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Before turning to the substance of the Port Authority's concerns, Applicants note that the Port Authority failed to support its request for divestiture of the Conrail NJSAA assets with an operating plan, traffic study or pro forma statements which are necessary for the Board to understand the impact of the proposed condition, if the Board chose to impose it.[8] The Port Authority also failed to submit any information concerning the impact of the requested condition on safety, commuter rail service, or the environment. This prevents the Board from fulfilling its responsibilities under the National Environmental Policy Act (NEPA).[9] The Port Authority also failed to relate its comments and the verified statements in support of its comments to the condition requested. Neither of the two verified statements

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[8] The Board has strongly disapproved imposing conditions as extreme as divestiture outside the responsive application context. In UP/SP, for example, several parties advocated divestiture of the so-called "SP East" rail lines and facilities, but did so in the form of comments, not responsive applications. The Board found that each of these commentors failed to provide the information necessary for the Board to make a reasonable determination on the effect of each of their respective proposals. See, UP/SP, Decision No. 44, p. 157 and p. 157, n.197 ("The proposal . . . to turn SP lines into public highways is vague, unprecedented, and unpredictable, and thus we cannot judge its impacts.").

[9] In Decision No. 47, the Board rejected NJT's initial environmental submission and request for clarification and stated that "[i]f NJT does not provide adequate environmental information, it will be impossible for [the Board] to complete the appropriate underlying environmental review of NJT's requested condition." Decision No. 47, slip op. at 2. Because the Port Authority did not label its submission as a responsive application, the Board was not forewarned that the Port Authority planned to submit an even more radical condition than NJT, with absolutely no environmental analysis.

in support of it even remotely suggests divestiture.[10] Utterly without support, the Port Authority's requested divestiture should be denied.

A divestiture proposal like that proposed by the Port Authority should not be made lightly. "Divestiture in the rail industry, with its network economies, is a requirement to be imposed only under extreme conditions, when no other less intrusive remedy would suffice." UP/SP, Decision No. 44, p. 157. If it is made, the party proposing that remedy should not only present sufficient evidence of the need for such an extreme remedy, but also the potential consequences. The Board and the ICC before it repeatedly have stated that they "are disinclined to impose conditions that would broadly restructure the competitive balance among railroads with unpredictable effects."[11] Id. at 144 (citing SFSP, 2 I.C.C.2d at 827, 3 I.C.C.2d at 928; and UP/MKT, 4 I.C.C.2d at 437).

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[10] Lillian Borrone, Director of Port Commerce, "reserves judgment" on the Applicants' Transaction, Borrone VS at 17-18, and the Port Authority's consultant, Thomas Schmitz, merely asks that the Board require the Applicants to provide a complete treatment of the planned operations and investments within the NJSAA and ensure that the planned operations will not impede the growth of commerce in the area, Schmitz VS at 12-13, something the Applicants have already done. Both Barrone and Schmitz submitted their verified statements before CSX and NS submitted more detailed operating plans for the NJSAA in CSX/NS-119. Neither submitted follow-up verified statements in the Port Authority's subsequent comments on those more detailed operating plans. Mohan RVS at 34.

[11] The Board is not without evidence regarding the negative effects of the proposal to create a terminal company to own and operate the NJSAA assets. Mr. Mohan forcefully argues that the SAA organization is far superior to having a terminal company owning and operating the Conrail NJSAA assets regardless of the structure and financial capacity of that terminal company. Customers in the NJSAA would likely suffer increased rates, and the terminal company would have different incentives for development and investment than will NS and CSX. Mohan RVS at 39-40.

The substantive issues raised by the Port Authority concern the potential loss of "geographic" competition between ports, the asserted lack of incentive to make intermodal capacity infrastructure investments, capacity constraints, and service by two carriers rather than one. These concerns are unfounded. The issue of capacity constraints is discussed by NS witness Mohan. Mohan RVS at 34-39.

a. Geographic Competition

The Port Authority argues that the Port of New York/New Jersey will suffer from a loss of "geographic" competition vis-a-vis the Ports of Norfolk and Baltimore. Mr. Finkbiner explains that the Port Authority's allegation that it will lose "geographic" competition is based on two erroneous assumptions: 1) that the relevant market consists of only the Ports of Norfolk, Baltimore and New York/New Jersey; and 2) that rail carriers have the power to determine the relative competitive position of the ports they serve. The Port Authority has failed to consider the Canadian ports of Halifax and Montreal in the relevant market. These ports currently have a substantial market share of the discretionary container traffic to the Midwest, and have experienced strong growth rates over the past several years. Finkbiner RVS at 4-5. Further, it is highly unlikely that NS or CSX has the power to force major steamship companies to divert traffic to other ports -- it is in the steamship companies' interest to concentrate their loadings to large magnet ports such as the Port of New York/New Jersey where both overland rail traffic and traffic to be delivered in the local area can be maximized in large vessel lots. Mohan RVS at 37-38; Finkbiner RVS at 4-5; Rutski RVS at 26-27.

b. Infrastructure Improvements

The Port Authority also expresses concern that, as a result of the feared loss in geographic competition between ports, NS and CSX will not make the necessary intermodal capacity infrastructure investments to handle the growth the Port of New York/New Jersey anticipates. As explained by Mr. Mohan and Mr. Finkbiner, neither NS nor CSX can afford to ignore the NJSAA intermodal market or to attempt to divert traffic from New York/New Jersey to another port, especially given that a major purpose of this Transaction is to gain access to the Port of New York. Any attempt to do so by one would result in the loss of that traffic to the other.

c. Two Carrier Service

Contrary to most other commentors, the Port Authority's comments express concerns about receiving two-carrier service in place of the one-carrier service it now has. As both Mr. Finkbiner and Mr. Rutski note in their respective rebuttal verified statements, not only is this both counter-intuitive from a business standpoint, it is contrary to the Port Authority's own statements. See Finkbiner RVS at 39-41 and Rutski RVS at 25-26. In a letter to Conrail dated February 3, 1997, the Chairman of the Port Authority observes that since the creation of Conrail in 1976,

> [A]n abiding Port Authority goal has been to secure effective and fully competitive Class I rail freight service for the bistate region to major interior markets. . . . Ensuring competitive rail freight service in the New York and New Jersey region will open access to markets to the benefit of producers, distributors, and consumers. On the other hand, this region's lack of competitive rail freight access would be detrimental to attaining desired economic and market share growth.

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Just as important, however, is the fact that the Port Authority failed to consider the findings of its own consultants that concluded that present rail service to the Port of New York/New Jersey lagged behind all North American ports, but that after the Transaction rail service to the Port of New York/New Jersey would be tied for first with the Port of Norfolk.[12] Simply put, the Booz-Allen & Hamilton report found that:

- "Rail service should markedly improve from Conrail's current service level" as a result of the Transaction. Id.
- The Transaction "will result in a substantial reduction in the current cost structure for rail service to New York/New Jersey. . . ." Id. at p. VI-14.
- "Cost reduction estimates show that New York/New Jersey will benefit the greatest among North Atlantic ports." Id. at p. VI-16.
- "More than one railroad needs to serve the terminals which provide the ultimate service to the customer, in order for true competitive access to exist. Conrail now controls virtually all access to the area." Id. at p. VI-20.

See also, Finkbiner RVS at 2-3.

8. Southern Tier West Regional P&D Board

Southern Tier West Regional Planning and Development Board ("STW") filed Comments and Responsive Application[13] seeking the enforcement and extension of the Southern Tier Agreement entered into between the New York State Department of Transportation ("NYSDOT") and Conrail and the repayment of funds STW claims Conrail

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[12] Booz-Allen, p. VI-11.

[13] In accordance with Decision No. 55, STW-2 will be treated as comments and requests for conditions.

now owes NYSDOT. The Southern Tier Agreement is between NYSDOT and Conrail and is more appropriately addressed by those parties outside this proceeding. STW is neither an agent nor a representative of NYSDOT[14] and should not be permitted to force an agreement on NYSDOT or on Conrail, particularly when the concerns are not related to the Transaction. STW's concerns instead relate to the long history of declining rail traffic on the Southern Tier Extension. The Board should not impose conditions to address pre-existing circumstances not associated with the Transaction.

STW first asks the Board to require NS to describe fully its plans for the Southern Tier Extension. NS has submitted a detailed operating plan and has had discussions of anticipated line and facility improvements. STW fails to explain why this is not sufficient or how NS should more fully describe its plans.

Next, STW claims that Conrail owes NYSDOT $2.136 million because it failed to redeploy an investment made by New York State under the TCS-Wellsville Agreement dated December 6, 1979.[15] However, NYSDOT and Conrail agreed in the Conrail Southern Tier Agreement December 1990 Amendment, dated December 13, 1990, that the investment no

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[14] STW Response, filed December 1, 1997, to Interrogatory No. 9 of CSX and Norfolk Southern's First Set of Interrogatories and Requests for Production of Documents to Southern Tier West Regional Planning and Development Board (reproduced in Vol. 3).

[15] The $2.136 million represents the depreciated value, as of December 1990, of an original $2.5 million investment. STW offers no evidence regarding the current depreciated value of the original $2.5 million investment.

longer served its original purpose and that Conrail should submit a plan to the state to redeploy the materials provided by NYSDOT elsewhere within the state.[16]

STW asks the Board either to require Conrail to pay the $2.136 million allegedly[17] owed to NYSDOT or require NS to enter into an extension of the Southern Tier Agreement to provide for the future use, application or investment of those funds on the Southern Tier Extension. As for the collection of the $2.136 million, this is an issue between Conrail and the NYSDOT which is clearly not related to the Transaction. To the extent provided for in the Transaction Agreement (Vol. 8B of the Application), NS will assume the obligations of Conrail with respect to the TCS-Wellsville Agreement and the December 1990 Amendment. However, NS reserves the right to challenge the amount allegedly owed NYSDOT by Conrail. STW's alternative requested condition, that the STB require NS to enter into an extension of the Southern Tier Agreement, is equally without merit. STW has not articulated a reason related to the Transaction why NS should be required to have an agreement regarding the future use, application or investment of those funds on the Southern Tier Extension.

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[16] STW-2 at 3; and STW Response, filed December 1, 1997, to Interrogatory No. 1 of CSX and Norfolk Southern's First Set of Interrogatories and Requests for Production of Documents to Southern Tier West Regional Planning and Development Board (reproduced in Vol. 3).

[17] STW's understanding of the facts is wrong. STW asserts that Conrail failed to submit a proposal to redeploy the $2.5 million investment granted by NYSDOT. STW-2 at 3-4. In fact, such a proposal was submitted by Conrail and considered but rejected by NYSDOT. R. Paul Carey RVS at 15-16. Thus, the terms of the December 1990 amendment have been satisfied, and there is no provision in the TCS-Wellsville Agreement which obligates Conrail to repay any monies to the State at this time.

STW further asks the Board to require NS to repair washouts at Alfred, Scio, and Belmont, NY and otherwise restore the Southern Tier Extension. If these washouts exist, they cannot be the result of the Transaction. Of course, if Conrail is required to make repairs on this line, then NS will honor the obligation to the extent it exists after the closing date. A determination on whether any such obligation exists is properly made in a proceeding directed to such an issue, not a control proceeding such as this. It would be inappropriate for the Board to condition its approval on the resolution of circumstances that predated this proceeding.

Finally, STW wants to extend certain sections of the Southern Tier Agreement, those being the service and maintenance commitments, for 5 years from the June 1, 1998 expiration date. STW does not explain why certain obligations of the railroad should be extended while those of the NYSDOT should not. Again, since this condition is not related to the Transaction, and is not designed to remedy a competitive harm resulting from the Transaction, it should be denied.

9. Toledo Metropolitan Area Council of Governments/ Toledo-Lucas County Port Authority

The Toledo Metropolitan Area Council of Governments (TMAC), a voluntary association of local governments, submitted: (1) a Request for Conditions (TMAC-1) pertaining largely to access to Toledo and the Toledo Docks; (2) Protestant's Statements and Argument (TMAC-2) pertaining to the related abandonment by NW of the Toledo Pivot Bridge (Docket No. AB-290 (Sub-No. 197X), as set forth in Volume 5 of the Application,

CSX/NS-22, at p. 84); and (3) a Request for Public Use Condition (TMAC-3) pertaining to the related Petition for Exemption by NW for abandonment of the Toledo to Maumee branch line (Docket No. AB-290 (Sub-No. 196X), as set forth in Volume 5 of the Application, CSX/NS-22, at p. 64). In addition, the Toledo-Lucas County Port Authority submitted a Request for Conditions[18] and an opposition to NW's proposed abandonment of the Toledo Pivot Bridge (TLCPA-4).

a. Abandonment of the Toledo Pivot Bridge.

TMAC and TLCPA oppose this abandonment, claiming that it will limit competitive access to a "large industrial area" and limit direct rail access for interchange with CN. TMAC-2 at 3, 5. However, TMAC's objections in TMAC-2 and TLCPA's objections in TLCPA-4 to the abandonment by NW of the Toledo Pivot Bridge (Docket No. AB-290 (Sub-No. 197X) are not well taken, and should be rejected.

First, NW's exemption petition meets the showing required under 49 C.F.R. § 1152.50. TMAC and TLCPA have not even attempted to argue that the Notice of Exemption contains any false or misleading information, or that the exemption should be stayed on historic or environmental grounds. See 49 C.F.R. § 1152.50. Indeed, TMAC in effect admits that the required showing has been made. See TMAC-2 at 7 ("the exemption on this abandonment may seem at first blush to meet STB Guidelines for abandonment (no local traffic, another bridge available for overhead traffic)"). TLCPA asserts that NW "has

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[18] TMAC's Request for Conditions (TMAC-1) and TLCPA's Request for Conditions are addressed in Section IV.

nowhere established that the proposed rerouting would be neither unduly circuitous or [sic] inefficient." TLCPA-4 at 14. As stated above, however, NW has made the showing required by the Board's regulation. To the extent that TLCPA opposes the abandonment, it is TLCPA's burden to produce evidence supporting its arguments, which it has not done. Additionally, if TMAC and TLCPA view the bridge as an essential transportation facility, they have the opportunity through the normal abandonment process to acquire the bridge, along with the accompanying maintenance liability.

Moreover, TMAC's and TLCPA's claims are simply wrong. TMAC's own evidence shows the redundancy of the Toledo Pivot Bridge: as TMAC's map shows, the bridge is only one of three rail bridges spanning the Maumee River at Toledo. Additionally, the new connection to be built at Oak Harbor will reroute all current traffic off the bridg

In addition, TMAC's and TLCPA's concerns regarding competition are unfounded. While the current Conrail bridge (to be operated by NS post-Transaction) will see a modest increase in traffic, it will not by any stretch of the imagination be the "busiest rail segment in the United States" as TMAC claims, (TMAC-2 at 5), or experience "debilitating congestion" as TLCPA claims. TMAC-2 at 14. Indeed, that segment will have volumes less than half that of some segments over which NS will operate in the northeast. See Application Volume 3B (CSX/NS-20), Appendix D.

Contrary to TMAC's claim that the bridge is essential for industrial access and interchange with CN and Ann Arbor (TMAC-2 at 3, 5) no rail customer has objected to the

abandonment, nor has any other rail carrier (including CN and Ann Arbor) that serves Toledo.

TMAC and TLCPA reveal their real agenda when they claim that the abandonment of the bridge would foreclose a W&LE connection with Ann Arbor or CN (which is untrue), and would eliminate the possibility of any third system, such as W&LE. See TLCPA-4 at 12 ("To efficiently operate to the new Toledo-area points, W&LE will require use of the Bridge."). TMAC and TLCPA thus seek to force NS to maintain an expensive facility solely for the convenience and benefit of potential competitors, and for the creation of a "phantom" transportation network that would rely on the infrastructure of others. Their efforts should be rejected, and the petition for exemption should be granted.

b. Request for Public Use Condition (TMAC-3).

TMAC supports NW's proposed abandonment of the Toledo to Maumee Branch line, (Docket No. AB-290 (Sub-No. 196X)) and seeks a 180-day public use condition on its disposition. TMAC-3 at 5. As TMAC mentions, NS and TMAC have communicated concerning TMAC's interest in the property. NS does not object to the proposed public use condition as long as that condition does not interfere with arms-length negotiations between NS and TMAC.

10. Village of Ridgefield Park, NJ

The Village of Ridgefield Park, NJ (the Village) submitted an Affidavit of its mayor, Mayor George D. Fosdick, as its Comment on the Transaction. Comments of Village of Ridgefield Park, NJ (unnumbered). Mayor Fosdick stated that "the Village has no objection per se to the granting of the [ ] application," but that certain "unrelated events have caused the application to take on a certain significance to the Village." Fosdick Affidavit ¶ 7. Specifically, the Village is concerned (1) that CSX planned to construct two cross-tracks at locations **within** the Village rather than at CSX's Little Ferry Yard in the Borough of Ridgefield (Fosdick Affidavit ¶¶ 9-10) which would create emergency response time problems for the Village; (2) that the cross-tracks, together with the CSX, NS and Walter Rich buyout of the Delaware Ostego Corporation, which owns the New York Susquehanna & Western Railway Company (NYS&W), would cause increased use of the NYS&W's fueling and light maintenance facility located in the Village; and (3) that a Conrail-owned drawbridge over the Hackensack River, which has been permanently closed by Conrail, prohibits entry of waterborne traffic to the eastern end of Overpeck Creek.

The Village's first concern is moot as it was based on a misunderstanding caused by an error in the Environmental Report submitted with the Primary Application. CSX/NS-23, Vol. 6C at 319 (Figure 4-15) erroneously depicted the location of one of the connections for Little Ferry as being constructed in Ridgefield Park, whereas it will in fact be constructed at Little Ferry, as suggested by Mayor Fosdick. Ridgefield Park was apprised of the correct location of the connection by letter dated October 21, 1997.

The Village's second concern, which stems from an unrelated on-going environmental issue concerning the NYS&W's refueling facility, cannot be resolved in this proceeding. Even after the management buyout of Delaware Ostego Corporation, CSX and NS will not have controlling interest in either Delaware Ostego Corporation or the NYS&W and therefore will have no control over the operation, maintenance, or disposition of the refueling facility. Those issues must be resolved in a more appropriate forum. CSX and NS would point out, however, that they do not plan to use the NYS&W facility, and therefore, there will be no increased use of the facility as a result of this Transaction.

The Village's final concern is that "the bridge over the Overpeck Creek maintained presently by Conrail be returned to being a moveable bridge." Id. ¶ 12(c). Mayor Fosdick states that "The United States Coast Guard has indicated that this drawbridge should be operable to water traffic." Id. ¶ 11.[19]

The facts, however, suggest that this bridge should remain closed. Overpeck Creek currently does not meet any of the federal requirements for navigability; it is not exposed to the reach of the tides, it does not feed into an interstate lake, and it has not been commercially navigable over the past 15 years. See 33 C.F.R. § 329.4 (1997); 33 C.F.R. § 329.6 (1997); 33 C.F.R. § 439.7 (1997). In response to CSX interrogatories, the Village acknowledged that there has been no water traffic since the early 1980's. See Village of

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[19] The Conrail Law Department and the Coast Guard have exchanged communications concerning appropriate interpretations of Coast Guard regulations concerning the status of the bridge. Again, those legal issues cannot be resolved in this proceeding.

Ridgefield Park Responses to Interrogatories, November 25, 1997, included in Vol. 3. In its discovery responses, the Village further explains that it has just completed a new park east of the bridge and that it is about to design a boat launch in the park so that individuals can use Overpeck Creek for recreational boating. Id.

However, in attempting to ascertain the feasibility of such plan, CSX learned from the Bergen County Department of Parks that a boat cannot traverse the creek because of the tidal gates by the New Jersey Turnpike. Moreover, the Department does not even regulate boat use on the creek because of the creek's inaccessibility and the shallowness of the water.

Indeed, the creek's water level is not even measured. The closest recorded indication of the creek's water level is a 1986 recorded measurement from the mainstream of the Hackensack River approximately two and one-half miles away. These measurement showed the Hackensack River's mean tidal range at 5.5 feet. Department of the Army, Rivers and Harbors Project Maps (Sept. 30, 1986). However, further inquiries to the Department of the Army and the Coast Guard revealed that those measurements would not accurately reflect the Overpeck Creek water level because the main body of the River is much deeper than Overpeck Creek, which is a branch off the main body of water.

Finally, to restore the mechanisms to make the bridge operable would cost $2.5 million dollars; it would cost up to an additional $200,000 annually to man the bridge.[20] Given that the waterway does not appear to be commercially or recreationally

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[20] The estimate is based on operating the bridge nine months a year, between March 16 and December 15, seven days a week, twenty-four hours per day. Based on the creek's

navigable and that, even if it were, the prospects of future traffic are at best speculative, it would not be economically feasible for CSX to restore the bridge at this time.

12. West Virginia State Rail Authority

The West Virginia State Rail Authority (WVRSA), an agency of the State of West Virginia, supports the Transaction, recognizing that it will benefit the public. Comments and Request for Conditions (unnumbered) at 7. WVRSA does, however, express some concerns about the Transaction, which Applicants have addressed elsewhere. See, e.g., Section VIII. After WVRSA submitted its comments, the Governor of West Virginia wrote a letter to the Board expressing the unconditional support of the State for the Transaction, appearing to indicate that the WVRSA's comments are no longer in effect. December 3, 1997 letter to the Board included in Vol. 3. In any event, as discussed elsewhere in this document, the WVRSA comments do not afford any basis for action by the Board.

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conditions during the winter months, it is assumed that a variance could be secured from the Coast Guard, which would be similar to other bridges currently operated by Conrail.

XVIII. THE NEW YORK DOCK CONDITIONS AND THE CARRIERS' APPENDIX A PROPOSALS ARE APPROPRIATE FOR THE IMPLEMENTATION OF THIS TRANSACTION

A. Introduction

In this part of their Comments, the Applicants respond to labor protection issues raised by various commentors. Comments were filed by the United Transportation Union ("UTU"), Transportation Communications International Union ("TCU"), International Association of Machinists ("IAM"), United Railway Supervisors' Association ("URSA"), Transportation Trades Department of the AFL-CIO ("TTD"), nine unions calling themselves the Allied Rail Unions ("ARU"),[1] and various local union organizations.[2] Some non-labor commentors also addressed employee impact issues.[3]

[1/] These unions are American Train Dispatchers Department/BLE; Brotherhood of Locomotive Engineers; Brotherhood of Maintenance of Way Employes; Brotherhood of Railroad Signalmen; International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers; International Brotherhood of Electrical Workers; National Conference of Firemen and Oilers/SEIU; Sheet Metal Workers' International Association; and Transport Workers Union of America.

[2/] These organizations are: St. Louis Rail Labor Coalition (Charles D. Bolam); UTU Illinois Legislative Board (John H. Burner); UTU General Committee of Adjustment 386 (John D. Fitzgerald); UTU New York State Legislative Board (Samuel J. Nasca); BLE New York State Legislative Board (Gary J. Brink - Division 54); BLE New York State Legislative Board (John F. Collins, Esq.).

[3/] These commentors are: Joseph C. Szabo, Mayor of Riverdale, Illinois; John R. Pippy, Pennsylvania House of Representatives; Congressman Robert Menendez; Senator Arlen Specter; Ohio Attorney General, Ohio Rail Development Commission and Public Utilities Commission of Ohio; Commonwealth of Pennsylvania, Governor Thomas J. Ridge, and the Pennsylvania Department of Transportation; Philadelphia Regional Port Authority, South Jersey Port Corporation, The Delaware River Port Authority, and the Port of Philadelphia and Camden, Inc. (collectively the "Delaware River Port Interests"); Cargill, Inc.; PPG Industries (Michael E. Petricelli); E.I. DuPont de Nemours & Company, Inc.; National Industrial Transportation League, U.S. Clay Producers Traffic Association, and The Fertilizer Institute; and American Public Transit Association.

For the most part, the labor union commentors agreed that the standard New York Dock labor protective conditions were appropriate for the transaction. UTU requests that the New York Dock labor protection be extended to the train and engine service employees of a non-applicant carrier, Delaware & Hudson Railway ("D&H"). UTU-5. TCU requests that New York Dock protections be enhanced in three ways for Conrail clerical and carmen employees represented by TCU. TCU-6. First, TCU contends that Conrail employees be given the option of a severance instead of following their work when it is transferred. Second, TCU asks that the amount of the New York Dock severance be increased. Third, TCU asks for lifetime protective benefits for Conrail employees who become dismissed as a result of the transaction.

The lengthiest labor-related comments were filed by the ARU. ARU-23. The ARU take the position that the Board is without authority to modify any term of a collective bargaining agreement because, according to the ARU, Article I, Section 2 of New York Dock requires the preservation of all agreement terms dealing with both "rates of pay, rules, and working conditions" and "other rights, privileges or benefits." It is the ARU's position that any changes to labor agreements necessary to allow implementation of a Board-approved transaction must be accomplished through the Railway Labor Act ("RLA") major dispute procedures and the Washington Job Protection Agreement ("WJPA").

The predicate for many of the labor-related comments is that there will be significant and far reaching adverse impacts on Conrail employees as a result of the transaction. ARU-23; TTD-3; TCU-6; IAM-4; URSA-3; Samuel J. Nasca V.S. (unnumbered); John F. Collins V.S. (unnumbered); JCS-1; Congressman Robert Menendez (unnumbered); Senator Arlen Specter (unnumbered); John R. Pippy (unnumbered); IL-1; OAG-4. Labor has greatly exaggerated the

projected impact on employees. As in any railroad consolidation, some positions will be abolished. However, Applicants are projecting abolishments of agreement positions which represent only about 3.6 percent of the aggregate of the CSX, NS and Conrail agreement workforces. These abolishments will be felt principally in the clerical, carmen, and maintenance of way crafts. Many of these projected abolishments will result from the elimination of unnecessary duplicative work, the elimination of redundant facilities, the better utilization of assets, the application of best practices and the computerization of work. In other crafts, there will be an immediate increase in positions. Moreover, after the first three years, it is expected that there will be an increase in employment as the railroads become more competitive with and divert more freight traffic away from trucks.

Those employees who are adversely affected will receive New York Dock benefits, which are far more generous than in other industries. The ARU wrongly contend that the transaction is being carried out on the backs of labor, because CSX and NS do not anticipate having to pay labor protection benefits for more than three years. The ARU are simply making up a non-existent issue. CSX and NS expect that almost all employees whose jobs are abolished as a result of the transaction will be offered positions on their systems within three years. A single year's attrition on CSX, Conrail and NS exceeds the number of positions to be abolished in connection with implementation of the transaction. While furloughed, employees will receive benefits under the New York Dock conditions or other existing protective arrangements.

No employees will suffer the loss of RLA collective bargaining rights as a result of the transaction. Almost all of the employees will continue to be under collective bargaining agreements and represented by their same unions. Several unions object to the Applicants'

proposing that employees in coordinated operations work under a single collective bargaining agreement. Those carrier proposals, however, are consistent with the way in which approved transactions have historically been implemented. Applicants' proposals also are consistent with Board, ICC, judicial, and New York Dock arbitration precedents. Combining workforces under a single agreement in coordinated operations is essential to realization of the efficiencies envisioned in the Operating Plans. Applying a single collective bargaining agreement to consolidated territories will not greatly affect the employees' compensation or working conditions, because many of the terms in the Conrail, CSX, and NS labor agreements are substantially similar.

The commentors' concerns are unfounded. The transaction will not visit great hardships on employees. The unions have failed to show the "unusual circumstances" that would be necessary in order for the Board to consider imposing a greater level of protection than the New York Dock conditions. The Board and ICC have consistently refused to impose attrition-type conditions, and TCU has shown no reason for their imposition here. Likewise, UTU has not shown any basis for departing from the Board's long-standing policy of not extending New York Dock protection to employees of non-applicant carriers.

For their part, the ARU seek to relitigate the Board's well-settled legal authority to modify labor agreements when necessary to allow the realization of efficiencies from approved transactions. But the D.C. Circuit has rejected, as "obviously absurd," the ARU's argument that Article I, Section 2 of New York Dock requires the preservation of all agreement terms. Numerous agency and judicial decisions recognize that agreement terms affecting rates of pay, rules and working conditions may be modified when necessary to realize public transportation

benefits from an approved transaction. It is equally well settled that, contrary to the ARU's assertions, labor issues relating to the implementation of approved transactions are resolved through the Board's jurisdiction and its labor protective conditions, not through the RLA.

The ARU have also misstated the "necessity" test for exercise of the Board's authority to modify agreement terms. There is no requirement that all savings from efficiencies be passed on to shippers in order for an operational change to yield a public transportation benefit. There is also no basis for the ARU's request that the Board find that CSX and NS have failed to show necessity for the agreement changes described in the Application. The agreement changes envisioned by Applicants are changes that unions either have agreed to in New York Dock implementing agreements or have been found by the Board, New York Dock arbitrators, and the D.C. Circuit to meet the necessity standard.

Many comments raise the specter of operational and safety problems like those recently experienced by the Union Pacific Railroad ("UP"). ARU-23; TCU-6; URSA-3; TTD-3; John F. Collins V.S. (unnumbered); Gary J. Brink (BLE Division 54) (unnumbered); PPG Industries, Inc. (unnumbered); DuPont (unnumbered); OAG-4. There is no basis for assuming that CSX and NS will have the same kinds of problems coordinating the operations of allocated Conrail assets into their respective systems. CSX and NS have each had long, successful experience with prior transactions. Moreover, the allocated portions of Conrail which will be operated by CSX and NS are not that large. CSX is adding approximately 4,000 miles to its approximately 18,000-mile system and NS is adding approximately 7,000 miles to its approximately 14,000-mile system. Also, NS and CSX are the two safest Class I railroads. As shown in their Operating Plans, CSX and NS are proposing to transfer certain operations from Conrail over a transition

period to help assure a smooth transition. There is no valid safety concern raised by this transaction. The Applicants address safety issues elsewhere, in Section XXI of the Narrative. See also Pursley RVS. We also note that CSX and NS have prepared Safety Integration Plans, which have been submitted to the Board.

There is also no basis for the ARU's contention that modification of their agreements will result in unconstitutional takings of property or a denial of due process.

Accordingly, for the reasons explained in this section of the Applicants' Narrative, the Board should respond to the employee-related issues raised by comments as follows:

* Impose the standard New York Dock labor protective conditions;
* Deny UTU's request that protective conditions be extended to employees of the D&H, a non-applicant;
* Reject TCU's request for attrition protections, increased severance, and a separation option in lieu of an employee's having to relocate to follow his work;
* Reject the ARU's arguments that Article I, Section 2 of the New York Dock conditions requires the preservation of all agreement terms and that any changes necessary to implement an approved transaction must be accomplished through the RLA or WJPA process;
* Reject the ARU's requested finding that Applicants have failed to demonstrate necessity to modify any specific agreement term;
* Reject URSA's argument that the Applicants' proposals raise any representation issue for this Board.

B. The Transaction Will Not Have A Severe Impact On Employees

1. The Comments Exaggerate The Projected Impact

Many comments assert that the transaction will have a devastating impact on employees. They state, for example, that "thousands" of employees will lose their jobs or be required to relocate. ARU-23 at 24, 56; see also TTD-3 at 3 ("close to 3,000 workers will lose their jobs, thousands more will be asked to move"); TCU-6 at 3 (employees "will suffer from forced relocation and employment loss"); John F. Collins V.S. (unnumbered) at 12 ("significant job cuts" in New York state); Congressman Robert Menendez (unnumbered) at 3 ("vastly reduced labor forces" in New Jersey); OAG-4 at 26 (serious negative impact in terms of jobs lost in Ohio).[4]

These claims are exaggerated. Several commentors erroneously rely on the 1995 Labor Impact Exhibit. URSA-3 at 3; IAM-4 at 2; JCS-1 at 2. As Applicants have explained, the 1995 Labor Impact Exhibit overstates the impact of the transaction because it uses Conrail's 1995 workforce as its basis for comparison. However, Conrail had reduced the size of its workforce significantly between 1995 and early 1997 for reasons entirely unrelated to this transaction. CSX/NS-26 at 2-3. The most accurate picture of the transaction's impact is contained in the 1996-97 Labor Impact Exhibit. That exhibit shows in total (i.e., agreement and non-agreement), 3090 jobs abolished, 1109 jobs created (for a net loss of 1981 jobs), and 2323 jobs transferred.

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[4] Several comments argue that the transaction will harm employees of other carriers or non-carriers. TTD-3 at 4 ("working men and women employed by other railroads or in the motor carrier sector will be harmed by the Conrail breakup"); JDF-1 at 2-3 (discussing alleged effects on BNSF employees). However, it is well settled that the Board does not consider the impact of a transaction on employees of carriers who are not applicants or of non-carriers. E.g., Union Pacific Corp., et. al.--Control--Missouri Pacific Corp. et. al., 366 I.C.C. 459, 621 (1982).

Labor Impact Exhibit (1996-97 Head Count) at 13 (attached to CSX/NS-26). Moreover, many of these jobs are non-agreement jobs. Only 2260 agreement jobs will be abolished, and 1101 will be created, for a net loss of only 1159 agreement jobs. Id.

The differences are significant. URSA, for example, relies on the 1995 Exhibit to state that 199 railway supervisor jobs will be abolished. URSA-3 at 3. But, the 1996-97 Exhibit shows 69 railway supervisor jobs abolished and five created, for a net loss of only 64 supervisor jobs. Labor Impact Exhibit (1996-97 Head Count) at 9-10. Likewise, IAM relies on the 1995 Exhibit to state that 182 machinist jobs will be abolished. IAM-4 at 2. However, the 1996-97 Exhibit shows 53 machinist jobs abolished and 77 created, for a net gain of 24 machinist jobs. Labor Impact Exhibit (1996-97 Head Count) at 6.

John F. Collins, on behalf of the Brotherhood of Locomotive Engineers ("BLE") New York State Legislative Board, states, without providing any source for his figure, that as a result of the transaction "a minimum of 100 people in the Buffalo, New York area will lose their jobs." John F. Collins V.S. (unnumbered) at 5. In fact, the 1996-97 Labor Impact Exhibit shows that, in Buffalo, 13 jobs will be abolished, 57 jobs will be created and 7 jobs will be transferred (for a net gain of 37 jobs).

Similarly, the Ohio Attorney General, Ohio Rail Development Commission, and Public Utilities Commission of Ohio, also without citing any source, state that a net loss of 450 Ohio-based jobs is projected and that 300 positions are slated to be transferred out of Ohio. OAG-4 at 27-28. In fact, the 1996-97 Labor Impact Exhibit shows that the net reduction of jobs in Ohio is 264 jobs (400 jobs abolished and 136 created). The Exhibit also shows that while 189 jobs will be transferred out of Ohio, 47 jobs from other states will be transferred into the state, for

a net transfer out-of-state of 142 jobs. Accordingly, the total net loss to Ohio through job elimination and transfers is only 406 jobs, which is approximately five percent of the combined CSX, NS and Conrail employment in that state. This is close to the rail industry's annual attrition rate of nearly five percent. Peifer/Spenski VS, Application Vol. 3A at 522.

Finally, although several commentors contend that Applicants' projected job abolishments and transfers are "in all likelihood low," TTD-3 at 4; see ARU-23 at 24, they provide no support for this contention. Applicants arrived at their projections through careful consideration of their operational needs and the relevant workforces, based on their expertise in running railroads and their considerable experience with consolidations in the past. Applicants believe that their projections are accurate, and none of the commentors has offered any facts that call them into question.

2. The Projected Net Job Loss Is Less Than In Previous Control Cases

The 1996-97 Labor Impact Exhibit shows a total of 3090 jobs abolished and 1109 jobs created, for a net loss of 1981 jobs.[5] Labor Impact Exhibit (1996-97 Head Count) at 13. However, in many crafts, there will be either no net job loss or even a net job gain. Labor Impact Exhibit (1996-97 Head Count) (boilermakers, 5 abolishments and 5 creations; electricians, 39 abolishments and 53 creations; engineers, 242 abolishments and 429 creations; machinists, 53 abolishments and 77 creations; dispatchers, no abolishments or creations; trainmen, 322 abolishments and 470 creations). In certain crafts, there will be no impact at all. Id. at 13 (no labor impact on blacksmiths, bridge inspectors, communication workers and dock workers). The

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[5] These figures include nonagreement jobs.

largest net job losses occur in three crafts (clerical, carmen, and maintenance of way)[6] and in the non-agreement workforce. Id.

The projected total net loss of 1981 jobs from this transaction is significantly less than the projected total net job losses in previous major control cases that have been approved by this Board. In Burlington Northern Inc., et al.--Control and Merger--Santa Fe Pacific Corp., et al., Finance Docket No. 32549 (served Aug. 23, 1995) ("BN/Santa Fe") (Dec. No. 38), there was a projected net loss of 2761 jobs. Slip op. at 46 n.69. In Union Pacific Corp., et al.--Control and Merger--Southern Pacific Corp., et al., Finance Docket No. 32760 (served Aug. 12, 1996) ("UP/SP") (Dec. No. 44), the Applicants' Labor Impact Exhibit projected a net loss of 3387 jobs. Slip op. at 171-72.

The projected net job loss is also substantially less than the job losses that are projected to result, and have already resulted, from recent mergers in other industries, such as the banking industry, where it has not been uncommon for over 10,000 jobs to be cut. Peifer/Spenski RVS at 2-3.

3. Agreement Employees Whose Jobs Are Abolished Will Receive New York Dock Until They Are Recalled

The 1996-97 Labor Impact Exhibit shows a net loss of 1159 agreement positions on NS, CSX and Conrail as result of the transaction. Most of the employees who are dismissed or displaced will continue to receive their earnings under the New York Dock conditions until they are offered an opportunity to return to service, in most cases before their protections expire.

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[6] Net job losses will also occur, although to a much lesser extent, in the crafts of laborers/firemen and oilers, police, railway supervisors/foremen, sheet metal workers, signalmen and yardmasters. Id.

Positions will become available as jobs are created and as active employees leave the railroads through natural attrition. In most cases, this will occur within three years, well before authorized New York Dock protection typically expires.

4. Agreement Employees Whose Jobs Are Transferred Will Be Made Whole Under New York Dock

Several commentors contend that "thousands" of employees will be forced to relocate. ARU-23 at 24, 56; TTD-3 at 3. That is incorrect. In fact, it is anticipated that only 1476 agreement positions will be transferred. Labor Impact Exhibit (1996-97 Head Count). Applicants planned the minimum number of relocations necessary to consolidate the Conrail workforce with CSX's and NS' respective workforces and recognize the benefits in preserving the valuable local knowledge and expertise of the Conrail employees.

The fact that some employees will have to relocate as a result of the transaction is certainly not a basis for disapproving the Application, as some commentors urge. "[R]elocation is not an extraordinary event in the railroad industry." Wilmington Terminal R.R.--Purchase and Lease--CSX Transp., Inc. Lines between Savannah and Rhine, and Vidalia and Macon, Ga, 6 I.C.C. 2d 960, 964 (1990) ("Wilmington Terminal"); see Wheeling Acquisition Corp.--Acquisition and Exemption--Lines of Norfolk & Western Ry., Finance Docket No. 31591, served May 7, 1990, slip op. at 3. Relocation is common in consolidations and is compensated under the New York Dock conditions. Norfolk & Western Ry.--Purchase--Illinois Terminal R.R., 363 I.C.C. 882, 889 (1981). Contrary to some commentors' protestations (e.g., TCU-6 at 14-17), it is not uncommon for employees to have to relocate to retain their protection under New York Dock. As the ICC has recognized:

> the New York Dock conditions themselves contemplate that employees will be relocated as a result of Commission approved transactions. In fact, a key purpose of all the labor protective conditions that the Commission imposes is to provide compensation for such dislocations. Accordingly, the conditions provide for a moving allowance, for pay protection, and for priority rehiring. Thus, it is not extreme or unusual that employees might have to relocate in order to retain their New York Dock protection; this is what has always been contemplated under those conditions.

Wilmington Terminal, 6 I.C.C. 2d at 963-64.

Employees who do have to relocate as a result of the transaction will suffer no economic loss: they will receive New York Dock's generous relocation benefits, and their earnings levels will be protected. The fact that there are some non-economic costs inherent in relocating (e.g., "severance of community and family roots," impacts on spouses' careers) is not a basis for expanding the protections of New York Dock. Norfolk & Western Ry.--Purchase--Illinois Terminal, 363 I.C.C. at 889.

5. CSX, NS And Conrail Agreements Are Substantially Similar

Many commentors contend that Conrail employees will be harmed if they are placed under CSX and NS collective bargaining agreements. ARU-23 at 102-27; TCU-6 at 8-14; TTD-3 at 3, 6-7; IAM-4 at 4-6; John F. Collins V.S. (unnumbered) at 13-20. Contrary to the rhetoric of some commentors, e.g. ARU-23 at 2 (accusing Applicants of "nullifying existing agreements and . . . unilaterally selecting the terms and conditions of employment to impose on employees"), most employees will continue to have collective bargaining rights, will continue to be represented

in most cases by the same union, and will be working under agreements that contain many of the same or similar provisions as contained in the Conrail agreements.[7]

First, with respect to wages, it should be noted as a general matter that rail workers are among the highest paid in all U.S. industries, with greater earnings than at least 97 percent of employees nationwide in each year since 1980. Peifer/Spenski RVS at 60 and Exhibit H. Moreover, although CSX and NS do not concede that Conrail employees will necessarily be less well paid under CSX and NS pay scales,[8] any employee who must accept a lower-paying position on CSX or NS will have his or her Conrail earnings level protected under the New York Dock conditions.

Second, the ARU make a blanket allegation that virtually all Conrail disciplinary rules are more protective of employees than those on CSX and NS. ARU-23 at 30. In fact, although not identical, Conrail, CSX and NS rules are premised on the same concepts -- due process and discipline for just cause. Any differences in the agreements are not significant. For example, with respect to train dispatchers, the Conrail agreement provides for a more expedited disciplinary process in the initial stages, but all agreements allow for postponements, and postponements are common (often at the union's request if the time limits provide an insufficient amount of time to prepare a defense). Even with these time differences, however, the total

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7/ For example, most of the provisions in Conrail's, CSX's and NS' train and engine service agreements resulted from World War I Director General's General Order 27, which laid the foundation for the separation of road and yard work and set forth the rules governing each. Since 1964, national agreements have brought further uniformity to the road and yard rules. These national agreements provide uniformity in matters such as pay, engine standards, hiring, promotion, vacation, personal leave time, off track vehicle insurance, health benefits, and lodging and meal allowances. Peifer/Spenski RVS at 46.

8/ Se Peifer/Spenski RVS at 26 n.4.

amount of time to progress an appeal all the way to an arbitration tribunal under all dispatchers' agreements, if each appeal and decision uses the full period allotted, is comparable: one year and one month (except under the NS/ATDD agreement, where the full period would be ten months). Moreover, Conrail, CSX, and NS employ similar informal practices regarding employee performance issues (coaching, counseling, etc.), and resort to formal disciplinary procedures only if such efforts prove to be unsuccessful.

Third, many of the purported "benefits" of the Conrail agreements, as opposed to the CSX or NS agreements, are illusory. For example, the ARU point out that the Conrail/BRS agreement provides "special relocation benefits" for employees allowed to "transfer to a position at a work location where the Company has a need to hire new employees, provided any vacancy which results therefrom at the employee's former work location does not create a need to hire another employee." Apparently, however, the opportunities for such assistance have been extremely limited. In fact, the agreement provision has not been used since its adoption in August 1996. Peifer/Spenski RVS at 48. In addition, the ARU are wrong in implying (ARU-24, Mason Dec. at 172, ¶ 20) that the Conrail/BRS agreement is unique in containing such relocation benefits. A national agreement provision on this subject, effective on Conrail, CSX, and NS, has been in effect for more than 25 years. It provides moving expenses for signalmen required to change their residence as a result of "organizational, operational or technological changes," which would cover most transfer of work situations not resulting from Board-approved transactions. Peifer/Spenski RVS at 48-49.

Similarly, it is highly questionable whether Conrail's 401(k) plans are "better" than those of CSX or NS. For example, under the Conrail 401(k) plan for engineers, Conrail matches 20%

of the employee's contribution, up to a maximum of 2% of his or her annual earnings, if Conrail has reached a certain yearly goal. The amount matched by Conrail is prorated if the company is under the yearly goal. Under the CSX 401(k) plan, CSX matches 25% of the employee's contribution, up to a maximum of 4% of the employee's annual earnings. The plan has no company goal contingency. An employee can deposit from 1% to 15% of his or her pay each pay period, subject to the above-discussed limit on matching.

Likewise, with respect to 401(k) plans for dispatchers, Conrail's plan provides for a company match of 20% of the employee's contribution, subject to a cap of 3% of the employee's pay, based on Conrail's percentage achievement of its performance goals. Under CSX's 401(k) plan for dispatchers, a match of 25% of the amount contributed by the employee, up to 4% of his or her compensation, is provided and is not tied to CSX's achievement of performance goals or any other standards or criteria. In addition, under CSX's plan, the employee may elect, once a year, voluntarily to contribute the monetary equivalent of up to 5 personal leave days to his or her account. Any personal leave days requested and not granted may also be voluntarily contributed to the employee's account. Finally, the ARU's claim that CSX's dispatcher plan caps an employee's contribution at 10% of his or her earnings, as opposed to 15% under the Conrail plan, is untrue. CSX's plan allows employees to contribute up to 15% of their pay.

Under the NS 401(k) plan, employees can contribute up to 10% of earnings to a pre-tax account and NS matches 30% of the contribution (up to a maximum match of $45 per month). In addition, an employee may contribute up to 5% of earnings to an after-tax account. Peifer/Spenski RVS at 49-50.

6. There Will Be Little Impact On The Railroad Retirement System

The ARU's assertion and the American Public Transit Association concern that the transaction will negatively impact Railroad Retirement is irrelevant to the Board's consideration of the Application. As previously demonstrated, the employment impact of the transaction is very modest. In any event, as discussed above, it is expected that most dismissed employees will be offered positions within three years. It is also anticipated that New York Dock protection will be available to those dismissed employees. Any protective payments will be reported as earnings; Railroad Retirement contributions will continue to be made; and creditable retirement months will continue to accrue to the employees' accounts. In addition, according to the Railroad Retirement Board's 1997 actuarial valuation report, the railroad retirement system is financially sound for the next 20 years.[9] CSX and NS also project that they will grow railroad employment, because the transaction will make them more truck competitive, which will have a positive effect on the system. Peifer/Spenski RVS at 61.

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[9] U.S. Railroad Retirement Board, Bureau of the Actuary, Twentieth Actuarial Valuation of the Assets and Liabilities Under the Railroad Retirement Act as of Dec. 31, 1995 (Aug. 1997).

C. The Standard New York Dock Conditions Are Appropriate For This Transaction

1. The New York Dock Conditions Provide The Proper Level Of Protection To Employees Who Are Adversely Affected By The Conrail Transaction

The ICC and the Board have reaffirmed in case after case that New York Dock provides the appropriate level of protection for employees in major merger and control transactions. The New York Dock conditions embody the "basic framework for mitigating the labor impacts of" such transactions, and "are appropriate to protect employees who are affected" by them. UP/SP, slip op. at 172.[10] As in each of these other cases, approval of the Conrail transaction subject to New York Dock protection will "be consistent with the public interest insofar as carrier employees are concerned." Id.

Most of the union comments recognize that New York Dock is appropriate to the Conrail transaction. The only union that requests additional benefits, TCU, raises no new issues. In every major control or merger case since New York Dock was adopted, labor interests have sought enhanced benefits substantially identical to the increased benefits sought here (e.g., attrition protection; protection against an employee's having to relocate to follow his work). The ICC and the Board uniformly denied these requests, because the unions could not show that "unusual circumstances" necessitated imposition of "more stringent protection" than New York

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[10] Accord, e.g., CSX Corp.--Control--Chessie System, Inc. and Seaboard Coast Line Industries,Inc. 363 I.C.C. 521, 589 (1980) ("CSX Control"); Norfolk Southern Corp.-- Control --Norfolk & Western Ry. and Southern Ry., 366 I.C.C. 173, 230 (1982) ("NS Control"); Union Pacific Corp., et al.-- Control--Missouri Pacific Corp., et al., 366 I.C.C. 459, 620 (1982) ("UP Control"); Union Pacific Corp. et al.--Control--Chicago & North Western Transportation Co., et al., Finance Docket No. 32133, served March 7, 1995, slip op. at 95 ("UP/CNW"); Rio Grande Industries, et al.--Control--Southern Pacific Transportation Co., 4 I.C.C.2d 834, 953 (1988) ("Rio Grande Industries Control"); BN/Santa Fe, slip op. at 80.

Dock. Railroad Consolidation Procedures, 363 I.C.C. 784, 793 (1981).[11] Our case is no different.

In this regard, it is essential to remember, amidst the request for even more, that New York Dock affords employees extraordinarily generous benefits. Most importantly, New York Dock guarantees up to six years of full wages, plus health and welfare benefits, to employees adversely affected by a transaction. These comprehensive benefits "are significantly more protective of the interests of railway labor than any previously imposed single set of employee protective conditions." New York Dock Ry. v. United States, 609 F.2d 83, 91 (2d Cir. 1978).[12] Indeed, assuring employees six years' statutorily guaranteed wages as a cushion against the impact of a corporate reorganization may be without parallel in any other industry. Peifer/Spenski RVS at 9.

Imposing even greater levels of protection, by contrast, would be contrary to the public interest. Saddling the carriers with these additional protective obligations would inhibit realization of the transportation benefits the Conrail transaction is intended to achieve. The ICC long ago explained why this is so, in the course of rejecting union requests for, among other things, protection against relocation, a conclusive presumption of adverse effect, and a lengthening of the protective period: "An expansion of employee protection imposes further

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11/ E.g., Burlington Northern, Inc.--Control and Merger--St. Louis-San Francisco Ry., 360 I.C.C. 788, 947-50 (1980) ("BN Control"); CSX Control, 363 I.C.C. at 589-90; NS Control, 366 I.C.C. at 229-30; Union Pacific Corp., et al.--Control--Missouri-Kansas-Texas R.R., 4 I.C.C.2d 409, 510-11 (1988) ("UP/MKT"); Rio Grande Industries Control, 4 I.C.C.2d at 953-54; UP/CNW, slip op. at 95-96; BN/Santa Fe, slip op. at 79-80; UP/SP, slip op. at 172-73.

12/ Accord, e.g., BN Control, 360 I.C.C. at 947; CSX Control, 363 I.C.C. at 589; NS Control, 366 I.C.C. at 231; UP Control, 366 I.C.C. at 620.

restrictions on a carrier's ability to use its employees productively. The conditions requested by [the unions] would have the effect of doing just that." CSX Control, 363 I.C.C. at 590; accord Rio Grande Industries Control, 4 I.C.C.2d at 954 (imposing enhanced benefits similar to those sought in CSX Control would "unduly restrict a carrier's ability to establish economical operations and use its employees productively").

With respect to its effect on employees, the Conrail transaction fits the general pattern of major merger and control transactions in which imposition of New York Dock was found to satisfy the public interest. Although the Conrail transaction is distinctive in that the assets of one large railroad are being allocated to be operated by two others, the transaction's impact on employees will not be unusual. As we have shown, the carriers anticipate that, for its size and scope, the Conrail transaction will in fact have a comparatively modest impact on employees. The number of jobs the carriers anticipate abolishing or transferring is far less than those experienced in recent major railroad transactions. Even in those mergers, the ICC found that these sorts of employee "dislocations" are inevitable and do not "pose a barrier to . . . approval." UP/SP, slip op. at 172. Rather, such workforce changes "lead to increased efficiency, a goal to be encouraged." UP/MKT, 4 I.C.C.2d at 511. And conditioning approval of the transaction on New York Dock serves to "mitigate these dislocations," and meet the public interest. UP/SP, slip op. at 172.

The conclusion that New York Dock is appropriate to the Conrail transaction is bolstered by Congress' having recently revisited the issue of employee protection in the course of passing the ICC Termination Act, Pub. L. No. 104-88, 109 Stat. 803. Congress there reduced the level of employee protection required in transactions involving smaller railroads. 49 U.S.C.

§ 11326(b), (c). And Congress expressly reaffirmed that in transactions involving Class I carriers, like the Conrail transaction, the existing New York Dock protection is appropriate. Id. § 11326(a); H.R. Conf. Rep. No. 104-422, 104th Cong., 1st Sess. 193 (1995), reprinted in 1995 U.S.C.C.A.N. 877. Given the recent congressional endorsement of New York Dock's six years of protection as appropriate to major transactions, the request that the Board add to New York Dock is particularly misconceived.[13]

There is no excuse for TTD's assertion (TTD-3 at 5) that New York Dock is inadequate, because employees do not actually receive the monetary benefits they are owed because of the railroad industry's "regularly expend[ing] massive resources to utilize every loophole at their disposal to evade actually making these protective payments to affected or harmed employees."[14] This is outrageous rhetoric, unfounded in fact. It does not warrant serious attention.

NS and CSX scrupulously comply with employee protective programs generally and the New York Dock conditions specifically. On NS, many employees who would be eligible for New York Dock protection are also protected under other employee protective arrangements and elect those protections in lieu of New York Dock. All told, since 1982, NS has paid $79.7 million in protective benefits. Under New York Dock itself, since 1982 NS has paid $18.2 million in benefits (including $4.7 million in separation payments). Peifer/Spenski RVS at 11.

13/ For these same reasons, we respectfully submit that the Board should not accept Senator Specter's suggestion that Conrail employees receive benefits in excess of what New York Dock provides. Comments of Senator Specter (unnumbered). Senator Specter also asks the Board to ensure that Conrail's headquarters remain in Philadelphia. Id. at 3. 49 U.S.C. § 741(b) states that "[t]he principal office of the [Consolidated Rail] Corporation or its principal railroad operating subsidiary shall be located in Philadelphia . . . ."

14/ ARU-23 at 59; Congressman Menendez (unnumbered) at 4; Senator Specter (unnumbered) at 3.

CSX has similarly honored its protective obligations. Between 1992 and 1996 alone, CSX paid $45.2 million in New York Dock protective allowances. During this period, CSX issued protective payments to 1,958 new New York Dock claimants. Peifer/Spenski RVS at 10.[15]

The New York Dock conditions themselves provide a specific mechanism for resolving disputes over an employee's entitlement to benefits. If a carrier fails to honor its obligations under the conditions, aggrieved employees have an expeditious and effective arbitration remedy (New York Dock, Article I, Section 11), with a right of appeal to the Board and, ultimately, to a federal court of appeals. The only valid measure of whether a carrier is wrongly denying New York Dock benefits is the number of cases that go to arbitration under Section 11, and the results of those arbitrations. If a carrier is regularly denying valid claims, then a union would be expected to pursue those claims for employees in arbitration. On NS only a handful of cases, 31 in all, have gone to arbitration under Section 11 since the 1982 decision in NS Control. Of this handful, NS prevailed in 24 cases; the union prevailed in the other seven. Peifer/Spenski RVS at 11.

These facts conclusively refute the assertion that the carriers routinely deny employees New York Dock benefits to which they are entitled.[16] These carriers do nothing of the sort.

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[15] Indeed, since 1990, many CSX employees have received New York Dock benefits for more than six years, because these employees were affected by more than one transaction subject to New York Dock. In particular: 111 clerical employees have received New York Dock payments for ten consecutive years, 52 for more than nine years, and 92 for more than eight years. Peifer/Spenski RVS at 10-11. In addition, CSX has also paid protective benefits under negotiated employee protective arrangements when employees elect that arrangement in lieu of New York Dock. Id.

[16] TTD also contends (TTD-3 at 5) that carriers improperly require employees to take "comparable work" throughout far-flung rail systems and deny protective benefits if the (continued...)

2. The Enhanced Benefits Sought Are Unjustified And Contrary To The Public Interest

a. Attrition Protection And Protection Against Being Required To Relocate Are Contrary To Established Board Precedent

There is nothing to be said in support of the specific enhancements that TCU seeks. TCU asserts that the Board should impose attrition (i.e., lifetime) protection for the Conrail employees i represents. TCU-6 at 7. TCU also contends that the Board should provide that employees whose work is transferred can refuse to follow their work and instead receive separation allowances far in excess of anything available under New York Dock. Id. These requests are contrary to settled Board policy and the purposes of employee protection. They are unjustified. And the Board should deny them.

The ICC repeatedly refused to impose attrition protection because it is directly at odds with the purpose of the ICA consolidation scheme and employee protection. Attrition protection destroys the economies of transactions, and therefore a carrier's ability to realize the public transportation benefits it intends. TCU well knows this. In BN/Santa Fe, TCU (and UTU) asserted that the alterations in the combined work force expected to result from that transaction justified attrition protection. The ICC, in accordance with longstanding policy, rejected that contention, explaining: "Attrition-type conditions are calculated to preserve unnecessary jobs, and unduly restrict a carrier's ability to establish economical operations." BN/Santa Fe, slip op.

16/ (...continued)
employees refuse. This is baseless. Article I, Section 6(d) of New York Dock specifies that employees can be required to accept "comparable work" only if this does not require a change in residence.

at 80.[17] This transaction is no different. It is not in the public interest for NS and CSX to be forced to keep on unneeded jobs or to pay protective allowances to experienced employees when the carriers have available positions.

These same decisions also defeat the veiled suggestion by the ARU (ARU-23 at 59) that because of asserted inadequacies of the Article I, Section 11 arbitration process, current employees should be presumed to be adversely affected by the Conrail transaction (i.e., these employees should be automatically certified such that any adverse effect on their employment is deemed to be caused by the Conrail transaction). The ICC has consistently rejected imposition of a conclusive presumption of adverse effect as unnecessary and contrary to the public interest. See, e.g., BN/Santa Fe, slip op. at 46, 80; decisions cited in note 17. The ARU attack on Section 11 arbitration is frivolous. The arbitration process is firmly settled, works well, and is always subject to Board oversight in the event arbitrators egregiously err or exceed their jurisdiction.

The ICC and now the Board likewise have consistently rejected labor's request that employees be afforded protection against having to relocate their residences to take available work as a precondition to the receipt of protective benefits. E.g., BN Control, 360 I.C.C. at 926;

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[17] The ICC had said exactly the same thing 15 years before, in CSX Control. There, labor asked the ICC to provide that for a period of 10 years following consummation, any displaced or dismissed employee was conclusively presumed to have been adversely affected by the transaction, "in effect, an attrition-type condition." 360 I.C.C. at 589. The ICC refused, explaining: "We have consistently refused to impose this kind of protection in coordination cases. Such conditions are calculated to preserve unnecessary jobs and unduly restrict a carrier's ability to establish economical operations." Accord NS Control, 366 I.C.C. at 230; UP/MKT, 4 I.C.C.2d at 512-13; Rio Grande Industries Control, 4 I.C.C.2d at 954 (providing for a conclusive presumption of adverse effect for a period of 10 years from consummation "would unduly restrict a carrier's ability to establish economical operations and use its employees productively"); UP/CNW, slip op. at 95-96.

CSX Control, 360 I.C.C. at 589-90; NS Control, 366 I.C.C. at 230; UP/SP, slip op. at 87, 172. There is no basis for changing the ground rules now.

Mergers and acquisitions of control "of necessity involve employee dislocations." UP/SP, slip op. at 172. Such changes "lead to increased efficiency, a goal to be encouraged," UP/MKT, 4 I.C.C.2d at 511, and the protective conditions are imposed to "mitigate these dislocations," UP/SP, slip op. at 172. New York Dock clearly obligates an employee to relocate his residence to follow his work or fully exercise his seniority. And New York Dock provides generous moving allowances to employees who are required to move. E.g., Wilmington Terminal, 6 I.C.C.2d at 963-64 ("it is not extreme or unusual that employees might have to relocate in order to retain their New York Dock protection; this is what has always been contemplated under those conditions").[18] This arrangement is part of the fundamental bargain embodied in all ICC-developed protective conditions: that "employees exercise existing contractual rights (seniority) to take available work elsewhere in exchange for economic protections that would be afforded should they ultimately be displaced." Norfolk & Western Ry. and New York, Chicago & St. Louis R.R.--Merger, etc. (Arbitration Review), 9 I.C.C.2d 1021, 1027 (1993), aff'd sub nom. United Transportation Union v. ICC, 43 F.3d 697 (D.C. Cir. 1995).[19] It would be contrary

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[18] In adopting New York Dock, the ICC made clear that Article I, Section 9, which provides for the payment of moving expenses, was intended to apply to "any employee who is required to move his place of residence within his protective period, as a result of action taken pursuant to our authorization." 360 I.C.C. at 74.

[19] Pennsylvania State Representative John R. Pippy, in a letter, has asked the Board to impose a special condition requiring that employees at Conrail's National Account Center whose jobs are eliminated by the closing of that facility be given first priority for new positions at NS' Regional Operations Headquarters. Such a condition would be inappropriate. The rights that employees may have at other facilities are properly addressed in implementing agreement negotiations or arbitration.

to the public interest for NS and CSX to have to pay unprecedented separation allowances for employees who refuse to follow their work, while simultaneously losing the expertise of those employees and being required to hire new, less experienced employees to fill available, needed jobs.

b. The Asserted "Sacrifices" Of Rail Labor Do Not Warrant Enhanced Employee Protection

TCU and other unions purport to justify the requests for enhanced protection on the ground that rail labor assertedly made extraordinary "sacrifices" in order to build the strong and profitable enterprise that Conrail is today.[20] TCU seems to contend that it would be unfair to limit agreement employees to New York Dock protection when Conrail's nonagreement employees and other shareholders stand to profit from the proposed transaction. TCU cites various Conrail performance statistics and purports to describe various ways in which Conrail employees have sacrificed to bring about those results. None of these contentions, even if true, would establish "unusual circumstances" or otherwise warrant enhanced employee protective benefits.

As a matter of logic and policy, there is no reason why the level or type of employee protective benefits should depend on the profitability of the acquired or controlled carrier, much less on the supposed previous "sacrifices" of agreement employees. The Board's role is to prescribe employee protective conditions that will ameliorate the adverse effects of a prospective transaction, not settle outstanding scores between carriers and employees. Accordingly, there is no occasion for the Board to decide whether agreement employees "made the greatest

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20/ TCU-6 at 3-7 and Roth VS; see also ARU-24, e.g., Scheer VS at 2 (citing employee "sacrifices" as ground for opposing Application).

contribution toward Conrail's recovery," as TCU witness Roth contends (TCU-6, Roth VS at 2). Even if TCU had made such a showing -- and it has not[21] -- that would not warrant burdening the transaction with costly enhanced employee protective conditions.

In fact, the contention that Conrail's current employees are owed some outstanding debt for their "sacrifices" is just wrong. TCU rests its contention principally on the sheer numbers of employees whose jobs were abolished (or were transferred to commuter railroads) in the effort to build Conrail from the properties of its bankrupt predecessors. The union's reliance on this data is based on the specious notion that Conrail's current workforce should be paid extra benefits because other persons no longer work for Conrail. This is a non sequitur. The number of jobs abolished and transferred prior to the proposed Conrail transaction is no measure of the protective benefits that should be imposed in favor of Conrail's current employees (much less employees of NS and CSX) who may be affected by it. By definition, current Conrail employees did not lose their positions in the effort to build Conrail; they are the ones who kept their jobs.

Nor are employees who may be affected by the proposed transaction entitled to enhanced protection because Conrail employees agreed to defer wage increases in 1981. A full account

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[21] Roth acknowledges, as he must, that several "factors" in addition to reduced labor costs contributed to Conrail's financial recovery. TCU-6, Roth VS at 3-4. These include government intervention unique to Conrail -- such as the substantial federal subsidies of Conrail and the elimination of Conrail's burdensome commuter service obligation -- as well as industry-wide regulatory reforms that freed carriers to market rail services more competitively. Indeed, Roth acknowledges that, by virtue of its traffic mix and route structure, Conrail "stood to gain more than other carriers from deregulation." Id. at 4. Not surprisingly, Roth makes no effort to identify or assess the factors that contributed to the demise of Conrail's predecessors -- a consideration that would be every bit as relevant to the sort of historical reckoning that he purports to present. Any meaningful effort to assign relative "credit" to the many forces, programs, and persons responsible for Conrail's current financial condition would be a complex and, for reasons explained in the text, pointless exercise.

of the 1981 wage increase deferral is provided in the Verified Statement of William M. McCain, Conrail's Assistant Vice President-Labor Relations ("McCain VS"). As he explains, the 1981 wage increase deferral was an express "goal" of the Northeast Rail Services Act ("NERSA"), Pub. L. No. 97-35, 95 Stat. 643 (1981) ("NERSA"), which provided (in section 1134(4)(A)) that Conrail "should enter into collective bargaining agreements with its employees which would reduce Conrail's costs in an amount equal to $200,000,000 a year, beginning April 1, 1981, adjusted annually for inflation." In accordance with that directive, Conrail negotiated a wage increase deferral agreement, entitled "Agreement Between Conrail and Certain Labor Organizations for Labor Organizations' Contributions to Self-Sufficiency for Conrail" (hereinafter "1981 Wage Agreement"), under which Conrail temporarily deferred wage increases for all crafts of its unionized employees. In addition -- and as TCU witness Roth fails to mention -- the same "sacrifice" was required of nonagreement personnel. Indeed, in addition to requiring Conrail proportionately to defer nonagreement wage increases, NERSA Section 1134(1) and the 1981 Agreement required Conrail to reduce the number of nonagreement personnel in proportion to reductions in agreement personnel. McCain VS at 2-3.

Conrail has long since restored its wage packages to national levels. As witness McCain testifies, Conrail began paying full national wages effective July 1, 1984, and has maintained wages at those levels ever since. Id. at 3.

Moreover, Conrail already has fully compensated the employees affected by the 1981 wage increase deferral. As Mr. McCain explains (and as TCU witness Roth fails even to mention), in 1985, Conrail entered into an agreement (the "Definitive Agreement of September 17, 1985, By and Between Conrail and the Undersigned Representatives of Conrail's

Agreement Employees" (hereinafter "Definitive Agreement")), under which Conrail committed to repay $200 million, and also to make early distribution of an Employee Stock Option Plan ("ESOP"), to compensate employees whose wage increases had been deferred pursuant to the 1981 Wage Agreement. McCain VS at 4-5.

The principal terms of the Definitive Agreement, including the repayment of deferred wage increases, were mandated by Congress in the Conrail Privatization Act, Pub. L. No. 99-509, 100 Stat. 1893 (1986), codified at 45 U.S.C. §§ 1301 et seq. Among the legislative findings in support of the Privatization Act, Congress found that Conrail's employees

> contributed significantly to the turnaround in the Corporation's financial performance and [that] they should share in the Corporation's success through a settlement of their claims for reimbursement for wages below industry standard, and a share in the common equity of the Corporation.

Id. § 4002(9). To this end, Section 4024 of the Privatization Act provided:

> PROVISIONS FOR EMPLOYEES.
>
> . . .
>
> (e) COMPENSATION FOR WAGES BELOW INDUSTRY STANDARD. -- The Corporation shall pay $200,000,000 to present and former employees subject to collective bargaining agreements, in accordance with the terms and conditions in the Definitive Agreement referred to in subsection (d)(1), or as otherwise agreed between the parties.

In addition, pursuant to Section 4024(f) of the Privatization Act, Conrail was required to honor the provisions of the Definitive Agreement entitling employees to accelerated distribution of stock under the ESOP. As Mr. McCain testifies, the parties to the Definitive Agreement intended and expected those provisions to yield affected employees more money than they would have received if wage increases had not been deferred. McCain VS at 4. In any event, Section 4038 of the

Privatization Act expressly provided that the Section 4024 cash and stock benefits were to constitute complete and final resolution of "all claims arising out of the pay increase deferrals by present and former employees of [Conrail] under the [1981 Wage Agreement]."[22]

In short, there is no basis in policy, fact, or law for enhancement of the employee protective conditions in this proceeding on account of the 1981 wage increase deferral or any other asserted "sacrifice" by rail labor.[23]

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[22] Roth's failure even to mention the legislated settlement deprives his supposed "report" of any credibility. He shows a similar disregard for the truth in his description of the Title V employee protection program mandated by the Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, 87 Stat. 985 ("3R Act"). According to Roth, the initial $250 million authorized for attrition-type protective payments (under Title V of the 3R Act) was depleted prematurely (in four years rather than the projected 25) because of "unpredicted carnage in the form of jobs and income." Roth VS at 5. Actually, according to congressional reports, the principal reason for the early depletion of Title V funds was that many individuals who retained their employment received "windfalls" in the form of "monthly displacement allowances" ("MDAs"). S. Rep. No. 96-784, 96th Cong., 2d Sess. 4-6 (1980). Under the original Title V formula, many individuals who continued as full-time employees of Conrail received, through a combination of regular earnings and MDAs, annual incomes in excess of their normal earnings on the predecessor railroads. Id. Congress intended to "eliminate windfall benefits" when it enacted the Staggers Rail Act of 1980, which made various changes in the formulas for computing MDAs. Id. at 5-9; Hinds v. Consolidated Rail Corp., 518 F. Supp. 1350, 1354-58 (Sp. Ct. R.R.R.A. 1981), cert. denied, 454 U.S. 1145 (1982).

[23] The various tables attached to Roth's statement also lend no support to TCU's labor "sacrifices" theory. Roth uses the tables to show that Conrail's operating performance and profitability improved between 1978 and the present. None of Roth's tables or other figures shows that these improvements were achieved at the expense of Conrail's current employees. The 1981 wage increase deferral is the only asserted "sacrifice" that Roth attempts to value; he says it saved Conrail $500 million. However Roth's own figures show that Conrail saved many times that amount through workforce reductions. Roth contends (TCU-6, Roth VS at 2) that Conrail eliminated 50,798 jobs since 1980, including 39,754 jobs between 1980 and 1983. Even assuming a constant average hourly rate of $11.15 (the average Conrail wage rate for 1981, according to Roth (id. Att. 1)), and without considering other non-wage labor costs, a single position cost more than $23,000 per year. By that measure, the positions abolished prior to 1983 alone would have cost Conrail well over $12 billion between 1983 and the present.

Likewise, there is no merit in TCU's reliance (TCU-6 at 6) on the amounts of supposed "severance payments" and "dislocation allowances" to be paid to Conrail's nonagreement employees in connection with the proposed transaction. ICC/STB-imposed employee protective conditions have never been conceived as a means to promote economic parity between unionized and nonagreement employees. There is no reason why the Board should use them in that fashion here. TCU contends that it would be "only equitable" for the Board to enhance its standard employee protections based on the level of nonagreement benefits. TCU-6 at 7. However, the imposition of such an ad hoc arrangement (contrary to ICC and Board precedent) would not produce an equitable result in this case. As Richard D. Huffman, Conrail's Assistant Vice President-Compensation and Benefits, explains, most of the benefits to Conrail's nonagreement employees (other than certain executives whose benefits are subject to individual employment contracts) are proceeds of the early allocation of Conrail's ESOP, not "severance" or "dislocation" payments. Verified Statement of Richard D. Huffman ("Huffman VS"). As Mr. Huffman explains (at 2-3), the ESOP was part of Conrail's Matched Savings Plan, a 401(k) retirement savings plan under which employee contributions were matched with Conrail stock. In accordance with applicable standards, Conrail is now allocating to eligible ESOP participants the proceeds of the sale of unallocated ESOP shares (less the amount paid to retire the loan used to purchase those ESOP shares when the plan was created in 1990).[24]

Conrail's unionized employees had an equal opportunity to participate in the Conrail Matched Savings Plan/ESOP. In 1989, Conrail offered all of its employees an opportunity to

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[24] The unallocated shares are those ESOP shares that were not allocated to individual employees' retirement savings accounts (under the Matched Savings Plan) prior to the tender of shares pursuant to the tender offer. Huffman VS at 3.

participate in the plan. All of Conrail's unions rejected that proposal. In 1992, one union, the FOP, made an agreement to participate in the Conrail Matched Savings Plan/ESOP; its members will participate in the ESOP allocation on the same terms applicable to nonagreement employees, as will certain TCU-represented "Technically Covered" clerical employees, who are subject to Conrail's nonagreement benefits package. Huffman VS at 3-4; McCain VS at 5. In hindsight, the other unions may regret their decisions to reject the ESOP. However, there is nothing "equitable" about TCU's suggestion that employees who rejected the opportunity and risks of participating in the ESOP should obtain enhanced protection in this proceeding.[25]

c. Employees of Nonapplicant Carriers Are Not Eligible For New York Dock Protection

UTU urges the Board to extend labor protection to employees of a nonapplicant carrier, D&H. UTU-5 at 6-7.[26] UTU's request is contrary to precedent and should be denied.

The ICC held long ago that its "labor protection conditions are designed to protect only employees of railroads participating in transactions," reflecting that "Congress intended protection only for employees of the merging railroads." BN Control, 360 I.C.C. at 948. The

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[25] As Mr. McCain testifies (VS at 6), there also is no merit to the contentions of Conrail employee R.D. Chamberlain, who urges the Board to deny the Application on the ground that Conrail employees assertedly "gave up our money making agreements and crew sizes to make [Conrail] a profitable railroad." Letter filed December 2, 1997 by R.D. Chamberlain, (unnumbered) at 1. Mr. Chamberlain's reference to "money making agreements" presumably refers to the fully-repaid 1981 wage increase deferral described in the text. His reference to "crew sizes" refers to Conrail/UTU agreements which, like the comparable crew consist agreements on all other class I railroads, provide enhanced monetary benefits to employees who work in reduced crews. The fact that UTU made such agreements with Conrail does not distinguish the proposed transaction from the several recent class I consolidations and does not otherwise warrant denying the Application.

[26] See also Comments of New York State Legislative Board, UTU (unnumbered) at 8.

ICC never wavered from this view; it consistently denied protection to employees of nonapplicant carriers.[27] The Board recently adhered to this position in UP/SP, slip op. at 175 n.22 (employee protection conditions are "not intended to protect employees of carriers not participating in" the transaction). There is no basis for changing course now.

UTU maintains that D&H's employees should be treated differently because NS will be operating a portion of Conrail's Southern Tier route, running from Binghamton to Buffalo, over which D&H holds trackage rights. Currently, the bulk of D&H's traffic over this corridor is overhead traffic that is interchanged with NS at Buffalo. Because NS will be acquiring this portion of the Southern Tier, UTU anticipates that NS will use its own trains over the line, obviating the Buffalo interchange with D&H. According to UTU, this will result in less work for the D&H train service employees currently operating trains over that line.

Contrary to UTU's assertions, nothing in this circumstance warrants departure from the rule that labor protection conditions are not intended to protect employees of nonapplicant carriers. The mere fact that D&H holds trackage rights on a Conrail line that will be operated by NS does not make D&H an applicant (or make the employees of D&H employees of NS or Conrail). UTU contends (UTU-5 at 6), mistakenly and without citation to authority, that "because NS is acquiring territory over which D&H has trackage rights," this case is "different

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[27] E.g., CSX Control, 360 I.C.C. at 590-91 ("we have never imposed labor protection conditions for the benefit of nonapplicant carriers' employees"); NS Control, 366 I.C.C. at 230-31; UP Control, 366 I.C.C. at 621 (Section 11347 "did not consider protection of employees beyond those employed by the carriers that were parties to the transaction itself"); UP/MKT, 4 I.C.C.2d at 513; UP/CNW, slip op. at 96 ("protection for employees of carriers other than the primary applicants is unwarranted, because labor protective conditions are designed to protect only employees of railroads participating in transactions").

from the normal scenario where a third-party carrier loses work due to a diversion of traffic upon implementation of the transaction."

In fact, our case is functionally identical to the "normal scenario" in which an applicant acquires a rail line and thereafter diverts its traffic to that line and away from another, parallel line owned by a third-party, nonapplicant carrier. Here, just as much as in the typical parallel lines scenario, there are two rail lines involved -- Conrail's by ownership and D&H's by trackage rights. These rail lines are just operated on one physical piece of track. D&H remains a nonapplicant, and there is no more justification for affording protection to its employees than to any other nonapplicant's employees. Cf. Rio Grande Control, 4 I.C.C.2d at 957 (no basis for providing protection to nonapplicant employees who may lose work as a result of an applicant carrier's discontinuing the use of trackage rights over the line on which the nonapplicant employees work, and routing traffic over a line the applicant will acquire in the transaction).

3. Other Requested Modifications

Some commentors have requested that the Board issue an order requiring labor organizations, at Applicants' request, to engage in New York Dock implementing agreement negotiations prior to Board approval of the transaction. NITL-7 at 36-37;[28] CARG-5 at 3; Terra Nitrogen Corp. and Terra Indus., Inc. (unnumbered) at 3. Applicants recognize that there are benefits in reaching pre-approval implementing agreements.[29]

28/ Since filing its comments, the NITL reached a settlement with CSX and NS and supports the transaction.

29/ Terra Nitrogen additionally requests that the Board's approval decision not become effective until Applicants certify that they have entered into implementing agreements. This condition has never been imposed before, and no circumstances exist that would warrant its imposition here.

Several commentors also have asked that the Board require the Applicants to submit all labor implementing agreements to the Board for its approval. Comments of PPG Indus., Inc. (unnumbered) at 5; Comments of E.I. DuPont de Nemours & Co., Inc. (unnumbered) at 6. This too is an unnecessary requirement. There is no need for the Board to review implementing agreements reached through negotiation. Requiring such review would needlessly delay implementation that had already been agreed upon.

4. Applicants Will Not Violate Article I, Section 3 of New York Dock

TCU argues that Applicants' proposals violate Article I, Section 3 of New York Dock in that Applicants are supposedly proposing to deny CSX clerical employees protection under existing CSX-TCU job stabilization agreements and to deny former Conrail employees protection under Conrail's Supplemental Unemployment Benefits ("SUB") Plan. TCU-6 at 19-21. Section 3 provides that the New York Dock conditions must be construed so as not to deny employees rights or benefits under existing job security or protective arrangements, but that an employee cannot "pyramid" benefits. That is, an employee entitled to benefits under both New York Dock and another protective arrangement must select only one arrangement under which to receive benefits.

Contrary to TCU's apparent misunderstanding, CSX and NS are not proposing to deny benefits under the Conrail SUB Plan or CSX's stabilization agreement.[30] CSX and NS agree that protections under existing protective arrangements are preserved by Section 3.

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[30] However, it is Applicants' position that the mere placement of employees covered by the CSX-TCU job stabilization agreements under the Conrail agreement and of employees covered by the SUB Plan under the CSX or NS agreements will not entitle these employees to benefits under either the protective agreements or New York Dock.

5. Placing Employees On A Consolidated Roster When They Cannot Initially Hold A Position At The Consolidated Location Is Neither Unprecedented Nor Violative Of New York Dock

CSX proposes, after the transaction, to consolidate the clerical work associated with customer service, crew management, finance and headquarters functions in Jacksonville, Florida. Accordingly, CSX has proposed to transfer these clerical functions relating to the portions of Conrail that it will operate to Jacksonville. CSX is further proposing to place Conrail clerical employees performing these functions who are not immediately needed on Jacksonville seniority rosters. As a result, when future vacancies arise at Jacksonville, these employees will be recalled to fill those vacancies. TCU argues that such a transfer to another seniority roster is unprecedented and changes New York Dock. TCU-6 at 14-17. CSX's proposal is neither unprecedented nor contrary to New York Dock.

The two Board decisions cited by TCU do not preclude CSX from including in a proposed implementing agreement a provision that furloughed employees are obligated to relocate when recalled for a new position. In fact, contrary to TCU's broad assertion that "[n]o railroad has ever implemented such a policy," TCU-6 at 16, CSX has in past coordinations, pursuant to negotiated implementing agreements, listed surplus employees on a seniority roster before work was available for them at the new location and then recalled them when positions became available. Indeed, CSX has entered into such arrangements with TCU. Peifer/Spenski RVS at 57-58.

The Board decisions cited by TCU concluded that, under Section 6(d) of New York Dock, a furloughed employee's dismissal allowance could be terminated if the underlying agreement required the employee to accept the transfer. CSX Corp.--Control--Chessie Sys., Inc.

and Seaboard Coast Line Indus., Inc. (Arbitration Review), Finance Docket No. 28905 (Sub-No. 28), served September 3, 1997; CSX Corp.--Control--Chessie Sys., Inc. and Seaboard Coast Line Indus., Inc. (Arbitration Review), Finance Docket No. 28905 (Sub-No. 25), served January 11, 1994. These decisions do not hold that a negotiated or arbitrated implementing agreement cannot require a dismissed employee to relocate.

CSX can show that requiring furloughed former Conrail employees to relocate to Jacksonville as positions become available is necessary to realize the efficiencies of the transaction. Although these employees will initially be surplus, CSX expects to have positions for them within three years. CSX will benefit from their job experience. Clerical employees required to relocate to Jacksonville will suffer no economic loss because they will receive relocation assistance provided for by the New York Dock conditions. Moreover, they will be productively employed at good, high-paying jobs where they will be able to use their prior railroad experience. Finally, the "significant equity issues for Conrail and CSXT Jacksonville employees" regarding "whether such transferred seniority should be dovetailed or endtailed . . ." (TCU-6 at 17) are the kinds of issues traditionally addressed in implementing agreements and present no "unique circumstances."

D. The Board Has Authority To Modify Labor Agreements In Order To Permit Implementation Of The Conrail Transaction, And The Carriers Are Not Required To Follow The Procedures Of The Railway Labor Act And The Washington Job Protection Agreement To Implement The Transaction

The ARU devote substantial effort to attacking the established framework ensuring that NS and CSX will be able, now and in the future, to make operational changes that will permit them to achieve the public transportation benefits the Conrail transaction promises. In this connection, the ARU contend that the Board lacks authority to modify labor agreements to permit

operational implementation of the transaction. According to the ARU, the carriers cannot carry out the Conrail transaction until they first bargain with their labor unions under RLA Section 6 and the WJPA to obtain the changes in existing labor agreements necessary to permit implementation.

The position of the ARU is a denial of seven decades of statutory and administrative history under the ICA's consolidation and employee protective provisions. More pointedly, the position of the ARU is a denial of all that has occurred in the law since 1983, when the ICC was first called upon to address these matters under the current standard employee protective conditions.[31] The ARU theories are discredited. They have no basis in law. They carry no substance.

The RLA/WJPA model advanced by the ARU is a formula for defeating the Conrail transaction. The position of the ARU is that the parties can voluntarily negotiate the terms of implementation, free from any meaningful compulsory dispute resolution mechanism should agreement not be reached. This is not, and never has been, a viable framework for ensuring that operational changes designed to implement approved transactions will occur. As a practical matter, to require the carriers to negotiate under the RLA over their right to implement transactions is to guarantee that transactions will not occur. The RLA is not designed to produce prompt agreement; just the opposite. Forcing carriers to adhere to such a process would require

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[31] Denver & Rio Grande Western R.R.--Trackage Rights--Missouri Pacific R.R., Finance Docket No. 30,000 (Sub No.-18), served October 25, 1983, slip op. at 6 (explaining that the ICC's jurisdiction over transactions would be "substantially nullified" if a Section 4 arbitrator could not authorize carriers to make the changes "in existing working conditions and collective bargaining agreements" required for implementation to occur), appeal dismissed sub nom. ICC v. Brotherhood of Locomotive Engineers, 482 U.S. 270 (1987).

them to pay a second price to labor in order to obtain the right to make needed operational changes. Congress, however, has already set the price for the implementation of the Conrail transaction, by requiring the payment of unparalleled compensatory benefits to adversely affected employees.

Unlike the RLA/WJPA model, New York Dock's mandatory and assured arbitration mechanism is designed to permit the carriers to obtain the adjustments in work forces necessary to implement the Conrail transaction. It is the vehicle that enables carriers to implement the "operational aspects of the transaction" "without the need to apply to . . . labor unions" for "authority to do so," except as required by the protective conditions themselves. UP/MKT Control, 4 I.C.C.2d at 514.

At this late date, there is simply no room for any dispute on these bedrock principles. Labor interests have tried unsuccessfully for fifteen years to win support for the proposition that carriers must use the RLA to obtain changes in labor agreements necessary to implement approved transactions. The unions have litigated these matters in the courts and before the ICC and the Board time and time again. The battle is over. The unions have lost. The law is settled that the Board has the authority to modify labor agreements, and that the operational implementation of approved transactions occurs exclusively through the New York Dock process. There is no justification for the assertion by the ARU that the carriers' unions must now be handed the power of veto over implementation of the Conrail transaction.

We address the subject here not because there is any question as to what the law is, but only because the ARU, against all reason -- and contrary to the position of many other unions[32] -- persist in advancing their outmoded positions, without acknowledging that they are asking for a complete reversal of settled doctrine.

The principles at stake are fundamental to carriers' ability to implement merger and control transactions. It is a familiar proposition that what carriers do when they come under common control is integrate their previously separate facilities, train operations, and workforces, to realize the benefits of being a unified system, rather than a collection of independent railroads.[33]

By their nature, such integrated operations are incompatible with existing labor agreements. Labor agreements correspond to work arrangements as they existed before the transaction, when the carriers were separate. These agreements divide up work by territory and facility. Thus, for example, a labor agreement's "scope" rule reserves work exclusively to employees covered by that agreement. American Train Dispatchers Association v. ICC, 26 F.3d 1157, 1161 (D.C. Cir. 1994) ("ATDA v. ICC"). Seniority provisions similarly divide workforces. They provide that jobs on the territory or facility to which the labor agreement

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32/ UTU, for example, has admitted that in the proper circumstances a New York Dock arbitrator can modify labor agreements, Union Pacific Corp. -- Control and Merger -- Southern Pacific Transp. Co., Finance Docket No. 32760 (Sub-No. 27), served June 26, 1997, slip op. at 5 ("UP-SP/Train Operations"), as have TCU (TCU-6 at 18), IAM (IAM-4, at 10-11), and URSA (URSA-3, at 12-13), in their comments in this proceeding.

33/ E.g., Southern Ry.--Purchase--Ill. Central R.R., 5 I.C.C.2d 842, 848 (1989) (operational changes to realize the economies made possible by acquisitions of control typically "involve a broad restructuring of two formerly independent work forces into a new integrated unit or units"), aff'd sub nom. United Transportation Union v. United States, 905 F.2d 463 (D.C. Cir. 1990).

applies can be assigned only to employees holding seniority rights under that agreement. Differences in other work rules can likewise frustrate integration of operations.

Consequently, there is a collision between existing labor agreements and a carrier's ability to carry out the Board's authorization by integrating its operations.[34] Here, as the CSX and NS Operating Plans describe (and Part F, below, briefly discusses), CSX and NS expect to undertake myriad operational changes directly related to realizing the transportation benefits of their each operating allocated portions of Conrail. For example, CSX and NS expect to consolidate train operations, transfer and centralize various types of clerical and shopcraft work, realign crew districts, and consolidate seniority systems. None of these operational integrations could occur if all existing agreements had to be left in place unchanged.

We here give but one specific example, which is particularly telling for the disingenuous way the ARU treat it in their Comments. After the transaction, NS anticipates operating an integrated locomotive fleet, such that it will make no operational difference whether a locomotive previously belonged to NS or to (former) Conrail. NS intends to organize the heavy repair of the combined locomotive fleet based on the locomotive's manufacturer: locomotives manufactured by General Electric will be sent to NW's existing locomotive facility in Roanoke for repair, while General Motors locomotives will be repaired at the Conrail Juniata locomotive

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[34] As the ICC explained: "almost all consolidations require scope [rule] and seniority [provision] changes in order to effectuate the purpose of the transaction. Railway Labor Act bargaining over these aspects of a consolidation would frustrate the transactions." CSX Corp.--Control--Chessie System, Inc. and Seaboard Coast Line Industries, Inc. (Arbitration Review), Finance Docket No. 28905 (Sub-No. 27), served December 7, 1995), slip op. at 15 ("CSX Control/Train Operations"), aff'd sub nom. United Transportation Union v. STB, 108 F.3d 1425 (D.C. Cir. 1997).

facility at Altoona, which NS will be operating. This arrangement will permit functional specialization which will promote greater efficiency in NS' locomotive heavy repair operations.

NS could not do this under the existing NW and Conrail labor agreements with the shopcraft unions applicable in those shops. The classification-of-work rules in the Conrail agreements would prohibit former Conrail locomotives from being sent to Roanoke for repair by NW employees; the classification-of-work rules in the NW agreements would prevent NS locomotives from being sent to Altoona for repair by (former) Conrail employees. Leaving these agreement terms unchanged would prevent NS -- and thereby the public -- from reaping the advantages of having an integrated locomotive fleet.[35]

The ARU assert that this inherent tension between the RLA and implementation of transactions is to be resolved in favor of the RLA and against implementation. According to the ARU, the only way agreement changes can occur is by the purchased consent of labor though RLA/WJPA negotiation.

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[35] The ARU (ARU-23 at 142-45) confuse this fundamental point. The ARU suggest that nothing in the Conrail agreements' classification-of-work rules would prevent former Conrail employees from repairing NS locomotives at the former Conrail facility at Altoona. But even assuming that this is true, the ARU misrepresent the key point. It is these rules in the NW agreements that would prevent NS locomotives from being sent to the former Conrail facility in Altoona for repair. What the rules in the Conrail agreements would prevent is the sending of Conrail's locomotives to Roanoke for repair by NW employees.

Accordingly, the ARU assertion (ARU-23 at 145) that "nothing in the Conrail agreements prevents NS from having GE or GM locomotives serviced at any location" is false. The ARU know this. At a different point in their Comments (at 110), the ARU expressly endorse NS' explanation that the "Conrail shop crafts agreements contain provisions that 'restrict the repair of Conrail locomotives by other than Conrail employees.'" (quoting NS Ans. to ARU Int. No. 183).

The ARU position is contrary to law. Congress, the courts, and the Board have resolved the inherent tension by providing that a carrier's ability to implement an approved transaction prevails over the RLA and existing labor agreements that would stymie implementation. The implementing agreement resulting from the New York Dock procedures is the means by which transactions can occur. Union consent to operational implementation is, ultimately, not required. But neither can the carriers unilaterally implement a transaction, as the ARU wrongly assert. Implementation occurs by agreement or, failing that, through adjudication in arbitration.

The seminal modern era decision is Norfolk & Western Ry. v. American Train Dispatchers Ass'n, 499 U.S. 117 (1991) ("Dispatchers"), in which the Supreme Court held that the 49 U.S.C. § 11321(a) exemption from "all other law" authorizes carriers to implement transactions free from the restraints of RLA Section 6 and labor agreements. 499 U.S. at 131-33.[36] As the Court explained, were the RLA to apply, "rail carrier consolidations would be difficult, if not impossible, to achieve." Id. at 133. Exhaustion of the RLA Section 6 process is "almost interminable." Detroit & Toledo Shore Line R.R. v. United Transportation Union, 396 U.S. 142, 155 (1969). The point of the Section 6 process is precisely not to force parties to agreement, Elgin, Joliet & Eastern Ry. v. Burley, 325 U.S. 711, 725 (1945), and, if that process were to apply to the implementation of Board-authorized transactions, unions would, in the end, be empowered to strike in order to block them. Requiring carriers to adhere to the

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[36] Section 11321(a) [formerly § 11341(a)] of Title 49, U.S.C., provides in relevant part:

> The authority of the Interstate Commerce Commission under this subchapter [Subchapter III--Combinations] is exclusive . . . . A carrier . . . participating in that approved or exempted transaction is exempt from the antitrust law and from all other law . . . as necessary to let that person carry out the transaction . . . .

protracted RLA process in an effort to win union consent to needed changes in labor agreements "would so delay the proposed transfer of operations that any efficiencies the carriers sought would be defeated." Dispatchers, 499 U.S. at 133. Section 11321(a) "is designed to avoid this result," and so permit realization of the longstanding congressional goal to facilitate transactions and promote the health of the nation's rail system. 499 U.S. at 133.[37]

The Board has authority to modify labor agreements as necessary to permit implementation of approved transactions. United Transportation Union v. STB, 108 F.3d 1425, 1429 (D.C. Cir. 1997) (case law "is clear in recognizing that the Commission may modify agreements as necessary to effectuate covered transactions") ("UTU v. STB"); ATDA v. ICC, 26 F.3d at 1162-65; Railway Labor Executives Association v. United States, 987 F.2d 806, 813-14 (D.C. Cir. 1993) ("Executives"). To this end, the courts have made clear that 49 U.S.C. § 11326 [formerly § 11347] is an independent source of statutory authority (in addition to Section 11321(a)) for modification of labor agreements by the Board and its arbitrators. Executives, 987 F.2d at 813-15 (Section 11326 "contemplate[s] that the ICC may modify a CBA" as "necessary to effectuate a transaction").[38]

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[37] Congressman Menendez states that "[t]he STB would never seriously entertain voiding contracts for coal or diesel fuel for profitable companies." Congressman Menendez (unnumbered) at 5. Vendors of coal and diesel fuel cannot block a Board-authorized transaction. Similarly, railroads are not required by federal law to enter into the implementation of a railroad transportation contract with particular vendors. In contrast, railroads are required by federal law to bargain with the representatives of their employees. Thus, labor contracts are not strictly comparable to contracts for goods and services. Moreover, Applicants are asking the Board not to permit the anti-assignment provisions in a number of contracts to strip Conrail's assets away from their intended use by CSX and NS. See Section VI

[38] The precise contours of the Board's authority -- including the prerequisites to and limits on the Board's exercise of that authority -- are discussed in Part E, below.

The courts' rulings merely confirm the position announced in decision after decision by the ICC, and now the Board, both in approving rail mergers or acquisitions of control[39] and in reviewing arbitration awards under the protective conditions.[40]

These decisions conclusively establish that the Board has the authority to modify "scope" rules, seniority rules, and other rates of pay, rules, and working conditions, if necessary. In particular, under New York Dock, work can be removed from the jurisdiction (scope) of separate labor agreements and put under a single agreement to govern the consolidated operations, so that work and employees can be assigned appropriately throughout the integrated system. And

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39/ E.g., UP/SP, slip op. at 173 (the arbitrator "will have the authority to override CBAs and RLA rights as necessary to effect . . . the merger"); BN/Santa Fe, slip op. at 82 ("an arbitrator . . . clearly does have authority to override CBAs and RLA rights, as necessary to effect the BN/Santa Fe control transaction.").

40/ E.g., UP-SP/Train Operations, slip op. at 4 ("it is now firmly established that the Board, or arbitrators acting pursuant to authority delegated to them under New York Dock, may override provisions of collective bargaining agreements when an override is necessary for realization of the public benefits of approved transactions); CSX Control/Train Operations, slip op. at 3, 12 ("it is well settled" that "this agency (and an arbitrator acting under New York Dock) is authorized to override provisions of collective bargaining agreements that prevent realization of the public benefits of a transaction"); CSX Corp.--Control--Chessie System, Inc., and Seaboard Coast Line Industries, Inc., 8 I.C.C.2d 715, 720 (1992) (ICC and its arbitrators can override existing labor agreements "that would prevent" an authorized transaction "from being carried out"), aff'd, ATDA v. ICC; Norfolk & Western Ry. et al.--Exemption--Contract to Arbitrate and Trackage Rights (Arbitration Review), Finance Docket No. 30582 (Sub-No. 2), served July 7, 1989, as reaffirmed after remand, served May 14, 1992, slip op. at 4 ("Interstate Railroad") ("the Commission and delegated arbitrators have the authority to override provisions of a collective bargaining agreement if such provisions prevent a Commission-approved transaction from being carried out"); Norfolk Southern Corp.--Control--Norfolk & Western Ry. and Southern Ry., 4 I.C.C.2d 1080, 1083 (1988) ("NS Control/Power Distribution") ("it has long been the Commission's view that private collective bargaining agreements and [RLA] provisions must give way to the Commission-mandated procedures of [New York Dock Art. I,] section 4 when parties are unable to agree on changes in working conditions required to implement a transaction authorized by the Commission") (this decision was vacated by the D.C. Circuit, but then reinstated when the United States Supreme Court reversed the D.C. Circuit in Dispatchers).

employees can be transferred from one labor agreement to another and placed on a consolidated seniority roster, so they can draw work assignments throughout the integrated system, under common rules.[41] Such changes are precisely those required for carriers to realize the transportation benefits of being an integrated system in the first place. UTU v. STB, 108 F.3d at 1431 ("it is obvious that separate and distinct parts, operating separately and distinctly, will not generate the value of consolidation"); ATDA v. ICC, 26 F.3d at 1163.

It is equally settled that New York Dock provides the exclusive forum for implementing Board-approved transactions. The Supreme Court's decision in Dispatchers makes clear that "the ability of the [Board] to exempt parties from RLA procedures and impose an alternative set of

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41/ CSX Control/Train Operations, for example, emphasizes that New York Dock authority includes "the switching of employees from work under one collective bargaining agreement to another." Slip op. at 12. That case involved CSX's consolidating the train operations of four separate properties under its common control, where the operations on each property were governed by a different labor agreement. The ICC upheld as appropriate an implementing agreement that merged four seniority rosters into one consolidated roster, and placed the affected employees under a single labor agreement, which would apply to the consolidated operations. The D.C. Circuit affirmed, finding it evident that these changes were "necessary to effectuate the merger of the rail lines," and improve efficiency of operations, "resulting in reduced rates to shippers and ultimately to consumers." UTU v. STB, 108 F.3d at 1431.

The Board reached the same conclusion in UP-SP/Train Operations, reaffirming that its authority encompasses the "consolidation of collective bargaining agreements." Slip op. at 5. This case involved UP's consolidating train operations on separate properties under its common control, where the operations on each property were governed by a separate labor agreement. The Board upheld as appropriate an implementing agreement that merged separate seniority rosters into one consolidated roster, and which placed the employees under a single, uniform labor agreement, applicable throughout the consolidated operations. Slip op. at 4-5.

The ICC had earlier endorsed the same principle in Interstate Railroad There, NW and its affiliate Southern Railway [now named NSR] jointly assumed control of a third affiliated railroad, the Interstate Railroad Company, with NW becoming responsible for train operations over the Interstate property. The ICC upheld as appropriate an implementing agreement providing that the former Interstate employees would work under the NW labor agreement.

procedures" "to efficiently resolve labor disputes which arise in connection -- or allegedly in connection -- with a railroad" transaction is essential to the effective working of the ICA consolidation scheme. Railway Labor Executives' Association v. Southern Pacific Transportation Co., 7 F.3d 902, 906-07 (9th Cir. 1993), cert. denied, 510 U.S. 1193 (1994). [42] The ICC (and now the Board) has long held this same position.[43]

The ARU have no valid argument against these controlling authorities. Instead, the ARU either ignore these decisions entirely, or twist them beyond recognition to make it appear as though the unions won these cases when in fact they lost.

Rather than legal authority, the ARU serve up a false history of the ICA consolidation and employee protection provisions. In this regard, the ARU assert (e.g., ARU-23 at 77) that the current framework marks a radical departure from some past era when Congress and the ICC left implementation of transactions to the vagaries of the RLA. But this is not an historically valid way of describing the ICA consolidation framework. The recent case law is grounded in decades of history.

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[42] It follows directly that a strike intended to "unilaterally frustrate" the decision of a New York Dock arbitrator is unlawful and may be enjoined. CSX Transportation v. United Transportation Union, 86 F.3d 346, 349 (4th Cir. 1996). Any other conclusion would "thwart the operation of the arbitration provision" of New York Dock. 86 F.3d at 352.

[43] E.g., NS Control/Power Distribution, 4 I.C.C.2d at 1084 (unless the "mandatory arbitration provisions of New York Dock take precedence over the RLA dispute resolution procedures," there "can be no assurances" that operational changes implementing an approved transaction "could ever be accomplished," because the RLA contains "no mechanism . . . for insuring that the parties will arrive at agreement"; citation omitted); Interstate Railroad, decision served July 7, 1989, slip op. at 5 ("it is settled that labor disputes arising from transactions approved pursuant to 49 U.S.C. § 11343 are resolved under Commission-imposed labor protective conditions and not through the provisions of the RLA").

Congress and the ICC never expected the RLA to be the vehicle for implementing transactions. Rather, over the years an ICA-based mechanism for timely implementation through a process of mandatory and assured arbitration has been developed. In particular, the real history of the ICA's consolidation and employee protective conditions conclusively establishes: (1) that Congress understood from the start that consolidations require changes in the terms of existing labor agreements in order to proceed, which is why Congress mandated protection for employees; (2) that Congress also understood that the RLA was an impediment to implementation, which is why Congress exempted transactions from that statute; (3) that the arbitration provisions in the ICC's employee protective conditions displace the RLA mechanism for dispute resolution and provide an affirmative, exclusive means of resolving labor disputes over implementation; and (4) that, to do their jobs, arbitrators acting under the protective conditions necessarily must modify labor agreement terms that would impair implementation. In exchange, employees receive uniquely generous compensatory benefits, now including up to six years' wage protection. New York Dock, 360 I.C.C. at 84.

The starting point is Congress' continual recommitment, since 1920, to a national policy of fostering railroad consolidations that serve to rationalize and improve the nation's rail system. Dispatchers, 499 U.S. at 132.[44] From the outset, the Section 11321(a) exemption has been a

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[44] E.g., United States v. Lowden, 308 U.S. 225, 232 (1939) (owing to the Transportation Act of 1920, "consolidation of the railroads of the country, in the interest of economy and efficiency, became an established national policy"); County of Marin v. United States, 356 U.S. 412, 416, 417-18 (1958) (Transportation Act of 1940 was designed "to facilitate merger and consolidation in the national transportation system," and "expresse[d] clearly the desire of Congress that the industry proceed toward an integrated national transportation system through substantial corporate simplification"); Pittsburgh & Lake Erie R.R. v. Railway Labor Executives' Association, 491 U.S. 490 (1989) (the 4R Act of 1976 and the Staggers Act of 1980 were "aimed at reversing the (continued...)

cornerstone of the legislative design, Seaboard Air Line R.R. v. Daniel, 333 U.S. 118, 125 (1948), ensuring that the "obligations imposed by laws such as the RLA will not prevent the efficiencies of consolidation from being achieved," Dispatchers, 499 U.S. at 132.

The Supreme Court's holding that Section 11321(a) overrides "collective-bargaining obligations via the RLA" in order to ensure that transactions would not be defeated "makes sense of the consolidation provisions" of the ICA. 499 U.S. at 132. It confirms that Congress has always appreciated that integrating once separate railroad operations, facilities, or workforces - would necessarily require changes in labor agreements, and that the RLA would frustrate implementation. Id. at 132-33. [45]

The employee protective conditions complement the broad guarantees of the Section 11321(a) exemption. Id. Section 11321(a) overrides the RLA, but it does not provide an affirmative means for management and labor to agree on terms of implementation of transactions in order to promote "the maintenance of a service uninterrupted by labor disputes," United States v. Lowden, 308 U.S. 225, 235-36 (1939) ("Lowden"). The arbitration provisions in the employee protective conditions, as developed over time, serve that function. In exchange, employees receive extremely generous compensation under the conditions.

44/ (...continued)
rail industry's decline through deregulatory efforts, above all by streamlining procedures to effectuate economically efficient transactions").

45/ The one deviation from this framework is the telling exception of the three-year period when Title I of the Emergency Railroad Transportation Act of 1933 ("ERTA"), ch. 91, 48 Stat. 211, was in effect. That temporary statute expressly excluded the RLA and labor agreements from the coverage of its exemption provision, Title I, § 10(a), 48 Stat. 215 -- an exclusion that was removed from the exemption provision in the permanent Title II of ERTA, ch. 91, § 202(15), 48 Stat. 211, 219, a predecessor of § 11321(a).

The WJPA, an RLA agreement entered into by most of the nation's railroads and unions, served as a model for later ICC protective arrangements. New York Dock Ry. v. United States, 609 F.2d 83, 86 (2d Cir. 1979). WJPA provided for up to five years wage protection for employees affected by "coordinations" between carriers. And WJPA Sections 4 and 5 required 90-day advance notice to interested employees and a preconsummation implementing agreement regarding the "changes to be effected" by a coordination and "any assignment of employees made necessary by a coordination."

In Lowden, the Supreme Court upheld the ICC's imposition of labor protection modeled after WJPA, even absent explicit statutory authorization. Compensatory protection was appropriate precisely because consolidations unavoidably abridge rights previously held under existing labor agreements, including "the loss of seniority rights which, by common practice of the railroads are restricted in their operation to those members of groups who are employed at specified points or divisions." 308 U.S. at 233, 235-36. [46]

The Transportation Act of 1940, ch. 722, 54 Stat. 899, placed a statutory foundation under employee protection, directing the ICC to provide a "fair and equitable arrangement" for employees adversely affected by transactions. The pivotal event was Congress' rejection of the so-called Harrington Amendment, which would have prevented railroad consolidations from

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[46] The ARU wrongly suggest that Lowden does not recognize a link between employee protection and the fact that transactions inevitably abridge employee contract rights. In fact, it was precisely because of Congress' "recognizing that consolidations in the public interest will" result in dismissals, transfers, and 'the loss of seniority rights'" that Congress decided to impose "a number of labor-protecting requirements." Dispatchers, 499 U.S. at 133 (quoting Lowden). In Lowden itself, the ICC had approved the "dovetailing" of the two carriers' seniority rosters. Chicago, Rock Island & Georgia Ry. Trustees Lease, 230 I.C.C. 181, 185, 187 (1938), modified, 233 I.C.C. 29 (1939).

occurring unless all RLA-based rights were preserved, by barring the ICC from approving any transaction that would "result in unemployment or displacement of employees . . . or in the impairment of existing employment rights." 84 Cong. Rec. 9882 (1939). The Harrington Amendment "threatened to prevent all consolidations," Railway Labor Executives' Ass'n v. United States, 339 U.S. 142, 151 (1950), by handing to labor the right to refuse to agree to the changes in labor agreements that must inevitably accompany consolidations, and to insist on a job freeze. The defeat of the Harrington Amendment confirmed Congress' intent to permit railroads to implement approved transactions without following the RLA, while ensuring that affected employees receive fair compensation under the protective conditions. See id. at 147-54; Nemitz v. Norfolk & Western Ry., 404 U.S. 37, 42 (1971).

The ICC implemented the 1940 Act by developing a standard set of conditions for consolidations, imposed in New Orleans Union Passenger Terminal Case, 282 I.C.C. 271 (1952), as modified in Southern Ry.-- Control--Central of Georgia Ry., 331 I.C.C. 151 (1967) ("Southern Control"). Southern Control definitively established that the provisions in the ICC's conditions for arriving at an implementing agreement were the exclusive means for resolving labor disputes over the operational implementation of approved transactions.

As the ICC there explained, adherence to the RLA "would seriously impede mergers," 331 I.C.C. at 171, by prohibiting the changes in agreement terms necessary for the consolidation of operations and facilities, id. at 162-65. Congress, in 1940, explicitly assigned to the ICC the responsibility for labor protection. The ICC, in turn, adopted employee protective conditions which incorporated much of the substance of WJPA. Specifically, in Southern Control, the ICC expressly adopted the advance notice and preconsummation implementing agreement requirements

of WJPA Sections 4 and 5. The ICC, however, explicitly modified WJPA to provide for the compulsory arbitration of disputes. Southern Control, 331 I.C.C. at 164. As a result, the arbitration procedure in the ICC's conditions -- and not the terms of WJPA of their own force -- became the exclusive mechanism for resolving labor disputes over implementation of ICC-authorized transactions. Id. at 162-65.[47]

Section 402(a) of the 1976 4R Act [48] amended the predecessor to Section 11326 by directing the ICC to adopt, as the "fair arrangement" for employees, conditions "no less protective of the interests of employees than those" previously imposed by the ICC and those "established pursuant to Section 405 of the Rail Passenger Service Act" ("RPSA"). The ICC discharged this mandate by adopting the New York Dock conditions for mergers and acquisitions of control.

Article I, Section 4 of New York Dock carries forward the principle of mandatory arbitration in the agency's earlier conditions, but with an express congressional imprimatur. In discharge of Congress' directive, New York Dock gives more definitive and effective shape to

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[47] The ARU (ARU-23 at 71) invent the proposition that Southern Control says that implementation of transactions is to occur only after changes in agreements have been made through the RLA. This is just fantasy. The ICC's whole point was to make clear that employees could not invoke RLA rights, as this would "seriously impede" mergers. 331 I.C.C. at 171. When unions served up the same treatment of Southern Control in the past, the ICC rejected it. See Interstate Railroad, decision served July 7, 1989, slip op. at 7-8 (in asserting that Southern Control supports the theory that before 1976 the ICC would impose protective "conditions only after modifications were made to existing collective bargaining agreements pursuant to RLA requirements," the union has "misinterpreted the Southern language . . . . Nothing in Southern can be construed as limiting the Commission's authority, or that delegated to an arbitration panel, to resolve labor disputes arising from an approved transaction").

[48] Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, § 402 (a), 90 Stat. 31, 62.

the arbitration procedure for arriving at implementing agreements (specifically separating it from the procedure for arbitrating disputes over an employee's entitlement to compensatory benefits contained in Article I, Section 11).

Borrowing from the Appendix C-1 conditions adopted in 1971 by the Secretary of Labor under RPSA, New York Dock places a stricter timetable on the bargaining and arbitration stages than had the ICC's earlier protective conditions. New York Dock allows carriers to implement a transaction upon completing the streamlined notice, negotiation, and arbitration procedures prescribed by Section 4. These improvements to the arbitration mechanism serve to "assure that the parties reach the necessary agreement prior to consummation but within a reasonable period so as not to delay unduly consummation of the transaction." New York Dock, 360 I.C.C. at 71. The ICC and now the Board have ensured that this mechanism functions as intended by exercising supervisory power over their arbitrators.

All of this ground has been covered many times over. The teachings of the history of the ICA consolidation and employee protection provisions have been confirmed in case after case. Even before the 4R Act, the courts understood that the ICC could authorize operational implementations of transactions "which conflict with existing collective bargaining agreements" and the RLA. Brotherhood of Locomotive Engineers v. Chicago & North Western Ry., 314 F.2d 424, 427 (8th Cir.), cert. denied, 375 U.S. 819 (1963). [49] The ICC itself followed the

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[49] As the Eighth Circuit explained, the "ICC's power to authorize mergers would be completely ineffective if authority to adjust work realignments through fair compensation did not exist." 314 F.2d at 430. Were the RLA to apply, it would "threaten to prevent many consolidations" as either party could "completely block any change in working conditions by refusing to agree" to it, id. at 431 -- an outcome that is both at odds with the Section 11321(a) exemption and expressly repudiated by Congress through its rejection of the Harrington Amendment, 314 F.2d (continued...)

same course.[50] And since the 4R Act, the Board's authority to modify labor agreements and displace the RLA has been established beyond debate in the case law already discussed.

Indeed, just two years ago Congress ratified the ICC's long standing view that the ICA vested the agency with authority to modify labor agreements as necessary to implement approved transactions. In passing the ICC Termination Act, Congress expressly restricted the Board's authority to modify labor agreements in certain transactions involving Class II and Class III carriers. 49 U.S.C. § 11324(e).[51] Congress, however, did not impose any such restriction in connection with merger and control transactions involving Class I carriers, even though Congress was fully aware that the ICC had interpreted the ICA and New York Dock to permit the agency

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49/ (...continued)
at 430-31. See also, e.g., Burlington Northern, Inc. v. American Railway Supervisors Ass'n, 503 F.2d 58, 62-63 (7th Cir. 1974) (per curiam) (merger protection agreement was not inconsistent with the RLA, but "if it were its provisions would be controlling"), cert. denied, 421 U.S. 975 (1975); Nemitz v. Norfolk & Western Ry., 436 F.2d 841, 845-46 (6th Cir.), aff'd on other grounds, 404 U.S. 37 (1971).

50/ In addition to Southern Control, in Norfolk & Western Ry. and New York, Chicago & St. Louis R.R.--Merger, Etc., 347 I.C.C. 506 (1974), the ICC expressly ruled that (the predecessor to) Section 11321(a) was effective to override RLA and labor agreement rights:

> [labor's assertion that] wages, rules, and working conditions governed by the Railway Labor Act may not be changed except in accordance with the procedures prescribed by that act is squarely refuted by the language of section 5(11) of the Interstate Commerce Act which confers exclusive and plenary jurisdiction upon this Commission to approve mergers and relieve carriers from all other restraints of Federal law.

347 I.C.C. at 511-12.

51/ Section 11324(e) provides that "no transaction described in section 11326(b) may have the effect of avoiding a collective bargaining agreement." Section 11326(b) covers only transactions "involving one Class II and one or more Class III rail carriers . . . ."

to modify labor agreements when necessary to the implementation of such transactions.[52] Instead, Congress reenacted the ICA's exemption "from all other law" and employee protective provisions for Class I carriers, without significant change. 49 U.S.C. Sections 11321(a), 11326(a). It is well settled that when Congress is aware of "the longstanding interpretations placed on a statute by an agency charged with its administration" and reenacts "the statute without pertinent changes," it is "persuasive evidence that the [agency's] interpretation is the one intended by Congress." NLRB v. Bell Aerospace Co., 416 U.S. 267, 275 (1974). Accord Albemarle Paper Co. v. Moody, 422 U.S. 405, 444 n.8 (1975); NLRB v. Gullet Gin Co., 340 U.S. 361, 366 (1951) ("it is a fair assumption that by reenacting without pertinent modification the provision . . . Congress accepted the construction placed thereon by the Board"); Lamoille Valley R.R. v. ICC, 711 F.2d 295, 324 (D.C. Cir. 1983) (ICC's interpretation of statute was "entitled to deference, especially since Congress implicitly approved that interpretation in revising and reenacting" the statutory provision in issue).

Against all this, the ARU now say that operational implementation of the Conrail transaction can be accomplished directly through WJPA itself, without the need for New York Dock arbitration. This is an empty assertion.

In the first place, the law is long past the point for arguments based on labor's right to rely on WJPA, as an independent RLA-based agreement, as the vehicle for implementing transactions subject to the Board's jurisdiction. As we have explained, Southern Control

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[52] See, e.g., 141 Cong. Rec. S19076 (December 21, 1995) ("Employees asked for just one exception to the current 'cram-down' practice of the ICC, which allows abrogation of collective bargaining agreements under certain circumstances") (remarks of Sen. Wellstone); 141 Cong. Rec. H12297 (Nov. 14, 1995) ("I would like to point out that this amendment does not in any way affect labor protection in Class I railroads") (remarks of Rep. Whitfield).

expressly refutes this position: implementation occurs not through a free-standing WJPA, but exclusively through the protective conditions imposed under the ICA, and subject to the Board's superintendence.[53] The complete answer to the ARU assertion that the WJPA procedures should be applied here is that the applicable procedures are those in the Board's New York Dock conditions. The ARU cannot seriously suggest that, after 18 years of imposing New York Dock conditions, in discharge of Congress mandate, the Board should now find that this transaction must be implemented through the WJPA.

In all events, adherence to the WJPA scheme would not produce the results falsely advertised by the ARU. In fact, as the ARU know, WJPA is not a realistic means for guaranteeing that implementing agreements will be expeditiously reached.

The ICC itself understood the inadequacy of the WJPA arbitration mechanism more than 30 years ago. In an early stage of the proceeding in Southern Control, the ICC recognized that "Section 13 of the Washington Agreement . . . involves a permanent committee whose decisions

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[53] Undeterred by the facts, the ARU just reinvent the case law to suit their own purposes. Thus, ARU assert (ARU-23 at 93 n.18) that the changes in scope and seniority provisions endorsed in ATDA v. ICC and UTU v. STB were not at odds with the requirements of the RLA because these changes were "accomplished in accordance" with an RLA agreement -- the WJPA. This is preposterous. In fact, the changes to labor agreements in those cases were imposed by arbitrators acting under New York Dock. A New York Dock arbitration award is an order of the STB. It is grounded in and derives its vitality from the ICA; it owes nothing to the RLA. United Transportation Union v. Norfolk & Western Ry., 822 F.2d 1114, 1119-22 (D.C. Cir. 1987), cert. denied, 484 U.S. 1006 (1988). The arbitrators' authority to modify labor agreements is derived entirely from Sections 11321(a) and 11326 of the ICA, and not from any supposed consent based on the fact that the railroad and union parties in ATDA v. ICC and UTU v. STB had entered into the WJPA some sixty years before. See Union R.R. v. United Steelworkers of America, Civil Action No. 96-2095, slip op. at 12 (W.D. Pa. Nov. 24, 1997) (a railroad's rights to implement an ICC-authorized transaction through arbitration under New York Dock, rather than through the RLA, "are statutory in nature, and owe nothing to the WJPA. Significantly, the Union has not identified any cases finding dispositive the fact that the parties were, or were not, signatories to WJPA")(included in Volume 3).

may be subject to protracted delay." Southern Ry.-- Control--Central of Georgia Ry., 317 I.C.C. 557, 566 (1962). Consequently, although the ICC adopted the notice and preconsummation implementing agreement requirement of WJPA Sections 4 and 5, the ICC "specifically rejected" Section 13 of WJPA. Southern Control, 331 I.C.C. at 164. Instead, the ICC, in Southern Control and then in New York Dock, provided for compulsory arbitration of disputes over implementing agreements. Id.; see also New York Dock Ry.--Control--Brooklyn Eastern District Terminal, 354 I.C.C. 399, 411 (1978) (explaining the Southern Control history); New York Dock, 360 I.C.C. at 70.[54]

Indeed, the ARU themselves appreciate the inadequacy of WJPA as a vehicle for ensuring timely implementation of transactions. Counsel for the ARU testified to this effect during congressional hearings on the ICC Termination Act, stating:

> one of the problems that the railroads never liked about the Washington Agreement was how long it took to get anything resolved if you had to go to arbitration. The Section 13 Committee sometimes took years and we worked on that and we tried to speed up that. That's one of the reasons why we used to make agreements, attrition agreements in these merger cases up until the Commission decided it could supersede our agreements in 1983 because the Washington Agreement took a long time to resolve disputes.

Disposition of the Railroad Authority of the Interstate Commerce Commission: Hearings Before the Subcomm. on Railroads of the House of Representatives Committee on Transportation and Infrastructure, 104th Cong., 1st Sess 181 (1995) (statement of William G. Mahoney, Esquire).

54/ WJPA, like the ICC protective conditions of the time, contained only one arbitration provision, which covered disputes over implementing agreements and also disputes over an employee's entitlement to compensatory benefits. Southern Control modified WJPA to provide for compulsory arbitration of both types of disputes.

The experience under WJPA bears out its inadequacy. Feifer/Spenski RVS at 13-16. Although WJPA Section 13 provides for arbitration of disputes, it contains no method to ensure that arbitration will proceed or a decision will be reached in anything approaching a timely manner. Originally, the Section 13 procedure was based on decision-making by a permanent joint management-labor committee (the Section 13 Committee), which, historically, included dozens of members. This process proved to be unwieldy, cumbersome, and prolonged.[55] In 1984, the parties modified the Section 13 procedures, largely to permit cases to be submitted to, and heard by, a neutral arbitrator without the participation of the full Section 13 committee. But even as modified, the Section 13 process is not an effective means for obtaining implementing agreements.

The Section 13 process still contains no meaningful timetables to generate prompt disposition at each stage: negotiation, selection of an arbitrator, conduct of the arbitration proceeding, and the rendering of an award. The Section 13 procedures still contain no mechanism to encourage the timely negotiation of agreements or to ensure that cases will not languish. Nor is the process subject to regulatory oversight. The Section 13 process also

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[55] Under the original procedures, a dispute that could not be resolved on the carriers' property could be submitted to the permanent Section 13 Committee. The Committee as a whole would meet from time to time to consider disputes on its docket, and to attempt to resolve those disputes consensually. In order to move to the next step of arbitration, the full Committee would have to declare that the two sides were deadlocked; only then could the Committee attempt to select a neutral arbitrator. Once selected, the arbitrator would often sit with the full Section 13 Committee (as well as the actual parties to the dispute) to hear the matter. The sheer size of the Section 13 Committee and the extended processes involved before an arbitrator could even be chosen left the entire process vulnerable to extensive delay.

contains procedural restrictions ill-suited to the task of arriving at an implementing agreement.[56] Moreover, the current process is largely unproven. Only a handful of cases have been arbitrated under the procedures, and the last such arbitration occurred 10 years ago. Not one of these cases involved the arbitration of an implementing agreement.[57] WJPA in fact has fallen into desuetude as a means of implementing coordinations. The last time an implementing agreement

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56/ For instance, in order even to docket a case with the Section 13 Committee, a party must provide 30 copies of a written submission setting forth its position. (After the other side submits its written position in response, the chairmen of the labor and management sides of the Section 13 Committee will then arrange for the selection of a neutral arbitrator.) Consistently with most RLA arbitration agreements, the practice is for the parties to be limited in what they submit to the Section 13 Committee to the factual record developed on the carrier's property. The subsequent hearing before the arbitrator is limited to this factual record. By contrast, there is no "on property" restriction on the evidence a New York Dock arbitrator can consider. To the contrary, in order to permit an arbitrator to make the findings of "approval" and "necessity" required under the law, the parties typically submit, in arbitration proceedings under Section 4 of New York Dock, extensive evidentiary materials that were not exchanged on the carrier's property.

57/ As explained in the Peifer/Spenski Rebuttal Verified Statement at 15 and n.2, only three cases have been submitted to the Section 13 Committee since adoption of the new procedures in September 1984. Even though none of these involved arbitration of an implementing agreement, one case took more than two years to reach a decision, and the other two took more than seven months each.

In asserting that implementation should occur though the WJPA, the ARU are arguing for a lack of uniformity as well as undue delay. Three unions -- TCU, BRS, and BMWE -- are parties to a February 7, 1965 job stabilization agreement (the "February 7 Agreement"), which modified WJPA for those unions by providing that disputes arising under WJPA would be resolved not through the WJPA Section 13 process but through the arbitration process established in the February 7 Agreement. That agreement provides for resolution of disputes before an RLA Special Board of Adjustment, known as Special Board of Adjustment No. 605. But this arrangement does not provide any better guarantee of prompt resolution of disputes than does the WJPA Section 13 process. On average, it has taken two years from the time of submission for the last five WJPA disputes to have been decided by Special Board of Adjustment No. 605. BMWE has recently entered into another agreement that provides, inter alia, that disputes arising under WJPA will be resolved by a new RLA Special Board of Adjustment No. 1087 created by that agreement. Peifer/Spenski RVS at 15 and n.3.

was actually imposed in arbitration under WJPA Section 13 was in 1969, in a case that took nearly two years to reach a decision. Peifer/Spenski RVS at 15.

In sharp contrast to WJPA, New York Dock is a well understood, proven means of obtaining implementing agreements in a timely manner. Section 4 of New York Dock is designed to force a decision even if one side does not cooperate. Unlike WJPA, New York Dock, in discharge of Congress' directives, prescribes precise timetables governing each step in the decision-making process, all subject to Board oversight to guarantee that the process is followed. In this manner, New York Dock ensures that arbitration will be expeditiously obtained and conducted precisely so that carriers can operationally implement transactions and thereby generate the public transportation benefits that integration is designed to achieve. These procedures for "efficiently resolv[ing] labor disputes" are "integral to meeting" the ICA's purpose to "promote 'economy and efficiency in interstate transportation by [removing] the burdens of excessive expenditures.'" Railway Labor Executives' Association v. Southern Pacific Transportation Co., 7 F.3d at 906 (quoting Dispatchers, 499 U.S. at 132)). New York Dock, not WJPA, satisfies the requirements of the ICA and is the law.

The ARU's aim in suggesting the Board turn back the clock to the previously rejected WJPA Section 13 process is to thwart the implementation of transactions, including the Conrail transaction, not promote it. The ARU seek to channel disputes over implementation into a process that would be free of Board review, and would enable unions to stop transactions completely or else force carriers to pay a second price to labor for permission to implement approved operational changes -- on top of the already unparalleled price the carriers pay to

affected employees in compensatory protective benefits. Such a result would subvert the purpose of the ICA.

All else failing, the ARU (ARU-23 at 74-76) fall back on the tired argument that the Board lacks authority to modify labor agreements because it is not a labor board and has no role in labor relations. But the law has long since overtaken this argument. In International Brotherhood of Electrical Workers v. ICC, 862 F.2d 330 (D.C. Cir. 1988), the D.C. Circuit affirmed the ICC's power to review the awards of its labor arbitrators, specifically rejecting the union's arguments that the ICC lacked labor expertise or a role in labor relations. 862 F.2d at 339. Since then, the jurisdiction of the ICC (and now the Board) over labor matters, and its authority to modify collective bargaining agreements, have been repeatedly upheld.[58]

At bottom, the ARU position is simply that the decisions of the Supreme Court, the courts of appeals, the ICC, and the Board establishing that the Board can modify labor agreements and that implementation occurs exclusively through the protective conditions are wrong. The ARU are asking the Board to undo the settled arrangement that ensures the prompt implementation of approved transactions (in exchange for extraordinarily generous compensation to adversely affected employees) -- an arrangement that has been functioning as intended.

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[58] The ARU's reliance (ARU-23 at 78) on Pittsburgh & Lake Erie R.R. v. Railway Labor Executives Association, 491 U.S. 490 (1989) ("P&LE") is entirely misconceived. That case concerned a sale of rail assets to a newly formed "noncarrier" entity under (then) 49 U.S.C. § 10901. The sale was not covered by the Section 11321(a) exemption from all other law. It was not covered by Section 11326. The ICC did not impose employee protective conditions. P&LE provides no support for the assertion by the ARU that a union can elect to rest on its asserted RLA rights in the face of a transaction that is exempt from the RLA, and in the face of a specific ICA provision mandating employee protective conditions that provide for the compulsory arbitration of implementing agreements. See CSXT v. UTU, 86 F.3d at 352 (the "weakness of the unions' argument is made evident by the fact that" P&LE does not "involve[] arbitration" under New York Dock).

As the ARU would have it, upon Board approval, CSX and NS could assume control of their shares of Conrail stock and property, but could make no operational changes until such time as the carriers purchase their unions' consent, through RLA/WJPA negotiations, to the operational changes that will generate the very transportation benefits that make the Conrail transaction in the public interest. This anti-implementation vision is directly at odds with more than seven decades of law encouraging consolidations that will improve the economy and efficiency of the nation's rail system.[59] The carriers are proposing to adhere to the law in implementing the Conrail transaction. The ARU objections to the carriers' doing so are groundless.

E. The ARU Misstates The Limitations On The Board's Authority

There are two limitations on the Board's established authority to modify labor agreements. First, the agreement modification must be "necessary to obtain the benefits of a transaction that we have approved in the public interest." CSX Control/Train Operations at 12. Second, by virtue of Article I, Section 2 of the New York Dock conditions, "rights, privileges and benefits," which the Board has defined as "the incidents of employment, ancillary emoluments or fringe

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[59] This is a version of the unions' discredited assertion that the Board's authority to modify labor agreements extends only to the "financial aspects" of a transaction, and not to operational changes that implement it. It is universally understood that the Board's authority to exempt transactions from the RLA and labor agreements extends to operational changes and not just to the corporate aspects of transactions. E.g., UTU v. STB, 108 F.3d at 1431 ("there is little point in consolidating railroads on paper if a consolidation of operations cannot be achieved"); ATDA v. ICC, 26 F.3d at 1164-65 (recognizing ICC's authority to modify labor agreements involving a transfer of work seven years after agency's approval of the control transaction); UP/SP, slip op. at 173 (the "immunizing power of section 11341(a) is not limited to the financial and corporate aspects of an approved transaction but reaches, in addition to the financial and corporate aspects, all changes that logically flow from the transaction"); BN/Santa Fe, slip op. at 82 (same).

benefits--as opposed to the more central aspects of the work itself--pay, rules and working conditions," must be preserved. Id. at 14. See also, e.g., UTU v. STB, 108 F.3d at 1429.

Perhaps realizing that their direct attack on the Board's authority to modify agreements is thoroughly discredited, the ARU purport to interpret the two limitations on that authority so as to achieve the ARU's same desired result -- no Board authority to modify agreement terms. To this end, the ARU assert that the Applicants' claimed efficiencies cannot be public transportation benefits unless all savings from those efficiencies are passed on to shippers. In fact, according to the ARU, even lower rates would not count as public transportation benefits because they only benefit private parties -- shippers. ARU-23 at 83-84. The ARU also request the Board to declare that Article I, Section 2 requires that, not only "rights, privileges, and benefits," but also "rates of pay, rules, working conditions" must be preserved. ARU-23 at 8. All of the ARU's assertions have already been rejected by Board, ICC, judicial and arbitration precedents. Moreover, the ARU interpretations are not shared by other unions, including UTU and TCU, which recognize that the Board has authority to modify agreement terms dealing with rates of pay, rules and working conditions.[60] Finally, the ARU are trying to expand the scope of "rights, privileges and benefits" beyond the meaning given that term by the Board.

1. Applicants' Claimed Efficiencies Will Yield Public Transportation Benefits

There are two components to the necessity test. First, there must be a nexus between the Board-authorized transaction and the intended operational change. Second, the operational change must "yield[] a transportation benefit to the public, 'not merely [a] transfer [of] wealth

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[60] See, e.g., UP-SP/Train Operations at 5; TCU-6 at 8.

from the employees to their employer.'" UTU v. STB, 108 F.3d at 1431 (quoting Executives, 987 F.2d at 815). The ARU argue that Applicants' claimed efficiencies are not public transportation benefits, but merely a transfer of wealth from employees to the carriers. This assertion is baseless.

The ARU, evidently hoping to support their theory through historical information, obtained in discovery the number of railroad employees, labor costs, and fuel costs for the last ten years.[61] The ARU were, however, forced to concede that, historically, labor cost savings, along with other cost savings, are in fact passed on to shippers in the form of lower rates. For example, the ARU admitted that "[t]he historical data shows that while there have been somewhat reduced rates for the shippers, reductions in operating costs have also resulted in significantly increased profits for the carriers." ARU-23 at 49 (emphasis added); see also ARU-23 at 51. In fact, the Board itself well understands that the more efficient rail operations resulting from deregulation and rail mergers since the enactment of the Staggers Act generate significant cost savings, which are passed on to shippers. For example, the Board observed in UP/SP that "the clear trend since 1980 has been that when railroads have reduced their costs through mergers or otherwise, those savings have largely been passed on to their shippers in terms of lower rates and improved service." Slip op. at 104.[62]

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[61] The ARU suggestion (ARU-23 at 48) that the Applicants refused to furnish any such historical information to them is false. In fact, the Applicants furnished to the ARU statistics maintained by the Association of American Railroads.

[62] Accord Central Power & Light Co. v. Southern Pac. Transp. Co., Finance Docket No. 41242, served December 31, 1996, slip op. at 19-20, ("[T]he economic benefits of fewer railroads, coupled with deregulation, have been enormous and largely shared with railroad customers. Indeed, shippers do not challenge the existence or sharing of the savings, but (continued...)

Nonetheless, the ARU contend that the efficiencies from the Conrail transaction cannot be public transportation benefits unless all labor savings are passed onto shippers. ARU-23 at 84 ("a significant portion of these are retained as profits."). As a threshold matter, the ARU's analysis of historical statistics does not show that CSX, NS or other railroads have retained as profits a "significant portion" of labor cost savings which resulted from ICC-authorized transactions. In any event, the cases reject the ARU's suggestion that all labor cost savings must be passed on to shippers in order for operational changes to yield public transportation benefits. Certainly, the D.C. Circuit has imposed no such requirement. In Executives, where the public transportation benefit factor first materialized, the Court broadly defined transportation benefits to "include the promotion of 'safe, adequate, economical, and efficient transportation,' and the encouragement of 'sound economic conditions among carriers.'" 987 F.2d at 815. In ATDA

62/ (...continued)
complain that they want an even bigger share.") (Commissioner Owen, commenting).

See also, e.g., H.R. Rep. No. 311, 104th Cong., 1st Sess. pt. 2 ("Shippers have benefited from the Staggers Act reforms. . . since the railroads real rates have declined by 1.6% annually since 1980."); Roy M. Neel, The Good, the Bad, and the Ugly of Telecom Reform, 45 DePaul L. Rev. 995, 1000 (1996) ("[Since 1980,] freight rates have declined roughly 1.5% per year in real terms, compared with a 2.9% increase per year in the five years prior to 1980.") (citing U.S. Dept. of Commerce, U.S. Industrial Outlook 40-5 (1994)); Id. ("Adjusted for inflation, rail rates in 1994 were 22% less than in 1982.") (citing Standard & Poor's, Industry Surveys, R25 (Apr. 1996)); Wesley W. Wilson, Market-Specific Effects of Rail Deregulation, 42 J. Indus. Econ. 1. 1, 3 (1994) ("Since deregulation, aggregate (average) rail rates have fallen in real terms . . . By 1988 . . . deregulation significantly lowered rates for almost all commodities."); Mark L. Burton, Railroad Deregulation, Carrier Behavior, and Shipper Response: A Disaggregated Analysis, 5 J. Reg. Econ. 417, 433 (1993) ("Staggers induced changes in carrier behavior and the response of rail shippers to these changes have brought about rates for many shipments which are measurably lower than they would have been in the absence of deregulation . . . [S]hippers of nearly all commodities have, to some degree, benefited from lower rates as a consequence of railroad deregulation."); Clifford Winston, Economic Deregulation: Days of Reckoning for Micro Economists, 31 J. Econ. Literature 1263, 1273 (1993); ("Shippers as a group benefited from rail rate deregulation.").

v. ICC, the D.C. Circuit held that efficiencies from the consolidation of functions were public transportation benefits, recognizing that "the very point of many mergers is to capture efficiencies from centralization of functions." 26 F.3d at 1165. In UTU v. STB, the D.C. Circuit upheld the ICC's finding that consolidating seniority rosters under one set of railroad agreements yielded public transportation benefits. 108 F.3d at 1431. None of these decisions suggests that all labor cost savings resulting from such efficiencies have to be passed on to shippers.

Contrary to the ARU's theory, the Board and ICC recognize that carriers can retain cost savings. For example, in BN/Santa Fe, the ICC classified cost savings as "public benefits" even if retained by the carrier:

> Public benefits may be defined as efficiency gains that may or may not be shared with shippers and which include cost reductions and service improvements. Cost reductions, regardless of whether they are passed on to shippers, are public benefits because they permit a railroad to provide the same level of rail service with fewer resources or a greater level of rail service with the same resources.

Slip op. at 51 (emphasis added).[63] Accord CSX Control/Train Operations at 13 ("while the railroad thereby benefits from these lower costs, so does the public"). While carriers can benefit from cost savings, competition or regulation guarantees that the shippers and ultimately consumers will benefit from lower rates resulting from efficiencies. Id.

The ARU make increased profits sound like a dirty word. But, as the Board, ICC, court decisions, and common sense recognize, railroad consolidations are designed to produce

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[63] Although in BN/Santa Fe the ICC was defining the term "public benefits" as used in 49 U.S.C. § 11344(b)(1)(A) (now § 11324(b)(1)), there is no reason why the term "public transportation benefits" coined in Executives should not be given the same meaning.

efficiencies that result in cost savings, including labor cost savings.[64] Forbidding railroads to benefit from labor efficiencies does not make any sense. Promoting the sound economic health of carriers is also a public transportation benefit, as recognized by 49 U.S.C. § 10101(4). It is profitable carriers, not unprofitable ones, that are able to raise the necessary investment in the private sector to maintain the world's finest rail freight transportation system. It is because CSX and NS are profitable that their unionized employees are among the highest paid employees in the nation. The mere fact that some labor cost savings may be retained by CSX and NS does not prevent the savings described in their Operating Plans from being public transportation benefits.

There is also no support for the ARU's assertions that the retention by carriers of savings from reduced labor costs is a transfer of wealth from employees to the carriers. The ARU themselves admit that most of the reduced labor costs over the last 15 years are a result of railroads' employing fewer employees, not a reduction in wage and benefit levels. ARU-23 at 50 ("Labor costs have been reduced in large part because the number of railroad workers employed by Class 1 railroads has been cut . . . ."). Similarly, most of the labor cost savings in this transaction come from the fact that CSX and NS can operate the allocated portions of Conrail with fewer employees because of the efficiencies flowing from the transaction. There is no transfer of wealth from the employees whose positions are abolished. Because of vacancies and new positions, CSX and NS expect to have jobs available for most, if not all, dismissed

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[64] E.g., Dispatchers, 499 U.S. at 132 ("consolidations in the public interest will 'result in wholesale dismissals. . .'").

employees within a few years, during which time the employees will receive their full measure of New York Dock protection.

The ARU's argument that wages of employees have remained stagnant is irrelevant to whether there is a transfer of wealth. In any event, the assertion is simply not true. As explained in the Peifer/Spenski Rebuttal Verified Statement, employee earnings on an annual basis have increased by 118% since 1980, while the CPI-W has increased only by 86%. Id. at 60.

But, even assuming (contrary to fact) that rail employees' wages have stagnated, that still does not demonstrate that applying one set of agreements to coordinated operations is a transfer of wealth. This is not a case in which the new operators are seeking to use Board processes to apply substandard labor agreements. To the contrary, the CSX and NS labor agreements, like Conrail's, are Class I railroad agreements, most of which were negotiated on a national level by the same unions that represent Conrail's employees. The fundamental economic terms are for the most part the same on NS, CSX, and Conrail. Peifer/Spenski RVS at 46. In this circumstance, there is no occasion for the Board to parse the terms of the Applicants' agreements to consider the ARU's contention (ARU-23 at 102-27) that Conrail's labor agreements are somehow qualitatively better than those of NS and CSX. Such an exercise would be both infeasible and improper, as Arbitrator Simon recognized in a recent CSX New York Dock arbitration proceeding:

> Nor is it proper to make qualitative judgments about the different agreements. First of all, that would not be possible in this case as the agreements were not put into evidence. Even if they were, it would be an impossible task to determine which agreement, taken in its entirety, is the "best." Some "better" provisions of one agreement may be outweighed by "better" provisions on different

> matters in another agreement. Furthermore, what may be beneficial for one employee may be immaterial to another. Even on the issue of sub-contracting, which was of particular concern to the IBEW, it is impossible to determine which agreement affords the greater protection to the employees because of the different factors involved.

CSXT and IBEW and TCU, April 11, 1997 (Simon, Arb.) (hereinafter "CSX Radio Repair Shop Award") at 25 (included in Volume 3).

In any event, there is no basis for finding that certain terms of Conrail's agreements are "superior," as ARU contend (ARU-23 at e.g., 109). As demonstrated in the Peifer/Spenski Rebuttal Verified Statement (at 47-50), many of the ARU's descriptions simply mischaracterize or overlook the comparable NS or CSX labor agreement provisions. Id.[65]

In similar circumstances, the ICC found in CSX Control/Train Operations that applying one set of agreements to a consolidated operation was necessary to realize public transportation benefits and was not a transfer of wealth. The reduction in labor costs would "occur through more efficient use of employees and equipment," not by a diminishing of the employees' wealth. CSX Control/Train Operations, slip op. at 13. The D.C. Circuit upheld this ICC finding, stating

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[65] The problem with asserting that one railroad's labor agreement is superior is also illustrated by the IAM's comparison of the Conrail-IAM and NW-IAM agreements, which were produced in discovery. Although we do not agree with the IAM's conclusion that the Conrail agreement is superior, it is telling that the IAM's own analysis indicates that many terms of the NW agreement are the same as or better than the Conrail agreement. See IAM-5, Response to Interrogatory No. 1(d) and report produced in response to Request for Production No. 1 (included in Volume 3).

We would also note that the ARU and other union commentors admitted in discovery responses that they did not do any quantitative analysis to support the contention that there would be a transfer of wealth. Response to Interrogatory No. 7, ARU-29; Response to Interrogatory No. 1(b), IAM-5.

that "[i]t is obvious that separate and distinct parts, operating separately and distinctly, will not generate the value of consolidation." UTU v. STB, 108 F.3d at 1431. To the extent that there are differences in agreements that might result in lower wages for employees, they would be protected by displacement allowances provided under the Board's conditions.

The ARU's further assertion that the efficiencies allowed by modification of their agreements cannot be public benefits, but are "private benefits," because they benefit private parties, shippers (ARU-23 at 83), is also frivolous. In effect, the ARU is arguing there can never be public benefits, only private benefits, from railroad consolidations.

The D.C. Circuit and Board precedents are unequivocal that the kinds of efficiencies described in Applicants' Operating Plans, centralization or consolidation of functions and employees, yield public transportation benefits. For example, the Board recognized in UP/SP that the $261.2 million in projected labor savings were part of the public benefits resulting from that consolidation. Slip op. at 109-10.[66] Accord CSX Control/Train Operations, slip op. at 13 ("Improvements in efficiency reduce a carrier's cost of service. This is a public transportation benefit because it results in reduced rates for shippers and ultimately consumers.").[67]

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[66] See also, e.g., UTU v. STB, 108 F.3d at 1431; ATDA v. ICC, 26 F.3d at 1165

[67] As explained in Part H, there is no merit at all to the ARU's contention that modification of agreements pursuant to the Board's protective conditions results in an unconstitutional taking of employees' property.

2. Article I, Section 2 of New York Dock Does Not Require Preservation Of Rates Of Pay, Rules And Working Conditions

The ARU seek to undo settled law by urging the Board "to use this transaction as a forum for informing the carriers that 'rates of pay, rules, working conditions' and 'other rights, privileges, and benefits' are immutable and must be preserved." ARU-23 at 95. According to the ARU, the Board only has authority to modify labor agreement "provisions that do not provide a rate of pay, rule, working condition or other right, privilege, or benefit . . . ." ARU-23 at 99. But the ARU consider essentially every term of an agreement to implicate a rate of pay, rule, working condition or right, privilege or benefit, and therefore to be "immutable." After listing virtually every term in Conrail's agreements, the ARU state that "[t]hese are only some of the CBA provisions falling within the rubric 'rates of pay, rules and working conditions', which are immutable and must be preserved." ARU-23 at 124.[68]

As the basis for their argument that Section 2 requires the preservation of agreement terms the ARU rely upon the literal language of Section 2, the ICC's New York Dock decision, an internal memorandum by a former ICC attorney (the "McCarthy Memorandum"), and a bizarre interpretation of UTU v. STB. The ARU's construction of Section 2, is, however,

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[68] See also id. at 127 ("as is noted above, employee interests that are 'rates of pay, rules, working conditions or other rights, benefits or privileges' are immutable . . . ."). The ARU's list of assertedly immutable provisions includes the following:

- Rates of pay;
- Seniority and scope rules;
- Provisions that relate to overtime, relief work and other compensatory relief;
- Advertising, bidding, and qualifications for positions;
- Rules relating to disciplinary procedures and medical disqualifications;
- Safety rules; and
- Flowback rights.

merely a resurrection of theories repeatedly interred by the ICC, the Board, and the D.C. Circuit.

a. The ARU's Construction Of Section 2 Is Contrary To Law

Labor has been unsuccessfully arguing for nearly 15 years that Section 2 of New York Dock requires the preservation of all agreement terms. The ICC rejected this argument when the issue was first presented to it, in 1983,[69] and ever since then.[70] The issue was definitively laid to rest in the line of agency and court decisions beginning with the ICC's decision in Delaware and Hudson Ry. Co.--Lease and Trackage Rights Exemption--Springfield Terminal Ry. Co., Finance Docket No. 30965 (Sub-No. 1), decision served Sept. 24, 1990 ("Springfield Terminal").

In Springfield Terminal, the ICC held that, under former Section 11347 of the ICA, 49 U.S.C. § 11347, and without resort to former Section 11341(a), the ICC had authority to modify agreements. In so doing, the ICC again rejected labor's interpretation of Section 2 of New York Dock. On appeal, the D.C. Circuit affirmed the ICC's holding that it had statutory authority under Section 11347 to modify agreements, finding that "the ICC's interpretation seems eminently reasonable, indeed indisputable." Executives, 987 F.2d at 814. The D.C. Circuit characterized rail labor's argument that Section 11347 required all agreement terms to be preserved as "an obviously absurd proposition . . . ." Id. However, the D.C. Circuit remanded

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69/ Denver & Rio Grande Western R. Co. - Trackage Rights - Missouri Pacific R. Co., Finance Docket No. 30000 (Sub-No. 18) (served October 25, 1983).

70/ E.g., CSX Corp.--Control--Chessie System, Inc., et. al., 6 I.C.C. 2d 715, 748-49 (1990); Southern Ry.--Purchase--Ill. Central R.R., 5 I.C.C. 2d at 854; Norfolk Southern Corp.--Control--Norfolk & Western Ry. and Southern Ry., 4 I.C.C. 2d at 1083-85.

to the ICC to define the scope of "rights, privileges and benefits that must be preserved . . . ." by Section 2. Id.

The ICC defined the phrase "rights, privileges and benefits" in CSX Control/Train Operations. In the underlying New York Dock proceedings, CSX proposed to combine the train operations and employees of the former B&O, C&O, WM and RF&P, consolidate employees on merged seniority rosters, and place all employees in the new consolidated seniority district under the agreements applicable to the former B&O. Rail labor argued that the placement of former C&O, WM, and RF&P employees under the B&O agreements abrogated the C&O, WM and RF&P agreements in violation of Section 2. Even though the D.C. Circuit held in Executives that labor's position that all agreement terms must be preserved was "obviously absurd," rail labor argued that Section 2 required the preservation of all agreement terms in the C&O, WM, and RF&P agreements, because all agreement terms allegedly involved a right, privilege, or benefit.[71]

In CSX Control/Train Operations, the ICC rejected rail labor's argument that Section 2 required the preservation of all agreement terms. The ICC limited the phrase "rights, privileges and benefits" to "the incidents of employment, ancillary emoluments or fringe benefits-as opposed to the more central aspects of the work itself—pay, rules and working conditions." Slip op. at 14 (emphasis added). The ICC went on to hold that the agreement terms modified by

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[71] The unions party to the underlying proceedings in CSX Control/Train Operations, before Arbitrator O'Brien, were BLE, which is one of the "ARU" in this proceeding, and UTU, which is not. The Railway Labor Executives' Association also participated before the ICC in support of BLE and UTU's position. Thus, all of the unions participating in these proceedings as the ARU also participated in the O'Brien Award review proceedings, either directly or indirectly through RLEA. This was also true in rail labor's appeal of the ICC's decision in CSX Control/Train Operations to the D.C. Circuit.

CSX's implementing agreements "did not come within 'rights, privileges, or benefits,' because they have consistently been modified in the past in connection with consolidations. This may well be due to the fact that almost all consolidations require scope and seniority changes in order to effectuate the purpose of the transaction. Railway Labor Act bargaining over these aspects of a consolidation would frustrate the transactions." Id. at 15.

The Board again recognized that "[i]t is firmly established that the Board, or arbitrators acting pursuant to authority delegated to them under New York Dock may override provisions of collective bargaining agreements when an override is necessary for realization of the public benefits of approved transactions," in UP-SP/Train Operations, slip op. at 4. As in CSX Control/Train Operations, the Board affirmed an arbitration decision consolidating employees from several railroads under a single agreement. Thus, the ICC and the Board held that agreement terms involving rates of pay, rules, and working conditions can be modified.

The D.C. Circuit has several times confirmed that Section 2 does not require the preservation of all agreement terms. As noted, in Executives, the D.C. Circuit held that Section 11347 of the ICA affirmatively gives the ICC the authority to modify agreements. In ATDA v. ICC, the court held that Section 2 of New York Dock does not require the preservation of scope clauses in agreements and that the transfer of work from one railroad to another, pursuant to an ICC authorization, "impinges on no other 'rights, privileges [or] benefits in the CBA . . . ." 26 F.3d at 1163.

And in UTU v. STB, the D.C. Circuit upheld the Board's decision (which the ARU attack as "insulting and specious," ARU-23 at 90) adopting implementing agreements that modified rates of pay, rules and working conditions in agreements. Citing Executives and ATDA

v. ICC, the court observed that "the Supreme Court and this court have made it clear that the ICC may abrogate certain terms of a CBA as necessary to effectuate an ICC-approved transaction." 108 F.3d at 1427 (emphasis added). The court explicitly upheld as "reasonable," the ICC's conclusion that the preservation requirement of Section 2 extends only to "the incidents of employment, ancillary emoluments, or fringe benefits -- as opposed to the more central aspects of the work itself -- pay, rules and working conditions." 108 F.3d at 1430. In doing so, the D.C. Circuit unequivocally held that the Board can modify agreement terms other than those conferring rights, privileges, and benefits so defined.[72]

The ARU have no valid argument against this unbroken string of authorities. Instead, the ARU engage in misdirection and outright denial of what the D.C. Circuit has actually held.

The ARU wrongly contend the ICC's New York Dock decision itself suggests that Section 2 forbids modification of agreements. In fact, nothing in the New York Dock decision, or the comments of the parties at the time, indicates that Section 2 was considered to require preservation of all agreement terms. Such a construction would have been directly at odds with Article I, Section 4 of New York Dock, which clearly contemplates that agreement terms can, if necessary, be modified through arbitration.

The ARU specifically points to the part of New York Dock in which the ICC rejected labor's proposal to modify the language of Section 2 on the ground that modification was unnecessary, 360 I.C.C. at 73. ARU-23 at 88. But the ICC has already explained why its

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[72] Indeed, "rates of pay, rules and working conditions" and "rights, privileges and benefits" describe virtually the entire universe of terms in collective bargaining agreements. Given that rights, privileges and benefits must be preserved, the only things to which the D.C. Circuit could have been referring in saying the Board has authority to modify the "terms of a CBA" are terms involving rates of pay, rules, and working conditions.

rejection of labor's proposal does not carry the meaning the ARU would now wrongly give it. In CSX Corp.--Control--Chessie System, Inc., 6 I.C.C. 2d 715 (1990), the ICC observed that this portion of New York Dock rests on the overall understanding that "'Article I, § 2 appears acceptable to all parties.'" 6 I.C.C. 2d at 748 n.25 (quoting 360 I.C.C. at 73). That understanding flatly refutes any notion that the ICC, at the time, intended Section 2 to work the "momentous change" of precluding all modifications of labor agreements. The railroads "obviously had no idea that such a momentous change claimed by RLEA was taking place when Section 2 was included in the New York Dock conditions," and plainly would not have found any such result "acceptable." 6 I.C.C. 2d at 748 n.25.

The ARU's reliance on the McCarthy Memorandum is equally erroneous. As a preliminary matter, it is important to note that this Memorandum is not binding upon the agency, regardless of what interpretation it is given. It is a basic precept of administrative law that an agency is not bound by views expressed internally within the agency. See, e.g., Citizens For A Better Environment v. EPA, 1990 U.S. Dist. LEXIS 18450 at * 5 (N.D. Ca. 1990) ("the internal memorandum, which originated from a mere staff member, cannot be viewed as a determination by the Administrator . . . . To hold the heads of federal agencies bound by the recommendations of their staff would be a strong disincentive for productive debate within the agencies.").

In any event, the McCarthy Memorandum does not say that Section 2 of the New York Dock conditions requires the preservation of agreement terms. ARU-23 at 87-88. By its terms, the Memorandum addressed the meaning of "rights, privileges, and benefits" in Section 2, in accordance with Executives' request for agency guidance as to the meaning of that phrase. The

author concluded that this phrase did not include rates of pay, rules, or working conditions. ARU-25 at 248.

Finally, the ARU assert that dictum in footnote 4 in UTU v. STB constitutes an "affirmation that 'rates of pay, rules, working conditions' . . . must be preserved." ARU-23 at 94. The ARU's position is insupportable. The ARU would read footnote 4 in a way that overturns the holdings of UTU v. STB, Executives, and ATDA v. ICC.[73]

UTU v. STB traces back to Executives, in which the D.C. Circuit, holding that the ICC's authority to modify agreements was limited by the ICC's obligation to preserve rights, privileges, and benefits, remanded to the agency with specific direction to clarify its views as to the meaning of this phrase. 987 F.2d at 814. The ICC provided the clarification the court had sought in CSX Control/Train Operations. The UTU v. STB court fully appreciated this, explaining: "up until now" the "broad conceptual framework has been clear, but the scope of the rights at issue has defied comprehension"; "in this case, the Commission offers a definition." 108 F.3d at 1430. The court then upheld the ICC's interpretation of Section 11347 and Section 2 as reasonable, explaining that under the ICC's scheme "the public interest in effectuating approved consolidations is ensured without any undue sacrifice of employee interests. In our view, this is exactly what was intended by Congress." Id.

In the face of this, the ARU contend that the court's dictum in footnote 4 says, in effect, never mind what we ruled in Executives and asked the ICC to do; and never mind that in CSX

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[73] Not only is the ARU's construction of UTU v. STB's holding erroneous, we also note that UTU v. STB cannot be read to overturn Executives and ATDA v. ICC, because of the rule that a panel cannot overturn the Circuit's prior precedents. See, e.g., La Shawn A. v. Barry, 87 F.3d 1389, 1395 (D.C. Cir. 1996) ("One three-judge panel . . . does not have the authority to overrule another three-judge panel of the court.").

Control/Train Operations, the ICC provided the clarification we sought and which we have found to be reasonable. Instead, let's start over from scratch. This is a preposterous contention, completely at odds with the jurisprudential history. In truth, CSX Control/Train Operations and UTU v. STB are the end of a litigation cycle as to the meaning of the 1976 amendment to Section 11347, as embodied in Section 2 of New York Dock, and close the book once and for all on the ARU's failed effort to obtain an expansive reading of that provision.

In all events, the ARU's assertion that footnote 4 means that the Board cannot modify rates of pay, rules and working conditions is refuted by the holding of UTU v. STB itself. In UTU v. STB, the court affirmed the ICC's adoption of arbitrated New York Dock implementing agreements that made changes in rates of pay, rules, and working conditions. Under those implementing agreements, CSX transferred employees from agreements applicable to the former C&O, WM and RF&P and placed them under the agreements applicable to the former B&O. As rail labor admitted, the transfer of employees from one railroad's agreements to another's necessarily modified the scope and seniority provisions in the agreements. Arbitrator O'Brien's award itself expressly recognized that the arbitrated implementing agreements changed some working conditions and that "these are indeed not insignificant changes for many train and engine employees in the territory to be coordinated." Award at 11 (included in Volume 3). See also CSX Control/Train Operations, slip op. at 13 n.24. The rail unions in CSX Control/Train Operations argued, as the ARU argue here, that the placement of employees in the new consolidated seniority district under a single agreement effectively annulled or abrogated all of the provisions of their former agreements. A comparison of rail labor's position in those

proceedings and in these show that they were identical in this regard. For example, in their joint brief to the D.C. Circuit in UTU v. STB, UTU, BLE and RLEA argued as follows:

> The preservation language of the ICA is similar in wording and effect to the language of the Railway Labor Act which places a status quo on changes in CBAs following air carrier mergers. 49 U.S.C. § 11347 preserves rates of pay, rules and working conditions and 45 U.S.C. §§ 152 Seventh and 156, prohibit changes in rate of pay, rules and working conditions in merger and similar situations. . . .
>
> The Unions also respectfully submit that the Commission's interpretation of the statutorily required § 2 of New York Dock is erroneous on its face and should be set aside and remanded to the STB with instructions to interpret and apply the plain language of that provision as it so clearly requires: No rates of pay, rules, working conditions or any employee collective bargaining rights, privileges or benefits under existing collective bargaining agreements or otherwise, may be changed in any circumstances in which § 11347 applies except by negotiation or by the provisions of an applicable statute.

Joint Br. Of Petitioner Unions and RLEA, Docket No. 95-1621 (D.C. Cir. filed Nov. 5, 1996) at 19, 30-31.

The ARU make the same argument in their Comments, contending, for example:

> [T]he ARU urges the STB to use this transaction as a forum for informing the carriers that "rates of pay, rules, working conditions" and "other rights, privileges, and benefits' are immutable and must be preserved. . . .
>
> . . . . And to the extent that Applicants desire CBA changes to increase efficiency or to lower their labor costs, they can do so through the RLA processes as was done before this agency became involved in setting agreement terms.

ARU-23 at 95, 101-02.

As this comparison shows, the argument advanced here by the ARU was clearly rejected by the D.C. Circuit in UTU v. STB. UTU v. STB is an "affirmation" that the ARU's construction of Section 2 is clearly erroneous.

The reason that the scope of "rates of pay, rules and working conditions" was not considered an issue in UTU v. STB, 108 F.3d at 1430 n.4, was that the D.C. Circuit had already recognized in Executives and ATDA v. ICC that such agreement terms could be modified. Moreover, as we have also explained, both rail labor and CSX took the position in CSX Control Train Operations that combining train operations and employees and placing all employees working in the consolidated territory under the B&O agreements would modify seniority, scope and other agreement provisions dealing with rates of pay, rules and working conditions. There is no question that, under labor law, scope rules and seniority rights are considered to be "rates of pay, rules or working conditions." See, e.g., Ford Motor Co. v. Huffman, 345 U.S. 330, 337 (1953) (seniority). Indeed, the ARU admit that scope and seniority provisions are work rules or working conditions. For example, the ARU state that "[o]ne of the most important working conditions that employees enjoy under their collective bargaining agreements is their seniority and concomitant right to perform the work within the scope of their seniority." ARU-23 at 108.

Even if the transfer of employees from one railroad's agreements to another's is only considered to modify scope and seniority provisions, the ARU's position here is still in conflict with controlling D.C. Circuit decisions. The ARU argue that scope and seniority provisions are rates of pay, rules, or working conditions, which are immutable under Section 2 of New York Dock. ARU-23 at 108-14. However, the D.C. Circuit held in ATDA v. ICC that scope rules

could be modified and in UTU v. STB that seniority provisions could be modified. The ARU cannot escape the fundamental conflict between their theories and controlling holdings of the D.C. Circuit.

b. The ARU's Interpretation Is Contrary To The Regulatory Scheme As A Whole

The ARU's interpretation of Section 2 is also totally contrary to the purpose of the ICA's consolidation provisions, of which Section 11326's labor protection requirement is only one part. As explained above in Part D, and as recognized by the Supreme Court, D.C. Circuit and Board precedents, the purpose of Chapter 113 of the ICA is to facilitate railroad consolidations. See, e.g., Dispatchers, 499 U.S. at 132 ("consolidation provisions of the Act . . . were designed to promote 'economy and efficiency in interstate transportation by the removal of the burdens of excessive expenditure.'"); ATDA v. ICC, 26 F.3d at 1159 ("encourage railway consolidations that would enhance economy and efficiency in the industry"). The requirement for mandatory labor protection was designed to remove labor strife as an obstacle to realization of merger efficiencies by providing for extraordinary benefits for displaced workers, while at the same time requiring that labor disputes relating to implementation of merger transactions be expeditiously resolved through the binding arbitration procedures of the protective conditions. The ARU's construction of Section 2 is completely at odds with this regulatory scheme. The ARU are trying to turn provisions designed to facilitate railroad consolidations into obstacles to block them.

Indeed, this conflict is a basic inconsistency in the ARU's argument. At the same time the ARU argue that all agreement terms must be preserved, they recognize that agreement terms must be modified in order for the transaction to be implemented. In a facile attempt to avoid this obvious conflict, the ARU suggest that unspecified "staffing changes" could be made through the

implementing agreement procedures of Section 5 of the WJPA. ARU-23 at 101. But more than "staffing changes" are necessary to integrate fully the work and workforces of several carriers to allow the benefits of consolidation. Nor do the ARU provide any valid explanation why it is improper to follow the implementing agreement procedures of Section 4 of the New York Dock conditions, which incorporate the concept of Sections 4 and 5 of WJPA. On the other hand, as the Applicants have explained in Part D, the WJPA dispute resolution procedures are inadequate.

3. The ARU Are Trying To Expand The Scope Of "Rights, Privileges And Benefits"

In yet another effort to undermine the Board's authority to modify agreement terms as necessary to allow the realization of efficiencies from approved transactions, the ARU advance an unduly expansive definition of the term "rights, privileges and benefits" in Section 2 of the New York Dock conditions. ARU-23 at 124-27. There is no basis for the ARU's expanded list of what should constitute rights, privileges or benefits.

In UP-SP/Train Operations, the Board adopted the D.C Circuit's understanding that the Board's definition of "rights, privileges and benefits" means "vested and accrued benefits." UP-SP/Train Operations, slip op. at 7 (quoting UTU v. STB, 108 F.3d at 1430). The ARU want to expand the scope of this phrase to include such items as the Supplemental Unemployment Benefits (SUB) Plan, personal leave benefits, funeral leave, vocational or educational training, and special relocation benefits. ARU-23 at 125-26. None of these items is a vested and accrued benefit. As TCU recognized, the SUB Plan is a labor protective arrangement. TCU-6 at 21.[74]

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[74] Although CSX and NS do not agree that the Conrail Sub Plan is a right, privilege or benefit, they are not proposing to "abrogate" that Plan. Employees' ability to elect between that protective arrangement or the Board's protective conditions is protected by Article I, section 3 of those conditions.

The Board has recognized that labor protective arrangements may be modified under Section 4 of New York Dock, if a necessity to do so can be shown. BN/Santa Fe, slip op. at 81. Similiarly, relocation benefits are analogous to moving expenses provided under the Board's labor protective conditions. Bereavement leave, personal leave, vocational and educational training have never been considered vested and accrued benefits, and the ARU cite no authority for the proposition that they have been treated in that manner.

4. There Is No Basis For The ARU's Arguments That Placing Conrail Employees Under CSX Or NS Agreements Violates Section 11326(a), The New York Dock Conditions, Or Executives

The ARU ask the Board to "emphatically state that imposition of new agreements on the former Conrail employees and elimination of all of the terms of the Conrail CBAs is necessarily a violation of Section 11326(a) and the New York Dock conditions." ARU-23 at 102. The ARU also contend that such placement "annul[s] all the terms of the Conrail employees' collective bargaining agreements . . . ." and therefore is contrary to Executives' admonition that Section 11326 forbids "willy-nilly" modification of agreements. ARU-23 at 97-98. The ARU have, yet again, ignored or distorted Board, ICC, and D.C. Circuit precedents, which clearly authorize the consolidation of work and former Conrail employees under CSX or NS agreements.

As a preliminary matter, the ARU have misspoken regarding the CSX and NS proposals. The carriers are not proposing to eliminate all application of the Conrail agreements. The Conrail agreements will continue to apply to Conrail's operations in the Shared Assets Areas. They will also continue to apply to certain of the allocated Conrail assets operated by CSX.

The ARU's contention that the application of CSX or NS agreements to former Conrail employees will violate Section 11326(a) and the New York Dock conditions is premised upon

the ARU's erroneous argument that they forbid the modification of any agreement term. As discussed above in Parts D and E.2, that construction of Section 11326(a) and Section 2 of New York Dock has already been rejected by the D.C. Circuit and the Board.

In fact, the Board has repeatedly held that the application of one railroad's agreements to a consolidated workforce was necessary to realize efficiencies from the approved consolidation and could be accomplished under an implementing agreement arbitrated pursuant to Section 4 of its protective conditions. E.g., UP-SP/Train Operations and decisions cited therein at 5 n.7. In these decisions, the Board and ICC upheld arbitral findings that efficiencies would be frustrated if the carriers had to apply multiple agreements to integrated workforces. Far from "rejecting such tactics," ARU-23 at 98, the D.C. Circuit recognized in UTU v. STB that the placement of employees under one set of agreements with common work rules met the necessity test and did not violate Section 11326(a) or Section 2 of New York Dock. Upholding CSX Control/Train Operations, the D.C. Circuit explained as follows:

> CSXT argued, and the ICC accepted, that a consolidation of seniority rosters was necessary to effectuate the merger of the rail lines. This is both obvious on its face and was demonstrated by CSXT. First, there is little point in consolidating railroads on paper if a consolidation operations cannot be achieved.

108 F.3d at 1431.

In fact, application of one railroad's agreements to a workforce consisting of employees originally from different rail properties is the standard in dealing with employees from railroads whose operations are being coordinated pursuant to Board authorization. CSX and NS, as well as other carriers, have accomplished numerous consolidations in this manner over the years.

These consolidations have been accomplished pursuant to negotiated and arbitrated New York Dock implementing agreements. In each case, employees were placed under a single agreement.

ARU's position is not shared by other unions. For example, in UP-SP/Train Operations, the Board noted that "UTU itself admits that there are circumstances in which collective bargaining agreements may be merged to effect the goals of mergers . . . ." Slip op. at 5. The TCU also recognized that the Board has authority to place employees under one railroad's agreement, although TCU does not agree that the Applicants have always shown a necessity to do so in this proceeding. TCU-6 at 8, 18.

F. There Is No Basis For Requested Findings That Applicants' Appendix A Proposals Are Not Necessary To The Implementation Of Their Operating Plans

Some unions assert that CSX and NS have failed to show that their Appendix A proposals are necessary to the implementation of the transaction. The ARU specifically request that the Board declare that "Applicants have failed to make such a necessity showing in this proceeding," and that the Board "does not explicitly or implicitly sanction the agreement changes discussed in Applicants' Operating Plans." ARU-23 at 8. There is no basis for these requests.

CSX and NS have each determined how best to integrate the allocated portions of Conrail into their existing operations, and have set forth their intentions in their Operating Plans. Each carrier's Appendix A describes consolidations of work and arrangements respecting employees that are necessary to, and appropriate for, the implementation of that carrier's Operating Plan. These proposals are fully consistent with Board and judicial precedent. As the D.C. Circuit has recognized, "there is little point in consolidating railroads on paper if a consolidation of operations cannot be achieved. It is obvious that separate and distinct parts, operating separately and distinctly, will not generate the value of consolidation." UTU v. STB, 108 F.3d at 1432.

The carriers' Appendix A proposals satisfy the fundamental New York Dock standards, which we have described in Parts D and E, above. Each carrier brings to its proposal its own management, experience, and operating practices. The carriers will be operating different parts of the former Conrail properties, and those parts will mesh with the carriers' existing properties, operations, and workforces in different ways. Most importantly, each carrier has its own Operating Plan designed to produce efficiencies from the consolidation of operations, facilities, and equipment on its own expanded system.[75] The Applicants' proposals reflect extensive analyses based on their long experience with consolidating operations, facilities, and equipment, and with combining workforces from various carriers into integrated systems. The proposals are appropriate to the task at hand.[76]

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[75] As the Board recently observed in UP-SP/Train Operations, there is no single rationale for selecting the appropriate collective bargaining agreement to be applied to a consolidated operation. Nothing in Board, ICC, or judicial precedent dictates that the same rationale be used in all circumstances. Id. at 5-6. See also ATDA v. ICC, 26 F.3d at 1163 ("Section 4 does not provide a formula for apportioning the 'selection of forces.' Instead, it frees the hand of the arbitrator to fashion a solution that is 'appropriate for application in the particular case.'").

[76] The ARU and TCU hopelessly miss the mark in attacking the method each carrier followed in developing its Appendix A. The ARU complain that the carriers developed their Operating Plans without regard to labor agreements and only later (through their labor relations officers) developed their Appendix A proposals to set forth necessary arrangements respecting employees. ARU-23 at 131-32. But the process the ARU describe comports precisely with Board and D.C. Circuit precedent. The fact of the matter is that labor considerations did not drive the Operating Plans; instead, the Appendix A proposals implement the Operating Plans, which were developed to achieve operational efficiencies. The ARU suggest it somehow matters that the Carriers' Operating Plan witnesses had not read the Conrail labor agreements. Id. The contention certainly does not support the ARU's assertion that the Appendix A proposals are unnecessary. Likewise without merit are the ARU's complaint that the carriers did not let the unions determine which labor agreements should be applied to the consolidated operations (id. at 26, 131) and TCU's complaint that the carriers have prepared no special "studies" to support their Appendix A proposals. The Appendix A proposals reflect the carriers' best judgments as to what arrangements will be appropriate; the unions have the opportunity to respond. And nothing requires the carriers to conduct special "studies."

1. CSX's Appendix A Proposals

The BLE, BMWE and BRS, commenting as the ARU, and TCU principally argue that CSX cannot show the necessity for placing former Conrail and CSX work and employees under a single agreement, because CSX currently has multiple agreements covering each of these crafts of employees. See, e.g., ARU-23 at 129; TCU-6 at 8. The ARU also suggest that the Applicants are using the Board's procedures to obtain system-wide agreements, when CSX has been unable to do so in RLA bargaining. ARU-23 at 129. The TCU further asserts that "multiple collective bargaining agreements among merged carriers are the norm in the industry, including the recent BN/Santa Fe and UP/SP mergers." TCU-6 at 8.

CSX is not seeking system-wide agreements in this proceeding.[77] CSX does, however, need to consolidate work and employees on its system with work and employees from the allocated share of Conrail which it will operate under single agreements in order to realize the efficiencies to be derived from the transaction. While it is true that CSX administers multiple collective bargaining agreements throughout its system, CSX does not typically have multiple collective bargaining agreements covering employees from several former railroads who work in operations or at facilities which have been consolidated. Numerous examples of the consolidation of work and employees from former railroads under a single agreement on CSX are listed in Exhibit G to the Peifer/Spenski Rebuttal Verified Statement. For example, as TCU notes, CSX has clerical agreements applicable to the former B&O, C&O, L&N and SCL, which

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[77] For example, CSX is not proposing a system-wide agreement for engineers, trainmen, signalmen or maintenance-of-way employees. In each of these areas, CSX is proposing three new districts comprised of portions of CSX and the allocated portion of Conrail that CSX will operate. CSX is proposing that a CSX or Conrail agreement apply to each of these districts, as described in CSX's Appendix A, CSX/NS-20 at 485.

are part of CSX. Where the work of these clerical employees has been coordinated, they have been placed under a single labor agreement pursuant to a New York Dock implementing agreement. Where employees from these former railroads have been consolidated on a merged seniority roster in Jacksonville, they have all been placed under CSX's SCL agreement. Moreover, the TCU has never questioned the need to place employees working in coordinated operations from several railroads under a single agreement. Indeed, TCU admits in its Comments that employees can be consolidated under one agreement, at least in some circumstances. TCU-6 at 18 ("If work is transferred, the agreement at the receiving location is normally applied."). Nor does TCU object to the placement of Conrail employees transferred to CSX's Jacksonville headquarters under CSX's SCL agreement.

The consolidation of employees under a single agreement in order to realize the efficiencies of the consolidation is also necessary for the other crafts of employees. For example, as explained in CSX's Appendix A, CSX cannot efficiently conduct train operations in accordance with its Operating Plan over its allocated Conrail lines and the adjoining portions of its system if locomotive engineers are restricted by their respective agreements to their former properties. It was for this same reason that CSX recently consolidated train operations on portions of the former B&O, C&O, WM and RF&P under the B&O agreements with the BLE and UTU to create the EBOC District. CSX Control/Train Operations.

Other than their general assertion that CSX does not need to consolidate train operations under one railroad's agreements because CSX has multiple agreements, the ARU never take issue with the efficiencies from combined train operations described in CSX's Operating Plan. Nor

can the ARU deny that these efficiencies will not be realized if CSX must apply multiple agreements to a supposedly integrated operation.

The ARU also do not take serious issue with CSX's proposed agreement modifications in the shopcrafts area. The ARU repeat their assertion that it is not necessary to place employees under a single agreement, because CSX now operates with multiple agreements for each shopcraft. ARU-23 at 150. However, as in other areas, CSX does not usually apply multiple agreements at locations which have been coordinated. For example, CSX consolidated freight car heavy repair work from its shop on the former SCL in Waycross, Georgia, at its Raceland, Kentucky, shop on the former C&O.[78] All employees and work were placed under the C&O shopcraft agreements. CSX's locomotive heavy repairs are performed at its Huntington, West Virginia, locomotive shop on the former C&O, and all employees performing work there have been placed under the former C&O agreements.

The ARU do not deny that, in order to efficiently manage and repair former Conrail locomotive and cars as part of an integrated fleet, CSX must be able to repair these locomotives and cars at its existing facilities.[79] With respect to repairs to be performed at locations on portions of Conrail to be operated by CSX, the ARU shopcraft unions also do not quarrel with CSX's approach of determining the applicable agreement based upon the predominant number of employees. However, they assert that CSX does not always follow that methodology, because CSX is proposing to apply former B&O or C&O agreements at locations where, according to the

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78/ This consolidation was a subject of Dispatchers.

79/ CSX will not operate Conrail's major locomotive and freight car heavy repair facilities, which are being allocated to NS.

ARU, former Conrail employees will predominate over CSX employees. ARU-23 at 135-137. CSX intends to follow a consistent approach. However, CSX is considering a geographic approach, rather than one based on specific points. In any event, the ARU are clearly wrong in asserting that "CSXT does not have a predominant number of employees at any of the [shopcraft] locations at which it intends to apply its CBAs." ARU-23 at 135. CSX employees will continue to predominate, for example, at its Raceland heavy repair car shop and its Cumberland locomotive repair shop.

Regarding CSX's proposal to centralize dispatching over the portion of Conrail to be operated by CSX at its dispatching center in Jacksonville, the ARU merely assert that the consolidation of such Conrail dispatching with CSX's "does not demonstrate that a public transportation benefit would be obtained from elimination of the ATDD-Conrail CBA." ARU-23 at 153. The ARU also allude to alleged safety problems found by the FRA at UP's centralized dispatch center. The ARU do not deny, though, that efficiencies result from centralized dispatching. The D.C. Circuit recognized in ATDA v. ICC that "the very point of many mergers is to capture efficiencies from centralization of function." 26 F.3d at 1165. Moreover, CSX has consolidated dispatching at Jacksonville since 1988 without any safety problems. Peifer/Spenski RVS at 29. Thus, the ARU have no basis to deny efficiencies from centralized dispatching. And, the ARU certainly do not deny the necessity for all dispatching work on CSX to be done under CSX's agreement with the ATDD applicable at Jacksonville, as proposed in CSX's Appendix A. The ATDD agreed in 1988 that all dispatching centralized at Jacksonville will be done pursuant to that agreement.

The necessity of consolidating employees under a single agreement is also demonstrated by New York Dock arbitration decisions, which have repeatedly found that the placement of employees from several prior railroads under one agreement, with merged seniority and common work rules, is necessary to realize efficiencies of Board-approved transactions. For example, Arbitrator O'Brien found that the placement of locomotive engineers and trainmen under one agreement was necessary in CSX Control/Train Operations. Arbitrator Yost recently reached the same conclusion in UP-SP/Train Operations with respect to trainmen. Interestingly, the BLE agreed that placement of former SP and DRGW engineers under UP agreements was necessary, in that BLE negotiated New York Dock implementing agreements to that effect under the conditions imposed in those proceedings. (The underlying arbitration awards in both CSX Control/Train Operations and UP-SP/Train Operations are included in Volume 3). Arbitrator Ables agreed that placement of train crew employees under one set of agreements was necessary when the train operations of the Interstate Railroad were assumed by NW. Interstate Railroad. Each of these arbitration decisions was upheld by the ICC or the Board.

Arbitrator LaRocco reached a similar conclusion in his award placing former Monongahela Railway engineers and conductors under Conrail agreements, after Conrail merged with the Monongahela. He found that leaving the former Monongahela employees under the Monongahela agreement would frustrate the integration of the Monongahela's operations into those of Conrail, explaining as follows:

> Leaving the MGA agreement intact would certainly prevent the Carriers from changing existing equipment utilization and the present rail traffic patterns. The MGA agreement could bar a Conrail engineer from operating on the former MGA property, prohibit the establishment of a centralized crew base, and require the Carriers to duplicate many administrative functions already

> performed by Conrail. Contrary to the Organization's argument, this is not a situation where only one or two MGA agreement provisions are hindering specific aspects of the Carrier's operating plan. Rather, because this merger involves the complete integration of the MGA into Conrail, the totality of the circumstances compel a total abrogation of the MGA agreement. Stated differently, it is impossible to accommodate the transaction by amending a few rules in the MGA agreement. Retaining even a residue of the MGA agreement will impede the impending transaction since the agreement, in and of itself, would maintain the MGA as a separate railroad property which is anathema to the complete integration of operations . . . .
>
> Imposing multiple agreements on the former MGA territory would render the coordination not just awkward but would thwart the transaction.

Consolidated Rail Corp. and UTU, Oct. 29, 1992 (LaRocco, Arb.) at 16-17 (included in Volume 3). Arbitrator Mikrut similarly found in two New York Dock awards that engineers and trainmen of the UP and former Chicago and North Western ("C&NW) should be placed under one railroad's agreements in order for UP to realize the efficiencies from combined train operations on the UP and former C&NW. UP and UTU, Feb. 27, 1996 (Mikrut, Arb.) (included in Volume 3); UP and BLE, January 10, 1996 (Mikrut, Arb.) (included in Volume 3).

Arbitrators have reached similar findings in arbitrations involving the non-operating crafts. New York Dock Arbitrator Simon found that placement of communications employees on CSX under one agreement was necessary when their work was consolidated at a centralized radio repair shop. He stated:

> The Referee concurs that it would hamper the efficiency and economy of the consolidation if the carrier were required to manage 17 employees under four (or even two) different collective bargaining agreements. The carrier should be allowed to utilize employees in the facility without being restricted by the artificial barriers imposed by different agreements. This is one of the objectives of consolidation . . . . Thus, it is the Referee's

> conclusion that the adoption of a single collective bargaining agreement at the consolidated facility is necessary to effectuate the transaction.

CSX Radio Repair Shop Award at 24 (included in Volume 3).

Similarly, Arbitrator LaRocco found that placement of signalmen from the Southern, Central of Georgia and NW under the NW agreement was necessary to realize the efficiencies of consolidating signal repair work on the NW. Arbitrator LaRocco recognized the operational problems that would result from leaving employees working in a consolidated area under different agreements with different work rules. He explained that "[i]mposing multiple agreements at the Roanoke facility would not just make the coordination unwieldy but would totally thwart the transaction. The Carriers persuasively argued that they could never attain operational efficiencies if the NW had to manage signal shop work and supervise shop workers under multiple and sometimes conflicting collective bargaining agreements." Norfolk & Western Ry. and BRS, Feb. 9, 1989 (LaRocco, Arb.) (emphasis added) at 27 (included in Volume 3). Arbitrator Peterson reached a similar conclusion regarding the necessity of placing Monongahela's machinists under the Conrail machinist agreement. Consolidated Rail Corp. and IAM, June 21, 1993 (Peterson, Arb.) (included in Volume 3).

As explained in CSX's Appendix A and the Peifer/Spenski Rebuttal Joint Verified Statement, CSX will face numerous operational problems if the territorial limitations and differing work rules of multiple agreements are applicable to its consolidated operations. Furthermore, it is no answer to assert, as the ARU do, that work and employees can be integrated by modifying only scope and seniority provisions in agreements. ARU-23 at 93 n.18. First, scope and seniority provisions are integral to and interrelated with other provisions in

agreements dealing with rates of pay, rules and working conditions. Second, leaving employees, who are supposedly working together in an integrated operation or facility, under different work rules will frustrate efficiencies, as found in the above arbitration decisions and as the following examples from the Peifer/Spenski Rebuttal Joint Verified Statement (at 31-34) illustrate:

- Seniority rules - Employees on a dovetailed roster would be subject to conflicting rules related to bidding, assignment, displacement and other basic procedural matters. For example, under the B&O BMWE Agreement (Rule 39) new positions and vacancies must be ". . . bulletined within fifteen (15) calendar days previous to or following the dates such positions are created or vacancies occur, except that temporary vacancies need not be bulletined until thirty (30) calendar days from the date such vacancies occur". This is inconsistent with Rule 3 of the Conrail BMWE Agreement which provides in Section 3(a), "All positions and vacancies will be advertised within thirty (30) days previous to or within twenty (20) days following the dates they occur." Similarly, the period of time advertisements run under the B&O and Conrail BMWE Agreements are not the same. On Conrail, under Rule 3(b) advertisements are ". . . posted on Monday or Tuesday and shall close at 5:00 P.M. on the following Monday". On the B&O, under Rule 40(a) bulletins are posted for a period of ten days, with no specific requirement to post on any particular day. The conflicts between these two agreements are repeated under almost every conceivable seniority move that could occur, such as force reductions and displacements. Under the Conrail BMWE Agreement Rule 4, Section 2(b), "An employee entitled to exercise seniority must exercise seniority within (10) days after the date affected." The Conrail Rule further provides, "Failure to exercise seniority to any position within his working zone (either divisional, zone or Regional) shall result in forfeiture of all seniority under this Agreement, except employees who decline to exercise Regional seniority in their Work Zone shall forfeit such Regional seniority". Under B&O Rule 44 employees who fail to exercise displacement rights are simply, "considered furloughed" and their seniority rights are not at risk until they are recalled and only then when recalled " . . . to a position with headquarters located within thirty (30) road travel miles from his home . . . ." In other words, if the conflicting agreements survived, chaos would reign.

- Classification of work - While the BMWE Agreements on both the B&O and Conrail generally cover employees working in the Track and Bridge and Building Departments, and the BRS Agreements generally cover employees in the Signal Departments, the basic classification of work rules are not identical. Accordingly, work that is normally assigned to one group of employees on Conrail, is not assigned to the same group of employees on the B&O. Switch heaters are maintained by Signalmen on the B&O and by Electricians working under the

IBEW Agreement on the Conrail lines being operated by CSX. Moreover, the B&O BMWE Agreement contains specific classification of work rules and strict lines of demarcation between classifications, whereas the Conrail BMWE Agreement (Rule 19) permits employees to ". . . be temporarily assigned to different classes of work within the range of his ability".

Classification of trains enroute - This rule applies to train and engine crews who depart their terminal and then are required to classify the cars in their train (switch them into different positions to create blocks or switch blocks of cars into different positions) at intermediate points or to reclassify their trains when no cars are picked up or set out. The B&O agreements do not restrict such intermediate point switching, as Conrail agreements do.

Deferments - This rule applies to runs which are advertised to go on duty at a certain time. When trains are delayed and they will not be ready at the designated time, the rules require that the crews be notified of the delay prior to the time they are to show up at the reporting point. The Conrail rules require notifying them of the delay and the time to which their start is to be deferred within the advance calling time in effect at the particular terminal (60, 75, 90, etc., minutes, whatever the calling time is to allow the employee to get ready and report). The B&O rule provides for 1 hour. The Conrail rule allows a deferment of unspecified length; the B&O rule allows a maximum of 3 hours and then the crew goes on pay.

Lap back - This rule allows or restricts the carrier from turning a train and engine crew back to a location that it just passed in the normal progress of its train, which turn is not part of the advertised work. The B&O agreement has no rule covering the lap back. The Conrail agreement has a rule which requires the carrier to pay a penalty of the round trip mileage traversed back in addition to the crew's normal compensation for pool freight crews. If the crew is regularly assigned, then the mileage is included in the actual miles run and paid for on a continuous time basis.

The onl practical way to administer conflicting agreements would be to segregate the work force in a con mon geographical area, which would effectively nullify savings or efficiencies that would normal flow from a coordination.

Finally, there are significant administrative efficiencies from being able to apply a single labor a greement to employees performing consolidated work. There are costs to applying multipl agreements to employees working in a coordinated operation. Supervisors and other

employees involved with the administration of agreements must be familiar with disparate work rules in various agreements. This complexity invariably leads to mistakes, which result in grievances and additional costs for the carrier and ill-will among employees from former carriers.

The other principal complaint regarding the necessity for CSX's proposed agreement modifications is the assertion by the BLE, BRS, BMWE and TCU that CSX has proposed unusually, and unnecessarily, large new seniority districts. ARU-23 at 45, 113, 156; TCU-6 at 17. The seniority districts proposed by CSX are necessary to realize the efficiencies in the Operating Plan and are comparable in size to existing seniority districts. Indeed, existing seniority districts on Conrail, CSX and other carriers are larger than the new districts proposed by CSX.

For example, in the train and engine area, on Conrail, the BLE and UTU have agreed to system-wide seniority for engineers and trainmen. Because these current seniority districts are system-wide, they are, by definition, larger than any being proposed by CSX. None of CSX's proposed districts are as large as these Conrail districts, which cover the entire Conrail system. CSX's proposal for its Eastern District will only slightly expand CSX's EBOC by including territory between Cumberland, Maryland, and Willard, Ohio. The proposed Northern District, which is basically Conrail's "F" District, will actually be smaller than the current "F" District, since the southern tier trackage of Conrail's "F" District would be operated by NS and therefore will not be part of CSX's Northern District.

CSX's proposed train and engine districts are also smaller than seniority districts proposed by the CSX BLE Western Lines and Northern Lines General Chairmen and agreed to by CSX. In addition, CSX's proposed districts are smaller than those on other railroads. For example,

even before its acquisition of the SP, UP had very large train and engine seniority districts. One ran from Oakland through Salt Lake City to west of Boise, Idaho; another ran from Lake Charles, Louisiana to Council Bluffs, Iowa, to Pueblo, Colorado.

There is no basis for the ARU's assertion that, since CSX experienced operational problems following implementation of the EBOC, the claimed efficiencies from integrating CSX and former Conrail train operations into three new "large" districts are illusory. ARU-23 at 44, 63. CSX did experience some initial difficulties implementing the EBOC, some of which were employee generated. While most employees could have held positions in their former seniority districts, a number of train and engine employees exercised seniority to hold new positions in the larger district. By exercising their seniority to territories on which they had not qualified, CSX experienced a temporary surge in crews requiring pilots until they became qualified on the new territories. Contrary to the ARU's assertion, CSX has not restricted the exercise of seniority of any engineer within the EBOC; engineers are permitted to exercise seniority consistent with the terms of their agreements. CSX also did not, and does not, require employees in the EBOC to take positions all over the district in order to protect their seniority rights. CSX would also note that, contrary to BLE's predictions in the CSX Control/Train Operations that creation of the EBOC would require engineers to relocate substantial distances, no engineers have applied for moving allowances since the EBOC district was implemented in early 1996. Peifer/Spenski RVS at 20.

CSX's proposed consolidated seniority districts for signal and maintenance-of-way ("M of W") employees also are comparable to those proposed for train and engine employees. The ARU argue that CSX cannot identify "any actual problem" with leaving CSX and former

Conrail employees under their former agreements. ARU-23 at 157. However, as explained for train and engine employees, and as found in numerous New York Dock awards, the "actual problem" is that CSX will not be able to conduct integrated maintenance operations if employees working in the same geographic area must be kept under separate agreements, which restrict CSX employees to CSX lines and former Conrail employees to former Conrail lines. The Board has recognized that efficiencies can result from the coordination of M of W and signal maintenance.[80] Also, CSX will be able to realize significant savings, from the ability to use its system production gangs and signal construction gangs on the allocated portion of Conrail that it will operate. CSX's unit costs for major track surfacing projects are over 60 percent less than Conrail's unit costs. Peifer/Spenski RVS at 56. The ARU argue that, in any event, no necessity has been shown, because the savings are labor cost savings, which, according to the ARU, cannot be public benefits. However, as previously discussed, labor cost savings resulting from improved efficiencies are public transportation benefits. Moreover, there are more savings from the ability to use system production gangs and signal construction gangs than labor cost savings. As explained in the Operating Plan, CSX will be able to perform programmed maintenance year-round and obtain material at less cost. CSX/NS-20 at 72.

The ARU also contend that the proposed seniority districts for M of W and signalmen are overly large and are, therefore, unsafe. ARU-23 at 159. Again, CSX's proposed seniority districts are comparable to the size of existing districts on CSX. For example, the existing seniority districts for BRS-represented signalmen on the former SCL, IBEW-represented

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80/ E.g., Union Pacific Corp.-Central-Missouri Pacific Corp. (Arbitration Review), Finance Docket No. 30000 (Sub-No. 48), slip op. at 8 (served July 31, 1996).

communications workers on the former SCL, B&O, and C&O, and TCU-represented communications workers on the former L&N encompass the entire former railroad systems and are larger than any of the seniority districts proposed in the Application. As explained in the Peifer/Spenski RVS at 56, the size of the proposed existing M of W and signal districts do not create safety problems or mean more work responsibilities for individual employees.

2. NS' Appendix A Proposals

NS' Appendix A is a fair and reasonable proposal for the selection and assignment of forces for NS' proposed operation of the former Conrail properties. On the basis of its extensive experience with railroad consolidations, NS developed Appendix A in order to address the immediate imperatives of operational implementation and also to accomplish the objectives of network expansion and single-system efficiency detailed in NS' Operating Plan. As the ICC and the Board have long recognized, and as we discuss above in Part D, it is almost always necessary to modify labor agreements in order effectively to implement railroad consolidations. This transaction is no exception. As NS explains further below, Appendix A is consistent with established New York Dock standards and strikes a fair and reasonable balance based on all appropriate considerations.

In their comments, some of the unions contend that NS has not shown the necessity for the agreement changes proposed in Appendix A. ARU-23 at 127-60; TCU-6 at 8-14; TTD-3 at 6-7. TCU and TTD acknowledge that the Board possesses authority to modify labor agreements, but they contend that NS has attempted to justify Appendix A on the basis of considerations that are insufficient to justify operating the allocated properties under the agreements specified. The ARU make similar contentions, but the thrust of their criticism rests on a steadfast denial (in the

face of overwhelming contrary legal authority) that it is ever necessary to use Section 4 processes, rather than the RLA, to implement Board-authorized transactions. All of these commentors simply disregard precedent, making no effort to analyze the proposed transaction within the framework of standards developed and applied in prior railroad consolations.

The changes that NS proposes in Appendix A are, if anything, more necessary than in previous major railroad consolidations. The proposed transaction, unlike the typical railroad consolidation, will allocate the properties of a single carrier in three parts, two of which will be operated by and need to be integrated into the existing systems of competing railroads. Following that division, the Conrail property could not continue to be operated in place, as it is now. This circumstance makes the selection and assignment of forces among the Applicants' current employees an immediate operational imperative: NS and CSX must obtain the implementing agreements that are necessary to permit them to be able to operate allocated Conrail properties. Peifer/Spenski R.S at 35.

For similar reasons, the necessity of selecting appropriate labor agreements is obvious. It would not be possible for NS simply to operate allocated Conrail properties under the agreements currently in place on Conrail. Those agreements provide for the operation of a single integrated railroad by employees of a single carrier, a structure fundamentally at odds with the proposed transaction. This carrier cannot simply step into the role of employer under the previous owner's labor agreements.

The operational imperatives arising from the allocation of Conrail properties could not be resolved by simply narrowing the scope of the Conrail agreements to correspond to the physical dimensions of the properties to be operated by NS. Many of the terms of Conrail's

agreements, including terms that the unions contend are particularly worthy of preservation, are integrally tied to Conrail's existing size and geography. Existing scope and seniority rights (ARU-23 at 108) and bonuses and retirement benefits tied to the financial performance of Conrail (id. at 31-32, 107), for example, cannot be applied on the fragmented properties that NS will operate as integral parts of a completely different railroad system, in an environment in which Conrail itself will no longer be operating a major railroad.

By allocating the Conrail properties, the proposed transaction fragments Conrail's existing seniority districts. If the existing Conrail agreements were left in place unchanged, NS' ability to use equipment and personnel would be artificially and inefficiently confined. The resulting operational inefficiencies would be particularly pronounced with respect to territorially confined maintenance and construction functions, such as the work performed under Conrail's agreements with BRS and BMWE. The BMWE agreement divides the Conrail property into three tiers of geographic territories over which certain types of M of W work are performed. For purposes of major program production work (e.g., laying rail), the property is divided into two parts (eastern and western regions). Within those regions, the property is subdivided into six "zones," which confine the work of other production gangs (e.g., timber and surfacing gangs) and their equipment. Finally, the six zones correspond to 18 separate seniority districts for purposes of day-to-day line and other maintenance functions. The proposed transaction will divide both of Conrail's M of W regions, all six M of W "zones," and 11 of the 18 M of W districts among the portions of Conrail to be operated by the Applicants and the Shared Asset Areas. The properties to be operated by NS therefore will include fragments of these various Conrail M of W geographic territories. The Conrail/BMWE agreement was never intended to apply to

properties after such fragmentation and could be "preserved" only at great cost. The Conrail properties to be operated by NS, standing alone, as would occur if the Conrail/BMWE agreement applied, would consist principally of territories that would not support a season's production work.

Similarly, the proposed transaction will fragment most of the existing seniority districts for signal and certain communications functions. Conrail's current agreement with BRS provides for 22 separate seniority districts. Employees subject to that agreement are required to protect assignments within those districts which do not require a change in residence. The properties to be operated by NS will include parts of 11 districts that will be split among NS and CSX and/or the Shared Asset Areas. If the Conrail/BRS agreement applied, the employees performing signal and communications work under that agreement would be restricted to truncated, unworkable seniority districts. Accordingly, any effort by NS to operate the allocated properties under Conrail's existing BRS agreement would be handicapped by territorial limitations that bear no relation to NS' post-transaction operations.

Beyond NS' immediate operational needs, Appendix A also addresses the objectives of operational integration set forth in NS' Operating Plan. NS intends to take full advantage of opportunities for single-system improvements by integrating the operations of allocated Conrail properties into its own highly successful operations.

The cornerstone of the NS operating plan is its "hub network system," under which NS plans to integrate the operations of allocated Conrail properties into a series of hubs grouped into three separate network systems. Each system will be comprised of combinations of existing NS and Conrail routes radiating from central hubs, which were selected (and may be shifted over

time) to reflect major traffic flows. Within the hub network system, NS intends to operate run-through freight trains, combine duplicative functions and facilities, and consolidate yard operations to improve yard efficiency and the speed and responsiveness of its train operations. To function, the hub network system depends upon NS' ability to operate through existing terminals, to eliminate interchange movements, and to route trains according to traffic type.

All of these elements will necessitate extending the appropriate NS agreements and practices (with appropriate accommodations) to cover the allocated Conrail properties included in each hub network system. This will create unified workforces, which may be utilized in the combined train and yard operations without regard to corporate boundaries. In addition, NS needs to realign and merge existing seniority districts and crew districts to match the hub design and to combine extra boards that provide crews for trains operating in different directions. None of this would be possible if NS were required to operate each hub network system using all of the agreements currently in effect on the properties that will comprise each hub network. To the contrary, if all agreements applied, NS would be required to make crew changes at the borders of existing crew districts, to engage in duplicate handling and interchange-type operations between existing terminals, and otherwise to operate the allocated Conrail properties as a separate railroad rather than as part of the NS system.

Implemented in accordance with Appendix A, the hub network system will produce immediate and substantial improvements in the speed and efficiency of train operations by extending routes and facilitating the efficient use of track, workforces, and equipment. The Appendix A proposal will permit NS to take advantage of the multiple routings made possible by the integration of NS and Conrail track that NS will operate. Under Appendix A, NS will

be able to offer efficient single-system service in the corridor between Chicago, Cleveland, Pittsburgh and Harrisburg by routing trains according to traffic type, service demands, and other operational considerations. If NS were to attempt to operate under the agreements currently in effect on the lines comprising that corridor, through freight operations would involve twelve separate seniority districts, which would dictate the routing of trains according to crew composition rather than service needs. Under NS' plan, the number of seniority districts would be reduced to four, thereby significantly enhancing the flexibility and efficiency of operations in this critical corridor. Likewise, throughout the Midwest, NS will use the NS track and the allocated portion of Conrail track interchangeably, making possible shorter routings and segregation of traffic by type.

NS also intends to make the most efficient use of the properties it will operate and the unified work force by combining crew districts and eliminating crew changes at existing terminals. NS intends to operate single-crew through freight service between Bellevue, Ohio and Elkhart, Indiana, via a new connection at Oak Harbor, Ohio, a route comprised of both existing NS and allocated Conrail track. New single-crew service also is planned between Toledo, Ohio and Peru, Indiana and between Elkhart and Peru. These train operations will be substantially faster and more efficient than would be possible if existing labor agreements were applied to the Conrail properties operated by NS.

Similar efficiencies will be achieved through yard consolidations at the several hub locations where NS and Conrail currently maintain yards. Common point terminals include Toledo, Cleveland, Chicago. Cincinnati and Columbus. By combining those yard operations

under the appropriate NS agreements, NS will reduce the delay, cost, and risk of loss associated with duplicate handling and transfer of rail cars between yards.

These plans find solid support in a long line of New York Dock cases. The ICC and the Board and their Section 4 arbitrators consistently have recognized the need to combine train operations of merged properties under a single labor agreement in order to realize single- system transportation benefits. E.g., CSX Control/Train Operations, slip op. at 12 (upholding arbitrator's imposition of an implementing agreement that placed employees under a single labor agreement applicable to the consolidated operations); Interstate Railroad (upholding an arbitrator's imposition of an implementing agreement under which former Interstate train service employees would work under the NW labor agreement when NW (along with NSR) assumed control of Interstate and NW became responsible for train operations over that property); United Transportation Union and Union Pacific R.R., February 27, 1996 (Mikrut, Arb.) (imposing implementing agreement that placed trainmen under one railroad's labor agreement); Union Pacific and Brotherhood of Locomotive Engineers, January 10, 1996 (Mikrut, Arb.) (same for locomotive engineers).

The necessity for unification is not limited to NS' proposed train operations. Contrary to the repeated assertions of the ARU, public transportation benefits do not arise solely from changes in the actual running of trains. The ARU prove nothing by asserting again and again that NS has proposed to integrate functions that will not directly "advance single-line service, an expanded network, interchange yard efficiency, better blocking or any other operational objective" (e.g., ARU-23 at 149). It is by now a familiar proposition that New York Dock procedures are not limited to changes in train operations. It is settled that consolidations of, for

example, car repair shops,[81] radio repair shops,[82] signal repair shops,[83] locomotive dispatching facilities,[84] and accounting work,[85] are logical elements of control transactions, which generate exactly the sort of system-wide efficiencies that railroad consolidations are intended to promote.

NS intends to consolidate similar functions in connection with this transaction, proceeding with due prudence and at an appropriate pace. NS intends to take full advantage of opportunities to combine clerical functions through both the consolidation of yards and terminals at common points and the centralization and relocation of clerical functions (such as yard operations, waybilling, and demurrage) from their former Conrail points to the respective NS facilities. NS intends to integrate the centralized yard functions of the allocated Conrail properties which it will operate (performed by approximately 200 TCU-represented clerks) to NS' centralized yard operations center at Atlanta, Georgia, where the work will be performed under the NS/TCU agreement already applicable to the center. In accordance with the Operating Plan, the Atlanta CYO center will monitor train and car movements for all yards on the NS system, including the

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81/ Norfolk Southern Ry. and Norfolk & Western Ry. and Brotherhood Railway Carmen, June 19, 1995 (Muessig, Arb.) (included in Volume 3).

82/ CSX Radio Repair Shop Award.

83/ Norfolk & Western Ry., et al. and Brotherhood of Railroad Signalmen, February 9, 1989 (LaRocco, Arb.).

84/ NS Control/Power Distribution, 4 I.C.C.2d at 1082-85.

85/ Union R.R. and Bessemer & Lake Erie R.R. and United Steelworkers of America, October 21, 1997 (Witt, Arb.) (included in Volume 3); Southern Ry. and Brotherhood of Railway, Airline, & Steamship Clerks, June 17, 1984 (LaRocco, Arb.) (included in Volume 3).

allocated Conrail facilities that NS will operate. The NS and former Conrail employees will monitor car movements without regard to former corporate boundaries.

Likewise, it is necessary to apply a single labor agreement in order efficiently to maintain an integrated equipment fleet, as described in NS' Operating Plan (CSX/NS-20 at 308-09). NS intends to consolidate heavy locomotive repair work so as to provide functional specialization based on manufacturer, sending General Electric locomotives to NW's Roanoke facility and General Motors locomotives to the former Conrail shop at Altoona. As we described in part D above, this will require operating both shops under a single set of agreements in order to enable NS to direct work based on functional specialization, rather than on the prior ownership of the locomotives, and to provide needed flexibility to shift locomotive work in response to changes in demand. Likewise, NS will consolidate the car repair facilities at NS-Conrail common points by unifying parts of the work and workforce of the former Conrail with the NS work performed under the NW shop craft agreements. Finally, NS intends to integrate shop craft personnel at field locations in order that repairs may be made efficiently, without regard to the identity of the original operator of the line on which the equipment is located at the time of the needed repair. Absent such consolidation, NS could be required to maintain duplicative forces at common points and on parallel lines that can be staffed efficiently only with a unified workforce. NS properly plans to avoid such inefficiencies by placing the Conrail properties to be operated by NS properties under the NW shop craft agreements.

Equally important is the integrity of the infrastructure for track and signals. NS' Operating Plan also calls for integrating M of W work in order to achieve efficiencies in work force allocation and equipment use. NS intends to integrate the allocated properties which it will

operate into its designated production gang ("DPG") program. NW uses the heavily mechanized DPGs to perform major programmed track renewal and production work, such as timber and surfacing work and laying rail, which require the use of specialized machinery operated by qualified personnel. DPGs travel across broad territories, generally following the seasons south to north in order to make most efficient use of the expensive equipment and employee expertise needed for such work. NS intends to expand its existing DPG territories to include the former Conrail properties in order to make the most efficient use of its DPGs. To do so, it is necessary that NS extend the NW/BMWE agreements to the allocated Conrail properties which it will operate.

Conrail has no comparable DPG program. If the Conrail/BMWE agreement were adopted on the allocated property operated by NS, NS' DPGs could not be operated on the property. Under the Conrail/BMWE agreement, production projects that span existing seniority districts could not be performed by a single gang. Rather, a group of employees working on a production gang could stay with a project only to the limits of that group's seniority district; at the border, the existing gang would have to be disbanded, and a new gang, made up of employees holding seniority on the portion of the former Conrail territory operated by NS, created and trained. Such territorial restrictions would substantially slow production work and increase operating costs by reducing productivity in workforce and equipment utilization. Indeed, given that Conrail's seniority districts will be fragmented, as earlier discussed, application of the Conrail/BMWE agreement to NS' allocated Conrail properties would be a practical impossibility.

To avoid such inefficiencies, NS properly proposes to extend the NW/BMWE agreements to cover the allocated Conrail properties operated by NS.[86]

Finally, Appendix A appropriately and of necessity promotes uniformity in standards, practices, and rules. In the case of the shop craft work, a uniform approach is required in order to avoid conflicts over work jurisdiction. As the ARU acknowledge in their comments (ARU-23 at 109), the Conrail and NW shop craft agreements contain different, and conflicting, rules regarding how work must be allocated between the various crafts. Likewise, communications work is apportioned between BRS and IBEW in a significantly different manner on Conrail than on NS. Perpetuating these differences on the combined operation would complicate training and supervision of employees, create conflicts over work jurisdiction, and potentially result in delays in performing repairs. NS appropriately proposes to avoid such problems by operating the allocated properties under the NW agreements.

Some of the unions have criticized NS for citing, among the justifications for the changes proposed in Appendix A, the promotion of uniform payroll, claims handling, and training processes and procedures. The unions seem to contend that such considerations, by definition, are insufficient to establish necessity under New York Dock standards. In addition, they contend that the fact that NS currently operates with multiple labor agreements refutes any suggestion that

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[86] NW's DPG program was established in 1993 pursuant to the recommendation of Presidential Emergency Board 219 ("PEB 219"). PEB 219 found that DPGs were essential to the efficient use of certain production gangs and equipment and that, in order to function, DPGs should work under certain flexible work rules, such as flexible start time and work site reporting rules. In addition, in order for the DPGs to function as intended on the allocated Conrail properties operated by NS, it is necessary that the DPGs be operated in tandem with the NW schedule agreement, which, unlike the Conrail/ BMWE agreement, contains the flexible work rules that PEB 219 found essential to the operation of DPGs. Peifer/Spenski RVS at 43.

a single agreement is strictly necessary to efficient operations. ARU-23 at 129; TCU-6 at 8. The unions are wrong.

First, there is no inconsistency in NS' proposal with respect to the number of agreements that will be applied. It is true that for many crafts NS currently administers (and will continue to administer) more than one agreement per craft. NS' labor agreements generally cover only the NSR or NW properties, and some agreements govern only particular territories within the two properties. However, with few exceptions involving very few employees, facilities and operations that have been consolidated have been placed under a single agreement per craft. To that end, in all previous New York Dock consolidations, NS has sought and obtained implementing agreements that place combined workforces under single agreements. NS proposes to do the same in this case.[87] This will enable NS to realize the efficiencies of applying uniform rules and procedures to its combined workforce, an objective perfectly consistent with New York Dock standards and NS' own practices.

The unions' effort to trivialize the significance of uniform rules and practices also is unavailing. Maintaining multiple staffs and systems to preserve administrative features of labor agreements imposes costs that are no less real in terms of their impact on carrier operations than are the costs associated with maintaining other duplicative facilities and functions. Differences in items such as crew calling rules, claims handling procedures, and the rules governing rights

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[87] NS proposes to place the combined operations under appropriate NS agreements. NS proposes to apply particular agreements to particular crafts and/or geographic regions in order to achieve appropriate unified workforces, based on considerations of geography, workforce size, and operational efficiency. For the most part, the unions do not appear to challenge the selection of the particular NS agreement proposed, as much as they challenge the proposal to use any NS agreement rather than a Conrail agreement.

to work assignments and filling vacancies necessitate duplicate computer programming, additional staffing levels, and unnecessary complication and confusion, while producing no corresponding benefits.

Likewise, NS reasonably considers it necessary to extend its first-rate training facilities and methods to its new operations. This proposal is driven not only by bottom-line efficiencies, but by considerations of employee and public safety. NS brings to its management of the allocated Conrail property that it will operate a consistently successful record in all measures of railroad performance and safety, including rates of bad orders for locomotives, employee injuries, and train incidents and derailments. In train operations alone, achieving NS' personal injury ratios and track-related derailment incident levels will contribute to approximately $20.7 million in annual savings. There is no reason why such savings should be considered any less necessary than equivalent savings achieved by eliminating unnecessary crew changes and car handling.

In any event, there is no issue presented here as to whether such considerations would warrant operating under a single labor agreement in the absence of other operational necessities. Contrary to the unions' suggestion, NS has not relied solely on administrative considerations in proposing Appendix A. Rather, as shown, Appendix A represents a fair and rational proposal for selection and assignment of forces and determination of which labor agreements should apply to the acquired properties, taking account of all appropriate factors, including the very real public benefits of uniform administration and training. In the totality of the circumstances, NS' proposal to operate the allocated Conrail properties under appropriate NS agreements more than meets the "necessity" standard.

The unions have not discredited Appendix A by citing particular differences between the Conrail and NS agreements (ARU-23 at 103-27) or by asserting that certain terms of Conrail's labor agreements are "superior" to NS' (e.g., id. at 109). To be sure, there are some differences in the provisions of the Conrail and NS agreements. However, to the extent that the unions are contending that NS has proposed extending its own labor agreements on the basis of those differences, they are just wrong. As explained above, the extension of NS agreements is compelled by a number of considerations, none of which is a preference to avoid particular terms of Conrail agreements. It would be inappropriate for either NS or the unions to "cherry pick" particular agreement terms for preservation. E.g., UP/SP, slip op. at 84-85, 174.[88]

Nor do the unions raise a valid "necessity" issue by challenging the size of the proposed seniority districts. The ARU contend that NS is proposing to establish large seniority districts for maintenance of way and signal employees that somehow will impose undue hardships on employees or undermine the safety of the integrated operations. ARU-23 at 112; ARU-24 at 190. They are wrong. As a practical matter, the size of a seniority district bears little relationship to the distances that will be covered by individual employees. Fixed headquarters employees typically work only on limited territories, which tend to be smaller than seniority districts. The proposed transaction will realign but not substantially alter the size of those territories. Fixed headquarters employees rarely will be required to travel the length of the seniority district. Moreover, a mobile gang does not normally work over the full extent of its

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88/ In any event, as explained in the Peifer/Spenski Rebuttal Verified Statement, the unions have mischaracterized a number of asserted differences between the Conrail and NS labor agreements. Peifer/Spenski RVS as 46-48.

territory in any given year. NS' proposal will expand the work opportunities for M of W and signal employees, but will not substantially alter employees' typical work patterns.

The seniority districts proposed for the integrated operations are consistent with the size of seniority districts under which NS currently operates. The proposed seniority districts for M of W and signal work on the allocated Conrail properties to be operated by NS (and the longest distance an employee could be required to travel to protect work on his or her district) will each extend 789 highway miles. On NW, the corresponding existing seniority districts for both M of W and signal construction work range in length from 593 to 764 highway miles.[89] Under the NSR/BMWE agreement, employees can be required to protect territories as long as 1,000 miles, well in excess of the largest district proposed for the combined NS-Conrail operation.

The unions' professed safety concerns are likewise without merit. Logically, there is no correlation between the size of a M of W or signal district and the safety of the corresponding work. The work performed by M of W and signal production gangs requires functional, but not territorial, familiarity. In any event, NS' consistently superior safety record is strong evidence that the sizes of NS' M of W and signal seniority districts are not unsafe.

G. Approval Of The Transaction Will Not Circumvent The Jurisdiction Of The National Mediation Board

URSA argues that CSX and NS are "attempt[ing] to circumvent the exclusive jurisdiction of the [National Mediation Board] to determine representational questions involving rail carriers, pursuant to Section 2, Ninth of the RLA" (URSA-3 at 5), and that because of this the Application

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89/ All NW employees in traveling assignments receive away-from-home expenses in accordance with their applicable collective bargaining agreements.

should be denied. As explained below, URSA's argument is incorrect and does not raise an issue for this Board.

NS, CSX and Conrail are different railroads, and accordingly work on CSX and NS is not necessarily performed in the same way in which similar work is performed on Conrail. As explained in CSX's and NS' Appendix A's, after the transaction, in some instances work coming to CSX or NS from Conrail will be performed by officers who are not represented by labor unions and therefore do not work under collective bargaining agreements. In other instances, work coming from Conrail to CSX or NS will be performed by a craft or class represented by a different RLA representative.

It is well settled that any effect that a Board-approved transaction may have on representational rights is a question for the National Mediation Board, not this Board, whether agreement employees are moving into a nonagreement workforce, as in Norfolk Southern Corp.--Control--Norfolk & Western Ry., et al., 4 I.C.C.2d at 1087 ("New York Dock does not preempt any NMB determination as to representation . . . . This is not to say that the ATDA may in fact retain its status. That, as the panel recognized, is for the NMB to determine . . . ."), or agreement employees represented by different unions are being coordinated, as in CSX Control/Train Operations at 15 ("The effect of our transaction on selection of union membership is under the jurisdiction of the National Mediation Board acting under the Railway Labor Act."). Accord Fox Valley & Western Ltd.--Exemption Acquisition and Operation--Certain Lines of Green Bay and Western R.R., et al., Finance Docket No. 32025 (Sub-No. 1), served Dec. 19, 1994, slip op. at 7 ("it is for the NMB to determine whether employees have chosen to be represented and who shall represent them."); Fox Valley & Western Ltd.--Exemption Acquisition

and Operation -- Certain Lines of Green Bay and Western R.R., et al., 9 I.C.C.2d 272, 281 n.12 (1993) ("it is the exclusive responsibility of the National Mediation Board to determine representation issues under the RLA . . . .").

H. The Board Lacks Jurisdiction To Consider The ARU Takings And Due Process Arguments, And No Credible Takings Or Due Process Issue Exists Even If The Board Were To Reach Those Arguments

The ARU assert that any modification of labor agreements by the Board would be an uncompensated taking and would violate due process. ARU-23 at 73-74. This is a familiar and empty contention. The Board has consistently held that it lacks jurisdiction to consider such Fifth Amendment claims, which attack the ICA and the protective conditions adopted under the ICA. Even if the Board were to reach the merits of such claims, it would find that modification of collective bargaining agreement rights as necessary to implement the transaction is not a taking of property within the meaning of the Fifth Amendment. The ARU's due process contention is equally frivolous given the extensive procedures available to the ARU and Congress' rational advancement of rail consolidation through the ICA.

1. The Board Lacks Jurisdiction To Consider The ARU's Constitutional Claims

The Board, like the ICC before it, refuses to entertain Fifth Amendment challenges exactly like the ARU's claims because the Board lacks jurisdiction to consider constitutional challenges to the ICA or to the ICA's effect on collective bargaining agreements. E.g., Canadian National Ry.--Lease from Grand Trunk Western R.R. Finance Docket No. 31387 (Sub-No. 1), decision served Aug. 23, 1990, slip op. at 7 n.15 (declining to consider a takings argument arising from an implementing agreement's override of collective bargaining agreement terms); Intermountain Western R.R.--Purchase--Union Pacific R.R., Finance Docket No. 31494, decision

served July 18, 1990, slip op. at 5 n.15 (declining to address a takings challenge); Wilmington Terminal R.R.--Purchase and Lease--CSX Transportation, 6 I.C.C.2d 799, 826-27 (1990) (considering a Fifth Amendment challenge to be "best left to the appropriate court to decide"), aff'd sub nom. Railway Labor Executives' Ass'n v. ICC, 930 F.2d 511 (6th Cir. 1991).[90] The Board's refusal to entertain constitutional challenges to its organic statute is firmly rooted in judicial precedent.[91] An administrative agency is bound to apply the law as Congress wrote it and simply does "not have jurisdiction to declare statutes unconstitutional." Branch v. FCC, 824 F.2d 37, 47 (D.C. Cir. 1987).

2. The Tucker Act Provides The Exclusive Remedy For The ARU Takings Challenge

The Board's refusal to consider takings challenges in particular is mandated by the Tucker Act, 28 U.S.C. § 1491(a), which vests the United States Court of Federal Claims with exclusive jurisdiction over suits to recover compensation for a taking. Preseault v. ICC, 494 U.S. 1, 11 (1990); Executives, 987 F.2d at 815; Union Pacific Corp.--Control and Merger--Southern Pacific Rail Corp., Finance Docket No. 32760, decision served Aug. 12, 1996, slip op. at 175 (declining to address a takings challenge because of the Tucker Act and expressing strong doubt as to its merits).[92] Resort to the Tucker Act is required by the Takings Clause itself. The

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[90] Cf. Burlington Northern R.R.--Abandonment Exemption, Docket No. AB-6 (Sub-No. 318x), decision served Nov. 2, 1990, slip op. at 3 ("Because it is our duty to administer the law as it is written by Congress, it is beyond our jurisdiction to address . . . constitutional arguments.").

[91] See, e.g., Weinberger v. Salfi, 422 U.S. 749, 765 (1975) (noting that "the constitutionality of a statutory requirement [is] a matter . . . beyond [the HEW Secretary's] jurisdiction to determine); Johnson v. Robinson, 415 U.S. 361, 368 (1974); Executives, 987 F.2d at 815-16.

[92] See also Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1016-17 (1984); Regional Rail Reorganization Act Cases, 419 U.S. 102, 124-25 (1974); Executives, 987 F.2d at 815; see also (continued...)

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Clause does not bar government action that takes private property; it merely forces the government to pay for property that it takes. E.g., English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 314-15 (1987); Railroad Reorganization Act Cases, 419 U.S. 102, 126 (1974); Executives, 987 F.2d at 816.

Post hoc adequate compensation precludes any need to curtail regulatory programs for fear that their application might effect a taking. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 128-19 (1985). No taking even exists -- i.e., a takings claim is not ripe -- until the government has denied just compensation. Suitum v. Tahoe Regional Planning Agency, 117 S. Ct. 1659, 1665 (1997); Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 195 (1985); see also Preseault, 494 U.S. at 12 (mandating use of the Tucker Act in a case under the ICA).[93]

3. No Taking Would Result From The Modification Of Collective Bargaining Agreements In Connection With The Conrail Transaction

No compensable taking occurs merely because a federal statute, such as the ICA, may affect private contract rights. Accordingly, courts have routinely rejected rail labor's Fifth Amendment claims based on the alleged impact of legislation on existing labor protection or collective bargaining agreements. E.g., Burlington Northern R.R. v. United Transportation

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92/ (...continued)
Rail Abandonments--Use of Right-of-Way as Trails--Supplemental Trails Act Procedures, Ex Parte No. 274, 5 I.C.C.2d 370 (Feb. 10, 1989) (finding the ICC not to be the proper forum for a takings challenge given the Tucker Act). For cases involving less than $10,000, a federal district court has concurrent jurisdiction, 28 U.S.C. § 1346(a)(2).

93/ The only case that the ARU cite in support of their Fifth Amendment argument is Executives, but that case in fact rejects the ARU position. The D.C. Circuit refused to address labor's Fifth Amendment claim, holding that it was "not the forum in which it can be decided" because of the Tucker Act's jurisdictional limitations. 987 F.2d at 815.

Union, 822 F. Supp. 797 (D.D.C. 1991), aff'd sub nom. United Transportation Union v. United States, 987 F.2d 784 (D.C. Cir. 1993) ("Burlington Northern v. UTU"); Railway Labor Executives' Ass'n v. United States, 575 F. Supp. 1554, 1558-59 (Sp. Ct. RRRA 1983), cert. denied, 465 U.S. 1101 (1984); United Transportation Union v. Consolidated Rail Corp., 535 F. Supp. 697, 706-08 (Sp. Ct. RRRA), cert. denied, 457 U.S. 1133 (1982).[94] The ARU comments present this same often rejected contention.

Courts consider three factors to determine whether governmental regulatory action constitutes a taking: (1) the character of the government action, (2) the economic impact upon the property owner, and (3) the extent to which the regulation interferes with investment- backed expectations. Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978); see also Lucas v. South Carolina Coastal Commission, 505 U.S. 1003 (1992) (discussing Penn Central's factors).

First, where, as here, the character of the government's action is simply "adjust[ing] the benefits and burdens of economic life to promote the common good," no compensable taking results. Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211, 225 (1986).[95] There must

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[94] The ARU also imply that the Board would be taking rights "for the private benefit of the Applicants," ARU-23 at 73, as opposed to serving the public interest. Although the Takings Clause requires that any property taken be "for public use," U.S. Const. amend V, this requirement "is coterminous with the [federal] regulatory power." National R.R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407, 422 (1992). The public use requirement is met by any use "rationally related to a conceivable public purpose." Id. (quoting Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 240-41 (1984)). Given that the Board will approve the Conrail transaction and modify employee rights only if it serves the public interest, the ARU allegation is not colorable.

[95] As the Supreme Court explained, in rejecting similar constitutional claims raised by bondholders in Penn-Central Merger and N&W Inclusion Cases, 389 U.S. 486, 510-11 (1968):

(continued...)

also be "an essential nexus" between the "legitimate state interests" and the regulatory conditions imposed upon the property holder. Nolan v. California Coastal Commission, 483 U.S. 825, 834-37 (1987). But, in this case, a perfect nexus exists given that modification of labor agreements is approved only as necessary to further the legitimate public interest in implementing the transaction.

Second, the economic impact of the regulation on the asserted property holder does not suggest that proper use of implementing agreements would go "too far." As Dispatchers made clear, 49 U.S.C. § 11321(a) exempts railroads from complying with collective bargaining agreements to the extent necessary for the railroad to carry out a transaction approved by the Board as in the public interest. Dispatchers, 499 U.S. at 127-28, 133; see also UTU vs. STB, 108 F.3d at 1429 , ATDA v. ICC, 26 F.3d at 1164. Moreover, employees who are actually affected by the railroad's restructuring receive generous compensatory New York Dock benefits in return. This historic trade negates the net economic impact on employees. Burlington Northern v. UTU, 822 F. Supp. at 802 (finding "insubstantial economic impact" after considering the effects of similar protective conditions); Wilmington Terminal R.R., 6 I.C.C.2d at 827 (expressing the view that "no 'taking' would be present [in overriding of collective bargaining agreements to implement a transaction] since adequate compensation exists in the form of New York Dock"). Given that the Supreme Court finds no taking when even a "rough

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95/ (...continued)

> While the rights of the bondholders are entitled to respect, they do not command Procrustean measures. They certainly do not dictate that rail operations vital to the Nation be jettisoned despite the availability of a feasible alternative. The public interest is not merely a pawn to be sacrificed for the strategic purposes or protection of a class of security holders.

proportionality" exists between the impact of the government's action and the benefits to be achieved, Dolan v. City of Tigard, 114 S. Ct. 2309, 2319-20 (1994),[96] the generous compensation afforded to affected employees supports the ICC's view in Wilmington Terminal that no taking occurs when protective conditions are imposed.[97]

Third, the extent of interference with investment-backed expectations also weighs against finding a taking. In the heavily regulated area of railroads in which Congress has repeatedly created legislative solutions to ongoing labor disputes, any expectancy of the status quo is "unreasonable if not naive." Burlington Northern v. UTU, 822 F. Supp. at 802. Congress has frequently exercised its power to alter or override collective bargaining agreements. Wilson v. New, 243 U.S. 332, 350-52 (1917); Maine Central Ry. v. Brotherhood of Maintenance of Way Employes, 835 F.2d 368, 371 (1st Cir. 1987), cert. denied, 486 U.S. 1042 (1988). Contracts that deal with a subject matter appropriately regulated by the federal government under the commerce power have an acknowledged "congenital infirmity" -- they may be superseded without violating the Fifth Amendment. Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211, 225 (1986).[98] Such contract rights "are not absolute," New Haven Inclusion Cases, 399 U.S.

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[96] The Supreme Court has also phrased the analysis as finding that a "[land-]use restriction may constitute a taking if not reasonably necessary to effectuate a substantial governmental purpose." Dolan, 114 S. Ct. at 2318 (citing Nolan, 483 U.S. at 834 (quoting Penn Central, 438 at 127)).

[97] The ARU are not satisfied with New York Dock compensation, but seek to use their fictive "property right" as a trump card to block rail consolidation. The Fifth Amendment, however, ensures fairness when the government acts, not government paralysis. The "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

[98] See also Norman v. Baltimore & Ohio R.R., 294 U.S. 240, 307-11 (1935); Louisville & Nashville R.R. v. Mottley, 219 U.S. 467, 482 (1911) ("That the exercise of [the commerce] (continued...)

392, 491 (1970), but "depend[] on a regime of common and statutory law for [their] effectiveness and enforcement." Dispatchers, 499 U.S. at 129-30. Accordingly, a "contract has no legal force apart from the law that acknowledges its binding character." Id. at 130.

In Lucas, the Court reasoned in this vein that a land owner's title did not include any right to use his land as a nuisance because the state law of nuisance limited the "property" that the landowner owned. Lucas, 505 U.S. at 1027-29. Accordingly, no taking would occur if a state regulation merely enforced state nuisance law. Railway labor collective bargaining property rights are similarly limited ab initio by the background of federal law. The property rights created by railroad collective bargaining agreements cannot include any immunity from the effects of Section 11321(a), Section 11326(a), or any other federal law. See UP/SP, slip op. at 175 (noting that a taking is "extremely unlikely" given that the ICA "statutory scheme is longstanding, and predates the relevant contracts."). The "title" that ARU assert they have to contractual property rights never did and never could include any right to assert a collective bargaining agreement in contravention of federal law. Thus, the ARU have no collective bargaining "property" and no reasonable expectations to the extent that their asserted property right conflicts with federal law.

4. The Board's Proceeding Ensures Due Process

The ARU also suggest a vague due process claim. ARU Comments at 68, 74. As we have explained, the Board lacks jurisdiction to consider the constitutionality of the statutorily-

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98/ (...continued)
power may be hampered or restricted to any extent by contracts made between individuals and corporations, is inconceivable.").

defined procedures within which it operates. Moreover, an ARU due process claim would lack support even if the Board were to consider it.

As the D.C. Circuit found in rejecting a due process claim similar to the present one, the extensive procedures available to rail labor under the ICA refute any notion that procedural due process is absent. Executives, 987 F.2d at 816 n.4. The "essential principle of due process is that a deprivation of life, liberty or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'" Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985) (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950)); see also Edelman v. Western Airlines, Inc., 892 F.2d 839, 847 (9th Cir. 1989) (discussing due process in the context of the Railway Labor Act). The ARU have received more than adequate process by receiving both notice and opportunity to be heard through the Board's active solicitation of comments on the proposed Conrail transaction and still more process under New York Dock and possible appellate review.[99]

Any ARU claim that the Board's economic regulation violates substantive due process is likewise without foundation. It has long been settled that a regulatory agency's adjustment of a railroad's economic arrangements with its employees in furtherance of the public interest could

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[99] In Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976), the Supreme Court further specified the process that is constitutionally due by weighing the private interest affected, the risk of erroneous deprivation through the procedures used, the probable value of additional procedures and the financial and administrative burdens that would be imposed on the government if additional procedural safeguards were required. Although the ARU assert substantial private interests, the Board's extensive procedures indicate that no other process is due because such process would undermine the government's paramount interest in efficient railroad consolidation. Maine Central R.R. v. Brotherhood of Maintenance of Way Employes, 657 F. Supp. 971, 985 (D. Me. 1987) (rejecting a similar procedural due process argument based on a Mathews analysis).

very rarely offend substantive due process. United States v. Lowden, 308 U.S. at 256 (dismissing a substantive due process claim brought by railroad trustees challenging an ICC order). Legislation that merely adjusts the benefits and burdens of economic life is presumed constitutional and violates due process only if the legislature enacting it "acted in an arbitrary and irrational way." National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry., 470 U.S. 451, 472 (1985).[100] The Supreme Court has long "upheld against due process attack the competence of Congress to allocate interlocking economic rights and duties of employers and employees . . . regardless of contravening arrangements between employer and employee." Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976). The ARU have not even attempted the required argument that the Congress was "arbitrary and irrational" in enacting the ICA, nor could they. Congress clearly acted rationally in the public interest when it chose to further its expressed goal of consolidation in the rail industry by creating an exemption "from all other law," 49 U.S.C. § 11321(a), and by mandating "fair arrangements" for the protection of employees, 49 U.S.C. § 11326(a), embodied in the New York Dock conditions. Executives, 987 F.2d at 815-16.

I. Unions Cannot Strike Over The Implementation Of A Board-Approved Transaction

In their Comments to this Board, the ARU have threatened to strike unless CSX and NS negotiate over the implementation of this transaction pursuant to the RLA.[101] This is not an

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100/ See also Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717, 729 (1984); Williamson v. Lee Optical Co., 348 U.S. 483, 487-88 (1955); Railway Labor Executives' Ass'n v. United States, 575 F. Supp. at 1558-59.

101/ These unions have stated that, if CSX and NS implement the changes described in their (continued...)

issue that requires any decision or action by the Board. However, it is settled law that the exclusive process for implementing a Board-approved merger or control transaction is the process set forth in New York Dock, and the Board should be aware that the ARU cannot circumvent that process or the Board's exclusive jurisdiction by an actual or threatened strike.[102]

The law is clear. The ARU cannot evade the New York Dock process by striking or threatening to strike. As the Supreme Court recognized in Dispatchers, Congress struck a balance in Section 11326 between the public interest, by ensuring that railroad consolidations are not blocked by labor disputes, and the interests of employees, by requiring labor protective benefits. 499 U.S. at 133. If a union could avoid the New York Dock procedures by striking or threatening to strike, this balance would be upset. Missouri Pacific R.R. v. United Transp. Union, 580 F. Supp. 1490, 1506 (E.D. Mo. 1984)("the balance and efficiency which Congress sought to achieve with this scheme would be essentially and materially frustrated if employees were free to strike"), aff'd, 782 F.2d 107 (8th Cir. 1986), cert. denied, 482 U.S. 927 (1987); CSX Transp., Inc. v. United Transp. Union, 86 F.3d 346, 349 (4th Cir. 1996) (a strike by a

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[101] (...continued)
Operating Plans "outside RLA processes," these unions "would respond to such change by striking. . . ." ARU-23 at 57. They also have represented that they were "will consider any attempt to change unilaterally existing agreements or other collective bargaining rights as justifying the resort to self-help." Id. at 78-79. One of the ARU unions, the Brotherhood of Railroad Signalmen, has served on CSX and NS what purports to be RLA section 6 notice, seeking negotiation under the RLA of any changes to be made pursuant to CSX's and NS's implementation of the Transaction.

[102] CSX Transportation, Inc., Norfolk Southern Railway Company, Norfolk and Western Railway Company, and Conrail have sued the "ARU" organizations, except the Transport Workers Union, in the Western District of Virginia seeking, inter alia, a declaration that there is no obligation to bargain under the RLA over implementation of the transaction and that the unions cannot strike to frustrate its implementation. Norfolk & Western Ry., et al. v. BRS, et al., No. 97-740-R (W.D. Va. filed Oct. 31, 1997).

union that did not agree with the outcome of a New York Dock arbitration "would unilaterally frustrate the arbitrator's decision, undermine the ICC's efforts to 'ensure the development and continuation of a sound rail transportation system,' 49 U.S.C. § 10101(4), and shut down part of the nation's vital rail transportation network.").

Moreover, federal district courts can enjoin a strike over the implementation of a Board-approved transaction without violating the injunction prohibition contained in the Norris-La Guardia Act ("NLGA"). There are two reasons for this result. First, where, as here, the imposition of labor protective conditions is mandatory upon approval, the Board's exclusive authority supersedes not only the RLA, but also the NLGA. Burlington Northern R.R. Co. v. United Transp. Union, 848 F.2d 856, 862-63 (8th Cir.), cert. denied, 488 U.S. 969 (1988). Alternatively, just as the NLGA is accommodated so as not to circumvent the arbitration provided for in the RLA or in collective bargaining agreements, it also is accommodated so as not to circumvent the "final, binding and conclusive" arbitration procedures provided for in New York Dock. CSX Transp., Inc. v. United Transp. Union, 86 F.3d 346, at 347.

XIX. THE BOARD SHOULD CONSIDER COMMENTS AND REQUESTS FOR CONDITIONS RELATING TO LOCAL ENVIRONMENTAL IMPACTS IN THE ENVIRONMENTAL REVIEW PROCESS BEING CONDUCTED BY THE BOARD'S SECTION OF ENVIRONMENTAL ANALYSIS.

A number of parties have filed comments or requests for conditions relating to local environmental impacts from proposed increases in train volumes or from construction projects associated with the proposed Transaction.[1] The appropriate process for consideration of these comments and requests for conditions is the environmental review process presently being conducted by the Board's Section of Environmental Analysis ("SEA") pursuant to STB regulations at 49 CFR Part 1105.

As the Board well knows, SEA is comprehensively analyzing both the systemwide environmental effects and the localized environmental effects of the proposed Transaction. This analysis is being undertaken to fulfill the Board's obligations under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq., and related environmental laws. The environmental impact analysis being conducted by SEA and the procedure for evaluating and responding to public comments solicited by SEA have been established pursuant to NEPA, related environmental laws, and the Board's implementing regulations at 49 CFR Part 1105 as the means for addressing the environmental effects of the proposed Transaction.

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[1] These filings include City of Cleveland (CLEV-9); State of Delaware Department of Transportation (unnumbered); Cities of East Chicago, Hammond, Gary and Whiting, Indiana (the "Four City Consortium") (FCC-9); Robert F Hagan (unnumbered); Illinois Department of Transportation (IDOT-2); Congressman Dennis J. Kucinich; Congressman Robert Menendez; Congressman Nadler and Other Congresspersons from the New York and Southern New England Areas (unnumbered); Ohio Attorney General, Ohio Rail Development Commission, Public Utilities Commission of Ohio (OAG-4); Congressman Louis Stokes (unnumbered); and Village of Ridgefield Park, NJ (unnumbered).

SEA has sought and received hundreds of public comments on the scope of its environmental review of the Application, on the Draft Environmental Assessments prepared by SEA for seven rail connection projects submitted by Applicants for expedited Board consideration (Sub Nos. 1-7), and on specific environmental issues. It will shortly publish for public comment a multi-volume Draft Environmental Impact Statement ("DEIS"). That DEIS will include Safety Integration Plans that CSX and NS submitted pursuant to Board Decision No. 52 for the Conrail lines over which they will operate, as well as for the Shared Assets Areas.

With the publication of the DEIS, SEA will solicit comments on any and all aspects of the detailed discussion and analysis contained in the DEIS. Under the Board's regulations, a 45-day period has been established for the submittal of public comments on the DEIS.

SEA will review all the comments it receives and will address the comments and any changes to the DEIS made in response to them in the final Environmental Impact Statement ("EIS"). The EIS will be made available to the public in advance of the Board's oral argument on the merits of the Application. Thus, a well-defined and accessible procedure is in place to address the environmental impacts of the proposed Transaction.

Applicants explained in the Application that the proposed Transaction will result in a number of significant, systemwide environmental benefits, including a systemwide net reduction in fuel usage, air pollutant emissions, highway congestion and maintenance, and motor vehicle accidents as a result of diverting a substantial amount of freight from truck to rail, diversions and rerouting of existing rail traffic to shorter and more efficient routes, and

extended railroad hauls made possible by the Transaction. CSX/NS-23, Vol. 6A at 70-78; CSX/NS-20, Vol. 2A, Gaskins VS at 111-17.

Because the Transaction will result in the rerouting of traffic, some line segments and yards will experience increased activity while other line segments and yards will experience decreased activity. It is important that localized environmental effects be viewed in the context of the entire proposal, rather than in piecemeal fashion. Because moving freight by rail rather than truck is beneficial to the environment, not to mention the economy, "not in my back yard" complaint must not be permitted to overshadow the systemwide benefits of the Transaction. Moreover, localized environmental impacts from increased activity in some areas should be assessed with a recognition of the localized environmental benefits to other areas which will experience decreased rail activity. The NEPA process was designed to ensure that this is the analysis followed by all federal agencies.

Accordingly, Applicants do not intend to address in this rebuttal filing comments and requests for conditions relating to localized environmental effects. Applicants understand that SEA will consider all such comments and requests, along with all other inputs it receives, in its continuing comprehensive analysis of both systemwide and local environmental effects.

A number of parties have gone so far as to offer alterations in the proposed Operating Plans of the Applicants; Applicants have responded to the operational issues raised by these proposals in other sections of this filing. Applicants are also responding to certain safety concerns raised by some parties in other sections of this filing.

XX. CONDITIONS REQUESTED BY OTHER PARTIES

A. Conrail Retirees.

Paul J. Engelhart, William J. McIlfatrick, H.C. Kohout, Thomas F. Meehan, Lawrence Cirillo, Charles D. Nester, Jacqueline A. Mace, Donald E. Kraft, and Robert E. Graham, all former employees of Conrail (the "Retirees"),[1] seek a variety of conditions allegedly to protect their interests in the assets of CRC's Supplemental Pension Plan (the "Supp. Plan"). The Retirees appear to be motivated largely by the surplus in the Supp. Plan. The Board should deny these requests for the reasons that follow.

First, the Retirees' requests concerning CSX's and NS' use of the Supp. Plan surplus is an improper attempt to use the Transaction to get a second bite at the apple on this issue.[2] As the Retirees freely acknowledge (RETR-8, pp. 7-8), essentially the same arguments proffered by the Retirees in this proceeding were considered and rejected in 1993 by the United States District Court for the Eastern District of Pennsylvania.[3] That decision was affirmed in 1997 by the United States Court of Appeals for the Third Circuit.[4]

In that case, plaintiffs challenged Conrail's amendment of the Supp. Plan to pay certain additional employee benefits, thereby diminishing the surplus, on the grounds that the amendment impaired the fiscal integrity of the Supp. Plan and constituted "impermissible

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[1] The Retirees represent themselves and a class consisting of all other similarly situated retirees who are participants or beneficiaries of participants in the Supp. Plan. Retirees' Comments at 3.

[2] Retirees' Comments at 20-21, request numbers 2, 4, 6 and 7.

[3] Engelhart v. Consolidated Rail Corp., No. 92-7056, 1993 WL 313705 (E.D.Pa. Aug. 16, 1993)(dismissing Retirees' claims with respect to the surplus assets in the Supp. Plan).

[4] Engelhart v. Consolidated Rail Corp., No 96-1920, argued June 13, 1997 (summarily dismissing Retirees claims after oral argument).

reversions of the assets of the Supp. Plan to Conrail." (RETR-8, p. 10) The courts in that case properly determined that, under ERISA, the plaintiffs have no current right to the surplus as long as the Supp. Plan remains in effect, and that Conrail could properly amend the Plan and use the surplus to fund other retirement benefit programs that did not accrue entirely to the Retirees. Engelhart, 1993 WL 313705 at *2.

The Retirees thus lost on these issues in federal court. They nonetheless appear in this proceeding to ask the Board, in effect, to overturn the federal courts and to prevent CSX or NS from using the Supp. Plan surplus as Plan sponsor, as Conrail has done, with the approval of the federal courts. The Board should not entertain the Retirees' attempt to relitigate claims already definitively rejected by the federal courts. There is no reason for the Board to grant the Retirees more than that to which they have been judged entitled by such courts.

Second, the Supp. Plan is a defined benefit pension plan and the Retirees are receiving all of the benefits promised them thereunder.[5] The Retirees' rights to those promised benefits will in no way be affected by the consummation of the Transaction. The Retirees' rights under the Supp. Plan are, and will be, fully protected by the Employee

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[5] As the name suggests, a defined benefit pension plan provides participants a specific benefit upon retirement, typically based upon a formula contained in the plan:

> A defined benefit plan is the type of program most people think about when they think of a pension plan. A defined benefit plan promises a participant a specific amount of pension benefits at retirement determined under a formula based on years of participation in the plan, and in most nonbargained plans, based on an average of compensation.

Stephen R. Bruce, Pension Claims: Rights and Obligations 14 (2d ed. 1993).

Retirement Income Security Act of 1974 ("ERISA"). In the oft-quoted words of the United States Supreme Court, ERISA represents a "comprehensive and reticulated" statutory regime governing pension plans.[6] Among its explicitly stated purposes is "to protect . . . the interests of participants in employee benefit plans," and to "improv[e] the equitable character and the soundness of such plans . . ." ERISA §§ 2(b), (c).

Indeed, ERISA has substantive rules addressing the very eventualities the Retirees say must be considered. For example, ERISA section 208 generally provides that if the Supp. Plan is ever merged or consolidated with another plan, (an event which could occur without regard to the Transaction), each participant in the Supp. Plan must be entitled to receive a funded benefit under the merged or consolidated plan equal to or greater than the funded benefit such participant would have received under the Supp. Plan prior to such merger or consolidation. Similarly, ERISA generally precludes the reduction of any benefit promised under the Supp. Plan. See ERISA § 204(g).

Third, ERISA itself provides ample opportunity for the Retirees and other Supp. Plan participants (along with the federal agencies responsible for administering the statute) to monitor, and if they believe appropriate, to challenge any actions taken with respect to the Supp. Plan. Another of the stated statutory purposes is to "provid[e] for appropriate remedies, sanctions, and ready access to the Federal courts." ERISA § 2(b). And this it does. See ERISA § 502 (providing civil enforcement access to the federal courts by, among others, plan participants and the Department of Labor) and ERISA § 501 (criminal sanctions for violation of ERISA's disclosure rules).

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[6] Nachman v. PBGC, 446 U.S. 359, 361 (1980).

Accordingly, the Board need not address these issues in this proceeding.

In addition to denying their substantive claims, the Board should deny the Retirees' requests relating to discovery and legal fees.[7] Pursuant to the procedural schedule set by the Board in Decision No. 6 the Retirees had the opportunity to conduct discovery against Applicants prior to October 21, 1997, and that period has closed. The Retirees have also had ample opportunity to conduct discovery relating to the Supp. Plan in their litigation in the federal courts. They have offered no reason why they should be allowed additional time for discovery. Furthermore, the Board should deny the Retirees' claim for legal costs and expenses. This request has no basis in the Board's rules and is wholly without merit.

B. Eight State Rail Preservation Group.

The Eight State Rail Preservation Group (ESRPG) requests that Conrail's former Erie-Lackawanna line be kept open from Akron, Ohio, Meadville, PA, Jamestown, NY to the Port of New York/New Jersey. ESRPG is concerned generally about congestion, service, and limiting truck transportation in the States of Ohio, NY and PA, with bottlenecks in Cleveland, Buffalo, and Pittsburgh. ESRPG contends that, because of the advantages of rail over truck, not just two, but three northeast, east-west through-railroads will be needed in the future for competition.

It is not clear what relief ESRPG is seeking or the asserted basis for it. Portions of this route have been abandoned and removed by Conrail, see Consolidated Rail Corporation v. Surface Transportation Board, 93 F.3d 793 (D.C. Cir. 1996), and other portions transferred to other parties. As to the portion that will be allocated to NS, there is no basis

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[7] See Retirees' Comments at 21, request numbers 10 and 11.

for concluding that NS will not keep them open, and any discontinuance or abandonment would, of course, be subject to Board review in another proceeding. In any event, ESRPG has made no showing that the transaction will have any adverse impact on this route.

Under these circumstances, there is no basis for the Board to prescribe any conditions as a result of ESRPG's requests.

C. Economic Development Council of the Lehigh Valley.

The Economic Development Council of the Lehigh Valley (EDCLV) is a consortium of all the economic development agency professionals in the Lehigh and Northampton counties (an area also known as the Lehigh Valley). According to EDCLV, the Lehigh Valley is served by Conrail through a system of mainlines and branchlines, and CP Rail is the only other Class 1 carrier serving the region. EDCLV notes, however, that CP Rail's service is limited to the Bethlehem Steel Corporation in Bethlehem, Pennsylvania and its associated Philadelphia, Bethlehem, and New England Railroad. Since the creation of Conrail, CP Rail has been precluded from providing service to other shippers within the region, although its trains do operate along both the Lehigh main line and the Reading main line.

EDCLV complains that, under the circumstances as they exist currently, there is a lack of competitive rail access in the Lehigh Valley, and that introducing competitive rail access would supposedly enhance the Lehigh Valley's economic viability. EDCLV's primary complaint is that the proposed transaction would "not improve competitive rail access in the Lehigh Valley." Under these circumstances, EDCLV requests that the Board impose

conditions that would increase competitive rail access within Lehigh Valley by, for example, granting CP Rail rights to serve additional shippers.

EDCLV's request for the prescription of conditions must fail because the EDCLV has not cited any harm that would be caused by the proposed transaction. To the contrary, EDCLV clearly wishes to obtain a benefit that would, in its view, remedy an existing problem.

D. Northampton County Development Corporation.

The Northampton County Development Corporation (NCDC) complains about the same existing conditions in the Lehigh Valley and requests the same relief to remedy them as does the EDCLV. The Applicants adopt the same position with respect to NCDC as they did with respect to the request for conditions made by EDCLV.

E. Jacobs Industries.

Jacobs Industries Ltd. (JIL) is an Ohio-based corporation located at what is now Conrail's Stanley Yard in Walbridge (Toledo), Ohio. JIL acknowledges that, technically speaking, it is not a shipper; rather, it is a break-bulk logistics facility that provides its services to rail shippers who route traffic to and from JIL.

The vast majority of the rail-borne traffic transported to and from JIL's facility is handled by Conrail, NS, or CSX trains because all three carriers serve the greater Toledo area, and all three maintain classification yards in the vicinity. However, by virtue of its location at the Stanley Yard, JIL is served directly by only one rail carrier -- Conrail. JIL's apparent concern is that if the proposed transaction is approved without "suitable protective conditions," CSX would replace Conrail as the only carrier directly serving JIL, and "CSX

would have considerable incentive to discriminate against" line-haul traffic of other carriers. JIL proposes a number of alternative solutions to its perceived problem, among which are the prescription of granting NS trackage rights to the JIL facility, granting NS haulage rights access on reasonable terms and conditions, and if the Board prescribe neither of these, then an order retaining in place the existing Conrail switching charges applicable for movement of traffic between NS and JIL facility.

The reality of JIL's situation is that it is what is known as a "1-to-1," and has alleged no harm caused by the proposed transaction sufficient to warrant the prescription of a condition. Applicants have addressed the situation faced by JIL, and other entities who are similarly situated, in Section V, supra, in connection with the Vertical Integration argument.

For the reasons set forth in that Section, the Board should deny the conditions requested by JIL.

CONDITIONS REGARDING IMPLEMENTATION AND OVERSIGHT

In contrast to those requests for conditions affecting the terms and conditions of the Transaction, requests for conditions that relate to the safe and efficient implementation of the Transaction reflect important concerns that warrant serious consideration.

XXI. CONDITIONS REGARDING IMPLEMENTATION AND OVERSIGHT SHOULD BE LIMITED.

A. Introduction.

Applicants recognize that many parties have expressed, and the Board has shown, concerns about whether this Transaction will be implemented smoothly and safely. Those concerns have been heightened by serious service problems that have arisen in recent months on the UP/SP system. Based on those concerns, a number of parties have requested the Board to impose various conditions before the Transaction can be implemented and also post-implementation oversight conditions.[1/]

The pre-implementation conditions sought by the comments of NITL, CMA and other parties vary in their specific details, but most of them share this common feature: before Applicants could "implement the transaction," they would be required to submit various "plans" or "certifications" to the Board, other parties would have a period of time to submit comments on those plans or certifications, and the Board would then approve or disapprove them. The "plans" that these conditions would require generally concern operations in the SAAs and the allocation of existing Conrail transportation contracts; the "certifications" would require Applicants to certify that various operating protocols, integrated information

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1/ See, e.g., NITL-7 at 5-6; CMA-10, Attachment 1. As we have noted and discuss further below, Applicants have recently concluded an agreement with the NITL which, among other things, commits Applicants to take a number of actions prior to implementing the Transaction and to support a three-year oversight condition. In the agreement, the NITL has agreed to withdraw their request for all conditions except certain conditions pertaining to rates ("Post Implementation Rate Conditions") and to support the Transaction in all respects other than the excepted Post-Implementation Rate Conditions. See Section II, supra. The pre-implementation actions that Applicants have voluntarily agreed to undertake are different from the pre-implementation conditions sought in NITL-7, and radically different from CMA-10.

systems and labor implementing agreements were in place.[2/] Although these parties have not precisely defined what they mean by "implement the transaction," Applicants presume this term means the allocation of assets to NYC and PRR that will effect the division of the operation and use of Conrail's assets between NS and CSX, which the Transaction Agreement provides will occur on the Closing Date, as defined in that agreement.

On the other hand, the post-implementation oversight conditions requested by most parties requesting such conditions generally would operate similarly to those imposed by the Board in the UP/SP case but usually cover topics going well beyond those imposed in UP/SP.

As we discuss below, the pre-implementation conditions sought by various parties are both unprecedented and entirely unwarranted. Such conditions would not contribute positively to the smooth or safe implementation of the transaction. On the contrary, they would seriously harm the public interest by imposing substantial delays that would hurt shippers, risk serious harm to Conrail and take away the very operational flexibility that railroads need to respond to changing conditions and avoid service failures. As to the service problems now being experienced in the West, Applicants certainly understand the concerns they have engendered, but the two situations are completely different on many counts, as we will explain. The service problems in the West provide no rational basis for imposing the unprecedented pre-implementation conditions being sought in this case.

There is also nothing about the facts of this Transaction that call for such extraordinary conditions. As discussed below and in the rebuttal verified statements of

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2/ See NITL-7 at 5, CMA-10, Attachment 1.

Nancy S. Fleischman and Michael J. Ward, dozens of teams at NS and CSX have been engaged for many months in extensive planning to ensure that the Transaction will be implemented smoothly and safely. At the Board's direction, Applicants have submitted a detailed operating plan for the North Jersey Shared Assets Area and three extensive Safety Integration Plans (SIPs) -- submissions that no parties to any previous rail consolidation were required to submit. Safety concerns expressed by the FRA and other parties have been fully addressed in the SIPs and elsewhere. Operations in the SAAs will not be unusual or unduly complex; many railroads, including CSX and NS, conduct similar joint operations in large and congested urban areas with success and have done so for years. Applicants themselves have every incentive to implement the transaction without disruption to service or customers. The pre-implementation conditions sought here will do nothing to make them try harder or to ensure the success of their efforts. To the contrary, restrictions upon Applicants' flexibility could increase the risk of service disruption.

While the pre-implementation conditions as structured and requested by the comments of various parties are unwarranted and would be harmful, as noted earlier Applicants have recently concluded an agreement with the NITL (set forth in Appendix B to this Volume) pursuant to which Applicants have agreed, among other things, to take a number of actions before implementing the Transaction to satisfy those parties' concerns. Those actions include: establishing a Conrail Transaction Council consisting of representatives of Applicants, the NITL, USCPTA, the Fertilizer Institute and other organizations of affected rail shippers; providing to the Council by February 1, 1998 a summary description of how operations will be conducted in each SAA; obtaining necessary labor implementing

agreements; and putting into place certain management information systems. Those undertakings have resulted from a process of private-sector negotiation among affected interests -- a process the Board has frequently encouraged. In addition, on two issues -- the status of Management Information Systems and the conclusion of those labor implementing agreements necessary for the implementation of the allocation of Conrail's routes -- CSX and NS have agreed to give notice to the Board before proceeding to bring about "Day One." Applicants believe that those undertakings appropriately address the reasonable pre-closing concerns of parties related to the implementation of the transaction; the NITL agrees.

Applicants have also agreed in their agreement with NITL et al. that the Board may impose a formal oversight condition of the kind that it imposed in the UP/SP case for a three-year period. This condition would require quarterly reports from NS and CSX after the Control Date; these reports would use objective, measurable standards, which NS, CSX and the Council will jointly recommend to the Board. Again, Applicants believe that such a condition would properly address the reasonable concerns of parties with respect to implementation of the transaction after the Closing Date.

B. NS and CSX Have Been Engaging in Extensive Planning For Many Months to Ensure Smooth and Safe Implementation.

Even before the primary application was filed in this case in June 1997, both NS and CSX initiated extensive and systematic measures to plan for the implementation of this transaction. They did so for two principal reasons. First, they recognized the challenges that a major rail transaction presents. Second, from the outset they were aware of the very substantial costs that failure to implement the Transaction properly and as promptly as possible would impose on them and their customers.

Since that time, scores of teams at NS and CSX have been working on implementation planning. Those efforts are headed at NS by Nancy S. Fleischman and at CSX by Michael J. Ward, both with full- time responsibility for coordinating implementation planning. The planning efforts, organization and achievements are described in detail in their accompanying verified statements.

At NS, almost 100 interdepartmental teams and subteams, consisting of about 300 different employees, many serving on several teams, have been working for months on implementation plans covering all aspects of the anticipated integration of Conrail operations to be allocated to NS and to the SAAs. The NS teams cover the full gamut of railroad business processes, from customer billing and car movement systems to equipment handling and payroll systems. Other teams are focused on matters unique to this Transaction, such as SAA operations and integration of computer, information and accounting systems. Coordination of planning with CSX and Conrail is given special attention. In addition, NS has established two groups, of seven and six employees respectively, who are working full time on developing implementation plans for the actual operation of the Conrail lines to be operated by NS and for the integration of Conrail's and NS' information system and Year-2000 planning. Coordinating all of these efforts are Ms. Fleischman and her staff of four full-time employees. The totality of the planning activities, NS believes, is unprecedented. As Ms. Fleischman says in her statement: "[H]aving been closely involved with the N&W-Southern consolidation in 1982, and having been an observer of other consolidations since 1976, I can state confidently that both the quantity and quality of the NS implementation

planning for this Conrail Transaction far exceed those in any previous consolidation I am familiar with." Fleischman RVS at 2-3.

Approximately six months ago, CSXT established an Integration Team and began a similar planning process for implementing the consolidation and operation of the portions of Conrail to be allocated to CSXT as well as to the Shared Assets Areas. As of this point, under the Integration Team CSXT has established 20 "core teams," which are supported by over 100 subteams, each of which is focused on specific tasks. The 20 core teams are entitled: Day One Operations; Safety; Headquarters Integration; Technology; Commercial; Labor; Capital Planning; Asset Division; Human Resources; Conveyances/Closing; Pro Forma; Communications; Intermodal; Inventory; Information Process; Monitoring On-going Conrail Operations; Corporate Governance; Concession Process; Training; and Implementation Planning. A twenty-first team, entitled "Future Teams," is established to cover newly-arising issues. A senior executive of CSXT has been assigned the leadership function of each team and, in most cases, this team leadership role has temporarily become the major part of that individual's responsibilities. Mr. Ward, Executive Vice President and Chief Financial Officer of CSXT, is in charge of CSXT's Integration Team. Mr. Ward brings to this job over twenty years of experience with CSXT and its predecessors, a significant portion of which was spent in the operational side of CSXT's Coal Department.

As is demonstrated in Mr. Ward's statement, the amount of time, emphasis, and resources devoted to implementing the allocation of Conrail assets, as well as to the planning for operating the overall system subsequent to Day One, has been enormous, and has involved incorporating the recommendations of over 50 members of CSXT's senior

management team who collectively have nearly a millennium of experience in the railroad industry.

Several other circumstances have made the extent of implementation information submitted in this case unprecedented. First, on the motion of the Port Authority of New York and New Jersey (Port Authority) and at the Board's directive, on October 29, 1997, NS and CSX submitted a 143-page supplement to their operating plan providing additional details about CSX and NS proposed operations in the North Jersey Shared Assets Area (NJSAA). These details were in addition to the extensive information about those operations contained in Applicants' operating plan submitted with the Application, which the Board acknowledged complied fully with the Board's regulations.[3/] No applicants in any previous merger case have been required to submit that level of detail concerning anticipated post-merger operations.[4/]

Second, on December 3, 1997, again at the Board's directive, NS and CSX submitted three extensive Safety Integration Plans (SIP's), which describe in detail the steps Applicants intend to take to ensure maximum safety on NS-PRR, CSX-NYC and in the SAA's. These plans are discussed in more depth in the following section. No applicant in any previous rail consolidation case has been required to submit such plans, and their submission in this case was required despite the fact that NS and CSX are industry leaders in rail safety. The

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3/ Decision No. 44, served October 15, 1997, at 3.

4/ The Port Authority of New York and New Jersey and several other parties have submitted comments on the NJSAA Operating Plan. Those comments are addressed in the rebuttal verified statements of D. Michael Mohan and John W. Orrison, who show that the comments critique the minutia of the plan and are completely insubstantial.

submission of these plans, the FRA's involvement in reviewing them, and in consulting with NS and CSX on integration issues should allay any realistic concerns in this area.

A third circumstance contributing to the unprecedented length of implementation planning in this case is the fact that Applicants will have had considerably more time to plan for implementation than was the case in other recent mergers. Although Applicants do not need the longer period for planning purposes and consider the extended schedule unnecessary, they will take full advantage of the time to refine their implementation plans. As James W. McClellan and Franklin E. Purcley note in their rebuttal verified statements, NS and CSX were already very familiar with Conrail, because both of them have been studying possible consolidations with Conrail for years. McClellan RVS at 5.

C. Safety Concerns Have Been Fully Addressed.

The comments of a number of parties, most notably DOT and FRA, have expressed concerns about the Transaction's potential effect on safety.[5/] DOT and FRA in their comments asserted that Applicants should address in a more detailed way how they propose to maintain rail safety while integrating their operations with Conrail's. In response to those concerns, the Board in Decision No. 52, served November 3, 1997, directed Applicants to prepare and submit, within 30 days, SIPs "that address the concerns set forth in the verified statement of [Director of FRA's office of Safety, Assurance and Compliance] Edward R. English included with DOT's submission." The decision stated that the SIPs would be

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5/ See also the filings of the American Trucking Association (ATA-6), Robert F. Hagen (unnumbered), and Congressman Robert Menendez (unnumbered).

included in the Draft Environmental Impact Statement (DEIS), and that the SIPs and safety matters in general will be dealt with through the environmental review process.

As noted, on December 3, 1997, Applicants filed three extensive SIPs -- one addressing safety on lines to be operated by CSXT, one addressing safety on lines to be operated by NS and a third addressing safety integration in the Shared Assets Areas. Those SIPs, which total 528 pages, address in great detail how Applicants intend to maintain their already high level of railroad safety practices and policies while integrating their operations with Conrail. They describe in detail the actions Applicants have already taken and the measures they intend to put into place to ensure that the Transaction will be implemented without any sacrifice of safety.

The SIPs were developed in close consultation with FRA. They were each reviewed by FRA in the drafting stage and they incorporate or address comments and suggestions received from FRA in that process. They address issues raised in the verified statement of Mr. English concerning safety integration as well as other safety issues. As indicated by the Board in Decision No. 52, the specific issues addressed by the SIPs will be discussed and considered in detail in the environmental review process. For that reason, these safety integration matters will not be addressed in detail here.

Applicants intend to continue their dialogue with FRA on safety implementation matters in the coming months, and in the period following any Board decision approving the Transaction. This is consistent with FRA's expressed interest in remaining informed about the safety integration process.

While their safety integration plans are appropriately flexible, and will be evolving further throughout the period leading up to, and following, the day on which they institute operations on the Conrail lines, the SIPs set forth CSX's and NS' current plans and their approach to addressing safety integration matters as the process proceeds. As such, these filings serve the purpose for which they were intended, i.e., to inform the Board, FRA and (through publication in the DEIS) the public concerning the safety integration planning process. Accordingly, Applicants do not propose to amend these formal filings as the integration process moves forward.

The comments filed in this proceeding with respect to safety issues do not address the fact that this transaction will benefit safety. These benefits are described in the Environmental Report, CSX/NS-23, Vol. 6A at 121-125 and Vol. 6B at 26-32. They are also addressed in the Rebuttal Verified Statements of Franklin E. Pursley, Charles Wehrmeister, and Dr. Ian Savage, a rail safety expert. These witnesses explain, and the statistics set forth in the DOT submission (DOT-3 at 4) demonstrate, that although Conrail has achieved impressive safety results, CSX and NS hold the best overall safety records among the Class I railroads. Pursley RVS at 3; Wehrmeister RVS at 1-2; Savage RVS at 7-9. Application over time of the safety practices and programs employed by CSX and NS to the Conrail system should result in improved safety on the Conrail lines. According to Dr. Savage, applying CSX's and NS' safety practices and programs to Conrail operations should result in 83 fewer collisions and derailments and 257 fewer employee fatalities and lost workday injuries per year. Savage RVS at 9.

Further, switching and yard activities account for a significant percentage of rail accidents. Savage RVS at 10. An additional significant safety benefit will flow from the transaction as a result of the anticipated reduction in switching activity. Savage RVS at 10.

The large number of highway-to-rail diversions that are predicted as a result of the transaction, and particularly by virtue of improved intermodal networks, will also result in enhanced safety. Pursley RVS at 5-6; Environmental Report, CSX/NS-23 Volume 6A at 125. It is well recognized, and statistically proven, that rail transport is much safer than highway transport. The elimination of over one million long-haul truck shipments annually will cause a net annual reduction of almost 1,700 highway accidents, including 21 crashes involving fatalities.

There are several other specific safety issues that FRA and other parties have raised that are not discussed in the SIPs and will be addressed briefly here. First, Mr. English's statement refers to a "CR/CSX/NS Line Segment Risk Analysis" performed by a consultant, ZETA-TECH Associates, Inc., attempting to quantify the safety impacts of changes in rail traffic projected by NS and CSX on each of 49 line segments covering 78% of Conrail's system based on 1995 train miles, as well as certain CSX and NS lines. English VS at 20-22. This analysis concludes that the increased traffic will produce a 12% increase in the risk of accidents system wide. Mr. English also refers to an analysis of the changes in the risk of highway-grade crossing accidents at various grade crossings. Id. at 24-29.

The Zeta-Tech analyses are addressed in detail in the Rebuttal Verified Statement of NS witnesses Gordon C. Rausser and Robin A. Cantor, which shows the analyses to be flawed. These witnesses conclude that the Zeta-Tech analysis does not provide a basis for

concluding that the transaction will result in an increase in accidents. In addition, on behalf of NS, witnesses Rausser and Cantor provide a critical analysis of FRA's research methodology, review the academic literature on safety culture and evaluate the safety risks associated with mergers and acquisitions in various transportation industries. Rausser and Cantor cite a number of reasons why it is reasonable to expect improved safety performance from the Transaction.

The American Trucking Associations ("ATA") requests that the Board require CSX and NS to make a financial and operational commitment to improve or remove "the many hazardous highway grade crossings along the Conrail lines" or delay the Transaction until Conrail has done so. ATA-6 at 6-8. In support of this extraordinary condition, ATA offers a newspaper article that reports about a grade crossing accident that did not occur on the Conrail system, outdated statistics about the type of protection available at grade crossings on the national rail system and the statement that trucks are particularly susceptible to crossing accidents. ATA does not identify any "hazardous" crossings on Conrail.

What ATA does not state is that CSX, NS and Conrail work diligently with state highway officials to enhance crossing safety. All three railroads have active programs in which they cooperate with state authorities, who bear primary responsibility for vehicular safety at crossings, to improve and separate grade crossings. Further, all three also actively participate in Operation Lifesaver, a grade crossing public education program. These activities are described in detail in the Environmental Report (CSX/NS-23 at 71-72) and in the Safety Integration Plans that have been submitted to the Board. Nothing about the transaction will reduce these efforts.

ATA also fails to take note of the decline in the number of crossing accidents over the last several years. In fact, Conrail has the lowest number of crossing accidents per million train miles among all of the Class I railroads. Pursley RVS at 15-19.

Grade crossing safety is a matter properly left to the control of state highway officials. In addition, any transaction-related impact on crossing safety can be addressed through the environmental process in this case in the context of specific facts and circumstances. ATA's criticisms in this area deserve no weight in this proceeding.

The Allied Rail Unions (ARU-23) and several other labor unions or their representatives also raise safety concerns.[6/] The primary concerns of these parties relate to the adequacy of post-transaction workforce levels. These concerns are addressed in detail in the Joint Rebuttal Verified Statement of Kenneth R. Peifer and Robert S. Spenski and in the Rebuttal Verified Statement of John Orrison. Peifer/Spenski RVS at 2, 5-8, 18-20 and 51-57; Orrison RVS at 12-14, 128-132. These witnesses demonstrate that there will be adequate workforce levels in each of the major safety-sensitive areas following the Transaction. In fact, the vast majority of experienced Conrail personnel will be retained following the Transaction, as discussed in the Safety Integration Plans and elsewhere. Orrison RVS at 14; Wehrmeister RVS at 8. The Peifer/Spenski Rebuttal Verified Statement observes that the

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6/ These other parties are John F. Collins, for the Brotherhood of Locomotive Engineers; International Association of Machinist and Aerospace Workers (IAM-4); Transportation Communications International Union (TCU-6); Transportation Trades Department, AFL-CIO (TTD-3); United Railway Supervisor Association (URSA-3); and New York State Legislative Board of the United Transportation Union. Congressman Dennis J. Kucinich echoes many of the concerns raised by these labor interests.

total projected job loss of this Transaction is far less than that predicted in the two recent Western railroad control transactions. Peifer/Spenski RVS at 2.

These parties also raise concerns based on the UP/SP merger experience. Those concerns also are not well-founded. The many differences between this Transaction and the UP/SP merger are described elsewhere in this submission. From the safety perspective, the differences are substantial. For example, as DOT has accurately noted in its submission (DOT-3 at 4), CSX and NS have had significantly better safety records over the last several years than any of the Western Railroads. Further, the UP/SP merger required UP to absorb a much larger SP system than the additional Conrail lines that either CSX or NS will operate as a result of this Transaction. The planning for the Conrail Transaction has also continued over a longer period and, as reflected in the SIPs, has embraced a comprehensive, careful and considered approach to all major safety related issues. Pursley RVS at 9-13; Wehrmeister RVS at 3-6. The FRA is also pro-actively involved in the process.

Congressman Robert Menendez also raises various safety issues primarily concerning operations in the North Jersey Shared Assets Area. These concerns have been addressed in the Shared Assets Areas SIP. The other concerns raised by Congressman Menendez regarding the safety impact of the Transaction on NJT are also addressed in each of the three SIPs that have been submitted as well as in the NJSAA Operating Plan (CSX/NS-119), and in Pursley RVS at 16-17.

Shell Oil Company has raised safety concerns regarding CSX. These concerns, which apparently evolve out of a news report concerning a recent FRA safety audit of CSX, are without foundation. CSX has created a task force to address the FRA's concerns arising

from that audit, as discussed in the SIP. Pursley RVS at 5.[7/] Shell is also apparently unaware of CSX's outstanding record in the safe transportation of hazardous materials. Pursley RVS at 18-19.

The Ohio Attorney General, Ohio Rail Development Commission and the Public Utilities Commission of Ohio question CSX's decision to transfer what they describe as an Ohio "Trouble Desk" to Jacksonville. (OAG-4 at 42-43). These Ohio parties are apparently referring to Conrail Signal and Communications Desk in Columbus, Ohio, a facility which serves as a center for receiving telephone calls concerning signal problems in Ohio and other Conrail-served states. The planned transfer of that facility to Jacksonville will have no safety implications. Pursley RVS at 19.

D. Conditions Requiring Applicants to Prepare Further Submissions for Public Comment and Board Approval Prior to Implementation Would Impose Delays That Would Seriously Harm Shippers and Applicants.

The pre-implementation conditions requested by various parties are not only unwarranted and unprecedented, but also, more importantly, they would substantially delay implementation of the transaction and thereby cause serious harm both to shippers and to Applicants.

The pre-implementation conditions requested would require Applicants to prepare and submit for public comment and Board review detailed plans concerning, among other things, operations, equipment allocations and personnel determinations in each of the Shared Assets Areas, allocations of existing Conrail transportation contracts between CSX and NS, and

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7/ The West Virginia State Railway Authority ("WVSRA") also raised concerns about the FRA's audit of CSX. The SIP submitted by CSX demonstrates that WVSRA's concerns are misplaced.

certifications that various actions, agreements and information systems are in place.[8] All parties would then be given time to review Applicants' submissions and submit critiques of them. Fairness would require that Applicants have some time to respond to the critiques. Apparently, the Board then would be required to review all submissions and, in its tradition, render an informed written decision discussing and sifting the issues and approving or disapproving the plans, allocations and certifications in whole or in part. To the extent certain aspects were deemed deficient or insufficient by the Board, presumably implementation would be further delayed while Applicants endeavored to remedy the deficiencies or insufficiencies, parties commented on those further efforts, and the Board reviewed them.

If such requirements were imposed by the Board, it is impossible to predict when the process might end and the transaction allowed to proceed, but it is certain that implementation could not take place, at a minimum, for a great many months after the date currently scheduled for the Board's final decision, July 23, 1998. As the Board well knows from experience, parties wanting to stop or slow the transaction would file as voluminous and detailed critiques as possible, which Board would be obliged to address in detail.

In fact, events in this proceeding already demonstrated that would be the case. As noted earlier, in compliance with Decision No. 44, granting a petition of the Port Authority filed on September 25, 1997, Applicants filed on October 29, 1997 a detailed, 143-page

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[8] See the filings of A.E. Staley (unnumbered), Cargill, Inc. (), Delaware River Port Interests (PRPA-2, SJPC-2, DRPA-2, PPC-2), Indianapolis Power & Light (IP&L-3), National Grain and Feed Assn. (NGFA-2), Northern Indiana Public Service Co. (NIPS-1), Occidental Chemical Corp. (unnumbered), Shell Oil Co. and Shell Chemical Co. (SOC-3).

operating plan for the NJSAA. Thereafter, the Port Authority and others filed interrogatories and took the depositions of two of Applicants' witnesses. The Port Authority, APL and Tri-State then filed comments on November 21, 1997, each of which claimed serious deficiencies in the NJSAA operating plan and predicted serious operational problems if Applicants are permitted to go forward. Those critiques are addressed in detail in the rebuttal verified statement of Michael Mohan and John Orrison and shown to be wholly insubstantial.

In Decision No. 44, the Board stated that it was establishing a schedule for the filing and commenting on the NJSAA operating plan to dovetail with the established procedural schedule, and therefore not delay it. There can be no doubt, however, if such a process were imposed with respect to all of the matters covered by the requested pre-implementation conditions, it would delay implementation well beyond the time now scheduled for the Board's final decision.

Such delay would seriously harm shippers and Applicants in several significant ways. First, it would delay the realization of the tremendous public benefits, amounting to almost a billion dollars a year, that Applicants have projected from the transaction -- projections that no party has seriously disputed. It will also harm Applicants by delaying their realization of the substantial private benefits they anticipate, mainly from increased revenues resulting from diverting traffic from the highways.

Perhaps more importantly, significant delay poses serious harm to Conrail, and thus to CSX and NS and to all shippers and communities dependent on Conrail's service. Uncertainty about the future and expectations about changes in personnel, operations and strategy can diminish Conrail's customers' enthusiasm for business development projects,

investments, long-term contracts and other forward-looking activity. There is also a serious risk that Conrail's own people, faced with such diminished opportunities and uncertainties about their own futures, will be less able to generate business and productivity improvements. So far, Conrail has been able to maintain its high level of service and even to grow its revenues since the transaction was announced. As time goes on, however, the risks become greater and greater.[9]

Any such deterioration would greatly compound the difficulties of implementing the transaction without disruptions to service. While Applicants are well aware that haste must be avoided, undue delay can have even more adverse consequences to shippers and to the public interest.

Apart from delay, the pre-implementation conditions sought by various parties would also cause harm by hampering the very flexibility that railroads vitally need in making and adjusting operating decisions on a day-to-day basis. As explained in the rebuttal statement of James W. McClellan, operational planning is important to provide good service, but even more important is the ability to adjust to continuously changing circumstances. Even apart from floods and other unpredictable natural events, the market for transportation services is

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[9] Several examples of the damage that prolonged uncertainly can cause to railroad companies can be gleaned from the Board's own history. In the 1980's, the ICC itself noted on several occasions the deleterious effects of the Southern Pacific Transportation Co.'s three-year existence under the control of a voting trustee. Earlier, in the 1960's, after the ICC took 11 years to finally approve the Union Pacific's application to acquire the Rock Island, the Rock Island had deteriorated so much that UP declined to consummate the transaction. Based in part on those experiences, Congress has enacted strict time limits on the Board's review of railroad consolidation applications. 49 U.S.C. § 11325. Those time limits should not be flouted under the guise of "post approval" conditions that would greatly delay actual implementation.

extremely dynamic, and no amount of planning can enable railroads to predict with certainty or precision how many cars, locomotives, train crews and other employees they will need on particular lines six, or even three, months in the future. For that reason, detailed operational planning is ongoing and continuously changing with circumstances, and anything that makes that task more difficult must be avoided. McClellan RVS at 7-8.

The necessary outcome, if not the basic purpose of the requests for Board review and approval of detailed operating plans and certifications is just the opposite; it is necessarily to limit Applicants' managerial discretion, by requiring them to follow an approved plan. There would be no point of requiring Applicants to submit, and the Board to review and approve, highly detailed operating plans and certifications, if Applicants were free to ignore them when implementing the transaction. In the case of the NJSAA operating plan, for example, the Port Authority, APL and Tri-State are contending that Applicants should not be permitted to implement according to Applicants' plan but should be required to implement according to some other plans that those parties think are better. Locking Applicants in to any pre-set detailed operating plan, however, would be a serious mistake.

Furthermore, with all due respect, the Board and shippers do not possess the day-to-day rail operating expertise that is likely to be helpful at this level of detail. Even if they did, by the time they reviewed and critiqued and debated and approved any given plan containing this level of detail, changing circumstances are likely to have made it inappropriate. Applicants, on the other hand, have both ample expertise and ample incentives to do everything possible to implement this transaction in a way that will maximize service and minimize disruption to their customers. Extension of the Board's

regulatory oversight, and its involvement in pre-planning, may be appropriate on matters where the interests of railroads and their customers are arguably not the same. But the day-to-day details of railroad operations are not such a matter.

E. Events Following the UP/SP Merger Provide No Basis for the Extraordinary Pre-Implementation Conditions Requested.

CMA and others, however, point to the problems UP is experiencing following its merger with SP, and they would probably say: "Well, UP also had expertise and ample incentive to implement its merger without service disruptions, and look at its problems. Those problems show that the Board should require NS, CSX and Conrail to do what we request before it allows them to implement their Transaction."

That reasoning is quite wrong. It is wrong for several reasons. First, the fact that UP is experiencing service problems is not a reason for imposing pre-implementation requirements that there is no good reason to believe would have lessened the risk of those problems occurring on the UP system itself. It is highly doubtful that requiring UP to submit a detailed operating plan for public dissection and debate and Board approval would have lessened the risk of the problems that ensued. Given the SP's pre-existing service problems, the delay that such a process would have caused would probably have increased the risk.

Second, the fact that there have been service problems after one rail transaction provides no reason to conclude the same problems are likely to follow another, completely different one. In fact, no party has produced a scintilla of record evidence to support even a theory as to why NS and CSX should have the problems with Conrail that UP has with SP.

There have been many rail control and combination transactions without significant problems. NS and CSX implemented the mergers that formed their present systems without major problems. The reliance of CMA and others on UP's problems to justify extraordinary conditions in this case is a non sequitur.

Third, there are many major differences between the circumstances of the UP/SP merger and the present transaction. These are described in the rebuttal verified statement of James W. McClellan, NS' Vice President-Strategic Planning. These differences include the fact that Conrail has a far better physical plant and record of service than SP had. Also, as noted earlier, NS and CSX were very familiar with Conrail going into this Transaction and have a much longer time to plan for its implementation. The extraordinary level of planning and reliance on former Conrail employees has been described. Furthermore, both CSX and NS have been analyzing Conrail for years in connection with possible combinations.

F. The Facts of this Transaction Do Not Necessitate the Extraordinary Conditions Sought.

Finally, there is nothing in the particular facts of this case that would justify the pre-implementation conditions sought. In fact, this transaction is a singularly inappropriate one in which to impose unprecedented conditions in an effort to obtain good service. Good service is induced best by competition, as the NITL well put it: "Creation of two carrier access will also tend to lead to more assured service levels to shippers even in the normal course of events . . . ." NITL-7 at 12. This transaction will create more competition than any previous one, and is thus the least appropriate to which to impose conditions that would require STB micromanagement to try to secure good service.

CMA and other parties, however, argue that the creation of the SAAs in this case is unprecedented and that operations in those areas will be uniquely complex, calling for extraordinary regulatory oversight. In fact, however, service in the SAAs will not be unduly complex or unusual. As discussed in the rebuttal statements of Mr. Mohan and Mr. McClellan, there are many large urban areas in the United States in which numerous railroads operate over the same lines, either directly or through jointly owned switching companies, without particular difficulty.

There is always, of course, a risk that unforeseen things can happen following a merger. The question for the Board is whether a regulatory response is likely to lessen, rather than aggravate, that risk, or whether it is more reasonable to rely on the expertise and self-interest of the parties to do so. For all the reasons stated, Applicants submit that the pre-implementation conditions sought by CMA and others is more likely to heighten rather than lessen that risk and should be rejected.

G. The Three-Year Oversight Process That Applicants and NITL Have Agreed To Is Reasonable and Should Be Imposed.

In addition to pre-implementation conditions, many parties request the Board to impose formal post-approval and post-implementation oversight conditions structurally similar to those it imposed following the UP/SP merger but covering other subjects.[10/] As noted

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[10/] See the filings of the American Farm Bureau Federation (unnumbered), American Shortline Railroad Assn. (unnumbered), Amtrak (NRPC-7), APL Ltd. (APL-4), ASHTA Chemical (ASHT-11), A.T. Massey (ATMC-2 and ATMC-3), Chicago Metra (METR-6), Connecticut DOT (unnumbered), CMA/SPI (CMA-10), FINA Oil and Chemical Co. (FINA-2), City of Indianapolis (CI-5), IP&L (IP&L-3), State of Maine DOT (unnumbered), National Grain and Feed Assn. (NGFA-2), New England Central Railroad (NECR-4),

(continued...)

earlier, Applicants have recently concluded an agreement with NITL which provides for a process for formal Board oversight of the Transaction's implementation for three years after the Closing, with quarterly reports from Applicants and opportunity for input from interested parties. Applicant's and the nation's largest shipper association believe that the process they have agreed to is reasonable and urge the Board to approve it.

The oversight parameters contemplated by the Settlement will be worked out in a cooperative way in conference between CSX and NS and shipper representatives. Objective, measurable standards will be developed in conference, for recommendation to the Board for its consideration. They will be based on the current operations of Conrail. The parties propose that the Board require regular quarterly reports from CSX and NS based on those standards, as developed, and that all interested shippers be given an opportunity to comment on the reports.

The procedure just outlined is essentially a non-forensic procedure and, we believe, provides the Board with a high degree of assurance that rational and useful standards and formats for reporting will be developed. The process worked out with the NITL is so clearly superior, in our view, to that proposed by other commentors that we do not think it would serve any useful purpose to discuss the various alternatives proposed in those comments. To the extent that they have merit, they doubtless will be discussed in the process of conference

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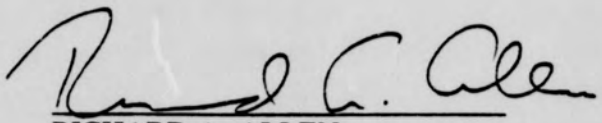
[10/](...continued)
Orange & Rockland Utilities (ORU-3), State of New York (NYS-10), Ohio Attorney General (OAG-4), Senator Jack Reed (unnumbered), State of Rhode Island DOT (unnumbered), Shell Oil Co. and Shell Chemical Co. (SOC-3), Terra Nitrogen Corp. (unnumbered), USDA (unnumbered), Westlake Group (unnumbered), West Virginia State Rail Authority (unnumbered), WLE (WLE-4).

between CSX and NS and the shipper representatives.

CONCLUSION

The Application should be approved in its entirety without conditions that relate to the structure and terms of the Transaction and with only limited oversight, consistent with the terms of the NITL Settlement. All other conditions should be denied.

Respectfully submitted,



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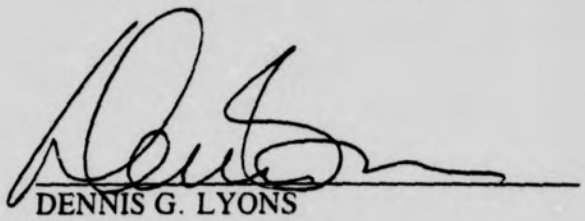

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APPENDIX A

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 33388

CSX CORPORATION AND CSX TRANSPORTATION, INC.
NORFOLK SOUTHERN CORPORATION AND
NORFOLK SOUTHERN RAILWAY COMPANY
-- CONTROL AND OPERATING LEASES/AGREEMENTS --
CONRAIL, INC. AND CONSOLIDATED RAIL CORPORATION

**THERE IS NO JUSTIFICATION -- COMPETITIVE OR OTHERWISE --
FOR IMPOSITION OF CONDITIONS THAT WOULD RADICALLY
ALTER, SOLELY FOR APPLICANTS, ESTABLISHED RULES
GOVERNING RAILROAD ACCOUNTING AND MAXIMUM RATE REGULATION**

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THERE IS NO JUSTIFICATION -- COMPETITIVE OR OTHERWISE -- FOR IMPOSITION OF CONDITIONS THAT WOULD RADICALLY ALTER, SOLELY FOR APPLICANTS, ESTABLISHED RULES GOVERNING RAILROAD ACCOUNTING AND MAXIMUM RATE REGULATION

Several protesting shippers and shipper groups have requested imposition of various types of conditions that would alter or reverse, for CSX and NS alone, established rules governing railroad accounting and the regulation of maximum reasonable rate levels. If adopted, the requested conditions would (1) preclude Applicants from including the full acquisition cost of Conrail in their accounts for purposes of revenue adequacy and jurisdictional threshold determinations, (2) modify existing rules governing qualitative market dominance and rate reasonableness determinations, and (3) impose an absolute rate cap for certain ill-defined categories of freight traffic.

There is no justification for any of these conditions, which would amount to the wholesale and unprecedented revision of existing accounting rules and rate regulatory standards, and the application of those revised standards solely to CSX and NS, and no other railroads. The requested conditions are not necessary to redress any claimed adverse competitive effects of the Transaction, nor are they warranted on any other ground. The requested conditions are also vastly overbroad and, if adopted, would result in substantial re-regulation of the combined CSX, NS and Conrail systems (which together would comprise a large share of the rail industry) contrary to congressional policy. All of them should be rejected.[1]

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[1] References herein to the Board include its predecessor, the Interstate Commerce Commission ("ICC").

I. THE BOARD SHOULD REJECT ARGUMENTS TO DEPART FROM ESTABLISHED RULES GOVERNING THE TREATMENT OF ACQUISITION COSTS FOR REVENUE ADEQUACY AND JURISDICTIONAL THRESHOLD DETERMINATIONS.

Objecting to the purchase price that CSX and NS paid for Conrail, several shipper interests have requested the Board to overturn well-established accounting rules and precedent requiring the use of acquisition cost (rather than predecessor cost) for regulatory purposes, and to apply this new standard only to Applicants in this proceeding. There is no merit to these requests.

CSX and NS paid $9.895 billion, plus assumed liabilities and transaction fees, for Conrail.[2] This amount substantially exceeds the historic net book value of the road property and equipment assets as recorded on Conrail's books.[3] In accordance with the purchase accounting rules prescribed by generally accepted accounting principles ("GAAP") and the Board's Uniform System of Accounts ("USOA"), Applicants will be required to make entries in their accounts to reflect the acquisition of Conrail. To the extent that CSX and NS combine their respective pro rata ownership interests in Conrail's assets with their own in consolidated financial statements, the application of these accounting rules would result in a substantial write-up in the carrying value of Conrail's assets as reflected in the property accounts that are included in each carrier's Annual Report Form R-1 and used for regulatory purposes. Whitehurst RVS at 14-17.[4] Similar accounting procedures have been followed in other recent rail mergers (UP/CNW, BN/Santa Fe, UP/SP). Id. at 13.

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[2] CSX/NS-18, Vol. 1, Goodwin/Wolf VS at 602; Whitehurst Dep., Sept. 3, 1997, at 24-25 & Ex. 1; Whitehurst RVS at 4.

[3] CSX/NS-18, Vol. 1, Ex. 16, App. C, at 131 ($6.693 billion at year-end 1995, after application of pro forma adjustments); Whitehurst Dep., Sept. 3, 1997, at 29; Wolf Dep., Sept. 11, 1997, Ex. No. 1 at 3; Whitehurst RVS at 14.

[4] Based on a preliminary estimate of the fair value of Conrail's assets, Applicants have estimated the amount of this anticipated write-up to be $9.550 billion for purposes of the pro forma financial statements included in the Application. CSX/NS-18, Vol. 1, Ex. 16, App. C, at 133-34; Id., Ex. 16, App. G, at 171-72; Whitehurst Dep., Sept. 3, 1997, at 29; Wolf Dep., Sept. 11, 1997, Ex. No. 1 at 3. See also Whitehurst RVS at 14-17 & Ex. WWW-1 (Price Waterhouse fair value estimate). For various reasons, the actual purchase accounting adjustments by CSX and NS necessary to reflect the Transaction may differ from the pro forma amounts. Whitehurst RVS at 16-17; see also CSX/NS-18, Vol. 1, at 133, 176 (note 4).

Several shipper interests (including ACE, et al., NITL and other shippers) object to the application of these accounting rules, and to any write-up in the value of Conrail assets for regulatory purposes, on the ground that the purchase price of Conrail reflects a large, and in their unsubstantiated view excessive, acquisition "premium."[5] Including this so-called acquisition "premium" in Applicants' books for regulatory purposes, it is claimed, would result in transaction-related competitive harm to "captive" shippers by increasing otherwise applicable regulatory ceilings on the carriers' rate levels. According to these shippers, this alleged competitive injury would occur because CSX and NS will have the need (in order to pay for Conrail) and enhanced ability (through alleged transaction-related increases in market power) to raise rates, particularly for "captive" shippers. The shippers claim that the Board will be powerless to prevent at least some portion of these predicted supra-competitive rate increases because, they say, the application of purchase accounting rules and associated write-up in the value of Conrail's assets would increase system-average URCS variable costs and the 180 percent revenue/variable cost ("r/vc") jurisdictional threshold (thereby raising the statutory "floor" below which the Board lacks jurisdiction to regulate maximum rates)[6] and reduce Applicants' rate of return (thereby reducing the availability of rate relief under the revenue adequacy component of the Board's "Constrained Market Pricing" coal rate standards).[7]

To remedy this claimed transaction-related competitive harm, these shippers seek a condition that would require that revenue adequacy and jurisdictional threshold determinations be based on Conrail's pre-transaction historic net book value -- or "predecessor cost" -- rather than the full cost actually incurred by CSX and NS to acquire Conrail.[8]

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[5] ACE, et al.-18 at 32-49; NITL-7 at 15-27, 42-48; GPU-02, Argument at 6-21; CE-05, Argument at 10-29; CEC 05, Argument at 22-25; PEPC-4, Argument at 20-24; General Mills, Wasescha VS (unnumbered) (dated October 16, 1997); SOC-3, Hall VS at 6, 14-15; see also NYS-10, Argument at 4, 34-35, 36-37.

[6] By statute, the Board lacks jurisdiction to regulate the maximum reasonableness of any rate that generates revenues less than 180 percent of the variable costs of service (49 U.S.C. § 10707(d)), and may not prescribe a rate below this threshold. STB Docket No. 41191, West Texas Utilities Co. v. Burlington Northern Railroad Co. (served May 3, 1996) ("West Texas"), at 33, aff'd sub nom. Burlington Northern Railroad Co. v. STB, 114 F.3d 206 (D.C. Cir. 1997).

[7] See Coal Rate Guidelines, Nationwide, 1 I.C.C.2d 520, 534-37 (1985), aff'd sub nom. Consolidated Rail Corp. v. United States, 812 F.2d 1444 (3d Cir. 1988).

[8] Several other commenting shippers complain that Applicants may raise rates to finance the purchase price of Conrail and the so-called acquisition "premium" it supposedly reflects, but do not request a condition requiring the use of Conrail's predecessor cost for regulatory purposes. See, e.g., CMA-10 at 6-16; NIMO-7 at 21-22; Indiana Port Commis-

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As an initial matter, Applicants state emphatically that there is no basis for the suggestion, implied by these shippers' loose u[8] of the term "premium," that NS and CSX paid more for Conrail than its fair value. What they paid was the result of a completely arms' length transaction, including competitive bidding in an open market setting, and the negotiated purchase price accordingly reflects the best and most reliable measure of Conrail's fair value. To the extent the shippers' use of the term is intended to suggest that CSX and NS paid a "premium" over and above what Conrail is fairly worth, they are incorrect: the purchase price for Conrail reflects no such "premium."[9]

In fact, the term acquisition "premium" is used by these shippers in different and inconsistent ways, and its use is both misleading and unhelpful for purposes of analyzing their claim for relief.[10] What they object to and wish to prohibit is NS and CSX adjusting their financial statements and property accounts after the Transaction, pursuant to the USOA, GAAP and the Board's decisions, to reflect the purchase price they paid for Conrail -- i.e., their acquisition cost -- to the extent that cost exceeds the pre-transaction historic net book value of Conrail's road property and equipment assets as reflected on its books for regulatory

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[8](...continued)
sion (unnumbered), at 10-11; ASHT-11 at 15-16; ENRS-7 at 25-28; DUPX-02 at 11-12; Comments of Occidental Chemical Corporation (unnumbered), Orbegoso VS at 5. CMA and SPI also request that the effects of the Conrail purchase price be included among the issues considered in the oversight proceedings they seek to have imposed as a condition to approval of the T ansaction. CMA-10 at 42.

[9] See Kalt RVS at 60; Whitehurst RVS at 4-5. Indeed, the Application includes unchallenged and unrebutted testimony establishing that the financial terms of the Transaction (including purchase price) are fair and reasonable. CSX/NS-18, Vol. 1, Nolop VS at 460; CSX/NS-18, Vol. 1, Levy VS at 555; CSX/NS-18, Vol. 1, Hamilton VS at 569; CSX/NS-18, Vol. 1, Goodwin/Wolf VS at 598. In reviewing the Transaction, the Board is required to consider and make findings with respect to the fairness of the purchase price of Conrail and the impact of the Transaction on the Applicants' fixed charges and financial condition. 49 U.S.C. §§ 11321(b), (c); see Schwabacher v. United States, 334 U.S. 192 (1948); UP/SP at 177. In approving the Transaction, therefore, the Board cannot rationally make these required findings and simultaneously credit the shippers' claims that the purchase price was excessive, or on that ground adopt the shippers' proposed condition excluding a large portion of the overall acquisition cost from CSX and NS investment bases for regulatory purposes.

[10] See Whitehurst RVS at 4; Kalt RVS at 59-60. This so-called "premium" is variously and inconsistently defined by these shippers to mean, among other things, the amount by which the acquisition cost of Conrail exceeds (1) the historic net book value of Conrail's assets, (2) the pre-transaction market value of Conrail's outstanding publicly traded stock, or (3) Conrail's total shareholder equity. See, e.g., ACE, et al.-18 at 9, 15-16; NITL-7 at 15-16; ACE, et al.-18, Crowley VS at 25-29. Only the first definition relates to the purchase accounting adjustments at issue here. Whitehurst RVS at 9, 14-17.

accounting purposes. In addressing their arguments, therefore, Applicants generally refer simply to the use of acquisition cost and its difference from Conrail's pre-transaction historic book value (or "predecessor cost").

The shippers' claims are both legally and factually unsustainable for a number of reasons.

First, the relief sought by the shippers is contrary to well-established accounting rules and controlling Board precedent requiring the use of acquisition cost, and not predecessor cost, in revenue adequacy and jurisdictional threshold determinations. See Railroad Revenue Adequacy -- 1988 Determination, 6 I.C.C.2d 933, 935-42 (1990) ("Ex Parte 483") aff'd sub nom. Association of American Railroads v. ICC, 978 F.2d 737 (D.C. Cir. 1992). The Board's decision requiring the use of acquisition cost was adopted with the active support of various shipper groups, including some (such as NITL) which are now arguing in this proceeding for the use of predecessor cost, a position they affirmatively (and successfully) opposed in Ex Parte 483.

Second, the Board's settled precedent on this issue reflects sound policy, including the recognition that rate regulatory standards must afford railroads the opportunity (if market conditions and the demand for service permit) to earn a competitive return on the current value of their investment, and that the purchase price of rail assets acquired in a recent, arms' length negotiated purchase transaction is a far more reliable and accurate measure of current value than the often archaic (if not random) historic book values shown on a railroad's accounts. Prohibiting carriers from reflecting the actual acquisition cost of assets on their books for regulatory purposes would shortchange investors by potentially denying them the opportunity to earn a competitive return on their investment, and it would deter railroads from entering into efficiency-enhancing rail consolidation transactions that would benefit the shipping public.

Third, even if there were any basis for reconsidering or departing from the Board's established precedent on this issue, doing so in this proceeding would be plainly inappropriate. The proper forum for considering such a fundamental change in regulatory law and policy would be either a rulemaking or other ex parte proceeding (including the annual revenue adequacy docket), where the merits and impact of the proposed rule on the industry generally and on other similarly affected transactions could be fully assessed and a uniform rule adopted for all carriers. By contrast, an individual rail consolidation proceeding is a decidedly ill-suited vehicle for making radical changes in accounting rules and regulatory policy governing maximum reasonable railroad rates. There can be no justification for creating a new standard applicable only to CSX and NS, and to do so retroactively, after CSX and NS purchased Conrail in reliance on the Board's longstanding rules and precedent endorsing the use of acquisition cost for regulatory purposes.

Fourth, even if the use of acquisition cost for regulatory purposes were properly open to reconsideration in this proceeding, the shippers have furnished no basis for

departing from existing rules in this case. The evidence overwhelmingly supports the conclusion that CSX and NS do not need to raise rates in order to pay for Conrail, and that the strongly pro-competitive effects of the Transaction would only reduce, not enhance, their ability to raise rates even if they had any financial compulsion to do so. There is no valid support for the claim that use of acquisition cost in revenue adequacy and jurisdictional threshold determinations would significantly raise otherwise applicable regulatory rate "ceilings"; the shippers' claims to the contrary simply (and intentionally) ignore the undisputed transaction-related efficiencies and traffic gains, which would have the effect of lowering those rate "ceilings." In any event, the condition the shippers seek would, under their own theory, do nothing more than confer an unnecessary and inappropriate regulatory windfall on shippers.

For these reasons, as more fully explained below, the Board should reject the shippers' contentions, and adhere to long-established rules employing acquisition cost for regulatory purposes. As coal shippers have previously observed with respect to this very issue, the Board "should not switch methodologies simply because they happen to affect revenue adequacy determinations. One method should be adopted and used, regardless of the results." Ex Parte 483, supra, 6 I.C.C.2d at 939. Applicants agree, and so should the Board.

A. Controlling Precedent Requires the Use of Acquisition Cost in Revenue Adequacy and Jurisdictional Threshold Determinations.

The shippers that have raised concerns regarding the potential impact of the Conrail purchase price on regulatory rate standards for the most part proceed as if the use of acquisition cost in revenue adequacy and jurisdictional threshold determinations were an unresolved or open issue. It is not. Both GAAP and the Board's accounting rules have long required purchase accounting adjustments to reflect acquisition cost, and the Board -- after carefully weighing the relevant legal and policy considerations, including the authoritative recommendations of the Railroad Accounting Principles Board ("RAPB") -- has squarely held that acquisition cost, not predecessor cost, should be used for regulatory purposes.[11]

There can be no question that the accounting rule the shippers seek to impose on CSX and NS for purposes of the Conrail acquisition is flatly contrary to GAAP. Precisely because the purchase price or other consideration for the acquisition of assets in an

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[11] Several of the shippers do not cite or even acknowledge the Board's prior precedent on this issue. See, e.g., GPU-02, Argument at 6-21; CE-02, Argument at 10-29; CEC-05, Argument at 22-25; PEPC-4, Argument at 20-24; General Mills, Wasescha VS (unnumbered) (dated October 16, 1997); SOC-3, Hall VS at 6, 14-15; NYS-10, Argument at 4, 34-35, 36-37.

arms' length negotiated transaction represents the best measure of the current value of those assets, GAAP requires purchase accounting adjustments to reflect acquisition cost, except in limited circumstances (not applicable here) involving a pooling of interests. See Financial Accounting Standards Board, Accounting Standards -- Current Text § B50 (1997 Supp.); Whitehurst RVS at 11-12. Acquisition cost for these purposes means the cash purchase price or, where assets are acquired for other than cash (including assumption of liabilities), the fair value of the consideration given or the fair value of the assets acquired, whichever is more clearly evident. Id., § B50.125. These accounting principles are highly relevant because the Board is under a statutory directive, in fashioning railway accounting rules, to conform to GAAP "to the maximum extent practicable." 49 U.S.C. § 11161; see also 49 U.S.C. § 11164.[12]

Not surprisingly, the railway accounting rules prescribed by the Board's USOA have long required carriers, in accordance with GAAP, to reflect the value of assets at acquisition cost, not predecessor cost. See 49 C.F.R. § 1201 (Instructions for Property Accounts § 2-15(c)(1)); 26 Fed. Reg. 11104, 11112 (1961) (adopting purchase accounting rules in their current form). The financial statements prepared in accordance with these rules are used for general regulatory purposes, including both revenue adequacy and jurisdictional threshold determinations.[13] In compliance with these rules, railroads over the years have in

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[12] The Board thus regularly follows GAAP. See, e.g., STB Ex Parte No. 512, Uniform System of Records of Property Changes for Railroad Cos. (served March 7, 1996); Modifications to General Purpose Costing System -- GPCS, 5 I.C.C.2d 880, 881 (1989); Revision to Uniform System of Accounts for Railroads, 3 I.C.C.2d 430, 435-37 (1986); Standards for Railroad Revenue Adequacy, 3 I.C.C.2d 261, 290-92 (1986), aff'd sub nom. Consolidated Rail Corp. v. United States, 855 F.2d 78, 85 (3d Cir. 1988).

[13] Thomas D. Crowley, who has submitted testimony on this issue for several different shipper parties, erroneously suggests that the accounting rules governing the treatment of the acquisition cost of Conrail for revenue adequacy purposes are different than the accounting rules that would apply for jurisdictional threshold purposes. See, e.g., ACE, et al.-18, Crowley VS at 27-28. This leads to the equally erroneous assertions that (1) the purchase accounting adjustments to reflect the acquisition cost of Conrail are different for the two regulatory purposes and (2) Applicants are proposing, for jurisdictional threshold purposes at least, to write up the value of Conrail's assets to an amount (fair value) that exceeds the actual acquisition cost of the assets. Id. In fact, the Board's revenue adequacy and jurisdictional threshold (URCS variable cost) determinations both are based on the same financial statements (Form R-1) prepared in accordance with the USOA, and the purchase accounting adjustments reflected on those statements would apply equally for both regulatory findings. Whitehurst RVS at 12 n.9. Moreover, the pro forma financial statements included in the Application do not reflect a write-up of Conrail's assets above the purchase price. The purchase price (including assumed liabilities and transaction fees) exceeded -- by the amount

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many instances adjusted their regulatory property accounts to reflect the acquisition cost of assets involved in a merger, consolidation or purchase transaction, whether the acquisition cost was greater or less than predecessor cost. See, e.g., BN/Santa Fe at 104 & n.141 ("Purchase accounting requires adjustment, either up or down, of the book value of the acquired railroad's assets to take into account the total purchase price paid for the railroad's stock") (emphasis added).[14]

Most important of all, however, the Board has also squarely held, consistent with these accounting rules, that acquisition cost -- and not predecessor cost -- should be used in revenue adequacy determinations. In Railroad Revenue Adequacy -- 1988 Determination, 6 I.C.C.2d 933, 935-42 (1990) ("Ex Parte 483"), aff'd sub nom. Association of American Railroads v. ICC, 978 F.2d 737 (D.C. Cir. 1992), the Board considered a proposal by the railroads to switch from the use of acquisition cost to predecessor cost in revenue adequacy determinations, at least in those instances in which railroad assets were acquired at less than their existing net book value. Relying on the RAPB's consideration of the same issue,[15] the Board rejected the railroads' proposal and reaffirmed the use of acquisi-

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[13](...continued)
preliminarily assigned to "goodwill" -- the fair value of the Conrail assets based on the preliminary Price Waterhouse estimate. The pro forma purchase accounting adjustments to Conrail's road property and equipment assets (which are the asset values used for regulatory purposes) are based on the lower amounts reflected in the preliminary fair value estimate. Id. at 14-16.

[14] See also Rio Grande Industries, Inc. -- Control -- Southern Pacific Transportation Co., 4 I.C.C.2d 834, 980 (1988), aff'd sub nom. Kansas City Southern Industries, Inc. v. ICC, 902 F.2d 423 (5th Cir. 1990); ICC Docket No. AB-1 (Sub-No. 218), Chicago & North Western Transportation Co. -- Abandonment Between Ingalton & Carol Stream, in Dupage County, IL (served March 20, 1991), at 6; ICC Finance Docket No. 31468, Notice of Exemption -- Issuance of Securities & Assumption of Liabilities -- Illinois Central Railroad Co. (served September 18, 1989), at 4 & n.8, aff'd mem sub nom. ICG Concerned Workers Association v. United States, 954 F.2d 787 (D.C. Cir. 1992); St. Louis Southwestern Railway Co. -- Trackage Rights Over Missouri Pacific Railroad Co. -- Kansas City to St. Louis, 5 I.C.C.2d 525, 533 (1989) ("SSW Compensation"), supplemented, 8 I.C.C.2d 80 (1991), 8 I.C.C.2d 213 (1991), aff'd sub nom. Union Pacific Corp. v. ICC, 978 F.2d 745 (D.C. Cir. 1992); Newrail Co. -- Purchase -- Western Pacific Railroad Co., 354 I.C.C. 885, 901-04 (1979).

[15] RAPB, Railroad Accounting Principles -- Final Report, Vol. II at 45-48 (September 1987). Established by Congress in the Staggers Rail Act, the RAPB was charged with formulating recommendations to integrate cost accounting principles into existing rail carrier rate regulation. The statute further directed the ICC to "implement and enforce such principles." Staggers Rail Act of 1980, Pub. L. No. 96-448, § 302(a), 94 Stat. 1934-38 (1980) (repealed by ICC Termination Act of 1995).

tion cost. In reaching this conclusion, the Board credited arguments advanced by various shipper groups (including NITL) that acquisition cost was consistent with GAAP and the RAPB's findings, that the acquisition cost of rail assets as determined in an arms' length purchase transaction was a better measure of the current value of the railroads' investment than "frequently outdated predecessor values," and that the Board in all events should adhere to a uniform rule and "not switch methodologies simply because they happen to affect revenue adequacy determinations." Ex Parte 483, supra, 6 I.C.C.2d at 938-41.

At issue in the Board's Ex Parte 483 decision were several transactions in which acquisition cost was less than predecessor cost. Nevertheless, there is no doubt that the Board's conclusion has equal -- if not greater -- validity when, as here, acquisition cost exceeds predecessor cost. Indeed, the Board considered the matter obvious. It stated: "No one suggests that we use old book values in cases where railroads are sold for more than these book values. Such an approach would potentially shortchange those recent investors who have paid a premium above the old book value with a return below the cost of capital for their investment." Ex Parte 483, supra, 6 I.C.C.2d at 940 (emphasis added).[16]

Although Ex Parte 483 involved revenue adequacy, and not jurisdictional threshold determinations, there is no principled basis to distinguish the two. The Board's rate of return calculations in revenue adequacy determinations and its URCS variable cost calculations in jurisdictional threshold determinations are based on the same financial statements prepared in accordance with the USOA and included in the railroads' Form R-1 filings. Both determinations rest on the same investment base and employ the same industry cost of capital rate. The Board's conclusion that revenue adequacy determinations should be based on acquisition cost, rather than predecessor cost, is therefore fully applicable to jurisdictional threshold findings.[17]

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[16] The few shipper parties that even acknowledge the Board's holding in Ex Parte 483 argue that it is not controlling because the Board stated that "we do not mean to suggest that we will accept the sale price of rail assets as a substitute for old book value in every case." 6 I.C.C.2d at 941; ACE, et al.-18 at 44; NITL-7 at 24. But the Board there was addressing the possibility that acquisition cost might not be appropriate because the purchase price of rail assets might be artificially depressed at a level below "old book value" by regulatory action, thus producing the potential for a "downward spiral" of acquisition costs, not cases in which acquisition cost is alleged to be above book value. In any event, for the reasons explained below, the proper forum for considering any departure from the Board's existing rule is a rulemaking proceeding (including the revenue adequacy docket).

[17] The conclusion that the holding in Ex Parte 483 applies equally to both revenue adequacy and jurisdictional threshold determinations is also supported by the Board's pronouncements involving USOA Account 80, which figures prominently in the shippers' requested condition excluding the so-called acquisition "premium" from consideration in rate

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Thus, whether revenue adequacy and jurisdictional threshold determinations should be based on acquisition cost or predecessor cost simply is not an open question. The issue has been carefully considered and squarely resolved as a matter of Board precedent, and the Board's decision has been sustained on judicial review. This controlling precedent requires the use of acquisition cost, and rejection of the shippers' requested condition.

B. The Board's Precedent Requiring the Use of Acquisition Cost For Regulatory Purposes Reflects Sound Public Policy.

The use of acquisition cost in revenue adequacy and jurisdictional threshold determinations is not only required by controlling Board precedent; it also reflects sound public policy principles that, in large measure, have fueled the railroad industry's financial recovery since the passage of the Staggers Rail Act in 1980. These principles recognize that railroads must be given an opportunity to earn (if they can) a competitive rate of return on the current value of their invested capital, and that the purchase price of rail assets in an arms' length negotiated transaction is a far better measure of current value than historic book values appearing on a railroad's accounting records. Excluding the full acquisition cost of rail assets from the investment base for regulatory purposes, at least when acquisition cost is greater than predecessor cost, would shortchange railroads by potentially denying them the opportunity to earn a competitive return on their actual investment, and would deter efficiency-enhancing rail consolidation and restructuring transactions that are clearly in the public interest. The shippers' arguments in favor of predecessor cost (i.e., depreciated original cost) all rest on an asserted analogy to public utility regulation that the Board has decisively rejected.

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[17](...continued)
cases. ACE, et al.-18, Crowley VS at 37-39. In ICC Docket No. 40581, Georgia Power Co. v. Southern Railway Co. (served November 8, 1993), the Board addressed the question whether amounts recorded by railroads in Account 80 (or, more accurately, debits to that account) should be included in URCS variable costs for jurisdictional threshold purposes. In answering that question in the negative, the Board relied on its prior analysis of this same issue in the revenue adequacy context. Id., Appendix (August 18, 1993 staff memorandum at 13) (citing Ex Parte No. 338, Standards & Procedures For the Establishment of Adequate Railroad Revenue Levels, 358 I.C.C. 844, 878 (1978)). Indeed, the Board's standard URCS Phase II output (Worktable A4, Part 1) itself indicates that Account 80 should be included in the URCS input only to the extent justified under the guidelines in Ex Parte No. 338. Thus, the Board has always recognized the close link between the financial data underlying revenue adequacy and jurisdictional threshold determinations.

1. Regulation Should Permit Railroads An Opportunity to Earn A Competitive Return on the Current Value of Their Investment.

It is by now beyond dispute, both as a matter of policy and statutory mandate, that regulation should afford railroads the opportunity -- if demand and competitive market conditions permit -- to earn a competitive (current cost of capital) rate of return on the value of their investment. See, e.g., 49 U.S.C. §§ 10701(d)(2), 10704(a)(2); Coal Rate Guidelines, supra, 1 I.C.C.2d at 534-35; Standards For Railroad Revenue Adequacy, 364 I.C.C. 803 (1981) ("Standards"), aff'd sub nom. Bessemer & Lake Erie Railroad Co. v. United States, 691 F.2d 1104 (3d Cir. 1982). Because most railroad services are subject to intense competition, regulation cannot guarantee such a rate of return, but artificial regulatory restraints should not impede the railroads' opportunity to earn such a competitive return. Otherwise, incentives to maintain and replace assets as they wear out, and to invest in new capacity and technology that the shipping public demands, will be eroded. Standards, supra, 364 I.C.C. at 809-11; Kalt RVS at 74.

It is equally well established that, in determining the value of railroad assets for regulatory purposes, current costs -- not historic or original costs -- are the relevant measure. Even in competitive markets, assets are always valued at current cost. For example, if a house originally built in 1900 at a cost of $10,000 today has a market value of $500,000 (reflecting the current cost to replace the house with an equivalent asset), no one would suggest that the current value is excessive or that, if the house is rented, the owner's return should be based on original cost. Kalt RVS at 73-75. The current market value of an asset may be more or less than its original cost, depending on demand conditions and other factors. In order to provide adequate incentives to maintain and replace assets as they wear out, however, the investor must earn a competitive return on the current (replacement) cost of the assets. Id.

The same principles dictate appropriate rules for railroad regulation, which should attempt to replicate the outcome of competitive markets. In the long run, railroads must be afforded an opportunity to earn a competitive return on current replacement cost, or else capital funds will be insufficient to justify needed maintenance and re-investment. Id. at 74-75; see also ICC Ex Parte No. 347 (Sub-No. 1), Coal Rate Guidelines, Nationwide (served February 24, 1983), at 12 n.37 ("Investors would not be expected to invest in producing a service if the revenues were not sufficient, in the long run, to provide for the replacement of the assets used.").

For these reasons, the Board has long recognized the superiority of current-cost valuation of assets for regulatory purposes. Replacement-cost valuation principles are the central feature of the Board's stand-alone cost methodology, which is the predominant standard used in assessing maximum reasonable coal rates. Coal Rate Guidelines, supra, 1 I.C.C.2d at 544-45. The Board also uses current-cost valuation principles in trackage

rights compensation proceedings and in other proceedings.[18] In fact, the Board has recognized the theoretical superiority of current (replacement) cost valuation principles in revenue adequacy determinations, but has nonetheless adhered to an historical book value accounting system because of the practical difficulties of implementing a current-cost valuation scheme. Standards For Railroad Revenue Adequacy, 3 I.C.C.2d 261, 275-84 (1986), aff'd sub nom. Consolidated Rail Corp. v. United States, 855 F.2d 78 (3d Cir. 1988).[19] But that is not to say, as the shippers do, that the older the "cost," the better. Clearly, if replacement cost cannot be used, the most recent arms' length transactional cost is best.

Thus, the Board's continued use of depreciated historical cost for revenue adequacy (and, by implication, jurisdictional threshold) determinations is a matter of administrative convenience and practicality, and cannot be said to reflect any policy judgment that old book values are the best, and most accurate, measure of current value. Where these practical implementation problems are absent (such as in stand-alone cost and trackage rights compensation cases), the Board has not hesitated to use more reliable measures of current value. That is precisely the policy justification underlying the Board's use of the current owner's acquisition cost, rather than the prior owner's original cost, for regulatory purposes.

2. Acquisition Cost is A More Accurate and Reliable Measure of Current Value Than Outdated Book Values.

Because acquisition cost is the product of arms' length negotiation in a market setting, it is inherently a more reliable and accurate measure of the current value or worth of an asset -- taking into account the age, condition, obsolescence and productivity of the asset -- than book values that appear on a carrier's accounts from prior to the acquisition. Kalt RVS at 60. See also Ex Parte 483, supra, 6 I.C.C.2d at 941 ("At the time of sale, market price (acquisition cost) becomes a better measure of value. It inherently takes into account the age of the assets purchased, the levels of maintenance performed, obsolescence, and the

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[18] See, e.g., Atchison, Topeka & Santa Fe Railway Co. -- Operating Agreement -- Southern Pacific Transportation Co., 8 I.C.C.2d 297, 304 (1992); Arkansas & Missouri Railroad Co. v. Missouri Pacific Railroad Co., 6 I.C.C.2d 619, 627 (1990), supplemented, 7 I.C.C.2d 164 (1990), 8 I.C.C.2d 567, aff'd sub nom. Missouri Pacific Railroad Co. v. ICC, 23 F.3d 531 (D.C. Cir. 1994); Reasonably Expected Costs, 5 I.C.C.2d 147, 158 (1988); SSW Compensation, supra, 5 I.C.C.2d at 530.

[19] It is perhaps telling that, in its search for authority supporting the use of depreciated original cost in valuing assets for regulatory purposes, ACE, et al. are forced to rely on an old and now outdated pre-Staggers decision that preceded the development of modern rate regulatory principles. ACE, et al.-18 at 41 (citing Net Investment -- Railroad Rate Base & Rate of Return, 345 I.C.C. 1494 (1976)).

presence of any excess assets."). The Board thus has regularly concluded that a recent negotiated sales price is the best evidence of the current market value of a railroad line or asset. See, e.g., SSW Compensation, supra, 1 I.C.C.2d 776, 786 (1984); Id., 4 I.C.C.2d 668, 674 (1987); Arkansas & Missouri Railroad, supra, 6 I.C.C.2d at 626; ICC Docket No. AB-1 (Sub-No. 218), Chicago & North Western Transportation Co. -- Abandonment Between Ingalton & Carol Stream, in Dupage County, IL (served March 20, 1991), at 6.

At a minimum, acquisition cost is far more reliable than depreciated original cost. The latter amount reflects "frequently outdated predecessor values" based on the actual or imputed costs of building long-lived rail assets and acquiring right-of-way many decades ago. Those original or imputed costs have little, if any, bearing on the current value of the assets or the current cost of replacing them. Moreover, book values reflect standard accounting measures of depreciation, which may deviate markedly from economic depreciation, with the result that the depreciated values over time may not accurately depict the remaining useful service lives or productive value of those assets. Ex Parte 483, supra, 6 I.C.C.2d at 940; Kalt RVS at 75.

In the case of Conrail, such book values have even less claim to validity as a measure of current value because they reflect significant write-downs at the time Conrail was created out of the remnants of the Penn Central and other bankrupt railroads in the Northeast. In recognition of the bankrupt railroads' inability to reorganize and their (at best) minimal value on a going concern basis, the rail assets of the bankrupt carriers transferred to Conrail were initially paid for by the government and recorded on Conrail's books at levels approximating net liquidation value. This resulted in a substantial write-down in the depreciated original cost of those assets as recorded on Conrail's books. Whitehurst RVS at 7-9.[20] Subsequently, the asset values on Conrail's books were adjusted to reflect additional compensation paid to the bankruptcy estates as a result of negotiated settlements with the government. Id. As a result, Conrail's book values do not even reflect depreciated original cost, much less current market value based on the revitalization of Conrail's rail operations over the past 20 years. It would be more accurate to describe those values as happenstance. Reliance on these book values as a measure of the current value of Conrail's assets would be completely arbitrary.

Thus, policy considerations strongly support the Board's decision to use acquisition cost in revenue adequacy and jurisdictional threshold determinations. Unlike old book values recorded on a carrier's accounts, acquisition cost is more likely to approximate current market value, and thus serve as a sounder basis on which to set regulatory rate ceilings that provide adequate incentives for continued investment in needed rail facilities and service.

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[20] See In re Valuation Proceedings Under Sections 303(c) and 306 of the Regional Rail Reorganization Act of 1973, 445 F. Supp. 994 (Special Court, R.R.R.A. 1977), 531 F. Supp. 1191 (Special Court, R.R.R.A. 1981).

3. Failure to Include the Full Acquisition Cost in the Investment Base For Regulatory Purposes Would "Potentially Shortchange" Carriers That Have Purchased Rail Assets At Current Value, and Deter Efficiency-Enhancing Rail Consolidations That Would Promote the Public Interest.

The Board's existing precedent requiring the use of acquisition cost for regulatory purposes promotes the policy of enabling railroads the opportunity to earn a competitive rate of return on their actual investment in recently acquired rail assets, thereby creating incentives for continued efficient investment in the railroad industry. By contrast, a rule precluding the use of acquisition cost in revenue adequacy and jurisdictional threshold determinations would frustrate these policy objectives.

Forbidding railroads that have recently acquired rail assets from including the full acquisition cost of those assets in their accounts for regulatory purposes would potentially deprive them of an opportunity to earn a fair, competitive return on their investment. Regulation, of course, cannot guarantee any particular level of return and, as the Board has frequently observed, regulatory rate standards play only a relatively small role in the railroads' rate-setting practices.[21] To the extent that regulatory rules affect the railroads' rate levels and overall returns, nowever, those rules should not artificially handicap their ability to earn a fair return on their actual investment. Such an approach would "potentially shortchange" railroads that have recently acquired rail assets at a cost that exceeds the "old" book values previously reported by the selling railroad for regulatory purposes. Ex Parte 483, supra, 6 I.C.C.2d at 940.

Adherence to the use of acquisition cost in regulatory determinations, by comparison, would ensure that railroads would not be impeded by regulatory constraints from earning an appropriate return if market conditions allow. As the Board recognized in Ex Parte 483:

> A policy that generally relies on the book value to the current owners of a railroad is consistent with economic and financial principles and assures those investors that the revenue adequacy concept will not operate as an unreason-

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[21] See, e.g., Ex Parte 483, supra, 6 I.C.C.2d at 941; Railroad Cost Recovery Procedures -- Productivity Adjustment, 5 I.C.C.2d 434, 447 (1989) (most rail traffic is unregulated; "shippers claim few rates are ever challenged"), aff'd sub nom. Edison Electric Institute v. ICC, 969 F.2d 1221 (D.C. Cir. 1992); Coal Rate Guidelines, supra, 1 I.C.C.2d at 521-22 (few railroad movements are subject to rate regulation, and "market forces generally constrain rail pricing of coal traffic").