STB FD 33388 2-23-98 E 185840

185840

EDWARD J. RODRIGUEZ
ATTORNEY AT LAW
67 MAIN STREET
POST OFFICE BOX 298
CENTERBROOK, CONNECTICUT 06409

ADMITTED IN CONNECTICUT
AND MASSACHUSETTS

TEL: (860) 767-9629
FAX: (860) 767-7419

E

February 20, 1998

Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 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:

Enclosed for filing is an original and twenty-five copies of Housatonic Railroad's (HRRC-13) Brief in Support of Requests for Conditions. Also enclosed is a 3-1/2" computer disk containing the filing in Wordperfect format.

Should you have any questions regarding this, please do not hesitate to call.

Thank you.

Very truly yours,

Edward J. Rodriguez

Edward J. Rodriguez

Counsel for Housatonic Railroad Company

EJR/swf

185840

HRRC-13

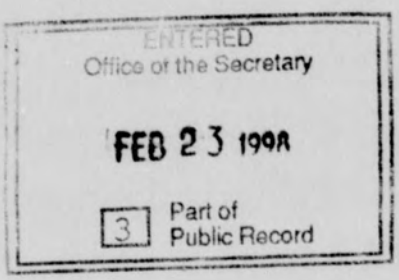
BEFORE THE
SURFACE TRANSPORTATION BOARD

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

HOUSATONIC RAILROAD COMPANY, INC.
BRIEF IN SUPPORT OF REQUESTS FOR
CONDITIONS
HRRC-13

February 23, 1998



Atty. Edward J. Rodriguez
P.O. Box 298
Centerbrook, Conn. 06409
(860) 767-9629

Attorney for:
Housatonic Railroad Company, Inc.

TABLE OF CONTENTS

I. Introduction..... 4

II. Description of Relief Requested..... 5

A. 1 to 2 Condition..... 6

B. Rate Condition..... 7

C. Access Condition..... 8

III. Nature of the Argument..... 9

IV. Effects of the Transaction on HRRC and its Customers..... 10

A. Description of HRRC and Its Relationship with Conrail..... 10

B. Changes in Relationship with Connecting Carrier..... 11

C. HRRC Market Area..... 14

D. Anti-Competitive Effects of the Proposed transaction..... 15

1. Competition West of Hudson River.... 15

2. Rail Competition Available to Competitors Disadvantages HRRC's Customers' Ability to Compete..... 16

3. Failure to Extend Rail Competition to HRRC Damages HRRC's Ability to Compete..... 17

4. Loss of Conrail as Neutral Intermediate Carrier..... 18

5. Loss of Direct Access to Majority of Conrail Territory..... 19

6. Applicants as Competitors..... 21

7. Summary of Harm to HRRC and HRRC Customers..... 23

V. Commission Authority to Impose Conditions..... 24

VI. The Surface Transportation Board Should Impose The Conditions Requested By Housatonic Railroad..... 27

A. Introduction..... 27

B. Unique Character of the Transaction..... 28

C. Nature and History of Conrail and Its Relation to HRRC..... 29

D. Housatonic Railroad Unique Circumstances. 30

E. The Public Interest and the Purposes of the Proposed Transaction..... 32

F. The Harm which will be Caused to HRRC and Its Customers is Harmful to the Public Interest..... 35

VII. The Specific Access Condition Requested By Housatonic Railroad Should Be Ordered..... 36

VIII. Conclusion..... 41

Exhibit A 42

I. INTRODUCTION

In a Decision served July 23, 1997, the Surface Transportation Board accepted for consideration the primary application (hereinafter, the "Application") and related filings submitted by Applicants CSX Corporation and CSX Transportation, Inc. (hereinafter "CSX"), Norfolk Southern Corporation and Norfolk Southern Railway Company (hereinafter "NS"), Conrail, Inc. and Consolidated Rail Corporation (hereinafter "Conrail" or "CR") for Board approval and authorization under 49 U.S.C. 11321-25 for, as is relevant here, (1) the acquisition by CSX and NS of control of CR, and (2) the division of assets owned by CR by and between CSX and NS.[1]

In a Decision issued July 23, 1997, the Board confirmed the procedural schedule previously prescribed for this proceeding. As pertinent here, the Board required that all parties wishing to file a responsive application or to offer comments, protests, and requests for protective conditions, must make such filing(s) by October 21, 1997. In keeping with the Board's procedural schedule, Housatonic Railroad Company, Inc. ("HRRC") filed its comments and requests for protective conditions (HRRC-10, hereinafter "HRRC Comments and Requests")

HRRC hereby submits this brief in support of its requests for protective conditions.

---

[1] Hereinafter CSX, NS and CR collectively will be referred to as "Applicants" and the series of transactions proposed in Applicants' primary application and related supplements shall be referred to as the "Transaction".

II. DESCRIPTION OF RELIEF REQUESTED

In HRRC Comments and Requests, HRRC requested that approval of the Transaction be conditioned upon three (3) specific conditions. The requested conditions involved (1) access by HRRC to certain connections by haulage arrangement with CSX (hereinafter "Access Condition"), (2) certain rate and revenue protection (hereinafter "Rate Condition"), and (3) creation of a switching district in the Cleveland, Ohio area to address a specific single line Conrail movement which after implementation of the Transaction would become a CSX/NS joint line movement (hereinafter "1 to 2 Condition").

Since the submission by HRRC of the HRRC Comments and Requests on October 21, 1997, a number of developments have occurred which directly or indirectly affect the HRRC requests. The developments include receipt by HRRC, through discovery and otherwise, of additional information about the proposed Transaction and the plans of Applicants following consummation of the Transaction; and settlement of certain issues between Applicants and the National Industrial Transportation League.

These developments and other factors have caused HRRC to review its requests for protective conditions and to modify certain of the requests by reducing the scope of relief requested. The primary relief now requested by HRRC is the Access Condition.

While HRRC does not abandon its request for S.T.B. action on rate equalization and on the 1 to 2 situation, the S.T.B. action requested is, in each case, substantially reduced. These issues

will be discussed briefly below. However the primary focus of argument will address the crucial Access Condition.

A. 1 to 2 Condition.

As discussed in detail in HRRC Comments and Requests,[2] and supra,[3] an important HRRC traffic movement consists of a movement of ground limestone from Canaan, Conn. to Gypsum, Ohio. The movement currently involves only HRRC and Conrail but after the Transaction will require movement by HRRC, CSX and NS.[4] HRRC originally requested the establishment of a switching district to address this traffic movement. HRRC now withdraws that request.[5]

The agreement reached by Applicants and the National Industrial Transportation League ("NITL Agreement") provides limited three year rate protection, at the shipper's option, in 1 to 2 traffic movements originating on Conrail.[6] The NITL

---

[2] HRRC Comments and Requests, HRRC-10 at 14-17, 27-28, Exhibit 6-1.

[3] Pages 19-20.

[4] HRRC Comments and Requests, HRRC-10 at 14-17, 27-28, Exhibit 6-1.

[5] The claim of Applicants that there is no reason to believe that HRRC and its customer will be harmed by conversion of a 2 carrier movement (HRRC,CR) to a three carrier movement (HRRC,CSX,NS) as set forth in Applicants' Rebuttal, CSX/NS -176, Volume 1, page P-349, is not deserving of any credence in view of the great lengths to which Applicants extol the virtues and economies to be realized by the conversion of double line movements to single line movements throughout their application documents. See, e.g., Applicants Rebuttal, volume 1, page C-15, in which Applicants state " The Transaction will not only increase competition, but also markedly improve rail service by creating new single-line service."

[6] The NITL Agreement was filed as Appendix B, volume 1 of Applicants' Rebuttal, CSX/NS-176, pages P-768 - P-774.

Agreement would seem to include the HRRC Gypsum movement except that the NITL Agreement does not specifically address movements originating on short lines.[7] While the NITL Agreement would provide only limited assistance in preserving the Gypsum business, it would be helpful, and HRRC requests that the S.T.B. order that the provisions of the NITL Agreement be applicable to traffic movements originating on HRRC.

2. Rate Condition

HRRC initially requested that the S.T.B. order broad rate equalization between HRRC stations and various CSX stations.[8] The request encompassed both public and private rates and also sought divisional protection beyond that to which HRRC is presently entitled with Conrail. HRRC believes that some of its rate concerns would be remedied by the requested Access Condition, and that other concerns will be addressed by implementation of certain announced CSX rate policies. To the extent that HRRC's concerns are not so addressed, it is difficult to fashion appropriate relief in this proceeding.

Accordingly, HRRC modifies its requested Rate Condition and requests only that the S.T.B. issue an order requiring CSX to fulfill commitments made in the Application to honor all rate

---

[7] The purpose and spirit of the NITL Agreement would seem to encompass traffic originating on a Conrail served short line; however HRRC believes that the language is ambiguous on this point and has been unable to receive assurances from Applicants that it does apply.

[8] HRRC Comments and Requests, HRRC-10, pages 29-33.

arrangements binding on Conrail for their duration, and to fulfill a commitment made in a letter from James Shefelbine of CSX to John R. Hanlon, Jr. of HRRC that with respect to public group-to-group or mileage scale rate documents, rates to HRRC stations will be the same as rates to CSX local stations within that same group.[9]

Specifically, the revised requested condition is as follows:

> Upon acquisition of the CR properties by CSX, CSX Group Rates or Mileage Scale Rates will include HRRC stations in the same group or scale as CSX stations in the same geographical regional group, unless CSX and HRRC otherwise agree. Where binding existing CR/HRRC arrangements apply to the stations and commodities, the division of revenue will be in accordance with the existing arrangements for their duration.

3. Access Condition

As indicated above, the Access Condition remains as the primary relief requested by HRRC. The remainder of this brief addresses the Access Condition. Specifically, as set forth in HRRC Comments and Requests, HRRC seeks the following relief:

> That the Surface Transportation Board require CSX to enter into a Haulage arrangement on reasonable terms with HRRC, under the terms of which CSX will haul HRRC traffic over the Boston-Albany Main Line (1) from Pittsfield to the Albany, New York area for the purpose of interchange at Albany with connecting carriers including, but not limited to NS, CP Rail and ST Rail, and (2) from Pittsfield to Palmer, Massachusetts for interchange purposes at Palmer and intermediate points.

---

[9] Letter dated January 27, 1998, from James Shefelbine, CSX Director - Mass Marketing to John R. Hanlon, Jr., HRRC President, explaining how CSXT's price simplification efforts will impact HRRC is attached hereto as Exhibit A.

III. NATURE OF ARGUMENT

The argument which follows will demonstrate that HRRC and its customers will suffer harm as a result of Applicants' Transaction; that the Surface Transportation Board has authority to condition the Transaction in such a way as to ameliorate the harm; and that based upon the applicable legal standards, the stated purposes of the Transaction, and the particular circumstances affecting HRRC and its customers, the S.T.B. should grant relief.

The argument will also show that the relief requested by HRRC is a reasonable and appropriate relief which will reduce, but not entirely eliminate, the harm which will be caused to HRRC and its customers. Furthermore, that the relief requested has not been shown by Applicants to cause them any harm whatsoever and that the requested relief is not in any way inconsistent with the stated purposes of the Transaction nor likely to interfere with the legitimate stated benefits sought to be achieved by the Applicants' Transaction.

IV. EFFECTS OF THE TRANSACTION ON HRRC AND ITS CUSTOMERS

A. DESCRIPTION OF HRRC AND ITS RELATIONSHIP WITH CONRAIL.

As set forth in greater detail in HRRC Comments and Requests, Housatonic Railroad Company, Inc. is a Class III rail carrier which interchanges all of its interline freight with Conrail at Pittsfield, Massachusetts. HRRC operates two connecting lines over approximately 161.3 miles in Massachusetts, Connecticut and New York. In 1997, HRRC handled 5748 cars consisting of 5005 inbound cars and 743 outbound cars. Housatonic Railroad owns and operates a lumber reloading facility in Hawleyville which handled 792 cars in 1997.

HRRC is common carrier, but with respect to Conrail it is also both a shipper and a customer.[10] As a captive Conrail short line HRRC cannot compete with Conrail. HRRC can not take business away from Conrail since HRRC does not interchange traffic with any other carrier and since, in any event, Conrail ultimately controls the through freight rates. HRRC is, in effect, the local retail provider of Conrail transportation services. Conrail and HRRC currently act as partners in the provision of transportation services.[11]

---

[10] The status of HRRC as a shipper and customer is explored in detail in HRRC Comments and Requests, HRRC-10, at pp. 6-8.

[11] The status of HRRC as a Conrail partner is explored in detail in HRRC Comments and Requests, HRRC-10, at pp. 8-10.

B. CHANGES IN RELATIONSHIP WITH CONNECTING CARRIER

Housatonic Railroad will, if the Transaction is consummated as planned, interchange all of its traffic with CSX Corporation. Neither HRRC nor its customers will have direct rail access to other Class I carriers.

A superficial examination might suggest that the post-transaction competitive position of HRRC and its customers will be unchanged from pre-transaction conditions, with CSX merely replacing Conrail, and the Applicants attempt to characterize the effects of the transaction in this superficial manner. However, in fact, the position of HRRC and its customers will be much worse if the Transaction is implemented without conditions.

Within its service area, Conrail operates virtually without competition. HRRC has direct access to the entire Conrail system through its interchange connection at Pittsfield, Mass. With respect to traffic which neither originates nor terminates on Conrail, Conrail serves as a neutral overhead carrier to southern, western, and Canadian gateways. Conrail is generally indifferent as to which gateway carrier it connects with. In addition, Conrail faces the same market rate constraints throughout the region, with the effect that no part of the Northeastern region is disproportionately benefited or burdened by freight rate differentials which do not reflect differentials in the cost of providing service or meeting truck competition.

Conrail does not discriminate against HRRC with respect to rates to competing stations and HRRC and CR do not regard themselves as competitors.[12] In short, Conrail serves as a neutral, gatekeeper to Housatonic Railroad and provides HRRC with neutral and competitive access to all carriers connecting with Conrail.

If the Transaction is implemented as proposed, HRRC will have direct access through its Pittsfield interchange connection with CSX to less than one-half of what now comprises Conrail.[13] Access to the remaining former Conrail territory will be only via joint CSX/NS service. Access to southern gateway connections will not be neutral. As discussed more fully below, CSX will naturally prefer that southern traffic move in single line service to and from CSX stations in preference to NS stations.

CSX will not be a monopolist within much of the former Conrail service area. As a consequence, competitive pressure will force CSX to reduce rates in areas of rail competition but not in areas, such as the HRRC service area, where such competition will not exist. As a result, access to western and Canadian gateways by HRRC via CSX will not maintain the rate and service neutrality of the Conrail service. In addition, CSX is likely to favor gateways to which it enjoys a competitive advantage over NS because of more direct routing, better track conditions, less traffic congestion and similar considerations.

---

12 See, HRRC Comments and Requests, HRRC-10, pages 9-10.

13 See, Railroad Control Application, volume 1, pages 6-12.

Apart from the foregoing differences in the types of competitive access which will be available to HRRC, there will be a fundamental change in the nature of the relationship between HRRC and its connecting carrier. As set forth above and in HRRC Comments and Requests, Conrail and HRRC are partners in a very real sense and Conrail does not compete with HRRC. The partnership arises both from the fiduciary relationship that grew out of the Conrail line sale to HRRC and out of rational self-interested behavior by Conrail as an indifferent monopolist.

The Applicants see their role differently. The primary thrust of the entire Railroad Control Application is aimed at enhancing competition. The enhanced competition, we are told, is both intermodal and intramodal. In describing the purpose of the Transaction, the Applicants state:

> "CSX and NS both project that the creation of new single-line routes will enhance their competitive positions, enabling them to divert traffic from other rail carriers, including one another."[14]

Thus, the Applicants acknowledge that a goal and purpose of the transaction is to divert traffic from other rail carriers, including, one must assume, from Housatonic Railroad. There is no doubt that Applicants, especially NS, will have incentive to do so, and their resolve to compete vigorously is echoed throughout their application material. Where Conrail was a partner to HRRC, Conrail's successors will be competitors to HRRC. It is difficult to imagine a more fundamental change in relationship.

---

14 Railroad Control Application, Volume 1, page 13.

C. HRRC MARKET AREA

Any examination of the competitive or anti-competitive effects of a transaction should begin with a definition of the relevant market area.[15] As indicated above, HRRC operates in Connecticut, Massachusetts and New York. More specifically, HRRC's direct service area encompasses the western portion of Massachusetts and Connecticut[16] and the eastern Hudson counties of Putnam and Dutchess in the state of New York.

The HRRC "Market Area" is broader than the direct service area. It includes the area in which HRRC and its customers compete. The Market Area encompasses (1) all of Connecticut, (2) western Massachusetts, (3) eastern New York including the Albany area, New York City and the southeastern counties of Westchester, Putnam, Dutchess, Orange, and Ulster, and (4) northern and central New Jersey encompassing what is proposed to become the North Jersey shared asset area and consisting of the region from South Brunswick north.[17]

---

[15] See, Comments of the United States Department of Justice, DOJ-1, at pp. 4-6.

[16] Berkshire County, Massachusetts; Litchfield and Fairfield Counties, Connecticut.

[17] The extent of the HRRC market area is amply supported by the record. HRRC Comments and Requests, HRRC-10, pp. 12-14, 23-25; Verified Statement of Stevenson Lumber Company, HRRC-10, Exhibit 8,pages 8-1,8-2; Verified Statement of Weyerhaeuser Canada, HRRC-10, Exhibit 8, page 8-3; Verified Statement of Kimberly-Clark Corporation, HRRC-10, Exhibit 8, pages 8-4, 8-5; Verified Statement of Quality Food Oils, Inc., HRRC-10, Exhibit 8, pages 8-6,8-7; Verified Statement of Fidco, HRRC-10, Exhibit 8, pages 8-8, 8-9; Housatonic Railroad's Response to New England Central Railroad, Inc. Responsive Application-Trackage Rights, HRRC-12, pages 7-9; statement of senator Christopher J. Dodd, HRRC-12, Exhibit A;

D. ANTI-COMPETITIVE EFFECTS OF THE PROPOSED TRANSACTION.

1. Competition West of Hudson River

After the transaction is consummated, the portion of the HRRC Service Area west of the Hudson River will have new and vigorous rail freight competition while the portion of the HRRC Service Area east of the Hudson River, including the HRRC direct service area, will not have such competition.

Applicants have essentially erected a competitive wall at the Hudson River.[18] HRRC is uniquely situated just east of that competitive wall. HRRC's interline interchange at Pittsfield, Massachusetts is only 43 miles from Albany, New York. HRRC's western terminus at Beacon, New York is approximately 15 miles from Maybrook, New York.[19] CSXT and NS will both serve Albany and NS will acquire a line through Maybrook.[20]

Verified Statement of John R. Hanlon, Jr., HRRC-12, Exhibit B.

[18] NS will apparently have an interchange with ST in Albany via haulage service by CP Rail. This will undoubtedly benefit ST and its New England customers but will not help HRRC because HRRC has no interchange with ST. The arrangement will actually harm HRRC by introducing NS competition to ST customers who compete with HRRC and its customers. For example, an HRRC lumber reload facility in Hawleyville, Connecticut competes directly with a ST served lumber reload facility in Waterbury, Conn. only 20 miles away.

[19] HRRC Comments and Requests, HRRC-10 at 12.

[20] The so-called Southern Tier Line.

2. Rail Competition Available to Competitors Disadvantages HRRC's Customers' Ability to Compete.

As indicated in the shipper letters attached to HRRC Comments and Requests, many HRRC customers compete directly with firms in the Rail Competitive Zone, including the North Jersey Shared Asset Area. Applicants agree that the increased competition in the competitive zones will cause shippers located there to experience decreased rail rates and therefore decreased transportation costs. Shippers served by HRRC will not benefit from the lower rates created by the new competition and will thereby be put at a competitive disadvantage.

As a result of higher costs, shippers served by HRRC, and Housatonic Railroad itself, will lose business. The loss of business will naturally lead to decreased employment, decreased capital investment and decreased tax revenue for state and local government.

The Coalition of Northeastern Governors, in its Comments and Requests for Conditions, referred to these effects, stating:

> With the anticipated discrepancy in rail transportation rates between the non-competitive areas and the competitive areas, shippers in the noncompetitive areas will be handicapped in their attempts to compete with shippers in the competitive areas. To the extent that transportation costs are a factor in a shipper's ability to deliver goods to its customers, shippers located east of the Hudson River or in other areas without competition will be at a severe disadvantage.[21]

---

[21] Comments and Requests for Conditions by Coalition of Northeastern Governors, CNEG-5, at pages 11-12.

3. Failure to Extend Rail Competition to HRRC Damages HRRC's Ability to Compete.

HRRC owns and operates a lumber reloading facility in Hawleyville, Conn.[22] From that location, HRRC arranges trucking for reload customers to many areas including to lumber retailers in eastern New York and New Jersey.[23] HRRC competes with and post-transaction expects to compete with reload facilities in Conn., New York and New Jersey, many of whom will have the benefit of new increased competition.[24] HRRC, in its capacity as reload operator and therefore a rail customer, and HRRC's reload customers, will be placed at a competitive disadvantage as a result of the Transaction unless HRRC has the opportunity for competitive economic access to other connections.

---

[22] Hawleyville is situated on interstate Route 84 just east of Danbury and approximately 10 miles from the New York/Connecticut state line.

[23] HRRC estimates that approximately 36% of truck deliveries are to destinations in New York and approximately 22% are to destinations in New Jersey. The other 42% are primarily to Connecticut destinations with some traffic to Massachusetts destinations. See verified statement of John R. Hanlon, Jr., HRRC-12, Exhibit B.

[24] The competing reload facilities include: Saratoga Warehouse Associates, Mechanicville, NY, Portanova Warehouse, Waterbury, CT, J & J Warehouse, Pittsfield, MA, Eastwood Carriers, Westfield, MA., Distributers Unlimited, Guilderland Ctr., NY, Anastasio and Sons, New Haven, CT, and Poiner Street, LTD, Newark, NJ. To the best of HRRC's knowledge and belief, each of the above competitors will either be directly served by CSX or will have competitive access to CSX and NS either directly or indirectly by CP Rail and/or ST Rail. See verified statement of John R. Hanlon, Jr., HRRC-12, Exhibit B.

4. Loss of Conrail as Neutral Intermediate Carrier.

As discussed above, Conrail provides HRRC with neutral and effective access to all carriers connecting with Conrail. If the Transaction is approved as proposed by Applicants, CSX will not serve as a neutral intermediate carrier since it directly competes with NS and other carriers. CSX will naturally favor traffic movements to and from CSX stations over traffic movements to stations of other carriers. As a result, HRRC and its shippers will be harmed by a reduction in competitive alternatives.

These conclusions are echoed by Andrew C. Robertson, a distinguished railroad expert, in his Verified Statement filed in support of the joint responsive application of the State of New York and the New York City Economic Development Commission (NYC-10, NYS-11) in which he states:

> Conrail now serves as the terminal railroad for the Northeastern United States where it terminates much more traffic than it originates. Because so much traffic originates outside its territory, Conrail can be neutral towards its interchange railroads (and their shippers) from ... New England. Unlike Conrail, CSX originates many of the commodities consumed by rail users in the Northeast.... Following industry practice and consistent with their desire to maximize single system routing, CSX can be expected to favor its system longhaul when it acquires its portion of Conrail. New York receivers who can now choose from a variety of off-line carriers will likely be "encouraged" to use only CSX where CSX can provide single line service. This single line service, touted as one of the major benefits of the merger, will have obvious and immediate negative effects on those New England ...shippers....[25]

---

25 Verified Statement of Andrew C. Robertson at page 4.

The preference to move its own traffic long haul will not only give each Applicant the incentive to favor its own shippers over southern shippers served by other carriers, it will also provide incentive for Applicants to favor lumber, woodpulp, paper and other forest product traffic from the south over competing origins in the north and west. Over 75% of HRRC inbound traffic consists of forest products.[26]

As discussed above, HRRC access to western and Canadian gateways via CSX will not be characterized by the rate and service neutrality of the Conrail service. Competitive pressure will force CSX to reduce rates in areas of rail competition, such as the portion of HRRC's Service Area east of the Hudson River, but not in areas where such competition will not exist, such as HRRC's direct service area. Accordingly, rates from HRRC stations to western and Canadian gateways will almost certainly be higher than rates to those gateways from rail competitive areas west of the Hudson River.

5. Loss of Direct Access to Majority of Conrail Territory.

HRRC now has direct access to the entire Conrail system through its interchange connection at Pittsfield, Mass. However, because of the division of Conrail's territory between CSX and NS, HRRC will lose direct access to over one-half of the former Conrail

---

[26] Verified statement of John R. Hanlon, Jr., HRRC-12, Exhibit B, page B-2.

territory. An example of the harm caused by the loss of direct access to former Conrail territory is an outbound traffic movement of ground limestone which originates in Canaan, Conn. on HRRC and terminates in Gypsum, Ohio on Conrail. The traffic movement is currently a two line movement [HRRC-CR]. If the transaction is consummated as proposed, NS will serve Gypsum, Ohio and the traffic movement will introduce an additional carrier. HRRC will interchange the traffic to CSX who will then interchange the traffic with NS, the destination carrier. It is likely that introduction of an additional carrier will introduce additional transportation costs. Since the Connecticut limestone producer competes directly with southern limestone producers, it is likely that NS will be able to divert that business to an NS served southern origin.[27]

---

[27] Attached to HRRC Comments and Requests, HRRC -10, as Exhibit 6 is a verified statement from Specialty Minerals, Inc., the HRRC shipper, expressing concern about the traffic movement and doubt about the likelihood that the movement will continue after the transactions are consummated unless the S.T.B. takes some protective action. See also, Verified Statement of John R. Hanlon, Jr., HRRC-12, Exhibit B, pages B-6 and B-7 in which he states: "HRRC is concerned that if the transaction is approved without conditions, that this important movement of traffic will be lost. HRRC believes that it will lose the Gypsum Ohio traffic because (1) the traffic will change from a two carrier movement to a three carrier movement involving two Class 1 carriers, (2) a three carrier traffic movement involving two Class 1 carriers is less efficient and more expensive than a two carrier movement involving one Class 1 carrier, (3) traffic from competing southern origins will in some cases change from a movement involving two Class 1 carriers to a movement involving one Class 1 carrier, (4) freight rates from Canaan to Gypsum, Ohio are likely to increase over present levels because of the introduction of an additional Class 1 carrier in the route, (5) freight rates from some competing southern origins are likely to decrease over current rates because of the elimination of a Class 1 carrier from the route, (6) rail freight costs constitute a large percentage of commodity costs in

The Gypsum, Ohio business has significant financial importance to HRRC and accounts for a significant portion of its revenue.[28] The limited relief provided by the NITL Agreement will not completely address the loss. In any event, the Gypsum movement is presented here merely as an illustration of the importance of the loss of direct access to a portion of Conrail territory.

6. Applicants as Competitors

As quoted above, Applicants have unabashedly declared that one purpose of the proposed Transaction is to divert traffic from other rail carriers. Both Applicants can be expected to compete with HRRC for business. In the case of NS, there is incentive to compete with HRRC for all of its business because NS will not have an interchange with HRRC. There is incentive for CSX to compete for HRRC business that currently goes to reload facilities as well as some incentive to compete for car load business if by doing sc CSX can increase the level of contribution on that traffic.[29]

---

the case of limestone, (7) limestone business is generally highly price elastic, (8) NS will have market incentive to divert or cooperate in diverting limestone traffic to Gypsum, from HRRC to southern origins on which movement NS will realize a longer haul and greater revenue and contribution, and (9) Applicants have refused to give HRRC any long term assurances of rate competitiveness. The HRRC limestone company competes with a variety of southern limestone producers including Georgia Marble, J.M. Huber, English China Chase and Silacoga."

[28] HRRC Comments and Requests, HRRC-10, states on page 17 "During 1996, revenue from the Gypsum, Ohio limestone business accounted for 7.46% of HRRC freight revenue."

[29] Even if CSX were to refrain from competition, NS would not. Since this is a joint application, any new competition by either Applicant arises out of the Transaction.

As indicated above, Norfolk Southern will have an economic presence in the Albany, New York area, approximately 43 miles west of HRRC's Conrail interchange at Pittsfield, Massachusetts. In addition, NS will acquire the Southern Tier line and have a presence in the Maybrook, New York area which is approximately 15 miles west of Housatonic's western terminus at Beacon, New York and is convenient to Interstate 84 with easy truck access to current HRRC market areas.

NS is a leader in intermodal transportation and rail/truck distribution and will compete vigorously for New England traffic in that manner. This competition will come at the expense of New England short lines and most particularly, because of location, at the expense of Housatonic Railroad. One can expect that either NS or an NS served private facility will vigorously engage in competition at those locations proximate to HRRC's market areas.

HRRC anticipates that NS or another party will establish reload facilities for lumber, woodpulp and other forest products as well as flexiflo and bulk transfer facilities for plastics, chemicals and other bulk products. The rail freight rates in the competitive area will enable those operators to successfully compete for current HRRC business. While HRRC's reload business is especially vulnerable to this competition, HRRC direct rail business in woodpulp, plastic and lumber is also vulnerable. Approximately 82% of HRRC's current inbound traffic presently

consists of lumber, woodpulp, other forest products and plastic.[30] This business is seriously threatened by the proposed transaction. As CSX and NS vigorously compete for business, any gain by NS will be at the expense of Housatonic Railroad.

7. Summary of Harm to HRRC and HRRC Customers.

By introducing rail competition in HRRC's backyard but failing to extend the competition to Housatonic Railroad, and by dividing Conrail territory as proposed by Applicants, HRRC is disadvantaged as both a Conrail customer and as a carrier, and HRRC customers are harmed in the following ways:

(i.) The competitive transportation cost advantage to be experienced by competitors to HRRC's customers will result of a reduction in business experienced by HRRC customers and as a result HRRC will receive less inbound traffic.

(ii.) HRRC expects to experience a reduction in traffic to its lumber reloading facility or a loss of customers because of competitive pressures which those firms will experience as a result of competition from NS and CSX reload points within the competitive zone west of the Hudson River.

(iii) HRRC and its customers will face predatory competition from transloading, reloading and distribution facilities located within the HRRC market area but within the rail competitive zone west of the Hudson River. HRRC expects NS, CSX and/ or private firms to compete successfully for HRRC business by rail truck transfer from those points.

---

30 Verified Statement of John R. Hanlon, Jr., HRRC-12, Exhibit B at B-2.

(iv) Loss of a neutral intermediate carrier will disadvantage HRRC and its customers by resulting in higher rates from gateways to HRRC stations then rates to competing stations in the rail competitive region within HRRC's Service Area.

(v) Loss of direct access by HRRC to more than one-half of the current Conrail territory will disadvantage HRRC and its customers who ship or receive freight to portions of the Conrail territory which will require a NS/CSX joint traffic movement.

(vi) Replacement of Conrail by Applicants which will compete with HRRC and with each other, while preventing HRRC from competing with Applicants, will disadvantage HRRC and HRRC customers compared to customers served directly by Applicants.

HRRC's inability to compete effectively is not the result of inefficient operation by Housatonic nor of natural transportation barriers. It is the result of a careful and deliberate division of Conrail assets which has the effect of introducing competitive rail service within a few miles of Housatonic Railroad while leaving Housatonic Railroad captive to a CSX monopoly. This harm to HRRC's ability to compete is a direct and foreseeable result of the proposed Transaction.

V. COMMISSION AUTHORITY TO IMPOSE CONDITIONS

The Interstate Commerce Act requires the Board to approve and authorize a transaction when "it finds that the transaction is consistent with the public interest".[31] In making that determination, the Board is instructed to consider at least the

---

[31] 49 U.S.C. 11324(c).

following:

> "(1) the effect of the proposed transaction on the adequacy of transportation to the public;
>
> (2) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction;
>
> (3) the total fixed charges that result from the proposed transaction;
>
> (4) the interest of rail carrier employees affected by the proposed transaction; and
>
> (5) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region or in the national rail system. [32]

The act states that "[T]he Board may impose conditions governing the transaction...."[33] but does not state the criteria which the Board should employ in imposing conditions. It is clear, however, that the Board has broad discretion to impose conditions, so long as the conditions are consistent with the public interest.

In determining whether proposed conditions are consistent with the public interest, the Board should consider not only the factors which it is required to consider in deciding whether the transaction is consistent with the public interest, but it also should consider the Rail Transportation Policy of the United States Government[34], the interests of the public as articulated in the proceeding by public officials who submit comments, the fostering

---

[32] 49 U.S.C. 11324(b).

[33] 49 U.S.C. 11324(c).

[34] 49 U.S.C. 10901a. See, Southern Pacific Transportation Company v. I.C.C., 736 F.2d 708,716 (D.C. Cir. 1984).

and preservation of competition, and environmental goals.[35]

Congress has at times noted its belief that the I.C.C. [S.T.B.] should take an active role in structuring transactions to advance the public interest. "The I.C.C. is not intended to be a passive arbiter but the 'guardian of the general public interest' with a duty to see that this interest is at all times effectively protected."[36]

Both the I.C.C. and the courts have described the circumstances in which conditions should be imposed broadly. For example, the D.C. Circuit Court of Appeals recently stated:

> [T]he Commission will impose conditions only when a transaction threatens harm to the public interest, the conditions are operationally feasible, they would ameliorate or eliminate the harm, and they would result in greater benefit to the public than detriment to the transaction.[37]

As specifically detailed below, the conditions requested herein are consistent with the public interest and operationally feasible. In addition, the conditions, if imposed, would result in public benefit and would in no way interfere with the public benefit to be obtained by the transaction.

---

[35] The Commission is required to consider the impact of any transaction on the quality of the human environment and the conservation of energy resources. 49 C.F.R. 1180.1(a)(2).

[36] See, discussion and sources cited in Lamoille Valley Railroad Co. v. I.C.C., 711 F.2d 295, 322 and at footnote 55 (D.C. Cir. 1983).

[37] Grainbelt Corporation v. S.T.B., 190 F.3d 794,796 (D.C. Cir. 1997) citing Union Pacific--Control--Missouri Pacific; Western Pacific, 366 I.C.C. 462, 562-65 (1982).

VI. THE SURFACE TRANSPORTATION BOARD SHOULD IMPOSE THE CONDITIONS REQUESTED BY HOUSATONIC RAILROAD

A. INTRODUCTION

The S.T.B. should impose the conditions requested by the Housatonic Railroad for the following reasons:

1. The harm caused to HRRC is a direct result of the Transaction.

2. The reduction in HRRC's ability to compete is harmful to the public interest.

3. The harm to HRRC and its customers is contrary to the stated purposes of the proposed Transaction.

4. The conditions requested are consistent with the public interest and the stated purposes of the transaction.

5. The proposed conditions would ameliorate the harm caused to HRRC and its shippers and are operationally feasible.

6. The proposed conditions will not harm the interests of the Applicants nor detract from the public benefits of the proposed Transaction.

In reviewing and determining the appropriateness of imposing the requested conditions, the S.T.B. should consider, in addition to the whole range of factors normally considered, certain factors that are unique to this transaction. Particularly unique are the character and purposes of the Transaction, the nature and history of Conrail and its relationship to Housatonic Railroad, and the particular situation of Housatonic Railroad and its customers.

B. UNIQUE CHARACTER OF THE TRANSACTION

This Transaction does not involve a merger or consolidation as those terms are normally understood.[38] Rather, it involves the division of most of the assets of Conrail and the Conrail market between two competitors. Conrail will continue to exist, owned by the two competitors and serving the needs of the acquiring competitors. The fundamental structure of the Transaction is unique to modern railroad transactions and it presents unique issues and opportunities which must be examined differently from prior transactions.

Unlike virtually every railroad merger or control proposal brought before the Board and its predecessor, this case does not focus on the question of whether and to what extent a planned consolidation of two or more carriers will eliminate competition between them. Competition between CSX and NS will continue and should even be enhanced by the Transactior. Competition between Conrail and the acquiring Applicants never existed to a significant extent.

The Applicants have carefully and purposefully agreed to divide the Conrail assets and markets for their own benefit. The focus must be on the effects that the proposed division will have

---

[38] A merger is usually understood to involve a combination of two or more corporations pursuant to which one of the corporations survives and succeeds to all of the assets and liabilities of the other corporation which ceases to exist. A consolidation is usually understood to involve a combination of two or more existing corporations pursuant to which a new corporation comes into being and succeeds to all of the assets and liabilities of the two merging corporations, both of which cease to exist.

on the existing competitive balance and on the way that the proposed alteration of the competitive balance will affect the market, Conrail's customers, and other rail carriers.

C. NATURE AND HISTORY OF CONRAIL AND RELATION TO HRRC.

Further setting this case apart from its predecessors is the nature of the firm to be acquired and divided. Conrail's creation was the result of a complex, Congressionally-mandated and monitored process, the primary goal of which was the preservation and enhancement of effective rail competition throughout as much of the Northeast as possible.

The Conrail which emerged from the process was a regional monopoly. Although direct rail competition to Conrail served stations was not achieved, the role of the smaller regional railroads in advancing competitive goals was recognized, and the reorganization was structured in a way to permit those regional carriers to survive and prosper in the environment of a Conrail monopoly. As indicated above, what developed in the Northeast was a rail system whose competitive balance depended upon Conrail's role as a neutral intermediate carrier.

All of the lines operated by HRRC are either former Conrail lines or lines which were taken out of service in connection with the formation of Conrail. The history of HRRC's development is relevant to its relationship with Conrail and is summarized in HRRC Comments and Requests.[39] The relationship between HRRC and

---

[39] HRRC Comments and Requests, HRRC-10 at pages 4-6.

Conrail is not merely one of connecting carriers. HRRC is both a Conrail customer and partner.[40] Since HRRC interchanges all of its interline traffic with Conrail, it depends upon its partnership with Conrail to allow it to compete successfully in the market. As a partner with HRRC, Conrail owes HRRC fiduciary duties of care and loyalty. It may not compete with HRRC, appropriate joint partnership opportunities for itself, nor otherwise engage in predatory behavior with respect to HRRC.[41]

D. HOUSATONIC RAILROAD UNIQUE CIRCUMSTANCES

A review of the responsive applications and requests for conditions filed in this proceeding discloses no other party that is adversely affected in the same way as Housatonic Railroad and its customers. Housatonic Railroad is the only railroad seeking conditions which shares all of the following characteristics:

1. It interchanges all of its interline traffic with Conrail.

2. It is geographically situated on the non-competition side of the boundary which separates an area of rail competition by Applicants (in this case west of the Hudson River) from an area in which one of the Applicants hopes to enjoy a monopoly position.

3. It depends on a partnership relationship with Conrail to sustain competitive freight service.

As described above, Housatonic Railroad's geographical location makes it and its customers particularly vulnerable to rail

---

40 See, HRRC Comments and Requests, HRRC-10, at pages 6-10.

41 See, e.g., Meinhard vs. Salmon, 249 N.Y. 458, 164 N.E. 545 (1928).

competition on the east side of the Hudson River.

The State of New York and the New York City Economic Development Corporation filed a responsive application seeking trackage rights for a neutral carrier over the Hudson Line to address its concerns that customers in the New York City area and New York southern counties east of the Hudson River will be at a competitive disadvantage to rail customers located west of the Hudson River, especially those in the proposed North Jersey Shared Asset Area.[42]

Many of the concerns expressed in that responsive application echo the concerns of Housatonic Railroad, and most of the area claimed by New York to be disadvantaged is within the HRRC Market Area.[43] However, there are certain differences which make the relief requested by HRRC more compelling.[44] They are as follows:

1. New York seeks competitive access by trackage rights for an unnamed neutral railroad while HRRC seeks access by haulage arrangement, the latter being less intrusive upon Applicants' operation.

---

[42] Joint Responsive Application of the State of New York and the New York City Economic Development Corporation, NYS-11/ NCY-10.

[43] As indicated above, HRRC's rail line extends from Danbury, Conn. to Beacon, N.Y. passing through the east Hudson counties of Dutchess and Putnam. HRRC also serves lumber receivers in the entire eastern New York area by truck transfer. HRRC, of course, does not serve customers in New York which are now direct rail served by Conrail.

[44] HRRC does not suggest that the relief requested in the New York joint responsive application should not be granted. While HRRC generally supports and agrees with most of the New York claims, it takes no position with respect to the appropriate relief to be granted, if any.

2. Applicants claim that recent agreements between Applicants and Canadian National and CP Rail will provide those Canadian carriers with access to the New York City market. Those arrangements do not provide access for HRRC or its customers.

3. New York does not make a claim of harm because of loss by its rail served businesses of direct access to more than one-half of the Conrail Territory.

4. New York does not claim that the Transaction will cause harm to the ability of an existing rail carrier to compete effectively.

5. New York does not claim that the Transaction interferes with existing competitive factors such as those involved with the HRRC/CR partnership.

E. THE PUBLIC INTEREST AND THE PURPOSES OF THE PROPOSED TRANSACTION

Under the governing statute,[45] the Board's "single and essential standard of approval" in railroad control proceedings is that "the [Board] finds the (transaction) to be consistent with the public interest."[46] In making the determination, the Board should consider, inter alia, (1) the factors set forth in the Interstate Commerce Act,[47] (2) the Rail Transportation Policy of the United States,[48] (3) the public purpose sought to be advanced by the Transaction, and (4) the stated goals in creating Conrail.

---

[45] (49 U.S.C. Section 11323, et. seq.

[46] Union Pacific Corp., Union Pacific R.R. Co., and Missouri Pacific R.R. Co. -- Control and Merger -- Southern Pacific Rail Corp., Southern Pacific Transp. Co., St. Louis Southwestern Ry. Co., SPCSL Corp., and The Denver and Rio Grande Western R.R. Co., Finance Docket No. 32760, Decision served August 12, 1996, at 98 ("UP/SP").

[47] 49 U.S.C. 11324(c).

[48] 49 U.S.C. 10901a. See, Southern Pacific Transportation Company v. I.C.C., 736 F.2d 708,716 (D.C. Cir. 1984).

The factors set forth in the Interstate Commerce Act are set forth above.[49] The factors include:

> (1) the effect of the proposed transaction on the adequacy of transportation to the public;
>
> (5) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region or in the national rail system.

The rail transportation policy of the United States includes the following goals:

1. To allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail.[50]

2. To ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense.[51]

3. To avoid predatory pricing and practices and avoiding undue concentrations of market power.[52]

4. To foster sound economic conditions in transportation and ensuring effective competition and coordination between rail carriers and other modes.[53]

5. To encourage and promote energy conservation policies.[54]

---

49 See, text accompanying note 16, supra.

50 49 U.S.C. 10101a(1).

51 49 U.S.C. 10101a(4).

52 49 U.S.C. 10101a(13).

53 49 U.S.C. 10101a(5).

54 49 U.S.C. 10101a(15).

Regulations require that the Applicants set forth the purpose of the proposed Transaction in the application.[55] In compliance with that requirement the Applicants state:

> "The purpose of the proposed transaction is to create two strong rail networks of broad and comparable scope that will compete vigorously to provide efficient service throughout the eastern United States."[56]

The regulations also require that Applicants set forth public interest justifications for the proposed transaction.[57] In response, Applicants state in part:

> "... one of the principal public benefits of the transaction is the substantial increase in intramodal and intermodal competition it will bring to shippers in the eastern United States...."[58]

The Board's consideration of the Application and its proponents' arguments should consider Congress' stated goals in creating Conrail, and the overall consistency of the Applicants' plan with the final realization of those goals. The Applicants themselves invite such an evaluation, as they present their plan as the ultimate fulfillment of Congress' and USRA's original intent.[59]

While USRA's primary goal of region-wide rail competition was

---

55 49 C.F.R. 1180.6(a)(1)(iii),

56 Railroad Control Application, page 12.

57 49 C.F.R. 1180.6(a)(2).

58 Railroad Control Application, page 17.

59 See, e.g., Applicants, Vol 1, V.S. Hoppe 18; V.S. McClellan at 13, 50.

not achieved in 1976, it emerges as a central theme of the Application. The claims of NS Chairman and CEO David R. Goode are representative:

> "This transaction is by far the most procompetitive railroad reconstructing in history. It will create two new Northeast/Southeast rail systems that will do their utmost to best each other in the marketplace every day. This will bring about a blossoming of rail competition, the likes of which the Northeast has not experienced in decades."
>
> "The advantages to our customers of the new competitive structure are clear. As network businesses, railroads are most effective when they connect the markets their customers want to reach. This transaction will create two far-flung transaction networks, and each one will serve most major markets in the East." [60]

Particularly in light of these claims, the measure of the Primary Applicants' true achievement of the goal of regional competition is a critical criterion for the Board to apply in evaluating the Applicants' proposed Transaction.

F. THE HARM WHICH WILL BE CAUSED TO HRRC AND ITS CUSTOMERS IS HARMFUL TO THE PUBLIC INTEREST

As set forth above, both the nature of the Application and the nature and history of the acquisition target implicate legal and public policy considerations that define the "public interest" far more broadly than has occurred in more recent rail merger proceedings. Despite the complexity of the case, a finding that the harm which will be caused to HRRC and to its customers is harmful to the public interest is straight forward and clear.

---

[60] Railroad Control Application, Vol. 1 at 323-32.

The public interest in this transaction is, first and foremost, to foster and promote both intramodal and intermodal competition. That is the stated purpose and public justification of the Application. It is also one of five factors set forth in the Interstate Commerce Act; it is pervasive in the rail transportation policy of the United States; and it formed a basic objective in the formation of Conrail.

The effects of the Transaction upon HRRC, as developed and described above, will be anti-competitive with respect to HRRC and its customers. It is appropriate for the S.T.B. to order conditions to mitigate the anti-competitive consequences which implementation of the proposed Transaction will have upon HRRC.[61]

VII. THE SPECIFIC CONDITIONS REQUESTED BY HOUSATONIC RAILROAD SHOULD BE ORDERED

Each of the three conditions requested by HRRC is intended to address the anti-competitive effects of the Applicants' proposed Transaction. Each fulfills the test recently articulated by the Circuit Court of Appeals in the case of Grainbelt Corporation vs. S.T.B.[62], namely, (1) that the Transaction threatens harm to the

---

[61] Applicants have agreed to divide the assets and markets of Conrail in a way which would be a clear per se violation of the Sherman Act if this were not an S.T.B. regulated transaction. A thoughtful and concise discussion of the antitrust implications of the proposed transaction appears in the Comments of the New York City Economic Development Corporation [NYC-9] at pages 7-11 and in the Comments of the State of New York, [NYS-10], Argument of counsel, at pages 4-6.

[62] 190 F3D 794,796 (D.C. Cir. 1997).

public interest, (2) the conditions are operationally feasible, (3) that the conditions would ameliorate or eliminate the harm, and (4) that the conditions would result in greater benefit to the public than detriment to the transaction.

The access condition requested in HRRC Comments and Requests, which continues without change is as follows:

> A Haulage arrangement by CSX over the Boston-Albany Main Line (1) from Pittsfield to the Albany, New York area for the purpose of interchange at Albany with connecting carriers including, but not limited to NS, CP Rail and ST Rail, and (2) from Pittsfield to Palmer, Massachusetts for interchange purposes at Palmer and intermediate points.[63]

It is clear that the request for a Haulage Arrangement with CSX satisfies the four criteria for imposing protective conditions.

> 1. As indicated above, the transaction as proposed threatens to harm the public interest by disadvantaging shippers/customers, including HRRC, who are situated just east of the Northeast competitive zone, by elimination of Conrail as a neutral intermediate carrier, by eliminating HRRC's direct access to over half of the Conrail territory, and by dividing the assets of Conrail between the Applicants who will compete with HRRC, while making it impossible for HRRC to compete with Applicants. There is real harm to competition.
>
> 2. The conditions are operationally feasible. Haulage rights are the least obtrusive method for obtaining access to other connections. They do not involve operation over CSX by another carrier, create scheduling conflicts, nor otherwise burden CSX operation.
>
> 3. The proposed conditions would not eliminate the harm but would ameliorate the harm and help to level the playing field by providing access to competition at a reasonable cost.

---

[63] For purposes of this request the "Albany Area" includes Albany, Selkirk, Mechanicville and Rotterdam Jct. The nature of the request is to provide the most efficient interchange location with each of the carriers.

> 4. The proposed haulage condition would result in benefit to the public by providing increased competition in rail transportation to an area which would otherwise not have the benefit of such increased competition. The proposed conditions would not in any way reduce competition in other areas nor otherwise cause detriment to the public benefits of the proposed transaction.

In addition, the proposed condition enhances competition in general and furthers the transportation policy of the United States. Not only does the proposed haulage arrangement foster competition by opening access to connecting carriers in order to provide rate and service competition for existing rail business, it also fosters competition for truck traffic in certain markets.

Applicants have failed even to allege in their rebuttal that the requested Access Condition would either cause harm to Applicants or be contrary to the purposes of the transaction. In fact, the requested Access Condition, if granted, would do neither. Implementation of the Access Condition would actually help cause the Transaction to accomplish its stated purpose of promoting competition "throughout the eastern United States." CSX, as the carrier performing the haulage service, would receive payment, consistent with past practice, which would fully compensate CSX for performing the haulage service.[64]

It is significant that in their rebuttal to the Joint Responsive Application of the State of New York and the New York City Economic Development Corporation, Applicants indicate that

---

[64] HRRC expects that if the Access Condition is granted, HRRC and CSX would be able to negotiate in good faith to agree upon an appropriate haulage fee. However, if they are unable to do so, HRRC requests that the S.T.B. retain jurisdiction to establish an appropriate haulage fee.

they have entered into a long term agreement with Canadian National Railroad and CP Rail which will allow those carriers to access the New York City market.[65] Apparently, those agreements also allow some economic access by those carriers to the Philadelphia Belt Line Railroad. The agreements have been designated Highly Confidential and HRRC is therefore unfamiliar with their details. However, the economic access provided to New York City shippers by those arrangements is analogous to the relief requested by HRRC.

In addressing access conditions, Applicants take two defensive positions. First, they assert that almost all of the access requests are designed to address "conditions involving a lack of competition that predate, and are not exacerbated by, the transaction."[66] As demonstrated above, in the case of HRRC, the conditions are created by the proposed Transaction.

Second, Applicants claim that certain shippers are likely to gain a competitive advantage over other shippers whenever a railroad consolidation occurs and that there is no obligation of Applicants to preserve the competitive balance existing before the consolidation.[67] Furthermore, Applicants argue, the Board should not impose conditions to achieve a competitive balance. In so arguing, Applicants cite the refusal of the I.C.C. to impose

---

[65] Joint Rebuttal of Applicants, CSX/NS-176, vol. 1, Narrative at VIII-17-18.

[66] Applicants Joint Rebuttal, Volume 1, at VIII-7.

[67] Applicants Rebuttal, volume 1, page VIII-9.

conditions in favor of Montana shippers[68] in the BN/SF merger.

While it may be true that typical rail consolidations may result in incidental advantages or disadvantages to certain shippers which can not be properly addressed by the Board's conditioning power,[69] this Transaction is not a typical rail consolidation and the disadvantages or harms caused to HRRC and its customers are not incidental or random.

As indicated above, this case does not present a straight forward consolidation of existing rail systems, which in the ordinary course would be expected to have myriad, incidental and unequal impacts on particular shippers or regions. CSX and NS have undertaken a deliberate and "careful" division of Conrail,[70] drawing boundaries and allocating assets with specific foreknowledge of the disparate impacts on prior competitive balances. Unlike the Montana shippers in BN/SF, HRRC and its customers have suffered a Transaction related harm as a direct consequence of the design of Applicants' Transaction.

---

68 Applicants' Rebuttal, volume 1 at page VIII-10. Certain Montana shippers claimed to be disadvantaged relative to Nebraska shippers. However, the Montana shippers were served by only one carrier prior to and after the merger, and the Nebraska shippers were served by two carriers both prior to and after the merger. The I.C.C. found no merger related harm. BN/SF 38-39, 98.

69 See, e.g., the discussion of Bunge Corporation, BN/SF at 99.

70 See, CSX/NS-176, volume 1, page VIII-7.

VIII. CONCLUSION

As set forth in detail above, the proposed Access Condition as well as the other conditions requested by Housatonic Railroad are requested to ameliorate harms to HRRC, to its customers, and to the public interest. The harms are caused directly by the proposed Transaction. The conditions requested are operationally feasible and would benefit the public interest. Furthermore, the conditions requested would advance the stated goals of the Transaction and the transportation policy of the United States and have not been shown to be harmful to Applicants in any significant way.

Housatonic Railroad Company, Inc. respectfully urges the Surface Transportation Board to grant the conditions requested by HRRC.

Respectfully submitted,

Edward J. Rodriguez

Atty. Edward J. Rodriguez
P.O. Box 298
Centerbrook, Conn. 06409
(860) 767-9629
Attorney for:
Housatonic Railroad Company, Inc.

Certificate of Service

I hereby certify that a copy of the foregoing Request for Conditions and Comments has been served upon all parties of record, as amended, by U.S. mail, postage prepaid, this 23 rd day of February, 1998.

Edward J. Rodriguez

Edward J. Rodriguez

"EXHIBIT "A"

CSX TRANSPORTATION

Sales and Marketing
500 Water Street
Jacksonville, FL 32202

January 27, 1998

John R. Hanlon, Jr. - President
Housatonic Railroad Company
67 Main Street
P.O. Box 298
Centerbrook, CT 06409

Dear John:

I am writing today to respond to your letter inquiring about CSXT's price simplification efforts, and how they will impact your company. As you saw at the Workshop, we have undertaken the effort of simplifying all of our public rate structures. The new structures will be used as a uniform framework to manage public prices in the combined company. The simplified structures will consist of mileage scales or group-to-group rate documents. With the exception of some agricultural commodities, all of our marketing units are going through the rationalization process.

Shortlines that participate in CSXT's simplified public rate structure will be included in the same regional group as CSX stations within that group. Therefore, the price to or from a shortline station within a group will be identical to the price to or from a CSX local station within that same group. In the case of mileage scales, revenue will be calculated on highway miles, regardless of the ownership of the originating or terminating station.

I have included a copy of our public document for finished paper products. Currently the document covers only local moves, but we will integrate shortlines by adding their stations to the existing groups. All of our group-to-group documents will use the same group structure.

Should you have any questions before then, please, don't hesitate to call me at (904) 359-1929.

Sincerely,

James Shefelbine

James Shefelbine
Director – Mass Marketing

Cc: Mark Bennett

Enclosures: 1

STB FD-33388 2-23-98 E ID-185839

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 -- TRANSFER OF RAILROAD LINE BY NORFOLK SOUTHERN RAILWAY COMPANY TO CSX TRANSPORTATION, INC.

BRIEF OF
CANADIAN NATIONAL RAILWAY COMPANY

Jean Pierre Ouellet
Chief Legal Officer and Corporate Secretary
Canadian National Railway Company
935 de La Gauchetiere Street West
16th Floor
Montreal, Quebec H3B 2M9
(514) 399-2100

L. John Osborn
Douglas E. Rosenthal
Elizabeth A. Ferrell
Sonnenschein Nath & Rosenthal
1301 K Street, N.W.
Suite 600 East
Washington, D.C. 20005
(202) 408-6351

Attorneys for:
CANADIAN NATIONAL RAILWAY COMPANY
GRAND TRUNK CORPORATION
GRAND TRUNK WESTERN RAILROAD INCORPORATED

Dated: February 23, 1998

TABLE OF CONTENTS

I. INTRODUCTION 2

A. CN's Role in the North American Rail Freight Market 2

B. CN's Participation In This Case, and Its Settlement With CSX 3

II. IN THE EVENT THAT THE BOARD DECIDES TO IMPOSE ANY CONDITIONS RELATING TO THE BUFFALO/NIAGARA FALLS AREA, THE AGENCY SHOULD ENSURE THAT CN IS TREATED NO LESS FAVORABLY THAN OTHER CARRIERS SERVING THIS AREA 5

CONCLUSION 8

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 -- TRANSFER OF RAILROAD LINE BY NORFOLK SOUTHERN RAILWAY COMPANY TO CSX TRANSPORTATION, INC.

BRIEF OF
CANADIAN NATIONAL RAILWAY COMPANY

Canadian National Railway Company ("CN"), Grand Trunk Corporation ("GTC") and Grand Trunk Western Railroad Incorporated ("GTW")[1] hereby submit this Brief, which addresses certain issues relating to the proposed acquisition of Conrail by CSX and NS.[2]

---

[1] Except where the context indicates otherwise, CN as used herein will embrace CN's wholly-owned subsidiary GTC, and GTC's wholly-owned subsidiary GTW.

[2] Unless the context indicates otherwise, "CSX" will embrace both CSX Corporation and CSX Transportation, Inc., "NS" will embrace both Norfolk Southern Corporation and Norfolk Southern Railway Company, and "Conrail" will embrace both Conrail Inc. and Consolidated Rail Corporation. "Applicants" and "Primary Applicants" will embrace CSX, NS and Conrail.

I. INTRODUCTION[3]

A. CN's Role in the North American Rail Freight Market

Canadian National is Canada's largest railroad and North America's sixth biggest. CN operates a transcontinental system, and is the only railroad in either Canada or the United States to do so. CN's business base produced revenues of more than $4 billion (CDN) in 1996, almost $2 billion of it from operations in the eastern part of North America.

In the United States, CN owns the Detroit-based Grand Trunk Corporation, a 1,000 mile network that is operated on a fully integrated basis with CN. GTC employs 2,000 people, generates revenues approaching $400 million (US) annually, and has a presence in Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin.

Beginning in 1993, CN embarked on a three-year transformation, with a view to moving ownership of the company from the government to the private sector. This led, in 1995, to the most successful public share offering in Canadian history. Today, CN is 100 percent investor-owned.

In the geographical area most directly affected by the proposed breakup of Conrail, CN is the only railroad generating a significant volume of traffic between Canada and the U.S., the world's largest trading partners. Canada-U.S. trade represents one-third of CN's business, and is its fastest growing segment at ten percent a year.

---

[3] By separate notice filed today (CN-14), CN is withdrawing its Responsive Application, filed in Finance Docket No. 33388 (Sub-No. 81), and related Verified Notice of Exemption, filed in Finance Docket No. 33388 (Sub-No. 83). However, CN relies here on those portions of the Verified Statement of Gerald K. Davies, filed October 21, 1997 in Sub-No. 81, that describe CN's role in the North American freight market and its negotiations with CSX and NS.

As a result of a number of factors, including favorable exchange rates and liberalized trade regulations, the past decade has seen a dramatic increase in the flow of trade between Canada and the United States. Since the signing of the 1989 Canada-U.S. Free Trade Agreement, the value of goods traded between these two countries has increased by $88 billion (U.S. funds), or 57 pe cent (1994 over 1988).

This trend has had a positive impact on CN. In 1988, transborder (Canada to U.S. and U.S. to Canada) traffic represented 24 percent of CN's total revenues, but by 1995 cross-border movements had increased to 31 percent of CN's revenue base.

CN believes that this trend will continue. Many of CN's major customers now view North America as a single economic entity, and select plant location based on proximity to raw materials and lowest cost of production, without regard to national boundaries. This fundamental shift will cause transborder trade flows to increase over time, and CN will continue to play a prominent role in moving such traffic.

B. <u>CN's Participation In This Case, and Its Settlement With CSX</u>

When the proposed merger of CSX and Conrail was announced in October 1996, CN had concerns about the impact of that transaction on its ability to compete in the future for traffic moving between the United States and Canada, particularly via the Montreal and Buffalo gateways. Those concerns continued when CSX and NS agreed in April 1997 to undertake a joint purchase of Conrail.

On August 22, 1997, CN announced a settlement agreement between CN and CSX with respect to the CSX acquisition of its share of Conrail assets. On October 23, 1997, CN and CSX executed a more definitive agreement setting forth the terms of their settlement. As

a result of this settlement, CN supports the proposed acquisition of Conrail assets by CSX. CN is confident that its settlement with CSX will preserve CN's ability to participate in the continued expansion of Canada-U.S. trade.

The CN-CSX settlement is a private agreement that does not require the approval of the Board, and therefore has not been submitted to the Board in this proceeding.[4] In essence, however, the settlement embodies a joint-marketing, access and trackage rights agreement that directly responds to the need for balanced rail competition for Canada-U.S. traffic. The settlement also includes provisions that will improve transit times for CSX intermodal traffic in Chicago. The key elements of the settlement are:

- A mechanism permitting CN and CSX to quote through rates for the entire movement of new business between certain points on each carrier's system, which will provide customers more responsive pricing.
- New arrangements at Buffalo, NY, which will enable CN and CSX to better compete for new business in the region.
- Operating arrangements in Chicago that will cut transit times for CSX intermodal trains by allowing them to operate over segments of CN track.

The CN-CSX settlement did not resolve all issues of concern to CN with respect to the breakup of Conrail, and it specifically left CN free to seek certain limited trackage rights to serve Detroit Edison's Trenton Channel Power Plant at Trenton, MI. On October 21, 1997, CN filed (CN-13) a Responsive Application seeking such trackage rights in Finance Docket No. 33388 (Sub-No. 81), and also filed a related Verified Notice of Exemption in Finance Docket No. 33388 (Sub-No. 83) for authority to construct and operate a short connecting

---

[4] CSX, in response to discovery requests by certain parties, did produce a Highly Confidential version of the CN-CSX settlement agreement.

track needed to implement the proposed trackage rights. Detroit Edison, the affected shipper, filed a statement in support of CN's Responsive Application. Today, at the request of Detroit Edison, CN is filing a Notice (CN-14) withdrawing its request for such trackage rights and construction authority.

CN now supports the Primary Application in this case, and seeks no relief from the Board as a condition to its approval of the proposed acquisition of Conrail by CSX and NS. However, as discussed below, CN does ask that it receive equitable treatment in the event the Board should decide to grant certain conditions requested by other parties.

II. IN THE EVENT THAT THE BOARD DECIDES TO IMPOSE ANY CONDITIONS RELATING TO THE BUFFALO/NIAGARA FALLS AREA, THE AGENCY SHOULD ENSURE THAT CN IS TREATED NO LESS FAVORABLY THAN OTHER CARRIERS SERVING THIS AREA

CN takes no position with respect to the conditions sought by various parties in this case. The parties who seek conditions have had a fair opportunity to present evidence and argument in support of their requests. The Primary Applicants, in turn, have had a fair opportunity to present responsive evidence and argument. The task now facing the Board is to apply the governing legal standards to the extensive record that has been developed, and to determine which conditions, if any, should be imposed on the CSX/NS acquisition of Conrail. CN is confident that the Board, in carrying out this task, will give careful consideration to the views and interests of parties both seeking and opposing conditions.

As a preliminary matter, CN assumes that the Board will apply its established legal standards governing requests for conditions in railroad merger proceedings, which have been

developed over the course of many years and have been applied in numerous cases.[5] The thrust of these standards is that the Board does not use its merger approval authority to alter the "status quo" as it exists before the merger is proposed. In this case, there may be disagreement as to whether the Board should look at the "status quo" as it existed when the breakup of Conrail was proposed or -- due to the assertedly unique circumstances of this case -- as it existed at the time Conrail was created. Regardless of which way the Board resolves any such disagreement, it should be able to grant or deny the conditions requested in this case without departing from the time-tested standards that have governed the imposition of conditions in prior merger cases.

While CN takes no position on the merits of any of the conditions requested in this case, CN does ask that, in the event the Board decides to impose any conditions relating to the Buffalo/Niagara Falls area, the agency ensure that CN is treated no less favorably than any other rail carrier serving this area.

Conditions relating to the Buffalo/Niagara Falls area have been requested by a number of parties, the foremost of which are the Erie-Niagara Rail Steering Committee (see ENRS-6) and the State of New York (see NYS-11). The ENRS request, supported by the State, seeks:

---

[5] See, e.g., Finance Docket No. 32760, Union Pacific Corp. -- Control and Merger -- Southern Pacific Rail Corp., Decision No. 44 at 178 (served Aug. 12, 1996) ("There must be a nexus between the merger and the alleged harm for which the proposed condition would act as a remedy."); 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 No. 38 at 55-56 (served Aug. 23, 1995) (conditions will not be imposed "to ameliorate long-standing problems which were not created by the merger," citing BN/Frisco); Union Pacific Corp., Pacific Rail System, Inc., & Union Pacific R.R. -- Control -- Missouri Pacific Corp. & Missouri Pacific R.R., 366 I.C.C. 462, 562-65 (1982).

(1) creation of a Niagara Frontier Shared Assets Area, providing direct rail service by CSX and NS, as well as reciprocal switching for all current and future customers to provide access by carriers other than CSX and NS;

(2) in the alternative, if no SAA is created, a reciprocal grant of terminal trackage rights by CSX and NS at $.29 per car mile; or

(3) alternatively, if neither of the above is imposed, reciprocal switching for all current and future customers on Conrail lines at a per car charge of $156 for all rail carriers that currently have access to the Buffalo area.

These conditions, as drafted, appear to contemplate equal treatment of all rail carriers serving the Buffalo/Niagara Falls area. CN respectfully requests that, should the Board decide to grant any of these conditions, in whole or in part, the agency ensure that the resulting condition does in fact afford equal treatment to all rail carriers, and does not place CN at a disadvantage to other carriers serving this area.

As the Board is aware, certain settlement agreements have been reached that address, among other subjects, the Buffalo/Niagara Falls area. The CN-CSX settlement contains new arrangements (including a negotiated switch rate) designed to enable CN and CSX to better compete for new business in this area. A settlement agreement entered into between CSX and Canadian Pacific Railway Company apparently establishes a negotiated switch rate for CP at Buffalo. See CSX/NS-176 at 140. In addition, a settlement agreement between the Primary Applicants and the National Industrial Transportation League provides, in part, that, for a period of five years, switch rates between CSX and NS at Conrail points now open to reciprocal switching shall not exceed $250 (subject to RCAF-U adjustment), and switch rates

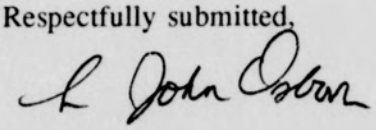
with other carriers at such points will be governed by other settlements or be preserved at existing levels (subject to RCAF-U adjustment). See CSX/NS-176, App. B.

It is quite possible that such settlement agreements will result in different commercial terms being in effect between different carriers serving the Buffalo/Niagara Falls area. Any such differences, however, would be the product of separate, arms-length negotiations. Indeed, it would be surprising if multiple, private negotiations had resulted in uniformity of treatment among carriers. But if the Board should decide to impose a condition (such as a reciprocal switch rate) with respect to the Buffalo/Niagara Falls area, the commercial terms thereby imposed would result not from private negotiations but rather from the exercise of the agency's public interest-based jurisdiction over the proposed merger. In CN's view, any such public condition should afford equitable treatment to all rail carriers serving the Buffalo/Niagara Falls area. CN requests that the Board provide for equitable treatment in the event that it imposes any condition relating to the Buffalo/Niagara Falls area.

CONCLUSION

For all of these reasons, CN supports the Primary Application and takes no position with respect to any requested condition, but asks that the Board provide for equitable treatment of carriers in the event that it imposes any condition relating to the Buffalo/Niagara Falls area.

Respectfully submitted,



Jean Pierre Ouellet
Chief Legal Officer and Corporate Secretary
Canadian National Railway Company
935 de La Gauchetiere Street West
16th Floor
Montreal, Quebec
H3B 2M9
(514) 399-2100

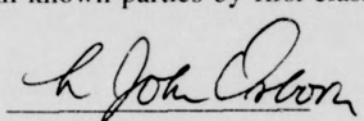
L. John Osborn
Douglas E. Rosenthal
Elizabeth A. Ferrell
Sonnenschein Nath & Rosenthal
1301 K Street, N.W.
Suite 600 East
Washington, D.C. 20005
(202) 408-6351

Attorneys for:
CANADIAN NATIONAL RAILWAY COMPANY
GRAND TRUNK CORPORATION
GRAND TRUNK WESTERN RAILROAD INCORPORATED

Dated: February 23, 1998

Certificate of Service

The undersigned hereby certifies that on this 23rd day of February, 1998, he served a true copy of the foregoing on counsel for all known parties by first-class mail, postage prepaid.



L. John Osborn

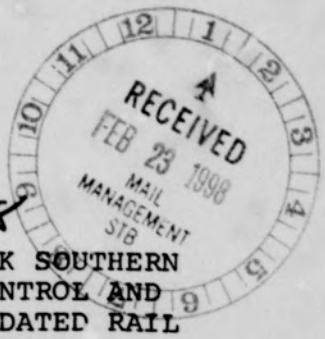
STB FD 33388 2-23-98 E 185838

UTU/IL-3

ORIGINAL

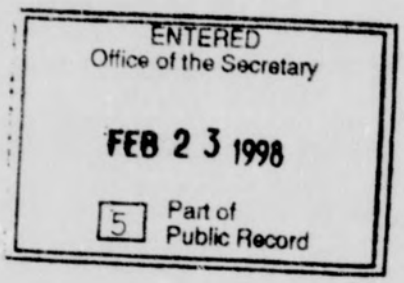
Before the

SURFACE TRANSPORTATION BOARD



Finance Docket No. 33388 */ 185838

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

GORDON P. MacDOUGALL
1025 Connecticut Ave., N.W.
Washington DC 20036

Attorney for Joseph C. Szabo

Due Date: February 23, 1998

*/ Embraces also Sub-Nos. 2 thru 7, and Sub-Nos. 36, 59, 80. 185846
185841 / 185842 185843 / 185844

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 RAII CORPORATION

BRIEF

Comes now Joseph C. Szabo,1/ for and on behalf of United Transportation-Illinois Legislative Board (UTU-IL), and submits this brief in opposition to approval of the above-referenced transactions.

Protestant on August 7, 1997, filed a notice of intent to participate; on August 22, 1997 he filed comments with respect to Sub-Nos. 2 thru 7 (JCS-1); on October 21, 1997, comments were filed on behalf of UTU-IL, by the Assistant Director for UTU-IL, John H. Burner, with respect to the basic transaction in F.D. No. 33388 (UTU/IL-1); on December 15, 1997, he filed comments with respect to Sub-Nos. 36, 59, and 80 (UTU/IL-2).2/

It is clear from the record which has been compiled thus far that the CSX and NS proposal to divide Conrail would be contrary to the public interest, and harmful to railroad employees. The proposed transactions would be particularly adverse to the Chicago area, and

---

*/ Embraces also Sub-Nos. 2 thru 7, and Sub-Nos. 35, 59, 80.

1/ Illinois Legislative Director for United Transportation Union, with offices at 8 So. Michigan Ave., Chicago, IL 60603.

2/ Another verified statment, also labeled JCS-1 (incorrectly) and filed October 21, 1997, is not part of the UTU/IL submission.

best interests and commerce of the state of Illinois.

The Board is required to consider the interests of all rail employees, not merely those of applicant carriers, in determing the public interest. Such a consideration, along with other factors, requires denial of the application, and the various related Sub-numbered proceedings.

Respectfully submitted,

GORDON P. MacDOUGALL
1025 Connecticut Ave., N.W.
Washington DC 20036

Attorney for Joseph C. Szabo

February 23, 1998

Certificate of Service

I hereby certify I have served a copy of the foregoing upon all parties of record by first class mail postage-prepaid.

Washington DC

Gordon P. MacDougall

STB FD 33388 2-23-98 E 185837

185837

LaRoe, Winn, Moerman & Donovan
ATTORNEYS AT LAW
3506 IDAHO AVENUE, N. W.
WASHINGTON, D. C. 20016
TELEPHONE (202) 362-3010
FAX (202) 362-3050

February 23, 1998

Vernon A. Williams, Secretary
Office of the Secretary
Case Control Branch
ATTN: STB Finance Docket No. 33388
Surface Transportation Board
1925 K Street, NW
Washington, DC 20423-0001

E

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:

Enclosed is an original and twenty-five (25) copies of the Brief of the Port Authority of New York and New Jersey (NY/NJ-19) for filing in the above-captioned proceeding. An additional copy is enclosed for file stamping and return with out messenger. Please note that this filing is also contained on a 3.5-inch diskette in WordPerfect 5.1 format which is also enclosed.

Very truly yours,

Paul M. Donovan

cc: All parties of record

185837

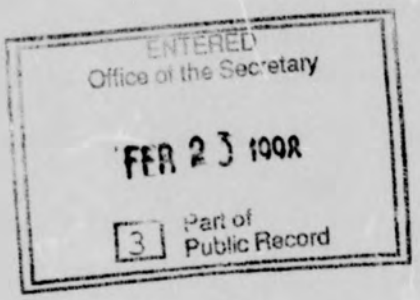
NY/NJ-19

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 THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY



Hugh H. Welsh, Deputy General
Counsel
The Port Authority of New York
and New Jersey
One World Trade Center, 67E
New York, NY 10048
(212) 435-6915

Paul M. Donovan
LaRoe, Winn, Moerman & Donovan
3506 Idaho Avenue, N.W.
Washington, DC 20016
(202) 362-3010

Attorneys for
The Port Authority of New York
and New Jersey

February 23, 1998

Table of Contents

I. INTRODUCTION..... 1

II. SUMMARY OF ARGUMENT..... 3

III. ARGUMENT..... 7

A. The Economic Welfare Of The New York/New Jersey Region Is Heavily Impacted By The Movement Of Waterborne Export/Import Traffic To, From And Through The Port Of New York/New Jersey..... 7

B. The Greatest Potential For Growth In Waterborne Export/Import Volumes At The Port Of New York/New Jersey Is Traffic Moving To And From Competitive Interior Destinations And Origins That Are Most Effectively Served By Rail..... 9

C. Since Its Creation, Conrail Has Improved Its Service At The Port Of New York/New Jersey, And Has Become A Significant Competitive Force Benefiting The Port..... 11

D. Remaining Competitive In The Rail Movement Of Containerized Export/Import Traffic Requires Ports To Provide For The Expeditious Transfer Of Containers To And From Rail Cars And Ships At On-Dock Rail Facilities..... 13

E. While The Proposed Transaction Would Result In Substantial Benefits To The New York/New Jersey Area In General, It Could Also Seriously Impede The Ability Of The Port Of New York/New Jersey To Compete For Waterborne Export/Import Traffic... 15

1. There is no doubt that the proposed transaction would benefit the New York/New Jersey region in many ways..... 15

a. The transaction would result in two major rail carriers serving most of the New York/New Jersey region..... 15

b. The increased single-line service resulting from the proposed transaction would materially benefit the New York/New Jersey region..... 17

2. The elimination of Conrail as the sole rail carrier available for most rail shipments moving to and from New York/New Jersey has potential negative consequences..... 18

a. The geographic competition supplied by Conrail to Applicants' operations at other North Atlantic ports would be lost as a result of the proposed transaction..... 18

b. Conrail has, over the past several years, "rationalized" its rail infrastructure at New York/New Jersey to a point where there is considerable doubt as to the ability of two line haul carriers, plus a terminal operator, efficiently to operate over those congested facilities. 20

F. The Only Satisfactory Substitute For The Lost Geographic Competition Provided By Conrail Is The Effective And Efficient Intramodal Competition That May Be Provided By CSX And Norfolk Southern, However, Norfolk Southern Proposes To Eliminate Any Meaningful Export/Import Service At The Port..... 22

G. The Operating Plan For The North Jersey Shared Assets Operating Area Filed By The Applicants Has Flaws That, If Not Corrected, Could Lead To Operating Problems In That Area That Would Eliminate Or Severely Limit Effective And Efficient Intramodal Competition For Waterborne Export/Import Traffic At The Port Of New York/ New Jersey And Negatively Impact The Entire North Jersey Shared Asset Region..... 25

1. The North Jersey Shared Asset Operating plan is flawed..... 25

2. In the event of operational problems at New York/New Jersey, the Applicants would use the overburdened rail terminal facilities to move domestic traffic that is truck competitive, and export/import traffic would be diverted to competing North Atlantic ports..... 28

H. The Continuing Oversight Of The Board, Coupled With The Meaningful Participation Of The Port Authority Of New York And New Jersey, Would Substantially Reduce Any Potential For Service Difficulties Or Disruptions Within The North Jersey Shared Assets Operating Area..... 32

I. In Order To Ensure Meaningful Port Authority Participation, Conditions Should Be Imposed By The Board In Approving The Proposed Transaction... 34

IV. CONCLUSION..... 37

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 THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY

I. INTRODUCTION

The Port Authority of New York and New Jersey ("the Port Authority") was created by a Congressionally consented to Interstate Compact between the States of New York and New Jersey, 42 U.S. Stat. 174 (1921), consenting to ch. 154, Laws of New York 1921; ch. 151, Laws of New Jersey, 1921.

The New Jersey Supreme Court has described the Port Authority as having been created by the two States as their joint agent, to wit:

"In 1921 the Legislatures of New Jersey and New York authorized the execution of the port compact...establishing the Port of New York district and creating the Port Authority as their joint agency." Newark v. Essex County Bd. of Taxatio 54 N.J.,

joint agency." Newark v. Essex County Bd. of Taxation, 54 N.J., 171, 175: 254 A. 2d 513, 515 (1969), cert. den. 396 U.S. 987 (1969) Along the same lines, in Trippe v. Port of NY Auth., 14 N.Y. 2d 119, 122-23; 198 N.E. 2d 585, 586 (1964), the New York Court of Appeals described the Port Authority as "a governmental agency of the States of New York and New Jersey" and as "a direct agency" of the two States.

A number of decisions recognizing the nature of the Port Authority as a State Agency were collected in Port of N.Y. Auth. v. J. E. Linde Paper Company, 205 Misc. 110, 113-14; 127 N.Y.S. 2d 155, 158-59 (N.Y. Mu. Ct., 1953) wherein the Court declared that: "The Port Authority is an arm and an agency of the States of New York and New Jersey, and in all of its activities, is engaged in the performance of essential governmental functions."

Article II of the Interstate Compact creating the Port Authority created the Port District, an area which coincidentally includes what has been described as the "North Jersey Shared Asset Area". Article XI of the Compact provides that the Port Authority shall from time to time make plans for the development of said district and Article XII provides the "The Port Authority may from time to time make recommendations to the legislatures of the two states or to the Congress of the United States, based upon study and analysis, for the better conduct of the commerce passing in and through the Port of New York, the increase and improvement of transportation and terminal facilities therein,

and the more economical and expeditious handling of such commerce."

There is little doubt that the Port Authority is authorized and qualified to represent the interests of the people of the Port District and the two States in reviewing and analyzing the future activities and participating in the future planning and operations of CSX and Norfolk Southern in the Port District and in engaging in such activities would be performing as essential governmental function.

The duty of the Port Authority to protect the commerce of the Port District includes two elements. First, the Port Authority must protect and promote the overall regional economy. Second, the Port Authority must protect and promote the export/import waterborne traffic which contributes so much to the overall regional economy.

In connection with both of these responsibilities, the Port Authority is vitally interested in the fate of Conrail, the only major rail carrier providing substantial rail service to New York/New Jersey. It is also vitally interested in the structure and service of any rail carriers surviving Conrail following approval of the pending Application.

II. SUMMARY OF ARGUMENT

The Port Authority has invested over $ 1.2 billion, and continues to invest, millions of dollars of public funds in port related facilities within the Port District. Included in these investments are those necessary to promote rail operations "on-

dock" at ExpressRail to speed the seamless transfer of ocean and inland rail movements to and from those interior destinations and origins that are highly competitive among the various ports along the Atlantic Coast. These large investments are warranted in view of the substantial impact that port commerce and the port industry has upon the overall economy of the region.

The port of New York/New Jersey is the major container port served by Conrail. While Conrail has focused its export/import traffic efforts at New York/New Jersey, Norfolk Southern has concentrated its efforts at the only North Atlantic port it serves, Norfolk. CSX, on the other hand has been limited to Baltimore as its major port in the North Atlantic. This situation has led to vigorous geographic competition among the Applicants with respect to export/import containerized traffic.

Conrail's response to this geographic competition has been to put into place improved "doublestack" service to and from the Midwest with lower rates, and better transit times. These efforts, coupled with the Port Authority's investment in on-dock rail terminal facilities have resulted in very substantial increases in export/import containerized traffic volumes moving by rail through New York/New Jersey. The proposed transaction would eliminate Conrail and with it eliminate Conrail's geographic competition.

There is no doubt that, on a purely regional basis, the proposed transaction holds great promise for New York/New Jersey. The prospect of two vigorous competing rail carriers both serving

the region is very attractive. In fact, the Port Authority has long sought such competitive rail service. At the same time, however, there is a threat that accompanies approval of the Application.

Ideally, the two rail carriers that would serve New York/New Jersey would compete for traffic to and from ExpressRail. That intramodal competition would replace the geographic competition currently existing among the Applicants insofar as New York/New Jersey is concerned. The North Jersey Shared Assets Operating Plan filed by the Applicants as a result of the Board's order in Decision No. 44, however, shows that Norfolk Southern has no intention of serving ExpressRail. The only real service with respect to the time sensitive and highly competitive export/import traffic moving over ExpressRail would be provided by CSX if the Application were approved. At best, therefore, the port would see CSX as a substitute for Conrail and the geographic competition provided by it to Norfolk Southern at Norfolk would constitute the only remaining force with respect to export/import containerized traffic.

An examination of the North Jersey Shared Assets Operating Plan inevitably leads to even greater concerns. Because of the highly congested rail facilities at New York/New Jersey and the efforts of Applicants to squeeze three rail operators into terminal facilities currently served by only one carrier, Norfolk Southern, CSX's sole remaining competitor with its export/import operations remaining centered at Norfolk, would operate fourteen

trains per day over the single rail line that serves ExpressRail, in contrast to the five trains per day currently operated over the same track. Any disruption whatever in operations would virtually shut down the only terminal capable of competing with Norfolk Southern's Norfolk export/import operations.

This situation presents what John Snow, CSX's Chief Executive Officer called the "potentiality for mischief." It is not necessary, however, to infer any ill will on the part of Norfolk Southern to see the real potential for danger. In fact, William Sheppard, a former Conrail operating expert, after examining the proposed North Jersey Operating Plan concluded: "In addition, should this plan be implemented as currently proposed, I have no doubt that the result would be operational paralysis in a matter of weeks."

In view of all the circumstances, the reduction in geographic competition that Conrail presently provides; the ability of the remaining carriers to divert export/import traffic to other ports that they serve with no loss of revenue to them; and the substantial uncertainty as to operations within the Shared Assets Area; the Port Authority is requesting that the Board impose certain conditions to any approval of the pending Application. These conditions are not intended, nor would they, impose any great burdens upon the Applicants and would not seek to interfere in their operations. They would, however, allow the Port Authority to provide meaningful input into those decisions within

the area that would substantially reduce any potential for service difficulties or disruptions.

,, Should those requested conditions be imposed, or should the Applicants agree to their imposition, the Port Authority is prepared to support the pending Application without reservation.

III. ARGUMENT

A. The Economic Welfare Of The New York/New Jersey Region Is Heavily Impacted By The Movement Of Waterborne Export/Import Traffic To, From And Through The Port Of New York/New Jersey.

The Port of New York/New Jersey creates economic activity that is directly needed for the movement of waterborne cargo. This includes not only land and waterside activities, but also documentation, financing, brokering and other essential services that are directly required for the movement of each ton of cargo. In addition, since New York/New Jersey moves large volumes of cargo, it has become a commercial center and services that are performed at New York/New Jersey and are directly related to the physical movement of waterborne commerce through ports other than New York/New Jersey.[1]

Specifically, the Port created economic activity includes firms that: provide products and services involved in the transportation of cargo through all terminals of the Port of New York/New Jersey and between the Port and an inland destination/origin; provide major products and services directly re-

---

[1] The information outlined in this section may be found in the statement of Lillian C. Borrone, Director of Port Commerce of the Port Authority of New York and New Jersey. (NY/NJ-15, Appendix A.)

quired for the conduct of international trade, to companies that transport cargo through the Port of New York/New Jersey; provide warehousing and distribution services for cargo shipped through the Port; and directly provide ocean transportation, local water transportation or trade services for cargo moving through ports other than the Port of New York/New Jersey.

The economic services of the port industry are linked to other industries in the regional economy. Port activities that take place at the waterfront, on board vessels, on railroad and truck lines, at related inland warehouses and freight forwarding facilities, as well as in downtown offices that handle the daily financing, insurance, brokerage and other direct needs of the industry, generate indirect and induced economic effects in the regional economy. Regional impacts occur when these companies that are directly engaged in maritime commerce purchase goods and services such as ship maintenance, repair services and fuel from other regional firms. These purchases lead to further inter-industry activity, the impact of which is called the indirect impact. Additionally, induced impacts occur when workers involved in direct and indirect activities spend their wages in the region.

In sum, the port industry at New York/New Jersey was responsible for total direct, indirect and induced regional sales of over $19.0 billion in 1993. In addition, the port industry created 166,500 jobs in the region and $6.2 billion in wages, and regional income and sales taxes of over $0.5 billion.

Of the 166,500 jobs generated by the port industry, 55 percent, or 93,320, were direct jobs. These direct jobs, with wages of over $4.0 billion, represent actual employment that can be counted or directly linked to cargo activity. The 74,180 indirect and induced jobs represented 45 percent of the employment generated by the port industry and accounted for over $2.0 billion in wages. (NY/NJ-15, App. A, p.2-6)

Of the 116,743 metric tons of cargo moving through the Port of New York/New Jersey in 1993, only 11,055 tons, or 9.47 percent, was containerized cargo. Containerized cargo, however, accounted for 47,760 of the 92,320 direct jobs, or 51.73 percent, created by the port industry. Automobiles accounted for 5,310 additional jobs, or 5.75 percent of the total direct jobs created by the port industry. Taken together, containerized cargo and automobiles provided wages of $2.17 billion, or 57.5 percent, of the wages generated directly by the port industry.

B. The Greatest Potential For Growth In Waterborne Export/Import Volumes At The Port Of New York/New Jersey Is Traffic Moving To And From Competitive Interior Destinations And Origins That Are Most Effectively Served By Rail.

During the years prior to containerization when breakbulk was the only form of general cargo waterborne transportation, the potential for export/import traffic growth was limited. Due to multiple handlings and other inland transportation difficulties, traffic tended to move through a relatively small number of ports and generally through the port closest to the inland origin or destination. Innovations such as mini-landbridge, where

transcontinental movement replaced all water traffic patterns, were simply not feasible.

Given the logistical difficulties, those ports with the largest local populations were dominant in terms of tonnages and market share over those ports with smaller consuming market potential. And New York/New Jersey with its large population, and its proximity to Europe, our largest trading partner, dominated the nation's ports, and handled more than a third of the nation's international waterborne cargo. (NY/NJ 16, p.9)

Mr. Thomas Schmitz (NY/NJ-16, pp.9-10) points out that "with the significant growth of containerized cargoes and the increasing use of supply chain logistics techniques, the size of a port's local market no longer ensures its utilization for the movement of discretionary waterborne 'through' traffic....Rather, the most cost-effective transportation route has quickly become the most influential factor is determining port selection."[2]

As a result of these factors, during the period 1980-1995, the Port of New York/New Jersey saw only a 1 percent compound annual growth rate in containerized cargoes. In addition, only 10 percent of the containerized shipments moved to or from the Port by rail. (NY/NJ-16, p. 10) However, from 1990 to 1995, the compound annual growth rate increased to 4 percent and rail

---

[2] As will be discussed below, Applicants, in their rebuttal filing, confuse vessel calls with port selection. A vessel may call at several ports in a single voyage. The vessel operator will choose a port at which it will discharge "through" , as opposed to "local" traffic, based upon cost and inland transportation service considerations.

shipments began to increase as well. It is anticipated that the compound annual growth rate will remain at the 3 to 5 percent level until 2005 and rise to 5 percent by the year 2015. Rail shipments will increase as well with that sector accounting for 20 percent of the Port's total containerized traffic by the year 2040. (NY/NJ-16, p. 11)

These rail traffic projections reflect the impact of containerization on the Port. Today, for any port to increase its market share it must compete successfully for traffic moving to and from the interior of the nation. That traffic is particularly susceptible to movement by rail. In fact, superior rail service is critical to the success of any port in attracting competitive traffic.

C. Since Its Creation, Conrail Has Improved Its Service At The Port Of New York/New Jersey, And Has Become A Significant Competitive Force Benefiting The Port.

There is no question but that "there is intense competition among the ports of the Atlantic Coast." (Deposition of John W. Snow, p. 185; NY/NJ-15, p. 11; NY/NJ-16, p. 9) Ms. Lillian C. Borrone, Director of Port Commerce for the Port Authority, testified that the North Atlantic is the most competitive of all North America's port ranges. (NY/NJ-15, p. 11) The number of U.S. ports, coupled with the Canadian ports of Montreal and Halifax, the interstate highway system and several rail carriers serving these ports offer ocean carriers and shippers a plethora of choices as to how to route their international shipments. (NY/NJ-15, p. 11)

Ms. Borrone went on to testify:

> Within the North Atlantic range, each of the Applicants in this proceeding current[ly] focus their efforts to attract international business at one port. Norfolk Southern concentrates on the only port it serves in the range, Norfolk. CSX seeks to move traffic primarily through Baltimore, and Conrail concentrates its efforts at New York/New Jersey. Accordingly, the three Applicants currently compete with each other at those respective ports and the ports benefit from their "geographic" competition. (NY/NJ-15, p. 11)

See also the deposition testimony of John W. Snow.[3]

As noted above, following the advent of containerization, New York/New Jersey began to lose market share, particularly that inland traffic moving to and from the coast by rail. Beginning in the mid-1980's, the Port Authority began a focused effort to increase rail movements to and from the Port. The tonnage assessment collected by ocean carriers to fund longshore fringe benefit costs have been reduced, particularly with respect to containers moving through the Port from origins and destinations more than 260 miles from the Port. In addition, the Port Authority offered a container incentive program to attract cargoes from that same interior territory. These efforts combined to reduce costs by up to $ 150 per container. (NY/NJ-15, p. 12)

---

[3] Mr. Snow testified at page 184 of his deposition as follows:

Q. And in connection with that, did CSX find itself in competition with the Norfolk Southern serving Norfolk to its south and with Conrail serving New York to its north?

A. To a certain degree, certainly.

Despite an improved rail cost structure, service levels were lacking. An extensive examination of rail issues to identify strategic alternatives led to greater partnering with Conrail to attract new rail traffic to the region. A study of rail service needs in 1990 identified the region's line-haul rates and ship-to-rail costs as disproportionately high relative to competitor ports.

In May of 1991, Conrail introduced doublestack rail service from the Port to Chicago which created line-haul cost efficiencies that were passed onto customers in reduced rates. Later in 1991, Conrail and Canadian Pacific joined to provide direct service from the Port to Montreal and Toronto. With service and line-haul costs vastly improved, terminal efficiency remained the missing ingredient on the Port's rail strategy. (NY/NJ-15, p. 12)

D. Remaining Competitive In The Rail Movement Of Containerized Export/Import Traffic Requires Ports To Provide For The Expeditious Transfer Of Containers To And From Rail Cars And Ships At On-Dock Rail Facilities.

In August of 1991, the Port Authority and Conrail took the first steps to address the issue of terminal efficiency and ship-to-rail transfer costs. Conrail's primary rail operation was relocated from the outdated Portside Yard immediately west of the Port to an interim on-dock facility adjacent to the vessel berths of the Elizabeth Port Authority Marine Terminal. Despite less than optimal operating conditions, the interim terminal ExpressRail facility achieved the desired effect of reducing the time and cost involved in intermodal transfers. (NY/NJ-15, p. 13)

Since opening, volume at ExpressRail, reflecting the substantial efficiencies of on-dock rail transfer operations, has grown over 25 percent per year, necessitating an entirely new terminal with greater capacity and the ability to expand further. Even during planning and construction of the new facility, twice it was necessary to add capacity to the existing operation. The new expanded ExpressRail terminal opened in January of 1996. The $19 million project virtually doubled the Port's rail terminal capacity to some 150,000 lifts annually. The facility handled nearly 105,000 containers in its first full year of operation. (NY/NJ-15, p. 6)

The dramatic increase in rail activity at the Port reflects the success of the combined efforts of the Port Authority and Conrail to attract rail traffic through the Port at the expense of their respective rivals, the ports of the North Atlantic including Baltimore and Norfolk as well as CSX and Norfolk Southern. In 1991, Portside Yard handled approximately 20,000 containers. As noted, that has increased to over 100,000 containers per year at the on-dock ExpressRail facility with future growth anticipated. (NY/NJ-15, p. 13) This increase in traffic also reflects the simple reality that to be successful in the competition for export/import containerized traffic moving by rail, or potentially moving by rail, a modern on-dock rail facility is a necessity.

E. While The Proposed Transaction Would Result In Substantial Benefits To The New York/New Jersey Area In General, It Could Also Seriously Impede The Ability Of The Port Of New York/New Jersey To Compete For Waterborne Export/Import Traffic.

1. There is no doubt that the proposed transaction would benefit the New York/New Jersey region in many ways.

a. The transaction would result in two major rail carriers serving most of the New York/New Jersey region.

The Port Authority has, for many years, recognized the benefits of two major rail carriers serving the New York/New Jersey region including the Port of New York/New Jersey. This transaction nearly meets that goal. Most of the New York/New Jersey region will indeed be served by both Norfolk Southern and CSX, either directly or through the Conrail Shared Asset Operator ("CSAO"). The obvious exceptions to that joint service are the on-dock ExpressRail facility which, although accessible to both carriers will be served, initially at least, only by CSX,[4] and New York East of the Hudson River which will also be served only by CSX.

As John W. Snow, Chairman, President and Chief Executive Officer of CSX testified in his verified statement:

> But this transaction will not only lead to enhanced competition between railroads and trucks. For many shippers, it will also lead to a significant increase in competition

---

[4] As will be discussed in detail below, Norfolk Southern does not propose to offer any real service to ExpressRail. In fact, the current "Export Express" operated by Conrail between Chicago and ExpressRail (TV-12) over lines to be acquired by Norfolk Southern is being dropped after the acquisition. (Compare CSX/NS-119, p. 50 with pp. 55-6; see also NY/NJ-18, p. 7)

> between railroads. During my twenty years with CSX, NS has consistently been a strong, vigorous competitor in the regions in which both companies operate. That competition has acted as a constant spur, requiring CSX to strive continuously to improve the quality of the total transportation package, including both price and service, that it offers to shippers. As a result of this transaction, that robust, head-to-head competition between CSX and NS will be extended to numerous customers now in Conrail's territory. While Conrail has done a superb job of revitalizing rail service in the Northeast, it has not faced this sort of intense competition from a worthy Class I rival in much of its territory, including the important Greater New York/New Jersey Port Area. This transaction thus increases the level of competition between railroads, giving many shippers a true choice between two competing Class I railroads, each of which is willing to exert every effort to win business away from its rival. (CSX/NS-18, Volume 1, pp. 307-8)

Similarly, David R. Goode, Chairman, President and Chief Executive Officer of Norfolk Southern testified in his verified statement:

> [T]he transaction proposed here offers an historic opportunity to accomplish what Congress, the Department of Transportation, the U.S. Railroad Association and others tried very hard to achieve but could not accomplish in the 1970's after the collapse of the Penn Central and other northeastern railroads: providing rail systems in the Northeast that are both strong and competing. Also, the new competition will be between two railroads each of which will fully control virtually all of its entire system without extensive reliance on trackage rights to provide two-carrier competition. (CSX/NS-18, Volume 1, pp. 332-3)

See also, DOJ-1, p. 3; NITL-7, p. 11.

b. The increased single-line service resulting from the proposed transaction would materially benefit the New York/ New Jersey region.

Applicants have made a strong, indeed a compelling, case that the proposed transaction would result in increased single-line rail services to large portions of the Northeast and Southeast. They have also demonstrated that the increased single-line services will permit Applicants to divert nearly 800,000 truckloads annually onto their rail lines. (CSX/NS-19, Volume 2A, p. 257 and Volume 2B, p. 226)

"The benefits to the public from these diversions of truck traffic to rail are substantial and varied. Major arteries in the Northeast, Midwest and Southeast have heavy car and truck traffic, creating significant public costs through congestion, safety hazards, diminished air quality, and highway damage. Diversion of truck traffic to rail intermodal will help to reverse this trend." (CSX/NS-19, Volume 2B, p. 228)

Applicants have also demonstrated that the New York/New Jersey region would see a substantial increase in intermodal rail traffic. Major diversions from highway into and out of the New York/New Jersey region can be anticipated as a result of single-line rail service replacing the joint-line CSX/Conrail and NS/Conrail services that exist today. (See, for example, CSX/NS-19, Volume 2A, pp. 250-5, and Volume 2B, p.229)

The competitive single-line rail services would give shippers and receivers at New York/New Jersey additional shipping options and would undoubtedly reduce shipping costs and improve

the quality of service. In short, the single-line services that would result from the proposed transaction would be of substantial benefit to the New York/New Jersey region.

2. The elimination of Conrail as the sole rail carrier available for most rail shipments moving to and from New York/New Jersey has potential negative consequences.

   a. The geographic competition supplied by Conrail to Applicants' operations at other North Atlantic ports would be lost as a result of the proposed transaction.

The testimony of Lillian C. Borrone, as discussed above, points out the obvious fact that Conrail, with New York/New Jersey as its primary port, competes with CSX and Norfolk Southern serving other ports with respect to waterborne international traffic. This "geographic" competition has resulted in continually improving service, particularly at the on-dock ExpressRail terminal facility, aggressive rate competition and rapidly increasing volumes of waterborne international traffic moving through the Port of New York/New Jersey. Plainly, this "geographic" competition would be lost as a result of the proposed transaction.

As discussed by Thomas A. Schmitz in NY/NJ-16, Conrail currently runs two inbound and two outbound trains to and from ExpressRail daily. Service is provided to and from the Midwest, New England and Canada. Expressrail trains serve 30 destinations daily providing second morning availability to Chicago, Cleveland, Columbus, Detroit, East St. Louis, Indianapolis, Worcester and Montreal; third morning availability to Toronto and

fourth morning availability to Kansas City. Conrail closely coordinates switching ExpressRail at with Maher Terminals. In fact, Maher has its own switch engine that works in conjunction with Conrail to shift loaded and empty cars within ExpressRail and to block shipments to facilitate Conrail's unloading of inbound trains as well as the building of outbound loaded trains. Thus, Conrail has a current operating agreement to coordinate the on-dock operation with Maher. (NY/NJ-16, p. 14)

The aggressive service and rate competition provided by Conrail with respect to waterborne export/import traffic moving through New York/New Jersey, and particularly over ExpressRail, is reflected in the growth of ExpressRail traffic. As noted above, 20,000 containers moved through Conrail's Portside Yard in 1991. That number has increased to 105,000 containers during the first full year of the expanded on-dock ExpressRail operations in 1996-7. This dramatic increase in traffic volume is the direct result of Port Authority investment and Conrail's effective competition with the carriers that here propose to acquire it.[5]

---

[5] The Port Authority and Applicants entered into a stipulation with respect to Conrail's investments in the New York/New Jersey region should it remain an independent carrier. The stipulations are as follows:

"1. Conrail has made investments in its rail lines and related facilities to enhance its capacity to handle efficiently waterborne intermodal export-import traffic moving through the Port of New York and New Jersey, which has been a major ocean port for Conrail.

2. The ability of a rail carrier to handle such traffic efficiently and profitably can be constrained by physical capacity limits, such as the size of terminals, and by operating practices.

3. Were Conrail to remain an independent company it is reasonable to expect that over the next several years it would

b. Conrail has, over the past several years, "rationalized" its rail infrastructure at New York/New Jersey to a point where there is considerable doubt as to the ability of two line haul carriers, plus a terminal operator, efficiently to operate over those congested facilities.

Conrail has, over the past several years, "rationalized" its rail operations and terminal facilities at New York/New Jersey. Conrail has eliminated the duplicative terminal and track facilities that were necessary to provide service by Conrail's predecessor railroads, but were not necessary to provide service by a single carrier.

Lillian C. Borrone testified regarding the Port Authority's concerns as a result of this rationalization:

> The Port Authority is obviously concerned that the rationalization process may have so reduced the rail facilities that the North Jersey area, referred to by Applicants as the North Jersey Shared Assets Area, may have insufficient rail infrastructure to support the efficient operations of two line haul carriers and one terminal carrier in place of Conrail. In fact, our analyses show that, given the port cargo projections we have for the New York/New Jersey regional marketplace even without regard to the increase[d] traffic projections expressed by the Applicants in the Application, following the acquisition of Conrail serious operational issues and deficiencies loom for the Region's freight rail and intermodal terminal network. (NY/NJ-15, p. 15)

(a) make further such investments if increased demand for its rail services to handle such traffic appeared likely to exceed its capacity to do so efficiently, the likely return warranted such investments, and the necessary cash to make such investments was available, and (b) continue to identify and where practical implement reasonable, economic changes to its operations."

In 1996, the regional marketplace for rail intermodal traffic was 1.024 million containers, 892,000 domestic and 132,000 export/import. Over the next ten years, the Port Authority projects an additional 325,000 domestic and 100,000 export/import containers moving through the region. (NY/NJ-15, p. 16)

At the same time, the New York/New Jersey region is rapidly running out of rail terminal capacity.[6] The projected increases in rail traffic would lead to a situation where domestic and export/import cargoes would compete for available terminal capacity. Domestic traffic is destined for or originates at New York/New Jersey, while the export/import traffic is merely moving through the region. Since the export/import traffic can be moved through competitive ports with no loss of revenue for either CSX or Norfolk Southern, while domestic traffic must go to or from the region, there can be no doubt as to which traffic would be given preference by the Applicants.[7]

---

[6] Materials designated as highly confidential by Applicants reflect the rail terminal capacity situation at New York/New Jersey as compared with available terminal capacity at competitive ports, most notably Norfolk. (See NY/NJ-16, Exhibit-TAS 2)

[7] The rebuttal verified statements of Thomas L. Finkbiner and Peter A. Rutski (CSX/NS-177, Volume 2A, p.72 and Volume 2B, p. 365 respectively) miss the mark by a wide margin when they argue that not providing sufficient terminal capacity at New York/New Jersey would be counter-intuitive from a business standpoint. Their argument is only sound when Norfolk Southern and/or CSX would lose revenue or increase costs as a result of not expanding capacity at New York/New Jersey. Since export/import traffic can and does move through competitive ports served by the Applicants, and since those competitive ports have excess terminal capacity, it would be "counter-intuitive" for the Applicants to increase terminal capacity to handle additional

The ExpressRail terminal is currently operating at 85 percent of capacity. The next largest handler of export/import container traffic is Croxton Yard which has been assigned to Norfolk Southern. Croxton currently operates at full capacity with no room for additional container traffic. Furthermore, many of the largest terminals in the region are also operating at or near capacity with little or no room for expansion. (NY/NJ-15, p. 16)

As will be discussed below, the North Jersey Shared Asset Operating Plan (CSX/NS-119) that Applicants filed in response to the Board's Decision No. 44, demonstrates serious operational problems within the area as a result of terminal capacity and track limitations. Applicants have yet to deal with these problems in a definitive manner.

F. The Only Satisfactory Substitute For The Lost Geographic Competition Provided By Conrail Is The Effective And Efficient Intramodal Competition That May Be Provided By CSX And Norfolk Southern, However, Norfolk Southern Proposes To Eliminate Any Meaningful Export/Import Service At The Port.

Conrail is currently providing improved service and is attracting increasing volumes of rail export/import traffic through New York/New Jersey in competition with CSX and Norfolk Southern at the ports served by those carriers. Clearly, the competitive impact of Conrail would disappear with approval of the proposed transaction.

---

export/import traffic when that same traffic could be handled, without additional investment at the competing ports.

Applicants have placed great emphasis upon the proposition that following approval of the transaction, New York/New Jersey would benefit from the competitive rail services provided by two vigorous line-haul carriers. Obviously, that assertion is true only to the extent that the competition is indeed vigorous. To the extent that any traffic, such as export/import traffic, is not the subject of vigorous competition, that traffic is substantially prejudiced by approval of the transaction.

Applicants' North Jersey Shared Asset Area Operating Plan (CSX/NS-119) demonstrates the competitive realities existing with respect to export/import traffic insofar as Applicants are concerned. Currently, CSX has only Baltimore as a container port in the North Atlantic range. Serving New York/New Jersey would give CSX not only the large New York/New Jersey consuming area, but also the opportunity to handle substantial volumes of export/import traffic over ExpressRail. Accordingly, CSX has provided for an inbound and an outbound daily train to and from ExpressRail with the understanding that if additional service is necessary a backup train would be operated to guarantee arrival of all containers within the operating schedule. (Deposition of John W. Orrison with respect to CSX/NS-119, November 19, 1997, pp.72-4)

By contrast, Norfolk Southern which serves the major competitive port of Norfolk proposes to drop the Conrail TV-12 (the "Export Express") which currently moves export containers from Chicago, and Pittsburgh to ExpressRail, and TV-11 which currently

operates between ExpressRail and Pittsburgh. (CSX/NS-119, pp. 48-56) This willingness to eliminate export/import service to and from ExpressRail (which really means to and from New York/New Jersey with respect to containerized traffic) reflects the ability of Norfolk Southern to handle that same export/import traffic at Norfolk.

The above does not mean, of course, that Norfolk Southern is not providing some level of competition, at least potential competition, at New York/New Jersey. In addition, Norfolk Southern serving Norfolk would provide some of the same type of geographic competition to CSX at New York/New Jersey that Conrail currently faces. On the other hand, the close coordination, on a continuing basis, that would be required for efficient operation of the congested terminals and terminal area would present Norfolk Southern with the opportunity to in large part control the fate of its competitor in the export/import traffic market. This power, characterized by Mr. John W. Snow as a "potentiality for mischief" in his deposition, is a major concern of the Port Authority.

In any event, to the extent that vigorous intramodal competition between Norfolk Southern and CSX, <u>with respect to export/import traffic</u>, does not develop, the Port of New York/New Jersey would have lost the geographic competition provided by Conrail without receiving any effective intramodal competition to replace it.

G. The Operating Plan For The North Jersey Shared Asset Operating Area Filed By The Applicants Has Flaws That, If Not Corrected, Could Lead To Operating Problems In That Area That Would Eliminate Or Severely Limit Effective and Efficient Intramodal Competition For Waterborne Export/Import Traffic At The Port Of New York/ New Jersey And Negatively Impact The Entire North Jersey Shared Asset Region.

1. The North Jersey Shared Asset Operating Plan is flawed.

The Board in its Decision No. 44, reacting to concerns raised by the Port Authority in NY/NJ-13, ordered the Applicants to file their proposed operating plan for the North Jersey Shared Asset Operating Area. This plan (CSX/NS-119) was reviewed by William H. Sheppard of Atlantic Rail Services, Incorporated. Mr. Sheppard, whose experience in railroad operations, particularly within the New York/New Jersey area are beyond dispute, found serious problems with the plan. (NY/NJ-18)

Mr. Sheppard found very serious flaws in the proposed plan and concluded:

> Although time does not permit for a more comprehensive and thorough review of the NJSAA plan, based upon my understanding of the information it contains, I have concluded that this plan is deficient in several respects for the reasons expressed above. In addition, should this plan be implemented as currently proposed, I have no doubt that the result would be operational paralysis in a matter of weeks. (NY/NJ-18, p. 19)

The reasons for these conclusions are varied and need not be reiterated here at length. However, Mr. Sheppard's observations

of the proposed operations as they would affect the North Jersey Shared Asset Area and ExpressRail, and therefore export/import container movements through New York/New Jersey should be discussed.

Mr. Sheppard first observes that when compared to today's Conrail operations a considerable increase in movements over the Chemical Coast line, and thereby past ExpressRail, is planned. In fact, while Conrail currently operates five trains per day over this line, CSX would operate two and Norfolk Southern would operate fourteen.[8] Mr. Sheppard states:

> Since yard jobs utilize some of the same trackage to deliver inbound and assemble outbound ExpressRail traffic for pick-up, and are expected to use this trackage to shuttle equipment between E-Rail and storage tracks at Elizabethport Yard, the increase demand upon Chemical Coast line capacity noted above could well result in delay and degradation of ExpressRail service, particularly when trains do not operate according to plan and fall out of sequence with other trains operating through this area. This situation could well result from the collateral effects of congestion experienced at other areas of the terminal, notably Oak Island Yard and vicinity. In this regard, it should be noted that new patterns of NJSAA train activity will be formed by trains routed through Oak Island Yard and vicinity en route to and from the NEC. These changes in traffic patterns, when combined with other changes in the way trains will access Oak Island Yard, are expected to adversely impact other yard functions and precipitate delays to other traffic in the NJSAA. (NY/NJ-18, pp. 14-15)

---

[8] It is particularly ironic that while Norfolk Southern plans to move fourteen trains per day past ExpressRail, it has cancelled the Conrail trains (TV-12 and TV-11) that currently serve this on-dock rail facility, and does not plan any replacement trains for those cancelled.

Plainly, operational difficulties of this magnitude could well impact the entire region. The benefits that Applicants have touted with respect to the region are totally dependent upon the ability of the Applicants to provide effective and efficient service there. Houston-like operational difficulties would not only eliminate any benefits from the transaction, but would actually substantially injure the shipping public.

While all of the flaws in the operating plan are of great concern to the Port Authority, those that affect the operations at ExpressRail are particularly vexatious. The sole reason for establishing and maintaining on-dock rail facilities such as ExpressRail is to speed the transfer and movement of the highly time-sensitive export/import containerized traffic. Any reduction in the quality of service with respect to this traffic would lead to the diversion of this traffic to other competing ports. Thus, the great increase in train activity on the Chemical Coast line that provides access to ExpressRail is very troubling.

As noted, Norfolk Southern plans to operate fourteen trains per day over the Chemical Coast line, and CSX two additional trains. Inasmuch as the Chemical Coast line is the only access to ExpressRail, these sixteen trains will compete for space on that line with the two trains (Q162 and Q163) that CSX plans to operate from and to ExpressRail. (See NY/NJ-18 and the attachments thereto) These sixteen trains should be contrasted with the five trains that operate over those tracks today. Reduced service quality seems inevitable. (NY/NJ-18, p. 14-15)

2. In the event of operational problems at New York/New Jersey, particularly at ExpressRail, the Applicants would likely use the overburdened rail terminal facilities to move domestic traffic that is truck competitive, and export/import traffic would be diverted to competing North Atlantic ports.

It is axiomatic that domestic traffic, including export/import traffic moving through West Coast ports, that originates at New York/New Jersey or is destined to New York/New Jersey will move to or from that location. The only question is whether it will move by rail or highway.

By contrast, export/import traffic that moves through Atlantic Coast ports to and from the interior can, and does, move through a variety of ports. Stated differently, the Atlantic Coast ports, particularly the North Atlantic Coast ports are highly competitive when it comes to attracting and maintaining a share of this traffic. (See pp. 6-7, supra)

As noted by Thomas L. Finkbiner, Vice President-Intermodal for Norfolk Southern, an ocean carrier normally calls at at least three Atlantic Coast ports during a voyage. (Deposition of Mr. Finkbiner, p. 16, see also NY/NJ-16, pp. 10-14) Thus, ocean carriers are free to route traffic through whichever port offers the best combination of price and service, both with respect to the port facilities and the inland transportation facilities. (Deposition of Mr. Finkbiner, p. 17)

Mr. Finkbiner also testified:

> Four essential operational elements are required to provide intermodal service acceptable in the marketplace: trains, terminals, equipment, and systems. First, a net-

> work of trains must be established to connect service points with transit times **and** with departure and arrival windows that are commercially acceptable. Second, investment and reinvestment in a network of terminals is required to handle the customer's freight efficiently at origin and destination. Third, equipment, including both flatcars and, for customers who do not supply their own, trailers and containers, must be available in the proper sizes and quantities to meet customers' needs. Fourth, systems must be in place for operational control and management of the information flow among the parties involved in intermodal transactions. (CSX/NS-19, Volume 2B, pp. 233-234)(Emphasis Mr. Finkbiner's)

Examining the four operational essentials discloses precisely why the Port Authority is concerned with respect to continued service at ExpressRail following approval of the proposed transaction. First, as previously noted, Norfolk Southern proposes to cancel the only current export/import container service operating to and from New York/New Jersey over the Conrail route that it would acquire. Second, because of Norfolk Southern's substantial increase in trains moving over the only access to ExpressRail, there is real doubt that CSX would be able to provide acceptable service to and from that facility.

Mr. Finkbiner emphasizes the importance of a network of trains able to meet transit time requirements and operate within the departure and arrival windows that are commercially acceptable. The congestion on the Chemical Coast line resulting from Norfolk Southern's increase in domestic trains plainly put into serious question the ability of CSX to serve ExpressRail within those acceptable arrival and departure windows.

Mr. Finkbiner stresses the importance of investment and reinvestment in terminals required to handle the customer's freight. And yet, Norfolk Southern has no plans for any investment in terminals that would handle export/import containerized freight, notwithstanding the capacity problems that even Norfolk Southern recognizes.[9] It is these very terminal capacity problems that undoubtedly led Norfolk Southern to cancel the current Conrail export/import container service.

Mr. Finkbiner stresses the need for equipment to move the customer's freight. Indeed that equipment must be made available within the departure window necessary to meet transit time requirements or it is of no use. The Norfolk Southern operations over the Chemical Coast line would very likely impede CSX's ability to position empty equipment in an efficient manner.

Mr. Finkbiner's concern with operational control is also appropriate. CSX may well be unable to control its operations at ExpressRail because of the large number of Norfolk Southern trains clogging its only access to that facility. In short, Mr. Finkbiner's testimony reflects the basis for the Port Authority's concern with the North Jersey Shared Asset Operating Plan.

Mr. Finkbiner testified that the proposed transaction would be "extremely beneficial to ports on the Eastern Seaboard." In view of Norfolk Southern's intent to cancel service at New

---

[9] See the Highly Confidential documents produced by Norfolk Southern pursuant to discovery and attached to NY/NJ-16 as Appendix B.)

York/New Jersey he apparently did not have that port in mind when he made that statement.[10] Mr. Finkbiner also testified:

> Norfolk Southern has a long-standing track record of not favoring one port over another and will take an evenhanded approach to providing rail service at all of the eastern ports that we will reach. Norfolk Southern does not intend to establish service or rates that would artificially divert freight among ports.[11]

It is not necessary to infer any ill will on the part of Norfolk Southern to recognize that it would continue to move North Atlantic export/import traffic post transaction in exactly the same way as it does today, through Norfolk. Further it is not necessary to infer any ill will in order to recognize that should the heavy volume of Norfolk Southern trains on the Chemical Coast line result in disrupted operations of CSX, CSX would continue to move North Atlantic export/import freight as it does today, through Baltimore.

---

[10] Since Mr. Finkbiner was deposed prior to the filing of the NJSAA Operating Plan, Port Authority counsel was unaware of the Norfolk Southern's intention at that time and was unable to inquire as to the real meaning of Mr. Finkbiner's statement.

[11] In deposition, Mr. Finkbiner was asked if the quoted language implied that Norfolk Southern has the ability to take less than an evenhanded approach as among ports. Mr. Finkbiner replied "There is no implication there." The following question and answer followed:
Q. So what is the purpose of a statement that you take an evenhanded approach if you don't have the ability to take other than an evenhanded approach?
A. It sounds good.

H. The Continuing Oversight Of The Board, Coupled With The Meaningful Participation Of The Port Authority Of New York And New Jersey, Would Substantially Reduce Any Potential For Service Difficulties Or Disruptions Within The North Jersey Shared Asset Operating Area.

In its Comments, Requests for Conditions, Opposition Evidence, and Supporting Argument (Ny/NJ-14), the Port Authority tentatively took the position that Applicants should be ordered to divest themselves of all assets within the North Jersey Shared Asset Area which Applicants presently propose to be operated by the CSAO. In taking this initial position, the Port Authority noted that its view might well change following the filing of the North Jersey Shared Asset Operating Plan that had been ordered by the Board in Decision No. 44. Indeed, following the filing of the Operating Plan and the Port Authority's opportunity to depose Messrs. Mohan and Orrison with respect to the Plan, the Port Authority has altered its view somewhat and hereby withdraws its request that the Board order divestiture of the CSAO assets. The withdrawal does not reflect a lessening of the Port Authority's concerns with respect to operations within the CSAO. It does, however, reflect a reconsideration of the optimum way to address those concerns in a manner that would better serve the public interest.

As stated in our initial Comments, the Port Authority has not taken the position that the Shared Asset Operating Area concept, although novel and unproven, could not work to provide adequate service at New York/New Jersey and even at ExpressRail. However, in order to be successful the concept would require the

close interaction of two intensely competitive railroads. The very nature of the shared asset concept requires monitoring and oversight.[12] As previously noted, the Port Authority has statutory responsibilities regarding the Port District, an area which includes most of the North Jersey Shared Asset Area, and is in a position to assist, both the Applicants and the Board in providing that monitoring.

Mr. John W. Snow testified at deposition in response to Port Authority counsel's question as follows:

> Q. ...Would you have any objection to the participation of the Port Authority, even under the general auspices of the STB, in a general oversight context.
>
> *****
>
> A. We recognize the enormous interest that the Port Authority of New York and New Jersey will have in the success of this transaction. We think it does a lot that is potentially very, very good for the port in giving it two different carriers with all the advantages that go with that. And I would think some advisory counsel role or something would be entirely appropriate, not a governance role. But we would expect to have significant outreach to the port and what precise form that will take or should take I think should be a subject for discussions between NS and CSX and the Port Authority and I would be happy to be party to those discussions. But cer-

---

[12] Mr. John W. Snow testified at deposition:
A. I think both Norfolk Southern and CSX recognize that we have to have strict neutrality from the shared asset operator and structure the governance of the operations in a way that we will get that sort of neutrality. It's true that we'll be intense competitors but we've tried to put in place, through the SAA mechanism, a vehicle to assure that that's even-handed and that one of us doesn't gain an advantage over the other. We're going to watch each other closely.... (Deposition of John W. Snow, p.197)

> tainly a close advisory role of one kind where information is shared and there is a communications outreach, certainly I would think that. And a regular way to review concerns and opportunities and so on I think would make some sense. Precise form of that, I'm not sure. (Deposition of John W. Snow, p. 198-199)

The Port Authority fully agrees with Mr. Snow that the Port Authority should provide an advisory role to ensure that operations within the Shared Asset Area are efficient and even-handed as between Norfolk Southern and CSX. The Port Authority also feels that the Board would also benefit from the input that the Port Authority could provide with respect to operations within this vital area.

I. In Order To Ensure Meaningful Port Authority Participation, Conditions Should Be Imposed By The Board In Approving The Proposed Transaction.

The Port Authority of New York and New Jersey is a bi-State agency created by compact between the States of New York and New Jersey with the consent of Congress and established to among other things, promote, develop, represent and protect the commercial interests of the Port of New York District and, in furtherance of its mission, is actively participating before the Board in this proceeding. It is acting on behalf of the people of the region in performing this function, and in protecting the commerce of the Port District is acting in the public interest.

The Port Authority has expressed concerns with respect to the proposed rail operations within the Port District, and the future of rail operations within the Port District. The Port Authority wishes to establish an ongoing relationship that will

permit the Port Authority to participate in the future planning and operations of CSX and Norfolk Southern in the Port District and in any oversight that may be ordered by the Board to promote the provision of effective and efficient service within the Port District.

Accordingly, the following conditions should be imposed as a condition of approval of the proposed transaction:

1. Norfolk Southern, CSX, and the Port Authority ("the parties") shall meet regularly in accordance with a mutually amenable schedule, to discuss major issues affecting the Port Authority and the provision of rail service to the Port District, for the purpose of promoting effective and efficient transportation for the District. The parties shall meet no less than quarterly following the decision of the Board's approval of the proposed transaction. Present at these meetings shall be senior officials of the parties, including such officials from the CSAO. In the event that any issues cannot be resolved by the representatives of the parties then the issues may be referred by the Chairman and the Executive Director of the Port Authority to the Presidents of CSX and Norfolk Southern for resolution.

2. a) In the event the Board approves the Application, the Port Authority shall review CSX's and Norfolk Southern's planning for the operations within the Port District and consult with CSX and Norfolk Southern from time to time with respect to significant changes to CSAO operations within the District.

b) The Port Authority, CSX and Norfolk Southern shall agree upon the development of certain operational data that is appropriate and necessary for the Port Authority to analyze the efficiency of rail operations within the Port District and between the Port District and major origins or destinations. To this end, the parties shall meet on a periodic basis to develop and review data. Such data shall include statistical data of the type currently produced by Conrail for the Port Authority, including aggregated traffic, car supply and distribution data, as well as data that will demonstrate transit times and performance standards for several time sensitive traffic types. The parties shall agree that the production, handling and disclosure of any such data will be treated in accordance with all applicable laws, and will be maintained, where appropriate, in a confidential manner to protect any proprietary or confidential information.

3. a) CSX and Norfolk Southern shall provide the Port Authority with the capital plans and budgets for CSAO within the Port District, and CSX and Norfolk Southern will continue to provide the Port Authority the same level of cooperation provided by Conrail in the past with respect to capital spending for operations within the Port District.

b) Should any impasse arise between CSX and Norfolk Southern that they submit to arbitration under the Shared Assets Agreement regarding CSAO improvements or capital investment in the Port District affecting the Port Authority's interest, the Port

Authority will have a right to present an amicus position to the arbitrator or arbitrators setting forth the Port Authority's views from a regional perspective,

4. CSX, Norfolk Southern and CSAO shall provide and implement economic development programs designed to promote the development of rail traffic within the Port District. CSX and Norfolk Southern shall consult with the Port Authority in the development of such plans, and the Port Authority shall apprise CSX and Norfolk Southern of opportunities for the development of rail traffic affecting the Port District. To the extent it deems appropriate, the Port Authority shall seek input from CSX, Norfolk Southern and CSAO in its capital planning process.

5. The Port Authority shall have standing before the Board to seek whatever necessary relief during such time as the Board maintains oversight following approval of the transaction with respect to the Port District.

To the extent that the Board imposes these conditions, the Port Authority will support the Application and recommend that the Board approve same.

IV. **CONCLUSION**

In view of the foregoing, the Port Authority of New York and New Jersey submits that the proposed transaction should be approved subject to the above-noted conditions. If those conditions are not imposed, the transaction should be disapproved.

Respectfully submitted,

Hugh H. Welsh, Deputy General
Counsel
The Port Authority of New York
and New Jersey
One World Trade Center, 67E
New York, NY 10048
(212) 435-6915

Paul M. Donovan
LaRoe, Winn, Moerman &
Donovan
3506 Idaho Avenue, N.W.
Washington, DC 20016
(202) 362-3010

Attorneys For
The Port Authority of New York
and New Jersey

CERTIFICATE OF SERVICE

I, Paul M. Donovan, certify that on February 23, 1998, I caused to be served by hand on Applicants' counsel four copies of NYNJ-19. I also caused NYNJ-19 to be served by first class mail on all other parties on the Service list.

Paul M. Donovan

STB FD 33388 2-23-98 E 185836

185836

Before the

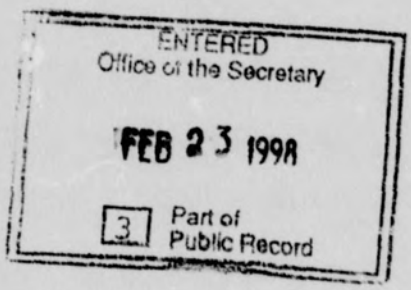
ORIGINAL

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 IN OPPOSITION



GORDON P. MacDOUGALL
1025 Connecticut Ave., N.W.
Washington, DC 20036

Attorney for Charles D. Bolam

Due Date: February 23, 1998

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 IN OPPOSITION

Protestant, Charles D. Bolam,[1/] files this brief in opposition against the proposed transactions. This filing is on behalf of United Transportation Union-General Committee of Adjustment (GO-A&LS), which represents persons employed by Alton & Southern Railway Company.

Protestant filed a Notice of Intent to Participate on August 7, 1997, and a verified statement was filed on October 22, 1997.[2/] The Alton & Southern Railway is controlled by Union Pacific Railroad Company, and is not a party applicant to this proceeding.

In addition to the impact upon Alton & Southern employees, the verified statement presented evidence concerning switching operations in the St. Louis area. Railroad unifications result in the closing of yards and abandonment of lines, making rail service unavailable to more and more shippers. The remaining facilities become congested

---

1/ General Chairman for UTU-GCA on Alton & Southern Railway Company, with offices at 1400-20th Street, Granite City, IL 62040. Mr. Bolam also serves as Vice President of the St. Louis Rail Labor Coalition, which represents members of various crafts and classes of railroad employees in St. Louis and within a radius of about 240 miles. (VS Bolam, 2).

2/ Although the filing was one-day late, service upon the parties was timely. An unopposed petition to accept the late-filing is pending.

because each destination require track space formerly provided in another yard. The UTU official projects the same conditions experienced during the "Wreck of the Penn Central" after that carrier collapsed. Moreover, safety is being compromised. (VS Bolam, 3-5).

Applicants did not offer any rebuttal to the Bolam verified statement, contrary to their summary. (CSX/NS-194, vii). Of course, the testimony of employees is directed not only to the harm to employees, but also to the harm which would be visited upon the public if the transactions are approved. Moreover, the Board is to consider the impact on non-applicant carrier employees in determining whether to approve the transactions, contrary to applicants' contentions on this score, which cited merely Union Pacific-Control-Missouri Pacific; Western Pacific, 366 I.C.C. 459, 621 (1982). See: Missouri-Kansas-Texas R. Co. v. United States, 632 F.2d 392, 410-13 (5th Cir. 1980); Detroit, Toledo & Ironton R. Co. v. U.S., 725 F.2d 47, 50 n.2 (6th Cir. 1984).

The applications should be denied.

Respectfully submitted,

GORDON P. MacDOUGALL
1025 Connecticut Ave., N.W.
Washington, DC 20036

Attorney for Charles D. Bolam

February 23, 1998

Certificate of Service

I hereby certify I have served a copy of the foregoing upon all parties of record, as indicated on the published service list, by first class mail postage-prepaid.

Washington DC

Gordon P. MacDougall

185832.

A PROFESSIONAL ASSOCIATION OF ATTORNEYS AT LAW

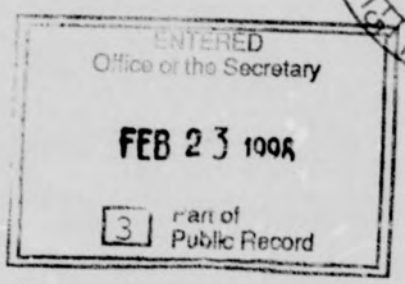
601 SECOND AVENUE SOUTH
SUITE 4200
MINNEAPOLIS, MINNESOTA 55402-4302
612 339-6321 • FACSIMILE 612 338-0535

2100 MINNESOTA WORLD TRADE CENTER
30 EAST SEVENTH STREET
SAINT PAUL, MINNESOTA 55101-4901
612 222-6321 • FACSIMILE 612 222-8905

Byron D. Olsen
(612) 373-8512
Facsimile: (612) 338-4608
E-mail: bolsen@felhaber.com

E

February 20, 1998



VIA FEDERAL EXPRESS

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

Re: Finance Docket No. 33388, CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Co. -- Control and Operating Leases/Agreements - Conrail, Inc. and Consolidated Rail Corporation

Dear Secretary Williams:

Enclosed for filing in the above-captioned docket are an original and twenty-five (25) copies of a Brief and Argument filed on behalf of Eastman Kodak Company, a party of record in the above proceeding. Also enclosed is a 3.5-inch disk containing the text of this pleading in WordPerfect 6.1 format.

80831-1

Please date stamp the enclosed extra copy of this letter and return in the enclosed, self-addressed envelope. Copies of the enclosed Brief are being served via Federal Express upon the Honorable Jacob Leventhal and counsel for Applicants. All other parties are being served via first class mail, postage pre-paid.

Respectfully submitted,

Byron D. Olsen

mcd
Enclosures: Original + 25 copies
Duplicate of this letter
3.5 diskette containing document

c: Judge Jacob Leventhal (1 copy) - ***via Federal Express***
Applicants (3 copies each) - ***via Federal Express***
Parties of Record (1 copy each) - ***via United States Mail***

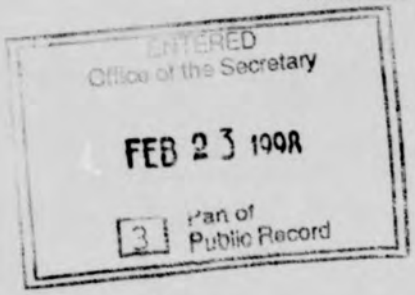
185832

EKC-4

SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 33388

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



**BRIEF AND ARGUMENT
on behalf of
EASTMAN KODAK COMPANY**

SUMMARY

Eastman Kodak Company ("Kodak") is a Party of Record to this proceeding. Kodak is a substantial rail shipper of coal presently moving under an Existing Transportation Contract with Conrail. While Kodak generally supports the application of CSX/NS to acquire Conrail in the interest of returning rail competition to Conrail service territory, Kodak objects to the CSX/NS request to the STB to take action to nullify certain provisions found in some Conrail/shipper transportation contracts, including Kodak's.

Kodak's agreement with Conrail provides that the Contract may not be assigned without the consent of the other parties to the agreement. The sale of Conrail to CSX/NS clearly requires such consent. Applicants have asked the STB to declare provisions of this type null and void. In Kodak's view, there is no lawful basis or authority for the STB to take such action, nor is it needed for successful consummation of the acquisition.

KODAK'S INTEREST AND PARTICIPATION IN THE PROCEEDINGS

Kodak filed its position in the form of a Verified Statement by Linda L. Kelley, Manager of Inbound Transportation, Rail and Bulk, of Kodak identified as EKC-2. As more fully set forth in the Verified Statement of Ms. Kelley, Kodak is a substantial user of rail freight transportation. In particular, Conrail delivers approximately 8,000 to 9,000 car loads a year of coal to Kodak Park at Rochester, New York for steam generation for both power and heating. Kodak Park is the largest single facility of Kodak's worldwide manufacturing operations. Coal consumed by Kodak at this one single location exceeds 800,000 tons per year and arrives entirely by rail. Kodak is clearly a major user of Conrail's service: other than electric power generating utilities, Kodak is the largest single user of steam coal on the entire Conrail system.

Kodak also makes wide use of railroads for freight shipment other than coal. It is a significant user of intermodal service by Conrail to Chicago and the west, and to the east for export. Other bulk commodities are moved in quantity by rail including plastics, pulp for paper making, chemicals and forest products. (EKC-2)

As a general proposition, Kodak favors the plan of the joint Applicants to divide Conrail roughly along the lines of its predecessors, the New York Central and the Pennsylvania Railroad. On the whole, it appears that the proposed transaction will yield a welcome return of Class I rail competition through much of Conrail's service territory. Indeed, Applicants have made much of this aspect of the proposed acquisition and distinguish other recent rail megamergers on that basis.

However, in one respect, CSX/NS are being disingenuous when they speak of the competitive benefits of their acquisition. In spite of trumpeting the benefits of a

return of competition, Applicants would have the STB revise and unilaterally change provisions of some Conrail shipper Existing Transportation Contracts without the consent of the affected shipper, in a manner that would produce a most anti-competitive result. The result would harm Kodak by depriving it of an important private contractual right, which it obtained by arms-length bargaining.

DISCUSSION AND ARGUMENT

Kodak is currently a party to a coal transportation contract with Conrail that runs until the beginning of the year 2002. One of the provisions of this contract requires the consent of all parties to an assignment of the contract by one party. This is referred to by some as a "consent to assignment clause" or by the Applicants as an "anti-assignment clause". The specific language in the Kodak/Conrail agreement reads as follows:

> *"15. Agreement: This contract is not assignable in whole or in part by one party without the prior written consent of the other parties. This contract shall inure to and be binding upon the parties hereto and their respective successors and permitted assigns. (emphasis supplied).*
>
> *16. Modification: This contract may not be modified except by an express written agreement signed by the parties hereto, and filed with the ICC. (emphasis supplied)."*

While similar provisions are often found in many types of railroad agreements, it is by no means an automatic inclusion. Indeed, contrary to assertions of CSX counsel in Applicant's Rebuttal (CSX/NS-176, P-103), the consent to assignment clause in

Kodak's contract with Conrail is not a standard or "boilerplate" one. Kodak was advised by Conrail representatives during negotiations with Kodak that it is a provision seldom agreed to by Conrail. As confirmed by documents produced by Kodak in response to discovery requests by CSX, Conrail at first was unwilling to include such a provision in the present transportation rate contract with Kodak. (See Vol. 3 Applicants' Rebuttal EKC-3). Only after further negotiation, with give and take on several points, did Conrail agree to include the clause. Thus, the consent to assignment clause was bargained for by Kodak and agreed to by Conrail. There is no basis or justification for the STB to now take any steps to nullify that clause without Kodak's consent.

Initial drafts of the current Kodak transportation contract with Conrail did not include a consent to assignment clause. This negotiation was going on from late 1991 through 1992. At that time Norfolk Southern had already made attempts to acquire or merge with Conrail. This compounded Kodak's longstanding uncertainty over the eventual ownership of the eastern railroad network. Consequently, as Kodak witness Kelley pointed out in her Verified Statement (EKC-2), Kodak sought a "consent to assignment" clause in the Conrail coal contract then in negotiation. Kodak had no way of predicting the result of any major restructuring involving Conrail and felt it imperative that it have the right to negotiate with other carriers in the event of a Conrail sale or merger. The periodic NS efforts to acquire Conrail and subsequent rumors of interest by others only underscored Kodak's concern and its need for a consent to assignment clause in the contract to provide options for an unknown future. Conrail subsequently agreed to the clause and it is today found in the

Kodak/Conrail contract. Most emphatically, it is not "boilerplate" and is certainly not a clause that Conrail freely accepted in its transportation contracts.

Applicants' Rebuttal Argument at Vol. 1 page 104 leaves the reader with the impression that all Conrail agreed to was a "best efforts" clause, rather than a consent to assignment provision. This is misleading. The full story is laid out in Kodak's responses to discovery found at EKC 3-1 through EKC 3-9. As negotiations progressed in 1992 between Kodak and Conrail, Virginia J. Clark, a Transportation Planner at Kodak, wrote the letter dated August 4, 1992 with attachments identified as EKC 3-6 and 3-7. As here material, Kodak sought a change in Article 12 of the draft contract, which had to do with Conrail abandoning a line upon which Kodak relied or selling such a line to a new railroad. A change was also sought in Article 15 to add the consent to assignment provision. This was entirely separate and unrelated to the Article 12 changes sought. Article 16 was already agreed and contained the language set forth above requiring mutual consent to any contract modifications.

Conrail's response, found at EKC 3-8 and EKC 3-9, shows that Conrail did not agree to Kodak's request with respect to individual lines being abandoned or sold to a new railroad (the Article 12 issue), but did agree without qualification to add consent to assignment to Article 15. Articles 12 and 15 of the contract are independent and essentially unrelated. This exchange of correspondence proves conclusively that Conrail agreed to the consent to assignment clause only after bargaining and certainly did not agree to everything Kodak sought by any means.

Kodak made its deal with Conrail, not with CSX. CSX has appointed itself as the replacement carrier under the Kodak/Conrail coal contract, without any

consultation with the other contracting party, Kodak. Kodak can accept that, providing of course that CSX meets the service commitments and other provisions of the contract. But this should give CSX no right to unilaterally obtain substantive changes in a contract to which it was not a negotiating party.

Overriding the consent to assignment clause is not the least bit necessary to take over Conrail's business (in this case by CSX). Life will go on after "Day One" in spite of Applicant's concerns. Shippers like Kodak will not immediately cancel their contracts and perhaps never will. There may be very few shippers with a similar assignment clause available to them anyway, although Kodak has no direct knowledge of that. All Kodak seeks is the opportunity which the Applicants have assured will be available to everyone: the right to seek competitive alternatives in Conrail territory. Kodak wants to preserve its right to seek better service and/or better rates from a competitive alternative which does not now exist: for example, a Norfolk Southern/Rochester and Southern route. Indeed it is perhaps unlikely that a two-line alternative will be able to compete with CSX single line routing on either a rate or service basis. But if the Applicants mean what they say, they should not quarrel with allowing Kodak to preserve its opportunity to do so.

Applicants argue that to allow the consent to assignment clauses to continue to be effective would somehow be one-sided. CSX, (or NS, depending upon to which railroad the transportation contract is assigned), would be fully obligated to perform Conrail's obligations under the contract while the shipper contracting party such as Kodak could decide to seek other alternatives. In fact, this is not unfair at all. This is a right that the parties bargained for, and what was obtained. Kodak would face the

same risk if it sold or merged away its coal using facilities. The obligation would remain with the acquiring entity.

Kodak is simply taking the Applicant's contentions with respect to restoration of competition at face value. The dominant theme sounded throughout the Application and subsequent pleadings filed by CSX/NS is that the Conrail acquisition will return railroad competition to Conrail service territory. As earlier noted, Kodak supports this, but now challenges Applicants to be consistent. CSX has made clear that it will take over the Kodak coal contract. CSX has also made clear it has no intention of renegotiating any changes in the existing Kodak coal transportation contract to be effective until after the end of the contract term, December 31, 2001. If Kodak's right to withhold its consent to the assignment is barred by the STB, it will deprive Kodak of the opportunity to explore competitive alternatives. After the acquisition, both CSX and NS will each be able to serve most current origins of Kodak coal. NS would be physically able to deliver coal to Kodak Park at Rochester by interchange with the Rochester and Southern at Silver Spring, New York. Yet if the STB steps in and acts to unilaterally revise the Kodak/Conrail contract (which it has no authority to do), Kodak will once again have no competitive alternatives.

SECTION 11321(a) OF THE INTERSTATE COMMERCE ACT

Applicants invoke Section 11321(a) of the Interstate Commerce Act (ICA) as practically mandating the requested overriding of private contracts. This is a misplaced expansion of this section of the ICA. The specific wording of Section 11321(a) as here pertinent is as follows:

..."A rail carrier or corporation participating in or resulting from a transaction approved by or exempted by the Board under this subchapter may carry out the transaction, own and operate property and exercise control or franchises acquired through the transaction without the approval of a State authority." (Emphasis supplied).

Note the emphasis on operating property and exercising control or franchises. This points up the major flaw in Applicants' argument. Section 11321 came into being long before railroads had the right to enter into shipper transportation contracts . It was intended to preserve operating rights of a carrier being acquired, such as joint facility agreements, trackage rights and other operating agreements, so that a carrier acquiring another carrier with ICC approval would obtain the right to use all of the trackage linkups necessary to have a complete functioning railroad system. Even cases cited by Applicants do not bring application of this Section into the realm of transportation contracts. (See e.g. Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Co. - Control - Missouri-Kansas-Texas Railroad Co. et. al. 4 ICC 2d 409).

Applicants go on from there to argue that the definition of property should be expanded beyond the statute and historic ICC interpretations, to all property interests, "both tangible and intangible" of the predecessor carrier. All contractual rights, say the Applicants, must pass unfettered to the consolidated carrier or carriers, not just trackage rights and joint facility agreements. There is no case law or statutory support for the proposition that the language of Section 11321 should be expanded beyond "own and operate property" to all contractual agreements, nor is there authority for

the STB to negate any contractual rights the Applicants find inconvenient. As noted, cases cited by Applicants deal with transfer of operating rights as distinguished from other contractual rights.

Before the ICC Termination Act of 1995, the language now found in Section 11321 was contained in Section 11341 of the ICA. The language under former Section 11341 shows little substantive difference from the current language of Section 11321. That language predates the Staggers Act of 1980, which Act, for the first time, permitted rail carriers to enter into transportation rate contracts (first codified as 49 USC 10713). In other words, what is now Section 11321(a) predated the legalization of contract rate making for railroads. It was never intended to extend to contract rates because such agreements were neither contemplated nor lawful at the time the language was first promulgated. This is borne out by the words of the statute: the specific scope of authority of Section 11321(a) is limited to the following:

> *"A rail carrier..... may carry out the transaction, own and operate property and exercise control or franchises acquired through the transaction....". (Emphasis supplied).*

A transportation rate contract is neither property to be owned nor operated, nor does it fall under the exercise of control or franchises. Other language in Section 11321 does not expand the scope beyond the power to "hold, maintain, and operate property, and exercise control or franchises". (49 USC 11321(a)). Nor have Applicants cited any case authority to the contrary.

THE NITL AGREEMENT

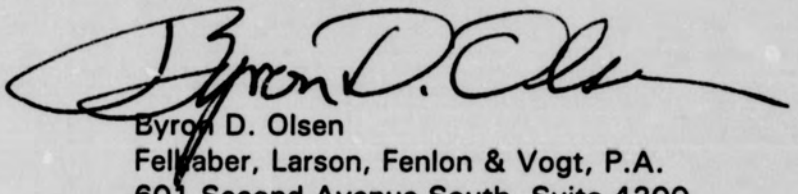
The National Industrial Transportation League (NITL) has entered into an agreement with CSX and NS with respect to certain issues. The Applicants suggest that this agreement resolves most shipper concerns including those associated with assignment of Existing Transportation Contracts. In particular, there is a provision dealing with shippers who become dissatisfied with the acquiring carrier that ends up performing service under the shipper's Conrail agreement. The NITL agreement on this subject misses the point: it deals with service deficiencies but says nothing about competitive rates or any other ancillary rights such as car supply, demurrage, etc. The NITL agreement provides an arbitration mechanism, but requires that the shipper wait six months, provide extensive documentation and finally assume the burden of proof to convince an arbitrator that indeed the succeeding carrier has been deficient in service performance under the contract. The concept of burden of proof is usually not part of the arbitration process, nor will it be easy for a shipper to document carrier service performance. A far more effective incentive to improve service performance is provided by the marketplace when a shipper can negotiate with a competitive carrier. All Kodak seeks to preserve in this proceeding is the preservation of that marketplace and contractual right. With that in place, there is no need for the cumbersome and time consuming NITL alternative.

CONCLUSION

Kodak urges that the STB avoid the unnecessary activity of delving into revision of private contracts between carriers and shippers which were freely negotiated and bargained. Should the proposed transaction be approved, Kodak urges that ordering

paragraphs implementing the prayer for relief found at page 101 of Vol. 1 of the Railroad Control Application (CSX/NS-18) and identified as (1)c specifically exclude the right of Applicants to disregard provisions in Existing Transportation Contracts limiting or prohibiting Conrail's rights of assignment.

Respectfully submitted,



Byron D. Olsen
Fellabaer, Larson, Fenlon & Vogt, P.A.
601 Second Avenue South, Suite 4200
Minneapolis, Minnesota 55402
(612) 373-8512
(612) 338-4608 (fax)
Attorney for Eastman Kodak company

Dated: February 20, 1998

CERTIFICATE OF SERVICE

I, Kelly Jo Zajac, certify that on February 20, 1998, I have caused a true and correct copy of the foregoing EKC-4 pleading, a Brief and Argument filed on behalf of Eastman Kodak Company, a party of record, to be served by Federal Express upon the Surface Transportation Board, the Honorable Jacob Leventhal, and counsel for Applicants, and by first class mail upon all other parties of record.

Dated: February 20, 1998

Kelly Jo Zajac

185830

LAW OFFICES

OBERMAYER REBMANN MAXWELL & HIPPEL LLP

ONE PENN CENTER - 19TH FLOOR

1617 JOHN F. KENNEDY BOULEVARD

PHILADELPHIA, PA 19103-1895

(215) 665-3000

FAX (215) 665-3165

Thomas E. Hanson, Jr.
Direct Dial: (215) 665-3280

February 20, 1998

VIA FEDERAL EXPRESS

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
Suite 700
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:

Enclosed for filing with the Board in the referenced proceeding, please find the original and twenty-five (25) copies of the Brief in Support of the Southeastern Pennsylvania Transportation Authority's Comments and Request For Conditions. In addition, the filing is submitted on a diskette formatted for WordPerfect 7.0.

Kindly date stamp the enclosed two additional copies of the Comments at the time of filing and return them in the enclosed envelope.

Thank you for your assistance in this matter. If you have any questions, please contact me at (215) 665-3280.

Very truly yours,

Thomas E. Hanson, Jr.
For: Obermayer Rebmann Maxwell & Hippel LLP

Enclosures
cc: Honorable Jacob Leventhal
Dennis G. Lyons, Esq.

SPTA

Richard A. Allen, Esq.
Paul A Cunningham, Esq.

185830

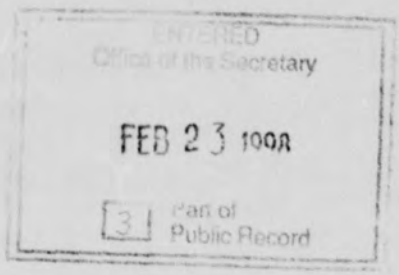
SPTA-8

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 33388

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

BRIEF IN SUPPORT OF THE SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY'S COMMENTS AND REQUEST FOR CONDITIONS



G. ROGER BOWERS
General Counsel
EUGENE N. CIPRIANI
Assistant Deputy Counsel
Southeastern Pennsylvania Transportation Authority
1234 Market Street, Fifth Floor
Philadelphia, PA 19107-3780

JOHN J. EHLINGER, JR.
CATHERINE PYUNE McELDOWNEY
THOMAS E. HANSON, JR.
Obermayer Rebmann Maxwell & Hippel LLP
One Penn Center, 19th Floor
1617 John F. Kennedy Boulevard
Philadelphia, PA 19103

Counsel for Southeastern Pennsylvania Transportation Authority

Dated: February 20, 1998

TABLE OF CONTENTS

		Page
I.	PRELIMINARY STATEMENT	1
II.	FACTUAL BACKGROUND	3
III.	LEGAL ARGUMENT	4
	A. Standard of Review	4
	B. Approval of the Proposed Acquisition Must be Conditioned on a Five (5) Year Extension of the 1990 Trackage Rights Agreement in Order to Protect the Public Interest and Prevent any Harmful Effects to the Commuting Public	6
	1. A failure to extend the 1990 Trackage Rights Agreement beyond the initial integration of Conrail lines into the CSX and NS system would adversely impact SEPTA's commuter transit operations and the present balance between freight and transit operations in the Southeastern Pennsylvania region	6
	2. Section 3.02(b) of the Trackage Rights Agreement must be revised to preclude the Applicants from revoking the dispatching rights over crucial SEPTA commuter lines	11
	3. The Applicants are precluded from operating following the proposed Acquisition in a manner that would impede SEPTA's ability to expand its service to meet the transit needs of the Southeastern Pennsylvania region	13
IV.	CONCLUSION	14

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 IN SUPPORT OF THE SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY'S COMMENTS AND REQUEST FOR CONDITIONS

The Southeastern Pennsylvania Transportation Authority ("SEPTA") submits this Brief in support of its Comments and Request for Conditions ("SEPTA Comments") filed in the captioned proceedings relating to the primary application ("Application") for approval of the proposed merger and acquisition of control (the "Acquisition") of Consolidated Rail Corporation ("Conrail"), CSX Corporation ("CSX") and Norfolk Southern Corporation ("NS") and affiliated parties (collectively, the "Applicants").

I. PRELIMINARY STATEMENT

SEPTA's primary concern with the proposed Acquisition is its impact on the public safety, the adequacy of transportation to the commuting public and the operation of SEPTA's extensive transit services in the Philadelphia region. Shortly after the Applicants filed their Application, SEPTA began discussions with representatives of Conrail, CSX and NS to address this concern, and sought information about the Applicants' operating plans through the SEPTA service territory and their announced intention to assume Conrail's rights and obligations under a 1990 Trackage Rights Agreement (the "Trackage Rights Agreement" or "Agreement") with SEPTA. A copy of the Agreement is attached as Exhibit "A" to the statement of Bernard Cohen, SEPTA's

Assistant General Manager - Strategic Planning ("Cohen Affidavit"), which accompanied SEPTA's Comments. For nearly a decade, this Agreement has provided the essential road map for the successful coordination of overlapping commuter and freight operations in the densely populated Philadelphia region.

The initial discussions with CSX and NS were cordial and replete with assurances of cooperation and access to information. SEPTA initially proposed a ten (10) year extension of the Trackage Rights Agreement to assure a continuation of the status quo and the smooth coordination of freight and transit service in the post-control period. SEPTA's desire for an intermediate term extension of the Trackage Rights Agreement was heightened by the uncertainties and inevitable disruptions associated with the takeover of Conrail's operation by two freight railroads, neither of which share the legacy or experience of Conrail (and its predecessors) relating to commuter rail service. See SEPTA's Comments at p. 5; Cohen Affidavit ¶¶ 7-9. SEPTA's request for a ten (10) year extension of the Agreement was rejected, but Conrail, on behalf of all the Applicants, agreed to a five (5) year extension to "avoid merger-related uncertainties." See Letter dated October 20, 1997 from R. Paul Carey, Conrail General Manager-Contracts, attached hereto as Exhibit "A." In the spirit of compromise and in the interest of achieving a prompt settlement with the Applicants, which would permit the parties to focus on operational and safety issues, including the concerns regarding proposed movements of CSX local and freight traffic discussed in Part III., infra, SEPTA would agree to a five (5) year extension of the Trackage Rights Agreement.

To the best of SEPTA's information, NS remains committed to a five (5) year extension of the Agreement, but CSX has reneged on its earlier position and now insists that an extension of the Trackage Rights Agreement must provide for an unqualified and unprecedented indemnification of CSX by SEPTA for any and all liability incurred by CSX within SEPTA's

service area, including liability caused by CSX's own negligence in its operation over SEPTA-owned lines. While CSX advised SEPTA early on that liability was a major concern, its clearly overreaching position on liability raises the question whether its true intention is to avoid its earlier commitment to extend the Agreement. This unreasonable demand has left the parties at an impasse, and has necessitated the filing of this Brief. SEPTA respectfully requests that the Surface Transportation Board (the "Board"), by and through its conditioning power, extend the Trackage Rights Agreement for a period of five (5) years commencing with the control date, and impose certain essential, narrowly-tailored refinements to the Agreement's dispatching provisions, as discussed below.

II. FACTUAL BACKGROUND

SEPTA is a public transit agency constituting a body corporate and politic, and exercises the public powers of the Commonwealth of Pennsylvania as an agency and instrumentality thereof. SEPTA's commuter system operates in accordance with the Pennsylvania Public Transportation Law, Act 26 of 1991, as amended by Act 4 of 1994, 74 Pa. Cons. Stat. Ann. §§ 1701, et seq. It comprises an extensive integrated mass transportation system, consisting of trolley, motorbus, subway, elevated and regional commuter rail routes throughout the Philadelphia metropolitan area. SEPTA's commuter rail and transit system is one of the oldest in the country. It carries an average of 90,000 passengers in over 500 commuter trains per day on its Regional Rail Division alone, and provides a significant and essential component of the daily movement of the population of Southeastern Pennsylvania.

SEPTA's regional rail system currently operates in close coordination with significant freight lines which are currently operated by Conrail. A portion of SEPTA's regional rail system, involving two commuter lines, operates on track segments owned by Conrail, while Conrail's

freight operations utilize all or portions of eleven SEPTA commuter lines. SEPTA's operations on lines shared with Conrail are a key component of SEPTA's passenger services.

Despite conducting distinct operations on shared lines in a significant metropolitan center, SEPTA and Conrail have maintained for the past fifteen (15) years a working relationship marked by safe and efficient freight and commuter service. The Trackage Rights Agreement, executed by SEPTA and Conrail on October 1, 1990, is the primary reason for this success. The Agreement governs access, dispatching, maintenance, control, construction, compensation, abandonment of service, dispute resolution, track rehabilitation, purchase rights and labor rights. It memorializes the operational and financial relationship, and the related customs and practices, that developed between SEPTA and Conrail over the preceding fourteen (14) years.

Without the Trackage Rights Agreement, it would be nearly impossible to achieve the safe, reliable and efficient integration of commuter and freight operations in the post-control period. In particular, SEPTA has concerns about the near and long term effect of the Acquisition upon (1) public safety; (2) the increased freight traffic and changes in freight traffic patterns beyond those outlined in the Operating Plan; (3) the critical dispatching function; and (4) SEPTA's ability to expand its transit operations within its service region to meet the needs of its ridership. See Cohen Affidavit ¶ 7. The Board's mandate to protect and promote the public interest would be fulfilled by conditioning the proposed Acquisition upon a five (5) year extension of the Agreement.

III. LEGAL ARGUMENT

A. Standard of Review

The Interstate Commerce Act (the "Act") requires that the merger of railroads subject to the jurisdiction of the Board may be accomplished only with the approval and authorization of the Board. 49 U.S.C. § 11323(a). "The Act's single and essential standard of approval is that the

[Board] find the [transaction] to be 'consistent with the public interest.'" Missouri-Kansas-Texas Railroad Co. v. U.S., 632 F.2d 392, 395 (D.C. Cir. 1980). The Board is required to consider at least the following 5 factors:

> (1) the effect of the proposed transaction on the adequacy of transportation to the public;
>
> (2) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction;
>
> (3) the total fixed charges that result from the proposed transaction;
>
> (4) the interest of rail carrier employees affected by the proposed transaction; and
>
> (5) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region or in the national rail system.

49 U.S.C. § 11324(b).

In determining whether a transaction is in the public interest, the Board performs a balancing test. 49 C.F.R. § 1180.1. It weighs the potential benefits to both the applicants and the public against the potential harm to the public. The Board considers whether the benefits claimed by the applicants could be realized by means other than the proposed consolidation that would result in less potential harm to the public. Id. In that regard, the Board has broad authority to impose conditions governing the transaction, including the granting of trackage rights. See 49 U.S.C. § 11324(c); 49 C.F.R. § 1180.1(d). It is appropriate for the Board to impose conditions where the transaction may produce effects harmful to the public interest, and the conditions in question will ameliorate or eliminate the harmful effects, be operationally feasible and produce public benefits (through reduction or elimination of the possible harm) which outweigh any reduction to the public benefits produced by the merger. Union Pacific Corp., Pacific Rail System, Inc., & Union Pacific R.R. - Control - Missouri Pacific Corp. & Missouri Pacific R.R., 366 I.C.C. 459, 562-565 (1982), aff'd., in part and remanded in part sub. nom., Southern Pacific

Transportation Co. v. I.C.C., 736 F.2d 708 (D.C. Cir. 1984), cert. denied, 469 U.S. 1208 (1985). Where a nexus exists between the merger and the alleged harm, and the proposed condition would act as the remedy for the harm to be caused, the Board should impose the condition in furtherance of the public interest. Id.

Here, the proposed Acquisition would adversely impact and harm commuter passenger service in the Southeastern Pennsylvania region in the absence of a trackage rights agreement governing commuter and freight operations on shared rail lines. SEPTA's proposed five (5) year extension of the current Agreement would eliminate or substantially mitigate the harm by maintaining the present balance between commuter and freight operations in the region, and would further the public interest in maintaining safe, reliable and efficient commuter transportation.

B. Approval of the Proposed Acquisition Must be Conditioned on a Five (5) Year Extension of the 1990 Trackage Rights Agreement in Order to Protect the Public Interest and Prevent any Harmful Effects to the Commuting Public.

1. A failure to extend the 1990 Trackage Rights Agreement beyond the initial integration of Conrail lines into the CSX and NS system would adversely impact SEPTA's commuter transit operations and the present balance between freight and transit operations in the Southeastern Pennsylvania region.

The Trackage Rights Agreement, among other functions, clearly delineates the rights of SEPTA and Conrail with regard to their operations on each other's rail property. In particular, Article III (Management and Operations) sets forth the guidelines by which the parties must operate, and strikes an appropriate balance between passenger and freight operations. Section 3.01 of Article III, which governs operations on SEPTA's rail properties, provides as follows:

> (a) SEPTA retains the right to establish the overall policies governing the management and operational control of all rail service over SEPTA Rail Properties, including, but not limited to, the dispatching and control of all trains. SEPTA's right shall not be exercised in a manner which would unreasonably interfere with Conrail's Trackage Rights.

(b) The scheduling and movement of SEPTA passenger trains shall take preference over all other train scheduling and movements.

(c) Conrail's freight operating rights described in this Agreement are for the purpose of permitting Conrail to operate road and local freight trains, as well as switching movements, special trains, locomotives, and other on-track equipment. Conrail shall have access to all running, side, switching, public delivery (team), yard, and interchange tracks included in SEPTA Rail Properties necessary for the provision of this freight service, including the right to store equipment, provided that such access shall not unreasonably interfere with SEPTA's existing or planned uses. (emphasis in original)

(d) Conrail shall have the right to amend and increase the level of its freight service, provided, however, that the character, scheduling or extent of the freight service shall not unreasonably interfere with SEPTA's existing or planned uses of SEPTA Rail Properties. (emphasis in original)

(e) Conrail may perform special and emergency transportation services, provided that the operations will not unreasonably interfere with SEPTA's uses.

* * * *

With regard to Conrail rail properties, Section 3.02 reads.

(a) Conrail retains the right to establish the overall policies governing the management and operational control of all rail service over Conrail Rail Properties, including without limitation the dispatching and control of all trains, which right shall not be exercised in a manner which would unreasonably interfere with SEPTA's Trackage Rights.

(b) SEPTA shall exercise dispatching control of all trains on the Trenton Line (the former New York Short Line) from C.P. Newtown Junction (M.P. 6.2) to Neshaminy (M.P. 21.1), and on the Trenton Line (the former New York Branch) from Neshaminy (M.P. 21.1) to Trent (M.P. 33.0), except that Conrail, on sixty days written notice, may assume such dispatching control.[1]

* * * *

(d) The scheduling and movement of SEPTA passenger trains shall take preference over all other train scheduling and movements.

(e) SEPTA's passenger operating rights described in this Agreement are for the purpose of permitting SEPTA to operate passenger trains in revenue service, as well as special and emergency trains, locomotives, and cars in passenger

[1] As discussed at Subpart 2, infra, this provision should be revised in a manner that would preclude CSX from revoking the dispatching on SEPTA's Route R8 Fox Chase and Route R3 West Trenton Lines.

revenue and nonrevenue service, and other on-track equipment. SEPTA shall have access to and use of all running, side, switching, interchange and yard tracks included in Conrail Rail Properties necessary for the provision of this passenger service, including the right to store equipment, provided that such access shall not unreasonably interfere with Conrail's Freight operations.

(f) SEPTA shall have the right to amend or increase the level of its passenger service, provided however, that the character, scheduling or extent of the passenger service shall not unreasonably interfere with Conrail's existing or planned use of Conrail Rail Properties.

* * * *

Article III advances the public interest associated with safe, efficient and reliable passenger service by providing that the scheduling and movement of passenger trains over SEPTA's lines and within its service area take preference over the scheduling and movements of freight trains. Yet, both SEPTA and Conrail are precluded from unreasonably interfering with each other's trackage rights or respective operations. The balance maintained by these provisions promotes the interests of both passenger and freight service and is necessary to protect the scheduling and movement of SEPTA's passenger trains. These provisions would become increasingly vital as the Applicants, particularly CSX, begin to increase their freight operations and change the freight traffic patterns in the Philadelphia area in the post-control period.

By way of example, according to NS' Operating Plan, NS proposes to grant CSX permanent overhead trackage rights to operate excess dimensional traffic, including doublestack freight trains, over the (1) Norristown Connector (owned by SEPTA), (2) the track between CP River (West Falls) and Abrams, Pennsylvania, and (3) Conrail's Morrisville Line between CP-King and Woodbourne (CP-Wood), Pennsylvania, plus run-around rights on a short portion of SEPTA's Norristown Line. See NS Operating Plan, Volume 3B at p. 108. The Applicants fail to identify the volume or frequency of freight traffic CSX intends to run over these lines pursuant to

this grant of permanent trackage rights, and they do not address the potential impact on SEPTA's passenger service on SEPTA's Route R6 Norristown and Route R3 West Trenton Lines.

SEPTA anticipates, based on NS' description of the proposed grant, that CSX dimensional freight traffic would execute a "wye" movement as it proceeds from West Falls to Abrams (Norris Interlocking) and through to Conrail's Morrisville Line. CSX's run-around and reverse move would interfere with SEPTA's Route R6 trains for lengthy periods of time, block heavily traveled highway grade crossings and require the raising of catenary not cleared for dimensional traffic. In addition to the delays on SEPTA's Norristown Line, SEPTA is fearful that service on SEPTA's Route R3 West Trenton Line would also be disrupted by the undefined increase in freight traffic. CSX's dimensional traffic, as it emerges from Norristown would meet SEPTA's Route R3 between Wood Interlocking and Trent Interlocking, likely causing delays and inefficient and unreliable service. Sections 3.01(b), (c) and (d) and 3.02(a) and (d) of the Trackage Rights Agreement were specifically drafted and adopted by SEPTA and Conrail to avoid the type of negative impacts likely to result from CSX's unexplained dimensional freight operations through Norristown, Pennsylvania.

In addition to CSX's undisclosed use of its permanent trackage rights in Norristown, Pennsylvania, the Applicants propose to allocate the Stoney Creek Branch in a manner that would cause significant increases in local freight traffic through SEPTA's Main Line route via Wayne Junction, where all but two of SEPTA's rail routes and several hundred commuter trains operate on a daily basis. According to the Joint Operating Plan, freight operations on SEPTA lines centered around the Lansdale Cluster would be allocated to CSX. Conrail presently serves the territory from Abrams Yard via the Stoney Creek Branch. However, the Applicants propose to split the allocation of the Stoney Creek Branch between NS and CSX and Abrams yard, the local yard by which CSX could access the Lansdale Cluster, is to be allocated exclusively to NS. Since

CSX would have no right under the Joint Operating Plan to use Abrams Yard, the only logical route by which CSX could access the Lansdale Cluster is through SEPTA's Main Line.

For the very purpose of removing local freight traffic from SEPTA's Main Line, Conrail and the Commonwealth of Pennsylvania Department of Transportation ("PADOT") extensively renovated the Stoney Creek Branch so that Conrail's local freight traffic could access the Lansdale Cluster via Abrams Yard in Norristown. The Applicants' Operating Plan proposes to undo this effort and revert this local freight traffic back to SEPTA's Main Line, a practice which was long ago recognized as hazardous to the commuting public and discontinued in favor of the Stoney Creek Branch via Abrams Yard.

The Applicants' proposed allocation of the Stoney Creek Branch would significantly alter present freight operations in the Southeastern Pennsylvania region. Additionally, the routing of local freight to the Lansdale Cluster through SEPTA's Main Line is absolutely unacceptable to SEPTA, and would undoubtedly cause significant adverse operational, safety and environmental impacts to SEPTA's passenger transit service. To prevent the hazards associated with the operation of CSX's local freight traffic through SEPTA's Main Line, the Board should condition any approval of the proposed Acquisition on an appropriate remedial measure. SEPTA suggests that CSX be required to route local freight traffic to the Lansdale Cluster from either West Falls or Woodbourne via Abrams Yard. This would require NS to grant CSX overhead trackage rights for local freight destined for the Lansdale Cluster, assuming that NS has the right to make such a grant without SEPTA's consent. Without this condition, CSX's operation of local freight traffic on SEPTA's Main Line, in the absence of the protections afforded by the current Trackage Rights Agreement, would create chaos for SEPTA's passenger service to the detriment of the commuting public.

In recognition of the importance of safe and reliable passenger service to Southeastern Pennsylvania's commuting public, SEPTA and Conrail memorialized within the Trackage Rights Agreement provisions that protect the scheduling and movement of passenger trains from overlapping freight operations. The Applicants, primarily CSX, plan increases and alterations to present freight operations which would cause significant adverse impacts to SEPTA's provision of passenger service to residents of the Southeastern Pennsylvania region. By conditioning its approval of the proposed Acquisition upon a five (5) year extension of the Trackage Rights Agreement, the Board would protect the interests of the commuting public and maintain the present balance between freight and passenger operations that has existed between SEPTA and Conrail for over fifteen (15) years.

2. Section 3.02(b) of the Trackage Rights Agreement must be revised to preclude the Applicants from revoking the dispatching rights over crucial SEPTA commuter lines.

Pursuant to Section 3.02(b) of the Trackage Rights Agreement, Conrail may revoke the dispatching rights which SEPTA currently holds over its Route R8 Fox Chase Line upon 60 days notice. Conrail currently dispatches its Philadelphia regional rail lines from Mt. Laurel, N.J., using a number of different dispatching assignments. Therefore, if Conrail exercised its right to revoke dispatching, the function would transfer to Mt. Laurel. According to the Joint Operating Plan, CSX would take over these lines from Conrail and arguably would assume Conrail's right to revoke the dispatching rights over a 3.5 mile section of the Conrail Trenton Line between Newtown Junction (NX) and Cheltenham Junction Interlockings. If this were to occur, the dispatching function over these lines would likely move to CSX's central dispatch location in Jacksonville, Florida. Instead of the relatively close dispatching point in Mt. Laurel, where Conrail currently controls tracks adjacent to the SEPTA dispatched territory owned by both SEPTA and Conrail, SEPTA's Route R8 commuter service could be placed at the mercy of a

dispatcher located nearly 900 hundred miles away in the state of Florida, having little or no experience or familiarity with the Philadelphia region, SEPTA's intricate transit operations and probably driven by a different set of priorities than those reflected in the Trackage Rights Agreement.

SEPTA is faced with the same situation between Wood and Trent Interlockings where its Route R3 West Trenton Line will interconnect with CSX doublestack traffic emanating from the Norristown area, as well as CSX manifest trains using the Trenton Line. As is the case with SEPTA's Route R8, SEPTA currently dispatches this territory, but CSX would have the right to move the dispatching function to Jacksonville, Florida. The detriment to commuter operations if CSX were to revoke the dispatching function over SEPTA's Route R3 is intensified by PADOT's planned renovation of I-95 in areas where SEPTA's Routes R3 West Trenton and R7 Trenton Lines presently operate. PADOT has committed over $57 million to improve facilities on these two lines to handle increased ridership. Particularly with respect to SEPTA's Route R3, signal improvements, increased overnight commuter car storage, station parking expansion and station improvements are funded. When the renovations begin, thousands of drivers who currently commute on I-95 will be displaced, and demand for SEPTA's service on Route R3 is expected to greatly increase over the next four years. This would occur at the same time CSX would have the right to move the dispatching function out of the region.

SEPTA's Route R8 Fox Chase and Route R3 West Trenton Lines are crucial to SEPTA's operations and transfer of the dispatching function for those lines to Florida is unthinkable. SEPTA negotiated Section 3.02(b) with Conrail, a freight operator with decades of experience with regard to the interconnection of freight and passenger services in the densely populated Southeastern Pennsylvania region. In the years since Section 3.02(b) became effective, SEPTA has utilized its dispatching rights in a responsible manner, and Conrail has never sought nor had

any reason to revoke SEPTA's dispatching rights. The Applicants already propose to upset the present balance between freight and commuter operations, among other things, by increasing the frequency and mode of freight traffic over SEPTA's commuter rail lines and operating in a manner likely to have detrimental effects on SEPTA's passenger operations. See Subpart 1, infra. SEPTA believes that in the absence of Board intervention CSX would revoke the dispatching over these important SEPTA lines, further harming commuter service in the region.

Industry experience with CSX dispatching has been less than satisfactory. Unless the Board addresses this dispatching issue through its conditioning power, the commuting public would surely suffer delays in service, unreliable commuter operations and a serious threat to safe transport to and from workplaces situated throughout the Southeastern Pennsylvania region. The Board should revise section 3.02(b) of the Trackage Rights Agreement in a manner that would preclude the Applicants from revoking the dispatching on SEPTA's crucial Route R8 Fox Chase and Route R3 West Trenton Lines.

3. The Applicants are precluded from operating following the proposed Acquisition in a manner that would impede SEPTA's ability to expand its service to meet the transit needs of the Southeastern Pennsylvania region.

In order properly to meet the expanding transit service needs of its ridership in the Southeastern Pennsylvania region and beyond, SEPTA is currently studying the feasibility of utilizing a portion of Conrail's Harrisburg Main Line from Norristown to Reading and Conrail's Morrisville Line from Glen Loch to Morrisville. At Table 5-PA-35 of the Draft Environmental Impact Statement ("DEIS"), it is stated that "Freight traffic may limit potential for passenger service to expand." Under the Trackage Rights Agreement, SEPTA and Conrail made mutual promises not to increase or alter their respective operations in a manner that would unreasonably interfere with each other's existing or planned uses of their respective properties. See Trackage Rights Agreement Sections 3.01(c) and (d) and 3.02(f), supra.

Prior to the proposed Acquisition, SEPTA was in the process of completing its studies of the Harrisburg and Morrisville Lines, obtaining funding for the expansion of its commuter rail service and undertaking the necessary steps to meet the public need for expanded passenger service to Reading and from Glen Loch to Morrisville. If there is a likelihood, as stated in the DEIS, that the proposed Acquisition would block SEPTA's efforts to expand over the Harrisburg and Morrisville Lines, the commuting public would be harmed by the proposed Acquisition, and SEPTA would be unable to meet the expanding needs of the region. The Applicants state in the Environmental Report, Volume 6A of their Application, that train densities from Eastwick, Pennsylvania to Marcus Hook, Pennsylvania would undergo a daily increase from 3.0 freight trains to 7.8 freight trains. See Figure D.6-1 (p. 381). Such a significant increase in freight traffic by the Applicants is of great concern to SEPTA, and could preclude SEPTA's existing plans to increase the frequency of its Route R1 Airport Line service from 30 to 20 minute headways.

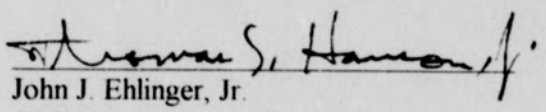
By conditioning the proposed Acquisition upon a five (5) year extension of the Trackage Rights Agreement, the Board would avoid these negative results by requiring the Applicants to adhere to the terms by which commuter and freight operations have been governed in the Southeastern Pennsylvania region for the past fifteen (15) years. Crucial among these terms is the mutual limitation on increases in operations which threaten either freight or passenger service. Under the terms of the Agreement, the Applicants' proposed increases in freight traffic would be limited to avoid interference with SEPTA's planned expansion over the Harrisburg and Morrisville Lines and planned reduction in headways on the Route R1 Airport Line.

IV. CONCLUSION

For the reasons set forth herein, SEPTA respectfully requests that the Board condition its approval of the proposed Acquisition upon (1) a five (5) year extension of the Trackage Rights Agreement to ensure the smooth integration of the Applicants' operations in the post-control

period; (2) modification of Section 3.02(b) of the Agreement to preclude CSX from revoking the critical dispatching function over SEPTA's Route R8 Fox Chase and Route R3 West Trenton Lines; and (3) an adequate plan which addresses the operational concerns set forth in Parts B.1. and B.3 above.

Respectfully submitted,



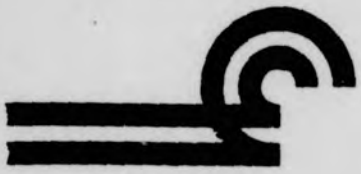
John J. Ehlinger, Jr.
Catherine Pyune McEldowney
Thomas E. Hanson, Jr.
Obermayer Rebmann Maxwell & Hippel LLP
One Penn Center, 19th Floor
1617 John F. Kennedy Boulevard
Philadelphia, PA 19103

Counsel for Southeastern Pennsylvania Transportation Authority

G. Roger Bowers
General Counsel
Eugene N. Cipriani
Assistant Deputy Counsel
Southeastern Pennsylvania
Transportation Authority
1234 Market Street, Fifth Floor
Philadelphia, PA 19107-3780

EXHIBIT A

CONRAIL



RECEIVED

OCT 1997

ASSISTANT GENERAL MANAGER
STRATEGIC BUSINESS &
RIDERSHIP DEVELOPMENT

Advance Copy via Fax to
215 / 580 - 3636

October 20, 1997

Mr. Bernard Cohen
Assistant General Manager - Strategic Business
& Ridership Development
Southeastern Pennsylvania Transportation Authority
1234 Market Street
Philadelphia, PA 19107-3780

Dear Mr. Cohen:

This refers to your letter of October 1, 1997 and our various meetings and conversations concerning SEPTA's position on matters pertaining to its operating relationship with Conrail.

Conrail, for its part, has no present intention to renegotiate the Trackage Rights Agreement dated October 1, 1990 during the pendency of its merger with CSXT and NS. In response to SEPTA's stated desire to avoid merger-related uncertainties, we have been supportive of an extension of this Agreement for an additional five (5) year term. This offer, if it were accepted by SEPTA, would carry the operating relationship well beyond the period of merger implementation.

We were willing to entertain SEPTA's desire for a longer renewal term (ten years or more), if certain disabilities inherent in the current structure of liability apportionment and indemnity provisions would be addressed by SEPTA. I was disappointed to see that your October 1 letter made no reference to this issue which, as you know, is of paramount importance to us.

SEPTA is also seeking to have Conrail surrender, in negotiations, the contractual right it presently holds to assume the dispatching control of its Trenton Line. You note the easement held by SEPTA as an argument in support of this concession by Conrail, if we were to agree. Without engaging in unnecessary argument, I would simply note that Conrail does not intend to yield this important right that Conrail holds by virtue of its ownership and explicit contractual provision that memorializes this right, and to which SEPTA agreed.

Further, for reasons that SEPTA itself introduced in a meeting with Conrail in 1996, it is not necessary for Conrail to yield this important right as SEPTA could plan for the eventual physical separation of its operations between Newtown Junction and Cheltenham Junction and between Neshaminy and West Trenton (or Yardley), as we had discussed at our meeting on the afternoon of October 13.

As to the proposed new SEPTA routes involving Cross County Metro and the Schuylkill Valley, I believe the terms of the Transfer Agreement between Conrail and SEPTA dated September 1, 1982 establish a framework for further negotiations, anticipating that SEPTA's franchise may eventually be enlarged to encompass the proposed Schuylkill Valley route. As you probably know, Conrail has maintained a continuing presence at the meetings called by Urban Engineers, Inc., and we are planning to attend the meeting scheduled for Wednesday, November 12, 1997.

The two issues you had identified to CSXT and NS involving Lansdale access and planned operations in Norristown are to be addressed by CSXT and NS.

Finally, I have read with interest the letters dated September 19 from Senators Santorum and Spector to Messrs. Goode and Snow, respectively, and which you enclosed with your October 1 letter to me. Let me say that Conrail, for its part, values the amicable working relationship that we have developed over many years, and remains committed to honor its obligations to SEPTA.

Very sincerely yours,

R. Paul Carey
General Manager - Contracts

Advance Copy via fax to:

Mr. Bill Schafer
Director - Strategic Planning Department
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510-9207

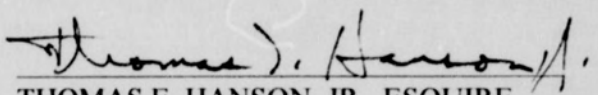
H. Craig Lewis, Esquire
Regional Vice President
Norfolk Southern Corporation
1717 Arch Street - 37th Floor
Philadelphia, PA 19103

Mr. J. Randall Evans
CSX Transportation
500 Water Street - J150
Jacksonville, FL 32202

Mr. Paul H. Reistrup
Vice President Passenger Service
CSX Transportation
Government Affairs
1331 Pennsylvania Avenue, NW
Suite 560
Washington, DC 20004

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief in Support of the Southeastern Pennsylvania Transportation Authority's Comments and Request for Conditions was served upon those listed on the service list, via first-class mail, postage prepaid on the 20th day of February, 1998.



THOMAS E. HANSON, JR., ESQUIRE

185838

CSX-140

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

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

BRIEF OF APPLICANTS CSX CORPORATION AND CSX TRANSPORTATION, INC.

(Public Version)

MARK G. ARON
PETER J. SHUDTZ
ELLEN M. FITZSIMMONS
CSX Corporation
One James Center
901 East Cary Street
Richmond, VA 23129
(804) 782-1400

P. MICHAEL GIFTOS
PAUL R. HITCHCOCK
DOUGLAS R. MAXWELL
NICHOLAS S. YOVANOVIC
CSX Transportation, Inc.
500 Water Street
Jacksonville, FL 32202
(904) 359-3100

DENNIS G. LYONS
RICHARD L. ROSEN
MARY GABRIELLE SPRAGUE
PAUL T. DENIS
DREW A. HARKER
SUSAN T. MORITA
SUSAN B. CASSIDY
SHARON L. TAYLOR
HELENE T. KRASNOFF*
(*Admitted in NY only)
Arnold & Porter
555 12th Street, N.W.
Washington, D.C. 20004-1202
(202) 942-5000

SAMUEL M. SIPE, JR.
BETTY JO CHRISTIAN
TIMOTHY M. WALSH
DAVID H. COBURN
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036-1795
(202) 429-3000

Counsel for CSX Corporation and CSX Transportation, Inc.

February 23, 1998

TABLE OF CONTENTS

		Page
INTRODUCTION		1
I.	THE TRANSACTION IS "CONSISTENT WITH THE PUBLIC INTEREST"	3
II.	OVERVIEW OF THE CLAIMS RAISED BY PARTIES TO THIS PROCEEDING	6
III.	ADDITIONAL BENEFITS ARE PROVIDED BY THE NITL SETTLEMENT	7
	1. Buffalo Switching Charges	7
	2. Conrail Rail Transportation Contracts	9
IV.	THE SO-CALLED "ACQUISITION PREMIUM" AND OTHER REGULATORY AND ACCOUNTING CHANGES	11
V.	REPLIES TO REBUTTALS BY PARTIES FILING RESPONSIVE APPLICATIONS	12
	1. East of the Hudson	12
	2. EJE/I&M	16
	3. Wisconsin Central	18
	4 Bessemer & Lake Erie	20
	5. Illinois Central	22
	6. Indianapolis	24
	7. Other RailTex Carriers: IORY, NECR	27
	8. Livonia, Avon & Lakeville	29
VI.	*NEW YORK DOCK* AND OTHER STANDARD LABOR PROTECTIVE PROVISIONS SHOULD BE IMPOSED	29

Page

VII. ENVIRONMENTAL CONDITIONS UNDER AN EIS ARE SUBJECT TO THE SAME STANDARDS AS OTHER CONDITIONS, AND THE BOARD SHOULD NOT IMPOSE CONDITIONS THAT WOULD CHANGE OR POSTPONE THE APPLICANTS' OPERATING PLANS OR REQUIRE SUBSTANTIAL EXPENDITURES FOR SPECIAL MITIGATION MEASURES IN ORDER TO MITIGATE DISCRETE, LOCALIZED ENVIRONMENTAL IMPACTS 32

1. Where, as Here, the Board Has Prepared an Environmental Impact Statement Rather Than an Environmental Assessment, the Board Does Not Have to Mitigate Every (or Any) Localized Environmental Impact 33

2. In the Balancing Process Local Environmental Impacts Should be Weighed Against the Great Transportation Benefits and Systemwide and Local Environmental Benefits of the Transaction 35

3. Because a Rail Control Transaction Affects Rail Operations Which Are Conducted on an Existing Private Infrastructure and Which Are Comprehensively Regulated to Protect the Public Against Unacceptable Environmental Impacts, the Board Should Not Reduce the Public Benefits of the Transaction by Ordering Special Mitigation Measures for Every Localized Impact 37

   (a) The Board Should Not Modify or Postpone Implementation of Applicants' Operating Plans 39

   (b) The Board Should Not Impose Conditions Which Would Burden the Transaction with Substantial Expenditures to Mitigate Local Environmental Impacts 40

4. Not Only Are Many of the Proposed Mitigation Measures Unnecessary and Potentially Harmful, They Are Also Beyond the Scope of the Board's Policies As to the Use of its Conditioning Power 43

Page

5. The City of Cleveland's Overreaching Request for Conditions Provides a Paradigm of a Case Where the Board Should Reject a Proposed Invasive Mitigation When More Narrowly Tailored Remedies Would Be More Effective and Less Injurious to the Public Interest 44

VIII. CONCLUSION 47

Appendices:

A. Proposed Findings and Order

B. Recent Pertinent Materials

TABLE OF AUTHORITIES

Page(s)

CASES:

Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, 462 U.S. 87, 97 (1983) 34

Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988) 11

Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v. Peterson, 685 F.2d 678, 681-82 (D.C. Cir. 1982) 33-34

Hughes River Watershed Converservancy v. Glickman, 81 F.3d 437, 446 (4th Cir. 1996) 34

Norfolk & W. Ry. v. American Train Dispatchers Ass'n, 499 U.S. 117 (1991) 31

Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989) 34

Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) 11

Simmons v. United States Army Corps of Engineers, 120 F.3d 664, 666 (7th Cir. 1997) 34

United Transp. Union v. STB, 108 F.3d 1425 (D.C. Cir. 1997) 30,31

AGENCY DECISIONS AND PROCEEDINGS:

Burlington N. Inc.--Control and Merger--Santa Fe Pac. Corp., Finance Docket No. 32549 (served Aug. 23, 1995) 22,29,34

Page(s)

CSX Corp. -- Control -- Chessie Sys., Inc. & Seaboard Coast Line Indus., 363 I.C.C. 521, 578-79 (1980), *aff'd sub nom. Brotherhood of Maintenance of Way Employees v. ICC*, 698 F.2d 315 (7th Cir. 1983) 23,29

New York Dock Ry. -- Control -- Brooklyn E. Dist. Terminal, 360 I.C.C. 60, *aff'd sub nom. New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979) 29,30,31

Norfolk & W. Ry. -- Control -- Detroit Toledo & Ironton R.R., 360 I.C.C. 498, 527 (1979), *aff'd in part & rev'd in part sub nom. Norfolk & W. Ry. v. United States*, 639 F.2d 1096 (4th Cir. 1981) 23

Railroad Revenue Adequacy -- 1988 Determination, 6 I.C.C.2d 933 (1990), *aff'd sub nom. Association of Am. R.Rs. v. ICC*, 978 F.2d 737 (D.C. Cir. 1992) 12

Railtex, Inc. -- Continuance in Control Exemption --Connecticut Southern R.R., STB Finance Docket No. 33121 (served Sept. 27, 1996) 28

Seaboard Air Line R.R. -- Merger -- Atlantic Coast Line R.R., Finance Docket No. 21215 (Sub-No. 5) (served Mar. 27, 1995) 23

Rulemaking Concerning Traffic Protective Conditions in Railroad Consolidation Proceedings, 366 I.C.C. 112 (1982), *aff'd in relevant part sub nom Detroit, Toledo & Ironton R.R. v. United States*, 725 F.2d 47 (6th Cir. 1984) 23

Union Pac. Corp.--Control--Chicago & North W. Transp. Co., et al., Finance Docket No. 32133 (served Mar. 7, 1995) 3,4,6,29,37

Union Pac. Corp. -- Control -- Missouri Pac. Corp., 366 I.C.C. 446 (1982), *aff'd in part and remanded in part sub nom. Southern Pac. Transp. Co. v. ICC*, 736 F.2d 708 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985), *modified*, 4 I.C.C.2d 668 (1987) 6,23

Page(s)

Union Pac. Corp., et al.--Control and Merger--Southern Pac. Corp, et al., Finance Docket No. 32760 (served Aug. 12, 1996) 2,3,4,22,29,34,35,37

UP/SP Merger -- Reno Mitigation Study Final Mitigation Plan (Feb. 11, 1998) 43

STATUTES AND REGULATIONS:

49 U.S.C. § 11161 11

49 U.S.C. § 11321 33

49 U.S.C. § 11324(b) 3

National Environmental Policy Act, 42 U.S.C. § 4321 et seq. 32,33

Noise Control Act of 1972, 42 U.S.C. § 4916 41

40 C.F.R. Part 201 42

49 C.F.R. § 1180.1(c) 4

49 C.F.R. § 1180.1(d)(1) 6

47 Fed. Reg. 54107 (Dec. 1, 1982) 42

CONFIDENTIALITY CONVENTIONS

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

The following example helps illustrate what each volume will look like to the reader:

HIGHLY CONFIDENTIAL

The X railroad carries traffic from State A to State B each year. The traffic accounts for [[[$25 million]]] in annual revenue.

PUBLIC

The X railroad carries traffic from State A to State B each year. The traffic accounts for [[[ ]]] in annual revenue.

NOTE: Page references to documents filed with the Board in this case in Public and Non-Public Versions are to the Highly Confidential version (or Confidential version if there is no Highly Confidential version) unless otherwise indicated.

ABBREVIATIONS, ACRONYMS AND SHORT-FORM CITATIONS TO DECISIONS, PLEADINGS AND VERIFIED STATEMENTS

I. ABBREVIATIONS AND ACRONYMS

Amtrak	National Railroad Passenger Corporation
APL	APL Limited
Applicants	CSX and NS (plus Conrail where context indicates)
Application	Applicants' Railroad Control Application (CSX/NS-18 through CSX/NS-25) (filed June 23, 1997)
ARU	Allied Rail Unions
B&LE	Bessemer and Lake Erie Railroad Company
BLE	Brotherhood of Locomotive Engineers
BN	The Burlington Northern Railroad Company
B&O	The Baltimore and Ohio Railroad Company
Board	Surface Transportation Board
BOCT	The Baltimore and Ohio Chicago Terminal Railroad Company
BRC	The Belt Railway Company of Chicago
Conrail	Consolidated Rail Corporation, CRC, CRR and, where the context indicates, their subsidiaries
CTC	Conrail Transaction Council
CMA	Chemical Manufacturers Association
CN	Canadian National Railway Company

CP	Canadian Pacific Railway Company
CSO	Connecticut & Southern Railroad
CSX	CSXC, CSXT and, where the context indicates, their subsidiaries
CSXC	CSX Corporation
CSX DEIS Comments	CSX's Comments on the DEIS, filed Feb. 2, 1998
CSXT	CSX Transportation, Inc.
Day One	The "Closing Date" referred to in the Transaction Agreement.
DEIS	Draft Environmental Impact Statement
DOJ	United States Department of Justice
DOT	United States Department of Transportation
EA	Environmental Assessment
EIS	Environmental Impact Statement
EJE	Elgin, Joliet and Eastern Railway Company
EJE/I&M	Elgin, Joliet and Eastern Railway Company/ I & M Rail Link LLC
ENRS	Erie-Niagara Rail Steering Committee
EPA	United States Environmental Protection Agency
Four Cities, Four Cities Consortium	Cities of East Chicago, IN; Hammond, IN; Gary, IN and Whiting, IN
FRA	Federal Railroad Administration
FSP	1975 Final System Plan of United States Railway Association
GAAP	Generally Accepted Accounting Principles

IC	Illiniois Central Railroad Company
ICC	Interstate Commerce Commission
IHB	Indiana Harbor Belt Railroad Company
I&M	I & M Rail Link, LLC
Inland Steel	Inland Steel Industries
Indianapolis	City of Indianapolis, Indiana
INRD	Indiana Rail Road Company
IORY	Indiana & Ohio Railway Company
IP&L	Indianapolis Power & Light Company
ISRR	Indiana Southern Railroad, Inc.
LAL	Livonia, Avon & Lakeville Railroad
MFN	Most Favored Nation
MGA	Monongahela (rail lines of the former Monongahela Railroad)
NEC	Northeast Corridor
NECR	New England Central Railroad
NEPA	National Environmental Policy Act
NITL	National Industrial Transportation League
NMB	National Mediation Board
NRPC	National Railroad Passenger Corporation (Amtrak)
NS	NSC, NSR and, where the context indicates, their subsidiaries
NSC	Norfolk Southern Corporation
NSR	Norfolk Southern Railway Company

NYCED	New York City Economic Development Corporation
NYC	New York City
NYS	New York State
Primary Applicants	CSX Corporation, CSXT Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company
P&W	Providence & Worcester Railroad Company
RTC	Rail Transportation Contract
RVS	Rebuttal Verified Statement
RailTex	RailTex, Inc.
Rebuttal	Applicants' Rebuttal, (CSX/NS-176 through CSX/NS-178) (filed Dec. 15, 1997)
RLA	Railway Labor Act, 45 U.S.C. § 151 *et seq.*
R&S	Rochester & Southern Railroad, Inc.
SAA	Shared Assets Area
SEA	Section of Environmental Analysis of the Surface Transportation Board
SP	Southern Pacific Transportation Company
STB	Surface Transportation Board
TCU	Transportation Communications International Union
Transaction	The matters for which approval is sought by the Application (Including the Related Applications and exemption requests therein contained)

Transaction Agreement	The Transaction Agreement and related Agreements found in Vols. 8B and 8C of the Application
UP	Union Pacific Railroad Company
USRA	United States Railway Association
UTU	United Transportation Union
VS	Verified Statement
WC	Wisconsin Central Ltd.
WJPA	Washington Job Protection Agreement of 1936
W&LE	Wheeling & Lake Erie Railway Company

II. SHORT-FORM CITATIONS TO DECISIONS

BN/SF	*Burlington N., Inc. -- Control and Merger -- Santa Fe Pac. Corp.*, Finance Docket No. 32549 (served Aug. 23, 1995).
Chessie/Seaboard	*CSX Corp. -- Control -- Chessie Sys., Inc. & Seaboard Coast Line Indus.*, 363 I.C.C. 521, 578-79 (1980), *aff'd sub nom. Brotherhood of Maintenance of Way Employees v. ICC*, 698 F.2d 315 (7th Cir. 1983).
N&W/DTI	*Norfolk & W. Ry. -- Control -- Detroit, Toledo & Ironton R.R.*, 360 I.C.C. 498, 527 (1979), *aff'd in part & rev'd in part sub nom. Norfolk & W. Ry. v. United States*, 639 F.2d 1096 (4th Cir. 1981).
New York Dock	*New York Dock Ry. -- Control -- Brooklyn E. Dist. Terminal*, 360 I.C.C. 60, *aff'd sub nom. New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979).
Reno Final Mitigation Plan	*UP/SP* Merger -- Reno Mitigation Study Final Mitigation Plan (Feb. 11, 1998).

SAL/ACL Sub 5	*Seaboard Air Line R.R. -- Merger -- Atlantic Coast Line R.R.*, Finance Docket No. 21215 (Sub-No. 5) (served Mar. 27, 1995).
Traffic Protective Conditions	*Rulemaking Concerning Traffic Protective Conditions in Railroad Consolidation Proceedings*, 366 I.C.C. 112 (1982), *aff'd in relevant part sub nom Detroit, Toledo & Ironton R.R. v. United States*, 725 F.2d 47 (6th Cir. 1984).
UP/CNW	*Union Pac. Corp. -- Control -- Chicago & North W. Transp. Co.*, Finance Docket No. 32133 (served Mar. 7, 1995).
UP/MP/WP	*Union Pac. Corp. -- Control -- Missouri Pac. Corp.*, 366 I.C.C. 446 (1982), *aff'd in part and remanded in part sub nom. Southern Pac. Transp. Co. v. ICC*, 736 F.2d 708 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985), *modified*, 4 I.C.C.2d 668 (1987).
UP/SP	*Union Pac. Corp. -- Control and Merger -- Southern Pac. Rail Corp.*, Finance Docket No. 32760 (served Aug. 12, 1996).

III. SHORT-FORM CITATIONS TO CERTAIN PLEADINGS, VERIFIED STATEMENTS AND REBUTTAL VERIFIED STATEMENTS IN THIS CASE

APL-4	APL Limited's Response and Request for Conditions (Oct. 21, 1997).
Applicatio.., Vol._	Railroad Control Application; Volumes 1 to 8 as indicated, CSX/NS-18 through CSX/NS-25 (June 23, 1997).
BLE-7	Responsive Application of Bessemer and Lake Erie Railroad Company (Oct. 21, 1997).
BLE-8	Comments and Requests for Conditions of Bessemer and Lake Erie Railroad Company (Oct. 21, 1997) (Howerter VS).
CMA-10	Joint Comments of the Chemical Manufacturers Association and the Society of the Plastics Industry, Inc. (Oct. 21, 1997).
CSX DEIS Comments	CSX Corporation and CSX Transportation, Inc.'s Comments on the Draft Environmental Impact Statement (Feb. 2, 1998)

CSX/NS-176	Railroad Control Application; Applicants' Rebuttal -- Volume 1 of 3 (Dec. 15, 1997).
CSX/NS-177	Railroad Control Application; Applicants' Rebuttal -- Volumes 2A and 2B of 3 (Dec. 15, 1997) (Jenkins RVS; Orrison RVS; Rosen RVS).
CSX/NS-178	Railroad Control Application; Applicants' Rebuttal -- Volumes 3A, 3B, 3C and 3D of 3 (Dec. 15, 1997).
CSX/NS-190	CSX/NS Reply to the CMA Comments on the NITL Settlement (Jan. 14, 1998). Rebuttal of CSX Corporation, CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company to Comments of Chemical Manufacturers Association and the Society of the Plastics Industry on the National Industrial Transportation League Settlement Agreement (Jan. 14, 1998).
CSX/NS-194	Party-by-Party Index to Applicants' Rebuttal Filing (Jan. 21, 1998).
Carlstrom RVS	Rebuttal Verified Statement of Dale Carlstrom, NECR-8 (Jan 14, 1998).
Cleveland DEIS Comments	Comments of the City of Cleveland, OH, on the Draft Environmental Impact Statement (Feb. 2, 1998).
DEIS	Draft Environmental Impact Statement in Finance Docket No. 33388 (Dec. 12, 1997).
DOJ-1	Comments of the United States Department of Justice and Verified Statement of Dr. Woodward (Oct. 21, 1997).
DOT-5	Comments of the United States Department of Transportation on the Draft Environmental Impact Statement (Feb. 2, 1998).
EJE-10	Responsive Application of Elgin, Joliet and Eastern Railway Company, Transtar, Inc. and I & M Rail Link, LLC (Oct. 21, 1997).
EJE-17/IMRL-6	Rebuttal Comments and Evidence of Elgin, Joliet and Eastern Railway Company, Transtar, Inc. and I & M Rail Link, LLC (Jan. 14, 1998).

ENRS-6	Comments, Evidence and Request for Conditions of Erie-Niagara Rail Steering Committee (Oct. 21, 1997).
IC-13	Rebuttal Comments and Evidence of Illinois Central Railroad Company (Jan. 14, 1998).
I&PL-3	Supplemental Comments, Evidence, and Request for Conditions of Indianapolis Power & Light Company (Oct. 21, 1997).
ISI-9	Opposition of Inland Steel Company to the Responsive Application of Elgin, Joliet and Eastern Railway Company, Transtar, Inc. and I & M Rail Link, LLC (Dec. 15, 1997).
ISRR-4	Indiana Southern Railroad, Inc.--Trackage Rights--CSX Transportation, Inc. and Indiana Rail Road Company -- Responsive Application of Indiana Southern Railroad, Inc. (Oct. 21, 1997).
NECR-4	Responsive Application of New England Central Railroad, Inc. (Oct. 21, 1997).
NECR-8	Rebuttal of New England Central Railroad, Inc. (Jan. 14, 1998).
NYS-24/NYC-17	Joint Rebuttal Statement of the State of New York and the New York City Economic Development Corporation (Jan. 14, 1998).
NYS-26	Comments of the State of New York on Draft Environmental Impact Statement (Feb. 2, 1998).
Rebuttal, Vol._	Applicants' Rebuttal, Volumes 1 through 3 (as indicated) CSX/NS-176 to CSX/NS-178 (Dec. 15, 1997).
WC-9	Responsive Application of Wisconsin Central Ltd. (includes Chicago Terminal District Map) (Oct. 21, 1997).
WC-10	Comments of Wisconsin Central Ltd. (Oct. 21, 1997).
WC-16	Rebuttal Comments and Evidence of Wisconsin Central Ltd. (Jan. 14, 1998).

BRIEF OF APPLICANTS CSX CORPORATION AND CSX TRANSPORTATION, INC.

INTRODUCTION

The record in this proceeding establishes unequivocally that the proposed Transaction is in the public interest and should be approved without conditions, other than those provided for in Applicants' Settlement agreement with NITL. The Transaction will yield substantial public benefits in the form of enhanced competition, new job opportunities, benefits to the environment, cost savings and efficiency gains. It will result in two expanded rail networks that will provide improved service to customers throughout the East and will compete more effectively with trucks. The vigorous competition that currently exists between CSX and NS will extend into the Northeast, which has been served by only one major railroad for over 20 years.

CSX and NS have reached out to shippers, the FRA and other Federal agencies, other railroads, states, local communities and development organizations, passenger authorities, and labor organizations to craft mutually beneficial arrangements to maximize the benefits of the Transaction. Chief among these is the settlement with the NITL, the country's largest shipper organization, discussed in greater detail below. Support for the Transaction is widespread. Over 2,700 expressions of support were filed with the Application or thereafter, including submissions from over 2,200 shippers, over 350 public officials, and over 80 other railroads. On the labor side, after negotiations, BLE and UTU have dropped their initial opposition. These two organizations represent approximately 43% of the total contract employees on CSX, NS and Conrail.

The merits of the overall Transaction have not been seriously challenged. Yet some parties to this proceeding have been understandably concerned about the severe service problems and safety issues that arose in the West while this Application has been pending. The specter of those problems, and the conviction that they must not recur in the course of implementing this Transaction, have led CSX and NS to redouble their independent efforts toward implementation of the operation of their portions of Conrail and the Shared Assets Areas. CSX believes that the level of its operational planning and attention to safety is unparalleled in the history of railroad mergers. CSX is committed to assuring that the enormous benefits of this Transaction are

achieved without service disruption or increased risk to its employees and the public. The following points are worth noting:

- In the degree of preparation for the consummation of the rail combination, in the structural differences between the Transaction and the *UP/SP* combination, and in the condition of the properties involved, there is ample assurance that the Transaction should not suffer from the same difficulties as has the *UP/SP* combination. *See* Rebuttal, Vol. 2A, McClellan RVS at 2; Orrison RVS at 12-14; Vol. 2B, Pursley RVS.

- The *UP/SP* transaction involved the elimination of duplicative routes and facilities. Structurally, the present Transaction is quite different; each of CSX and NS is augmenting its existing system in an end-to-end manner; almost no abandonments are involved.

- *UP/SP* involved the loss of jobs in the operating crafts. In the present Transaction, job loss will be slight. Some crafts, including engineers and trainmen, will have net job gains. The number of jobs projected to be abolished in the first three years will be less than Applicants' annual attrition -- and employment in out years is expected to **increase**.

- In *UP/SP*, the combination was consummated although many implementing labor agreements in the operating crafts remained to be obtained. Here, CSX and NS have agreed with each other and with the NITL that separate operations over Conrail's routes will not begin until the necessary implementing agreements with labor have been obtained. Rebuttal, Vol. 1 at 770.

- Similarly, the NITL Settlement requires the essential integration of management information systems prior to the division of Conrail's routes. *Id.*

- CSX and NS have each been engaged in extensive and detailed pre-Transaction planning, as evidenced by the Rebuttal Verified Statements of their respective witnesses. Rebuttal, Vol. 2A, Fleischman RVS; Vol. 2B, Ward RVS.

- Various other provisions contained in the NITL Settlement establish interaction with shipper representatives in the pre-implementation and implementation processes, thus providing an external check and review as to the implementation. Rebuttal, Vol. 1 at 770.

- CSX and NS have the best safety records in the railroad industry. The safety problems highlighted by the *UP/SP* combination have been addressed at the behest of the FRA and the Board in the present case. Safety integration plans have been developed and are being updated on a continuing basis by both acquiring carriers. DEIS, Vol. 2; Rebuttal, Vol. 2B, Pursley RVS. DOT/FRA has commented favorably on these efforts of Applicants. DOT-5 at 2-5.

- A detailed, special North Jersey Shared Assets Area Operating Plan was ordered by the Board (even though the initial plan fulfilled the Board's regulations) and has been the subject of scrutiny. Under the NITL Settlement, less formal operating plans that will provide meaningful information to shippers have been prepared for all three Shared Assets Areas.

- There will be an interim period between the Control Date and the actual division of Conrail's routes. While that period will be as brief as possible consistent with safe and efficient operations, it will permit CSX and NS, without the inhibitions caused by the prohibition against premature control, to

review Conrail's operations in great detail before proceeding to integrate their respective allocated assets into their own systems.

- Section 2.2(c) of the Transaction Agreement, discussed further in Part III, below, provides for a further intermediate stage of stability of operations while the in-place rail transportation contracts of Conrail run off at the end of their respective terms.

As set forth in Applicants' Rebuttal (Vol. 1 at 7), the Transaction should be approved without regulatory conditions, except the oversight and other conditions expressly provided for by the NITL Settlement. Further conditions on implementation or otherwise are not necessary, given the panoply of protections just reviewed.

I. THE TRANSACTION IS "CONSISTENT WITH THE PUBLIC INTEREST"

Congress has provided that: "The Board shall approve and authorize a transaction under this section [49 U.S.C. § 11324(c)] when it finds the transaction is consistent with the public interest." The "single and essential standard of approval is that the [Board] find the [Transaction] to be 'consistent with the public interest.'" *UP/CNW* at 53 (*quoting* *Missouri-Kansas-Texas R.R. v. United States*, 632 F.2d 392, 395 (5th Cir. 1980)); *accord* *UP/SP*, slip op. at 98. The five statutory criteria that define the public interest are

(a) the effect of the proposed transaction on the adequacy of transportation to the public;

(b) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction;

(c) the total fixed charges that result from the proposed transaction;

(d) the interest of rail carrier employees affected by the proposed transaction; and

(e) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region or in the national rail system.

49 U.S.C. § 11324(b).

The second and third criteria are not relevant to the Board's determination here. No carrier remaining in the case seeks inclusion as its primary remedy.[1] And no one disputes CSX's (or NS's) ability to

---

1 W&LE seeks trackage rights but mentions inclusion as a possible fallback remedy; however, its filing does not purport to be a request for inclusion.

cover its fixed charges following the Transaction. The interests of affected carrier employees will be adequately addressed through the imposition of standard labor protective conditions. *See* Part VI.

The key criteria in this Transaction, as in most control transactions, are the adequacy of transportation and the competitive effects of the transaction. In assessing the adequacy of transportation, the Board, like its predecessor, examines the public benefits that will result from the transaction. *UP/CNW* at 53; *UP/SP* at 99. "Public benefits may be defined as efficiency gains such as cost reductions, cost savings, and service improvements." *UP/SP* at 99.

In assessing competition, the Board is guided in part by the rail transportation policy enacted in the Staggers Act. "The 15 elements of that policy . . . taken as a whole emphasize reliance on competitive forces, not government regulation, to modernize railroad operations and to promote efficiency." *Id.* at 100. The Board does not "limit [its] consideration of competition to rail carriers alone, but examine[s] the total transportation market(s)." *Id.* at 99.

Where a transaction will yield public benefits but also may bring a reduction in competition that cannot be remedied by appropriate conditions, the Board performs "a balancing test weighing 'the potential benefits to applicants and the public against the potential harm to the public.'" *UP/CNW* at 55-56 (*quoting* 49 C.F.R. §1180.1(c)). In this case, however, there is no occasion to weigh public benefits against competitive harm; there will be no competitive harm. Approval of this Transaction is compelled both because it will yield very substantial public benefits in the form of cost savings and service improvements **and** because it is overwhelmingly procompetitive -- the most procompetitive rail combination within memory.

Evidence of the public benefits of the Transaction is undisputed. Quantified benefits from cost savings, efficiencies and other factors are expected to be nearly $1 billion per year. Application, Vol. 1 at 16. The benefits of improved service to shippers are not readily quantifiable but are nonetheless real. Shippers will benefit from the creation of extensive new single-line service routes between points where they do not currently exist, including points in the Southeast and New England. The new rail network resulting from the combination of CSX's system with portions of Conrail will result in more efficient operations, allowing CSX

to route traffic around congested points like Cincinnati and facilitating more efficient interchange of traffic with western carriers.

The proposed Transaction will result in intensified, rather than diminished, competition. The geographic arena of vigorous rail-to-rail competition between CSX and NS will be expanded. Class I rail competition will be introduced for the first time in a generation to the Greater New York City area, to New Jersey, and to upstate New York. The Transaction thus rectifies the one flaw in the public efforts to create Conrail and in the subsequent success of Conrail both before and after its reentry into the public sector: A large sector of the Northeastern United States becomes part of the lines of two powerful competitive rail carriers, giving shippers direct routes throughout the Eastern United States. The new Shared Assets Areas and the equal access of CSX and NS to the MGA coal mines will be significant parts of the new competitive picture. Enhanced competition will not be limited to those areas. As CSX's commercial officers have explained, head-to-head competition between CSX and NS in SAAs will benefit shippers in other areas where only CSX may be physically present because CSX will have a powerful incentive to make sure that shippers located on its lines move as much traffic over CSX as possible. Rebuttal, Vol. 2A at 214-15.

At least as important, the proposed Transaction will result in efficient rail networks with longer single-line hauls that can compete more effectively with the trucks that currently dominate freight transportation in the East. The benefits of enhanced competition between rail and truck extend beyond reduced rates and improved service for shippers. They include the environmental and safety benefits of removing trucks (over one million long-haul truck trips per year) from the interstate highways. Application, Vol. 2A, Bryan VS; Vol. 2B, Krick VS.

The Transaction amply meets the statutory test of being "consistent with the public interest." No conditions are needed to make it so. "Consistent with the public interest" understates what the Transaction does. It is greatly promotive of the public interest and greatly enhances that interest.

II. OVERVIEW OF THE CLAIMS RAISED BY PARTIES TO THIS PROCEEDING

Notwithstanding the unambiguous benefits of the Transaction and the widespread support for it, numerous parties have sought relief of one sort or another. In most cases, their positions are supported only by narrow self-interest and they avoid any attempt to satisfy the bedrock standards of the Board for a grant of conditions.

The Board, like its predecessor, imposes conditions sparingly because they tend to reduce the benefits of a consolidation for both the carriers and the public. *UP/CNW* at 56; 49 C.F.R. § 1180.1(d)(1). Thus, a condition will not be imposed unless the Board finds

> that the consolidation may produce effects harmful to the public interest (such as an anticompetitive reduction of competition in an affected market), that the conditions to be imposed will ameliorate or eliminate the harmful effects, that the conditions will be operationally feasible, and that the conditions will produce public benefits (through reduction or elimination of the possible harm) outweighing any reduction to the public benefits produced by the merger.[2]

UP/MP/WP at 565.

Unable to satisfy these standards for relief, most parties simply avoid addressing them. Knowing that they cannot show competitive harm or establish the likely loss of essential rail services, they attack specific details of the Transaction, complaining that the Transaction should have had different features that would have advantaged the complaining party more, or that other parties were advantaged more than the complaining party. Applicants have addressed all these and other claims in the Rebuttal. Space permits only a few of these claims to be further answered here. A party-by-party index of the complaints and Applicants' responses to them in the Rebuttal was filed on January 21, 1998. CSX/NS-194.

The issues raised by the DEIS were analyzed in CSX's environmental comments filed on February 2, 1998. A brief discussion is included in Part VII to put the environmental issues in perspective.

---

2 Environmental conditions are imposed only on a similar basis. *See* Part VII below.

III. ADDITIONAL BENEFITS ARE PROVIDED BY THE NITL SETTLEMENT

The NITL Settlement, with the largest of the shipper organizations in the United States, fine-tunes the details of the Transaction in a way which does not detract from its benefits but in fact provides additional benefits to the shippers. We refer to the Applicants' Rebuttal (Rebuttal, Vol. 1 at 25-30) and to CSX/NS-190 for a further development of the benefits of the NITL Settlement. The latter document furnishes the answers to criticisms made of the Settlement by CMA, a more narrowly based, rival shippers' organization.[3] The NITL Settlement provides for a "Conrail Transaction Council" with representatives of CSX, NS and NITL and other organizations representing affected rail users, to serve as a forum for constructive dialogue;[4] provides for the development and circulation to and by the Council of a user-friendly summary of how operations will be conducted in each of the three Shared Assets Areas; makes provision that separate operations over the Conrail lines will not be begun by CSX and NS until the Board has been advised that management information systems are in place to manage operations on the former Conrail system, within the Shared Assets Areas, and the interchanges between the CSX/CR and NS/CR systems, and that the railroads have obtained the necessary labor implementing agreements; provides for three-year Board oversight of the Transaction under measurable standards to be developed in consultation between the railroads and the Council; provides for protections, both as to service and rates, for a period of three years, to those Conrail shippers who have historically had single-line movements (of at least 50 cars in a base year) but will have a joint line service as a result of the Transaction (so-called "one to two" shippers); and makes provision with respect to the maintenance of interchanges and reciprocal switching, reductions in switching rates, and access to facilities in the Shared Assets Areas.

A fuller development of two particular benefits of the NITL Settlement is in order:

1. *Buffalo Switching Charges*. -- A particularly favorable effect of one provision of the NITL Settlement will be felt in the Buffalo area: reduced switching charges. A spokesgroup for that area, ENRS,

---

3 Many CMA members are also members of NITL.

4 That Council has been formed. Its first meeting is scheduled for early March.

called in October 1997 for the creation of another shared assets area there, or failing that, general "terminal" access to shippers by all railroads throughout the region, or, failing that, open reciprocal switching at an arbitrary $130 rate in the region. ENRS-6 at 6-8. None of these remedies was or is appropriate. As Applicants' Rebuttal pointed out (Rebuttal, Vol. 1 at 136-42), the area will be no worse off and indeed much better off in terms of transportation options after the Transaction than before, and hence none of those remedies is warranted. While on a number of the Conrail routes in this area CSX steps into Conrail's shoes, Conrail's Southern Tier lines from New York into Buffalo are allocated to NS, complementing NS's historic service over the Nickel Plate Line from Buffalo to Cleveland and beyond. But in addition to this, the NITL Settlement provides additional relief and further undercuts the ENRS arguments, even on their own terms.

One of the principal claims of the ENRS presentation was that while in form there was widespread reciprocal switching in that area between Conrail and other rail carriers, including NS, the reciprocal switching option was meaningless because the Conrail switching charges were too high -- generally at $450 and all at least $390 per car. ENRS-6 at 22-23; *id.*, Fauth VS at 27-28. The NITL Settlement reduces those Conrail switching charges to $250 between CSX and NS, the level of charges that generally exists between CSX and NS at their historic reciprocal switching points.[5] The reduced charges will greatly change the competitive picture drawn in the ENRS filing, which was expressly based on the existence of the old switching charges and the traffic patterns that resulted from them. Rebuttal, Vol. 1 at 141.

Recent developments in the case underscore the fallacy of a related argument made in the ENRS presentation, namely, that in 1996 as part of the CSX/Conrail Merger Agreement, Conrail cancelled reciprocal switching at numerous points in the Buffalo area. ENRS-6 at 29-30. Conrail witness A.J. McGee refuted this and indicated that these "closings" were simply the deletion of the names of shippers formerly served at reciprocal switching points who had gone out of business or moved or otherwise ceased to use rail transportation, as evidenced by inactivity. He indicated that if any shippers had protested and identified themselves as still at the switching point and wishing to have reciprocal switching, their names would have

---

5 CSX settlements with CN and CP also provide relief from the Conrail switching rates in the region.

been restored. Rebuttal, Vol. 2A at 350-53. At his deposition taken by counsel for ENRS, McGee was confronted with no shipper who had sought reinstatement of its name as open to reciprocal switching who had been declined that reinstatement. McGee Dep., Feb. 5, 1998 (*see* App. B).

Thus, the two underpinnings of ENRS's witness Fauth's testimony fail: The $390/$450 per car Conrail switching charges are reduced between CSX and NS by the NITL Settlement, and the charge that Conrail canceled any "real" reciprocal switching arrangements in 1996 stands refuted on the record.

2. *Conrail Rail Transportation Contracts*. -- The NITL Settlement evidences the acceptance, by the largest shipper organization in the country, of the basic principles of the agreed-upon disposition of the Conrail Rail Transportation Contracts, effected in Section 2.2(c) of the Transaction Agreement. That provision affords two public policy benefits, and the NITL Settlement adds a third:

First, and most important, it assures respect for contractual arrangements on both sides. It requires the two carriers who will operate Conrail's lines to assume responsibility, in a logical and prescribed way, for the performance of the remaining portions of Conrail's Rail Transportation Contracts. It continues the mutuality of obligations under the contracts between carrier and shipper, an obviously fair approach, contrary to the CMA assertion that the shippers should have an option to get out of their contracts but the carriers should not have such an option. CMA-10 at 35-36.

Second, it aids a smooth transition to the separate allocation of Conrail's routes on "Day One" and in the period following it. It does this by removing the possibility, sought by CMA and some shippers, that all of the traffic under Conrail contracts would be shifted on "Day One," an irresponsible proposal which would make the task of devising and executing well-working operating plans extraordinarily difficult, particularly in the North Jersey Shared Assets Area and other places with heavy movements of traffic. In depositions taken after Applicants' Rebuttal by a shipper challenging Section 2.2(c), the witnesses of NS and CSX who made this point in their Rebuttal Verified Statements reinforced the need for an orderly allocation of the contracts. NS's witness, Prillaman, testified that while it might be possible in the case of a single Conrail contract to devise a replacement contract and a means of performing it in a relatively short period

of time, the more contracts that were opened up simultaneously at the same time, the more the difficulties and complexities that would be introduced. Prillaman Dep., Jan. 13, 1998, at 29-30 (*see* App. B). And CSX's Rebuttal witness, Jenkins, expanded on his testimony as to the difficulties of such a general opening of the Conrail contracts. Jenkins Dep., Feb. 5, 1998, at 6-11 (*see* App. B).

Third, the NITL Settlement adds a safety net through an arbitration process for those shippers who are dissatisfied with the allocation of their contract performance (in those cases where either CSX or NS could perform complete, single carrier line-haul service). The process allows a six-month period for the working out of initial "bugs" in service and then furnishes a speedy arbitration remedy.

Much of the concern about service issues raised by the few shippers who oppose Section 2.2(c) appears to be a mask for a desire to break their Conrail contracts and obtain a better deal. In a curious filing (APL-4), APL prophesies service difficulties if its movements are handled by CSX and makes an *ad hominem* attack on CSX, claiming CSX will favor its ocean shipping and intermodal service provider affiliates over the service it affords APL, which is a competitor of those affiliates. But as demonstrated in the Rutski RVS (Rebuttal, Vol. 2B at 378-83), such "conflicts of interest" are ubiquitous in the intermodal business and no one can survive in the business if it does not deal fairly with affiliate and nonaffiliate alike. Most tellingly, APL's prayer for relief is not that the Board order that its contract be allocated for performance by NS -- with whom it seems to have no quarrel -- to the fullest extent that NS can perform it. [[[

]]]

IV. THE SO-CALLED "ACQUISITION PREMIUM" AND OTHER REGULATORY AND ACCOUNTING CHANGES

A number of shippers have asked the Board to impose conditions in this proceeding that would reverse or alter, for NS and CSX alone and retroactively at that, established rules governing railroad accounting and maximum rate regulation. Rebuttal, Vol. 1 at 106, n.1. Some shipper organizations also support those requests, including the NITL, since the Settlement with it excluded any resolution of those issues. *See id.* at 106, 768. If adopted, the requested conditions would (a) preclude Applicants from including the full acquisition cost of Conrail in their accounts for purposes of revenue adequacy and jurisdictional threshold determinations (b) modify, as to CSX and NS alone, existing rules governing market dominance and rate reasonableness determinations, and (c) impose on CSX and NS an absolute rate cap for certain movements. *See id.* at 106-112; *id.* at App. A at 733-67. The subject is highly technical and the merits, which strongly support the Board's current practices and regulations, are discussed at considerable length in Applicants' Rebuttal at the pages just noted.

The short answer for present purposes is that the relief sought by these parties would not only contradict present Board regulations and policies, but would also single out CSX and NS as the only railroads subject to these alternative rules. To produce such a result through the process of a retrospective adjudication applicable only to one or two railroads is questionable as a matter of public policy and due process protections.[6] Both GAAP, which the Board is statutorily required to follow (49 U.S.C. § 11161) and the Board's accounting rules have long required railroads to make purchase accounting adjustments to reflect actual acquisition costs. And with respect specifically to revenue adequacy determinations, the Board's

---

6 *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984) (in conducting factual inquiry as to whether regulatory "taking" has occurred, court should consider, among other factors, the governmental action's "interference with reasonable investment-backed expectations"). It is highly questionable whether the Board, in the absence of express congressional authorization, may give retroactive effect to any action changing its accounting rules. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

predecessor in 1990 squarely decided, with the support of shipper groups including NITL, to require railroads to use acquisition cost, rather than the pre-transaction book values on the books of the acquired company, for purposes of revenue adequacy determinations. That decision was fully upheld on judicial review. *See Railroad Revenue Adequacy -- 1988 Determination*, 6 I.C.C.2d 933, 935-42 (1990), *aff'd sub nom. Association of Am. R.Rs. v. ICC*, 978 F.2d 737 (D.C. Cir. 1992).

No change in these established rules is warranted -- in this proceeding or otherwise. There is no basis for visiting disparate treatment upon CSX and NS. If there were any question concerning the continuing wisdom of the Board's rules, a proposed rulemaking would appear to be the only appropriate procedure.

V. REPLIES TO REBUTTALS BY PARTIES FILING RESPONSIVE APPLICATIONS

We reply in this Part to the arguments made by certain parties filing responsive applications in their rebuttal filings made on January 14, 1998. CSX has not had any previous opportunity to reply to these filings.[7] Because the great majority of those responsive applications seek relief that would primarily impact CSX, we are constrained to devote a major portion of this brief to addressing them.

1. ***East of the Hudson*** -- The responsive applications or related filings in this area are (a) the application of NYS/NYCED (NYS-11/NYC-10) and their rebuttal (NYS-24/NYC-17), and (b) the reply presentation of Representative Nadler and 23 of his congressional colleagues (Unnumbered, filed January 14, 1998).

(A) Like many other parties seeking enlargement of the Shared Assets Areas or similar conditions to suit their wishes, NYS/NYCED seek, in effect, to have the equivalent of an SAA across the Hudson by introducing a "trackage rights carrier" to operate between Selkirk, NY (near Albany), and the Bronx over the Conrail line being allocated to CSX. As extensively discussed in Applicants' Rebuttal (Vol. 1 at 124-36), this request violates the settled policy of the Board and its predecessor that conditions will not be imposed

---

7 CSX's response to the initial filings of the responsive applicants was contained in the Applicants' Rebuttal. We will seek to avoid duplication of that Rebuttal here.

on a transaction to make the requestor better off competitively than it was before. *See* Part II above. That is an application of the Board's related principle that conditions will not be imposed to deal with existing situations not created by the transaction. Of course, at the present time there is only one Class I rail carrier East of the Hudson -- Conrail. NYS/NYCED attempt to avoid the point that they are complaining about the continuation of an existing situation by saying that since allegedly the Transaction brings less rail competition to the East of the Hudson area than did the recommendation of the 1975 Final System Plan (FSP) of USRA, it cannot be said to be in the public interest. That argument appears to be fundamentally flawed, but the short answer is that the facts do not support it in any event. While the FSP sought to introduce a competitive rail line from Northern New Jersey through New York State to Buffalo and beyond (a proposal which could not in fact be accomplished then), it did not propose any rail competition to Conrail East of the Hudson. *See* FSP, Vol. 1 at 18, 20-21 (maps). Thus, the FSP and the Transaction each produce the same result East of the Hudson, but the FSP's unfulfilled goal to introduce rail competition from New York City (through Northern New Jersey) west of the Hudson is achieved by the Transaction.

The Transaction, although it need not, does more for "East of the Hudson" than the present Conrail does. *First*, by introducing two strong competitive rail carriers, one of them CSX, west of the Hudson, the Transaction makes CSX pay attention to the shippers east of the Hudson, so that they do not resort to drayage across the Hudson where they will have an NS option. Conrail had no such constraint west of the Hudson. It was indifferent to the use of drayage across the Hudson, having no rail competition on the west side, and indeed concentrated its efforts on the west side. The criticism made by NYS/NYCED, in its January 14, 1998 filing (NYS-24/NYC-17 at 23-29) and in NYS's Environmental Comments of February 2, 1998 (NYS-26 at 14-20), as to the environmental effects of drayage across the Hudson is misplaced. The point is **not** that CSX supports drayage across the Hudson from points east of it; rather CSX in its own interests will seek to minimize any such drayage. It will be in CSX's interests to give service to customers east of the Hudson, and to price that service in a way, which will prevent that drayage from happening and will reduce

the amount of cross-river drayage that is already taking place. Rebuttal, Vol. 1 at 125-29; Vol. 2A, Kalt RVS at 179.

Second, the commercial access of CP and P&W to the CSX East of the Hudson line introduces competition from these carriers to a considerable extent on that line. In response, NYS/NYCED find fault with the extent of the competition that is introduced by the CP settlement and suggest that CP made itself a bad deal and thus will not be able to compete. NYS-24/NYC-17 at 29-34. But in the first place, the settlement does afford more competition than there was before the Transaction; there were no such arrangements between CP or P&W and Conrail. Next, it is gratuitous to assume, as do NYS/NYCED, that CP ignorantly or wilfully made a settlement in which it gave up claims and positions of its own in the case in exchange for rights that were meaningless.

We note the fact that no major carrier has yet stepped forward to accept NYS/NYCED's invitation to compete with CSX east of the Hudson for the rail service revenues that might be anticipated to be available there. Indeed, the NYS/NYCED filing points out that only approximately 5% of the freight revenues in the Greater New York City area are East of the Hudson revenues. NYS-24/NYC-17 at 20. So far, the only carrier that has come forward is the tiny Class III New England Central Railroad, which has furnished a very short statement. *Id.*, Petersen RVS. No serious presentation is made as to its resources, the financing and equipment it would devote to the service, its notions as to marketing, or the like.[8]

(B) Representative Nadler and his 23 colleagues have expressed concern over the geographic and infrastructure problems of providing rail service east of the Hudson due to the fact that there appears to be no usable passage, by tunnel or bridge, for rail movements across the Hudson south of Albany, about 100 miles north of Manhattan. This congressional group has made various proposals, beginning with a proposal to conscript CSX and NS as operators of a new car float service from the North Jersey SAA to Brooklyn and/or to extend the joint allocation of the Northeast Corridor (NEC) Conrail freight rights, currently running

---

8 A fuller presentation is, of course, made in our Rebuttal, including the operational difficulties of introducing a second freight carrier on this line which is heavily devoted to passenger service. Rebuttal, Vol. 1 at 124-33.

from Washington, D.C. to New York City, which becomes an allocation solely to CSX at Penn Station in Manhattan and easterly from there. *See* Intervention Petition of Congressman Nadler, *et al.* (Unnumbered), filed Oct. 21, 1997, at 12-15. The joint allocation under the proposal would be extended to the east of Penn Station so that NS would have concurrent rights into New England with CSX, apparently for the purpose of certain limited operations involving low profile RoadRailers and similar freight equipment through the Manhattan passenger tunnels and eastward. No serious interest in these proposals by CSX or NS has ever been expressed, and both stand on the allocations of the NEC freight rights provided for in their Application. As to operations through the passenger tunnels, there is no evidence of serious interest in that proposal since the one-day trial of the operation in August 1982, and in the interim, as is well known, greater clearance requirements, rather than less, have been the order of the day in freight railroading.

While CSX has not included in its operating plan any movements of freight through the existing Hudson and East River passenger tunnels and is not convinced that such movements would be economically and operationally feasible, it has no prejudice against considering movements through existing or new tunnels if they can be demonstrated to be feasible. On this issue, as on the possibility of an increased use of cross-harbor float services between Jersey City/Bayonne, NJ, and Brooklyn, CSX has an open mind and obviously would participate in or provide such services, within its operational authorities, if the same were feasible and economically attractive. As noted in the Rebuttal (Vol. 1 at 136), CSX looks forward to the two-year study of these and other movements which is being launched by NYCED commencing in the Spring of 1998. The Applicants' design of the SAA relating to the New York Metropolitan Area, in the area west of the Hudson where the overwhelming majority of the freight traffic of the Metropolitan Area area originates and terminates, was based on the state of the rail traffic flows and potential flows visible to CSX and NS at the time of the negotiation of the Transaction Agreement in the Spring of 1997. Future improvements in the public infrastructure in the region which might provide additional physical rail access to the area east of the Hudson, to which the proposed study by NYCED may be a preface, could well change that picture. But it is obvious that any effectuation of any such major infrastructure improvements facilitating cross-harbor and

other new trans-Hudson rail movements in the area lies years in the future. Thus, the arrangements made by the Applicants are completely appropriate to present conditions. The Board's powers of oversight, and to authorize additional rail service where the public interest and necessity require, and CSX and other carriers' economic interests, can be relied upon should infrastructure changes be made which would warrant changes in the provision of rail service to the New York Metropolitan Area.

2. ***EJE/I&M***. -- EJE/I&M claim that there will be an undue concentration of power in CSX's hands over intermediate switching railroads in the Chicago area as a result of the Transaction and that in order to remedy this situation Conrail's controlling 51% block of stock in IHB should be divested to a "consortium" consisting of EJE and I&M.

The proposal is an inappropriate solution to a nonexistent problem. There are three intermediate switching carriers operating in the downtown Chicago terminal area, BOCT, BRC and IHB. The Transaction will have no effect on the control of BOCT by CSX which has been its 100% owner for many decades. It will have no effect on control over BRC, which is split 50-50 between the Eastern roads and the Western roads; CSX acquires no additional interest in BRC in the Transaction; NS takes over Conrail's interest. As to IHB, CSX and NS will leave the ownership of the 51% block in Conrail and will cause Conrail to vote it in accordance with a stockholder agreement. Rebuttal, Vol. 1 at 300, 309-10; Application, Vol. 8C at 693. The stockholder agreement is an open agreement which is before the Board. EJE and I&M themselves say they will have a stockholder agreement according to their application filed last October (EJE-10 at 6, 15), but they have not gotten around to drafting it and now seem to be contending that they each will act independently of the other, with no agreement. *See* EJE-17/IMRL-6 at 25.

The CSX/NS agreement provides for a system of checks and balances between CSX and NS in the exercise of their powers with respect to the controlling block of IHB stock. Other provisions of the agreement which are complained about by EJE/I&M relate not to Conrail's powers as 51% stockholder but to the exercise of Conrail's powers as a contracting party under existing agreements with IHB. *See* Application, Vol. 8C at 703-06. Accordingly they have no relationship to the exercise of stock control.

Other complaints of EJE/I&M relate not to CSX and NS's voting of Conrail's stock interest in IHB but to the effect of their respective operating plans on IHB. Those plans will minimize their use of the IHB's Blue Island Yard as an interchange point or a place to store cars and will stress its use as a place through which there will be run-through trains in cooperation with Western carriers, thus cutting down on switching and handling in the crowded terminal area. While this will in a sense "influence" IHB's business, it is the influence that a customer exercises in its role as a customer, not in its role as an owner. Recent events teach that the relief of congestion in terminals, through preblocking and run-through operations, must be an important goal of transportation policy. CSX's and NS's operating plans provide for achieving that goal and their use of, rather than their control over, IHB will effect it. EJE/I&M's insistence that service to local shippers through the Yard is a greater goal is highly questionable.

The fact that the Applicants propose operating plans in the Chicago area that will change the usage of the Blue Island Yard does not mean that IHB and its Blue Island Yard will not be operated in an independent fashion. CSX and NS are committed to having it continue to operate in an independent fashion as defined in the Board's earlier decision in this case (*see* Decision No. 53, served Nov. 10, 1997) and as it has operated under Conrail's control. The fact that there is a shareholders' agreement between CSX and NS does not mean that greater domination will occur than was exercised by Conrail or that IHB's independence will end. Conrail by itself had all the powers of CSX and NS under the IHB Agreement rolled into one; it could by itself exercise each and every power of CSX and NS recited in the Agreement. CSX's rights are limited and its freedom of action constrained by the rights of NS and by the continuing 49% stock interest of CP in IHB. Because of NS's rights, CSX will be more constrained in the exercise of power over IHB than is Conrail.

EJE/I&M propose to operate IHB not with emphasis on run-through movements through the Chicago gateway but with emphasis on service to local shippers. EJE-10 at 8-9. Such a plan would have difficulty qualifying in the public interest even if proposed as part of a voluntary transaction. It is absurd to say that it justifies a transaction contrary to that proposed by the parties in the Primary Application. To be

sure, local service will not be neglected in the Transaction; there will be plenty of capacity for service to local shippers. Rebuttal, Vol. 1 at 322-23. EJE/I&M have never explained why CSX and NS would not want to promote these local operations and enjoy their share of revenues from them.

In contrast to the benefits which the Transaction will bring to Chicago, the EJE/I&M proposal brings nothing. The major Western carriers do not support it. The origins of I&M's entrance into this "coalition" with a grand total of two members have remained as murky as they were left at the time of our Rebuttal. Rebuttal, Vol. 1 at 314-18. EJE/I&M have not put forward their shareholder agreement and seem to be receding from even having one. *See* EJE-17/IMRL-6 at 25; Rebuttal, Vol. 1 at 317; Rebuttal, Vol. 3C at 24-25. Applicants mildly exaggerated in our Rebuttal by saying they had no operating plan; their operating plan exists but it covers all of one page, much of it devoted to complaining about a discovery ruling of the ALJ. EJE-10, Ex. 15 at 35. The rest of that page contains the substantial equivalent of nothing. There are a number of shippers served solely by IHB and EJE, but no plan is offered to remedy these "two-to-ones" were IHB and EJE to come under common control. The EJE/I&M proposal is said to accentuate service to local shippers but the largest shipper on the IHB, Inland Steel, opposes the EJE/I&M responsive application. *See* ISI-9. The only answer given to this by EJE/I&M appears to be that EJE will not control IHB; but then why did Transtar and EJE file a control application? Despite the repeated assertion of attorney-client privilege at crucial points, it seems clear that EJE took the initiative in bringing I&M into the coalition, possibly in an effort to dilute the "two-to-one" issues. As late as October 1, 1997, EJE made the required environmental filing, a condition precedent to the October 21, 1997, responsive application, solo, without I&M's name appearing.

3. ***Wisconsin Central***. -- WC claims that the governing issue as to its responsive application, which seeks the forced sale to it of the Altenheim Subdivision of the BOCT, a long-time 100% subsidiary of CSXT, is the following:

> Should CSX be permitted to own 100% of B&OCT, to own jointly with Norfolk Southern Railway Company ("NS") 51% of the Indiana Harbor Belt Railroad Company ("IHB"), to have absolute dispatching authority over IHB in the Chicago

Terminal, to appoint the IHB general manager, to control the IHB Blue Island Yard and to own 25% of The Belt Railway Company of Chicago ("BRC").

WC-16 at 3.

It sounds from this as if WC is joining in the proposal of EJE and I&M, and in fact WC was at one point a member of that "coalition" but apparently dropped out leaving it a coalition with one member until I&M somehow came to join up. WC apparently dropped out because it settled with NS under an arrangement in which WC would get a Conrail line. Part of the settlement was that WC was to support the Transaction, which included the matters caricatured in the above quotation. WC-10 at 12. So some other opportunistic goal had to be pursued, which did not contravene the allocation of Conrail's assets in the Transaction, and so the long-pursued goal of WC to acquire ownership of the Altenheim Subdivision, a line over which WC already has trackage rights, was substituted. To be sure, the proposed relief does not contravene Applicants' request for approval of the Transaction; indeed it has no relationship to the Transaction at all. Under the established principles of the Board, this makes it inappropriate for imposition as a condition. *See* Part III above. WC's claim relates entirely to a preexisting matter, not to any alleged harm arising out of the Transaction, least of all to the alleged harm quoted above. BOCT has been owned 100% by CSX and its predecessors, and it has owned the Altenheim Subdivision, each for many decades. The squabbles about dispatching on the Subdivision that are recounted in the WC filings (WC-16, McCarren RVS at 7, WC-9 at 7) are preexisting conditions and are irrelevant to the Transaction. Rebuttal, Vol. 2A, Booth RVS at 4-5.

Like the EJE/I&M application, the WC application attempts to wrest part of the facilities in the Chicago terminal area from their owner on a forced sale basis and to alter their service orientation. The most desirable orientation of IHB, which the individual operating plans of CSX and NS would further, is to expedite through movements of traffic through Chicago, while also providing appropriate facilities for local switching. EJE/I&M proposes to alter this to make the IHB concentrate on service to local shippers. The Altenheim Subdivision of BOCT has been in recent years largely devoted to service to local shippers, while

affording trackage rights for those who wish to use it for parts of through movements in Chicago, as does WC. WC wishes to change this orientation so that its own through movements (or perhaps those in its haulage operations between CN and IC, though this possibility is not mentioned) would be favored and the local switching would take place when its movements would not be disturbed by it. This has nothing to do with the Transaction in this case and accordingly is not an appropriate exercise of the Board's powers.

Much of the rest of the WC rebuttal deals with issues as to the switching charge controversy between it and BOCT and the $20 million plus arbitration award rendered against WC in that case, and in discussing the issues concerning the Conrail block of stock in the IHB, which ostensibly WC has dropped but which keeps creeping into its filings, signed by counsel who also represent EJE and I&M. No further reply on these issues appears necessary.

4. ***Bessemer & Lake Erie*** -- One of the substantial procompetitive benefits of the Transaction is the introduction of two-carrier competition to the coal mines served by the former Monongahela Railway and now solely rail-served by Conrail. Notwithstanding this indisputable increase in competition, B&LE has filed a conditional responsive application (BLE-7) and request for conditions (BLE-8) seeking trackage and haulage rights in order to establish itself as a third carrier serving the MGA mines. In addition, B&LE seeks conditions requiring CSXT and NSR to quote joint rates to B&LE via specified interchanges both for MGA-origin coal and coal originating in CSXT's B&O Origin Coal District, with the further requirement that such rates provide CSXT or NSR with exactly the same revenue per mile as the single-line routing via Ashtabula. There is no basis for granting any of the relief sought by B&LE. B&LE has not shown, nor could it, that the Applicants' proposal to add a second carrier serving the MGA mines will significantly reduce competition, nor that there will be any loss of essential rail service.

The trackage and haulage rights sought by B&LE would become effective only if CSXT serves the MGA mines by means of a haulage arrangement with NSR. But CSXT has equal access to the MGA with NS. While B&LE's reasoning is vague, it apparently believes that CSXT would not provide meaningful competition to NSR for shipments of MGA-origin coal if it had to rely on haulage via NSR. This contention,

and B&LE's requested relief, are thus entirely hypothetical. CSXT anticipates competing vigorously for the MGA business and the Transaction Agreement puts it on an equal access footing with NSR; it is not subordinate to NS. Moreover, even assuming *arguendo* a haulage agreement between CSXT and NSR, it is clear that that would represent a net increase in competition over the current situation in which MGA coal mines have only Conrail to look to for rail transportation. Indeed, B&LE's responsive application itself contemplates relying on haulage via NSR from the MGA mines to a connection with B&LE (via trackage rights over either CSXT or NSR), and contends that its haulage arrangement would be competitive with NSR.

B&LE claims to be concerned about a loss of competition to a purported "lake coal market," consisting of service to two of the four Lake Erie coal docks, although it fails to articulate how the Transaction would exacerbate the current situation in which only Conrail can transport coal from the MGA mines. In reality, B&LE is seeking to improve its pre-Transaction position by obtaining forced access to coal sources it cannot serve today. B&LE fears that CSXT will "divert" coal traffic from a current inefficient three-line haul reaching B&LE's coal dock in Conneaut, OH, to an efficient single-line haul reaching the Ashtabula Dock. *See* Howerter VS, BLE-8 at 21. That is precisely the type of shipper-oriented benefit, in terms of improved transportation efficiency and increased competition, that the Transaction will afford. And if CSXT were unable to take advantage of that efficiency, due to congestion, shortage of dock capacity or otherwise, nothing would prevent it from maintaining or reestablishing interline service with B&LE to Conneaut.

B&LE has not refuted Applicants' showing that the Transaction will increase competition for MGA coal, nor can it overcome the operational problems its requested relief would create. *See* Rebuttal, Vol. 1 at 145-46; Orrison RVS, Rebuttal, Vol. 2B at 489-92. More important, it has not shown that there would be any reduction in competition as a result of the Transaction. Its request for traffic protective conditions and a cap on divisions is contrary to Board precedent (*see* the next subpart) and sound policy. Its requested relief must be denied.

5. ***Illinois Central*** -- IC seeks divestiture or dispatching control of CSX's Leewood-Aulon mainline, and a gateway/rate condition. Both requests are unsupported by principle and should be denied. *See* Rebuttal, Vol. 1 at 288-99. Divestiture is a remedy "to be imposed only under extreme conditions," and even then trackage rights are preferred. *UP/SP* at 157-64. IC already has trackage rights; what it wants is to use this proceeding to take CSX's property and control CSX's train operations through a major gateway.

The premise of IC's request is that its trains have experienced delays through Memphis. Such delays -- which CSX is working to avoid -- are an existing problem, not an effect of the Transaction, and afford no basis for relief. *UP/SP* at 145; *BN/SF* at 56. Moreover, those delays clearly result from differing uses of the line. It gives CSX essential access to the Memphis gateway and to CSX's Leewood Yard, whereas IC uses it as a segment in its long haul.[9] Delays simply reflect the fact that such differing uses may not always permit IC trains instantaneous access and transit. IC also shares responsibility.[10]

IC plainly wants its use of the line to have priority. However, the Board's role is not to determine the highest and best use of railroad facilities owned by one carrier but shared with another; such situations are numerous throughout the industry. Nor is IC's use a "better" one. IC's repeated praise of its own efficiency and profitability --which have yielded it a high purchase price from CN -- cannot reduce the importance of Memphis for interchange between CSX and Western roads.[11] The Board should not impose a condition that would impede CSX's flexibility in using this major East-West gateway or its associated yards.

IC has adequate remedies under its trackage rights agreement, which requires CSX to [[[

---

9 IC states the cause of many of the delays has been that "CSXT trains are 'out of' or 'doubled out of' CSXT's Leewood Yard." IC-13, McPherson RVS at 2. The IC documents Mr. McPherson attaches confirm that, as well as showing that interchanges with Western roads (*e.g.*, BNSF) may occupy part of the Leewood-Aulon line. *Id.* Exs. 1 & 2. IC does not suggest that CSX has any alternative access to Leewood Yard. IC's other claims are based solely on self-interested statements and are completely unsubstantiated.

10 IC concedes its traffic "is beyond the oversight of the CSXT dispatcher until it knocks on the door at Leewood or Aulon." IC-13, McPherson RVS at 7. IC should be seeking better coordination with CSX, not insisting on a cleared track the moment it "knocks on the door."

11 The importance of Memphis looms even larger with the recent problems of Western roads in handling traffic over New Orleans.

]]]

IC does not allege there has been any discrimination or favoritism by CSX. It is only in arguing that delays will be exacerbated by the Transaction that IC speculates about discriminatory motives. *See* IC-13, Skelton RVS at 4-5. That speculation must be rejected. There is no reason to expect discrimination post-Transaction. CSX will continue to have incentives to use efficient routings and no incentive to violate its trackage rights agreement with IC.[12]

IC's second request is for a condition that would lock in IC-Conrail gateways, apply them to all CSX traffic and dictate CSX's portion of the rate. Rebuttal, Vol. 1 at 296-99. That self-serving proposal is flatly contrary to settled law that such traffic protective conditions are inefficient, anticompetitive and contrary to the public interest. Those "protective" conditions were standard in rail merger cases for many years. But decisions of the ICC, reaching back almost two decades, have consistently rejected traffic "protective" conditions and have held that the free market -- not regulatory intervention -- best ensures that efficient routings will be used. Those imposed on existing pre-1980 combinations were accordingly removed by the ICC in the 1980's. *See, e.g., SAL/ACL Sub 5* at 15-16; *Chessie/Seaboard* at 578-79; *N&W/DTI* at 527. *See also UP/MP/WP* at 565-66 (traffic protective conditions "remove incentives for efficient operations by keeping carriers from pricing more efficient routes at lower rates" and "hamper carrier efforts to rationalize their systems by freezing existing junctions and interchanges"). *See also Traffic Protective Conditions*.

The Board should not limit CSX's use of efficient routings, whether they involve IC or not. Conditions are imposed only to protect competition -- not competitors. What IC is seeking is to preserve its position as a competitor and to block CSX from being able to offer customers more efficient routes. IC's request must be denied.

---

12 Moreover, IC's model works both ways: If CSX has a competitive incentive to delay IC, IC has one to delay CSX. IC dispatching thus would have equally "anticompetitive" effects.

6. ***Indianapolis***. – Although the Transaction will create more rail competition in Indianapolis than currently exists, several parties, including a responsive applicant, seek far-reaching conditions to remedy alleged anticompetitive effects. These requests are unjustified and should be denied. The Transaction Agreement itself assures that the allocation of the Conrail lines will cause no diminution of rail alternatives. Indeed, competition will be increased by the elimination of the Conrail $390 switching charges between CSX and NS and the substitution of cost-based pick-up and delivery service between them.

Today, most industries in and around Indianapolis are directly served by only one Class I rail carrier, Conrail. In particular, CSX has only limited access to Indianapolis customers. CSX tracks reach Indianapolis only from the east, and its trains destined for Indianapolis are taken to State Street Yard. Rebuttal, Vol. 1 at 51. CSX uses overhead trackage rights over Conrail to reach that yard from the west. Conrail picks up CSX cars at State Street Yard for delivery to CSX customers located on the "Indianapolis Belt" or that are located on other Conrail tracks and that are open to reciprocal switching. Conrail charges CSX $390 per car for that service. *Id.*

Under the Transaction Agreement, CSX will be allocated the Conrail lines serving Indianapolis. But NS will obtain trackage rights over CSX to reach Hawthorne Yard in Indianapolis. And NS will also receive trackage rights over CSX between Indianapolis, Crawfordsville and LaFayette, and Indianapolis and Muncie. (CSX today provides service between Indianapolis and Crawfordsville by way of overhead trackage rights over Conrail.) In Indianapolis, CSX will provide pickup and delivery service for NS, much as Conrail does for CSX today, to serve those customers that previously had access to either Conrail or CSX -- except that CSX will do so not at Conrail's $390 rate but at a cost-based rate. *Id.* at 54; Application, Vol. 8C at 501-08.

Despite the fact that the Transaction does not cause any reduction in competition in Indianapolis and indeed, as noted, improves competition, ISRR, a RailTex affiliate, has filed a responsive application seeking trackage rights that, in the aggregate, would expand its system by over 70%. ISRR-4 at 14. It seeks trackage

rights over Conrail lines between Indianapolis and Muncie, Crawfordsville and Shelbyville. ISRR has made no showing of any justification for those trackage rights and they should be denied.[13]

ISRR also seeks trackage rights that would permit it to serve directly all customers on the Indianapolis Belt. ISRR-4 at 3. As in the case of ISRR's other requests, this is unnecessary to remedy any loss of competition, inasmuch as the Transaction replicates, and indeed improves upon, existing Class I access in Indianapolis and, most importantly, gives the Indianapolis shippers access to the expanded systems of CSX and NS. ISRR's request is obviously aimed at improving ISRR's existing competitive position, and, like its other requests, is without any legal basis.

Finally, ISRR seeks trackage rights to serve two Indianapolis-area plants operated by IP&L. ISRR-4 at 2. IP&L and DOJ seek similar relief. I&PL-3 at 19; DOJ-1, Woodward VS at 24. These requests are based on a misapprehension of the current transportation alternatives for these plants and a misconception as to what constitutes a 2-to-1 situation requiring relief under the Board's precedents.

IP&L's Perry K steam generating plant is located in downtown Indianapolis and is rail-served only by Conrail. ISRR originates a small amount of coal that is delivered to the plant via an interchange with Conrail. CSX does not serve Perry K today, nor does it have access to the plant via switch. After the Transaction, CSX will step into Conrail's shoes and serve Perry K directly. In addition, the Transaction Agreement will provide NS with access to Perry K via cost-based switching. In other words, the Transaction will introduce new competition for Perry K and will cause no reduction in competition. ISRR and IP&L speculate that after the Transaction CSX will favor its affiliate, INRD, over ISRR as a source-serving carrier in connection with coal movements destined for Perry K. Even if there were any basis for that speculation -- and there is none -- such a vertical integration concern does not justify relief under Board precedent.

---

13 There is no loss of competition at Crawfordsville, Shelbyville or Muncie. Rebuttal, Vol. 1 at 366-68. Moreover, even were ISRR to lose its existing IP&L business in Indianapolis, its threat to abandon a short segment of line linking it to the only major city it reaches has no substance. *Id.* at 369-70. In any event, ISRR has failed to show that any shipper on that line would lose essential transportation services, an issue on which it has the burden of proof. *Id.* at 370.

IP&L's second Indianapolis-area plant, the Stout plant, is rail-served exclusively by INRD. At the present time, all of the coal delivered to Stout is delivered by INRD, as developed below. In the past, ISRR had originated coal destined for the Stout plant. That coal was interchanged with Conrail and then switched to the plant via INRD, pursuant to a contract between INRD and IP&L. [[[

]]] Thus, the Transaction has no effect on the transportation alternatives available to IP&L's Stout plant and will not reduce competition. The existing alternatives will remain in place, and the ability of ISRR to originate coal to Stout will depend, as it did prior to the Transaction, on its ability to reach an agreement with CSX and INRD when the current contracts expire. The requests of ISRR, IP&L, and DOJ to rearrange rail transportation in Indianapolis are unnecessary to remedy any loss of competition and are entirely unwarranted.

There is no plausible claim that the Stout plant is currently a "2-to-1" point. [[[

]]] This leaves only IP&L's claim, supported by DOJ, that it could build out from the Stout plant to Conrail in order to provide the competition to INRD that does not exist today. But the record shows that such a build-out would be prohibitively costly if it could indeed be built at all. Rebuttal, Vol. 2A, Kuhn RVS. Moreover, the record refutes IP&L's claim that the build-out option has constrained INRD's pricing. Hoback Dep., Jan. 9, 1998, at 82 (*see* App. B). The real constraint on INRD's pricing of coal movements to Stout, given the plant's proximity to its Indiana coal sources, is truck competition. As IP&L's Vice President, Fuel Supply, testified, "[t]he rate we have under [the INRD] contract is the truck competitive rate. Mr. Hobeck [*sic*] was fighting two trucking companies." Rebuttal, Vol. 3D,

Knight Dep., Dec. 8, 1997, at 38. *See also* Rebuttal, Vol. 2A, Hoback RVS at 196-98; Hoback Dep., Jan. 9, 1998, at 62-64, 97, 130 (*see* App. B).[14]

The record shows that the alleged build-out is a contrivance devised for purposes of asserting "2-to-1" status in this case. IP&L's build-out study was commenced only after the filing of the Application, and IP&L witness Weaver testified that during his tenure with IP&L the company had not previously studied such a build-out. Rebuttal, Vol. 3D, Weaver Dep., Dec. 8, 1997, at 80-81. Unlike legitimate claimants in other proceedings, IP&L has not provided the evidentiary basis for claiming 2-to-1 status and the Board should reject the relief sought by ISRR, IP&L and DOJ.

7. ***Other RailTex Carriers: IORY, NECR***. -- Two other RailTex carriers similarly try to misuse this proceeding to expand their systems on a forced basis. Their requests should also be denied.

IORY's eight trackage rights requests would nearly double its system. Two are based on IORY delays over Conrail's Springfield-Cincinnati line.[15] Delays reaching Cincinnati are an existing problem for all railroads, driven by geography and track configuration. Rebuttal, Vol. 1 at 355-57. IORY has failed to show they would be exacerbated, and ignores a key facet of CSX's Operating Plan, which is to reduce Cincinnati congestion. *Id.* at 357.

Nor is there harm to competition. IORY speculates that CSX will cause delays to steal its traffic, but CSX would not intentionally delay any Cincinnati trains because its own operations would suffer as well. *Id.* at 358-59. Moreover, there are multiple strong incentives to keep IORY's time-sensitive traffic on its line. *Id.* at 354 & n.50. The rights sought provide no cure: without major improvements, the Washington Court

---

14 Contrary to IP&L's suggestion in its Comments on the DEIS, Applicants do not propose an increase of truck transportation of coal to Stout. It is the threat that such transportation could occur that will ensure competitive rail rates from INRD, just as it does today.

15 One (Monroe-Middletown) relates solely to NS. The other involves CSX's line between Washington Court House and East Norwood (Cincinnati) and is addressed here.

House line would be slower than Conrail's line; IORY's only response is to claim that improvements would cost $2 million, not $5 million.[16]

IORY's remaining requests are based on groundless arguments that NS cannot offer adequate competition or the bankrupt theory that Conrail served as a "neutral competitive gateway."[17] Those claims have no merit. *Id.* at 361-64.

NECR seeks trackage rights that would expand its lines by 75%. Those rights would inject it into Albany and the North Jersey SAA -- which would be completely unwarranted by any effect of the Transaction, and would interfere with CSX's ability to operate. *See* Rebuttal, Vol. 1, at 380-81. They would also connect NECR to CSO, another RailTex affiliate, notwithstanding RailTex representations to the Board in 1996 that "the transaction [to control CSO] is not part of a series of anticipated transactions that would connect CSO with any railroad in the RailTex corporate family."[18]

NECR has shown neither competitive harm nor loss of essential services. *Id.* at 376-80. On rebuttal, it claims for the first time that its projected $8 million revenue loss will have a "most likely fatal effect." NECR-8, Carlstrom RVS at 2.[19] However, NECR has failed to substantiate that figure or rebut CSX's critique of it. Rebuttal, Vol. 2B, Rosen RVS at 320-21.[20] NECR has also failed to show essential service loss under any assumptions; to the contrary, the very existence of drayage to transloading facilities that NECR claims will draw away business proves that adequate alternative transportation will be available.

---

16 These rights would also cause CSX operating problems, as well as give IORY a windfall connection to an isolated branch line. *Id.* at 357-59.

17 IORY has also been less than forthcoming in its failure to disclose that one of these requests would give it access to substantial new automotive traffic at Marysville. *Id.* at 363.

18 *RailTex, Inc. -- Continuance in Control Exemption -- Connecticut Southern R.R.*, STB Finance Docket No. 33121 (served Sept. 27, 1996).

19 In response to discovery on its responsive application, NECR asserted only that such revenue losses would force it to discontinue service on marginal sections of its rail system. Rebuttal, Vol. 1 at 379, n.75; Vol. 3A at 162.

20 Moreover, NECR has not established that granting the requested rights would remedy the alleged harm; its projected $7 million revenue rests on sheer speculation. *Id.* at 322-24.

8. ***Livonia, Avon & Lakeville***. -- LAL seeks divestiture or trackage rights for direct interchange with R&S. Its lack of that interchange is an existing condition the Transaction will not affect. Rebuttal, Vol. 1 at 372-74. CSX is simply stepping into Conrail's shoes, and where LAL-CR movements become LAL-CSX-NS ones, Applicants will provide efficient interline service. *Id.* at 373-74. LAL's remedy also involves a three-carrier movement (LAL-R&S-NS) and would not cure the harm alleged; its claim that R&S is a better intermediate link has no merit. Finally, LAL's wish to be in a SAA affords no basis for relief. *Id.* at 119-24.

VI. *NEW YORK DOCK* AND OTHER STANDARD LABOR PROTECTIVE PROVISIONS SHOULD BE IMPOSED

The Board should impose the *New York Dock* and other standard employee conditions in this Transaction as it and the ICC have consistently done in other railroad combination cases.[21] *New York Dock* benefits are among the most generous in American industry. They guarantee up to six years of full wages, a moving allowance, retraining and preferential rehiring. There is no basis for the requested enhancements to extend protection to employees of non-Applicants (UTU-requested) or to provide attrition-type and other additional protection (TCU-requested). Neither union demonstrated the "unusual circumstances" required for such enhancements. Similar requests have been uniformly rejected. *See* Rebuttal, Vol. 1 at 591-603.[22]

This Transaction does not present any unusual labor impacts. It will have less impact on contract employees than prior combinations where the standard protective conditions were found adequate. Many crafts will experience no reductions or may even see increases in employment. Furloughs from the initial implementation will total less than one year's attrition (about 3.6%) on CSX, NS, and Conrail. Applicants expect that almost all furloughed employees will have positions within three years. Thereafter, additional growth in employment is anticipated. The abolishments result from the elimination of redundant facilities,

---

21 *E.g.*, *UP/SP*; *BN/SF*; *UP/CNW*; *CSX Corp.--Control--Chessie Sys., Inc. & Seaboard Coast Line Industries, Inc.*, 361 I.C.C. 521 (1980).

22 As in *UP/SP*, the Board should refuse UTU's request to impose as a condition the commitments made by the applicants to UTU. *UP/SP* at 171, n.218.

adoption of better practices, or technological improvements. Accordingly, these abolishments will not affect CSX's ability to perform necessary work. For example, CSX will be able to abolish maintenance of way positions because of the greater efficiencies from its production gangs. *See* Rebuttal, Vol. 1 at 666.

Nor does the Transaction have any unusual impact on collective bargaining rights. Most employees will remain represented by their unions and covered by collective bargaining agreements containing many similar terms.[23] While CSX is proposing that former Conrail employees and CSX employees be placed on consolidated seniority rosters and be subject to a single railroad's collective bargaining agreements, these changes are necessary for CSX to operate its allocated portion of Conrail as an integrated part of CSX's system. The Board's arbitrators have repeatedly found that such consolidation of employees working in coordinated operations is necessary to realize the public transportation benefits of approved transactions.[24] The necessary changes to collective bargaining agreements described in CSX's Appendix A (Application, Vol. 3A at 485) and the Joint Verified Statement (Application, Vol. 3B at 520) and Rebuttal Verified Statement (Rebuttal, Vol. 2B at 1) of Kenneth R. Peifer and Robert S. Spenski are similar to changes authorized pursuant to prior negotiated and arbitrated *New York Dock* agreements. Upholding arbitrated implementing agreements on CSX, the D.C. Circuit has stated that "[i]t is obvious that separate and distinct parts, operating separately and distinctly, will not generate the value of consolidation." *United Transportation Union v. STB*, 108 F.3d 1425, 1431 (D.C. Cir. 1997). Without these agreement changes, the public transportation benefits of the Transaction will be frustrated. The *New York Dock* benefits are the part of the statutory equation that balances this.

In contrast, ARU are unable to cite any precedent that changes like CSX's proposed changes are unnecessary to realize the transportation benefits described in CSX's Operating Plan. ARU merely repeat their discredited attack on the STB as biased and falsely depict *New York Dock* as involving a process of

---

23 There is no basis for URSA's argument concerning infringement of the NMB's jurisdiction. *See* Rebuttal, Vol. 1 at 681.

24 *See* arbitration decisions in Rebuttal, Vol. 3B at 81-556.

unilateral modification of collective bargaining agreements. They also claim such unilateral modifications will lower employee morale and create unsafe conditions. However, in the real world most *New York Dock* implementing agreements are reached through negotiation; indeed, in *BN/SF* all necessary implementing agreements were reached through negotiation. CSX fully expects in this Transaction that most of the necessary implementing agreements will be achieved through negotiation. Significantly, UTU, which represents about 28 percent of CSX's contract work force, has reached a settlement with the Applicants and supports this Transaction. Applicants have also reached a settlement with BLE pursuant to which BLE has removed its opposition to this Transaction. BLE represents approximately 18 percent of CSX's contract workforce. Additionally, CSX and NS have had implementing agreement discussions with almost all of the other rail unions.

ARU's alleged safety issue is equally unfounded. CSX and NS have the best safety records in the industry. Moreover, each has submitted thorough and unprecedented safety integration plans, which the FRA has found satisfactory. Labor's attempt to assail the *New York Dock* process under the guise of safety is completely without foundation.

If negotiation fails to produce the required agreement, the authority of the STB and its arbitrators to modify collective bargaining agreements as necessary to implement the Transaction has been repeatedly upheld by the STB, ICC, the courts and Congress. *See Norfolk & Western Ry. Co. v. American Train Dispatchers Ass'n*, 499 U.S. 117 (1991); *United Transportation Union v. STB*, *supra* (and cases cited therein); Rebuttal, Vol. 1 at 605-31. ARU's argument that the Transaction should be implemented pursuant to the WJPA procedures or the RLA is without merit. The Board's predecessor long ago held that its protective conditions, not the WJPA, are the exclusive vehicle for implementing approved transactions.[25] Similarly, ARU's claim that Article I, § 2 of *New York Dock* requires the preservation of all collective

---

25 *E.g.*, in *Dispatchers*, the Supreme Court recognized that, if the RLA processes applied, "rail carrier consolidations would be difficult, if not impossible, to achieve." 499 U.S. at 133.

bargaining agreement terms is contrary to established law (*see* Rebuttal, Vol. 1 at 639-50). ARU's contentions are designed solely to frustrate and delay the implementation of this Transaction.

VII. ENVIRONMENTAL CONDITIONS UNDER AN EIS ARE SUBJECT TO THE SAME STANDARDS AS OTHER CONDITIONS, AND THE BOARD SHOULD NOT IMPOSE CONDITIONS THAT WOULD CHANGE OR POSTPONE THE APPLICANTS' OPERATING PLANS OR REQUIRE SUBSTANTIAL EXPENDITURES FOR SPECIAL MITIGATION MEASURES IN ORDER TO MITIGATE DISCRETE, LOCALIZED ENVIRONMENTAL IMPACTS

The proposed Transaction, besides being procompetitive and otherwise promotive of the public interest from a "transportation" standpoint, is also pro-environment. The Application's Environmental Report demonstrated, and the DEIS found, that the Transaction would bring systemwide environmental benefits and had no systemwide adverse environmental impacts. Yet the DEIS appears to seek remediation and mitigation for all local environmental impacts involved in the Transaction, without full consideration of the impact on the very operating plans which are to bring about the Transaction's public interest benefits and the systemwide environmental gains. This approach of the DEIS (and of many commenting parties) ignores the settled meaning and interpretation of the National Environmental Policy Act (NEPA) and threatens grossly to compromise the benefits of the Transaction. In some instances the proposals made by opponents to the Transaction, such as the City of Cleveland, would result in a meltdown of east-west traffic flows which today account for over 80 daily freight trains passing through Cleveland on Conrail's lines.

* * * * * *

The basic principle underlying NEPA, 42 U.S.C. § 4321, is that federal agency actions that may have significant environmental impacts should not be effected in ignorance of those environmental impacts. Thus, the potential environmental impacts of this Transaction must be called clearly and plainly to the attention of the Board members before their final decision is made, so that they may balance the benefits of the proposed Transaction (both "transportation" and environmental) against any environmental impacts from the Transaction. Just as the Board is not to devote itself single-mindedly to its transportation mission in

ignorance of the environmental consequences,[26] the Board is not to devote itself single-mindedly to avoiding discrete, localized environmental impacts. One of the reasons for the Board's very existence is to ensure that interstate commerce is not unduly impeded by localized interests. If the Board were to accede to demands to prevent every localized environmental impact, either by rerouting the trains to another line or demanding other special measures that burden rail transportation, the Board would eviscerate the Commerce Clause of the Constitution (and Congress' enactments under it), and the national rail network could be reduced to an inefficient agglomeration of local rail lines, each subject to the *de facto* control of the local political entity through which it passes. Nothing in NEPA requires the Board to disregard its fundamental statutory mandate in title 49 of the United States Code in this manner. Nothing in NEPA overrides 49 U.S.C. § 11321, reenacted by Congress in 1995, which gives the Board exclusive jurisdiction over rail combinations and expressly states that such combinations may be carried out "without the approval of a State authority." 49 U.S.C. § 11321(a). The Board must of course evaluate the localized impacts expected to result from the Transaction, giving due consideration to the comments of communities submitted to the Board, but it is the Board's duty to take a broader view and serve the interest of the public as a whole.

1. Where, as Here, the Board Has Prepared an Environmental Impact Statement Rather Than an Environmental Assessment, the Board Does Not Have To Mitigate Every (or Any) Localized Environmental Impact

In prior rail combination cases, an Environmental Assessment ("EA") was prepared. The present case represents the first time the Board (or its predecessor) has prepared an Environmental Impact Statement ("EIS") in a rail combination case. The EIS and EA processes are fundamentally different. These differences are explained in detail in CSX's Comments on the DEIS, submitted to the Board on February 2, 1998.

The purpose of preparing an EA is to determine whether the action contemplated may have a significant adverse environmental effect. If the EA reveals that there may be any such effect, the agency must either prepare a full EIS or mitigate the potential effect to the level of insignificance. *See, e.g., Cabinet*

---

26 The process employed to date by the Board's Section of Environmental Analysis ("SEA") clearly guarantees that the Board will not overlook any environmental issue.

Mountains Wilderness/Scotchman's Peak Grizzly Bears v. *Peterson*, 685 F.2d 678, 681-82 (D.C. Cir. 1982). But where, as here, the STB prepares an EIS, it has no corresponding obligation to mitigate every (or any) environmental impact. The preparation and consideration of the EIS is all that is required to satisfy NEPA's mandate. As the Supreme Court has explained, "[i]f the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding other values outweigh the environmental costs." *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).[27]

Although the DEIS recites the differences between the two processes, the DEIS nonetheless recommends a mitigation measure for every adverse local impact determined to be significant. A number of these mitigation measures would require CSX or NS to modify substantially their operating plans. Other preliminary recommendations would require CSX or NS to expend substantial sums of money for grade crossing improvements (which have long been recognized to be the responsibility of federal, state and local governments, not the railroads) and for other improvements and programs. The very real danger of eroding, if not completely eliminating, the public benefits of the Transaction is heightened by the fact that a number of local entities have asked for mitigation measures which go even beyond those recommended in the DEIS.

The EAs prepared in *BN/SF* and *UP/SP* had to provide for mitigation of all significant environmental impacts because the ICC or the Board wished to avoid extending the procedural schedule for preparation of an EIS. The EAs were thus not drafted to facilitate the balancing of benefits and environmental impacts which is the hallmark of the EIS process. Here, however, where the effect of a mitigation measure might reduce materially the public benefits of the Transaction, the Board should balance

---

27 The EIS process does not "require agencies to elevate environmental concerns over other appropriate consideration." *Baltimore Gas and Electric Co.* v. *Natural Resources Defense Council*, 462 U.S. 87, 97 (1983) (citing *Stryckers' Bay Neighborhood Council* v. *Karlen*, 444 U.S. 223, 227 (1980)). Rather, the EIS process mandates that federal agencies "balance a project's economic benefits against its adverse environmental effects." *Hughes River Watershed Conservancy* v. *Glickman*, 81 F.3d 437, 446 (4th Cir. 1996). Once a federal agency identifies and evaluates the adverse environmental effects of a proposed action, NEPA's goals are satisfied. *Simmons* v. *United States Army Corps of Engineers*, 120 F.3d 664, 666 (7th Cir. 1997).

the asserted local impact against the public benefits of the Transaction and determine whether the harm justifies the cure. CSX believes that in virtually all cases it will not. It will never be justified where the alleged "cure" requires harming the carriers' operating plans.

Although CSX and NS were disappointed that the Board rejected the Applicants' proposed procedural schedule in favor of a longer schedule that would more easily accommodate the preparation of an EIS, the prolongation of that schedule to prepare an EIS rather than an EA now provides the Board much greater flexibility in determining whether and how to treat local environmental impacts. Among other benefits, there will be no need for the Board to conduct any mitigation studies after its final decision or to forbid traffic increases pending completion of any mitigation plans. That was the posture that the Board found itself in *UP/SP* under an EA once it identified potentially significant local impacts in Reno, NV, and Wichita, KS.

2. In the Balancing Process, Local Environmental Impacts Should Be Weighed Against the Great Transportation Benefits and Systemwide and Local Environmental Benefits of the Transaction

The great "transportation" benefits of the Transaction have already been described in the Application and Rebuttal and have been reviewed in Part I above. They involve the introduction of much additional rail competition, extensive new single-line service, and enormous savings. In addition, the DEIS has correctly concluded that numerous systemwide environmental benefits would flow from the Transaction. Although these benefits do not receive the extended discussion in the DEIS that localized impacts receive, the Board should afford them the substantial and controlling weight they deserve in making its decision. These benefits -- in the areas of safety, transportation, air quality and energy consumption -- were described in the Environmental Report (Vol. 6A of the Application at 70-78), and in the CSX DEIS Comments at 22-27. Just as important, no systemwide adverse effects have been identified. It is beyond dispute that freight is moved by rail more safely and with less energy consumption and air pollution than by truck, and that the Transaction will greatly strengthen rail's competitive position against trucks throughout the East (over one million intermodal containers or trailers per year are predicted to divert to the rail system). It would thus be contrary

to the public interest to impose burdensome conditions on approval of the Transaction, ostensibly in the name of the environment, which would set back railroads in competing with trucks for freight business and thus eliminate the transportation and environmental benefits of those diversions.

It should also not be overlooked that where traffic will be rerouted to one rail line because of the Transaction on Day One (the day on which CSX and NS will implement their operating plans) that same amount of traffic will be rerouted from another line. The total quantum of local impacts will thus not be greater on Day One; they will simply be distributed among the line segments differently. The local benefits along the line segments that will experience decreases in rail traffic are not described in the DEIS, but this balancing should not be ignored by the Board. It is a fact of life that the individual residents and neighborhoods along Conrail's Lake Shore Line in Cleveland, for example, who will benefit from the rerouting of trains from the Lake Shore Line to Conrail's Short Line, have not flooded the Board with letters in support of the Transaction. The letters have come from those residents near NS's Nickel Plate Line in the western Cleveland suburbs and some from residents near the Short Line who will experience the increased traffic.[28] Yet, in balancing the benefits and impacts of the Transaction, there is no basis for discounting the benefits to the persons who will experience decreased traffic when weighing the impacts on the persons who will experience increased traffic. The reality of America's rail and highway systems is that they enter thousands of communities and move freight and passengers through the backyards and frontyards of countless residences and businesses. The Board, in balancing the impacts on these local interests, must reject the proposals of the City of Cleveland and other like interests that promote one backyard over another while ignoring or glossing over the severe negative impacts that their proposals would have on the national transportation system. Unlike the Board, such proponents are not responsible for enforcing the national transportation goals and policies.

Of course, the operating plans contemplate that the total volume of rail traffic will increase in the years following control as the transportation benefits of the Transaction lead to the diversion of freight from

---

28 Nor have motorists and residents along interstate highways who will benefit from reduced truck traffic spoken up.

truck to rail but, as explained above, the adverse environmental impacts of increased rail traffic will be more than offset by the benefits of decreased truck traffic.

As set forth above in Part I, the "single and essential standard of approval is that the [Board] find the [Transaction] to be consistent with the public interest." *UP/CNW* at 53; *accord* *UP/SP* at 98. Thus, conditions should not be imposed by the Board unless they are necessary to ensure that the Transaction presented to the Board, viewed as a whole, is in the public interest. CSX submits that, given the substantial transportation benefits and systemwide environmental benefits of the Transaction, the Board would be justified in concluding that no mitigation of local environmental impacts is warranted, as the aggregate of all the local environmental impacts that may result from the Transaction does not come close to outweighing the benefits of the Transaction. Nevertheless, where local impacts can be mitigated with reasonable noninvasive measures (measures which do not interfere with the operating plans), CSX does not object to undertaking such mitigation, as CSX's DEIS Comments and its settlement with East Cleveland make clear.

3. Because a Rail Control Transaction Affects Rail Operations Which Are Conducted on an Existing Private Infrastructure and Which Are Comprehensively Regulated To Protect the Public Against Unacceptable Environmental Impacts, the Board Should Not Reduce the Public Benefits of the Transaction by Ordering Special Mitigation Measures for Every Localized Impact

The environmental review of a railroad control transaction is quite unlike the usual subject of an EIS -- the construction of a new facility either by the federal government or with federal funding or federal permit approval. A railroad control transaction, in contrast, involves an extensive network of existing private infrastructure. When a new facility is proposed to be constructed, there are real choices to be made among competing land uses and alternative designs. Mitigation measures are usually appropriate to ensure that when the status quo land use is changed, the design of the project will disrupt the existing environment as little as possible. In a railroad control transaction, however, only existing infrastructure is at issue; all the land is already dedicated to railroad uses (here with the minor exception of the construction of a limited number of short connections and some yard improvements). Land uses adjacent to the existing rail infrastructure almost certainly postdate the railroad; the existing environment thus includes the rail activity. Although the level of

traffic may change on certain line segments or at particular facilities as a result of the transaction, train traffic fluctuations are routine occurrences and are not ordinarily subject to any federal review or approval.[29] The circumstances under which mitigation is appropriate in rail combination cases is thus much more limited.[30]

Furthermore, limitations on the number of trains and times of operations as proposed by various local interests would be destructive of the national rail freight and passenger network, would superfluously, unnecessarily and imperfectly cohabit with comprehensive regulation from other Federal and state agencies, and would result in a patchwork of peculiar, localized regulation. In contrast to such a localized view, Federal regulations cover all the areas addressed through the Board's environmental review process, including rail safety, vehicle safety and delay at grade crossings, passenger rail safety, transportation of hazardous materials, air emissions, and noise emissions. The Board is not the primary regulator of these matters and its contact with them is necessarily episodic, incident to its own primary responsibilities. The Board can rest assured that without **any** special mitigation measures targeted at the local effects of increased traffic on particular line segments or at particular facilities, the public will be protected by the existing regulatory and funding framework. Indeed, if the Board were to impose mitigation with respect to matters subject to primary regulation by other federal or state agencies, the Board would inappropriately intrude on the jurisdiction and priorities of those agencies.

---

29 *See* DEIS Vol. 1 at 1-10. The level of freight traffic on any given rail line or at any given facility varies through the years, sometimes greatly, with shifts in the origin and destination of shipments, the overall level of economic activity, shipper plant closings and openings, competition from other railroads, development of substitute products for those shipped by existing rail customers, competition from trucks, and other factors.

30 An analogy may be useful. When a new interstate highway is proposed to be constructed, an EIS is prepared. That EIS considers a variety of potential impacts, including destruction of natural resources, changes in land use, and local air, noise and transportation effects. Local communities can make their views known. The federal government must weigh all these factors in making the important decision whether to build the new highway and where. Once the decision to proceed is made, however, it would be considered an absurdity for any community along the route to be permitted to cap the number of vehicles which could use a particular section of the highway or to shut down the highway during certain hours. The impermissible burden on interstate travel would be immediately apparent. The decision to construct the interstate rail network was made in the 19th century and the early years of the 20th century. The commitment of resources to that network was made a hundred years ago, and there is no going back. There can be no other rail network as we approach the 21st century. The burden on interstate commerce from a local community blocking the free flow of interstate rail traffic over this network would be just as impermissible as blocking an interstate highway. The public would suffer from the inferior rail service, although the cause of the problem might not be as obvious as suddenly coming upon a roadblock on an interstate highway.

(a) The Board Should Not Modify or Postpone Implementation of Applicants' Operating Plans

Not only is Board management of railroad routing decisions unnecessary to protect the public, that management would very likely harm the public. The CSX and NS operating plans have been carefully designed to maximize the efficient use of the CSX and NS interstate rail networks for the benefit of shippers and the economy in general. Capital improvements have been designed and constructed to provide the capacity required for **these** operating plans. CSX's and NS's ongoing integration planning is designed to achieve the safe, seamless implementation of **these** operating plans. The Board would jeopardize this transition to post-"Day-One" operations and the national rail movements if it were to impose conditions that substantially modify the Operating Plans.[31] CSX cannot overstate the serious harm to the public interest that could be caused by the imposition of such conditions --potential paralysis of the Eastern rail network with potential devastating effects on service, jobs and the communities along the rail network. As amply evidenced by the recent difficulties in the UP service territory, localized problems expand geometrically in an integrated rail system; the resultant negative impacts are not limited to the railroad's pocketbook but are shared by numerous businesses and communities and their employees and residents.

CSX and NS will succeed after the Transaction if they can move freight efficiently (quickly, reliably and cost-effectively), and they will fail if they cannot. In order to maximize efficiency, railroad management must make a myriad of decisions, including train routing and scheduling, arrangements for picking up and delivering cars, strategies and locations for blocking cars and building trains, and coordinating interchange points. The rail network works well only if there is the flexibility to adjust these decisions to meet changing traffic flows and customer needs, and other variables. If artificial restrictions are built into the CSX and NS

---

31 The DEIS recommends two such conditions -- a 15-minute passenger/freight train separation rule which would severely restrict CSX's planned service on its critical Atlantic Coast Service Route along the I-95 corridor, and the limitation on traffic through Erie, PA, pending construction of an alternative route which would severely restrict NS's planned service on its new Southern Tier route to the North Jersey SAA. Some parties, most notably the City of Cleveland and the Four Cities Consortium of northwestern Indiana, have also requested significant modifications to the operating plans. These requested conditions would seriously impede access in and out of Chicago, through Cleveland -- the critical centerpoint of the Conrail "X" -- and in and out of the New York City area.

interstate rail networks (such as limits on the number of trains on a line each day or prohibitions on operating during certain hours or within so many minutes of a passenger train), the rail managers will lose flexibility and the rail network will lose capacity, producing a less efficient rail system, with the resultant loss of rail jobs and the negative impacts on the environment from the diversion of time-sensitive freight to trucks. This means that (1) if a Board condition burdens one railroad of the two more greatly, it will be prevented from competing effectively with the other, thereby adversely affecting the procompetitive benefits of the Transaction, or (2) if the conditions affect CSX and NS equally, they would have to route the freight by slower and/or more circuitous routes (leading to poorer service and an increase in energy consumption and air emissions on a systemwide basis). It also means that CSX and NS will lose business to trucks, eliminating the economic benefits of the Transaction as well as increasing energy consumption, air emissions, and fatal and crippling accidents related to freight transport.

Most importantly, major modifications of the CSX and NS operating plans through the imposition of significant restrictions on train operations, such as proposed by the City of Cleveland, would result in the meltdown of the east-west traffic flows that would equal, if not surpass, the service disruptions occurring in Houston. In this case, the degradation of the national transportation system resulting from such proposals and modifications would be most severely felt in the Northeast and mid-Atlantic service territories.

(b) The Board Should Not Impose Conditions Which Would Burden the Transaction with Substantial Expenditures To Mitigate Local Environmental Impacts

With respect to proposed mitigations that are not in the nature of restrictions on the routes, numbers or schedules of train operations, but in the nature of direct expenditures for things such as upgraded rail/highway crossing warning devices, rail/rail or rail/highway grade separations, noise barriers or special new programs, the proposed "cure" will effect other types of harm, as explained in detail in the CSX DEIS Comments.

First, federal law provides that expenditures for rail/highway crossing warning devices and grade separations are for the benefit of the public, not the railroads, and should accordingly be borne by the public.[32] Collectively, these expenditures in respect of the Transaction might total many hundreds of millions of dollars. It is inappropriate to burden CSX and NS with these costs when similar costs which arise when other railroads change their traffic levels and patterns are borne by the public. Changing the rules only for CSX and NS discriminates against these carriers and puts them at a competitive disadvantage against trucks and other rail carriers. It would subject the Board to untold future requests to "correct" what are for the most part pre-existing conditions. Moreover, because there is an established federal/state regulatory and funding framework for such improvements, the Board intrudes on the jurisdiction and the priorities of other agencies when trying itself to devise a remedy for every impact. It is sufficient for the Board to inform the agencies with jurisdiction about the potential environmental impacts of the Transaction so that they can use that information in their decision-making.

Second, any limited condition for noise mitigation would unfairly treat similarly situated communities dissimilarly, and any expansive condition would be so expensive as to increase the costs of CSX and NS to the point of jeopardizing their competitiveness with other railroads and trucks. More importantly, the expansive conditions suggested by some would so distort the balance of proper mitigation that they would have dire results for the nation's economy. None of these results would serve the public interest. The EPA, in consultation with the Department of Transportation, regulates noise emissions from railroad equipment and facilities pursuant to Section 17 of the Noise Control Act of 1972, 42 U.S.C. § 4916. EPA has chosen to regulate by controlling noise at the source (locomotives and rail cars) and has rejected the approach of shielding receptors by noise barriers. Accordingly,

---

32 *See, e.g.*, CSX DEIS Comments at 72-73, 86-87.

railroads do not typically construct noise barriers.[33] Yet the DEIS and a number of commentors recommend mitigation for noise impacts on a number of line segments, presumably beyond what is already required by federal regulation, including mitigation on one segment which is predicted to carry only 11 trains per day after the Transaction. It should be noted that there are currently over 13,000 miles of rail line in the CSX, NS and Conrail systems that carry 12 or more trains per day. The communities on those lines might well ask why the Board would require construction of a noise barrier on one line with 11 trains a day when they experience more frequent train movements.[34] Where mitigation of impacts from a change in a traffic level would put a community in a better position than one with a similar preexisting traffic level, the mitigation should not be implemented. Nothing in NEPA requires that preferential treatment. Mitigation should only be considered where necessary to place communities with similar levels of traffic after the Transaction on a level playing field. Conversely, a condition that would require construction of noise barriers along thousands of miles of rail line (at a cost of about $1 million/mile for the typical 10-foot-tall barriers along highways) would treat similarly situated communities similarly, but more than eliminate all value from the Transaction.

Third, with respect to proposed conditions that would impose what are essentially new regulatory programs only on CSX and NS, such as proposed new requirements for transporting hazardous materials, these conditions would also impose substantial costs on CSX and NS in the nature of increased personnel costs and possibly increased capital costs which are not borne by other railroads or the trucking industry. CSX agrees with DOT that such conditions are inadvisable because DOT's hazardous materials regulations, which apply to all rail carriers, adequately protect the public. DOT-5 at 6-8. Accordingly, the public interest

---

33 *See* CSX DEIS Comments at 95-6; 40 C.F.R. Part 201 (Noise Emission Standards for Transportation Equipment; Interstate Rail Carriers); 47 Fed. Reg. 54107 (Dec. 1, 1982). Federal law preempts any inconsistent state or local regulation.

34 This recommended mitigation is even more anomalous because it would only benefit residents in a town who experience lower noise levels than their neighbors. The DEIS properly recognizes that horn noise may not be mitigated because FRA requires horns to be sounded at grade crossings for safety reasons. Thus, the only residents that are eligible for mitigation are those located away from grade crossings where horn noise has diminished to the point where wayside noise predominates. Because horn noise is louder than wayside noise, the residents recommended for mitigation experience lower levels of noise than their neighbors near grade crossings.

is not served by putting CSX and NS at a competitive disadvantage by subjecting them alone to expensive new regulatory programs.

4. Not Only Are Many of the Proposed Mitigation Measures Unnecessary and Potentially Harmful, They Are Also Beyond the Scope of the Board's Policies as to the Use of Its Conditioning Power

The exercise of the Board's power to require mitigation is constrained by well-established limitations. The same standards govern the imposition of all conditions by the Board, whether directed to the transportation, economic, or environmental effects of the Transaction. *See*, *e.g.*, DEIS, Vol. 1 at 1-10. However, as explained throughout our Comments on the DEIS (*see*, *e.g.*, pp. 5-7, 13-16), the DEIS fails to apply these standards in a number of critical respects. Moreover, some commentors have improperly urged the Board to go even beyond the mitigation recommended in the DEIS. Space does not permit us to repeat our responsive arguments here. We wish to emphasize, however, that the Board should enforce its sound precedents not to use its conditioning authority to remedy preexisting conditions.[35] In addition, the Board should not reach to impose burdensome mitigation measures where alternative remedies are available or more narrowly tailored mitigation would be adequate to protect the public interest. In this regard, the NEPA process under an EIS and the Board's conditioning authority should not be used to rewrite industrywide regulations and operating practices related to railway safety and operations. The Board has recognized that its conditioning power may not be used to effectuate broad restructuring of the rail industry and the competitive balance among carriers, *see*, *e.g.*, *BN/SF* at 55-56. It follows *a fortiori* from this that it would be inappropriate to use the NEPA review process to impose conditions that fashion broad new safety and operating rules to which other railroads are not subject and that would intrude on the regulatory responsibilities of other federal and/or state agencies.

---

35 SEA has acknowledged that preexisting conditions include "existing railroad operations [and] land development in the vicinity of the railroads." DEIS, Vol. 1 at 1-10; *see* also Reno Final Mitigation Plan at 2-39 and 2-40. SEA has also acknowledged that historically higher train traffic levels should be taken into account when determining the nature of existing railroad operations. Reno Final Mitigation Plan at ES-10. CSX agrees, but believes that the DEIS has impermissibly recommended a number of measures designed to remedy conflicts between rail operations and adjacent land uses that predate the Transaction.

5. The City of Cleveland's Overreaching Request for Conditions Provides a Paradigm of a Case Where the Board Should Reject a Proposed Invasive Mitigation When More Narrowly Tailored Remedies Would Be More Effective and Less Injurious to the Public Interest

Cleveland is the centerpoint of the Conrail "X", the center of Conrail's vital east-west movements. It will become the centerpoint of the competitive transcontinental movements to and from the gateways by CSX and NS. The total volume of freight moving through Cleveland will not increase substantially as a result of the Transaction. The basic allocation of lines agreed to by CSX and NS -- the Short Line to CSX and the Lake Shore Line to NS --furnishes the only existing way in which the two competing railroads can operate through Cleveland without crossing each other at grade. The City of Cleveland has proposed that the allocation of lines be "flipped," so that CSX would operate over the Lake Shore Line and NS would operate over the Short Line. All parties agree that it would be impossible to conduct efficient train operations if all trains had to interweave through the same rail/rail grade crossing at Berea, OH, southwest of the City of Cleveland. Accordingly, the City of Cleveland has proposed that CSX and NS construct a massive rail "flyover" at Berea and associated construction that would cost somewhere in the range of $172 million by the City's own, presumably conservative, estimates. Apart from this enormous out-of-pocket cost, construction of this flyover would take up to two years, during which implementation of the CSX and NS Operating Plans would either be severely disrupted or entirely postponed, and would impose on Berea a massive structure with its own environmental impacts, both during construction and permanently. At a minimum, this construction would result in this main east-west corridor being shut down for eight hours per day during the construction period, causing a meltdown of east-west traffic flows in this 80-plus daily train route. Such a response to limited local environmental impacts in Cleveland is entirely unwarranted, particularly where the Board has undertaken to prepare an EIS and has no obligation to mitigate into insignificance every local impact, significant or otherwise.

Although the City's Comments on the DEIS (at 6) suggest that the rail line routes it favors are entirely industrial and that the routes CSX and NS propose to operate over are entirely residential, this is

simply not true. All of the rail lines through Cleveland pass through a mix of industrial, commercial, institutional and residential areas.[36] Rail freight, including hazardous materials, safely moves through Cleveland today and will do so after the Transaction. The City is protesting the safety risk of adding about 40 trains per day to the Short Line through certain of Cleveland's residential neighborhoods and University Circle. But the same amount of traffic is presently moving over the Lake Shore Line through other Cleveland residential neighborhoods and close to its downtown business district. Moreover, this level of train traffic is far from unusual. There are thousands of miles of rail line in the CSX, NS and Conrail systems, traversing cities, towns and rural areas, over which 40 or more trains a day operate. Such train movements are common throughout all of the major metropolitan areas like Cleveland that Conrail serves today. Comprehensive federal regulation and industry practices ensure that the risk of an accident with serious consequences to any resident of Cleveland is extremely small.

In addition, there will not be a significant increase in the number of Cleveland residents who will experience rail noise. Moreover, CSX has proposed to undertake direct mitigation of increased noise along the Short Line. Taking Cleveland's own figures, the number of Cleveland residences warranting noise mitigation under CSX's and NS's operating plans is 154 or 173 (depending on whether an NS alternative plan is implemented) and the number under Cleveland's alternatives is 25 or 84 (depending on whether its Alternative One or Alternative Two is implemented),[37] a difference of between 70 and 150 residences. CSX respectfully submits that the increase of noise at 70 to 150 residences to levels permitted by federal regulation and presently experienced by people elsewhere in Cleveland and in many other communities throughout

---

36 In its DEIS Comments, the City of Cleveland presents a variety of estimates of the number of persons who live in proximity to (within a thousand feet of) the rail lines proposed to experience traffic increases as a result of the Transaction. Cleveland completely ignores the persons living in proximity to the rail lines which are projected to experience decreases in traffic under the CSX Operating Plan. CSX has estimated that approximately the same number of Cleveland residents live within a thousand feet of the Short Line (which will experience an increase in traffic under the CSX Operating Plan) and of the Lake Shore Line (which will experience a decrease in traffic under the CSX Operating Plan).

37 Cleveland DEIS Comments at 50. CSX believes that Cleveland overstates the differential in noise impacts because it does not take into account the residences on the Lake Shore Line which would be deprived of the benefits of decreased noise levels under its routing Alternatives.

America does not justify the extraordinary relief Cleveland seeks, which would burden the national rail system -- and the City's neighboring municipalities.

Rather, the correct approach is to directly mitigate the noise impacts on those limited number of residences. Despite its general misgivings about noise mitigation noted above, CSX has proposed to undertake direct mitigation of increased noise along the Short Line.[38] The berms and low noise walls proposed by CSX would substantially reduce the amount of time residents are subjected to wheel/rail noise, and the proposed landscaping would help compensate for the locomotive noise that cannot be mitigated. Although Cleveland has dismissed the proposal because it does not reduce noise on the Short Line to pre-Transaction levels, that is not the correct standard for the Board to follow in the general public interest. Moreover, CSX is willing to consult with Cleveland about alternative direct noise mitigation proposals.

Cleveland's neighbor to the east, the City of East Cleveland, where a preponderance of the most affected residences exist, agrees with CSX that the impacts from rerouting train traffic from the Lake Shore Line over the Short Line are best addressed by measures that would directly mitigate the impacts and improve other aspects of life in the community. CSX and the City of East Cleveland recently entered into an agreement by which CSX would (1) mitigate the noise impacts to the approximately 120 residences which abut the Short Line through a combination of berms or low walls and landscaping and sound insulation in the affected houses; (2) provide funding to the City's police, fire and service departments to assist them in responding to rail-related (and other) emergencies; and (3) work cooperatively with the City to provide job and economic development opportunities. CSX believes that these measures are appropriate because the City

---

38 It should be noted that vehicle traffic delay resulting from rail operations is not a serious problem in Cleveland, either at present or after the Transaction under any of the proposed operating scenarios. Because Cleveland has always been extremely important to rail transport, the investment has been made through the years to grade-separate most of the rail infrastructure.

of East Cleveland will experience a significant increase in traffic as a result of the Transaction; and there are no rail lines in that City that will experience corresponding decreases in traffic.[39]

As part of development of a mitigation plan, the Mayor of the City of East Cleveland and his senior safety, fire and other officials inspected the Short Line to better appreciate the proposed train operations and the relationship of this line with the surrounding community. The Mayor organized a town hall meeting with over 150 participants, formed a citizens' advisory group and engaged the City Council to assist in crafting the City's position on the proposed operations and desired mitigation. CSX's Chairman and other CSX officials visited with the Mayor and his City Council and an agreement was achieved that serves the interests of the residents along the Short Line and promotes other legitimate civic goals.

East Cleveland points the proper direction to go. The carriers' operating plans should not be compromised or frustrated. In East Cleveland's light, the Board should take the requisite hard look at the environmental impacts of the Transaction in the Cleveland area. CSX is confident that the Board will conclude that direct mitigation can substantially cure or compensate for the impacts, and that the proposed rerouting would cause more problems than it solves.

As noted above, other mitigation measures that would have similarly invasive and disruptive consequences have also been proposed, both in the DEIS and by commentors such as the Four Cities Consortium. Similarly, no persuasive case has been made out for any of these other burdensome mitigation measures. The Board should similarly reject them.

VIII. CONCLUSION

The Application should be granted as sought; the Related Applications of the Applicants should be granted; and all Responsive Applications should be denied. No conditions should be imposed other than *New York Dock* and the other standard labor-protective provisions contemplated by the Application, and the

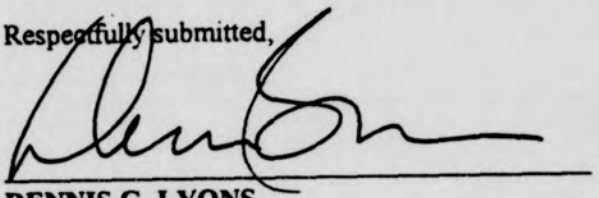
---

39 For a particularly plain-spoken account of certain events which followed the settlement by East Cleveland, see that City's press release, "*Mayor White Retaliates Against Mayor Onunwor for Supporting CSX Deal*," Feb. 18, 1998, in Appendix B.

conditions contemplated by the NITL Settlement with respect to Board oversight. Certain additional relief should be granted as necessary so that certain of the activities contemplated by that Settlement may take place.

Proposed findings and a proposed order implementing the foregoing are attached as Appendix A.

Respectfully submitted,



MARK G. ARON
PETER J. SHUDTZ
ELLEN M. FITZSIMMONS
CSX Corporation
One James Center
901 East Cary Street
Richmond, VA 23129
(804) 782-1400

P. MICHAEL GIFTOS
PAUL R. HITCHCOCK
DOUGLAS R. MAXWELL
NICHOLAS S. YOVANOVIC
CSX Transportation, Inc.
500 Water Street
Jacksonville, FL 32202
(904) 359-3100

DENNIS G. LYONS
RICHARD L. ROSEN
MARY GABRIELLE SPRAGUE
PAUL T. DENIS
DREW A. HARKER
SUSAN T. MORITA
SUSAN B. CASSIDY
SHARON L. TAYLOR
HELENE T. KRASNOFF*
(*Admitted in NY only)
Arnold & Porter
555 12th Street, N.W.
Washington, D.C. 20004-1202
(202) 942-5000

SAMUEL M. SIPE, JR.
BETTY JO CHRISTIAN
TIMOTHY M. WALSH
DAVID H. COBURN
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036-1795
(202) 429-3000

Counsel for CSX Corporation and CSX Transportation, Inc.

February 23, 1998

CERTIFICATE OF SERVICE

I, Dennis G. Lyons, certify that on February 23, 1998, I have caused to be served a true and correct copy of the foregoing CSX-140, Brief of Applicants CSX Corporation and CSX Transportation, Inc. on all parties on the service list in Finance Docket No. 33388, by first-class mail, postage prepaid, or by more expeditious means.