to problems in accepting its traffic on arrival at Queensgate Yard. See id. Moreover, as explained below CSX has strong incentives not to delay IORY's trains. Id. IORY also fails to take any account of the fact that one of the major objectives of the CSX Operating Plan is to reduce congestion at Cincinnati. See CSX/NS-20, Vol. 3A at 208-09; Orrison VS at 20-22 & Fig. JWO-6.

Moreover, with respect to trains it operates in conjunction with CSX, IORY itself has been a major source of delays over Conrail's Springfield-Cincinnati line. As described above, IORY doubled its size between June 1996 and October 1997. IORY began using the Springfield-Cincinnati line in February 1997, when it began operating over the former DT&I lines. Interrogatory Response, IORY-6 at 10-12. IORY has had difficulty integrating the newly-acquired lines into its system. Orrison RVS at 42, 44. Its problems have included equipment and crew shortages, which in turn have caused delays in its operations over the Conrail line. See id. Indeed, at the request of automotive customers CSX moved empty auto racks and took other actions at its own expense in order to assist IORY as it struggled to absorb the DT&I lines. Id. at 42.

In any event, the alternate CSX route over which IORY seeks traffic rights would not eliminate delays for IORY traffic moving to or from Cincinnati. That route -- via Washington Court House -- is longer, more circuitous and has a lower track speed than

Conrail's Springfield-Cincinnati line. See id. at 45-46.[53] Using it would increase rather than decrease IORY's transit time. Id. The additional time consumed in using this route -- approximately 4 hours -- would be unacceptable to automotive customers, IORY's principal focus of concern.[54]

IORY's argument that NS and CSX have incentives to delay time-sensitive IORY traffic so it will be diverted to their lines (IORY-4, Burkart VS at 4) is completely unfounded. That claim not only is speculative but also ignores the fact that IORY's use of the Springfield-Cincinnati line is governed by a trackage rights agreement that NS will be assuming as part of the Transaction. See Section IX.A. To the extent IORY might have any concerns in the future regarding dispatching of its trains on the Springfield-Cincinnati line, it can raise them with NS and address them in the context of the trackage rights agreement. No Board action is required.

Nor does CSX have any incentive to delay IORY's trains at Queensgate Yard. If IORY trains are late getting into Queensgate Yard, connections with CSX's scheduled departures may be missed. CSX then must either run additional trains, at additional expense, or hold the IORY cars in the yard until the next scheduled train to the destination, tieing up track space and reducing the yard's operating flexibility. In short, it is very much in CSX's

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[53] Due to track conditions, the track speed on IORY's line from Springfield to Washington Court House is 25 mph. Orrison RVS at 45-46. While the track speed on CSX's line from Washington Court House to Midland City is 40 mph, that line includes a number of segments on which there are 10, 15, or 25 mph restrictions. Id.

[54] The line is also physically unsuitable for automotive traffic, in that there are no sidings between Washington Court House and Cincinnati that can accommodate length of IORY's multilevel automotive trains. Orrison RVS at 44-45.

own interest to bring IORY's trains into Queensgate Yard on a timely basis, not to delay them.

Granting IORY trackage rights over the East Norwood-Washington Court House line would create operating problems for CSX. Contrary to IORY's claims, the track would need to be upgraded to carry the multilevel trains IORY seeks to run over the lines. See Orrison RVS at 45-46.

Finally, granting IORY these unnecessary trackage rights would clearly give it a windfall. IORY's Greenfield branch is a former CSX line that in 1988 was purchased from CSX by the City of Greenfield and leased by the City to IORY's affiliate, IOCR.[55/] That transaction necessarily contemplated that all traffic from the branch would be interchanged with CSX at Midland City, where it connects with the CSX Line between Washington Court House and Cincinnati. CSX thus retained the revenues associated with moving the branch's traffic beyond Midland City. Giving IORY(IOCR) the opportunity to deprive CSX of those revenues by obtaining trackage rights from Midland City to Cincinnati (East Norwood) and Washington Court House would be precisely the sort of "windfall" that the Board's conditioning power should not be used to bestow. See, e.g., BN/Frisco at 951-52 & n.101 ("we do not favor conditions which result in a windfall to railroads").[56/]

[55/] See Indiana & Ohio Central Railroad, Inc. -- Modified Rail Certificate, ICC Finance Docket No. 31319 (served Nov. 18, 1988); CSX Transportation, Inc. -- Abandonment in Clinton and Ross Counties, OH, ICC Docket No. AB-55 (Sub-No. 243) (served May 31, 1988; corrected June 24, 1988). As those decisions make clear, that was a unified transaction in which IORY's lease of the line was integral to the City's purchase of it.

[56/] While that windfall is somewhat indirect in the context of a lease, it is no less real. If ownership of the branch provided access to carriers other than CSX, IORY presumably (continued...)

b. IORY's Claims Regarding Delays Cannot Support Trackage Rights Between Monroe and Middletown.

IORY seeks local access trackage rights between Middletown and Monroe, OH over Conrail's branch line, based upon a claim that the Transaction will further delay traffic from Cincinnati to IORY's Mason to Monroe line. IORY-4 at 6. This line junctions the Springfield-Cincinnati main line at Middletown. IORY alleges that increased traffic over the Conrail main line will further exacerbate the delivery delays to Reed Yard. IORY-4, Burkart VS at 6. IORY contends that the requested condition is necessary to reduce current transit times from Cincinnati to Reed Yard by 4 to 5 days. IORY-4 at 6. This request should be denied.

After the transaction, NS will simply step into the shoes of Conrail. There will be no increase in traffic on the Middletown to Monroe line, and IORY alleges none. Curiously, IORY alleges traffic increases on the Cincinnati to Springfield line to support its request for trackage rights on the Middletown to Monroe line. See IORY-4, Burkart VS at 6. Simply put, IORY will not suffer any competitive harm. IORY's requested condition is not only an attempt to change a preexisting condition that obviously displeases IORY, but also an attempt to gain access to AK Steel, an industry IORY does not serve today. Moon RVS at 16-17.

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[19](...continued)
would have been required to pay the City a higher rental under its lease in anticipation of the added revenues.

c. There Will Be Adequate Two Carrier Access at Sidney, OH, and IORY is Not Entitled to Trackage Rights Between Sidney and Quincy.

IORY's third request is for trackage rights between Sidney and Quincy, OH over a Conrail line to be operated by CSX. IORY-4 at 3. IORY claims this condition is necessary to remedy the 2-to-1 situation at Sidney. Id. at 6. IORY claims that the remedy Applicants have proposed -- granting NS trackage or haulage rights -- is inadequate to provide competition for CSX at Sidney because NS allegedly would have to operate over a circuitous route. Id. at 6, 7.

As explained in Section IV.D.2., the Board should deny IORY's request, which is simply designed to enhance IORY's competitive position. No Sidney, OH shippers have raised such concerns. The NS access to Sidney provided for as part of the Transaction is fully adequate, and both the CSX and NS operating plans demonstrate their intent to serve Sidney. See Orrison RVS at 46; Mohan RVS at 77. Indeed, more shippers will have a competitive choice at Sidney post-transaction than do today. Orrison RVS at 46.

Moreover, granting IORY trackage rights on the Sidney- Quincy line would create significant operating problems. The Sidney line will be an important one in CSX's post-Transaction operations. Id. at 46. Inserting a local carrier -- which is already experiencing integration problems -- on this line would dramatically increase the likelihood of operating problems. Id.