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RICHARD A. ALLEN

February 23, 1998

Via Hand Delivery

Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: 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, Finance Docket No. 33388

Dear Secretary Williams:

I submit an original and twenty-five copies of each of the highly confidential and public versions of NS-62, Brief of Applicants Norfolk Southern Corporation and Norfolk Southern Railway Company. Also enclosed is a 3 1/2" computer disk containing the pleading in Wordperfect 5.1 format, which is capable of being read by Wordperfect 7.0.

Should you have any questions regarding this, please call.

Sincerely,

Richard A. Allen

Counsel for Norfolk Southern Corporation and Norfolk Southern Railway Company

Enclosures

cc: The Honorable Jacob Leventhal
All Parties of Record

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FILED FOR THE PUBLIC RECORD

NS-62

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

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February 23, 1998

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TABLE OF ABBREVIATIONS

AA	Ann Arbor Railway Company
ACE	Atlantic City Electric Company
ACE, et al.	Atlantic City Electric Company and Indianapolis Power & Light
AEP	American Electric Power Service Corporation
Amtrak	National Railroad Passenger Corporation
APL	APL Limited
Applicants	CSX Corporation, CSX Transportation, Inc., Norfolk Southern Corporation, Norfolk Southern Railway Company, Conrail, Inc. and Consolidated Rail Corporation
Applicants' Rebuttal	CSX/NS-176 through 178, filed December 15, 1997
Application	the Railroad Control Application (CSX/NS-18 through 25) filed on June 23, 1997
ARU	the Allied Rail Unions
BLE	Bessemer & Lake Erie Railroad
Board	Surface Transportation Board
Closing Date	the date on which operation of Consolidated Rail Corporation's lines will be divided between CSX and NS
CMA	Chemical Manufacturers Association
CN	Canadian National Railway
Commission	Interstate Commerce Commission
Conrail	Conrail Inc., Consolidated Rail Corporation and their subsidiaries
CP	Canadian Pacific Railway Company
CRC	Consolidated Rail Corporation

CRR	Conrail Inc.
CSX	CSX Corporation and CSX Transportation, Inc.
CSXC	CSX Corporation
CSXT	CSX Transportation, Inc.
D&H	Delaware and Hudson Railway Company, Inc.
DEIS	Draft Environmental Impact Statement
Delmarva Power	Delmarva Power and Light Company
DOJ	U.S. Department of Justice
DOT	U.S. Department of Transportation
EFM	Eighty Four Mining Company
EIS	Environmental Impact Statement
EJE	Elgin, Joliet and Eastern Railway Company
FRA	Federal Railroad Administration
IC	Illinois Central Railroad Company
ICC	Interstate Commerce Commission
ICCTA	ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803
IORY	Indiana & Ohio Railway
IP&L	Indianapolis Power & Light Company
ISRR	Indiana Southern Railroad
Labor Impact Exhibit	the Labor Impact Exhibit attached to CSX/NS-26
LAL	Livonia, Avon & Lakeville Railroad Corporation
LD&RT	Lakefront Dock and Railroad Terminal Company

MMM	Martin Marrietta Materials
NEC	Northeast Corridor
NECR	New England Central Railroad, Inc.
NITL	National Industrial Transportation League
NITL Settlement	the agreement reached between Applicants and the National Industrial Transportation League, signed on December 12, 1997
NMB	National Mediation Board
NS	Norfolk Southern Corporation and Norfolk Southern Railway Company
NSC	Norfolk Southern Corporation
NSR	Norfolk Southern Railway Company
NW	Norfolk and Western Railway Company
NYSEG	New York State Electric and Gas Company
NYC	New York Central Lines LLC
P&W	Providence and Worchester Railroad Company
PRR	Pennsylvania Lines LLC
RCAF-U	Rail Cost Adjustment Factor - Unadjusted
RJCW	R.J. Corman Railroad Company/Western Ohio Line
RLA	Railway Labor Act
SAAs	Shared Assets Areas
SEA	the Surface Transportation Board's Section on Environmental Analysis
SIPs	the Safety Integration Plans
SMSAs	Standard Metropolitan Statistical Areas

TCU	Transportation Communications International Union
Transaction	the transaction proposed by Applicants in the Application
UP/SP merger	the merger contemplated by the primary application filed in Finance Docket No. 32760 and approved by the Surface Transportation Board in Decision No. 44 in that docket
UTU	the United Transportation Union
W&LE	Wheeling & Lake Erie Railway Company
WCL	Wisconsin Central Ltd.
WJPA	Washington Job Protection Agreement

TABLE OF SHORT CITATION FORMS

BG&E	Baltimore Gas and Electric Co. v. Natural Resources Defense Council, 462 U.S. 87, 97 (1983)
Bell Aerospace	NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974)
BN/Frisco	Burlington Northern, Inc. -- Control & Merger -- St. Louis-San Francisco Railway Company, 360 I.C.C. 784 (1980), aff'd sub nom. Missouri-Kansas-Texas R.R. v. United States, 632 F.2d 392 (5th Cir.) cert. denied, 451 U.S. 1017 (1981)
BN/SF	Finance Docket No. 32549, Burlington Northern Inc. and Burlington Northern Railroad Company -- Control and Merger -- Santa Fe Pacific Corporation and the Atchison, Topeka and Santa Fe Railway Company, Decision served Aug. 23, 1995, aff'd sub nom., Western Resources, Inc. v. STB, 109 F.3d 782 (D.C. Cir. 1997)
Central Vermont	Central Vermont Ry. v. ICC, 711 F.2d 331 (D.C. Cir. 1983)
CSX Control	CSX Corp. -- Control -- Chessie System, Inc. and Seaboard Coast Line Industries, Inc., 363 I.C.C. 521 (1980)
Dispatchers	Norfolk and Western Ry. Co. v. American Train Dispatchers' Ass'n., 499 U.S. 117 (1991)
Hughes River	Hughes River Watershed Conservancy v. Glickman, 81 F.3d 437 (4th Cir. 1996)
Marin County	County of Marin v. United States, 356 U.S. 412 (1958)
New York Dock	New York Dock Ry. -- Control -- Brooklyn Eastern District Terminal, 360 I.C.C. 60, aff'd sub mon. New York Dock Ry. v. United States, 609 F.2d 83 (2d Cir. 1979)
NS Control	Norfolk Southern Corp. -- Control -- Norfolk & Western Ry. and Southern Ry., 366 I.C.C. 173 (1982)
Railroad Consolidation	Railroad Consolidation Procedures, 363 I.C.C. 784 (1981)
Railroad Revenue Adequ.	Railroad Revenue Adequacy -- 1988 Determination, 6 I.C.C.2d 933 (1990), aff'd sub nom. Association of American Railroads v. ICC, 978 F.2d 737 (D.C. Cir. 1992)

Rio Grande Control	Rio Grande Industries, et al. -- Control -- Southern Pacific Transportation Co., 4 I.C.C.2d 834 (1988)
Robertson	Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989)
Schwabacher	Schwabacher v. United States, 334 U.S. 182 (1948)
Soo Line	Soo Line R.R. -- Petition for Declaratory Order, Finance Docket No. 33350, served February 4, 1998
Southern Control	Southern Ry. -- Control -- Central of Georgia Ry., 331 I.C.C. 151 (1967)
UP/CNW	Finance Docket No. 32133, Union Pacific Corp. et al. -- Control -- Chicago & North Western Transportation Co., et al., served March 7, 1995
UP/MKT	Union Pacific Corp., Union Pacific R.R. & Missouri Pacific R.R. -- Control -- Missouri-Kansas-Texas R.R., 4 I.C.C.2d 409 (1988) petition for review dismissed sub nom. RLEA v. ICC, 883 F.2d 1079 (D.C. Cir. 1989)
UP/MP/WP	Union Pacific Corp., Pacific Rail System, Inc., and Union Pacific R.R. -- Control -- Missouri Pacific Corp. and Missouri Pacific R.R., 366 I.C.C. 459 (1982), aff'd in part & remanded in part sub nom. Southern Pacific Transportation Co. v. ICC, 736 F.2d 708 (D.C. Cir. 1984), cert. denied, 469 U.S. 1208 (1985)
UP/SP	Finance Docket No. 32760, Union Pacific Corp., Union Pacific R.R., and Missouri Pacific R.R. -- Control and Merger -- Southern Pacific Rail Corp., Southern Pacific Transportation Co., St. Louis Southwestern Railway Co., SPCSL Corp., and The Denver and Rio Grand Western Co., Decision No. 44, served Aug. 12, 1996, appeal pending sub nom. Western Coal Traffic League v. Surface Transportation Board, No. 96-1373 (U.S. Court of Appeals for the District of Columbia Circuit)

UP/SP, Dec. No. 66	Finance Docket No. 32760, Union Pacific Corp., Union Pacific R.R., and Missouri Pacific R.R. -- Control and Merger -- Southern Pacific Rail Corp., Southern Pacific Transportation Co., St. Louis Southwestern Railway Co., SPCSL Corp., and The Denver and Rio Grand Western Co., Decision No. 66, served Dec. 31, 1996
UTU	United Transportation Union v. STB, 108 F.3d 1426 (D.C. Cir. 1997)
Western Resources	Western Resources, Inc. v. STB, 109 F.3d 782 (D.C. Cir. 1997)

TABLE OF CONVENTIONS

CONFIDENTIALITY CONVENTIONS

This document contains two classifications of material: highly confidential and public. All highly confidential material appears between sets of three brackets in the highly confidential version. In the public versions, highly confidential material has been redacted, but the three brackets remain to identify the existence of this material.

PAGE REFERENCES

In all cases, when reference is made to a particular page in a document that has been submitted to the Board under seal, reference is made to the highly confidential version of that document.

BRIEF OF NORFOLK SOUTHERN

Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively, "NS") submit this brief in support of the Railroad Control Application (CSX/NS-18 through 25) filed on June 23, 1997 (the "Application").[1] This brief will focus on issues and aspects of the transaction proposed by Applicants (the "Transaction") that are of principal relevance or concern to NS; the brief being filed by CSX Corporation and CSX Transportation, Inc. (collectively, "CSX") will address matters of principal relevance or concern to CSX.

INTRODUCTION AND SUMMARY

The Applicants seek the Board's approval for a Transaction the public benefits of which are manifest, widely recognized and largely undisputed. The improvements in rail service, the planned capital improvements to the rail systems and the tremendous increase in rail competition will spur economic development and enhance the ability of shippers throughout the Eastern United States to compete in the global marketplace.

Applicants submit that the case for speedy approval and implementation of the Transaction is compelling. Thousands of parties that are urging approval of the Transaction agree. These include the National Industrial Transportation League ("NITL"), the United Transportation Union ("UTU"), the Brotherhood of Locomotive Engineers ("BLE"), more than 100 railroads, the governors or transportation agencies of 10 states, and over 2200 shippers and groups representing shippers.

The remaining protestants claiming competitive or economic injury do not present substantial or difficult issues in this case. To the extent shippers and other parties have

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[1] Tables of Abbreviations and short case citation forms follow the Table of Authorities. Applicants' proposed findings and order are set forth in Appendix A. Deposition excerpts cited in this brief are set forth in Appendix B.

raised legitimate competitive and economic concerns, those have been reasonably addressed in the settlements Applicants have made with NITL and other parties.

The more substantial concerns that have been raised in this case relate to the manner in which Applicants will implement the Transaction and to the environmental effects of the Transaction on particular communities. NS and CSX take these concerns very seriously.

Concerns about implementation, which are largely service and safety related, have been reasonably addressed in the NITL Settlement and in the Safety Integration Plans (SIPs) that NS and CSX developed in consultation with the Department of Transportation ("DOT") and Federal Railroad Administration ("FRA"). In the NITL Settlement, NS and CSX have made extraordinary commitments relating to implementation of the Transaction, far beyond those made in any previous case. And, as DOT recently stated, the SIPs, which have also not been required in previous cases, fully and satisfactorily deal with the safety implementation issues that have been raised in this case.

Environmental issues are being addressed primarily in an environmental impact statement. Accordingly, unlike previous mergers, which only performed environmental assessments, the Board is not required to ensure that the Transaction will have no significant environmental effects. On an overall, systemwide basis, the Transaction will provide very substantial environmental benefits. In some communities, there will be decreases in train movements and in others there will be increases. The latter have prompted demands for mitigating conditions, including various operating restrictions and other conditions that would shift burdens to others and would substantially reduce, if not eliminate, the public benefits (including environmental benefits) of the Transaction. While NS and CSX are making every

effort to reach agreements with the affected communities that will reasonably resolve their concerns, it is unlikely that every demand for mitigation will be met. To the extent demands remain unmet, Applicants submit that it would not be reasonable to impose proposed environmental conditions on Applicants in light of the significant overall environmental benefits of the Transaction, the impacts to be mitigated, the other public benefits of the Transaction and the extent to which conditions sought would undermine those benefits and burden the rail system as a whole.

In sum, the Transaction is very much in the public interest, economically, competitively and environmentally, and should be approved without conditions except those set forth in the NITL Settlement and standard employee protective conditions.

BACKGROUND

A. The Transaction: A Unique Opportunity

Under the proposed Transaction, NS and CSX will divide between them the use and operation of most of the 10,500 miles of rail lines and other assets of Consolidated Rail Corporation ("CRC"), and each will integrate the operation of lines and assets allocated to it into its existing system. In addition, both NS and CSX will use and serve shippers on some 700 miles of lines to be retained by CRC in three Shared Assets Areas ("SAAs") -- North Jersey, South Jersey/Philadelphia and Detroit -- and CSX will have access to shippers on some 190 miles of lines to be allocated to NS in the coal fields served by the former Monongahela Railroad. The Transaction divides or shares CRC's principal routes in a way that will enable both NS and CSX to offer efficient and competing single-line service to

communities in the Northeast most of which, for more than 20 years, have had rail service from only one Class I railroad, CRC. In addition, the Transaction will result in two strong, far-reaching and very competitively balanced rail networks in the Eastern United States. After the Transaction, NS will operate 21,400 route miles and CSX will operate 23,100. CSX/NS-18 at 523.

Today, of the four main rail routes between the Northeast and the Midwest, CRC has three and CSX has one. After the Transaction, NS and CSX will each have two. CSX/NS-18 at 330. In addition, the Transaction divides CRC's east-west routes between CSX and NS in a way that ensures that neither carrier will be precluded from competing with the other in the major markets because of excessive circuity, and it also ensures that each will have adequate line and terminal capacity. Id. at 520-521.

Other enormous benefits of the Transaction include greatly expanded single line routes, increased competitiveness with trucks that will divert substantial traffic from highways to rail lines, associated environmental and safety benefits, and hundreds of millions of dollars of budgeted capital improvements. These largely undisputed benefits are detailed in the Application and discussed further in Part I of the Argument.

It could well have been otherwise. Conrail was created by Congress in 1976 out of the remains of the Penn Central and seven other bankrupt Northeast railroads. Despite their desires and best efforts, Congress, the Department of Transportation and the United States Railway Association were unable to devise multiple rail systems to replace Penn Central and the others that would be both competitive and financially viable. To ensure financial viability, they created a single railroad to serve most of the Northeast, CRC, leaving

additional competitive systems for another day if at all. CSX/NS-18 at 506-508. There was no particular reason, however, to believe that such systems would develop.

As the Board knows, the Transaction represents the culmination of a vigorous contest between NS and CSX for control of Conrail that lasted from mid-October 1996 to early March 1997. Though it cannot speak for CSX, NS believes that the outcome of that contest owes a great deal to the existing statutory and regulatory framework governing railroad consolidations. While that framework recognizes the parties' basic freedom to structure the transaction and battle out the terms in the open market, the statute's strong emphasis on competition, and the Board's known commitment to it, led to a result far more beneficial to the public than anyone could have hoped for at the outset.

In short, a fortunate confluence of circumstances presents the Board with by far the most pro-competitive railroad restructuring in history and a unique opportunity to do what Congress, DOT and others were unable to do after the collapse of Northeast railroads in the 1960s and 70s: to restore to the Northeast competitive rail service that will at the same time be efficient and financially viable.

B. Support for the Transaction: NITL and Other Settlements

Support for the Transaction is truly unprecedented. Almost every affected constituency supports it. That support says more about the merits of the Transaction than Applicants ever could. Over 2,700 letters of support were included with the Application, including letters from more than 2,200 shippers, 350 public officials and 80 railroads. CSX/NS-21, Volumes 4A through 4G. Since then, more than 300 additional parties, most notably NITL, UTU, BLE, NYSEG and 22 additional railroads, have filed statements of support.

Among those supporting the transaction are 10 states.[2] These include Pennsylvania (the home of Conrail), New Jersey and Maryland, which are among the states most directly affected by the Transaction.

In addition, opposition to the Transaction is extremely limited. Most notably, neither the Department of Justice nor the Department of Transportation opposes the Transaction. Although DOJ has expressed concerns about three isolated situations, it has acknowledged the new rail competition that the Transaction would create. DOJ-1 at 3. DOT's initial comments, filed on October 21, 1997, expressed concerns only about safety and implementation. More recently, DOT's very favorable comments on Applicants' SIPs and other steps to address safety, indicate that DOT's concerns in that regard are largely satisfied. The comments of DOJ and DOT in this case are in marked contrast to those they expressed in UP/SP.

The support for and lack of opposition to the Transaction reflect not only its merits but also Applicants' efforts to reach agreements with public agencies, shippers and other railroads to address their concerns. The Board, like the ICC have emphasized many times their preference for privately negotiated resolutions of disputes between railroads and the shippers and communities they serve over agency-imposed dictates.[3] Applicants have

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[2] The states whose Governor or Department of Transportation have issued statements supporting the transaction are: Alabama, Kentucky, Maryland, Michigan, Mississippi, New Jersey (press release), Pennsylvania, South Carolina, Virginia and West Virginia. In addition, letters of support have been received from other officials, agencies and legislatures of the following states: Alabama, Georgia, Indiana, Kentucky, Maryland, Michigan, Mississippi, Ohio, South Carolina, Tennessee and Virginia.

[3] See, e.g., BN/Santa Fe, Decision No. 40, 1995 ICC LEXIS 242, served Sept. 21, (continued...)

heeded that admonition and have reached agreements with numerous parties. These include agreements with 16 railroads, listed at CSX/NS-176 at 19. As a result of these agreements or other considerations, a number of parties that filed oppositions to the Transaction and/or requests for conditions filed by the following parties on October 21, 1997 have since withdrawn them. These include NITL, NYSEG, ACE, Delmarva Power and Light, UTU, BLE, Toledo-Lucas County Port Authority, Toledo Metropolitan Council of Governments, and the City of East Cleveland.

The number and scope of the settlement agreements bear witness to Applicants' efforts to satisfy legitimate concerns. In cases where settlements have not been reached, it is not for lack of trying but for lack of any proportionality between the protestants' settlement demands and the Transaction's impact and protestants' apparent hope to use the regulatory process to extract unrelated private benefits from Applicants. That strategy should not be rewarded.

The most noteworthy of these settlements is the agreement NS and CSX have reached with the nation's largest shipper trade association, NITL, on December 12, 1997. That agreement, which is set forth in full at CSX/NS-176 at 768-774, addresses the principal concerns raised by shippers and their representatives in this proceeding and resolves them in a reasonable way. The NITL Settlement includes the following provisions:

- Establishment of a Conrail Transaction Council to function as an ongoing forum for constructive dialogue among NS, CSX and shipper representatives regarding implementation planning and the implementation process.

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[3](...continued)
1995, at *15-*16; BN/Santa Fe, Decision No. 38, served Aug. 23, 1995, slip op. at 88; UP/MKT, 4 I.C.C.2d at 468; UP/MP/WP, 366 I.C.C. at 589.

- Commitments by NS and CSX to obtain all necessary labor implementing agreements and to have in place management information systems to manage operations on CRC lines in the SAAs, to manage interchanges between NS and CSX and having necessary car tracking capabilities before the date on which operation of CRC's lines will be divided between CSX and NS ("Closing Date").

- Conrail transportation contracts will be honored by NS and CSX and allocated between them pursuant to the Transaction Agreement; shippers that are not local to NS or CSX who are dissatisfied with service after six months may seek to change carriers through expedited arbitration.

- For shippers of more than 50 carloads a year on routes on which CRC now provides single-line service which will become interline NS/CSX routes post-Transaction, NS and CSX will, at the shipper's option, maintain existing CRC rates for three years (subject to RCAF-U adjustments).

- At all points where CRC now provides reciprocal switching, NS and CSX will keep those points open for at least 10 years and will cap their switching charges at such points for five years to no more that $250 per car (subject to RCAF-U adjustments), which in many cases is substantially less than CRC's current charge.

- The parties will jointly recommend that the Board require oversight of the implementation of the Transaction for a three-year period, with quarterly reports that will use objective, measurable standards to be developed and recommended by the Council.

These provisions go well beyond the traditional conditions that the Board and the ICC have imposed in previous consolidations. Applicants' agreement to undergo three years of Board oversight is all the more remarkable, inasmuch as the concerns raised about implementation have been largely generated by Western service problems following the UP/SP merger, yet these circumstances have no parallel in this Transaction. See CSX/NS-176 at 724-25 and pp. 47-48, infra. The fact that NITL opposed the UP/SP merger but (along with most other affected parties) supports this Transaction reflects the general recognition of the basic differences between the two transactions.

C. The Statutory Standards and Their Application to this Proceeding.

The statute governing the Board's decision in his case, 49 U.S.C. § 11324(c), provides:

> The Board shall approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest.

This statute reflects a long-standing national policy favoring railroad consolidations. That policy has its roots in the Transportation Act of 1920 (see Schwabacher v. United States, 334 U.S. at 191-92), and was reinforced in the Transportation Act of 1940, which was enacted "to facilitate merger and consolidation in the national transportation system." Marin County, 356 U.S. at 416. It was reaffirmed again in the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210 ("4R Act"), which was "intended to encourage mergers, consolidations, and joint use of facilities that tend to rationalize and improve the Nation's Rail system." S. Rep. No. 94-499, 94th Cong., 1st Sess. 20 (1975).

In determining whether a transaction is consistent with the public interest the Board is required by 49 U.S.C. § 11324(b) to consider five factors: (1) adequacy of transportation; (2) inclusion of other carriers; (3) total fixed charges; (4) rail carrier employees' interests; and (5) competition. In addition, the Board and ICC have held that the effects of the transaction on the environment will also be considered as part of the public interest determination. UP/SP at 218; BN/SF at 54.

In this case, the second and third factors are not at issue. No other railroad has requested inclusion and no party has disputed the ability of CSX and NS to cover their fixed

charges.[4] The only disputes concern the effects of the Transaction on the adequacy of transportation, railroad employees, rail competition and the environment. While a number of parties are still requesting conditions based in some fashion on those factors, in reality the disputes between Applicants and those parties are quite limited.

As to factor one, no party has seriously disputed the transportation efficiencies and improvements, the increased rail competition and the other public benefits that the Application shows the Transaction will bring about.[5] The asserted adverse effects on the adequacy of transportation to alleged adverse effects on other specific carriers. The Board and ICC, however, have long recognized that the public interest in competition and transportation efficiency is generally disserved by imposing restrictions or conditions on rail consolidations carriers. BN/Frisco, 360 I.C.C. at 951 (conditions are not warranted to protect competing railroads; such conditions generally harm shippers and competition.)

With respect to the effect on employees (factor four), UTU and BLE now support the Transaction. Furthermore, Applicants agree that the Board must impose New York Dock and other standard conditions to protect adversely affected employees, and the principal dispute with the remaining unions is whether the Board should find that this is an extraordinary transaction warranting more than those standard protections.

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[4] Although the responsive application filed by W&LE asks the Board "to reserve jurisdiction to entertain an inclusion petition should financial considerations make that necessary as an alternative to bankruptcy liquidation during the oversight period" (WLE-4 at 9), it has not filed an inclusion application, as the Board recognized in Decision No. 54.

[5] Some parties, such as CMA, have claimed that the benefits are not as great as Applicants say they will be, but even those parties do not deny that the Transaction will have a substantial positive effect on the adequacy of transportation throughout the region affected.

While some shipper interests argue that the Transaction will have adverse effects on rail competition (factor five) -- based mainly on arguments about vertical foreclosure that have been repeatedly rejected by the Board, the ICC and the courts, see pp. 22-23, infra -- virtually no railroads have made that claim. The two railroads whose requests for trackage rights and other conditions are of principal concern to NS -- the Wheeling and Lake Erie ("W&LE") and Ann Arbor ("AA") -- have not based those claims on an asserted need to preserve rail competition. Their claims are based instead on an asserted adverse impact on those railroads' revenues, and thus on a claimed -- but wholly unsupported (see pp. 29-35, infra) -- threat to essential transportation services.

Similarly, while a number of parties have complained about potential environmental effects of the Transaction at discrete locations (including alleged impacts on safety) and have requested conditions to mitigate them, no party has disputed the showing made in the Application, and acknowledged in the Draft Environmental Impact Statement (DEIS at ES-2), that, on a systemwide basis, the Transaction will have a positive environmental effect. In fact, Applicants have shown that the net overall environmental effects of the Transaction will be extremely positive, mainly (but by no means exclusively) as a result of the projected diversion of almost one million truckloads of traffic each year from the highways to the rails. CSX/NS-23 at 18-19. Those diversions will reduce fuel consumption, air pollution and highway congestion, as well as deaths and injuries by a highly predictable amount. CSX/NS-18 at 16; DEIS at B-14. Those diversions, as well as rerouting of traffic to achieve operating efficiencies, will necessarily result in increases in rail traffic on some line segments (and reductions on others), but even those areas with rail increases on line segments will

share in the beneficial effect of reduced highway traffic. In considering requests for conditions to mitigate specific local impacts, however, the Board must also consider the associated costs of such conditions, particularly the loss of the environmental, economic and other public benefits that led to those impacts. See pp. 43-46, infra.

D. The Standards For Imposing Conditions

49 U.S.C. § 11324(c), authorizes the Board to impose conditions. The Board's policy with respect to conditions has been well established and consistently applied for at least 20 years. That policy embodies the following principles and conclusions:

1. "[C]onditions generally tend to reduce the benefits of a consolidation." BN/SF at 55.

2. Conditions will therefore be imposed only on a clear showing that they are needed to remedy harms that are both transaction-related and significant. "To be granted, a condition must first address an effect of the transaction. We will not impose conditions 'to ameliorate longstanding problems which were not created by the merger,' nor will we impose conditions that 'are in no way related either directly or indirectly to the involved merger.'" Id. at 55-56.

3. Conditions "must also be narrowly tailored to remedy [the merger-related harm]." Accordingly, conditions will not be imposed "that would put its proponent in a better position than it occupied before the consolidation." Id. at 56.

4. "[C]onditions are not warranted to offset revenue losses by competitors." Id.

5. Conditions must be "operationally feasible" and must "produce public benefits (through reduction or elimination of the possible harm) outweighing any reduction of the public benefits produced by the merger." Id.

6. Conditions should not be imposed "that would broadly restructure the competitive balance among railroads with unpredictable effects." Id.

7. The fact that a consolidation results in competitive or other transportation benefits to some shippers but not to others is not a transaction-related harm to the latter for which conditions are warranted. UP/SP at 130 ("We will not

> impose a condition just because one group of shippers obtains pro-competitive merger benefits that other shippers do not enjoy.")

See also UP/SP at 144; UP/CNW at 97; UP/MKT at 437; UP/MP/WP at 562-565.

In addition, in considering requests for conditions, it is essential that the Board keep in mind the basic and paramount purpose for which Congress entrusted the Board and its predecessor with exclusive authority to review and approve railroad consolidations: to protect and promote the national interest in commerce and in a strong transportation system, often against the clamorous imprecations of competing local interests. That was the basic purpose for which the Transportation Act of 1920 first granted exclusive authority over rail consolidations to the ICC.[9] As Justice Jackson explained in Schwabacher, 334 U.S. at 191:

> [T]he stress and strain of World War I brought home to us that the railroads of the country did not function as a really national system of transportation. That crisis also made plain the confusions, inefficiencies, inadequacies and dangers to our national defense and economy flowing from the patchwork railroad pattern that local interests under local law had created.
>
> The demand for an integrated, efficient and coordinated system of rail transport, equal to the needs of our national economy and defense, resulted in the Transportation Act of 1920 . . . [That Act conferred on the ICC] the power and duty . . . regardless of state law, to control rate and capital structures, physical make-up and relations between carriers, in light of the public interest in an efficient national transportation system.

See also, State of Colorado v. United States, 271 U.S. 153, 164 (1926) (ICC's duty is to "prevent unjust preference to particular intrastate shippers or localities at the demonstrated expense of interstate commerce.") The fundamental duty of the Board to protect "the public interest in an efficient national transportation system" was reinforced in the ICCTA, which

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[9] See "National vs. State Regulation" in Gabriel Kolko, Railroads and Regulation (Princeton University Press, 1965, Norton ed. 1970), pp. 217-30 (Transportation Act of 1920 outgrowth in part of 1742 different state rail regulatory laws passed between 1902 and 1915).

specifically added to the factors the Board must consider in rail merger cases the effect on competition among rail carriers in "the national rail system." 49 U.S.C. § 11324(b)(5). This duty is pertinent to all of the requests for conditions in this case and particularly to the demands, often conflicting, of different localities in this case to reroute trains or impose operating restrictions or other exceedingly costly conditions to reduce the effect of Applicants' projected operations on those localities.

ARGUMENT

I. THE TRANSACTION WILL PRODUCE UNPRECEDENTED PUBLIC BENEFITS

There can be no question that the Transaction is consistent with the public interest and thus should be approved. The public benefits are enormous. The projected quantified public benefits, based on 1995 data, are almost $1 billion annually. CSX/NS-18 at 16. No party has disputed these projections. The quantified public benefits do not include the even greater non-quantified public benefits that will result from increased rail competition, diversion of traffic from the highways, increased economic development and global competitiveness, and hundreds of millions of additional dollars that NS and CSX plan to expend to improve the rail system in the Eastern United States. The quantified and unquantified public benefits include the following:

First, the Transaction will bring about an unprecedented increase in rail-to-rail competition without any reduction in competition elsewhere. Shippers in the SAAs, in the Monongahela coal fields and many other locations currently served by only one Class I

carrier will be gaining direct rail service by a second one.[7] Dr. Barry Harris, has estimated that more than $700 million in annual freight movements that are now rail-served solely by Conrail at origin or destination will have two independent and competitive routings after the Transaction. CSX/NS-19, Vol. 2B at 14-17.[8]

The Transaction will also bring about a tremendous increase in competition between railroads and other modes. NS and CSX have estimated that the expansion of direct single-line intermodal service throughout the new NS and CSX systems will divert million tons of freight annually from truck to rail, resulting in almost a million fewer truck trips per year. CSX/NS-19, Vol. 2A at 255; CSX/NS-19, Vol. 2B at 156; CSX/NS-23, Vol. 6A at 71.

The expansion of the NS and CSX systems will enable them to provide shippers far more extensive single-line service, more direct routes, more reliable service and improved equipment utilization. All of this will improve operating efficiency, reduce costs, cut transit times and terminal delays, and provide logistics savings to shippers associated with single-line service and the shift of traffic from highways to rail lines. The operating cost savings, logistics savings and other quantifiable public benefits will amount to nearly $1 billion for

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[7] These include shippers like ACE, which, presumably recognizing the competitive benefits it will obtain, has withdrawn the comments and request for conditions it filed in October.

[8] This estimate, of course, greatly understates the amount of traffic that will benefit competitively from the Transaction, since it does not include traffic that will continue to have direct service by only one Class I carrier after the Transaction (e.g., to or from a shipper in Boston, MA) but will still gain important competitive alternatives through improved joint line service by the other Class I carrier and smaller carriers, possible truck movements to nearby transload points on the other Class I carrier, and possible shifts of production to facilities served by the other Class I carrier. This estimate also does not reflect the qualitative enhancement of competition that will result from competition between two far-reaching and competitively balanced rail networks.

NS and CSX each year. CSX/NS-18 at 16, 592; CSX/NS-19 at 52. These transportation benefits will bring new economic development opportunities to the East and help industries served by the new systems to be more competitive in the global marketplace. CSX/NS-19, Vol. 2B at 248-56.

The operating efficiency gains and diversion of traffic from highways to rail lines will also yield substantial environmental benefits, as recognized in the DEIS. Because trucks on average require at least three times the amount of fuel as trains to move the same amount of freight the same distance, by the most conservative estimate the shift of traffic to the rails will cut diesel fuel consumption by 80 million gallons per year (DEIS at 3-1), improve overall air quality (id. at 4-70), and reduce the potential for accidental release of ozone-depleting materials (id. at 4-62).

The Transaction will yield similar safety benefits. NS is a recognized leader in safety in the railroad industry, having recently earned, for the eighth straight year, the prestigious E.H. Harriman Gold Award for employee safety. As the DEIS noted (DEIS at B8-1), NS and CSX had the lowest accident rates of all Class I railroads for the period 1994-1996. Applying either NS's or CSX's low accident rate to the new lines would reduce rail accidents by approximately 50 per year. CSX/NS-23, Vol. 6A at 75. Each year, the diversion of traffic from trucks to rails will prevent approximately 1600 highway accidents and 133 related personal injuries and save 31 lives. DEIS at B-14. Also, because trucks have ten times more hazardous materials incidents per ton mile of freight moved than do railroads (NS Comments on DEIS at 3-2), any diversion of hazardous materials from truck to rail will provide significant environmental and safety benefits. The total commitment of NS and CSX

to safety is reflected in their exemplary safety records and in the SIPs they developed in close consultation with FRA and submitted to the Board in December. DOT has said that "the Department is satisfied that the SIPs address and satisfactorily mitigate every safety concern raised in the environmental review portion of this proceeding." DOT-5 at 4.

The competitive benefits, operating efficiency gains and environmental and safety benefits will be achieved with no significant adverse competitive effects. The existing NS and CSX systems are largely end-to-end with the portions of Conrail that each will operate. In those few areas where customers would have gone from two to one, the Transaction Agreement preserves two-carrier service, through trackage rights or other arrangements. CSX/NS-19, Vol. 2A at 19; CSX/NS-19, Vol. 2B at 8.

The benefits will also be achieved with minimal line abandonments. NS anticipates only 29 miles of lines will be abandoned, and they will be lines that have little or no local traffic and where overhead traffic can be routed more efficiently over other lines. CSX/NS-20, Vol. 3B at 174-177; NS-28.[9/]

All of these benefits are largely undisputed. While a number of parties have claimed that the Transaction will have various adverse effects on them, none have challenged Applicants' projections of the public benefits or have seriously questioned the overall

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[9/] As stated in NS-28, NS has withdrawn the petition for exemption in Docket AB-290 (Sub-No. 195X) to abandon a 21-mile line between Dillon and Michigan City, IN. Also, NS has agreed with the Toledo-Lucus County Port Authority and Toledo Metropolitan Council of Governments to change the notice of exemption in Docket No. AB-290 (Sub-No. 197X) to abandon the Toledo Pivot Bridge to a notice of discontinuance.

competitive, environmental and safety benefits.[10] On the contrary, these are widely acknowledged. See CSX/NS-176 at 20-24. Indeed, impressive confirmation of the transportation and economic benefits of the Transaction is reflected in the recent decision of one of Applicants' principal Class I competitors, Canadian Pacific Railway ("CP"), to retain its St. Lawrence & Hudson Railway unit, which CP had indicated earlier last year it might sell. CP has now decided to retain a line that was apparently slated for oblivion, citing "new opportunities in the wake of the Conrail Inc. breakup."[11]

II. THE BOARD SHOULD NOT PERMIT CONTRACTUAL PROVISIONS TO THWART IMPLEMENTATION OF THE TRANSACTION.

The essence of the Transaction is that NS and CSX will divide (and in the case of SAAs, share) the operation and use of Conrail's entire system and all the rights and assets comprising it. Those assets include Conrail's rights and obligations under transportation contracts with shippers, as well as trackage rights over other carriers' lines, such as rights over New Jersey Transit lines between Suffern, NY and Hoboken, NJ, rights over the IHB in the Chicago area and rights over various Amtrak lines, including the Northeast Corridor ("NEC"), which Conrail has retained and used ever since it transferred those lines to Amtrak in 1976. CSX/NS-18 at 93-94, 217-224.

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[10] As we will discuss below, a number of parties have disputed the degree of the competitive benefits claimed by Applicants on the basis of arguments that, as to those parties, the transaction will reduce competition for various reasons, by, for example, not extending to them benefits extended to others; converting some movements from single-line to joint-line service; causing alleged vertical foreclosure of competitive options; and leading to shifts in gateways that will be less efficient and more costly. None of these parties, however, dispute the obvious pro-competitive effects of the overall Transaction.

[11] Wall Street Journal, December 8, 1997 at B4.

Because the Transaction could not be carried out otherwise, the Application asks the Board to declare that its approval of the Transaction "will permit CSXT and NSR to conduct operations over the routes of Conrail covered by Trackage Agreements . . . as fully and to the same extent as CRC could, notwithstanding any provisions in such Trackage Agreements purporting to limit or prohibit Conrail's unilateral assignment of its operating rights to another person." CSX/NS-18 at 102. The Application also requests a similar declaration with respect to other assets, including Conrail's transportation contracts. Id. at 102-103.

Several parties have contended that the Board cannot or should not permit NS and CSX to acquire Conrail's contractual rights, including trackage rights, without those parties' consent.[12] These contentions are incorrect. As the Board made clear in UP/SP, the Board's approval of a transaction under 49 U.S.C. § 11323 and 11324 overrides private contractual provisions, including those requiring consent to the assignment of trackage rights, where such overrides are necessary to permit the parties to carry out the approved transaction. UP/SP at 170 and n. 217; UP/SP, Dec. No. 66, 1996 STB LEXIS 356 at *21-22 (STB, Dec. 31, 1996). Because the Transaction simply could not be implemented unless all such consent requirements are overridden and because it is essential that there be no uncertainty about the scope of Applicants' operating rights post-Transaction, it is of the utmost importance that the Board's decision expressly reject these parties' contentions and grant the declaratory relief requested.

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[12] These parties include Amtrak (NRPC-7), CMA (CMA-10), APL (APL-4), the City of Indianapolis (CI-5), Eastman Kodak Company (EKC-2), the Gateway Western and Gateway Eastern Railways (GWWR-3), P&W (undesignated) and Redland Ohio, Inc. (Redland-2).

The Rebuttal refutes the arguments of each of these parties. CSX/NS-176 at 94-105. NS adds here only the following points regarding Amtrak's arguments concerning the assignment of CRC's rights on the NEC.

First, as Amtrak notes in its comments (NRPC-7 at 2), Amtrak and Applicants have been in discussions regarding Applicants' post-Transaction operations on Amtrak lines, and Amtrak expressly acknowledges that it "is anxious to maximize the efficient utilization of the Northeast Corridor by freight traffic that is compatible with Amtrak and commuter freight operations." Id. at 11.

Second, the Transaction will not adversely affect Amtrak's passenger operations. Amtrak will continue to control dispatching on the NEC, and Applicants' operations will continue to be subject to the operating agreement between Amtrak and Conrail, which, among other things, makes any requested changes in freight service subject to the "physical limitations of the NEC, to Amtrak's speed, weight, and similar operating restrictions and rules or safety standards, and to the needs of, and in particular to the adequacy, safety and efficiency of, Amtrak passenger train operations and commuter service."[13/] Indeed, Amtrak recently stated that it "agrees with SEA that Amtrak's ownership and control of the NEC is an important safeguard in ensuring that neither Amtrak nor commuter train service on the NEC will be harmed by the Acquisition." NRPC-11 at 4.

Third, although Amtrak asserts in a footnote that the Board lacks the authority to grant the override relief requested, it cites no authority and offers no reasons in support of

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13/ Second Amended and Restated Northeast Corridor Freight Operating Agreement, Dated October 1, 1986, Sections 2.3(b) and (c).

that claim. The claim, moreover, is squarely in conflict with the Supreme Court's decision in Norfolk and Western Ry. Co. v. American Train Dispatchers' Ass'n., 499 U.S. 117, 129-33 (1991), and with the Board's decision in UP/SP, which specifically held that § 11321(a) would override a consent requirement in a trackage rights agreement that would otherwise prevent the track user from assigning operating rights to another carrier as contemplated by the approved transaction. The Board ruled that earlier decisions to the contrary "did not survive the Supreme Court's 1991 Dispatchers decision, which made clear that the immunity provision may override contractual obligations." UP/SP at 170, n.217. Furthermore, there can be no question that such overrides are absolutely necessary to enable Applicants to carry out the Transaction; without them, not only the NEC but many other lines on which Conrail now operates could be unavailable to NS and CSX.

III. THE BOARD SHOULD DENY ALL REQUESTS FOR CONDITIONS OTHER THAN THOSE CONTAINED IN THE NITL SETTLEMENT.

Applicants' Rebuttal (CSX/NS-176 through 178) addresses in detail all of the requests for conditions and shows why all of them other than those contained in the NITL Settlement should be denied. Space does not permit them all to be discussed here. This brief will address those requests that are of principal concern to NS.

A. Conditions Based on Claims That Rail Competition Will Be Reduced.

Various parties have challenged the proposition that the Transaction will have no adverse effects on rail competition in two ways: First, some argue, contrary to well-settled economic principles and Board precedents, that shippers currently served at origin or destination by only one carrier will suffer reduced competition as a result of the vertical integration of that carrier with one of its joint-line connections. Second, several parties

claim that some shippers currently served by two carriers will lose effective service by one of them.[14]

Vertical Integration Claims. The argument that competition will be reduced through vertical integration has been refuted fully in the Rebuttal (CSX/NS-176 at 80-93; CSX/NS-177, Vol. 2A at 248-284) and need not detain the Board long. Significantly, one of the principal proponents of this argument, ACE, has since withdrawn its comments and request for conditions.[15]

The argument rests on contentions that repeatedly have been rejected by the Board, the ICC and the courts. The Board and the ICC consistently have recognized and applied the common-sense presumption that a railroad which is the sole carrier serving an origin or destination will seek to maximize its economic advantage in the rates that it charges, with the result that its combination with another railroad with which it interlines will not result in less competition or higher rates to the shipper. See, e.g., UP/SP at 119-20; BN/Santa Fe at 70-78, aff'd sub nom., Western Resources, Inc. v. STB, 109 F.3d 782, 787 (D.C. Cir. 1997); UP/MKT, 4 I.C.C. at 476; UP/MP/WP, 366 I.C.C. at 538. The Board, the ICC and the courts have made clear that this is a presumption that a shipper may overcome if it can

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[14] No party has made a claim that competition will be significantly reduced by the reduction of the number of carriers in a market from three to two. NS believes there would be no basis for any such claim in the facts of this case or in the Board's previous analyses of such claims. See, e.g., UP/SP at 119-20.

[15] The only parties that explicitly advanced this argument in their comments were ACE, Indianapolis Power & Light Company ("IP&L") and Orange and Rockland Utilities, Inc. See ACE et al.-18; ORU-3. Other parties suggested the same claim, but made no effort to support it with evidence or arguments. See, e.g., NECR-4 at 7; CMA-10 at 26-27; IC-5, Skelton VS at 6-7.

supply evidence clearly showing "that, prior to the merger, the benefits of origin competition flowed through to the [shipper] and were not captured by the destination monopoly . . . [and] that such a competitive flow through will be significantly curtailed by the merger." UP/MKT, 4 I.C.C.2d at 476.

As discussed in the Rebuttal, no party making this argument even attempts to supply the kind of evidence needed to overcome the presumption. Instead, IP&L and their consultants have attempted to refute the validity of the presumption itself. They have attempted to do so on the basis of arguments that have been specifically rejected by the Board and the ICC and on the basis of a patently fallacious analysis that compares Conrail rates for different coal movements between 1991 and 1995. CSX/NS-176 at 88-91; CSX/NS-177, Vol. 2A at 269-281 (Kalt RVS).[16] As the Board aptly observed in Decision No. 17 in this case, affirming the denial of a discovery request based on these arguments:

> [ACE et al.] are attempting to undermine more than the one-lump theory here. They are challenging a basic principle of economics, that firms will generally attempt to maximize their profits. This is the basic premise the ICC and Board have long applied, with court approval, when viewing competitive issues in assessing mergers: if carriers have additional market power, they will use it. Petitioners have not suggested a plausible rival economic theory to replace this one.

Decision No. 17 at 3.[17]

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[16] As Professor Kalt points out in his rebuttal verified statement, among the numerous errors in the analysis of Conrail coal rates is the fact that there is no "before" in the purported "before and after" analysis. Throughout the entire period examined, Conrail controlled both the origins and destinations involved. CSX/NS-177, Vol. 2A at 269-270.

[17] The court of appeals made much the same observation when it affirmed the ICC's views on the effects of vertical integration in the BN/SF case, stating: "It may not take a theory to beat a theory, but it helps." Western Resources, Inc. v. ICC, 109 F.3d at 790.

Two-to-one Claims. The only specific claims that the Transaction will have unremedied 2-to-1 effects with NS as the only remaining carrier are made by DOJ (Gibson Plant), AEP (Cardinal plant), and Ann Arbor Railway. None of these claims is correct.

With respect to the Gibson plant in Carol, Indiana, the plant's owner, PSI, has not complained or sought conditions, and DOJ's claim is based on an incorrect factual premise: that the plant has two-railroad access today. As shown in the Rebuttal, only NS has access to that plant. Conrail formerly provided service to that plant from one coal mine under a contract with PSI and via trackage rights over a four-mile segment of NS lines unconnected with any other Conrail lines, but Conrail's contract with PSI and its trackage rights on NS terminated contractually in 1996. Moreover, despite Conrail's limited service before 1996, there has been no meaningful competitive two-carrier access to the plant since at least 1981. CSX/NS-176 at 77-79; CSX/NS-177, Vol. 2A at 453-455.

AEP's 2-to-1 claim regarding its Cardinal plant on the Ohio River at Brilliant, Ohio, is equally groundless. In 1995, over 93% of the coal delivered to the plant was by river barge, and the rest was delivered by W&LE and by truck. AEP's professed concern is that W&LE "may not survive as a result of the proposed transaction" (AEP-5 at 2), and that if it does not, the plant will be reduced from two railroads to one. The first difficulty with this claim is that there is no basis for AEP's speculation that W&LE will not survive the Transaction (see pp. 32-33, infra). Second, Conrail has never served this plant, [[[

]]] Finally, any loss of rail service options would

have no significant competitive impact on the plant in any event, because more than 90% of its coal supply has been [[[ ]]] delivered by barge and truck. Id.

AA's 2-to-1 claims are also without merit and will be addressed at p[illegible], below. CSX will address in its brief the 2-to-1 claims asserting that CSX will be t[illegible] remaining carrier.

B. Conditions Seeking Changes to Existing Rules Governing Railroad Accounting and Maximum Rate Regulation.

Several shippers and shipper groups seek conditions that would reverse or alter, for NS and CSX alone, established rules governing railroad accounting and maximum rate regulation. These 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 market dominance and rate reasonableness determinations, and (3) impose an absolute rate cap for certain movements.

As discussed in detail in the Rebuttal, no justification whatever has been made for any of these conditions, which, if imposed, would amount to a significant reregulation of one part of the railroad industry -- NS and CSX -- contrary to consistent congressional policy since 1976. See CSX/NS-176 at 106-112, 736-767; CSX/NS-177, Vol.2A at 284-304, Vol. 2B at 648-724.

First, the arguments concerning acquisition costs proceed from the false premise that NS and CSX paid an excessive amount for Conrail, including some "premium" above its fair value. No party has submitted any evidence supporting such a claim, and it is ludicrous on its face to suppose that NS and CSX, through competitive bidding in the marketplace, paid

any more for Conrail than they believed it was worth. Accepting that premise, moreover, would require the Board to second-guess the marketplace. It would also fly in the face of any "fairness" finding which the Board is required to make in approving the Transaction.

Second, the requested condition that would preclude Applicants from including the full acquisition cost of Conrail in their accounts would conflict directly with long-standing accounting rules of the Board and with Generally Accepted Accounting Principles, which 49 U.S.C. § 11161 requires the Board to follow. It would also conflict with a decision of the ICC in 1990, which was supported by NITL and other shipper groups and upheld on judicial review, requiring railroads to use acquisition cost rather than pre-Transaction book value for purposes of revenue adequacy determinations.[18] Those rules and precedents are based on sound public policy. Furthermore, even if there were some reason to reconsider them, it is plainly inappropriate to do so here, in a proceeding that applies to only two railroads.

Third, the parties seeking conditions that would change the standards for determining market dominance for NS and CSX and that would impose permanent rate caps on various categories of traffic have simply made no plausible claim or showing that the requested conditions have any connection to any competitive harm caused by the transaction.

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[18] Railroad Revenue Adequacy -- 1988 Determination, 6 I.C.C.2d 933, 935-42 (1990), aff'd sub nom. Association of American Railroads v. ICC, 978 F.2d 737 (D.C. Cir. 1992). Although the ICC's decision addressed the use of acquisition cost for revenue adequacy purposes, its reasoning is fully applicable to jurisdictional threshold determinations as well, because both regulatory functions are based on the same financial accounting data prepared and submitted in accordance with the Uniform System of Accounts.

C. Conditions Seeking Enlargement of Joint Service Areas.

One aspect of this Transaction that makes it uniquely pro-competitive and will produce some of the chief public benefits is the agreement of CSX and NS to share the use of lines in three SAAs (North Jersey, South Jersey/Philadelphia and Detroit), give CSX access to lines in the Monongahela coal region in southwestern Pennsylvania and adjacent West Virginia, and provide capacity to CSX at Conrail's Lake Erie dock facility at Ashtabula, Ohio. Many shippers or their representatives outside those areas argue that the failure to include them causes competitive harm to them even though they will experience no reduction in the number of carriers serving them (and in most cases will gain significant new market opportunities through the expanded single-line service NS and CSX will be providing them). They have requested conditions that would effectively expand these areas to include them, such as trackage rights conditions or other conditions that would give them direct access to an additional carrier.

There is no merit to any of these requests, which are addressed in detail in the Rebuttal. See CSX/NS-176 at 113-176, 454-458. For very good reasons, the Board and the ICC have consistently held that the failure of a transaction to benefit all shippers equally is not a harm warranting imposition of conditions to mandate such universal equality. If it were, no consolidation having competitive, efficiency and other public benefits would ever occur, contrary to longstanding national policy. As the Board said in UP/SP at 130: "We will not impose a condition just because one group of shippers obtains pro-competitive merger benefits that other shippers do not enjoy." See also UP/SP at 183, 190; [illegible] at 38-39, 98-100; UP/MKT, 4 I.C.C. at 469.

D. Conditions Seeking Prescription of Switching Charges.

Several parties seek conditions that would prescribe or otherwise restrict post-Transaction switching charges. These are listed and discussed in the Rebuttal at CSX/NS-176 at 208-219. The requests share these features in common: first, none explains what Transaction-related harm the request is intended to redress (because, in fact, there is none); and second, none provides any evidence that would support the prescription of any specific charge or a uniform charge throughout the post-Transaction NS and CSX systems.[19] In short, there is no basis for these requested conditions. Furthermore, shippers' concerns with post-Transaction switching charges have been reasonably addressed in the NITL Settlement, in which NS and CSX have agreed for 10 years to keep open to reciprocal switching all points where Conrail now provides reciprocal switching and to cap switching charges at such points for five years at $250 (subject to annual RCAF-U adjustment), which is substantially below Conrail's current charge at many points.

E. Conditions Sought By Passenger Entities.

A number of passenger agencies and other parties with an interest in passenger agencies have requested a variety of conditions. These are addressed in detail in the Rebuttal, which shows them to be unrelated to any Transaction-related harm and unwarranted

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[19] There is no basis whatever for the reliance by several parties on the UP/SP decision in support of their requested $130 switching fee cap. The Board did not prescribe a $130 switch fee in that case; it merely accepted a charge that the applicants in that case negotiated with CMA in a private, arms-length negotiation. What applicants were willing to agree to in that case with its unique facts (including overlapping rail lines) in an agreement containing many other provisions obviously has no bearing on what the appropriate or legally required switch charges might be at hundreds of other locations in a different part of the country two years later.

for other reasons as well. We will not repeat that discussion here, except to note that Applicants are still striving to reach a settlement with Amtrak, and have reached agreement with NJ/DOT and Chicago Metra.

F. Conditions Requested By Railroads.

As noted earlier, over 100 freight railroads have filed statements supporting the Transaction. Several others have requested conditions. Two of particular concern to NS are discussed here: the requests of the Wheeling and Lake Erie Railroad ("W&LE") and of the Ann Arbor Railway Company ("AA").

1. The Wheeling and Lake Erie. Based on its claim that the Transaction will cause it to lose $12.7 million in annual gross revenue, W&LE seeks an extensive list of trackage and haulage rights and other conditions.[20] The contentions supporting these requests are refuted in detail in Applicants' Rebuttal. The following points warrant emphasis here.

First, while Applicants have shown that W&LE's claims regarding the Transaction's impact on W&LE's traffic and revenues are greatly overstated, there is a more fundamental deficiency in W&LE's request for conditions. The request is based entirely on an asserted threat to essential transportation services, yet W&LE has made no showing whatever that essential services are likely to be lost even if it were to go out of business.

The Board's railroad merger policy and many decisions applying it make clear that the Board will impose trackage rights or other conditions only where they are shown to be

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[20] If the Board does not grant W&LE's other conditions, W&LE asks the Board to retain jurisdiction to consider inclusion in the case of a W&LE bankruptcy. WLE-7, Parsons RVS at 5.

necessary to prevent a reduction of competition or harm to essential services, not just to protect competitors. 49 C.F.R. § 1180.1(c)(2); UP/MP/WP at 562; UP/MKT at 460. In the absence of such a showing, imposing conditions to protect the traffic and revenues of other railroads is not only unwarranted, it is likely to be positively harmful to competition and service to shippers. As the ICC stated in BN/Frisco:

> [R]ailroads do not have a proprietary right in the future to the traffic they have carried in the past. Therefore, we need not protect railroads from the possible loss of traffic through diversion to a merged railroad. On the contrary, protecting competing railroads tends to limit a shipper's ability to obtain the best service from the merged company and dampens the incentives for competitive response to the merged company from existing railroads. While a shift in traffic from one line to another may eliminate the need for service over the original line, this simply demonstrates that the earlier service is no longer essential. The consignor or consignee has the ability to determine, and in most instances does determine, which railroad will receive which traffic over specific routes.

BN/Frisco at 951 (emphasis supplied). In this case, Applicants have specifically demonstrated that imposition of the W&LE conditions would result in serious operational harms. CSX/NS-176 at 405-06; CSX/NS-177, Vol 2A at 127-63; CSX/NS-177, Vol. 2A at 529-40.

W&LE does not contend that any of the conditions it seeks are needed to remedy any claimed loss of rail competition resulting from the Transaction. When asked in discovery to identify the competitive harm to which each of its conditions related, W&LE stated that a special study would be needed to do so and that its requested conditions "are addressed to the cumulative impact of the expected diversions from W&LE which would render it incapable of providing competitive service to its shippers."[21] If the requested conditions are not

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[21] Interrogatory Response, W&LE-6 at 5. Although Mr. Parsons stated in his initial (continued...)

sought to remedy any identified competitive harm, they can be justified only if shown to be necessary to prevent the loss of essential services.

W&LE, however, has failed completely to satisfy the showing required by the Board's policy and precedents to establish a likely loss of essential services. The Board's rail merger policy provides:

> In assessing the probable impacts [of consolidations], the Board's concern is the preservation of essential services, not the survival of particular carriers. A service is essential if there is a sufficient public need for the service and adequate alternative transportation is not available.

49 C.F.R. § 1180.1(c)(2)(ii) (emphasis supplied). See also, UP/MKT at 431. Neither W&LE nor any of its supporting shippers contends, or even suggests, that adequate alternative transportation would be unavailable to them if W&LE went out of business. Most of W&LE's major customers are also served by other rail carriers, and all of W&LE's primary loads are near other railroads. CSX/NS-176 at 402-403. Indeed, W&LE has conceded that rail service can be expected to continue on its system even if it were to go into bankruptcy.[22] Nor have any shippers suggested that service by trucks or other modes

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[21] (...continued)
verified statement that Reserve Iron & Metal was a "2-to-1" shipper which W&LE was seeking trackage rights to serve, no such request was included in the list of requested conditions set forth in Mr. Wait's statement and no operating plan was presented with respect to it. Applicants' Rebuttal also shows that Reserve Iron and Metal is not a 2-to-1 shipper (CSX/NS-177, Vol 2B at 495), and W&LE's rebuttal does not dispute this showing.

[22] "W&LE does not argue that all rail service would close if it entered bankruptcy. Service under directed service order, or by NS if inclusion is ordered, would have different characteristics than that now provided by W&LE which has been endorsed by its supporting shippers in W&LE-4." WLE-6 at 5. See also, WLE-7 at 9 (asserting that Applicants want W&LE to fail so Applicants can serve W&LE shippers) and the analysis of the Ohio Rail Development Commission, included in WLE-7, which discusses the rail options W&LE shippers would have in the event of a W&LE bankruptcy.

would not be an adequate available alternative to them. See Central Vermont Ry. v. ICC, 711 F.2d 331 (D.C. Cir. 1983) (affirming ICC's conclusion that railroad had not shown its services were essential because it had not shown that its traffic could not be adequately served by other routes or by truck). See also UP/MKT, 4 I.C.C. at 474.[23]

In view of W&LE's complete failure to make the showing necessary to establish a loss of essential services, the Board need not ponder at length W&LE's greatly overstated claims about the Transaction's impact on it. The traffic diversion studies in the Application, performed by highly experienced outside consultants and based on calendar year 1995 revenue data (as required in this proceeding), showed a net annual revenue loss to W&LE of $1.4 million. W&LE's diversion study, performed by its Vice President Marketing and Sales and based on 1996 fiscal year data, claimed to show a revenue loss to W&LE of $12.7 million. NS's traffic witness, John Williams, shows that W&LE's claims were dramatically overstated and that even under the 1996 data used by W&LE, the diversions to NS would only be $2.0 million per year. CSX/NS-177, Vol 2B at 770-788. The Rebuttal also shows that W&LE's claims regarding W&LE's history and NS's post-Transaction market dominance are erroneous and that any financial difficulties W&LE may be having are the result of long-standing structural problems entirely unrelated to the Transaction. CSX/NS-

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[23] W&LE's discussion of "essential services" plainly misunderstands the term as used in the Board's policy and precedents. In arguing that its services are "essential," W&LE points repeatedly to statements from supporting shippers lauding the W&LE's quality of service and favorably contrasting W&LE's level of interest in their business to that of one or more of the Class I carriers. See, e.g., W&LE-7 at 25-26. Testimonials by shippers to the quality of a carrier's services do not establish that adequate transportation alternatives are not available to the shippers.

176 at 395-401. W&LE's Reply (WLE-7) provides new evidence or convincing arguments to refute this.[24]

2. Ann Arbor Railway. AA, which operates a 46-mile line between Ann Arbor, MI, and Toledo, OH, seeks trackage rights between Toledo and Chicago. It advances two arguments in support of this request: First, AA claims that the Transaction will cause it to lose approximately $3.35 million in annual gross revenue, compelling it to reduce services and forcing some of AA's shippers to turn to other transportation modes, which AA contends amounts to a loss of essential services. AA-5 at 8. Second, AA claims that the Toledo to Chicago rail corridor is a "2-to-1 corridor," and that trackage rights to AA would preserve two-carrier competition. Both Applicants' Rebuttal and AA's own testimony clearly demonstrate that these two claims are groundless.[25]

First, like W&LE, AA has failed completely to show that the Transaction's impact on AA will result in the loss of any essential transportation services. Although AA says that there are 10 active shippers on its line, it makes no claim that any of them would lose

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[24] For example, $3.6 million of W&LE's claimed traffic diversions relate to an NS/W&LE intermodal train that ran for a few weeks in early 1997. Mr. Williams cited evidence that the train was canceled by NS for reasons unrelated to the Transaction; namely, seriously inadequate on-time performance by W&LE. CSX/NS-177, Vol. 2B at 393. In its reply, W&LE blames NS for the delays, but offers no evidence that the cancellation of the train had anything to do with the Transaction. WLE-7 at 29-30. Another $1.8 million of W&LE's claimed diversions relate to the expiration of a short-term lease of NS's portion of Huron Dock. Although W&LE agrees with Mr. Williams that non-renewal of the lease is reasonable, it argues without evidence that it is Transaction-related. Id. at 30.

[25] In addition to its trackage rights request, AA also asked the Board to let it interchange with CN in Ann Arbor, Michigan to "recoup its projected revenue losses." AA-5 at 7. In Rebuttal, Applicants demonstrated this to be unworkable given the nature of CN's rights in Ann Arbor. CSX/NS-176 at 341. On reply, AA seems to have abandoned this requested condition by failing to submit any evidence to the contrary. AA-7.

essential transportation services if AA went out of business, and none of those shippers have submitted any statement making that claim.[26/]

Second, although AA claims gross revenue losses, it has submitted no evidence regarding the effect of the purported diversions on net revenues, and thus on the ability of AA to continue service.[27/]

Third, AA's claims regarding the impact of the Transaction on its gross revenues are greatly overstated, as Applicants show in the Rebuttal.[28/] Furthermore, since the Rebuttal was filed, AA has conceded that Chrysler Corporation will move a second automobile assembly plant next to AA's Ottawa Yard in Toledo, [[[

[26/] AA president Evert Erickson makes the conclusory allegation that several of those shippers "would be adversely impacted by the reduction or elimination of rail service," AA-5, Erickson VS at 7 (emphasis added), but he does not show that AA's demise would leave those shippers without adequate alternative rail or motor carrier service. Indeed, AA's argument that an increase in its costs would cause its customers to "switch to other transportation modes" (AA-5 at 8) clearly suggests that alternative transportation is available to them. As the court held in Central Vermont Ry. v. ICC, 711 F.2d at 338, this agency has properly put the burden on the party seeking conditions to demonstrate that the loss of its service will leave shippers without adequate transportation alternatives. AA has failed to meet that burden.

[27/] While AA does claim that "[t]he estimated revenue losses would force AA to cover its fixed costs from a declining traffic base thereby increasing its per unit cost which would have to be passed on to its remaining customers," AA submits no evidence on the level of fixed costs nor financial pro formas showing the effects of the loss on AA's balance sheets. AA-5 at 8; see also, AA-5, Erickson VS at 6-7 (same).

[28/] CSX-NS-176 at 339-341; CSX/NS-177, Vol. 2A at 355-364; CSX/NS-177, Vol. 2B at 792-799.

]]][29]

AA's claim that the corridor between Toledo and Chicago will become a "2-to-1 corridor" served only by NS is demonstrably false. CSX's high-speed route between Toledo and Chicago provides a competitive alternative to the route NS will operate post-Transaction. CSX/NS-176 at 341; CSX/NS-177, Vol 2A at 356-57. AA claims that the "use of [this] CSX routing would add additional circuity to any AA traffic moving between Toledo and Chicago," implying that the circuity eliminates that route as a viable Toledo-to-Chicago option. AA-5 at 12. AA fails to inform the Board, and only admitted upon cross-examination in deposition, that the CSX high-speed route is only "between 15 and 25" miles longer than the NS route -- less than 10 percent of the NS rail miles between Toledo and Chicago. Erickson Tr. at 6-7.

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[29] Mr. Erickson's recent deposition testimony about [[[ ]]] and other matters contradicts his rebuttal verified statement in a number of significant respects. For example, Erickson admitted that [[[

]]], Erickson Tr. at 17, but in his rebuttal verified statement he argued that NS' witness "Mr. Williams ignores the fact that there are two Chrysler plants in Toledo and only one is adjacent to AA's Ottawa Yard," and further argued that because "the drayage distance to CSXT's Walbridge Yard is about 13 miles . . . AA enjoys no competitive advantage from being located closer to one of Chrysler's plants as Mr. Williams suggests." AA-7, Erickson RVS at 8. Erickson also admitted that the CSX high-speed route from Toledo to Chicago is only 15 to 25 miles longer than the CRC route NS will operate after implying in his rebuttal verified statement that NS' witnesses statements to the same effect were incorrect. AA-7, Erickson RVS at 8, Erickson Tr. at 6-7. Other examples include Erickson RVS at 6 (switching charges); Erickson Tr. at 4-5 (same); AA-7, Erickson RVS at 7 (effect of the new Chrysler contract); Erickson Tr. at 17 (same).

G. Conditions Requested By Coal Shippers.

The Transaction will provide very significant benefits to shippers and receivers of coal by virtue of expanded single-line service, new market opportunities, shorter and more efficient routes, and new competition between CSX and NS for service to shippers in SAAs and in the Monongahela coal region.[30] These benefits are recognized by a number of utilities and coal producers that support the Transaction,[31] or have withdrawn their requests for condition, such as ACE. Several utilities and other producers, however, continue to request conditions based on the same types of arguments as those already discussed. Those that will be served by NS after the Transaction are AEP (whose contentions regarding its Cardinal plant were discussed earlier), Eighty Four Mining Company ("EFM") and Detroit Edison.

EFM claims that it will be harmed because its competitors in the Monongahela region will gain access to a second carrier and it will not. As noted, however, it is well settled that this is not a harm for which conditions will be imposed. Furthermore, EFM will not in fact be harmed by the Transaction but will be significantly benefitted. CSX/NS-176 at 456-458; CSX/NS-177, Vol. 2A at 119-123.[32]

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[30] CSX/NS-19, Vol.2A at 313-349 (Sansom VS), 347-379 (Sharp VS); Vol. 2B at 261-282 (Fox VS).

[31] These include Pennsylvania Power and Light, Delmarva Power and Light, Ohio Valley Coal Company and NYSEG.

[32] A.T. Massey Coal Company expresses the same concern as EFM about competitive harms, but says only that it may be harmed at some point in the future and asks the Board to retain jurisdiction to impose conditions if its concerns materialize. ATCM-2 at 4-5. There is likewise plainly no basis for this request.

Detroit Edison seeks trackage rights for CN to gain access to Detroit Edison's Trenton Channel plant. The plant is now served only by Conrail, and after the Transaction both NS and CSX will be able to serve it. Detroit Edison's argument that the Board should require Applicants to give a third carrier access to the plant is patently groundless.

H. Conditions Requested By Parties That Will Receive Joint Line Service.

The division of Conrail's operations between NS and CSX, which will greatly increase both rail service and rail competition throughout the Northeast, will also necessarily create some situations where current single-line service will become joint-line service. The magnitude of these is relatively small. Applicants have shown that more than six times as many current joint-line movements will become single-line as the number of current single-line movements that will become joint-line. CSX/NS-18 at 550; CSX/NS-19, Vol 2B at 68. Many shippers in these circumstances will also be gaining access to more, much larger, single-line markets. These include shippers of aggregates like Martin Marrietta Materials (MMM), National Lime and Stone Company and Wyandot Dolomite, Inc., all of whom seek conditions based on their loss of single-line service for some of their current moves. CSX/NS-176 at 500-510.

While there is no question that single-line service is generally more efficient and superior to joint-line service, the division of a single-line route between two railroads to create a joint-line route causes no reduction in competition or loss of essential services and therefore does not warrant protective conditions. As noted, many of the shippers who will lose single-line routes will gain other single-line routes and market opportunities they did not previously have. Also, contrary to the claim of MMM, competitive joint-line movement of

aggregates are feasible and are now being provided. Id. at 502; CSX-NS-177, Vol. 2B at 495-496.

Although this circumstance does not warrant mandated conditions, NITL has nevertheless negotiated significant benefits for these shippers in the NITL Settlement. NS and CSX have agreed with NITL to maintain existing Conrail rates for three years for shippers of more than 50 carloads a year on all routes that will become interline NS/CSX routes post-Transaction. This provides a reasonable transition period for shippers to adjust to the changes in the Eastern rail infrastructure and take advantage of the new marketing opportunities created by the Transaction.

I. Employee Protective Conditions.

Approval of the Application, subject to the Board's standard employee protective conditions, is consistent with the public interest and the Board's mandate under the ICA. UTU and BLE, which represent all of the carriers' train and engine service employees (a total of 38 and 44 percent of the agreement employees on Conrail and NS, respectively), support the Transaction.[33] Other labor unions have filed opposing comments, but none has shown a reason for the Board to depart from the settled principles governing employee protection in railroad consolidations.

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[33] UTU's notice of its support for the Transaction (UTU-6) explained that the carriers and UTU have agreed to certain terms for application of New York Dock benefits and procedures. The carriers have committed to those terms; there is no need for the Board to impose them as conditions. UP/SP, at 171 n.218. By letter dated February 18, 1998, BLE advised the Board that it has withdrawn its opposition to the Application and furnished a copy of a separate letter agreement of the same date similarly addressing terms for application of the New York Dock conditions and expressing BLE's support for the Transaction.

For its size and scope, the Transaction will have a relatively modest impact on employees. Across the applicants' three systems, the Transaction is expected to produce a short term net loss of 1,981 agreement and nonagreement jobs (Labor Impact Exhibit (1996-97 Head Count) at 13 (attached to CSX/NS-26)), far fewer than the numbers of job losses projected for other recent railroad consolidations found to be in the public interest.[34] More to the point, all of the projected employee impacts are the result of workforce changes that will "lead to increased efficiency" of railroad operations, a "goal to be encouraged," UP/MKT, 4 I.C.C.2d at 511. The carriers anticipate that the improved operations will permit them to increase their traffic, and that most of the agreement employees who will be furloughed from their current positions will be offered employment within three years. CSX/NS-177 at 2. In the meantime, those employees will receive monetary benefits in accordance with mandatory employee protective conditions.

The Board's standard employee protective conditions, including the New York Dock conditions, are appropriate to the Transaction. The New York Dock conditions afford extraordinarily generous monetary benefits, including up to six years' wage protection, to employees who are adversely affected as a result of the implementation of the transaction. The New York Dock benefits may be without parallel in any other industry. The ICC and the Board have consistently imposed the New York Dock conditions, without modification, in

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[34] UP/SP, at 171-72 (projected net loss of 3,387 jobs; "Mergers of necessity involve employee dislocations and the labor protective conditions that we impose are to mitigate these dislocations."); BN/SF, at 46 n.69 (projected net loss of 2,761 jobs).

all the major railroad consolidations approved in the last two decades.[35] No "unusual circumstances" exist within the meaning of Railroad Consolidation Procedures, 363 I.C.C. 784, 793 (1981), that would require even greater levels of protection here.

Nearly all of the rail labor commentors in this proceeding acknowledge that the Board's standard employee protective conditions are appropriate to the Transaction. Only the Transportation Communications International Union ("TCU") asks the Board to enhance the New York Dock benefits. TCU-6 at 7. We addressed TCU's requests at length in our Rebuttal (CSX/NS-176 at 591-600). As we showed (id. at 594-600), TCU's contention that Conrail's current employees deserve lifetime ("attrition") protection based on asserted past sacrifices of rail labor has no basis in fact, logic, or policy. TCU's other requested enhancements -- protection against relocation and increased severance benefits -- also would contravene Board policy by substantially impairing the carriers' ability efficiently to implement the proposed transaction. The ICC and the Board consistently have rejected requests for such enhanced benefits,[36] and the Board should do the same here.[37]

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[35] UP/SP, at 172; UP/CNW, at 95; BN/SF, at 80; Rio Grande/SP, 4 I.C.C.2d at 953-54; NW/ Southern, 366 I.C.C. at 230; UP/MP, 366 I.C.C. at 620; CSX Control, 363 I.C.C. at 589.

[36] E.g., BN/SF at 80 ("Attrition-type conditions are calculated to preserve unnecessary jobs, and unduly restrict a carrier's ability to establish economical operations."); UP/CNW, at 96 (same); UP/MKT, 4 I.C.C.2d at 510-11 (rejecting various requested modifications, including changes in formula for calculation of monetary benefits); Rio Grande/SP, 4 I.C.C.2d at 953-54 (rejecting enhancements on ground, inter alia, that requested modifications would impede efficient operational implementation); NW/Southern, 366 I.C.C. at 230-31 (denying unions' requests for protections against relocation, additional relocation benefits, and extended protective period).

[37] UTU "has reserved its right to maintain its position" that employee protective conditions should be extended to employees of Delaware and Hudson Railway Company, Inc. (continued...)

The New York Dock conditions also provide the appropriate mechanism for implementing the Transaction and for invoking the Board's settled authority to modify labor agreements as necessary to implement authorized transactions. E.g., UTU v. STB, 108 F.3d 1425 (D.C. Cir. 1997). New York Dock's mandatory and assured arbitration mechanism enables carriers to implement the "operational aspects of the transaction" "without the need to apply to . . . labor unions" for "authority to do so." UP/MKT, 4 I.C.C.2d at 514.[38]

The need for an expeditious implementation mechanism is particularly compelling in this case by reason of the unique structure of the Transaction, which will allocate the operations of a single carrier into three parts. It would not be possible for NS to operate its allocated Conrail properties under Conrail's existing labor agreements, which provide for the operation of a single integrated railroad by employees of a single carrier. For example, the properties that NS will operate include fragments of a number of Conrail maintenance of way and signal seniority territories. If NS were required to "preserve" the scope and seniority rights in Conrail's current labor agreements, line maintenance, signal, and production work

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[37](...continued)
("D&H"), a nonapplicant. UTU-6 at 1 n.1. As we showed previously (CSX/NS-176 at 600-02), nothing in the circumstances faced by the D&H employees justifies departing from the longstanding rule that the protective conditions do not extend to employees of nonapplicant carriers.

[38] Congress has ratified this interpretation of the ICA. In the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, Congress eliminated the Board's authority to modify labor agreements in certain smaller transactions, but reenacted without substantive change the statutory provision governing imposition of employee protective conditions in major railroad transactions (§ 11326(a)). See, e.g., NLRB v. Bell Aerospace Co., 416 U.S. 267, 275 (1974) (when Congress, aware of the "longstanding interpretation placed on a statute by an agency charged with its administration," reenacts the statute "without pertinent change," it is "persuasive evidence that the [agency's] interpretation is the one intended by Congress.").

forces and their equipment would be confined to those fragmented territories, creating tremendous operating inefficiencies directly at odds with the purposes of the Transaction.[39]

NS proposes to achieve the transportation benefits described in its Operating Plan by operating NS' allocated Conrail properties as part of an integrated NS system under labor agreements currently in effect on NS properties. NS has set forth its proposals in Appendix A, and it has elaborated on the necessity for its proposals in its Rebuttal and supporting testimony. In accordance with the New York Dock procedures, NS will attempt to reach voluntary implementing agreements with the representatives of affected employees and, if necessary, will seek appropriate agreements in Article I, § 4 arbitration.

The unions remaining in the ARU attack the established ICA framework by asking the Board to declare that NS' implementing proposals cannot be achieved under New York Dock, but only through the protracted procedures of Railway Labor Act collective bargaining.[40] The ARU position is a denial of settled law, based on a long discredited view that the ICA and the New York Dock conditions (Article I, § 2) require the preservation of all "rates of pay, rules, and working conditions" in addition to "rights, privileges, and benefits." ARU-23 at 8, 85-95. As we showed previously (CSX/NS-176 at 639-51), the interpretation urged by the ARU has been definitively rejected in a line of cases

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[39] TCU incorrectly contends (TCU-6 at 19-21) that NS is proposing to deny former Conrail employees benefits under Conrail's Supplemental Unemployment Benefits ("SUB") Plan. NS recognizes that Conrail employees will have the right to elect coverage under the SUB Plan in accordance with Article I, § 3 of New York Dock. CSX/NS-176 at 603.

[40] BLE, one of the two largest ARU organizations, has withdrawn its opposition to the Transaction and has agreed to follow the New York Dock process on an expedited basis.

confirming the Board's authority to modify labor agreements, including rates of pay, rules, and working conditions.

The ARU contention that the carriers should be required to implement "staffing changes" under the RLA-based Washington Job Protection Agreement ("WJPA") (ARU-23 at 101-02) is equally misguided. The ICC held long ago that implementation of authorized transactions occurs exclusively through the protective conditions imposed under the ICA, not through WJPA. Southern Ry.--Control--Central of Georgia Ry., 331 I.C.C. 151 (1967); see also CSX/NS-176, § XVIII(D). The WJPA, unlike New York Dock, does not provide an expeditious mechanism for obtaining implementing agreements. See CSX/NS-176 at 625-26.[41]

J. Environmental Conditions.

The Board's Section of Environmental Analysis ("SEA") has undertaken an exhaustive environmental review of the Transaction and the Board will, for the first time, issue an Environmental Impact Statement ("EIS") with respect to a railroad consolidation proceeding. The December 12, 1997 Draft EIS ("DEIS") concludes, correctly, that the Transaction will produce substantial systemwide environmental benefits in several respects and will not create any systemwide significant adverse environmental impacts. Nevertheless, the DEIS suggests that a variety of conditions may be imposed on Applicants in order to mitigate certain

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[41] Contrary to the United Railway Supervisors Association's contentions (URSA-3 at 5), the Board's approval of the Application will not dictate representational determinations or otherwise interfere with the jurisdiction of the National Mediation Board ("NMB"). As the Board recently confirmed (Soo Line R.R.--Petition for Declaratory Order, Finance Docket No. 33350, served February 4, 1998, slip op. at 11 n.14), the effect of a Board-approved transaction on employee representation is a question exclusively for the NMB. See CSX/NS-176 at 681-83.

localized adverse effects, and a number of parties have filed comments in this proceeding and in response to the DEIS requesting the imposition of mitigating conditions. NS addressed the issue of mitigating conditions at length in its February 2, 1997 Comments on the DEIS. The following points bear emphasis here:

In deciding whether to impose any conditions, including environmental mitigation conditions, the Board must weigh and balance all considerations relevant to its ultimate public interest determination. These include not only specific adverse environmental effects, but also the positive environmental effects and the positive economic, transportation and other public benefits of the Transaction. The fundamental command of the National Environmental Policy Act, 42 U.S.C. § 4321, is that federal agencies must take a "hard look" at potential environmental impacts associated with the exercise of federal regulatory functions, but there is no corresponding mandate to mitigate such impacts. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349, 352-53 (1989). In choosing a course of action, the agency must weigh positive environmental effects against adverse environmental effects and must balance environmental factors against other relevant legal or policy considerations bearing on the propriety of the proposed action. Id. at 350. Indeed, the basic purpose of NEPA is to require a federal agency to "balance a project's economic benefits against its adverse environmental impacts." Hughes River Watershed Conservancy v. Glickman, 81 F.3d 437, 446 (4th Cir. 1996). The intent of NEPA is not to "elevate

environmental concerns over other appropriate considerations" before the agency. Baltimore Gas and Electric Co. v. Natural Resources Defense Council, 462 U.S. 87, 97 (1983).[42]

In light of these principles, proposals made in the DEIS or by other parties for operating and service restrictions are particularly inappropriate. The significant economic and environmental benefits that will result from the Transaction can be fully realized only if Applicants are permitted to implement the operating plans on which such benefits are predicated. As discussed more fully in NS' Comments on the DEIS (at Section 2.5), restrictions on the number of trains that may be operated over a particular section of track or other routing or operating restrictions would (a) create operational bottlenecks or clogs that will inhibit service and infect the network with congestion and delay, (b) preclude realization of transportation benefits of the Transaction, (c) reduce the environmental benefits of the Transaction, and (d) impose long-term rigidity on railroad operating decisions. Proponents of restrictions have simply not analyzed the offsetting environmental costs of the restrictions, much less balanced the overall environmental benefits of the transaction.

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[42] In prior rail consolidations the agency's environmental review has taken the form of an Environmental Assessment ("EA"), not an EIS. Since the purpose of an EA is to assess whether the proposed action would have significant environmental effects warranting the preparation of an EIS, once the Board and or the ICC identified any significant adverse environmental impacts associated with such prior consolidations, the agency was faced with the choice of either requiring that all such impacts be mitigated as a condition to the consolidation or performing a complete EIS. See, e.g., 46 Fed. Reg. 18026, 18037 (1981) (agencies can include enforceable mitigation measures to conclude that an action does not require preparation of an EIS). In this proceeding, by contrast, since a detailed EIS is being prepared in the first instance, there is no requirement that all identified adverse impacts be mitigated; instead, there is only the essentially procedural requirement that all environmental impacts be taken into consideration by the agency. Given the broad scope of the EIS in this case and the significant systemwide public benefits to be derived from the Transaction, it is not at all unlikely that some localized environmental impacts identified in the EIS will appropriately remain unmitigated.

The Board's paramount concern and responsibility is the national rail transportation system. Thus, any conditions proposed to remedy a localized impact of the Transaction must not only be reasonably related in nature and degree to the particular impact, but must also not impose an unreasonable burden on the rail systems being created by the Transaction. With respect to asserted environmental impacts of the Transaction, much attention is being focused on Northern Ohio and, in particular, on Cleveland and its environs. Faced with the challenge of allocating routes and assets in that area so as to provide both competitive balance and operational integrity, NS and CSX developed a plan that they firmly believe will achieve those goals safely, efficiently and effectively.

As Applicants have shown in their Rebuttal and in their Comments on the DEIS, the rail lines and facilities in Cleveland and Northern Ohio play a critical role in the rail transportation network in the Eastern U.S. that will result from this Transaction, just as they have historically played such a critical role. It bears noting that, overall, the Cleveland area will not experience a significant increase in rail traffic as a result of the Transaction, and some of the most contentious lines have handled equal or greater traffic in the past. NS Comments on DEIS at 2-12. Over time, traffic patterns will change for reasons unrelated to the Transaction, and while shifts in traffic patterns projected from the Transaction will result in more traffic for some portions of the Cleveland Area, other portions of the area will experience less traffic. Consequently, regulatory reshuffling of the traffic at the expense of efficient operations of the network is unjustified.

The mitigation proposals advanced by Cleveland and other Ohio interests would, in many cases, shift the burdens and impacts from one city to another or one community to

another. Among other things, the City of Cleveland has proposed material changes in the allocation between NS and CSX of lines and facilities in Cleveland. This proposal would disrupt the competitive balance and operating efficiencies of the Transaction, clog the traffic at the heart of the system, and spread that congestion along the arteries leading west to Chicago and east to Pittsburgh and New York. The record contains no evidence whatsoever to respond to the operating and efficiency concerns raised by Applicants. The proposal would also require the construction of a very large, extremely expensive and environmentally questionable railroad "fly-over" in an adjoining city, Berea. While for their part the Applicants are endeavoring to reach reasonable accommodations with Cleveland and other Northern Ohio communities, the Board should not adopt proposals that would seriously undermine the salutary goals of this Transaction.[43]

K. Conditions Regarding Implementation and Oversight.

Based on concerns about whether the Transaction will be implemented smoothly and safely, several parties ask the Board to impose various conditions before the Transaction can be implemented and also post-implementation oversight conditions. These concerns have been heightened by service problems that have arisen on the UP/SP system.

No party in this proceeding has a greater concern or a greater stake than NS and CSX in the safe and smooth implementation of the Transaction. That concern is reflected in the

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[43] Preserving the benefits of the Transaction does not only mean preserving the operating plans designed by CSX and NS. It also means preserving the economic benefits of Transaction. In this regard, proposals that would require the Applicants to spend extraordinary sums of money that are out of proportion to the adverse impacts that would be remedied must also be rejected. Those are costs that would be imposed not just on CSX and NS but on their railroad systems and all who use them. State of Colorado v. United States, 271 U.S. 153, 162-63 (1926).

extraordinary implementation planning activities both railroads have been performing since well before the Application was filed[44] and in the SIPS, which, as noted, DOT states "address and satisfactorily mitigate every safety concern raised in the environmental review portion of this proceeding." DOT-5 at 4. It is also reflected in the NITL Settlement, in which NS and CSX have made commitments to the shipping community regarding implementation that exceed by far anything agreed to in previous cases. These include promises to obtain necessary labor implementing agreements and to have in place certain management information systems before operation of CRC lines will be divided between NS and CSX. They also include an agreement to recommend a three-year oversight proceeding for the Board to monitor implementation of the Transaction.

Any requested pre-implementation and oversight conditions that go beyond these actions and commitments, however, would be unwarranted and should be denied. As explained in the Rebuttal, pre-implementation conditions that would require further submissions and Board proceedings before the Transaction could be implemented would not contribute positively to its smooth or safe implementation. On the contrary, they would seriously harm shippers and Applicants by imposing substantial delays and by reducing critically needed operating flexibility. CSX/NS-176 at 719-724. They are also based on a view very much at odds with the Board's own recognition, recently stated in the UP/SP

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[44] These are described in CSX/NS-176 at 708-712; CSX/NS-177, Vol. 2A at 88-115, Vol. 2B at 597-629.

oversight proceeding, that "government cannot operate private businesses as well as private businesses themselves."[45]

NS believes that NITL, DOT and many other parties recognize that the circumstances of the UP/SP merger and of the current service problems have little bearing on this Transaction and do not warrant more by way of government-mandated conditions in this case than what NS and CSX have done and agreed to. The Board's recent analysis of the circumstances leading to the UP/SP service problems strongly reinforces that conclusion. After the reviewing the circumstances, the Board stated:

> [T]he evidence does not lead to the conclusion that approval of the merger was the cause of the service problems, and there is no reason to believe that rail mergers, in and of themselves, result in systemic service problems.[46]

L. Other Condition Requests.

The conditions requested by other parties are fully addressed in the Rebuttal and will not be discussed further here.

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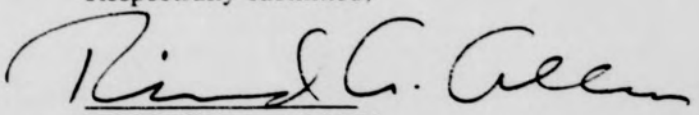
[45] STB Service Order No. 1518, Joint Petition for Service Order, unpublished decision served February 17, 1998 at 2.

[46] Id. at 6.

CONCLUSION

The Application should be approved in its entirety, conditioned only on standard employee protective conditions and as provided in the NITL Settlement. A Proposed Findings and Order is set forth in Appendix A.

Respectfully submitted,



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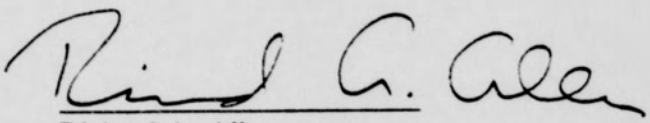
February 23, 1998

CERTIFICATE OF SERVICE

I, Richard A. Allen, hereby certify that on this 23rd day of February, 1998, I have cause to be served a true and complete public-version copy of the foregoing NS-61, Brief of Applicants Norfolk Southern Corporation and Norfolk Southern Railway Company, by first class mail, postage prepaid, or by more expeditious means, on all parties of record, and by hand delivery on:

The Honorable Jacob Leventhal
Administrative Law Judge
Federal Energy Regulatory Commission
Office of Hearings
825 North Capitol Street, N.W.
Washington, D.C. 20426



Richard A. Allen

February 23, 1998

APPENDIX A

APPLICANTS' PROPOSED FINDINGS AND ORDER

APPENDIX A

APPLICANTS' PROPOSED FINDINGS AND ORDER

FINDINGS

In Finance Docket No. 33388, we find: (a) that the acquisition and exercise of control of CRR and CRC by CSX and NS, and the resulting joint and common control of CRR, CRC, NYC and PRR, through the proposed Transaction is within the scope of 49 U.S.C. § 11323 and is consistent with the public interest; (b) that the Transaction will not adversely affect the adequacy of transportation to the public; (c) that no other railroad in the area involved in the Transaction has requested inclusion in the Transaction, and that failure to include other railroads will not adversely affect the public interest; (d) that the Transaction will not result in any guarantee or assumption of payment of dividends or any increase in fixed charges except such as are consistent with the public interest; (e) that interests of employees affected by the proposed Transaction do not make such Transaction inconsistent with the public interest, and any adverse effect will be adequately addressed by the conditions imposed herein; (f) that the Transaction will not significantly reduce competition in any region or in the national rail system; and (g) that the terms of the Transaction, including the terms of the acquisition of CRR stock, are just, fair and reasonable to the stockholders of CRR, CSXC and NSC. We further find that the oversight condition imposed in this decision is consistent with the public interest. We further find that any rail employees of Applicants or their rail carrier subsidiaries affected by the control transaction authorized in Finance Docket No. 33388 should be protected by the conditions required by 49 U.S.C. § 11326 (*New York Dock Ry. -- Control -- Brooklyn Eastern Dist.*, 360 I.C.C. 60, 84-90 (1979)), as to the control transaction and operating agreements; *Norfolk & Western Ry. Co. -- Trackage Rights -- BN*, 354 I.C.C.

605, 610-15 (1978), as modified in *Mendocino Coast Ry., Inc. -- Lease and Operate*, 360 I.C.C. 653, 664 (1980), as to trackage rights).

The foregoing findings specifically extend to the following elements of the Transaction in Finance Docket No. 33388:

a. The joint acquisition of control of CRR and CRC by CSX and NS, as contemplated by the Application;

b. The assignment of certain assets of CRC (including without limitation trackage and other rights) to NYC to be operated as part of CSXT's rail system and the assignment of certain assets of CRC (including without limitation trackage and other rights) to PRR to be operated as part of NSR's rail system (collectively, the "NYC/PRR Assignments"), with NYC and PRR having such right, title, interest in and other use of such assets as CRC itself had;

c. The entry by CSXT into the CSXT Operating Agreement and the operation by CSXT of the assets held by NYC; the entry by NSR into the NSR Operating Agreement and the operation by NSR of the assets held by PRR; and the entry by CSXT, NSR and CRC into the Shared Assets Areas Operating Agreements and the operation by CSXT, NSR and CRC thereunder of assets held by CRC, with CSXT and NSR respectively acquiring the right to operate and use the Allocated Assets and the Shared Assets, subject to the terms of the Allocated Assets Operating Agreements, the Shared Assets Areas Operating Agreements and other Ancillary Agreements, as fully as CRC itself had possessed the right to use them;

d. The continued control by CSX, NS and CRR of NYC and PRR, subsequent

to the transfer of CRC assets to NYC and PRR, and the common control by CSXC, CSXT, NSC, NSR, CRR and CRC of NYC, PRR and the carriers each of them controls;

e. The acquisition by CSXT and NSR of the trackage rights listed in Items 1.A and 1.B of Schedule 4 of the Transaction Agreement, the rights with respect to the NEC listed in Item 1.C of that Schedule, and the acquisition by CSXT of the rights provided for by the Monongahela Usage Agreement (to the extent not the subject of a related application addressed below);

f. The acquisition by CRC from CSXT and NSR, and by CSXT and NSR from each other, of certain incidental trackage rights over certain line segments, as identified in Section 3(c) of each of the three Shared Assets Areas Operating Agreements; and

g. The transfer of CRC's Streator Line to NS; all as provided in the Application and the Transaction Agreement and the Ancillary Agreements referred to therein.

We further find that upon consummation of the authorized control and the NYC/PRR Assignments, it is consistent with the public interest and necessary for the Applicants to carry out the Transaction that NYC and PRR shall have all of such right, title, interest in and other use of such assets as CRC itself had, notwithstanding any provision in any law, agreement, order, document, or otherwise, purporting to limit or prohibit CRC's unilateral transfer or assignment of such assets to another person or persons, or purporting to affect those rights, titles, interests and uses in the case of a change in control.

We further find that upon consummation of the authorized control and the CSXT

Operating Agreement, the NSR Operating Agreement and the Shared Assets Areas Operating Agreements, it is consistent with the public interest and necessary for the Applicants to carry out the Transaction that CSXT and NSR shall have the right to operate and use the Allocated Assets allocated to each of them and the Shared Assets, including those presently operated by CRC under trackage rights or leases, including but not limited to those listed on Appendix L to the Application (subject to the terms of the Allocated Assets Operating Agreements, the Shared Assets Areas Operating Agreements and other Ancillary Agreements) as fully as CRC itself had possessed the right to use them, notwithstanding any provision in any law, agreement, order, document, or otherwise, purporting to limit or prohibit CRC's unilateral assignment of its operating rights to another person or persons, or purporting to affect those rights in the case of a change in control.

We further find that with respect to the Allocated Assets and the assets in Shared Assets Areas consisting of assets other than routes (including, without limitation, the CRC Existing Transportation Contracts referred to in the Transaction Agreement) it is consistent with the public interest and necessary for the Applicants to carry out the Transaction that CSXT and NSR shall have the right to use, operate and perform and enjoy such assets to the same extent as CRC itself could, notwithstanding any provisions in any law, agreement, order, document, or otherwise, purporting to limit or prohibit CRC's assignment of its rights to use, operate and perform and enjoy such assets to another person or persons, or purporting to affect those rights in the case of a change in control.

We further find that the NYC/PRR Assignments are not within the scope of 49 U.S.C. § 10901.

We further find that the provisions (a) for a Conrail Transaction Council in the Settlement Agreement, dated December 12, 1997, filed in Finance Docket No. 33388, between the National Industrial Transportation League and CSX and NS, including the provisions for communication and sharing of information among CSX, NS and the Council contemplated thereby, and (b) the process for addressing shipper implementation and service concerns under that Settlement Agreement and under the allocation of Existing Transportation Contracts in Part II.C of that Settlement Agreement, are consistent with the public interest.

We further find that to the extent that the ownership interests and control by CSX and NS over CRR, CRC, NYC or PRR, or any other matter provided for in the Transaction Agreement or the Ancillary Agreements referred to therein, may be deemed to be a pooling or division by CSX and NS of traffic or services or any part of earnings by CSX, NS or Conrail within the scope of 49 U.S.C. § 11322, such pooling or division will be in the interest of better service to the public or of economy of operation, or both, and will not unreasonably restrain competition.

We further find that discontinuance of the temporary trackage rights to be granted to NSR on the CRC line between Bound Brook, NJ, and Woodbourne, PA, (to be assigned to NYC and operated by CSXT) at the time and on the terms provided for in the Transaction Agreement and the Ancillary Agreements referred to therein, is required and permitted by the present and future public convenience and necessity and will not have any serious, adverse impact on rural and community development.

In Finance Docket No. 33388 (Sub-No. 1), we find that the proposed operations over the rail line constructed pursuant to the exemption that became effective under our decision

served November 25, 1997, are exempt from prior review and approval pursuant to 49 C.F.R. § 1150.36.

In Finance Docket No. 33388 (Sub-Nos. 2-7), we find that the proposed operations over the rail lines constructed pursuant to exemption granted in our decision served November 25, 1997, are exempt from prior review and approval because such review is not necessary to carry out the transportation policy of 49 U.S.C. § 10101, the transaction is of limited scope, and regulation is not necessary to protect shippers from the abuse of market power.

In Finance Docket No. 33388 (Sub-Nos. 8, 9, 11, 13, 15, 16, 17, 19 and 20), we find that the proposed constructions and extensions of rail lines, and operations over them, are exempt from prior review and approval pursuant to 49 C.F.R. § 1150.36.

In Finance Docket No. 33388 (Sub-Nos. 10, 12, 14, 18, 21 and 22), we find that the proposed constructions and extensions of rail lines, and operations over them, are exempt from prior review and approval because such review is not necessary to carry out the transportation policy of 49 U.S.C. § 10101, the transaction is of limited scope, and regulation is not necessary to protect shippers from the abuse of market power.

In Finance Docket No. 33388 (Sub-No. 23), we find that the relocation of NW's railroad line at Erie, PA is exempt from prior review and approval pursuant to 49 C.F.R. § 1180.2(d)(5).

In Finance Docket No. 33388 (Sub-No. 24), we find that the transfer to CRC of NW's railroad line between MP 319.2 at Tolleston (Gary), IN, and MP 441.8 at Ft. Wayne, IN, is exempt from prior review and approval because such review is not necessary to carry out the

transportation policy of 49 U.S.C. § 10101, the transaction is of limited scope, and regulation is not necessary to protect shippers from the abuse of market power.

In Finance Docket No. 33388 (Sub-No. 25), we find that the acquisition of trackage rights by NW is exempt from prior review and approval pursuant to 49 C.F.R. § 1180.2(d)(7).

In Finance Docket No. 33388 (Sub-No. 26), we find: (a) that the acquisition and exercise of control of LD&RT by CSXC and CSXT and the common control of LD&RT, CSXT and other rail carriers controlled by CSXT and/or CSXC is within the scope of 49 U.S.C. § 11323 and is consistent with the public interest; (b) that the transaction will not adversely affect the adequacy of transportation to the public; (c) that no other railroad in the area involved in the transaction has

requested inclusion in the transaction, and that failure to include such railroads will not adversely affect the public interest; (d) that the transaction will not result in any guarantee or assumption of payment of dividends or any increase in fixed charges; (e) that interests of employees affected by the proposed transaction do not make such transaction inconsistent with the public interest, and any adverse effect will be adequately addressed by the conditions imposed herein; (f) that the transaction will not significantly reduce competition in any region or in the national rail system; and (g) that the terms of the transaction are just, fair and reasonable. We further find that any rail employees of applicants or their rail carrier affiliates affected by the control transaction authorized in Finance Docket No. 33388 (SubNo. 26) should be protected by the conditions required by 49 U.S.C. § 11326 (*New York Dock Ry. -- Control -- Brooklyn Eastern Dist.*, 360 I.C.C. 60, 84-90 (1979)).

In Finance Docket No. 33388 (Sub-No. 27), we find that the acquisition of trackage

rights by NW is exempt from prior review and approval pursuant to 49 C.F.R. § 1180.2(d)(7).

In Finance Docket No. 33388 (Sub-No. 28), we find that the acquisition of trackage rights by CSXT is exempt from prior review and approval pursuant to 49 C.F.R. § 1180.2(d)(7).

In Finance Docket No. 33388 (Sub-No. 29), we find that the acquisition of trackage rights by CSXT is exempt from prior review and approval pursuant to 49 C.F.R. § 1180.2(d)(7).

In Finance Docket No. 33388 (Sub-No. 30), we find that the acquisition of trackage rights by NW is exempt from prior review and approval pursuant to 49 C.F.R. § 1180.2(d)(7).

In Finance Docket No. 33388 (Sub-No. 31), we find that the acquisition of a 50 percent interest in APR by CSX will not result in an acquisition of control within the scope of 49 U.S.C. § 11323.

In Finance Docket No. 33388 (Sub-No. 32), we find that the acquisition of trackage rights by NW is exempt from prior review and approval pursuant to 49 C.F.R. § 1180.2(d)(7).

In Finance Docket No. 33388 (Sub-No. 33), we find that the acquisition of trackage rights by NW is exempt from prior review and approval pursuant to 49 C.F.R. § 1180.2(d)(7).

In Finance Docket No. 33388 (Sub-No. 34), we find that the acquisition of trackage rights by CSXT is exempt from prior review and approval pursuant to 49 C.F.R. § 1180.2(d)(7).

In Finance Docket No. 33388 (Sub-No. 35), we find that the responsive application filed by NYSEG has been withdrawn.

In Finance Docket No. 33388 (Sub-No. 36), we find that the responsive application

filed by EJE, Transtar and I&M is not consistent with the public interest.

In Finance Docket No. 33388 (Sub-No. 39), we find that the responsive application filed by LAL is not consistent with the public interest.

In Finance Docket No. 33388 (Sub-No. 59), we find that the responsive application filed by WCL is not consistent with the public interest.

In Finance Docket No. 33388 (Sub-No. 61), we find that the responsive application filed by B&LE is not consistent with the public interest.

In Finance Docket No. 33388 (Sub-No. 62), we find that the responsive application filed by IC is not consistent with the public interest.

In Finance Docket No. 33388 (Sub-No. 63), we find that the responsive application filed by RJCW is not consistent with the public interest.

In Finance Docket No. 33388 (Sub-No. 69), we find that the responsive application filed by the State of New York *et al.* is not consistent with the public interest.

In Finance Docket No. 33388 (Sub-No. 75), we find that the responsive application filed by NECR is not consistent with the public interest.

In Finance Docket No. 33388 (Sub-No. 76), we find that the responsive application filed by ISRR is not consistent with the public interest.

In Finance Docket No. 33388 (Sub-No. 77), we find that the responsive application filed by IORY is not consistent with the public interest.

In Finance Docket No. 33388 (Sub-No. 78), we find that the responsive application filed by AA is not consistent with the public interest.

In Finance Docket No. 33388 (Sub-No. 80), we find that the responsive application filed by W&LE is not consistent with the public interest.

In Finance Docket No. 33388 (Sub-No. 81), we find that the responsive application filed by CN and GTW is not consistent with the public interest.

In Finance Docket No. 33388 (Sub-No. 83), we find that the notice of exemption filed by GTW is moot.

In Dockets AB-55 (Sub-No. 551X) and AB-167 (Sub-No. 1181X), we find that the abandonment by CSXT and CRC of railroad lines known as the Danville Secondary Track between MP 93.00+/- at Paris, IL, and MP 122.00+/- at Danville, IL, is exempt from prior review and approval pursuant to 49 C.F.R. § 1152, subpart F.

In Docket AB-290 (Sub-No. 194X), we find that the discontinuance by NSR of railroad lines between MP SK-2.5 near South Bend, IN, and MP SK-24.0 near Dillon Junction, IN, is exempt from prior review and approval pursuant to 49 C.F.R. § 1152, subpart F.

In Docket AB-290 (Sub-No. 196X), we find that the abandonment by NSR of railroad lines between MP TM-5.0 in Toledo, OH, and MP TM-12.5 near Maumee, OH, is exempt from prior review and approval because such review is not necessary to carry out the transportation policy of 49 U.S.C. § 10101 and the Transaction is of limited scope.

In Docket AB-290 (Sub-No. 197X), we find that the discontinuance by NSR of the Toledo Pivot Bridge between MP CS-2.8 and MP CS-3.0 near Toledo, OH, is exempt from prior review and approval pursuant to 49 C.F.R. § 1152, subpart F.

We find on the basis of the final Environmental Impact Statement issued in this proceeding that this action will not result in any significant adverse environmental impacts on a systemwide basis and that its approval will result in environmental benefits, including the conservation of energy resources, on a systemwide basis.

We find that changes in traffic levels resulting from this action will cause beneficial environmental effects in some local areas and will cause adverse environmental effects in other local areas, depending on whether traffic levels are decreasing or increasing. We find that the adverse local environmental effects do not outweigh the beneficial transportation and system-wide and local environmental effects of the Transaction.

We find that to the extent that there are significant adverse local environmental impacts resulting from the proposed Transaction, mitigation of these impacts is warranted only where the costs and burdens of that mitigation would not impair the implementation of the Transaction or significantly reduce the operational efficiencies and other public interest benefits justifying our approval of the Transaction.

We further find that the conditions set forth in Appendix __ with respect to environmental mitigation are consistent with the public interest and that no other conditions relating to environmental

impacts or environmental mitigation are necessary to make the transactions authorized in this proceeding or the embraced proceedings consistent with the public interest or with the National Environmental Policy Act.

We find that the proposed construction projects and abandonments, as conditioned in this decision, will not significantly affect the quality of the human environment or the

conservation of energy resources.

We further find that all other conditions requested by any party to this proceeding and/or embraced proceedings but not specifically approved in this decision are not in the public interest or not necessary in the public interest and should not be imposed.

ORDER

It is ordered:

1. In Finance Docket No. 33388, the Application filed by CSXC, CSXT, NSC, NSR, CRR and CRC is approved. The Board expressly reserves jurisdiction over the Finance Docket No. 33388 proceeding and all embraced proceedings in order to implement the oversight condition imposed in the Board's decision and, if necessary, to impose further conditions or to take such other action as may be warranted.

2. If the Applicants consummate the approved Transaction, they shall confirm in writing to the Board, within 15 days after consummation, the date of consummation; such notice shall be given both as to (a) the assumption of control over CRR and CRC by CSXC, CSXT, NSC and NSR, and (b) as to the "Closing Date" provided for in the Transaction Agreement contained in the Application. Where appropriate, Applicants shall submit to the Board three copies of the journal entries recording consummation of the Transaction.

3. All notices to the Board as a result of any authorization shall refer to this decision by date and docket number.

4. No change or modification shall be made in the terms and conditions approved in the authorized Application without the prior approval of the Board.

5. The approval granted hereby expressly includes, without limitation, the following elements of the Transaction as defined in the Transaction Agreement (and the Ancillary Agreements therein referred to) and the Application:

   a. The joint acquisition of control of CRR and CRC by CSX and NS;

   b. The NYC/PRR Assignments;

c. The entry by CSXT into the CSXT Operating Agreement and the operation by CSXT of the assets held by NYC; the entry by NSR into the NSR Operating Agreement and the operation by NSR of the assets held by PRR; and the entry by CSXT, NSR and CRC into the Shared Assets Areas Operating Agreements and the operation by CSXT, NSR and CRC thereunder of assets held by CRC;

d. The continued control by CSX, NS and CRR of NYC and PRR subsequent to the transfer of CRC assets to NYC and PRR, and the common control by CSXC, CSXT, NSC, NSR, CRR and CRC of NYC, PRR and the carriers each of them controls;

e. The acquisition by CSXT and NSR of the trackage rights listed in Items 1.A and 1.B of Schedule 4 of the Transaction Agreement, the rights with respect to the NEC listed in Item 1.C of that Schedule, and the acquisition by CSXT of the rights provided for by the Monongahela Usage Agreement (to the extent not the subject of a related application addressed below);

f. The acquisition by CRC from CSXT and NSR, and by CSXT and NSR from each other, of certain incidental trackage rights over certain line segments, as identified in Section 3(c) of each of the three Shared Assets Areas Operating Agreements; and

g. The transfer of CRC's Streator Line to NS;

all as provided for in the Application and in the Transaction Agreement and the Ancillary Agreements referred to therein.

6. The NYC/PRR Assignments are not within the scope of 49 U.S.C. § 10901.

7. Upon the consummation of the authorized control and the NYC/PRR Assignments, NYC and PRR shall have such right, title, interest in and other use of such assets as CRC itself had, notwithstanding any provision in any law, agreement, order, document or otherwise, purporting to limit or prohibit CRC's unilateral assignment of its assets to another person or persons, or purporting to affect those rights, titles, interests and uses in the case of a change of control.

8. Pursuant to 49 U.S.C. § 11321, CSXT and NSR may conduct operations over the routes of Conrail as provided for in the Application, including those presently operated by CRC under trackage rights or leases, including but not limited to those listed on Appendix L to the Application, as fully and to the same extent as CRC itself could, notwithstanding any provision in any law, agreement, order, document or otherwise, purporting to limit or prohibit CRC's unilateral assignment of its operating rights to another person or persons, or purporting to affect those rights in the case of a change in control.

9. Pursuant to 49 U.S.C. § 11321, CSXT and NSR may use, operate and perform and enjoy, as provided for in the Application, the Allocated Assets and the assets in Shared Assets Areas consisting of assets other than routes (including, without limitation, the Existing Transportation Contracts of CRC) to the same extent as CRC itself could, notwithstanding any provisions in any law, agreement, order, document, or otherwise, purporting to limit or prohibit CRC's assignment of its rights to use, operate and perform and enjoy such assets to another person or persons, or purporting to affect those rights in the case of a change in control.

10. Pursuant to 49 U.S.C. §§ 11321 and 11322, to the extent that the ownership

interests and control by CSX and NS over CRR, CRC, NYC or PRR, or any other matter provided for in the Transaction Agreement or the Ancillary Agreements referred to therein and attached thereto, may be deemed to be a pooling or division by CSX and NS of traffic or services or any part of earnings by CSX, NS or Conrail within the scope of 49 U.S.C. § 11322, such pooling or division is approved.

11. Discontinuance of the temporary trackage rights to be granted to NSR on the CRC line between Bound Brook, NJ, and Woodbourne, PA, (to be assigned to NYC and operated by CSXT) at the time and on the terms provided for in the Transaction Agreement is approved.

12. The terms of the acquisitions of CRR stock by CSXC, Tender Sub, NSC and AAC are fair and reasonable to the stockholders of CRR, CSXC and NSC.

13. The provisions for a Conrail Transaction Council in the Settlement Agreement, dated December 12, 1997, filed in Finance Docket No. 33388, between the National Industrial Transportation League and CSX and NS; the communication and sharing of information among CSX, NS and the Council contemplated by that Agreement; and the process for addressing shipper implementation and service concerns under that Agreement and under the allocation of CRC Existing Transportation Contracts in Part II.C of that Agreement, are each consistent with the public interest and are approved.

14. In Finance Docket No. 33388 (Sub-No.1), CSXT is authorized to operate over the rail line constructed pursuant to the exemption allowed to become effective under our decision served November 25, 1997.

15. In Finance Docket No. 33388 (Sub-Nos. 2-7), applicants are authorized to

operate over their respective rail lines constructed pursuant to the exemption granted in our decision served November 25, 1997.

16. In Finance Docket No. 33388 (Sub-Nos. 8, 9, 11, 13, 15, 16, 17, 19 and 20), the notices of exemption are accepted.

17. In Finance Docket No. 33388 (Sub-Nos. 10, 12, 14, 18, 21 and 22), the petitions for exemption are granted.

18. In Finance Docket No. 33388 (Sub-No. 23), the notice of exemption is accepted.

19. In Finance Docket No. 33388 (Sub-No. 24), the petition for exemption is granted.

20. In Finance Docket No. 33388 (Sub-No. 25), the notice of exemption is accepted.

21. In Finance Docket No. 33388 (Sub-No. 26), the application is approved.

22. In Finance Docket No. 33388 (Sub-No. 27), the notice of exemption is accepted.

23. In Finance Docket No. 33388 (Sub-No. 28), the notice of exemption is accepted.

24. In Finance Docket No. 33388 (Sub-No. 29), the notice of exemption is accepted.

25. In Finance Docket No. 33388 (Sub-No. 30), the notice of exemption is accepted.

26. In Finance Docket No. 33388 (Sub-No. 31), the petition for exemption is

dismissed.

27. In Finance Docket No. 33388 (Sub-No. 32), the notice of exemption is accepted.

28. In Finance Docket No. 33388 (Sub-No. 33), the notice of exemption is accepted.

29. In Finance Docket No. 33388 (Sub-No. 34), the notice of exemption is accepted.

30. In Finance Docket No. 33388 (Sub-No. 35), the responsive application filed by NYSEG is dismissed.

31. In Finance Docket No. 33388 (Sub-No. 36), the responsive application filed by EJE, Transtar and I&M is denied.

32. In Finance Docket No. 33388 (Sub-No. 39), the responsive application filed by LAL is denied.

33. In Finance Docket No. 33388 (Sub-No. 59), the responsive application filed by WCL is denied.

34. In Finance Docket No. 33388 (Sub-No. 61), the responsive application filed by BLE is denied.

35. In Finance Docket No. 33388 (Sub-No. 62), the responsive application filed by IC is denied.

36. In Finance Docket No. 33388 (Sub-No. 63), the responsive application filed by RJCW is denied.

37. In Finance Docket No. 33388 (Sub-No. 69), the responsive application filed by

the State of New York, *et al.*, is denied.

38. In Finance Docket No. 33388 (Sub-No. 75), the responsive application filed by NECR is denied.

39. In Finance Docket No. 33388 (Sub-No. 76), the responsive application filed by ISRR is denied.

40. In Finance Docket No. 33388 (Sub-No. 77), the responsive application filed by IORY is denied.

41. In Finance Docket No. 33388 (Sub-No. 78), the responsive application filed by AA is denied.

42. In Finance Docket No. 33388 (Sub-No. 80), the responsive application filed by W&LE is denied.

43. In Finance Docket No. 33388 (Sub-No. 81), the responsive application filed by CN and GTW is denied.

44. In Finance Docket No. 33388 (Sub-No. 83), the notice of exemption filed by GTW is dismissed.

45. In Dockets AB-55 (Sub-No. 551X) and AB-167 (Sub-No. 1181X), the notice of exemption is accepted.

46. In Docket AB-290 (Sub-No. 194X), the notice of exemption is accepted.

47. In Docket AB-290 (Sub-No. 196X), the petition for exemption is granted.

48. In Docket AB-290 (Sub-No. 197X), the notice of exemption is accepted.

49. The authority granted in Finance Docket No. 33388 for (a) the acquisition and exercise by CSX and NS of control, joint control and common control of CRR, CRC, PRR

and NYC; (b) the NYC/PRR Assignments; (c) the entry into and performance of operating agreements for Allocated Assets and Shared Assets; and (d) transfer of the Streator Line to NS are subject to the labor protective conditions set out in *New York Dock Ry. --Control -- Brooklyn Eastern Dist.*, 360 I.C.C. 60, 84-90 (1979).

50. The trackage rights approved in Finance Docket No. 33388 are subject to the labor protective conditions set out in *Norfolk & Western Ry. Co. -- Trackage Rights -- BN*, 354 I.C.C. 605, 610-15 (1978), as modified in *Mendocino Coast Ry., Inc. -- Lease and Operate*, 360 I.C.C. 653, 664 (1980).

51. The relocation of N&W's Erie, PA, line exempted in Finance Docket No. 33388 (Sub-No. 23) is subject to the labor protective conditions set out in *Oregon Short Line R. Co. -- Abandonment -- Goshen*, 360 I.C.C. 91, 98-103 (1979).

52. The line transfer exempted in Finance Docket No. 33388 (Sub-No. 24) is subject to the labor protective conditions set out in *New York Dock Ry. -- Control -- Brooklyn Eastern Dist.*, 360 I.C.C. 60, 84-90 (1979).

53. The trackage rights exempted in Finance Docket Nos. 33388 (Sub-Nos. 25, 27-30 and 32-34) are subject to the labor protective conditions set out in *Norfolk & Western Ry. Co. Trackage Rights -- BN*, 354 I.C.C. 605, 610-15 (1978), as modified in *Mendocino Coast RY. Inc. --Lease and Operate*, 360 I.C.C. 653, 664 (1980).

54. The control of LD&RT approved in Finance Docket No. 33388 (Sub-No. 26) is subject to the labor protective conditions set out in *New York Dock Ry. -- Control -- Brooklyn Eastern Dist.*, 360 I.C.C. 60, 84-90 (1979).

55. The discontinuance and abandonments authorized in Finance Docket No. 33388 and Dockets AB-167 (Sub-No. 1181-X), AB-55 (Sub-No. 551X) and AB-290 (Sub-Nos. 194X and 196X-197X) are subject to the labor protective conditions set out in *Oregon Short Line R. Co. -- Abandonment --Goshen*, 360 I.C.C. 91, 98-103 (1979).

56. Approval of the transactions authorized in the Finance Docket No. 33388 proceeding and/or in the various embraced proceedings are subject to the environmental mitigation conditions set forth in Appendix __ hereto.

57. All conditions that were requested by any party to this proceeding and/or embraced proceedings but that have not been specifically approved in this decision are denied.

58. This decision shall be effective thirty days from the date of service.

APPENDIX B

DEPOSITION EXCERPTS

TRANSCRIPT OF PROCEEDINGS

BEFORE THE

SURFACE TRANSPORTATION BOARD

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	STB Finance Docket No. 33388

DEPOSITION OF EVERT O. ERICKSON

H I G H L Y C O N F I D E N T I A L

Washington, D. C.

Thursday, February 12, 1998

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copy of the responsive application rebuttal verified statement, if that helps. I will be referring to certain lines in that. If you want that, or you can refer to the one you have there.

On page 6 of ycur rebuttal verified statement, at the start of the first full paragraph, and I will read this. It says, "Mr. Meador correctly states that AA has access to the Ford Motor Company facility at Milan via an NSR switch."

Have I read that correctly?

A It is Milan, the pronunciation.

Q I was talking to somebody yesterday and they gave me three different pronunciations for that. AA there refers to Ann Arbor and NSR refers to Norfolk Southern Railroad?

A Yes.

Q It goes on "in order to divert AA's Milan traffic post-transaction, NSR can unilaterally increase the switch charge to AA and render AA's participation in this traffic uneconomical or otherwise operationally impede AA's continued participation." Did I read that correctly?

A Yes.

Q Can Norfolk Southern now pre-transaction unilaterally increase the switch charge to AA, that switch charge being referred to?

A Yes, they can do that today.

Q Further down there you say, if I can continue reading, "recognizing that NSR will no longer need AA's services post-transaction, Mr. Williams contends that AA can elect to jointly bid for the Milan traffic moving to Chicago with CSXT or CN."

Have I read that correctly?

A Read it once more.

Q "Recognizing that NSR will no longer need AA's services post-transaction, Mr. Williams contends that AA can elect to jointly bid for the Milan traffic moving to Chicago with CSXT or CN"?

A That's correct.

Q That's referring to a post-transaction scenario?

A Right.

Q Is that also true today?

A Yes.

Q Does AA now jointly bid for Milan traffic moving to Chicago with either CSX or CN?

A We bid on traffic that is moving Conrail today. Conrail has special service for the traffic going to Twin Cities. It moves into Elkhart where it is marriaged up with other traffic from Michigan and Ohio, and it goes on a unit train out of Elkhart straight to destination via the CP.

Q I understand that. Has AA jointly bid for the Milan traffic moving to Chicago with either CSX or CN before today?

A No. It is Conrail moved today.

Q On page 9 of your rebuttal verified statement, in the last paragraph, I understand that to read "Mr. Meador claims that the CSXT route from Toledo to Chicago is only about 15 miles longer than the CRC route NSR is acquiring."

Is that how your rebuttal verified statement reads at that point?

A Yes.

Q Do you know if that's a true statement,

that the CSX route from Toledo to Chicago is only about 15 miles longer than the CRC route NSR is acquiring?

A I'm not sure it is 15 miles. It is probably somewheres between 15 and 25 miles, I would agree to that.

Q Does that include the move from Toledo south to Deschler, Galatea or Fostoria that you refer to in the next line?

A Yes.

Q On page 10 of the rebuttal verified statement, there is a statement that reads, if I can find it here -- I'm sorry. I have to --

I'm reading from approximately the middle of the carryover paragraph, the sentence states "from the Walbridge Yard, CSXT would need to haul the traffic to Willard, Ohio, which will be CSX's new auto hub for east-west traffic, and from Willard on to Chicago." Is that how that sentence reads?

A Yes.

Q I'm going to focus in on the phrase "which will be CSX's new auto hub for east-west traffic,"

New York, Massachusetts and New Jersey, (2) Cincinnati, serving the southeastern United States, and (3) Chicago (Gibson Yard), serving the ramps west of Chicago on BNSF, UP and CPRS. The dedicated hubs will be used to gather multi-level traffic from origin assembly plants and to build trains on multilevel blocks that will move directly to destination auto ramps without further classification."

Is this consistent with the statement in your rebuttal verified statement that the CSX new auto hub traffic for -- auto hub for east-west traffic would be located at Willard, Ohio?

A It doesn't mention it in this document, but I do know that they are building a new facility in Willard. They are spending a lot of money there. I have heard $50 million to build this yard to classify traffic. It doesn't state that in here. But it is my understanding that's what they are doing at Willard.

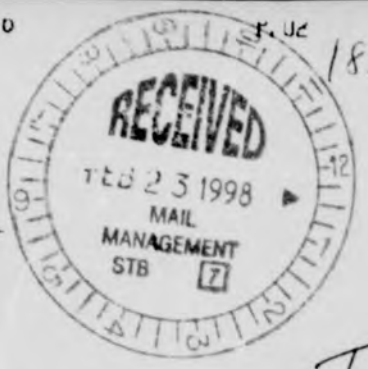
Q Okay. That's fine. The final subject, on page 7 of your rebuttal verified statement, in the

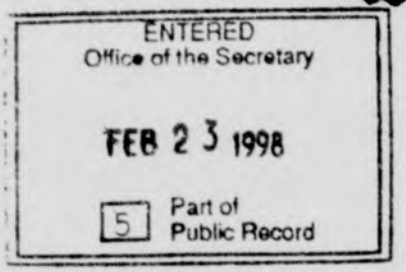
third full paragraph, there is a line that reads "since my prior statement was prepared and shortly before the Applicants filed their rebuttal, AA was successful in negotiating a multi-year agreement with Chrysler Corporation to perform switching services at their new facility in Toledo." Did I accurately read that sentence?

A Yes.

STB FD-33388 2-23-98 E ID-185861

185861





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February 20, 1998

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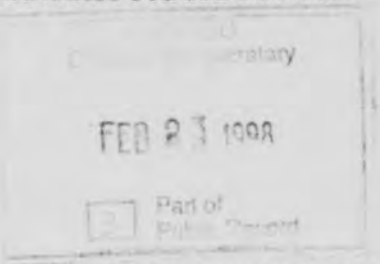

Mr. Vernon Williams, Secretary
Surface Transportation Board
1925 K. Street, Northwest RM 700
Washington, D.C. 20423-001

SUBJECT: Filings Before the Surface Transportation Board - 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

Dear Secretary Williams:

The Toledo Metropolitan Area Council of Governments (TMACOG) with this rescinds and withdraws our request for protective conditions, opposition to abandonment and comments that we submitted to the Surface Transportation Board (STB) on October 21, 1997 subject to the terms and conditions of the enclosed agreement between Norfolk Southern and TMACOG, the Toledo-Lucas County Port Authority. With the implementation of the provisions included in this agreement TMACOG now is in support of the application of Norfolk Southern and CSX to acquire Conrail.

TMACOG continues to have concerns with the impacts of this transaction on our local government members and will actively participate in the environmental review process. TMACOG also intends to remain a party of record for the purposes of the Finance Document in order to receive final determinations of the STB in this case.

Should any questions arise regarding this filing, please feel free to contact Mr. David R. Dysard at (419) 241-9155 ext. 118. Thank you for your assistance on this matter.

Sincerely,

William L. Knight
Executive Director

DRD:dfs

Enclosures Letter agreement between Norfolk Southern, TMACOG and Toledo-Lucas County Port Authority

cc Parties of Record on Finance Docket 33388
Robert Wimbish, REA, Cross & Auchincloss, Counsel for the Toledo-Lucas County Port Authority
Robert Cooney, Counsel for Norfolk Southern Corporation
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February 18, 1998

Mr. Robert E. Greenlese
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Mr. David Dysard
Director of Transportation Planning
Toledo Metropolitan Area Council
of Governments
P. O. Box 9508
Toledo, OH 43697-9508

Re: CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company – Control Operating Leases/Agreements – Conrail, Inc. and Consolidated Rail Corporation, Finance Docket No. 33388 ("Application")

Dear Sirs:

This Letter Agreement (Agreement) outlines the understanding between Norfolk Southern Railway Company and Consolidated Subsidiaries (NS) and Toledo-Lucas County Port Authority (TLCPA) and Toledo Metropolitan Area Council of Governments (TMACOG) as it relates to the above-captioned proceeding before the Surface Transportation Board (STB).

1. Toledo Docks

TLCPA and TMACOG will withdraw their request that the Wheeling & Lake Erie Railway Company (W&LE) be granted access to the Toledo Docks. NS will aggressively market Toledo Docks in the same manner it markets other Lake Erie ports for the movement of waterborne coal, ore and other traffic moving to, from or via Lake Erie.

2. Pivot Bridge

TLCPA and TMACOG will withdraw their request that the STB reject NS' notice of exemption for abandonment of the Pivot Bridge in Lucas County, Ohio (Docket No. AB-290 (Sub-No. 197X)). NS will modify the notice filed in Sub Docket No. 197X to provide for discontinuance rather than abandonment of the Bridge. NS further agrees not to seek authorization or exemption to abandon the Pivot Bridge for a four-year period from the date of the STB's final decision authorizing the control of Conrail in Finance Docket No. 33388. NS, TLCPA and TMACOG may mutually agree to abandonment of the Pivot Bridge prior to the expiration of the four-year period. If abandonment authority is sought and received, NS will offer to sell for $1.00 the Pivot Bridge to TMACOG or other agency for public use.

3. Vickers Grade Separation

TMACOG will withdraw its suggestion that NS and CSX construct a grade separation at the crossing of their lines at Vickers in Northwood, Ohio. NS reaffirms its commitment to work with CSXT to negotiate smoother train operations at Vickers.

4. Toledo-Maumee Line

NS agrees that upon obtaining STB authorization to abandon the Toledo-Maumee Line (Mileposts TM-5.0 and TM-12.5) subject to petition for exemption in Docket No. AB-290 (Sub-No. 196X), NS will donate and quitclaim to TMACOG or its designee NS' interest in the right of way. NS will retain its interest in the ties, rail and metal material and will remove these items from the line at an appropriate time following abandonment.

5. TLCPA and TMACOG Support

TLCPA and TMACOG agree to promptly, but not later than February 23, 1998, rescind and withdraw their respective October 21, 1997, requests for protective conditions, opposition to abandonment and comments and submit a statement of support for the Application, subject to the terms and conditions of this Agreement.

Very truly yours,

James W. McClellan
Vice President-Strategic Planning

If the foregoing terms and conditions are acceptable, please acknowledge your acceptance by signing triplicate counterparts of this Letter Agreement in the space provided below.

ACCEPTED:

TOLEDO-LUCAS COUNTY
PORT AUTHORITY

By James H. Hartung
Title President
Date 19 February 1998

TOLEDO METROPOLITAN AREA
COUNCIL OF GOVERNMENTS

By William T. Zwiebel
Title Executive Director
Date February 19, 1998

3. Vickers Grade Separation

TMACOG will withdraw its suggestion that NS and CSX construct a grade separation at the crossing of their lines at Vickers in Northwood, Ohio. NS reaffirms its commitment to work with CSXT to negotiate smoother train operations at Vickers.

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5. TLCPA and TMACOG Support

TLCPA and TMACOG agree to promptly, but not later than February 25, 1998, rescind and withdraw their respective October 21, 1997, requests for protective conditions, opposition to abandonment and comments and submit a statement of support for the Application, subject to the terms and conditions of this Agreement.

Very truly yours,

James W. McClellan
Vice President-Strategic Planning

If the foregoing terms and conditions are acceptable, please acknowledge your acceptance by signing triplicate counterparts of this Letter Agreement in the space provided below.

ACCEPTED:

TOLEDO-LUCAS COUNTY
PORT AUTHORITY

By_____

Title_____

Date_____

TOLEDO METROPOLITAN AREA
COUNCIL OF GOVERNMENTS

By_____

Title_____

Date_____

STB FD-33388 2-23-98 E ID-185858

185858

BRL-7

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

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

BRIEF OF CITY OF BAY VILLAGE, CITY OF ROCKY RIVER, AND CITY OF LAKEWOOD, OHIO

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Dated: February 23, 1998

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

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

BRIEF OF
CITY OF BAY VILLAGE,
CITY OF ROCKY RIVER,
AND CITY OF LAKEWOOD, OHIO

Pursuant to the schedule adopted for this proceeding, the cities of Bay Village, Rocky River, and Lakewood, Ohio (collectively referred to as "BRL") submit their brief. BRL assert that the mitigation proposals of the Section of Environmental Analysis ("SEA") in the December 12, 1997 Draft Environmental Impact Statement ("DEIS") are inconsistent with the Surface Transportation Board's ("STB" or "Board") responsibilities under (1) the ICC Termination Act of 1995 ("ICCTA"); (2) the National Environmental Policy Act ("NEPA"); and (3) the National Freight Transportation Policy of the U.S. Department of Transportation ("DOT").

BRL further assert that the Board should order, as a condition of its approval of the Conrail Acquisition, three

measures to mitigate the environmental (public health and safety) impacts of the Norfolk Southern Railway Company's ("NS") proposal to increase traffic on its Cleveland to Vermillion line segment ("Line Segment").

First, the Board should mandate full implementation of the mitigation measures proposed by NS on November 25, 1997. Those mitigation measures, referred to herein as the "Maestri Plan",[1] should be fully funded by NS.

Second, NS should be permitted no increase in traffic volume over the Line Segment.

Finally, the Board should retain jurisdiction for five years to ensure its ability to order further measures in the event that the environmental impacts of the Conrail Acquisition as mitigated by the Maestri Plan are more severe than they appear at this time.

I. BACKGROUND

BRL's concerns with the proposed division and control of Consolidated Rail Corporation by NS and CSX Transportation, Inc. arise out of the NS proposal to increase traffic on the Line

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[1] The elements of the Maestri Plan are summarized hereinbelow. BRL note the NS assertion that, even if it were to agree to the Maestri Plan through negotiations with BRL, that agreement should not be made a formal condition of Board approval of the Conrail Acquisition. NS comments on the DEIS at 2-13. NS is wrong. The Interstate Commerce Commission ("ICC") has determined correctly that certain types of agreements require approval "because they affect not only the private interests of the involved carriers but also the public interest in a sound and efficient national transportation system as defined by the Interstate Commerce Act." Norfolk Southern Corp. -- Control -- Norfolk & W. Ry. Co., 366 I.C.C. 173, 240 (1982).

Segment from a Base Case 13.5 trains per day to a Post-Acquisition Case 34.1 trains per day. If this increase in traffic were to be permitted, the resulting adverse environmental impacts -- identified in the DEIS and in the BRL and DOT comments on the DEIS -- would be felt by BRL residents in virtually all facets of everyday life. They also would be inescapable. The NS proposal would mean that, on average, there would be one NS train every 42 minutes on this line segment. Air quality would be degraded; railroad-generated noise would increase to levels unacceptable for residential areas; pedestrians and street traffic would be placed in increased danger; street traffic would be delayed; the ability of public safety providers, i.e. police, fire, and ambulance services, to reach victims in a timely manner would be seriously degraded; and property values would be reduced.

As detailed in BRL's comments on the DEIS, SEA's initial evaluation of the public health and safety impacts on the Line Segment reflects, inter alia, NS's estimates of additional trains, which are bound to be minimized,[2] and reflects other serious analytical and evaluation errors. However, neither the understated impacts as determined by the DEIS nor the more serious impacts reflected in the BRL comments are unavoidable.

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[2] Both the ICC and the courts have recognized that self-serving statements by a merging railroad "are entitled to little credence." See Norfolk & W. Ry. Co. -- Control -- Detroit, Toledo & Ironton R.R., 360 I.C.C. 498, 512 at n. 27 (1979) and Lamoille Valley R.R. v. I.C.C., 711 F.2d 295, 318 (D.C. Cir. 1983).

To the contrary, as explained in the November 25, 1997 letter from Bruno Maestri, System Director, Environmental Protection of NS,[3] an alternative route is available for all, or virtually all,[4] the additional trains proposed for operation by NS over the Line Segment. And, NS is willing to use this alternative route. The one thing that NS is unwilling to do is to pay for the construction necessary to make this alternative route viable.[5]

Reduced to its essentials, the NS approach to this transaction is a simple one. On the one hand, NS proposes a consolidation with Conrail that will provide it "net operating benefits [read "profits"] in a normal year of $553 million."[6] On the other hand, NS proposes that the public either suffer the environmental degradation that would result from the consolidation or pay the cost of the steps necessary to eliminate that degradation.[7]

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[3] This letter is reproduced in Volume 5C, Appendix S of the DEIS. See also DEIS Volume 2, NS Safety Integration Plan, at 196.

[4] Mr. Maestri does not explain the operational reason why the proposed alternative route cannot be used for all of the additional traffic or, for that matter, why it cannot be used for all traffic proposed for this Line Segment.

[5] Mr. Maestri has estimated a cost of approximately $47 million for the construction package outlined in his letter. NS-67-P-00484. NS restates its demand for public funding at page 5-12 of its comments on the DEIS.

[6] CSX/NS-18 at 19.

[7] Among the costs contemplated by NS is the suggestion that Lakewood close several grade crossings. DEIS, Volume 3B at OH-139. **This is not an action the Board can require Lakewood to take and Lakewood has advised NS on more than one occasion that it will not close its streets for the convenience of the railroad.**

BRL do not accept, and the Board should not accept, the "heads I win, tails you lose" bargain offered by NS. For the reasons stated herein, the Board should adopt BRL's proposed mitigation.

II. THE DEIS DOES NOT PROPOSE LEGALLY SUFFICIENT MITIGATION

As an initial matter, the Board should recognize that the "mitigation" proposals contained within the DEIS are not legally sufficient. The recommended mitigation for BRL is as follows:

> 20. NS shall continue to consult with local and county government agencies, the Ohio Department of Transportation, elected representatives from the west Cleveland suburbs and the City of Cleveland, and other appropriate parties to address concerns about train traffic increases on the Cleveland to Vermilion rail line segment (Nickel Plate Line). Specifically, NS shall meet with these parties to negotiate a mutually-acceptable binding agreement on the construction and funding allocation of NS's preliminary alternative routing plan to balance train traffic on the Cleveland to Vermilion rail line segment and the Lakeshore Line through Berea, and associated improvements that include new rail line connections, possible grade separations, upgrading warning devices at some highway/rail at-grade crossings, and highway/rail at-grade crossing closures. The preliminary mitigation plan developed by NS was recently submitted to SEA. SEA invites public comments on appropriate alternative mitigation that the Board could require in the event that the parties cannot reach a mutually-acceptable binding agreement prior to issuing the Final EIS.[3]

BRL submit that the quoted language does not constitute

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[3] DEIS, Volume 4 at 7-19, Section 7.2.4, paragraph 20. The wording of the preliminary SEA recommendation in Volume 3B at OH-140 is slightly different, but the substance appears to be the same.

legally cognizable "recommended mitigation." Rather, as recognized in the final sentence quoted above, the DEIS contains no recommended mitigation in the hope that interested parties can reach agreement with NS. Failing that, the DEIS effectively proposes to "start from scratch" in the FEIS.

Given applicable court precedent, it is clear that the Board's final order in this proceeding cannot adopt a "consultation" requirement in lieu of definitive mitigation requirements. As the court stated in State of Idaho By & Thru Idaho Pub. Util. v. I.C.C., 35 F.3d 585, 596 (D.C. Cir. 1994),

> ... the conditions imposed by the Commission require only that Union Pacific consult with various agencies about the impacts of salvage; thus, only Union Pacific will be in a position to assess the total environmental impact of salvage activities and perform an "individualized balancing analysis." We have held that NEPA prohibits such an abdication of regulatory responsibility in favor of the regulated party.

See also Illinois Commerce Com'n v. I.C.C., 848 F.2d 1246, 1258 (D.C. Cir. 1988).

Simply stated then, the DEIS provides no guidance to the Board as to appropriate mitigation for BRL. Accordingly, BRL will, in the following sections of this brief, outline the statutory considerations for that mitigation and summarize the facts and precedent supporting the mitigation BRL advocate.

III. The ICC Termination Act of 1995

Two sections of the ICC Termination Act of 1995 ("ICCTA") are critical to the Board's consideration of the Conrail Acquisition and the BRL mitigation proposals. First, Section 11324(c) requires the Board to approve the proposed transaction

if it is "consistent with the public interest"[9] and authorizes the Board to "impose conditions governing the transaction."[10] Second, Section 10101(8) states that "In regulating the railroad industry, it is the policy of the United States Government -- to operate transportation facilities and equipment without detriment to the public health and safety."[11]

When read together, Sections 11324(c) and 10101(8) provide the Board with three options in reviewing public health and safety issues raised in the Conrail Acquisition proceeding. First, the Board could determine that the adverse impacts of the Conrail Acquisition on the public health and safety outweigh any claimed benefits, thus mandating a finding that the Conrail Acquisition is inconsistent with the interest and must be denied. While BRL do not propose that the Board prohibit the Conrail Acquisition, it remains worthwhile to consider the one case in which the ICC denied an application on environmental grounds.

In Indiana & Ohio Railway Company -- Construction and Operation -- Butler, Warren, and Hamilton Counties, OH,[12] the ICC denied the application of the Indiana & Ohio Railway Company ("I&O Railway") to reconstruct a 2.9-mile line over an abandoned railway because of its environmental impacts. The Commission relied on "public convenience and necessity" language in section

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[9] 49 U.S.C. § 11324(c).

[10] Id.

[11] 49 U.S.C. § 10101(8).

[12] 9 I.C.C.2d 783 (1993).

10901(c) of the Interstate Commerce Act ("ICA") in finding that the project's adverse impacts on public safety outweighed its transportation benefits. Citing Louisville & Jefferson County Port Authority and CSX Transp., Inc. -- Construction and Operation Exemption, 4 I.C.C. 2d 749 (1988), the ICC relied upon section 10101 of the ICA to define the public interest when considering whether an action conforms with the public convenience and necessity.[13]

Given I & O Railway precedent, it is clear that (1) transportation-related benefits claimed for a transaction may be outweighed by serious public health and safety concerns[14] and (2) when these public health and safety concerns cannot be mitigated adequately, the application must be denied.

This brings BRL to the second of the above-noted three options available to the Board in dealing with environmental issues in acquisition cases. That is, in some cases, the Board may determine that adverse impacts of the proposal on the public health and safety are so minor as to not only permit a finding that the proposal is consistent with the public convenience and necessity, but to permit a further finding that no applicant-funded mitigation is required. As explained infra, the environmental impacts of the Conrail Acquisition on BRL are too

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[13] Id. at 788. See also Chesapeake and Ohio Ry. v. United States, 704 F.2d 373, 376 (7th Cir. 1983), which states that the Rail Transportation Policy "is to guide the Commission in applying the rail provisions of the Interstate Commerce Act."

[14] 9 I.C.C.2d at 790.

substantial to justify such a determination.

The Board's third option, exemplified by Decision No. 44 and subsequent SEA documents[15] in the Union Pacific/Southern Pacific proceeding,[16] is to find that while public health and safety concerns do not rise to the level that would mandate a denial of the acquisition, they do rise to the level that mandate the imposition of conditions pursuant to Section 11324(c). This option requires a careful analysis of the environmental degradations resulting from the acquisition and a subsequent consideration of methods of mitigation and cost of mitigation options.

It is this third option that is advocated by BRL. And, for the reasons discussed infra, BRL advocate the adoption of the Maestri Plan, fully funded by NS, as a condition of Board approval of the Conrail Acquisition.

Prior to leaving our discussion of the ICCTA, one of its other provisions should be noted. That is, 49 U.S.C. § 11321(a) states that the Board's authority over railroad consolidations "is exclusive." Accordingly, the NS assertion that the Board should not impose mitigation that "conflicts with the traditional

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[15] See, e.g. the February, 1998 Final Mitigation Plan for Reno, Nevada ("Reno FMP").

[16] Finance Docket No. 33760, Union Pacific Corporation, Union Pacific Railroad Company, And Missouri Pacific Railroad Company -- Control And Merger -- Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., And The Denver And Rio Grande Western Railroad Company.

role of state DOTs"[17] is meritless.[18]

IV. The National Environmental Policy Act

Section 102(2)(C) of the National Environmental Policy Act directs all federal agencies to include an Environmental Impact Statement ("EIS") in proposals for legislation and other major federal actions significantly affecting the quality of the human environment. The EIS must include an analysis of the following:

> 1. the environmental impact of the proposed action;
>
> 2. any adverse environmental effects which can not be avoided should the proposal be implemented;
>
> 3. alternatives to the proposed action;
>
> 4. the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and
>
> 5. any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.[19]

The Supreme Court has described a reviewing court's responsibility as follows: "[t]he role of the courts is simply to

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[17] NS comments on the DEIS at 2-5 through 2-7. The NS position is a transparent effort to utilize state and federal funding mechanisms to cure environmental problems engendered not by normal railroad operations, but solely by a consolidation within the Board's exclusive jurisdiction. As DOT states at page 18 of its comments on the DEIS, "the applicants should be responsible for mitigation of those problems."

[18] NS's position also runs afoul of the D.C. Circuit's "'chutzpah' doctrine." Marks v. Commissioner, 947 F.2d 983, 986 (D.C. Cir. 1991). The court has defined "chutzpah" as "a young man, convicted of murdering his parents, who argues for mercy on the ground that he is an orphan." Harbor Ins. Co. v. Schnabel Found. Co., 946 F.2d 930, 937, n.5 (D.C. Cir. 1991).

[19] 42 U.S.C. § 4332 (2)(C).

ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary and capricious."[20] In considering whether an agency decision is arbitrary and capricious, the reviewing court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."[21] The arbitrary and capricious standard requires that an agency take a "hard look" at relevant environmental factors.[22] The upshot of the "hard look" requirement is that the agency must adequately consider all "reasonable" and "feasible" alternatives (like the Maestri Plan) prior to reaching a decision on the proposed action.[23]

NS would have the Board review the procedural, as opposed to substantive, mandate of NEPA and the "arbitrary and capricious" standard of review as giving rise to either an obligation of the

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[20] Baltimore Gas & Elec. Co. v National Resources Defense Council, 462 U.S. 87, 97 (1983).

[21] Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378 (1989) (citation omitted). The arbitrary and capricious standard derives from the Administrative Procedure Act, which provides that an appellate court shall set aside an agency decision that is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

[22] Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989); Kleppe v. Sierra Club, 427 U.S. 390, 410 n. 21 (1976).

[23] Missouri Mining, Inc. v. I.C.C., 33 F.3d 980, 984 (8th Cir. 1994); City of Grapevine, Tex. v Depart. of Transp., 17 F.3d 1502, 1506 (D.C. Cir, 1994) (citing 40 CFR § 1502.14(a)-(c)). See Natural Resources Defense Council v. Morton, 458 F.2d 827, 834 (D.C. Cir. 1972).

Board to, or a license to, minimize the use of the Board's conditioning power under the ICCTA. NS goes so far as to say that "[t]he Board is obligated by NEPA and the ICCTA to balance adverse environmental effects against offsetting positive environmental effects and, importantly, non-environmental public benefits of the Transaction." NS comments on the DEIS at 2-3.

NS is, of course, wrong. There is nothing in NEPA that permits, let alone requires, the Board to find that environmental degradations to the BRL communities should not be mitigated either because of improvements to the environment in other portions of the Country or because of claimed economic benefits of the transaction. To the contrary, as exemplified by Decision No. 44 in the Union Pacific/Southern Pacific transaction, the benefits of a railroad consolidation are balanced only against harms "that cannot be mitigated by conditions." Decision No. 44 at 99 (emphasis added).

There are six interrelated questions asked by the Board in determining whether to utilize its conditioning power:

1) Will the merger produce effects harmful to the public interest that a condition will ameliorate or eliminate?
2) Will the condition be operationally feasible, and produce net public benefits?
3) Will the condition broadly restructure the competitive balance among railroads with unpredictable effects?

4) Does the condition address an effect of the transaction?

5) Is the condition narrowly tailored to remedy adverse effects of the transaction?

6) Does the condition put the proponent in a better position than it occupied before the consolidation?

Decision No. 44 at 144-145. See also Union Pacific -- Control -- Missouri Pacific; Western Pacific, 366 I.C.C. 462, 562-565 (1982).

As will be demonstrated herein, the answers to each of these questions justify the relief sought by BRL. That is,

1) The Conrail Acquisition will produce public health and safety effects harmful to the public interest that the Maestri Plan will ameliorate or eliminate.

2) The Maestri Plan is conceded by NS to be operationally feasible and to produce net public benefits.

3) The Maestri Plan will not affect the competitive balance among railroads.

4) The Maestri Plan addresses effects of the transaction not only in the BRL communities, but in Berea and Olmsted Falls.

5) The Maestri Plan is narrowly tailored to remedy adverse effects of the transaction in

that it proposes a rerouting of only new trains.

6) The Maestri Plan will not put BRL in a better position than it occupied before the consolidation in that it will not reduce the number of trains currently operating in BRL.

V. DOT Policy

The Maestri Plan has an estimated cost of approximately $47 million, a considerable sum. However, this cost cannot be viewed in either a policy vacuum or what we will term a transactional vacuum.

DOT policy is clear. It is to reduce the "social costs of environmental degradation" and to ensure that these social costs "are more accurately reflected in the price of transportation services."[24] As discussed infra, the "social costs of environmental degradation" of concern to BRL are enormous. These costs include (1) noise at levels unacceptable under standards adopted by the United States Department of Housing and Urban Development ("HUD")[25]; (2) one additional railroad-street vehicle accident every two years; (3) hundreds of emergency vehicles being delayed every year because of trains blocking the streets;

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[24] DOT, National Freight Transportation Policy, 62 F.R. 785, 788 (January 6, 1997). BRL note that DOT's policy is consistent with Congressional intent "that environmental concerns be moved higher up" on regulatory agencies' agendas. Platte River Whooping Crane v. F.E.R.C., 876 F.2d 109, 118 (D.C. Cir. 1989).

[25] DOT has similar standards. See Grapevine, supra note 23, 17 F.3d at 1507-08.

and (4) reduced property values for thousands of homes near the tracks.

What is not clear is whether ordering NS to fully fund the Maestri Plan will have any significant impact on the "price of transportation services." NS has stated that this transaction will provide it "net operating benefits [read "profits"] in a normal year of $553 million."[26] Is this amount sufficient to absorb a one-time $47 million mitigation package without affecting freight rates? Of course. But, even if it is not, it is not DOT policy to permit NS to "externalize" these costs by forcing them on the public. To the contrary, DOT policy is to require NS to "internalize" these "social costs of environmental degradation."

This is not, by any means, a radical result. Just as the Board has made it clear that the Union Pacific must be responsible for environmental mitigation required as a result of its merger with Southern Pacific, the Board must tell NS that it cannot accept the benefits of this transaction and pass the costs onto others.

VI. The Facts Mandate Adopting The Maestri Plan As A Condition

The imposition of merger mitigation conditions related to claims of environmental degradation must be based on a realistic appraisal of all of the facts of record. To date, the facts relating to BRL's concerns have been addressed in the DEIS and that document, in turn, has been the subject of comments by a few

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[26] CSX/NS-18 at 19.

parties, notably BRL, NS, and DOT.

A. Cumulative Impacts Must Be Considered

Prior to summarizing the environmental impacts set forth in the DEIS, BRL must note our overriding concern with its narrow focus. That is, while the "West Cleveland Suburbs, Ohio" were identified as an "area of special concern" at the outset of the DEIS,[27] the remainder of the DEIS failed to address the cumulative environmental impacts on BRL. Individual environmental components of the NS proposal, e.g. noise and air quality degradation, were discussed, albeit incorrectly, but the cumulative impact of these components were ignored.

In taking this approach, the DEIS implicitly rejected the logic of DOT's October 21, 1997 Preliminary Comments.[28] In addressing highway-rail crossings, DOT noted that a large increase is projected for the "NS line through Lakewood, Ohio" and stated that "[a]ll of the crossings on [this segment] should be analyzed together as a corridor and mitigation measures designed to reduce risk along entire segments rather than on a crossing-by-crossing basis."[29]

DOT has seen the same fatal flaw in the DEIS. Its February 2, 1998 comments on the DEIS (DOT-5) informed SEA of DOT's "view that a purely technical application of environmental thresholds can result in real-world impacts being overlooked" and further

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[27] DEIS, Executive Summary, ES-12.

[28] DOT-3.

[29] DOT-3 at 24.

concluded that "the DEIS analysis isolates some of the 'individual' impacts of the transaction in such a way that it fails to identify certain broader consequences ...." "DOT recommends that the final EIS should focus more broadly in order to measure the transaction's true impacts more accurately ...." Id. at 2.

While substantial time and effort must, of necessity, be expended in an examination of the "trees", the Board should not lose sight of the "forest", i.e. the total environmental and socio-economic impact of a dramatic increase in trains on BRL. The point here is a basic one. The three standards that the Board considers in designing environmental mitigation are whether the proposed condition is "reasonable", whether it is "directly related to the action proposed for approval", and whether it is "supported by the information developed during the environmental analysis."[30] These standards cannot be met simply by viewing individual impacts, e.g. air quality or noise. Rather, it is the total impact of the NS proposal on BRL that must determine whether a mitigation proposal meets the Board's three criteria.[31]

Let us then turn to a summary of the DEIS evaluation of the "trees" and what that evaluation says about the "forest."

1) Safety, Highway/rail at-grade crossings: In unexplained

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[30] DEIS, ES-14.

[31] As NS notes in its comments on the DEIS, a finding of cumulative impact is based on the idea that synergies between multiple effects can create more substantial effects. NS comments at 4-53. In other words, the whole is frequently greater than the sum of its parts.

contrast to its approach of considering "freight rail accidents" on a line segment basis,[32] and in contrast to the corridor-based approach to accidents in the Reno FMP (at 2-11), the DEIS examined "highway/rail at-grade crossing safety" on a crossing-by-crossing basis and considered mitigation for certain crossings "if the accident frequency increased by one additional accident every 100 years."[33] As recognized by DOT, the DEIS focus on individual crossings is in error and the Board should adopt a "corridor-based analysis."[34]

Consider the DEIS evaluation tool in light of the total accident frequency for BRL. DEIS Volume 3B, Table 5-OH-8 establishes that between West 117th Street, the border between Cleveland and Lakewood,[35] and Bradley Road, the western-most crossing considered in Bay Village, the Post-Acquisition annual accident frequency would be 0.5824 greater than the Pre-Acquisition annual accident figure. In other words, **the DEIS predicts that BRL will experience one additional accident at a grade crossing every two years as a result of the NS proposal** on trackage through BRL that has been described by a Norfolk Southern manager of grade crossing safety as "<u>one of the most</u>

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[32] DEIS, Volume 1 at 3-6 and Volume 3B at OH-14.

[33] DEIS at ES-18; <u>See also</u> Volume 1 at 3-11.

[34] DOT-5 at 17-19.

[35] The border actually is in the middle of West 117th Street.

dangerous in our 15,000 miles of track."[36]

2) Hazmat accidents: While the DEIS predicted that the post-acquisition interval between mainline hazardous materials accidents would remain substantial,[37] it also predicted **a 252.4% increase in hazmat releases on the Cleveland to Vermilion line segment.**[38]

3) Highway/rail at-grade crossing traffic delay: The data in the Supplemental Errata, Table 5-OH-11 (Revised), establish that, as a result of the proposed increases in NS traffic volumes, **the average delay per vehicle at the five crossings considered would increase by 163%.**

4) Air Quality: **Cuyahoga County, Ohio, in which BRL are located, would experience substantially higher emissions increases than any other county considered in the DEIS.**[39] Volume 3B, Table 5-OH-16 indicated that these increases exceed the emissions screening level "after netting" and further found that these emissions would exceed 1% of total county emissions for

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[36] NS-67-P-00739. As explained in a December 19, 1991 NS memorandum, "Train traffic thru [sic] Lakewood can be at various speeds and the majority of the present warning systems are not of the constant warning time type. **Train/auto accidents are not uncommon.**" NS-67-P-01705.

[37] DEIS volume 5A, Appendix B, Attachment B-1.

[38] Id. Attachment B-5 identifies the Cleveland-Vermilion line segment as a "new major key route" for hazardous materials. DEIS, Volume 3B, Table 5-OH-10 finds that NS will increase its annual car loads of hazmats from 9,000 to 32,000 on this Line Segment.

[39] DEIS, Volume 5A, Appendix E, Attachment E-3], County Total Emissions Increases for Threshold Activities, in Decreasing Order of Total NOx (Prior to Netting Analysis).

NOx.

5) Noise: The woefully inadequate DEIS noise analysis (see infra) found that **the number of receptors on the Cleveland-Vermilion line segment would be 4,439.**[40] Even assuming, arguendo, that this number is not understated, it is still 83% higher than on any other line segment. Each of these "receptors", a rather bland term including homes, schools, and hospitals, would experience railroad noise 34.1 times per day. This is once every 42 minutes, 24 hours per day, seven days per week, 365 days per year.

The Board should not presume that each of these trains would give rise to noise for only a short duration. To the contrary, the DEIS finds that "wheel/rail noise from train operations may last three to four minutes per location ...."[41] **This means that the wheel/rail noise would be experienced between 1.705 hours and 2.273 hours per day.**

Further, the DEIS finds that "locomotives must sound their horns through much of Lakewood because its 27 highway/rail at-grade crossings are spaced only hundreds of feet apart."[42] Again, this means that **railroad horn noise would be experienced by thousands of Lakewood residents for hours each day.**

6) Emergency Response: The DEIS found two ways to evaluate

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[40] DEIS, Volume 5A, Appendix F, Attachment F-1, Rail Line Segments that Meet STB Requirements for the Noise Analysis.

[41] DEIS, Volume 3B at OH-137.

[42] Id.

the potential effect of the Conrail acquisition on emergency vehicle response times, i.e. crossing delay per stopped vehicle and total daily crossing blockage time.[43] It also found that the total blocked crossing time on the Line Segment would increase by 158%. **This means that emergency response vehicles would be blocked up to 1.2 hours each day.**[44]

7) Summary Of DEIS Findings: Even if the Board were to find that none of these adverse public health and safety impacts has been understated in the DEIS, but see infra, and that none of these adverse public health and safety impacts is, standing alone, sufficient cause for mitigation, it must still conclude that, collectively,

> one additional railroad accident every two years, **and**
>
> a 252.4% increase in hazmat releases, **and**
>
> a 163% increase in average delay per vehicle, **and**
>
> higher emissions increases than any other county, **and**
>
> 4,439 adversely impacted sensitive noise receptors, **and**
>
> a 158% increase in emergency vehicle delays,

constitute ample cause for mitigation. The market views these impacts as serious -- houses near the tracks are not selling[45] -- and the Board should do no less.

B. The DEIS Understated Environmental Impacts

While the DEIS asserted that SEA has "reviewed and verified"

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[43] DEIS, Volume 1 at 3-18.

[44] See DEIS, Volume 3B at OH-137.

[45] See infra.

the data submitted by NS,[46] a review of the DEIS establishes that the data used to perform analyses of each of the matters considered are incorrect. Thus, the environmental impacts summarized above are understated.

1) Train Speeds: In DEIS Volume 5A at A-1, the first data element listed for verification is train speeds. According to Section A.4.2, the DEIS utilized two different speeds in its analysis. For purposes of its safety analysis, the DEIS used the maximum operating speed. This maximum speed also was used in the DEIS calculations of Average Delay Per Vehicle.[47] For purposes of air quality analysis, the DEIS used what it described as "typical freight train speed." However, this speed also was deemed equal to the maximum operating speed when the maximum operating speed is 35 mph and below (as it is on portions of the Line Segment).[48]

The DEIS is in error. We note at the outset that NS has no data as to its average speeds in BRL. According to a December 8, 1997 letter from counsel for NS to BRL, "NS has not calculated average speeds for these trains."

At least part of the reason that NS does not operate at its maximum allowable mainline track speed through BRL is that, also according to the December 8th letter, 20% of its trains utilize a

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[46] DEIS, Volume 3A at 5-2.

[47] See, e.g., DEIS Volume 3B, Table 5-OH-11.

[48] The maximum speed at the easternmost 31 grade separations in BRL (32 including 117th Street) is 35 mph.

siding within BRL.[49] The maximum speed entering, operating through, and leaving the siding is 25 mph.[50]

A more important reason that NS does not operate at anywhere near its maximum speed in BRL is the inherent danger of operating through communities with so many grade crossings over such a short distance. **In Lakewood there is one grade crossing every 485 feet.**[51] Moreover, because of track curves and the number of buildings located close to the tracks, NS engineers are unable to see many of the crossings until they are close to them and thus they run the trains far below the maximum speed.

As recounted in BRL-2 at 9, a review of police accident reports in Lakewood for railroad/street vehicle accidents since 1992 revealed an average speed for the NS trains of 31 mph. The Lakewood police confirmed this figure by using a radar gun to determine the average speed of NS trains during the period January 22 through January 27, 1998. The average speed at Bunts Road in Lakewood during that period was 30.6 mph. Similarly, the Bay Village police used radar guns to determine the speed of NS trains during the period January 22 through January 27, 1998.

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[49] Clague Siding, located between MP B 193.9 and MP B 197.0. NS-32 at 6.

[50] NS-32, response to interrogatory 1(d).

[51] In order to place this figure in context, the Board is requested to note that the Reno FMP contains a listing of "crossings per distance" in selected urban areas. Table 2.4-1. That table finds that the "Cleveland/Lakewood, Ohio" area has 33 crossings in 3 miles. This is one per .09 miles. Only one other community in the Country, West Palm Beach, Florida, has grade crossings that close together, and that community only has one-third as many grade crossings.

The average speed at Dover Road was 38.9 mph, substantially lower than the 50 mph speed used in the DEIS. Rocky River police also used radar guns to determine the speed of NS trains during the period January 22 and January 26, 1998. The average speed at the Elmwood crossing was only 23 mph.

Even these figures overstate the "average" speed of NS trains during the course of a year in that they do not include data for trains that stop prior to, or in the middle of, a crossing. Just such an event happened on January 22nd. An eastbound NS train entered the view of the police at 4:30 p.m. and was initially clocked at 34 mph. However, it started to slow at 4:32 p.m. and then stopped. When it finally cleared the Elmwood crossing, it was traveling at only 8 mph.

Reduced to its essentials then, the BRL comments demonstrate that each calculation in the DEIS that relies on train speed, e.g. traffic delay and emergency service vehicle delay, understates the impact of the Conrail Acquisition on BRL.

2) Trains Per Day: The second data element listed in DEIS Volume 5A at A-1 is trains per day. BRL take it as a given that any train count projection in a consolidation proceeding will be, at best, an estimate. And, as noted above, the applicant has a "self-serving" incentive to understate the number of new trains. In fact, NS has not provided any data to support the train count upon which the DEIS relies.

BRL note that NS already has revised its train counts once

in this proceeding.[52] Of greater importance, NS cannot "verify" its train count for this line segment. The October 30, 1997, letter from counsel for NS to BRL admitted that "Norfolk Southern does not have a list identifying each train that is projected to travel over this line segment, and would have to perform a special study to make such an identification." If NS does not have such a list, the DEIS could not have verified the NS projection.

Once again, this means that every calculation in the DEIS that relies on the NS train count projection is unverifiable.

3) Noise: The DEIS suggested that, as a result of a pending rulemaking before the Federal Railroad Administration ("FRA"), the Board should not propose specific mitigation for the railroad horn noise impacts of the NS proposal.[53] Following this conclusion -- which obviously ignored the fact that adoption of the Maestri Plan as a condition could not possibly run afoul of FRA efforts -- the DEIS considered "wayside noise effect."[54] Rail line segments were deemed eligible for noise mitigation "for noise sensitive receptors exposed to at least 70 dBA Ldn and an

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[52] See CSX/NS-54, the August 28, 1997 document that reduced the proposed train count over the Cleveland to Vermilion line segment from 37.8 trains per day to 34.1 trains per day.

[53] DEIS, ES-23; Volume 3A at 5-9; and Volume 3B at OH-71.

[54] DEIS, Volume 3B at OH-74 and Volume 5A, Appendix F at F-5.

increase of at least 5 dBA Ldn."[55]

The DEIS wayside noise effect analysis was in error for several reasons.

First, the DEIS ignored all of the noise generated by the 20% of NS trains that idle on Clague Siding.

Second, contrary to the approach taken by other agencies,[56] the DEIS omitted any consideration of the number of "sensitive receptors" in determining whether mitigation is required. Further, the DEIS mitigation proposals are not based on total noise, total railroad noise impacts, or the total number of new trains. Rather, those proposals are premised on nothing more than the percentage increase in trains. The significance of this is established in DEIS, Volume 5A, Attachment F-1 at 2. There, the Oak Harbor to Bellevue line segment is deemed eligible for noise mitigation because its change in dBA is 5.5 (resulting from a 253% increase in the number of trains). However, there are only 513 sensitive receptors on that segment. In contrast, while the change in dBA is "only" 4.0 for the Cleveland to Vermilion segment, the number of sensitive receptors found by the DEIS on

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[55] DEIS, Volume 3B at OH-74. The DEIS contains no source for this standard and no analysis of the difference between this standard and the Board's 3 dB increase/65 dB total noise standard. 49 CFR § 1105.7(e)(6).

[56] In Transcontinental Gas Pipe Line Corporation, 79 FERC ¶ 61,346 at 62,475 (1997), the Federal Energy Regulatory Commission relied on the fact that "the noise sensitive areas (i.e. residences) in this case are more numerous and are closer to the new compressor stations than the noise sensitive areas in the three cases cited by Transco."

this Line Segment is 4,439.[57]

Stated another way, even using the understated DEIS numbers, approximately nine times as many sensitive receptors (read "people living in predominantly residential areas") would be affected by increased noise on the Line Segment. The fact that the percentage increase in noise level is less than would be experienced on another line segment should not be dispositive when a vastly greater number of people would be adversely impacted by unacceptable noise levels.

Consider again the finding of the DEIS "that wheel/rail noise from train operations may last three to four minutes per location."[58] This means that if NS increases its trains by 20.6 to a total of 34.1 trains per day, the sensitive receptors on the Line Segment would be subject to this noise between 1.7 and 2.3 hours per day, seven days per week, 365 days per year. This is a greater noise frequency than would be experienced on the Oak Harbor to Bellevue line segment. And, BRL would experience a greater increase in number of trains than would be experienced on the Oak Harbor to Bellevue line segment (20.6 trains per day as compared to 19.5 trains per day).

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[57] BRL maintain that the DEIS count of sensitive receptors is substantially understated. The verified statements of Kevin F. Beirne, Brian F. Moran, and James M. Sears identify 1,338 sensitive receptors in Rocky River, 3,944 sensitive receptors in Lakewood, and 1,920 sensitive receptors in Bay Village in the post-acquisition case. **Thus, these three communities alone have 7,202 sensitive receptors, 62% more than the DEIS found for the entire Cleveland to Vermilion line segment.**

[58] DEIS, Volume 3B at OH-137.

Third, the above-noted "70 dBA Ldn and 5 dBA Ldn increase" standard also is arbitrary and capricious in that it ignores the standards adopted by other federal agencies. As explained in the verified statement of Edward J. Walter, Jr., the Environmental Protection Agency and the Department of Housing and Urban Development (HUD) use 55 decibels as their goal for outdoor noise in residential areas. Outdoor noise above 65 dB but not exceeding 75 dB is "normally unacceptable" for HUD-assisted development. **Outdoor noise above 75 dB is "unacceptable" to HUD.**

In light of the clear HUD standard for acceptable noise levels, the DEIS standard for considering the significance of noise increases cannot be justified. If noise levels will increase to a level deemed unacceptable by HUD as a result of increased train movements, it makes no sense to say that this level of noise does not require mitigation simply because the increase in noise is less than approximately 320%, i.e. a 5 dB increase. If an increase in pre-existing levels from 65 dB to 70 dB is worthy of mitigation, a locale with a pre-existing dB level of between 70 and 75 should not have to experience a 320% increase in noise to justify mitigation.

This is precisely the case in the BRL communities. The average 100' Ldn at 13.5 trains per day is 72.6. **At 34.1 trains per day, the average 100' Ldn would be 76.6, well above the HUD level of "unacceptable."**

Without mitigation, the quality of life of the residents of BRL's "sensitive receptors" would be severely impacted and their

economic losses also would be great. As Mr. Walter explains, not only would unacceptable noise levels prohibit HUD funding for new development, but HUD considers this factor in determining the amount of insurance or other assistance that may be given.

Prospective purchasers also consider noise in determining the value of housing. As recently reported, a Lakewood Realtor has stated that "Houses next to the tracks are virtually unsellable. I have seen four listings in Lakewood that are directly on the tracks that have sold for substantially less dollars."

In brief, increased noise translates to lower property values, another cost proposed to be borne by the BRL communities to allow NS to obtain "net operating benefits in a normal year of $553 million."

These concerns are not limited to just a few citizens of Lakewood, Rocky River and Bay Village. As reflected in Mr. Walter's exhibits EJW-2 and EJW-3, **with 34.1 trains per day, the noise levels at the 100 feet distance would be above 75 dB, i.e. "unacceptable", at eight of the nine tested locations.** In fact, noise would, on average, be at the 75 dB level 164 feet from the tracks. The 65 dB level, i.e. the bottom end of the "normally unacceptable" level, would not be reached for hundreds of feet from the NS tracks.

There are two fundamental points here. First, the DEIS 70 dba/5 dBA Ldn increase standard is meritless. If a quantitative approach is to be used, the HUD standards should be adopted.

Second, under any reasonable standard, the 100' Ldn levels and the number of sensitive receptors within the 65 db contour line in the BRL communities which would result from an increase in the number of trains per day to 34.1 demand mitigation. As computed by Mr. Walter, the 100' Ldn levels average 76.6. Given the 7,202 sensitive receptors in BRL, representing tens of thousands of people that would be faced with these unacceptable noise levels, NS should be ordered to take its additional trains elsewhere.

4) Air Quality: As explained by the verified statement of David H. Minott, the DEIS air quality analysis ignores the fact that projected CO impacts resulting from motor vehicles queued at grade crossings exceed the "significant impact thresholds" by substantial amounts at Hird Avenue in Lakewood. This air quality impact was ignored in the DEIS, thus understating the negative environmental consequences of the Conrail Acquisition.

5) Maximum Delay For At-Grade Crossings And Its Impact On Emergency Services: As noted above, the train speed issue cuts across a number of the DEIS analyses. One affected calculation is the purported "Estimated Maximum Delay (in Minutes) for At-Grade Roadway Crossings" found in DEIS, Volume 3B, Table 5-OH-53. It should be clear that the figures shown in this table cannot possibly be the "maximum" delay at the BRL grade crossings because this table assumes that NS will operate each one of its trains at the maximum authorized speed.

If the maximum delay at-grade crossings is to be used as a

criterion for the need for mitigation, it should be computed to reflect the likely average speeds as discussed above and the correct "time in minutes for gate closing and opening prior to and after the passage of the train" discussed in BRL's comments on the DEIS.

The DEIS also failed to recognize that changes in the total blocked crossing time per day are a more than reasonable tool to estimate changes in the number of emergency vehicles that would be delayed every year in BRL if NS is allowed to operate 34.1 trains per day. However, in Volume 3B at OH-137, the DEIS states: "SEA has not predicted frequencies of delay for emergency response vehicles, due to the inherent uncertainties and obvious localized issues such as locations of responding emergency vehicles." BRL submit that the DEIS analysis is incorrect and that our contention that the proposed increase in NS traffic would result in over 600 delays to emergency services vehicles annually can be verified easily.[59]

Based on the data in BRL-2, we know that the Lakewood, Bay Village, and Rocky River police, fire, and EMS services are blocked by trains at least 253 times per year under current conditions. Since the total blocked crossing time per day with

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[59] As noted by DOT, "[T]rain traffic following the integration of Conrail will clearly cut [Lakewood] in half by blocking virtually all of its 27 crossings." DOT-5 at 19. DOT states that "Impacts on emergency vehicle access should receive special concern as a general matter because of the obvious risks involved." Id. at 20. **This special concern is particularly needed in the BRL communities since there are no hospitals north of the tracks.**

34.1 trains per day is 258% of total blocked crossing time per day with 13.5 trains per day (see DEIS Table 5-OH-53), there would be approximately 653 emergency vehicle delays per year if NS operates 34.1 trains per day. BRL submit that this is an unacceptable result and requires mitigation.

6) Roadway Crossing Delay: As described in DEIS Volume 1 at 3-19, the DEIS used a "level of service" ("LOS") analysis to measure the significance of delays to highway traffic resulting from increased rail traffic. Simply stated, the DEIS does not consider the impact of additional rail traffic on highway traffic to be significant unless it results "in (1) a post-Acquisition level of service E and F regardless of the pre-Acquisition condition, or (2) a reduction from pre-Acquisition level-of-service C or better to a post-Acquisition level of service D."[60]

The DEIS LOS analysis reasonably may be characterized as "a straw that broke the camel's back" approach. That is, in all but the most extreme situations, even if the impact of increased rail traffic on street traffic would be severe, it would not give rise to a mitigation recommendation unless the pre-existing condition was poor at best. In fact, the only grade crossing for which a grade separation is recommended by the Supplemental Errata has a pre-acquisition LOS of D.

This approach to traffic mitigation differs markedly from the above-described DEIS approach to noise mitigation. In the

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[60] This second option for relief does not appear in Volume 5A at C-15. Thus, it is not clear which of these two sets of criteria were used by the DEIS.

noise context, a finding that mitigation is necessary is actually less likely if pre-acquisition noise levels are high. In contrast, in the context of viewing traffic impacts, unless the pre-acquisition LOS is high, the post-acquisition LOS could not rise to a level at which a grade separation is considered necessary.

At the same time, the DEIS approach to mitigation to alleviate traffic delay problems differs markedly from the approach SEA has taken in other proceedings. By way of example, the Reno FMP does not rely on an LOS analysis. Rather, based on a review of the totality of the facts, SEA there has recommended millions of dollars of improvements to Union Pacific tracks in order to mitigate the delays to street traffic that otherwise would result from the Union Pacific/Southern Pacific merger.

A review of the DEIS Supplemental Errata, Table 5-OH-11 (Revised), establishes part of the basis for BRL's concern with vehicle delays. According to the DEIS analysis, the "average delay per vehicle", i.e. the numerical equivalent of the LOS grade, would increase by 163% at the five BRL crossings considered, West 117 St, Bunts Rd, Columbia Rd, Dover Center Rd, and Bradley Rd, as a result of the Conrail Acquisition. Even assuming, arguendo, that the average delay per vehicle has been calculated accurately, this is a substantial increase in average vehicle delay. And yet, because of its failure to consider cumulative impacts, the DEIS does not consider whether this increase in average vehicle delay should serve as part of the

justification for environmental mitigation. This is error. The purpose of environmental mitigation should be to identify not just substantial individual environmental degradations, but to identify all environmental degradations and to return communities, as closely as possible, to the pre-existing condition.

In any event, the "pre" and "post" "crossing delay per stopped vehicle" and "average delay per vehicle" still must be calculated accurately. And, it is clear that the figures presented in Table 5-OH-11 (Revised) are not accurate for the following reasons.

First, as discussed previously, the DEIS has erred in utilizing the maximum allowed speed rather than a reasonable estimate of an average speed.

Second, as also discussed previously, the DEIS has erred in accepting a post-acquisition trains per day figure that NS has not been able to verify.

Third, in computing the "blocked crossing time per train", another of the components of both the crossing delay and the average delay, the DEIS utilized an understated constant, i.e. 0.50 minutes, to reflect the "time in minutes for gate closing and opening prior to and after the passage of the train."[61] As demonstrated in BRL's comments on the DEIS, the correct time for NS is 0.66 minutes.

7) Pedestrian Safety: "SEA did not separately consider potential

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[61] DEIS, Volume 5A at C-11.

pedestrian impacts."[62] BRL cannot ignore pedestrian safety and see no reason why the Board should do so. As reported in BRL-2 and BRL-3, children attending 22 elementary and middle schools in BRL cross the tracks each day. This fact must be considered by the Board in determining the need for environmental mitigation.

8) Summary Of Environmental Degradation: As established herein, our prior summary of the DEIS findings obviously does not fully reflect the environmental degradation proposed to be borne by BRL in order to improve NS's bottom line. To that prior list, we must add the following:

every DEIS calculation including train speed understates environmental impacts, and

every DEIS calculation including the number of NS trains is unsupported in the record, and

every DEIS analysis of noise impacts is based on an incorrect methodology, and

every DEIS analysis of noise impacts understates the number of sensitive receptors, and

the DEIS analysis of air quality impacts ignores CO impacts above significant impact thresholds, and

the DEIS understates the maximum delay at grade crossings, and

the DEIS ignores the fact that BRL would experience approximately 653 emergency vehicle delays per year, and

the DEIS ignores pedestrian safety.

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[62] DEIS, Volume 1 at 4-13.

BRL submit that the environmental degradation resulting from the NS proposal for the Line Segment is substantially greater than the environmental degradation discussed by SEA in its recently issued Reno FMP.[63] We further submit that the Maestri Plan is the only approach that NS has conceded to be available to eliminate that environmental degradation.

IV. The Maestri Plan

As outlined in Mr. Maestri's November 25, 1997 letter to Elaine Kaiser, the Maestri Plan contemplates three fundamental elements. First, NS would upgrade the existing Conrail track to Cloggsville and would construct a connection at Vermilion. Second, NS would construct a grade separation at Front Street in Berea. Third, NS would construct a grade separation at Fitch Street in Olmsted Falls.[64]

In light of the above-described Board analysis of proposed mitigation, several points must be noted with regard to the Maestri Plan.

First, the Maestri Plan is designed only to eliminate the need for new traffic over the Line Segment.[65] Thus, it would not improve the environmental status quo.

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[63] This results, in part, from the fact that the projected increase in trains through Reno is 11.3 per day (Reno FMP at 2-2) as opposed to the 20.6 train per day increase proposed by NS for BRL.

[64] Maestri letter, DEIS Volume 5C, Appendix S at 9.

[65] Id. at 2.

Second, the Maestri Plan is operationally feasible.[66]

Third, the Maestri Plan, by eliminating new traffic and the environmental degradation resulting from that traffic, produces net public benefits, including improving conditions in Berea and Olmsted Falls. In fact, NS, the party with the burden of proof in this proceeding, has not even suggested that the annual costs of its investment in the Maestri Plan would be greater than the net public benefits. Rather, NS has asserted only that the cost of this plan "outweighs any economic benefits to NS."[67] This is irrelevant under the Board's criteria.

Fourth, the Maestri Plan would not affect the competitive balance among railroads.

Fifth, the Maestri Plan obviously addresses an effect of the Conrail Acquisition.

Sixth, the Maestri Plan is narrowly tailored to remedy adverse effects of the transaction and would not put BRL in a better position than it occupied before the consolidation. That is, there would be no reduction in the current number of trains operating through BRL.

In brief, the Maestri Plan meets every criterion for environmental mitigation conditions. It should be adopted by the Board. And, since this is baseline (Tier 1) mitigation, Union Pacific/Southern Pacific Decision No. 71 calls for it to be fully

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[66] Id. at 1.

[67] DEIS, Volume 2, NS Safety Integration Plan at 196 (emphasis added).

funded by NS.

VI. No Increase In Traffic Over The Line Segment Should Be Permitted Until The Construction Required For The Maestri Plan Has Been Completed.

As SEA has implicitly recognized in the Reno FMP, railroads should not be free to visit environmental degradation on communities by increasing train traffic before they complete the mitigation measures required by the Board. "SEA also recommends that the Board continue to impose on UP the current cap of 14.7 daily freight trains through Reno until these physical installations are made." Reno FMP at 2-25.

BRL request a similar condition in this proceeding. That is, the 14.7 train per day cap adopted for Reno was two trains per day more than the Base Case in the UP/SP proceeding. In this case, the Base Case is 13.5 trains per day and the train cap should be 15.5 trains per day.

VII. The Board Should Retain Oversight For Five Years.

BRL previously have advocated that the Board retain jurisdiction over the Conrail Acquisition for purposes of expanding environmental mitigation in the event that the impacts of the transaction are greater than those that can be estimated today.[68]

DOT has joined BRL in requesting the Board to retain oversight. DOT-5 at 2, 9 and 21. "[W]e strongly recommend that the STB retain jurisdiction for a five year period to monitor relevant developments . . . and to remain in a position to

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[68] BRL-2 and BRL-6.

address . . . issues that may arise." Id. at 13.

Similarly, the Town of Haymarket has set forth a substantial case for retention of jurisdiction by the Board. TOH-2. Among other things, Haymarket explains that retention of oversight is consistent with the Agreement Between The National Industrial Transportation League, NS, And CSX. CSX/NS-176 at 771.

Retention of jurisdiction is amply supported by precedent, e.g. Penn-Central Merger & N&W Inclusion Cases, 389 U.S. 486, 522 (1968); Baltimore & Ohio R. Co. v. United States, 386 U.S. 372, 387 (1967) ("Once a valid order is entered by the Commission, it, of course, has the power to retain jurisdiction for the purpose of making modifications that its finds necessary in the light of subsequent circumstances or to assist in compliance with prior conditions previously required or, of course, to correct any errors.").

Similarly, retention of jurisdiction is amply supported by the fundamental uncertainty as to the number of trains NS would operate over the Line Segment. Since train counts obviously are a vital input to any environmental analysis, the Board should adopt DOT's position and retain jurisdiction for five years.

Conclusion

BRL do not gainsay that $47 million, the NS cost estimate of its mitigation proposal to eliminate the environmental damage to BRL, is a substantial sum. But, even in the unlikely event that the entire cost of this mitigation were to be expensed in one year, it would be only 8% of that year's "net operating benefits

in a normal year of $553 million." If this cost is amortized over only ten years, the minimum one would expect, it would be only 0.8% of those years' "net operating benefits." Again, this would be a reasonable expenditure even if the data presented in the DEIS fully reflected the environmental harms to BRL resulting from the NS proposal.

WHEREFORE, BRL respectfully request the Board to impose three environmental mitigation conditions on the Conrail Acquisition. First, the Board should mandate full implementation of the Maestri Plan at the sole expense of NS. Second, NS should be permitted no increase in traffic volume over the Line Segment until such time as it completes the construction required under

the Maestri Plan. Finally, the Board should retain jurisdiction over the Conrail Acquisition for five years.[69]

Respectfully submitted,

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Attorneys for
City of Bay Village
City of Rocky River
City of Lakewood

Dated: February 23, 1998

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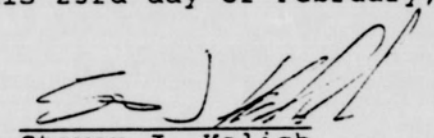
[69] If, for any reason, the Board does not impose the three conditions advocated by BRL, BRL would request in the alternative that NS be required to (1) install gates and lights at all grade crossings in BRL; (2) pay for the construction of a new Fire/EMS station in Rocky River north of the tracks; (3) replace Clague Siding with a new siding west of BRL; (4) repair the bridge located to the west of the Westlake Hotel; (5) follow the best practices permitted by the FRA for noise abatement following completion of FRA's ongoing study; and (6) fund studies to determine whether grade separations are feasible in BRL and fully fund any feasible grade separations.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served copies of the foregoing upon all parties of record by first class mail, postage prepaid.

Dated at Washington, D.C., this 23rd day of February, 1998.



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February 23, 1998

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VIA HAND DELIVERY

Mr. Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, N.W., Seventh Floor
Washington, DC 20423-0001

Re: CSX Corp./Norfolk Southern Corp. -- Control and Operating Leases/Agreement -- Conrail; Finance
Docket No. 33388

Dear Secretary Williams:

Enclosed are the original and 25 copies each of the highly confidential and public versions of the "Supplemental Brief of Indianapolis Power & Light Company in Support of Request for Conditions in IP&L-3 and in Support of the Responsive Application of Indiana Southern Railroad, Inc. (ISRR-4)" (IP&L-11). The highly confidential version of IP&L's Brief is being filed under seal in accordance with the Protective Order. Also enclosed is a 3.5" diskette containing the Brief in WordPerfect format.

We have incorporated by reference into IP&L-11 matters addressed in IPL's October 21, 1997 Joint Comments with Atlantic City Electric Company (ACE, et al.-18) and IPL's own Supplemental Comments filed the same date (IP&L-3). Because of this, for the convenience of the Board, we are submitting herewith 25 additional copies of ACE, et al.-18 and IP&L-3.

Please date stamp and return the enclosed three additional copies of each version of IP&L's Brief via our messenger.

Very truly yours,

Michael F. McBride

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Brenda Durham
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Attorneys for Indianapolis Power & Light Company

Enclosures

cc: All Parties on the Certificate of Service

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STB FD-33388 2-23-98 E ID-185853

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ORU-4

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

BRIEF OF ORANGE AND
ROCKLAND UTILITIES, INC.

In its October 21, 1997 Comments and Request for Conditions, Orange and Rockland Utilities, Inc. ("Orange and Rockland") cited certain respects in which the breakup of Conrail, and its absorption by Applicants CSX Transportation, Inc. ("CSX") and Norfolk Southern Railway Company ("NS") will have adverse impacts on Orange and Rockland. In the relatively brief discussion of these issues in their Rebuttal, Applicants have failed to establish legal or policy grounds for denying the conditions sought by Orange and Rockland.

Orange and Rockland's concerns focus on the 700,000 tons of extremely low sulfur "supercompliance" coal that is necessary to fuel the Lovett Plant, located on Conrail's River Line in Tomkins Cove, New York. Today, all coal burned at the Lovett Plant is delivered by Conrail. Under the Applicants' proposal, CSX would

take over Conrail's River Line, and would be the sole delivering railroad to the Lovett Plant. Orange and Rockland would go from being captive to Conrail today, to being captive to CSX after implementation of the proposed Railroad Control Application.

Although this suggests an equivalence of service for Orange and Rockland before and after this proceeding, Orange and Rockland has shown that its ability to meet its obligations to its customers is threatened by aspects of the Applicants' proposal that could be cured, in an operationally feasible manner, without jeopardizing any benefits that may also flow from the breakup of Conrail. Where conditions are requested that can meet these criteria, well-established precedent calls for the imposition of such conditions. See, e.g., Union Pacific -- Conrail -- Missouri Pacific; Western Pacific, 366 I.C.C. 462, 565 (1982).

I. SERVICE PROBLEMS

As explained by Orange and Rockland Witness Bogin, substitution of CSX service for Conrail service jeopardizes operations at the Lovett Plant in two ways. First, documented deficiencies in service by Conrail to the Plant will be exacerbated as a result of the proposed Transaction. This diminution in service quality is due in part to the many difficulties CSX is certain to experience in integrating approximately 42% of Conrail into its system.

The Board has heard at length from shippers (and railroads) in the Western United States about service problems, and problems in shippers' plant operations, resulting from Union Pacific's acquisition of Southern Pacific. These problems have lasted for many months, are still being "solved", and are producing effects and aftereffects that will be felt for years to come. Much of the resulting damage will never be corrected or compensated.

Orange and Rockland has every reason to fear similar problems or worse problems, if CSX absorbs part of Conrail. CSX must integrate half of a major railroad into its own operations, avoiding disruption of services formerly provided by Conrail and CSX, while also preserving coordination with other carriers including NS, which will be experiencing its own growing pains. In comparison, UP's takeover of SP, an intact railroad, should have been an easier task.

Even if a UP-type "meltdown" can be avoided, Orange and Rockland remains concerned about increased congestion on the River Line between Albany and New York City, producing more frequent and more extended delays in coal deliveries to the Lovett Plant. As Orange and Rockland Witness Bogin explains (V.S. at 5) service to the Lovett Plant over the River Line is constrained by the fact that traffic can move over the line in only one direction at a time. A short delay in departure can and does mean that trainloads of coal arrive at the Lovett Plant a full day late, due to the narrow "window of opportunity" for deliveries.

The Applicants' own projections call for a significant increase in traffic over the River Line if CSX takes over. Almost 20% more rail tonnage is projected, and the Applicants have repeatedly cited their expectations of inducing shippers via motor carrier to divert some or all of their freight from truck to rail.

In their Rebuttal, the Applicants promise repeatedly that there will be no recurrence in the East of UP's disastrous service problems in the West. Extensive planning and coordination efforts are said to be underway, and the Board is invited to exercise oversight of implementation of the Transaction for a three-year period.

It is obviously in Applicants' own interests to avoid any service problems in the new configuration contemplated by this Transaction. The fact remains that breaking up Conrail into separate (and shared) portions, and integrating the resulting operations, is likely to be more complicated than UP's acquisition of SP. And if Applicants have discussed measures to avoid service problems to the Lovett Plant, those measures have not been discussed with or disclosed to Orange and Rockland. Moreover, while STB oversight in Ex Parte No. 573, Rail Service in the Western United States, and the resulting service order were helpful, oversight alone has not resolved western shippers' problems, and is unlikely to be able to resolve any service problems the Conrail breakup may produce.

Of course, it is small consolation to Orange and Rockland if the Transaction avoids service problems on a UP/SP scale, but leads to impaired fuel deliveries to the Lovett Plant. As railroad mergers and acquisitions become larger and more complex, it becomes possible for the Applicants to dismiss larger and more damaging service problems as "isolated" or "incidental".

The Board must not make the mistake of tolerating major service disruptions in the context of major mergers, merely because minor service disruptions have been tolerated in minor proceedings. The statute and the Board's own regulations recognize that major transactions require special handling, and the only mergers that could exceed the impact of this one would be transcontinental mergers, e.g., NS with BNSF or CSX with UP. Because major mergers can produce major problems as well as major benefits, proceedings like this one require additional regulatory scrutiny and vigilance, and a greater readiness to impose corrective conditions.

Finally, Orange and Rockland's concerns about greater congestion on the River Line have been ignored by the Applicants. At pp. 452-453 of their Rebuttal, they call Orange and Rockland's contention that existing service problems will be aggravated "totally speculative", and they go on (inconsistently) to claim that CSX will provide "the same consistently high level of service" Orange and Rockland receives today. But today's service is poor, and there is nothing speculative about Orange and Rockland's

concerns about congestion; they are based on the Applicants' own projections.[1/]

Notably, the response of Applicants' Witness Sansom to Orange and Rockland's Comments does not contend that they are "speculative", or that current service quality is high. His response is rather than Orange and Rockland has a water delivery option rendering rail service concerns immaterial. As explained below, Witness Sansom is wrong, but even if water delivery were feasible, this alleged option would not enable Orange and Rockland to avoid service problems on coal deliveries covered by rail transportation contracts. Plainly, contracts have not protected UP shippers on the Texas Gulf Coast.

Orange and Rockland's concerns about adverse impacts from this Transaction on timely and reliable service to the Lovett Plant warrant remedial action in this proceeding.

II. REDUCED COMPETITION

Even if there were any basis for Applicants' claims that CSX will provide better service to the Lovett Plant than Conrail (and there is none), Orange and Rockland would still seek conditions on any approval of this Transaction by the Board. Absent conditions, the proposed Transaction will permit CSX to foreclose competition for coal and for coal transportation that Orange and Rockland now enjoys.

1/ See Railroad Control Application, Volume 3A, Attachment 13 (page 448) and Attachment 13-7 (page 470).

As explained by Orange and Rockland Witness Bogin (V.S. at 2), the Lovett Plant burns special "supercompliance" coal characterized by high Btu content (13,000 Btu per pound) and extremely low sulfur (1.0 lbs. per MMBtu). This low sulfur content is necessary under applicable environmental regulations. Because Conrail originates relatively little of this Central Appalachian-type supercompliance coal, Conrail's market dominance over service to the Lovett Plant has not restricted Orange and Rockland's ability to take advantage of origin competition on two levels.

First, Orange and Rockland has been able to obtain bids from supercompliance coal producers served by NS, and from competing coal producers served by CSX. As a result, Orange and Rockland has had a free hand to choose the supercompliance coal with the combination of features -- price, quantity, burn characteristics and emission impacts -- that best meets Orange and Rockland's needs. Second, Orange and Rockland has been free to negotiate with CSX and NS for the optimal combination of transportation rates and rail service terms.

So long as Conrail received the revenues it demanded for its services, it was indifferent to the identity of the coal producer and delivering carrier. CSX will not be so impartial. At best, CSX can be expected to price its services in such a way as to neutralize any competitive advantage currently enjoyed by coal producers served by NS. And 80% of the supercompliance coal

available from Massey Coal Sales, Orange and Rockland's current primary producer, is served only by NS. Bogin V.S. at 9.

At worst, CSX can foreclose access to NS-originated coal supplies for the Lovett Plant. CSX's market power will enable it to insure that the delivered price of such coal always exceeds the delivered price of coal from mines CSX serves, no matter how competitive the NS coal, or the NS rate from the mine to the interchange point with CSX.

The result would be a clear distortion of the marketplace not just for coal transportation, but also for coal itself. As Witness Bogin states, "CSX should not be allowed to use its market power to steer Orange and Rockland away from efficient mines producing the best coal at the best price and toward less efficient mines producing less suitable coal at higher prices, merely because it has the ability to monopolize Orange and Rockland's rail service." V.S. at 8.

The Applicants acknowledge Orange and Rockland's argument and Witness Bogin's testimony in their Rebuttal (Volume I at p. 83-84) but appear to miss the point. They say that Orange and Rockland "offers no proof at all of this alleged origin competition", when in fact, Witness Bogin explains the competition in the marketplace to supply and transport supercompliance coal for the Lovett Plant quite well, from her own personal knowledge as Orange and Rockland's coal buyer.

The concept is not difficult to grasp. Rail competition, though desirable in itself, is also desirable as a means of transmitting the benefits of competition in commodity markets from sellers to their customers. The avowed goal of natural gas pipeline and electric utility restructuring in recent years has been to allow the markets for those commodities to operate freely, without distortion by monopoly pipelines or electric utilities. Indeed, the need for protection from market distortions by railroads is arguably greater than the need for such protections with respect to gas and electricity, because those commodities are fungible compared with coal.

How is the public interest served if Orange and Rockland's present ability to choose freely between qualified producers of a scarce commodity -- supercompliance coal -- is significantly impaired because CSX wants coal for the Lovett Plant to come only from mines it serves? Assuming other benefits of the Conrail breakup outweigh this reduction in competition for Orange and Rockland's business, what is the rational for not conditioning merger approval on imposition of protective conditions requested by Orange and Rockland?

The Applicants argue that, under the "one-lump" theory, origin competition is a myth. However, even their consultant, Dr. Kalt, concedes in his Rebuttal Verified Statement (Vol. 2A, page 34) that where the rates of "upstream" railroads like NS and CSX are not

driven by competition down to incremental costs, "some of the lump may be retained by the upstream carriers". In other words, there may be more than one "lump".

Some support for both sides of this debate is provided by Delaware & Hudson Railway Co. v. Consolidated Rail Corp., 902 F.2d 174 (2d Cir. 1990). It is clear from that opinion that Conrail sought to put full-blown "one-lump" pricing into effect when it demanded an 800% increase in its revenues for a joint haul with the D&H, effectively forcing D&H to earn no profit on its participation in a haul that could also move via Conrail direct. However, the court of appeals concluded that Conrail's actions could be in violation of the antitrust laws. The case was later settled.

There are relatively few antitrust cases involving the railroad industry, and it is a safe bet that this decision received wide attention. It is also likely that the decision contributed to a reluctance by delivering railroads to risk similar challenges by employing full "one-lump" pricing. And, of course, no railroad that used such pricing would be invulnerable to retaliation in other situations, in which it lacks a destination monopoly.

Ultimately, the railroads cannot have it both ways. If the one-lump theory holds, it makes no sense to require captive shippers to challenge anything other than the bottleneck rate, since all abuse of market power is concentrated in that rate. If, on the other hand, origin competition among railroads exists,

remedial measures should be taken in merger proceedings to minimize any merger-related diminution in that competition.

And even if it is assumed that the one-lump theory is correct as to upstream rail competition, the Board must not ignore deleterious effects on source competition of a Transaction like this. Conrail's neutrality as to Orange and Rockland's coal purchasing decisions meant that all of the low-sulfur mines in Central Appalachia could compete to supply coal to the Lovett Plant. There is a natural incentive on CSX's part to discourage Orange and Rockland's purchases of coal from NS-served mines that will, in turn, reduce the incentive of CSX-served mines to offer their lowest prices to Orange and Rockland.

To Applicants' Witness Sansom, such concerns are academic. He argues that Orange and Rockland will not be captive to CSX because ships can deliver coal to the Lovett Plant, bypassing CSX's destination monopoly.

Mr. Sansom's position rests on erroneous assumptions. His "best evidence" for his conclusion is the fact that a different utility, Central Hudson Gas and Electric Corp., uses "ocean-going self-unloading" ships to deliver "the same supercompliance coal ORU uses" to Central Hudson's Danskammer plant, 26 miles up the Hudson River from the Lovett Plant. Applicants' Rebuttal Volume 2B, Sansom Rebuttal V.S. at 64. He goes on (id. at 67) to argue that Orange and Rockland "can import super compliance coal if necessary."

One problem with this analysis is that Central Hudson does not use the same coal as Orange and Rockland. Danskammer is able to burn coal with a sulfur content of 1.1 lb SO_2/MMBtu, while the coal burned at the Lovett Plant cannot exceed 1.0 lb SO_2/MMBtu sulfur. The difference may seem small, but its impact on coal purchases is significant. Central Hudson has apparently located foreign coal producers that will commit to supply large volumes of 1.1 lb. SO_2 coal. Orange and Rockland's attempts to identify reliable, long-term foreign sources of 1 lb. SO_2 coal have been unsuccessful.

A second disparity between Orange and Rockland's situation and Central Hudson's is that there are no coal unloading facilities at the Lovett Plant. Assuming arguendo that such facilities could be built, why would Orange and Rockland incur the considerable expense of doing so, if there are no reliable foreign sources of the supercompliance coal required at the Lovett Plant? Domestic supercompliance coal delivered by a combination of rail and water would not be competitive with all rail deliveries even if unloading facilities at the Lovett Plant were already in place.

In positing a scenario (which is, unfortunately, factually erroneous) in which Orange and Rockland could bypass the CSX bottleneck monopoly over River Line deliveries to the Lovett Plant, Mr. Sansom is implicitly conceding the need for such protection. Water deliveries will not achieve this goal, but there are conditions the Board can and should impose that will.

III. ORANGE AND ROCKLAND'S REQUESTED CONDITIONS ARE NECESSARY

In its Comments, Orange and Rockland requested the imposition of conditions that would cure both of its concerns. Specifically, trackage rights for NS over the River Line from Northern New Jersey to the Lovett Plant would enable Orange and Rockland to obtain coal deliveries despite service problems on NS or CSX, as they attempt to absorb their respective portions of Conrail's lines. Trackage rights over the final 50 miles of movements from Central Appalachia to the Lovett Plant would also preserve the benefits of origin competition that Orange and Rockland now enjoys.

The Board could also order CSX to establish reasonable interchange rates over the final delivery leg of movements from NS-served mines. Such a condition would enable NS and CSX, and the mines they serve, to compete based on price and quality. The danger of foreclosure or exclusionary pricing by CSX would be mitigated. CSX would be encouraged to attract Orange and Rockland's business by making its own service better than Orange and Rockland obtains today, rather than by making NS joint line service worse.

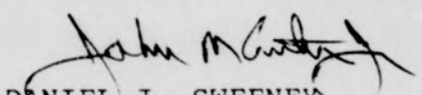
The requested conditions are justified by economic and service considerations by policy, and by precedent. Because they do no more than prevent the withholding, as opposed to the sharing, of the efficiency gains the Applicants promise to achieve, imposition of these conditions will not harm the Transaction. On the contrary, by conditioning any approval order as requested by Orange

and Rockland, the Board will not just preserve, but will enhance, the public interest.

IV. CONCLUSION

New competition in the electric utility industry means that reliable, cost-effective railroad deliveries of low sulfur coal have become critical. While true "partnerships" between utilities and railroads hold great promise, consolidations in the railroad industry also create great dangers to the continued production of dependable, low-cost electric power. For the reasons set forth in Orange and Rockland's Comments and in this Brief, the Board should grant Orange and Rockland's request for the imposition of protective conditions.

Respectfully submitted,



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Dated: February 23, 1998

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CERTIFICATE OF SERVICE

I hereby certify that I have this 23d day of February, 1998, caused the foregoing Brief to be served by first-class mail on counsel for the applicants and on the FERC Administrative Law Judge assigned to handle discovery matters, as indicated below. Copies have also been served by first-class mail on all parties of record on the official service list.

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February 23, 1998

VIA HAND DELIVERY

Mr. Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, N.W., Seventh Floor
Washington, DC 20423-0001

Re: CSX Corp./Norfolk Southern Corp. -- Control and Operating Leases/Agreement -- Conrail; Finance Docket No. 33388

Dear Secretary Williams:

Enclosed are the original and 25 copies each of the highly confidential and public versions of the "Supplemental Brief of Indianapolis Power & Light Company in Support of Request for Conditions in IP&L-3 and in Support of the Responsive Application of Indiana Southern Railroad, Inc. (ISRR-4)" (IP&L-11). The highly confidential version of IP&L's Brief is being filed under seal in accordance with the Protective Order. Also enclosed is a 3.5" diskette containing the Brief in WordPerfect format.

We have incorporated by reference into IP&L-11 matters addressed in IPL's October 21, 1997 Joint Comments with Atlantic City Electric Company (ACE, et al.-18) and IPL's own Supplemental Comments filed the same date (IP&L-3). Because of this, for the convenience of the Board, we are submitting herewith 25 additional copies of ACE, et al.-18 and IP&L-3.

Please date stamp and return the enclosed three additional copies of each version of IP&L's Brief via our messenger.

Very truly yours,

Michael F. McBride

Michael F. McBride
Bruce W. Neely
Brenda Durham
John M. Collins

Attorneys for Indianapolis Power & Light Company

Enclosures

cc: All Parties on the Certificate of Service

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February 23, 1998

VIA HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423-0001

Re: CSX Corp., et al., Norfolk Southern Corp., et al. -- Control and Operating Leases/Agreements -- Conrail Inc., et al., Finance Docket No. 33388

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding, please find an original and 25 copies of the Brief of the International Association of Machinists and Aerospace Workers ("IAM"). Also enclosed is a 3.5" diskette containing the text of this filing in WordPerfect 6.0/6.1 format.

I have included an additional copy to be date-stamped and returned with our messenger.

Thank you for your attention to this matter.

Sincerely,

Debra L. Willen

Debra L. Willen
Counsel for the IAM

DLW:mmw

cc: Allison Beck, Esq.
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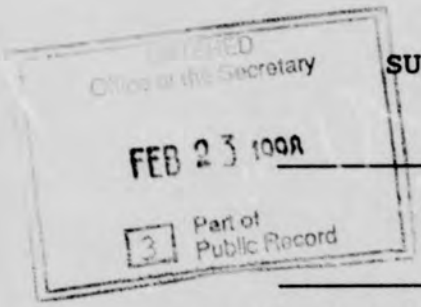
IAM-6



BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33388

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

BRIEF OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS

The International Association of Machinists and Aerospace Workers ("IAM") hereby submits its Brief opposing the control and operating leases/agreements application of CSX Corporation ("CSXC"), CSX Transportation, Inc. ("CSXT"), Norfolk Southern Corporation ("NSC"), Norfolk Southern Railway Co. ("NSR"), Conrail, Inc. ("CRR"), and Consolidated Rail Corporation ("CRC) (hereinafter collectively "the Applicants").[1/]

In its Comments previously filed in this proceeding, the IAM voiced its strenuous opposition to the proposed transaction. In particular, the IAM opposes the Applicants' plan to abrogate the IAM's collective bargaining agreements with Conrail, as set forth in Appendices A to NS' and CSX's Operating Plans. In addition, the

[1/] Hereinafter CSXC and CSXT are referred to collectively as "CSX," NSC and NSR are referred to collectively as "NS," and CRR and CRC are referred to collectively as "Conrail."

IAM opposes the merger on the grounds that it will have a deleterious impact upon railway safety. Accordingly, the IAM respectfully requests that the Surface Transportation Board ("STB" or "the Board") deny the pending application.

In the alternative, the IAM urges the STB to condition any approval of this transaction upon the imposition of the New York Dock and other applicable labor protective provisions. Moreover, as the Applicants now concede, issues regarding the modification or abrogation of existing labor agreements must first be the subject of negotiation and arbitration pursuant to Article I, Section 4 of the New York Dock conditions.

I. THE IAM HAS NOT OVERSTATED THE ADVERSE IMPACT THAT THIS TRANSACTION WILL HAVE UPON ITS MEMBERS.

The STB must consider the interest of affected rail carrier employees in determining whether the proposed acquisition of control by CSX and NS of Conrail and the division of Conrail's assets between them should be approved. 49 U.S.C. § 11324(b)(4). As previously noted, the IAM represents approximately 950 employees on the Conrail system, 700 employees on the NS system and 1,150 employees on the CSX system in the machinists craft or class. According to the Applicants' Labor Impact Exhibit, based on 1995 average head count, 182 machinist jobs would be abolished and 173 machinist jobs would be transferred if the proposed transactions were approved. Applicants' Submission of 1995 Labor Impact Exhibit, CSX/NS-26, based on 1995 average head count, at 14.

The Applicants assert that the IAM has "exaggerated" the impact of the transaction upon its members. Applicants' Rebuttal, Vol. 1, CSX/NS-176 at 576. The Applicants persist in relying upon the 1996-97 head count to calculate the impact of the transaction on their employees. Id. at 576-77. The Board expressly rejected that approach in an earlier decision and found that the Applicants must use the year 1995 as the base line for setting forth labor impact figures. Decision No. 7 at 9. There is therefore no basis for the Applicants' assertion that such data overstates the impact that the transaction will have upon the IAM's members.

II. THE APPLICANTS' PROPOSED ABROGATION OF THE IAM'S COLLECTIVE BARGAINING AGREEMENTS IS UNWARRANTED AND WOULD SIGNIFICANTLY INTERFERE WITH THE RIGHTS AND INTERESTS OF IAM-REPRESENTED EMPLOYEES.

NS' and CSX's plans to abrogate the IAM's collective bargaining agreements with Conrail will also have a gravely adverse impact upon the employees whom IAM represents. In a significant departure from legal precedent and past practice, NS and CSX seek the STB's approval of this plan, in conjunction with the Board's consideration of the instant transaction. It is beyond dispute, however, that any proposed changes to the Conrail agreements must first be the subject of bargaining and, if necessary, arbitration under Article I, Section 4 of the New York Dock conditions. In any event, the Applicants have not established that such changes are necessary to effectuate the transaction pursuant to 49 U.S.C. § 11321(a).

As noted in the IAM's initial Comments, NS proposes that all IAM-represented employees on the Conrail routes and facilities allocated to NS be subject to the Norfolk & Western Railway Co. ("NW") collective bargaining agreement effective September 1, 1949. Application, Vol. 3B at 373-74. CSX also states that its collective bargaining agreements with the IAM will apply to CSX's portion of the Conrail system and IAM's agreements with Conrail will be overridden. Application, Vol. 3A at 492, 503-04. The Applicants devised this plan to abrogate the Conrail collective bargaining agreements without having undertaken more than a very cursory review of those agreements, if any, and without having engaged in a single negotiating session with the IAM regarding an implementing agreement. See IAM-4 at 3-4.

Article I, Section 4 of the New York Dock conditions sets forth the required procedure for reaching an implementing agreement to effect a subject transaction. Under that procedure, changes in labor agreements are subject to collective bargaining and ultimately arbitration. While repeatedly conceding that "operational implementation of approved transactions occurs exclusively through the New York Dock process[,]" (CSX/NS-176 at 607), NS and CSX nonetheless request that the Board sanction now the changes to collective bargaining agreements proposed in their Operating Plans. As the Applicants acknowledge, however, "[i]mplementation occurs by agreement or, failing that, through adjudication in arbitration." CSX/NS-176 at 611.

Prior to the parties' exhaustion of the Article I, Section 4 procedure, it would be premature for the Board to make any findings regarding the necessity of overriding the Conrail collective bargaining agreements. Indeed, the Interstate Commerce Commission "g[a]ve arbitrators the prime responsibility for achieving a balance between collective bargaining rights and consolidation efficiencies...." CSX Corp. -- Control -- Chessie System, Inc. and Seaboard Coast Line Indus., Inc., 6 I.C.C. 2d 715, n. 31 (1990).

In the event that the Board feels compelled to address this issue at this procedural stage, however, the Applicants have failed to establish the necessity of a contractual override. Pursuant to 49 U.S.C. § 11321(a), the STB may modify a collective bargaining agreement "only as 'necessary' to effectuate a covered transaction." RLEA v. United States, 987 F.2d 806, 814 (D.C. Cir. 1993) (citation omitted). "[T]he benefit cannot arise from the CBA modification itself; considered independently of the CBA, the transaction must yield enhanced efficiency, greater safety, or some other gain." ATDA v. ICC, 26 F.3d 1157, 1164 (D.C. Cir. 1994).

This is a standard that NS and CSX clearly have not met. Instead the Applicants point to administrative efficiencies, such as uniform payroll, claims handling, and training processes. CSX/NS-176 at 677. NS and CSX basically argue that it is more efficient to administer fewer agreements. If this in itself were sufficient to establish the necessity of an override, however, then collective bargaining agreements would never survive a merger or consolidation of control. Carriers can not and should not be given

blanket authority to override entire collective bargaining agreements negotiated by their employees' certified collective bargaining representatives for the mere sake of administrative convenience. "[P]arties to contracts should not easily be relieved of obligations voluntarily undertaken." CSX Corp. -- Control -- Chessie System, Inc. and Seaboard Coast Line Indus., Inc., 6 I.C.C. 2d at 749.

NS maintains that, as the acquiring carrier, it should be able to impose its agreements on its allocated portion of Conrail. E.g., Application, Vol. 3B at 373-74. However, NS can cite to no legal authority in support of this "acquiring carrier" doctrine. Indeed, the IAM's collective bargaining agreements with acquired carriers have survived after prior mergers on the NS system. Thus, there currently are five collective bargaining agreements in effect on the NS system applicable to the machinists craft or class. IAM-4 at 3-4.

In fact, NS' position is directly contrary to arbitral authority. Arbitrators have applied the "controlling carrier" doctrine; simply stated, where work is transferred, the collective bargaining agreement covering the receiving location is applied to that work. E.g., CSXT, IBEW and TCU (Radio Repair Coordination (Arbitrator Simon) (Apr. 11, 1997), reprinted in Applicants' Rebuttal, Vol. 3B, CSX/NS-178 at 248.[2/] In the absence of a

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[2/] For this reason, NS' plan to integrate the Conrail locomotives which it acquires into its locomotive fleet, with functional specialization based upon manufacturer, does not require total abrogation of the Conrail agreements. See CSX/NS-176 at 609-
(continued...)

transfer of work, the existing collective bargaining agreements should remain in effect.

Further, NS mistakenly assumes that the unions are not challenging the selection of the particular NS agreement proposed. CSX/NS-176 at 678, n.87. The IAM does contest NS' unilateral selection of the archaic 1949 NW agreement for its allocated portion of the Conrail system. Moreover, contrary to NS' assertion, the IAM's own analysis of the respective work rules set forth in the NW agreement and the Conrail agreement reveals that the Conrail agreement is superior in almost all respects. See Applicants' Rebuttal, Vol. 3A, CSX-NS-178 at 100.

CSX also has taken the position that its collective bargaining agreements with the IAM will apply to its portion of the Conrail routes and facilities. Application, Vol. 3A at 492, 503-04. It is interesting to note though that CSX plans to apply the Conrail agreements to other crafts. CSX contends that it is not merely selecting the contract that it deems most advantageous; rather, its supposed methodology is to determine the applicable agreement based upon the predominant number of employees. CSX/NS-176 at 658. As the Allied Rail Unions have pointed out, however, this methodology is not consistently applied. ARU-23 at 135-37. In response, CSX now states that it is considering a geographic approach. CSX/NS-176 at 658. Once again, it is apparent that the only efficiency CSX

[2/](...continued)
610, 675. If shopcraft work is consolidated after the transaction, then the "controlling carrier" doctrine would apply to any transfers of work from Conrail to NS facilities and from NS to Conrail facilities.

can expect to achieve by overriding specified collective bargaining agreements is the administrative efficiency of administering one less agreement. This is hardly a justification for abrogating contractual rights and conditions.

In short, the Applicants' intention to abrogate the IAM's collective bargaining agreements with Conrail is totally unjustified and severely impairs the rights of the IAM-represented employees. For this reason, the IAM opposes the proposed acquisition of control by CSX and NS of Conrail and the division of Conrail's assets between them.[3/]

III. THE PROPOSED TRANSACTION POSES A SIGNIFICANT THREAT TO THE SAFETY OF RAIL LABOR AND THE PUBLIC.

In light of the Applicants' Operating Plans and their recent safety records, it is virtually certain that the safety problems that resulted from the Union Pacific - Southern Pacific merger will be repeated if this transaction is approved as proposed.

The IAM detailed in its initial Comments the specific areas of safety concern identified by the Federal Railroad Administration ("FRA") as a direct result of recent rail mergers in the western United States. As a result of "a fundamental breakdown in [Union Pacific's] ability to effectively implement basic railroad

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[3/] The IAM notes that, despite the Applicants' announced intention to abrogate Conrail collective bargaining agreements, they have conceded that "CSX and NS are not proposing to deny benefits under the Conrail SUB Plan or CSX's stabilization agreement. CSX and NS agree that protections under existing protective arrangements are preserved by Section 3 [of Article I of New York Dock]." CSX/NS-176 at 603. Any future application of the New York Dock conditions should be consistent with these assurances.

operating procedures and practices essential to safe railroad operations[,]" (FRA 19-97, Sept. 10, 1997), the FRA conducted a comprehensive safety inspection of UP and uncovered several deficiencies. Specifically, the FRA faulted the following: ineffective crew utilization, causing crews to work longer hours with less off-duty time; inadequate supervision of employee performance; dispatching supervisors' unfamiliarity with the territories of the dispatchers they supervise; dispatcher fatigue; dispatching conflicts; failure to comply with operating rules; infrequency of safety job briefings; lack of employee training on new equipment; use of defective equipment on trains; locomotive defects; inconsistent drug testing of train crews; lack of proper familiarization trips for locomotive engineers; and widespread harassment and intimidation of employees to not report defects and injuries. Id.

CSX has experienced similar safety problems. After a series of incidents, the FRA conducted a comprehensive audit of the CSX system and found problems much like those plaguing UP in the following areas: signals and train control; operational testing; crew management; hazardous materials; track maintenance and locomotive inspections. Safety Assurance and Compliance Program Report for CSX Transportation, Inc., Executive Summary. Most significantly, the FRA found serious deficiencies in CSX's safety culture. Train operations are emphasized over safety considerations, and employees who raise safety concerns face harassment and intimidation. Id. at ix-x.

More recently, in November, 1997 the FRA cited NS for over 220 violations, based upon its failure to follow proper train inspection procedures and operation of trains with defective brakes. See Memorandum dated Nov. 6, 1997 from FRA Motive Power & Equipment Safety Inspector Larry D. Ewing to FRA Region 1 Administrator David Myers, attached to TCU-14.

Despite the Applicants' efforts to distinguish their proposed transaction from the UP-SP merger in terms of the territorial size of the acquired facilities and the quality of the rolling stock, it is likely that the UP experience will be repeated here. The Applicants' own safety culture, coupled with particular aspects of their proposed Operating Plans, make serious safety problems inevitable. Thus, their plan to centralize dispatcher supervision, (Application, Vol. 3A at 504-05; Vol. 3B at 376-77), will result in supervisor unfamiliarity with the territories they supervise. Plans to increase seniority districts for train crews, communications and signal employees and maintenance of way employees, (Application, Vol. 3A at 486-88, 490-91, 493-94; Vol. 3B at 357-58, 365-372), will force those employees to work in unfamiliar territory. Reductions in maintenance of way employment and in the number of shopcraft employees who maintain and repair locomotives and cars, (Applicants' Submission of 1995 Labor Impact Exhibit, CSX/NS-26), without corresponding reductions in fleet size, rail lines or traffic, will lead to maintenance deficiencies and the use of defective equipment.

For these reasons, the proposed transaction can be expected to have a deleterious effect upon public safety in general and the safety of rail labor in particular and should not be approved.

CONCLUSION

For all these reasons, the IAM respectfully submits that the instant application should be denied. In the event that the application is approved, however, approval of the primary application should be conditioned upon the New York Dock protective provisions and approval of related trackage rights, abandonments, and lease approvals should be conditioned upon the Norfolk and Western, Oregon Short Line and Mendocino Coast conditions. Moreover, issues regarding the modification or abrogation of existing labor agreements must first be the subject of negotiation and arbitration pursuant to Article I, Section 4 of the New York Dock conditions.

Respectfully submitted,

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Date: February 23, 1998

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief of the International Association of Machinists and Aerospace Workers were served this 23rd day of February, 1998, by first-class mail, postage pre-paid, upon all parties of record in this proceeding.

Debra L. Willen

Debra L. Willen

STB FD-33388 2-23-98 E ID-185847

185847

ATMC-4

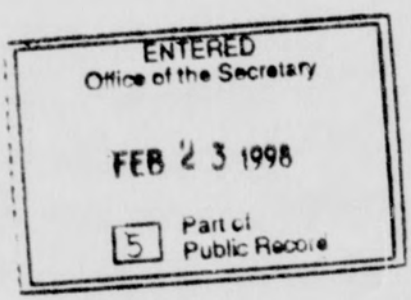
BEFORE THE

SURFACE TRANSPORTATION BOARD

WASHINGTON, D.C.

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	)	STB Finance Docket No. 33388

BRIEF OF
A. T. MASSEY COAL COMPANY, INC.,
IN SUPPORT OF REQUEST FOR
IMPOSITION OF CONDITIONS



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Due and Dated: February 23, 1998

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.

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	)	STB Finance Docket No. 33388

BRIEF OF
A. T. MASSEY COAL COMPANY, INC., ET AL.
IN SUPPORT OF REQUEST FOR
IMPOSITION OF CONDITIONS

Comes now A. T. Massey Coal Company, Inc. (Massey), and its subsidiaries Bandytown Coal Company, Central West Virginia Energy Company, Eagle Energy, Inc., Elk Run Coal Company, Inc., Goals Coal Company, Green Valley Coal Company, Hillsboro Coal Company, Independence Coal Company, Inc., Knox Creek Coal Corporation, Long Fork Coal Company, Marfork Coal Company, Inc., Martin County Coal Corporation, Massey Coal Sales Company, Inc., New Ridge Mining Company, Omar Mining Company, Peerless Eagle Coal Co., Performance Coal Company, Rawl Sales & Processing Co., Sidney Coal Company, Inc., Stirrat Coal Company, Stone Mining Company, Tennessee Consolidated Coal Company, United Coal Company, Vantage Mining Company, Vesta Mining Company, Wellmore Coal Corporation, Power Mountain Coal Company

and Spartan Mining Company, and submit this brief in support of their request for the imposition of conditions in the captioned proceeding.[1]

MASSEY'S INTEREST

Massey is one of the five largest marketers of coal in the United States. Transportation of coal is vital in its operations. Massey is headquartered in Richmond, VA. Massey produces, processes and sells bituminous, low sulfur coal of steam and metallurgical grades from 19 mining complexes (17 of which include preparation plants) located in West Virginia, Tennessee, Kentucky and Virginia.

To show the magnitude of Massey's activities, following is a table listing Massey's coal production for the last three fiscal years.[2] Data provided are in thousands of short tons, with the last three zeros omitted. Figures are given for steam coal, metallurgical coal, and total for each year.

Year	Steam Coal	Metallurgical Coal	Total
1994	17,120	7,333	24,453
1995	15,790	11,634	27,424
1996	17,578	13,616	31,194

Massey expects its production and sales to continue to rise in the future, provided it is able to get needed transportation service from NS and CSX at a price that will move Massey's coal.

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[1] For ease of reference, Massey and its subsidiaries will be referred to collectively simply as "Massey," unless the context requires a different treatment.

[2] Massey's fiscal year ends on October 31.

Quite obviously, Massey is heavily dependent upon rail service to move coal to its customers. Massey is concerned that its competitive position not be harmed by the proposed split of Conrail assets. To guard against that potential harm, Massey has requested that oversight conditions be imposed on the realignment of the railroad system in the East for a period of ten years following consummation.

For the first four years, Massey proposes that oversight proceedings be held annually. After that, they should be held biennially or at such intervals as the STB, in its discretion, may find useful. The results produced in the aftermath of Union Pacific Corp., Union Pacific Railroad Co., and Missouri Pacific Railroad Co.--Control and Merger--Southern Pacific Rail Corp., Southern Pacific Transportation Co., St. Louis Southwestern Railway Co., SPCSL Corp. and The Denver and Rio Grande Western Railroad Co., Finance Docket No. 32760 ("UP/SP"), definitely show that it is wise not to take at face value what railroad applicants say in a proceeding that involves unknown and unknowable major consequences at the time approval is given.

In UP/SP, oversight has been prescribed for a five year period. Based on the grave service deficiencies and other problems that have arisen subsequent to that merger, STB oversight is definitely needed. Without the potential for STB intervention to correct problems, it is almost a certainty that the problems in the Gulf Coast area following the merger of UP and SP would not have been the subject of a voluntary agreement[3] between BNSF and UP which will apparently lead to joint

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[3] There was a Union Pacific press release on February 13, 1998, which gave the outline of the agreement that had been reached between UP and BNSF. The Associated Press also reported the agreement on the same date.

ownership of certain critical track, as well as the availability of service by either BNSF or UP to many shippers in Houston and along the Gulf Coast.

If parties know that their conduct will be scrutinized, it will open up possibilities for negotiation and compromise that would not otherwise exist.[4] Massey is seeking regulatory scrutiny by the STB over a meaningfully long period of time in order to have an appropriate remedy for such future problems as may be produced by the division of Conrail's assets between NS and CSX. Governmental intervention is not something that should be relied upon to solve all problems, but the mere fact that circumstances would allow such intervention would be an impetus for the involved carriers and shippers to work things out among themselves.

THE THREE YEAR OVERSIGHT PERIOD CALLED FOR IN THE AGREEMENT BETWEEN NITL AND APPLICANTS IS FAR TOO SHORT

While it is good that the National Industrial Transportation League ("NITL") and Applicants have reached an agreement ("NITL AGREEMENT") that narrows the issues markedly in this proceeding, that should not influence the STB to defer unduly to them in discharging its regulatory responsibilities. Indeed, the STB has been subjected to criticism from numerous quarters for allowing the rail applicants and certain shipper organizations to formulate most of the conditions that were ultimately adopted by the STB in Union Pacific Corp., Union Pacific Railroad Co., and

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[4] One might consider this to be roughly analogous to the theorem in physics which says that a closed system cannot be observed without inducing change in it.

Missouri Pacific Railroad Co.--Control and Merger--Southern Pacific Rail Corp., Southern Pacific Transportation Co., St. Louis Southwestern Railway Co., SPCSL Corp. and The Denver and Rio Grande Western Railroad Co., Finance Docket No. 32760, Decision No. 44, 1996 STB Lexis 220 (August 12, 1997). There are those who contend that failure of the STB to come up with more meaningful conditions is what led to the massive service failures involving rail service at Houston and along the Gulf Coast.

The distaste of the STB for the very practical solution of divestitures in that case has aroused comment in many circles. It is now a bit ironic that the two principal railroads involved in UP/SP who agreed earlier on extensive conditions that involved primarily trackage rights should now come back with another agreement to swap ownership rights in certain Gulf Coast rail properties due to the infeasibility of trackage rights as a solution. What else may be required to achieve a solution that is in the public interest? How long will these problems persist? What other problems may become evident as the situation develops? Certainly reserving a five year period for continuing oversight in the less complex UP/SP merger proceeding will undoubtedly turn out to be a wise decision on the part of the STB. Indeed, an even longer oversight period could ultimately be required in the UP/SP merger proceeding.

If the condition requiring a five year oversight period in the UP/SP merger was appropriate, then the proposed three year oversight period called for in the NITL Agreement is entirely too short. The division of Conrail property between NS and CSX is a much more complex undertaking than

the absorption of SP by UP. Cutting the oversight period down to three years to be consonant with the NITL Agreement would logically appear to be the reverse of what should occur.

Many contracts for the transportation of coal and other commodities are multiyear in duration. As contracts end, it is important to know that meaningful recourse may be had to the regulatory structure if necessary for redress of potentially troublesome transportation grievances. The availability of oversight proceedings, rather than the need to initiate complaints, will assist in the fair and equitable resolution of differences that inevitably will arise between shippers and carriers. Moreover, continuing oversight should materially assist in alleviating, through future action perhaps, the feeling in the shipper community that typically the STB is not very helpful when major rail interests weigh in against shippers.[5] Furthermore, as concentration increases in the rail industry, it becomes more important that there be at least a perception in the broader community that the regulator is not in bed with the regulated. An extended rather than abbreviated oversight period would therefore serve a useful purpose in more than one arena.

Especially important to Massey, and many other shippers as well, is the implementation of competitive access. On April 5, 1996, Massey made a successful bid to purchase major coal

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[5] There are indications that the STB may be readjusting the balance in its decisions so as to be less favorably tilted towards major railroads; if so, further confirmation will be welcomed by shippers. See, e.g., FMC Wyoming Corporation and FMC Corporation v. Union Pacific Railroad Company, STB Finance Docket No. 33467, served December 16, 1997.

production facilities[6] that were served by both Conrail and CSX via a jointly controlled railroad[7] only to have Conrail and CSX agree to divide up that railroad and liquidate it[8] shortly thereafter.

Following the agreement of Conrail and CSX to divide their jointly controlled railroad, Massey was left with coal shipping facilities that were in all instances served by only one rail carrier.

In the absence of competition, rail rates inevitably will be higher than if there is competition for the subject coal traffic, unless "virtual" competition is injected via the regulatory process. Indeed, this is perhaps the best current justification for having a regulatory agency such as the STB. But with the acceptance of differential pricing practices of railroads, regulators have ipso facto awarded at least a modicum of monopoly rents to the railroads.

It is bad enough that shippers such as Massey must put up with the added weight of monopoly rents – indeed, excessive rents have been known to cause revolutions.[9] But what is

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[6] Shown on Appendix A (map) to ATMC-3 as the Green Valley Plant.

[7] The Nicholas, Fayette & Greenbrier Railroad.

[8] Following a request for regulatory relief filed by Green Valley Coal Company, a Massey subsidiary, in Consolidated Rail Corporation and CSX Transportation, Inc. - Acquisition and Operation - Nicholas, Fayette and Greenbrier Railroad Company, Finance Docket No. 32845 (petition filed April 23, 1996), there was a negotiated settlement which resulted in withdrawal of the Green Valley Coal Company's opposition to the transaction proposed in that proceeding. Had it been known then that CSX and NS would thereafter, in a fairly short time, agree to divide Conrail's assets, Green Valley Coal Company would not have acquiesced in losing service from Conrail without some additional agreed protection to simulate intramodal rail rate competition. The Green Valley Plant would have been a two-to-one point but for the division of the NF&G assets by Conrail and CSX. Was the division of the NF&G part of an orchestrated prelude to the liquidation of Conrail?

[9] For example, the rise to prominence of Charles Stuart Parnell in Ireland in the 19th century was attributable to an unfair system of land tenure, including the squeezing of as much rent as possible from the Irish peasantry, and was an underlying cause of the rebellion of the

(continued...)

especially distressing to Massey is the prospect that many of its geographically close competitors – specifically, coal shippers on the old Monongahela Railroad ("MGA") – will be served after the division of Conrail by both NS and CSX, whereas presently they are served only by Conrail.

The response of the Applicants has been that it does not matter that Massey will be hurt competitively following the merger, since it is the marketplace that must be considered, and there will be more rather than less competition for coal traffic following the Conrail carve-up. Moreover, they state – quite correctly, as Massey has already agreed – that in many instances Massey will have a single line connection rather than a joint line connection to many more major coal users.

Quite candidly, Massey has not been able to deduce from the facts it has to work with whether the proposed transaction to dismember Conrail will be favorable or adverse to Massey. One main reason for this is that the resolution to this conundrum is dependent upon the future actions of NS and CSX. If Massey's competitors become more favored due to concessions brought about by intramodal rail competition, then Massey's ability to market coal will be diminished. Of course, the best resolution would be for Massey's facilities to be accorded real – as distinguished from virtual – competitive intramodal rail service.

Although the next millennium is close at hand, real rail competition for Massey's coal is not. Accordingly, virtual competition – regulation, as it were – must be provided if Massey is to be accorded relief from future adverse impact due to the division of Conrail.

(..continued)
Irish that led to formation of what is no the Republic of Ireland.

Jerry M. Eyster, Massey's Vice President - Corporate Development, said the following in his verified statement, ATMC-3, at page 6:

> Should it become apparent post-consummation that Massey's competitive position has suffered vis-a-vis its competitors who will have competitive rail service following consummation, then Massey requests leave to seek the imposition of competitive access or other conditions in the oversight proceedings to remedy the harm to Massey's relative competitive position. Imposition of a condition based on this principle will encourage fair treatment of Massey. The mere existence of such a condition would militate against its ever being used. But without such a condition, railroad pricing practices may adversely affect Massey's competitive position in the future.

Keeping the door open for a request for competitive access or other relief in oversight proceedings will act as a safety valve. Provided the involved railroads act in a responsible manner, establishing a ten year period for oversight will cost the regulatory budget very little.

MASSEY SHOULD BE GRANTED LEAVE TO FILE FOR SPECIFIC RELIEF DURING THE OVERSIGHT PERIOD IF IT SUFFERS HARM

As a captive shipper of a monopolist railroad, Massey should be allowed to file for appropriate relief in the oversight proceedings that will take place following consummation of the division of Conrail between NS and CSX if Massey suffers as a result of the splitting up of Conrail. As noted earlier, Massey is not certain what the impact of the transaction upon it will be. Massey

wants to reserve the right to seek regulatory relief, such as competitive access solutions, should it be adversely impacted as a result of favored treatment being given to its competitors.[10]

The former Interstate Commerce Commission recognized in its last days that the freight railroads required federal economic regulatory oversight because the rail industry retains monopoly power over certain sectors of traffic. Policy Statement on the Transportation Industry Regulatory Reform Act, Ex Parte No. MC-222, served March 12, 1997, p. ES-4. The Interstate Commerce Commission then, in that same report, goes on to say:

> Although competitive transportation alternatives exist for much of the traffic carried by rail today, some traffic is nevertheless captive to railroads. Such traffic includes bulk commodities such as coal, chemicals, grain, and other raw materials; heavy, oversized equipment; and certain hazardous materials.
>
> The potential for the exercise of monopoly power by a railroad makes continued regulatory oversight essential. The competitive portion of the industry's business complicates the regulatory task. Successful regulation of the rail industry must not be so restrictive as to hamper the railroads' ability to compete effectively and maximize profits on competitive traffic. Yet regulation must be sufficiently vigilant, forceful, and effective to provide the constraints needed to protect the public from abuses of monopoly power.

Policy Statement on the Transportation Industry Regulatory Reform Act, supra, p. 4.

Persons having monopoly power can be devilishly clever. One can only hope that the exercise of such power will be benign, for if not, far-reaching adverse consequences can flow from it.

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[10] Adding to the mix of concerns is the fact that a subsidiary of NS, Pocahontas Land Corporation, is a major owner of coal reserves in Appalachia. Its total holdings include 900,000 acres in the southern and midwestern United States. See CSX/NS-18, p. 72. So, not only are coal producers on the MGA a source of concern, but one of the Applicants has a subsidiary whose activities could be troublesome in the future.

With respect to the regulated activities of railroads, it does no good to talk about the protection afforded by the antitrust laws of the United States, because regulation by the STB significantly insulates railroads from antitrust perils. Indeed, that was brought home most forcefully by the arguments of the United States Department of Justice in UP/SP, supra, and most pointedly in the oral argument of Assistant Attorney General Bingaman.[11] The argument, of course, failed, and that is why the STB is now occupied with devising remedial solutions – formal and informal – in the aftermath of the UP/SP merger.

APPLICANTS GIVE NO REASONS OTHER THAN SELF-INTEREST FOR A SHORT OVERSIGHT PERIOD

In discussing the concerns of Massey in their rebuttal, Applicants proceed from basically an *a fortiori* argument that oversight beyond three years is not needed because it is not needed. The mere fact that some parties got together and decided it would be nice to agree on a three year oversight period does not negate the need for continued scrutiny of one of the largest and most complex rail realignments in history. Such a transaction is clearly due more than a polite nod and wink and a touch by a rubber stamp. The STB, in the exercise of its regulatory functions, ought clearly to recognize the need for keeping its options open longer than might be needed for nearly any other rail consolidation matter.

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[11] The oral argument was delivered before the STB by Ms. Bingaman on July 1, 1996, in Washington, DC. There can be no doubt that approval for the merger transaction as it was proposed would not have been forthcoming had usual antitrust mechanisms been applicable.

Applicants criticize numerous parties for suggesting that the oversight period, at a minimum, should be as long as that prescribed in UP/SP. See Applicants' Rebuttal, CSX/NS 176, p. HC-726, n. 10. They urge that the imprimatur of the subscribing parties on the NITL Agreement clearly makes the agreed three year oversight period the greatest reasonable upper bound for such a period.

Now it is true that NITL is the largest shipper organization in the United States.[12] But it is equally true that it speaks only for a minor fraction of the entire shipper community. Massey, for one, is not a member of NITL.[13] Neither are most of the other parties in this proceeding, should they be counted using that standard. But even if Massey were to be a member of NITL, all members of that group hold, inviolate, the right to independent action in matters such as this. NITL is an umbrella group.[14] As such, it is controlled by certain elements. Its committee structure makes it quite susceptible to capture by narrow, special interest groups.[15] Political considerations often drive the actions of such an organization. All of this should be recognized so that the significance of the terms in the agreement between NITL and the Applicants can be evaluated. When that is done, it will be seen that a good argument can be made for these terms being used as minimum points of

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[12] NITL had 711 member companies as of January 12, 1998. As of that same date, NITL also had 219 "associates," who are generally carriers or third party logistics providers. See Internet Worldwide Web at URL http://www.nitl.org/meminfo/curlm&a.htm.

[13] Neither is Massey's parent, Fluor Corporation.

[14] Its Internet web page at URL http://www.nitl.org/meminfo/curlm&a.htm contains a list of members and "associates." The "associates" pay dues. Listed among the associates are Norfolk Southern Corporation, CSX Transportation, Burlington Northern Santa Fe, Illinois Central Railroad, and Union Pacific Railroad.

[15] This is not a condemnation, but rather a statement of how nearly all organizations such as NITL operate. In particular, smaller voices - even those with important interests - get lost.

departure in the quest for appropriate regulatory solutions. But they are not benchmarks for what is needed.

COMPETITIVE ACCESS RULES NEED REVIEWING

The STB[16] has been very sparing in its use of regulatory authority to prescribe competitive access.[17] The rules which it inherited from the ICC, as interpreted in Midtec,[18] are atrocious in their complexity and have never been successfully used by shippers seeking relief as a result. This truly was a successful exercise in docket control.

Certainly in the case of competitive access policy, the status quo is not worthy of continuation. Some real and meaningful relief must be made available if American industry, and most particularly the coal industry, is to be truly competitive with foreign coal producers. It is hardly a testament to the efficiency of the American transportation system when coal can be delivered from South Africa or Poland less expensively than from American sources due to the high cost of rail freight. The anomaly comes home even more clearly when freight rates from the Powder

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[16] And its predecessor, the ICC, as well.

[17] Even the use of Service Order 1518, prescribing access over the lines of UP following its merger with SP and made necessary due to the monumental failures of service in the Houston area and along the Gulf Coast, was clearly done with distaste for government intervention and was first made effective for a more limited period of time than was warranted. Joint Petition for Service Order, STB Service Order No. 1518, served October 31, 1997.

[18] See Midtec Paper Corp. v. Chicago and North Western Transportation Co. (Use of Terminal Facilities and Reciprocal Switching Agreement), 3 I.C.C.2d 171 (1986), affirmed sub nom. Midtec Paper Corp. v. United States, 857 F.2d 1487 (D.C. Cir. 1988).

River Basin are considered; following the development of rail competition for that traffic, rates tumbled from theretofore lofty levels.

Electric utilities are major users of coal, and are major customers for Massey. These utilities are being subjected to deregulation of their markets, and from necessity look for the most cost-effective sources of coal in order to survive in the marketplace. A number of them have even built shortline railroads or spur tracks in order to gain service from more than one major railroad and thus force competition into play.[19] Certainly the electric utilities, themselves now facing the discipline of competition, can fairly ask that the same remedy be applied to the railroads bringing their coal - whether the competition be virtual or real.

As concentration in the railroad industry increases, so, too, does the need increase for regulatory rules that will allow meaningful competitive access to be obtained by shippers and receivers of coal and other rail-captive commodities.

THE RELIEF MASSEY SEEKS

In view of the great uncertainty and significant problems that could develop following the division of Conrail assets, Massey requests that oversight proceedings be conducted for at least a ten-

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[19] There are those who criticize such actions by the utilities as a misallocation of resources. Construction of new rail lines merely for the purpose of fostering competition for coal traffic would have been unnecessary had the ICC adopted more market-oriented competitive access policies. It was because the ICC was perceived as a part of the problem rather than holding an answer that it is now extinct. George Santayana's admonition regarding history ought well to be a talismanic guide for the STB.

year period following consummation of the CSX and NS proposal to divide the assets of Conrail. Massey proposes the following in that regard:

1. Oversight proceedings should be conducted for each of the first four years.

2. Oversight proceedings should then be conducted biennially for the balance of the oversight period.

3. Because of the consequences that will flow from consummation, the Board should reserve continuing jurisdiction to impose such conditions as future facts and circumstances may warrant, in order to correct problems as and if they occur.

4. Should it become apparent after consummation that Massey's competitive position has suffered with respect to its competitors who will have competitive rail service following consummation, then Massey should be granted leave to seek the imposition of competitive access or other conditions in the oversight proceedings to remedy any substantial harm that may be done to Massey's relative competitive position as a result of changed rail service.

Imposition of conditions based on the foregoing standards will encourage fair treatment of Massey by the Applicants. The mere existence of such conditions will tend to negate the need to invoke the help of the STB. But without such conditions and the possible imposition of appropriate sanctions, railroad pricing practices may adversely affect Massey's competitive position in the post-consummation future.

As a major coal marketer, Massey usually can take care of itself. That may not necessarily be true, however, when Massey faces the monolithic power of a monopoly railroad. Make no mistake about it; a squeeze which is business-contracting and which chills business activity can emanate from such. Massey prays, for the reasons stated in this brief, that the conditions which it

has requested will be imposed as conditions to granting the application of NS and CSX to divide the assets of Conrail between them.

Respectfully submitted,

A. T. Massey Coal Company, Inc.,
and Named Subsidiaries

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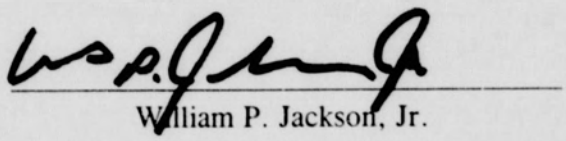
CERTIFICATE OF SERVICE

I, William P. Jackson, Jr., hereby certify that on this 23rd day of February, 1998, I have served a copy of the foregoing Brief of A. T. Massey, Inc., in Support of Request for Imposition of Conditions upon all parties of record in this proceeding, by first class mail, postage prepaid.



William P. Jackson, Jr.