US OFFICE PRODUCTS

APPENDIX A

PROPOSED FINDINGS

AND

ORDER

APPENDIX A

APPLICANTS' PROPOSED FINDINGS AND ORDER

FINDINGS

In Finance Docket No. 33388, we find: (a) that the acquisition and exercise of control of CRR and CRC by CSX and NS, and the resulting joint and common control of CRR, CRC, NYC and PRR, through the proposed Transaction is within the scope of 49 U.S.C. § 11323 and is consistent with the public interest; (b) that the Transaction will not adversely affect the adequacy of transportation to the public; (c) that no other railroad in the area involved in the Transaction has requested inclusion in the Transaction, and that failure to include other railroads will not adversely affect the public interest; (d) that the Transaction will not result in any guarantee or assumption of payment of dividends or any increase in fixed charges except such as are consistent with the public interest; (e) that interests of employees affected by the proposed Transaction do not make such Transaction inconsistent with the public interest, and any adverse effect will be adequately addressed by the conditions imposed herein; (f) that the Transaction will not significantly reduce competition in any region or in the national rail system; and (g) that the terms of the Transaction, including the terms of the acquisition of CRR stock, are just, fair and reasonable to the stockholders of CRR, CSXC and NSC. We further find that the oversight condition imposed in this decision is consistent with the public interest. We further find that any rail employees of Applicants or their rail carrier subsidiaries affected by the control transaction authorized in Finance Docket No. 33388 should be protected by the conditions required by 49 U.S.C. § 11326 (*New York Dock Ry. – Control – Brooklyn Eastern Dist.*, 360 I.C.C. 60, 84-90 (1979)), as to the control transaction and operating agreements, *Norfolk & Western Ry. Co. – Trackage Rights – BN*, 354 I.C.C. 605, 610-15

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

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

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

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

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

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

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

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

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

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

We further find that upon consummation of the authorized control and the CSXT Operating Agreement, the NSR Operating Agreement and the Shared Assets Areas Operating Agreements, it is consistent with the public interest and necessary for the Applicants to carry out the Transaction that CSXT and NSR shall have the right to operate and use the Allocated Assets allocated to each of them and the Shared Assets, including those presently operated by CRC under trackage rights or leases, including but not limited to those listed on Appendix L to the Application (subject to the terms of the

Allocated Assets Operating Agreements, the Shared Assets Areas Operating Agreements and other Ancillary Agreements) as fully as CRC itself had possessed the right to use them, notwithstanding any provision in any law, agreement, order, document, or otherwise, purporting to limit or prohibit CRC's unilateral assignment of its operating rights to another person or persons, or purporting to affect those rights in the case of a change in control.

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

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

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

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

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

In Finance Docket No. 33388 (Sub-No. 1), we find that the proposed operations over the rail line constructed pursuant to the exemption that became effective under our decision served November 25, 1997, are exempt from prior review and approval pursuant to 49 C.F.R. § 1150.36.

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

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

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

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

In Finance Docket No. 33388 (Sub-No. 24), we find that the transfer to CRC of NW's railroad line between MP 319.2 at Tolleston (Gary), IN, and MP 441.8 at Ft. Wayne, IN, is exempt from prior review and approval because such review is not necessary to carry out the transportation policy of 49 U.S.C. § 10101, the transaction is of limited scope, and regulation is not necessary to protect shippers from the abuse of market power.

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

In Finance Docket No. 33388 (Sub-No. 26), we find: (a) that the acquisition and exercise of control of LD&RT by CSXC and CSXT and the common control of LD&RT, CSXT and other rail carriers controlled by CSXT and/or CSXC is within the scope of 49 U.S.C. § 11323 and is consistent with the public interest; (b) that the transaction will not adversely affect the adequacy of transportation to the public; (c) that no other railroad in the area involved in the transaction has requested inclusion in the transaction, and that failure to include such railroads will not adversely affect the public interest; (d) that the transaction will not result in any guarantee or assumption of payment of dividends or any increase in fixed charges; (e) that interests of employees affected by the proposed

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

In Finance Docket No. 33388 (Sub-No. 27), we find that the acquisition of trackage rights by NW is exempt from prior review and approval pursuant to 49 C.F.R. § 1180.2(d)(7).

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

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

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

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

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

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

In Finance Docket No. 33388 (Sub-No. 34), we find that the acquisition of trackage rights by

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

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

In Finance Docket No. 33388 (Sub-No. 36), we find that the responsive application filed by EJE, Transtar and I&M is not consistent with the public interest.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

We further find that the conditions set forth in Appendix __ with respect to environmental mitigation are consistent with the public interest and that no other conditions relating to environmental impacts or environmental mitigation are necessary to make the transactions authorized in this proceeding or the embraced proceedings consistent with the public interest or with the National Environmental Policy Act.

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

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

ORDER

It is ordered:

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

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

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

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

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

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

   b. The NYC/PRR Assignments;

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

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

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

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

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

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

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

7. Upon the consummation of the authorized control and the NYC/PRR Assignments, NYC and PRR shall have such right, title, interest in and other use of such assets as CRC itself had,

notwithstanding any provision in any law, agreement, order, document or otherwise, purporting to limit or prohibit CRC's unilateral assignment of its assets to another person or persons, or purporting to affect those rights, titles, interests and uses in the case of a change of control.

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

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

10. Pursuant to 49 U.S.C. §§ 11321 and 11322, to the extent that the ownership interests and control by CSX and NS over CRR, CRC, NYC or PRR, or any other matter provided for in the Transaction Agreement or the Ancillary Agreements referred to therein and attached thereto, may be deemed to be a pooling or division by CSX and NS of traffic or services or any part of earnings by CSX, NS or Conrail within the scope of 49 U.S.C. § 11322, such pooling or division is approved.

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

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

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

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

15. In Finance Docket No. 33388 (Sub-Nos. 2-7), applicants are authorized to operate over their respective rail lines constructed pursuant to the exemption granted in our decision served November 25, 1997.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

37. In Finance Docket No. 33388 (Sub-No. 69), the responsive application filed by the State of New York, *et al.*, is denied.

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

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

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

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

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

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

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

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

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

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

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

49. The authority granted in Finance Docket No. 33388 for (a) the acquisition and exercise by CSX and NS of control, joint control and common control of CRR, CRC, PRR and NYC, (b) the NYC/PRR Assignments; (c) the entry into and performance of operating agreements for Allocated Assets and Shared Assets; and (d) transfer of the Streator Line to NS are subject to the labor protective conditions set out in *New York Dock Ry. --Control -- Brooklyn Eastern Dist.*, 360 I.C.C. 60, 84-90 (1979).

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

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

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

53. The trackage rights exempted in Finance Docket Nos. 33388 (Sub-Nos. 25, 27-30 and 32-34) are subject to the labor protective conditions set out in *Norfolk & Western Ry. Co.*

Trackage Rights -- BN, 354 I.C.C. 605, 610-15 (1978), as modified in *Mendocino Coast RY, Inc. --Lease and Operate*, 360 I.C.C. 653, 664 (1980).

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

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

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

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

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

US OFFICE PRODUCTS

APPENDIX B

RECENT PERTINENT MATERIALS

TRANSCRIPT OF PROCEEDINGS

BEFORE THE

SURFACE TRANSPORTATION BOARD

CSX CORPORATION AND CSX TRANSPORTATION INC., NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY COMPANY -- CONTROL AND OPERATING LEASES/AGREEMENTS -- CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION	STB Finance Docket No. 33388

DEPOSITION OF L. I. (IKE) PRILLAMAN

CONFIDENTIAL

Washington, D. C.

Tuesday, January 13, 1998

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you're getting 50 percent of the revenue and paying 50 percent of the expenses. What do you think about that?

A. The way it's described, it's -- it's not the preferable way. The ideal way, contracts would be traded to the point that each were allocated. But in your instance, in essence you would be doing as you described.

Q. And that's an accurate reflection of what the transaction agreement between CSX and Norfolk Southern requires?

A. On the broad basis. Not on a contract-by-contract basis, but on an overall basis, yes. Yes.

Q. Yes. Okay. Mr. Prillaman, I thank you very much for the time and that's all the questions I have for you.

A. Thank you.

EXAMINATION BY COUNSEL FOR CSX CORPORATION

BY MR. LYONS:

Q. I think I only have one question, and I'll ask the witness to look at the sheet of paper that

Mr. Gitomer provided to him. And I note that the statement in the question is in the singular: If "a shipper" provided "its" contract.

Would the problems of allocation increase if there were a great many shippers who provided their contracts or tried to go through that exercise in the same time frame with a great many shippers with their contracts? Would the problems increase in that situation and over the situation where there was simply a single one?

A. Yes, it would vary with the volume of requests.

Q. Thank you very much. I have no further questions.

FURTHER EXAMINATION BY COUNSEL FOR APL, LIMITED

BY MR. GITOMER:

Q. Let me add one follow-up to that. That seems to be the situation that's going to arise on the control date where you will have however many Conrail contracts to review. And you've indicated you think that if the control date is August 22nd, that you can review them and be ready to go by

ORIGINAL

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

RAILROAD CONTROL APPLICATION

~~HIGHLY CONFIDENTIAL~~

Washington, D.C.

Thursday, February 5, 1998

Deposition of CHRISTOPHER P. JENKINS, a witness herein, called for examination by counsel for the Parties in the above-entitled matter, pursuant to agreement, the witness being duly sworn by JAN A. WILLIAMS, a Notary Public in and for the District of Columbia, taken at the offices of Steptoe & Johnson, L.L.P., 1330 Connecticut Avenue, Washington, D.C., 20036-1795, at 10:40 a.m., Thursday, February 5, 1998, and the proceedings being taken down by Stenotype by JAN A. WILLIAMS, RPR, and transcribed under her direction.

with the law firm of Donelan, Cleary, Wood & Maser, representing Erie/Niagara Rail Steering Committee. And I have also executed both forms of the undertaking under the protective order.

EXAMINATION BY COUNSEL

FOR APL LIMITED

BY MR. GITOMER:

Q. Good morning, Mr. Jenkins.

A. Good morning.

Q. Thank you for being here, we appreciate your time. I just have a couple questions for you about the portion of your rebuttal testimony dealing with Conrail's transportation contracts.

Are you involved in the negotiation of transportation contracts between CSXT and shippers?

A. Yes.

Q. Could you describe that process?

A. Well, the process involves working with a customer to make a commitment on both parties to move traffic usually for a designated period of time in a designated volume over a given origin/destination pair.

Q. Okay. And is there a general time period that these negotiations entail, would it

be a week, a month, a year, does it vary?

A. It varies tremendously.

Q. Could you estimate how long it might take to negotiate a contract that might have 15 or 20 origin and destination pairs and perhaps 160,000 carloads per year?

A. It could take years, I mean in many cases we have a very long sales cycle.

Q. And what about on the shorter side, if both parties were committed to negotiating to reach agreement, how short do you think it would be?

A. Well, it's difficult to say. But, in dealing with large volumes and multiple O/D pairs, you know, I would guess a minimum time of several months would be involved.

Q. Okay. Thank you. Where CSX and Norfolk Southern can provide transportation for a shipper today, do CSX and NS jointly decide which of the two railroads will handle the shipper's contract business?

A. No.

Q. Does the shipper decide?

A. The shipper decides, yes.

Q. Now, in your rebuttal verified

statement, do you discuss the allocation of Conrail's contract movements between CSXT and Norfolk Southern when the traffic moves between what will become the shared asset areas? And I would refer you to pages 1 and 2 of your statement, in the volume they're pages 209 to 210, at the bottom and then the top of the page.

A. Yes, that is, yes.

Q. Now, on page 1 you refer to the applicants' proposal for effecting a smooth commercial transition for contract movements currently performed by Conrail. And, if that was turned down by the Surface Transportation Board, could you think of another way to allocate Conrail's contracts between CSX and Norfolk Southern that would foster a smooth transition?

A. Not offhand, no.

Q. With regard to the noncontract traffic that Conrail handles today, do you know how CSX and Norfolk Southern are going to allocate that traffic?

A. I don't believe there's an issue of allocation because there's no commitment on the part of either Conrail or the shipper.

Q. Then how will CSX determine which

traffic it will handle that is noncontract traffic?

A. The customer will decide that. We're talking about tariff business I believe.

Q. Yes.

A. The customer will decide.

Q. Now, on the fourth line of page 2 of your statement, you've used the word outset. By outset do you have some specific date in mind?

A. No.

Q. Could outset be the closing date that has been referred to throughout the applicants' rebuttal case?

MR. SIPE: If you're going to use what you think is a defined term, why don't you state your understanding of it just to make sure we're all using the same term.

MR. GITOMER: That's fine.

BY MR. GITOMER:

Q. As I understand the term closing date, and please correct me if I'm wrong, that will be a date sometime after CSX and Norfolk Southern obtain control of Conrail and allocate the Conrail assets and begin operating over those assets?

A. Synonymous with split date?

Q. I would assume that could be the same date, yes.

A. Okay.

Q. Do you have an idea of what, using your term, the split date would be?

A. No.

Q. Now, you've said that section 2.2 C of the transaction agreement is the only feasible way to allocate Conrail's contract movements without -- or you've said that's the only way to do it. Is your main concern with the allocation of the contract traffic the possible shift of those movements back and forth between Norfolk Southern and CSX as you've said in your statement?

A. The concern is that, in order to have a smoothly operating railroad, we need to have a degree of volume predictability. And that could be impaired by having uncertainty as to what's going to occur with some of the traffic.

Q. And you would like to have that certainty on the split date?

A. If not sooner.

Q. Okay. How much sooner than the split

date would you like the certainty?

A. Well, we're in the process right now of resource planning, designing our operating plan, trying to understand what our locomotive and manpower needs would be. And, the sooner we have certainty, the better.

Q. And when will you have access to the Conrail transportation contracts?

A. I don't know.

Q. Now, essentially you've said that CSX and Norfolk Southern will step into Conrail's shoes to guarantee that Conrail's customers will not lose the benefit of the bargains they made.

A. Uh-huh.

Q. And that's on page 2, paragraph 2, essentially lines 3 to 6, I just attempted to summarize that.

A. Uh-huh.

Q. For those contract movements allocated to CSXT, will CSXT also retain the benefit of the bargain that Conrail made for the benefit of Conrail?

A. Yes.

Q. Okay. So the contracts are two-way streets?

TRANSCRIPT OF PROCEEDINGS

BEFORE THE

SURFACE TRANSPORTATION BOARD

CSX CORPORATION AND CSX TRANSPORTATION INC., NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY COMPANY -- CONTROL AND OPERATING LEASES/AGREEMENTS -- CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION	STB Finance Docket No. 33388

DEPOSITION OF THOMAS G. HOBACK

~~CONFIDENTIAL~~

Washington, D. C.

Friday, January 9, 1998

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A No, sir, I don't.

Q Did you ever check into what those rates were?

A That was part of RDI's study, and the distances from Miller Creek and the Switz City area to Stout are very similar to the distance from Farmersburg, and we believed that within a certain range, the rates would be similar.

Q So what you're saying is your consultants concluded that the truck rate from the Switz City/Miller Creek area to Stout is approximately $5 per ton?

A It's more than that. I don't remember the exact numbers that they gave us, but it was not significantly different than a rate from Farmersburg would be.

Q Assuming that's the case, why would you reduce your rate to -- I can't recall whether -- it's $3.15, I believe you said, when your competition is charging over $5?

A Well, a number of factors need to be considered. First of all, IP&L has an ongoing

ownership and maintenance cost in their rolling stock that they do not have with truck deliveries. Mr. Knight told me in 1996 or possibly late 1995 that IP&L had put together a number of teams to look at areas in IP&L where they could reduce their costs, and some people at the Stout plant had come up, independent of my discussions with Mr. Knight, with the thought that, if they could eliminate their rail car unloading capability, that that would save Stout plant in excess of $2 million per year by shutting down the shed, shutting down the car dumper, eliminating the locomotive and crew that they would need at Stout plant. It would eliminate the extra handling of coal because the coal trucks would be able to dump coal right on the stockpile.

In addition to that, Miller Creek is several miles from the railroad loading facility, and so the coal has to be trucked several miles from Miller Creek mine to the load out at Switz City. I don't know the exact cost for that, but I've heard it is between $1.25 and $1.50 per net ton.

By the time all of these costs are added

up, we needed to be about roughly $2 per net ton less than the truck rate in order to be competitive, and then in addition, because we didn't serve Farmersburg mine directly, it was served by Canadian Pacific, they had a charge for moving coal approximately 25 miles from the mine origin at Farmersburg down to a connection with us at Linton.

One of the other factors that Mr. Knight told me, and this was confirmed by Mr. Gionani of Black Beauty Coal, was if IP&L were to take all of their Farmersburg tonnage by truck, Black Beauty would have avoided capital costs of about 4 to $5 million since they would have not had to have built the rail unloading facility and the new holding track.

Q Refresh my recollection. The Farmersburg traffic started moving when?

A January of 1997.

Q 1997. I believe you testified that, in 1995 and 1996, you moved coal from Miller Creek and Switz City to Stout; is that correct?

A Yes, sir.

time. I am just asking, when you studied our proposed build-out, whether you understood it was going to go to a line of railroad that exists today?

A My understanding is that this proposed IP&L build-out, which, by the way, I had never heard anything about before this filing, I had never known that IP&L had seriously considered a build-out since back in the mid-'80s before I started Indiana Railroad. But as I understand it, the proposed IP&L build-out would go to an industrial spur that is not designed for unit coal trains. It would have to move for some ways over that spur or another spur would have to be constructed on the shipper's property. There would have to be substantial upgrading of, I believe it's Kentucky Avenue to get to a Conrail spur.

And then the short answer is that yes, I understand that the build-out could go to the shipper's spur and there is rail there, but that rail and the Conrail trackage for some distance are not suitable for handling coal unit trains today.

Q In any event, the short answer is our

A No.

Q And would your answer be the same about the CP rate quoted to Conrail to serve -- to interchange with Conrail to the north?

A I was not aware that CP quoted in connection with Conrail.

Q Now, do you have any knowledge about the relationship between the two rates that CP quoted, south to Linton or north to Conrail?

A No, sir. The only information that was really shared with me was Don Knight's telling me that the truck rate from Farmersburg to Stout that we needed to meet was this $5 a ton.

Q When you were negotiating this contract with Mr. Knight that you've testified you entered into in mid-'96, was that the first transportation contract Indiana Railroad had with IPL?

A It was the first substantive transportation contract we had with IPL.

Q If I use the word "threat" to describe something you said, will you take it in the same noncritical sense that you told me you meant it when

that each of those movements to which you refer were kinds of movements that occurred for special reasons. They're not -- or were not intended to be ongoing movements.

Q Was it effective in getting you to negotiate lower rates with Mr. Knight -- that he was routing traffic over Conrail as well as directly in on your railroad?

A Mr. Knight told me the competition that we had to meet was truck competition.

Q I didn't ask you what he said. I am asking whether from your standpoint the fact that IP&L routed traffic in over Conrail and not just directly in on you, did that have an effect on your negotiations leading up to that contract?

A I don't recall that it did.

Q You didn't want IP&L to route traffic that way, did you? You wanted all the business you could get for yourself directly?

A Going to Stout plant?

Q Yes.

MS. TAYLOR: Is that a question?

City of East Cleveland

News Release

For Immediate Release
February 18, 1998

Contact: Eric Brewer
216 681 2209

Mayor White retaliates against Mayor Onunwor for supporting CSX deal

Mayor White cuts off discussion about a water department transfer

EAST CLEVELAND - Hours after Mayor Emmanuel Onunwor signed an agreement with CSX officials supporting the rail company's plan to increase train traffic within its borders, Cleveland Mayor Michael White ordered Water Commissioner Julius Ciaccia to cut-off water department transfer discussions with the city.

"It is unfortunate that my brother and my mentor, whom I respect dearly, will take such a position," Mayor Onunwor said. "In my view, the CSX transportation plan, and the conversion of East Cleveland from master meter to direct services are two separate issues that have no relationship whatsoever. Unfortunately, my brother does not see it that way."

Mayor Onunwor expressed surprise at Mayor White's quick and un-Christian-like retaliation against his community, saying that it was nothing more than an attempt to punish him for not following his wishes. Mayor White has been a constant critic of the CSX/Conrail merger.

"As has been his pattern, Mayor White is attempting to intimidate those who disagree with him into accepting his way of thinking," Mayor Onunwor said. "The real world doesn't operate that way."

Mayor Onunwor said CSX officials, which included CSX Chairman John Snow, made an honorable attempt to negotiate the differences the rail line and the community had with each other. He said the agreement he signed this morning with CSX allows his community to receive $2.2 million in cash to improve East Cleveland's safety and service departments; $480,000 in cash to residents for use in abating noise for about 120 homes directly alongside the rail lines; between $850,000 and $1,000,000 to landscape property alongside the rail line that CSX will own that is now owned by Conrail; the promise of 15 percent of the jobs at the intermodal facility; economic development assistance in attracting new companies into the community; and the opportunity to identify residents to work with contractors rebuilding the Conrail Collinwood yard.

"I did what I thought was in the best interest of my community, and will do it again if the need ever arises," Mayor Onunwor said.

Mayor Onunwor said East Cleveland was taken for granted during Cleveland and the Ohio Rail Development Commission's (ORDC) negotiations with CSX. During a meeting at ORDC Chairman James Betts' Cleveland law offices on February 17, 1998, Mayor Onunwor said his Chief of Staff, Eric Brewer, was shocked to learn that officials from both (Tom O'Leary and City of Cleveland Law Director Sharon Sobol Jordan) had indicated that East Cleveland was supportive of ORDC's negative position on the CSX/Conrail merger. Mayor Onunwor said officials from ORDC had never communicated with the city.

Mayor Onunwor said he originally signed a letter agreeing with Cleveland's alternative plan after it was faxed to him at the last minute by someone in Mayor White's law department. Mayor Onunwor said the letter simply came to his office with a signatory page, and was presented to him as if the protest needed to be lodged with the Surface Transporation Board in Washington, D.C. within hours or else the city would lose its ability to have its concerns met at a later date.

"I met with Mayor White and I trusted his judgement at the time," Mayor Onunwor said. "After I had the opportunity to examine the issues for myself, I realized that Mayor White was not in opposition to CSX's merger, he was simply attempting to negotiate the best deal he could for his city. According to Mayor White's plan, East Cleveland - as always - gets left out of the equation."

Mayor Onunwor said his discussions with CSX officials were totally above-board. Unlike the adversarial role that Mayor White has with Cleveland City Council members and Cleveland residents, Mayor Onunwor said East Cleveland City Council members and residents were aware of the negotiations with CSX every step away of the way. He said CSX met with over 150 residents at a Town Hall meeting, and addressed a standing-room only crowd of residents at a February 17 City Council meeting. Mayor Onunwor said City Council members unanimously and enthusiastically voted to support the agreement at its February 17 meeting, an agreement which was met with applause from the residents in attendance.

Mayor Onunwor said he is deeply disappointed that Mayor White has taken the adversarial position that he's taken with East Cleveland. He said Mayor White and other officials must respect the fact that East Cleveland's needs must be met first, and that they may not always be in agreement with the needs of people in other communities.

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ORIGINAL

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)

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February 23, 1998

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

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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 Accoun g 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).
Application, 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.

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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,

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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

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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 cancelled 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.

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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

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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

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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

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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 EJF 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 [[[

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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.

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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.

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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.

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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

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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.

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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,

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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

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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

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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.

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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*

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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

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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 *Strykers' 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

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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.

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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 if so, 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

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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 interpoint 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,

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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

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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.

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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

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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

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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

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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,

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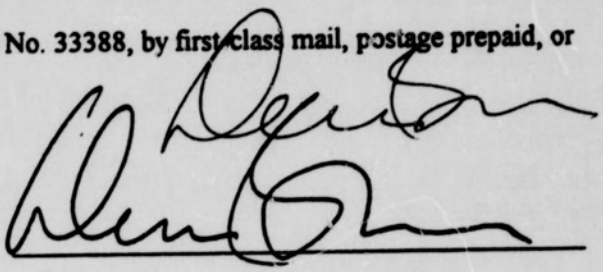
February 23, 1998

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.



US OFFICE PRODUCTS

APPENDIX A

PROPOSED FINDINGS

AND

ORDER

APPENDIX A

APPLICANTS' PROPOSED FINDINGS AND ORDER

FINDINGS

In Finance Docket No. 33388, we find: (a) that the acquisition and exercise of control of CRR and CRC by CSX and NS, and the resulting joint and common control of CRR, CRC, NYC and PRR, through the proposed Transaction is within the scope of 49 U.S.C. § 11323 and is consistent with the public interest; (b) that the Transaction will not adversely affect the adequacy of transportation to the public; (c) that no other railroad in the area involved in the Transaction has requested inclusion in the Transaction, and that failure to include other railroads will not adversely affect the public interest; (d) that the Transaction will not result in any guarantee or assumption of payment of dividends or any increase in fixed charges except such as are consistent with the public interest; (e) that interests of employees affected by the proposed Transaction do not make such Transaction inconsistent with the public interest, and any adverse effect will be adequately addressed by the conditions imposed herein; (f) that the Transaction will not significantly reduce competition in any region or in the national rail system; and (g) that the terms of the Transaction, including the terms of the acquisition of CRR stock, are just, fair and reasonable to the stockholders of CRR, CSXC and NSC. We further find that the oversight condition imposed in this decision is consistent with the public interest. We further find that any rail employees of Applicants or their rail carrier subsidiaries affected by the control transaction authorized in Finance Docket No. 33388 should be protected by the conditions required by 49 U.S.C. § 11326 (*New York Dock Ry. – Control – Brooklyn Eastern Dist.*, 360 I.C.C. 60, 84-90 (1979)), as to the control transaction and operating agreements; *Norfolk & Western Ry. Co. – Trackage Rights – BN*, 354 I.C.C. 605, 610-15

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

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

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

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

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

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

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

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

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

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

We further find that upon consummation of the authorized control and the CSXT Operating Agreement, the NSR Operating Agreement and the Shared Assets Areas Operating Agreements, it is consistent with the public interest and necessary for the Applicants to carry out the Transaction that CSXT and NSR shall have the right to operate and use the Allocated Assets allocated to each of them and the Shared Assets, including those presently operated by CRC under trackage rights or leases, including but not limited to those listed on Appendix L to the Application (subject to the terms of the

Allocated Assets Operating Agreements, the Shared Assets Areas Operating Agreements and other Ancillary Agreements) as fully as CRC itself had possessed the right to use them, notwithstanding any provision in any law, agreement, order, document, or otherwise, purporting to limit or prohibit CRC's unilateral assignment of its operating rights to another person or persons, or purporting to affect those rights in the case of a change in control.

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

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

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

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

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

In Finance Docket No. 33388 (Sub-No. 1), we find that the proposed operations over the rail line constructed pursuant to the exemption that became effective under our decision served November 25, 1997, are exempt from prior review and approval pursuant to 49 C.F.R. § 1150.36.

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

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

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

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

In Finance Docket No. 33388 (Sub-No. 24), we find that the transfer to CRC of NW's railroad line between MP 319.2 at Tolleston (Gary), IN, and MP 441.8 at Ft. Wayne, IN, is exempt from prior review and approval because such review is not necessary to carry out the transportation policy of 49 U.S.C. § 10101, the transaction is of limited scope, and regulation is not necessary to protect shippers from the abuse of market power.

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

In Finance Docket No. 33388 (Sub-No. 26), we find: (a) that the acquisition and exercise of control of LD&RT by CSXC and CSXT and the common control of LD&RT, CSXT and other rail carriers controlled by CSXT and/or CSXC is within the scope of 49 U.S.C. § 11323 and is consistent with the public interest; (b) that the transaction will not adversely affect the adequacy of transportation to the public; (c) that no other railroad in the area involved in the transaction has requested inclusion in the transaction, and that failure to include such railroads will not adversely affect the public interest; (d) that the transaction will not result in any guarantee or assumption of payment of dividends or any increase in fixed charges; (e) that interests of employees affected by the proposed

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

In Finance Docket No. 33388 (Sub-No. 27), we find that the acquisition of trackage rights by NW is exempt from prior review and approval pursuant to 49 C.F.R. § 1180.2(d)(7).

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

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

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

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

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

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

In Finance Docket No. 33388 (Sub-No. 34), we find that the acquisition of trackage rights by

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

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

In Finance Docket No. 33388 (Sub-No. 36), we find that the responsive application filed by EJE, Transtar and I&M is not consistent with the public interest.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

We further find that the conditions set forth in Appendix __ with respect to environmental mitigation are consistent with the public interest and that no other conditions relating to environmental impacts or environmental mitigation are necessary to make the transactions authorized in this proceeding or the embraced proceedings consistent with the public interest or with the National Environmental Policy Act.

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

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

ORDER

It is ordered:

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

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

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

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

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

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

   b. The NYC/PRR Assignments;

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

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

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

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

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

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

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

7. Upon the consummation of the authorized control and the NYC/PRR Assignments, NYC and PRR shall have such right, title, interest in and other use of such assets as CRC itself had,

notwithstanding any provision in any law, agreement, order, document or otherwise, purporting to limit or prohibit CRC's unilateral assignment of its assets to another person or persons, or purporting to affect those rights, titles, interests and uses in the case of a change of control.

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

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

10. Pursuant to 49 U.S.C. §§ 11321 and 11322, to the extent that the ownership interests and control by CSX and NS over CRR, CRC, NYC or PRR, or any other matter provided for in the Transaction Agreement or the Ancillary Agreements referred to therein and attached thereto, may be deemed to be a pooling or division by CSX and NS of traffic or services or any part of earnings by CSX, NS or Conrail within the scope of 49 U.S.C. § 11322, such pooling or division is approved.

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

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

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

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

15. In Finance Docket No. 33388 (Sub-Nos. 2-7), applicants are authorized to operate over their respective rail lines constructed pursuant to the exemption granted in our decision served November 25, 1997.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

37. In Finance Docket No. 33388 (Sub-No. 69), the responsive application filed by the State of New York, *et al.*, is denied.

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

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

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

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

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

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

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

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

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

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

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

49. The authority granted in Finance Docket No. 33388 for (a) the acquisition and exercise by CSX and NS of control, joint control and common control of CRR, CRC, PRR and NYC; (b) the NYC/PRR Assignments; (c) the entry into and performance of operating agreements for Allocated Assets and Shared Assets; and (d) transfer of the Streator Line to NS are subject to the labor protective conditions set out in *New York Dock Ry. --Control -- Brooklyn Eastern Dist.*, 360 I.C.C. 60, 84-90 (1979).

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

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

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

53. The trackage rights exempted in Finance Docket Nos. 33388 (Sub-Nos. 25, 27-30 and 32-34) are subject to the labor protective conditions set out in *Norfolk & Western Ry. Co.*

Trackage Rights -- BN, 354 I.C.C. 605, 610-15 (1978), as modified in *Mendocino Coast RY, Inc. --Lease and Operate*, 360 I.C.C. 653, 664 (1980).

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

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

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

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

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

US OFFICE PRODUCTS

APPENDIX B

RECENT PERTINENT MATERIALS

TRANSCRIPT OF PROCEEDINGS

BEFORE THE

SURFACE TRANSPORTATION BOARD

CSX CORPORATION AND CSX TRANSPORTATION INC., NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY COMPANY -- CONTROL AND OPERATING LEASES/AGREEMENTS -- CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION	STB Finance Docket No. 33388

DEPOSITION OF L. I. (IKE) PRILLAMAN

~~CONFIDENTIAL~~

Washington, D. C.

Tuesday, January 13, 1998

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you're getting 50 percent of the revenue and paying 50 percent of the expenses. What do you think about that?

A. The way it's described, it's -- it's not the preferable way. The ideal way, contracts would be traded to the point that each were allocated. But in your instance, in essence you would be doing as you described.

Q. And that's an accurate reflection of what the transaction agreement between CSX and Norfolk Southern requires?

A. On the broad basis. Not on a contract-by-contract basis, but on an overall basis, yes. Yes.

Q. Yes. Okay. Mr. Prillaman, I thank you very much for the time and that's all the questions I have for you.

A. Thank you.

EXAMINATION BY COUNSEL FOR CSX CORPORATION

BY MR. LYONS:

Q. I think I only have one question, and I'll ask the witness to look at the sheet of paper that

Mr. Gitomer provided to him. And I note that the statement in the question is in the singular: If "a shipper" provided "its" contract.

Would the problems of allocation increase if there were a great many shippers who provided their contracts or tried to go through that exercise in the same time frame with a great many shippers with their contracts? Would the problems increase in that situation and over the situation where there was simply a single one?

A. Yes, it would vary with the volume of requests.

Q. Thank you very much. I have no further questions.

FURTHER EXAMINATION BY COUNSEL FOR APL, LIMITED

BY MR. GITOMER:

Q. Let me add one follow-up to that. That seems to be the situation that's going to arise on the control date where you will have however many Conrail contracts to review. And you've indicated you think that if the control date is August 22nd, that you can review them and be ready to go by

ORIGINAL

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

RAILROAD CONTROL APPLICATION

~~HIGHLY CONFIDENTIAL~~

Washington, D.C.

Thursday, February 5, 1998

Deposition of CHRISTOPHER P. JENKINS, a witness herein, called for examination by counsel for the Parties in the above-entitled matter, pursuant to agreement, the witness being duly sworn by JAN A. WILLIAMS, a Notary Public in and for the District of Columbia, taken at the offices of Steptoe & Johnson, L.L.P., 1330 Connecticut Avenue, Washington, D.C., 20036-1795, at 10:40 a.m., Thursday, February 5, 1998, and the proceedings being taken down by Stenotype by JAN A. WILLIAMS, RPR, and transcribed under her direction.

with the law firm of Donelan, Cleary, Wood & Maser, representing Erie/Niagara Rail Steering Committee. And I have also executed both forms of the undertaking under the protective order.

EXAMINATION BY COUNSEL
FOR APL LIMITED

BY MR. GITOMER:

Q. Good morning, Mr. Jenkins.

A. Good morning.

Q. Thank you for being here, we appreciate your time. I just have a couple questions for you about the portion of your rebuttal testimony dealing with Conrail's transportation contracts.

Are you involved in the negotiation of transportation contracts between CSXT and shippers?

A. Yes.

Q. Could you describe that process?

A. Well, the process involves working with a customer to make a commitment on both parties to move traffic usually for a designated period of time in a designated volume over a given origin/destination pair.

Q. Okay. And is there a general time period that these negotiations entail, would it

be a week, a month, a year, does it vary?

A. It varies tremendously.

Q. Could you estimate how long it might take to negotiate a contract that might have 15 or 20 origin and destination pairs and perhaps 160,000 carloads per year?

A. It could take years, I mean in many cases we have a very long sales cycle.

Q. And what about on the shorter side, if both parties were committed to negotiating to reach agreement, how short do you think it would be?

A. Well, it's difficult to say. But, in dealing with large volumes and multiple O/D pairs, you know, I would guess a minimum time of several months would be involved.

Q. Okay. Thank you. Where CSX and Norfolk Southern can provide transportation for a shipper today, do CSX and NS jointly decide which of the two railroads will handle the shipper's contract business?

A. No.

Q. Does the shipper decide?

A. The shipper decides, yes.

Q. Now, in your rebuttal verified

statement, do you discuss the allocation of Conrail's contract movements between CSXT and Norfolk Southern when the traffic moves between what will become the shared asset areas? And I would refer you to pages 1 and 2 of your statement, in the volume they're pages 209 to 210, at the bottom and then the top of the page.

A. Yes, that is, yes.

Q. Now, on page 1 you refer to the applicants' proposal for effecting a smooth commercial transition for contract movements currently performed by Conrail. And, if that was turned down by the Surface Transportation Board, could you think of another way to allocate Conrail's contracts between CSX and Norfolk Southern that would foster a smooth transition?

A. Not offhand, no.

Q. With regard to the noncontract traffic that Conrail handles today, do you know how CSX and Norfolk Southern are going to allocate that traffic?

A. I don't believe there's an issue of allocation because there's no commitment on the part of either Conrail or the shipper.

Q. Then how will CSX determine which

traffic it will handle that is noncontract traffic?

A. The customer will decide that. We're talking about tariff business I believe.

Q. Yes.

A. The customer will decide.

Q. Now, on the fourth line of page 2 of your statement, you've used the word outset. By outset do you have some specific date in mind?

A. No.

Q. Could outset be the closing date that has been referred to throughout the applicants' rebuttal case?

MR. SIPE: If you're going to use what you think is a defined term, why don't you state your understanding of it just to make sure we're all using the same term.

MR. GITOMER: That's fine.

BY MR. GITOMER:

Q. As I understand the term closing date, and please correct me if I'm wrong, that will be a date sometime after CSX and Norfolk Southern obtain control of Conrail and allocate the Conrail assets and begin operating over those assets?

A. Synonymous with split date?

Q. I would assume that could be the same date, yes.

A. Okay.

Q. Do you have an idea of what, using your term, the split date would be?

A. No.

Q. Now, you've said that section 2.2 C of the transaction agreement is the only feasible way to allocate Conrail's contract movements without -- or you've said that's the only way to do it. Is your main concern with the allocation of the contract traffic the possible shift of those movements back and forth between Norfolk Southern and CSX as you've said in your statement?

A. The concern is that, in order to have a smoothly operating railroad, we need to have a degree of volume predictability. And that could be impaired by having uncertainty as to what's going to occur with some of the traffic.

Q. And you would like to have that certainty on the split date?

A. If not sooner.

Q. Okay. How much sooner than the split

date would you like the certainty?

A. Well, we're in the process right now of resource planning, designing our operating plan, trying to understand what our locomotive and manpower needs would be. And, the sooner we have certainty, the better.

Q. And when will you have access to the Conrail transportation contracts?

A. I don't know.

Q. Now, essentially you've said that CSX and Norfolk Southern will step into Conrail's shoes to guarantee that Conrail's customers will not lose the benefit of the bargains they made.

A. Uh-huh.

Q. And that's on page 2, paragraph 2, essentially lines 3 to 6, I just attempted to summarize that.

A. Uh-huh.

Q. For those contract movements allocated to CSXT, will CSXT also retain the benefit of the bargain that Conrail made for the benefit of Conrail?

A. Yes.

Q. Okay. So the contracts are two-way streets?

TRANSCRIPT OF PROCEEDINGS

BEFORE THE

SURFACE TRANSPORTATION BOARD

CSX CORPORATION AND CSX TRANSPORTATION INC., NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY COMPANY -- CONTROL AND OPERATING LEASES/AGREEMENTS -- CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION	STB Finance Docket No. 33388

DEPOSITION OF THOMAS G. HOBACK

~~CONFIDENTIAL~~

Washington, D. C.

Friday, January 9, 1998

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A No, sir, I don't.

Q Did you ever check into what those rates were?

A That was part of RDI's study, and the distances from Miller Creek and the Switz City area to Stout are very similar to the distance from Farmersburg, and we believed that within a certain range, the rates would be similar.

Q So what you're saying is your consultants concluded that the truck rate from the Switz City/Miller Creek area to Stout is approximately $5 per ton?

A It's more than that. I don't remember the exact numbers that they gave us, but it was not significantly different than a rate from Farmersburg would be.

Q Assuming that's the case, why would you reduce your rate to -- I can't recall whether -- it's $3.15, I believe you said, when your competition is charging over $5?

A Well, a number of factors need to be considered. First of all, IP&L has an ongoing

ownership and maintenance cost in their rolling stock that they do not have with truck deliveries. Mr. Knight told me in 1996 or possibly late 1995 that IP&L had put together a number of teams to look at areas in IP&L where they could reduce their costs, and some people at the Stout plant had come up, independent of my discussions with Mr. Knight, with the thought that, if they could eliminate their rail car unloading capability, that that would save Stout plant in excess of $2 million per year by shutting down the shed, shutting down the car dumper, eliminating the locomotive and crew that they would need at Stout plant. It would eliminate the extra handling of coal because the coal trucks would be able to dump coal right on the stockpile.

In addition to that, Miller Creek is several miles from the railroad loading facility, and so the coal has to be trucked several miles from Miller Creek mine to the load out at Switz City. I don't know the exact cost for that, but I've heard it is between $1.25 and $1.50 per net ton.

By the time all of these costs are added

up, we needed to be about roughly $2 per net ton less than the truck rate in order to be competitive, and then in addition, because we didn't serve Farmersburg mine directly, it was served by Canadian Pacific, they had a charge for moving coal approximately 25 miles from the mine origin at Farmersburg down to a connection with us at Linton.

One of the other factors that Mr. Knight told me, and this was confirmed by Mr. Gionani of Black Beauty Coal, was if IP&L were to take all of their Farmersburg tonnage by truck, Black Beauty would have avoided capital costs of about 4 to $5 million since they would have not had to have built the rail unloading facility and the new holding track.

Q Refresh my recollection. The Farmersburg traffic started moving when?

A January of 1997.

Q 1997. I believe you testified that, in 1995 and 1996, you moved coal from Miller Creek and Switz City to Stout; is that correct?

A Yes, sir.

time. I am just asking, when you studied our proposed build-out, whether you understood it was going to go to a line of railroad that exists today?

A My understanding is that this proposed IP&L build-out, which, by the way, I had never heard anything about before this filing, I had never known that IP&L had seriously considered a build-out since back in the mid-'80s before I started Indiana Railroad. But as I understand it, the proposed IP&L build-out would go to an industrial spur that is not designed for unit coal trains. It would have to move for some ways over that spur or another spur would have to be constructed on the shipper's property. There would have to be substantial upgrading of, I believe it's Kentucky Avenue to get to a Conrail spur.

And then the short answer is that yes, I understand that the build-out could go to the shipper's spur and there is rail there, but that rail and the Conrail trackage for some distance are not suitable for handling coal unit trains today.

Q In any event, the short answer is our

A No.

Q And would your answer be the same about the CP rate quoted to Conrail to serve -- to interchange with Conrail to the north?

A I was not aware that CP quoted in connection with Conrail.

Q Now, do you have any knowledge about the relationship between the two rates that CP quoted, south to Linton or north to Conrail?

A No, sir. The only information that was really shared with me was Don Knight's telling me that the truck rate from Farmersburg to Stout that we needed to meet was this $5 a ton.

Q When you were negotiating this contract with Mr. Knight that you've testified you entered into in mid-'96, was that the first transportation contract Indiana Railroad had with IPL?

A It was the first substantive transportation contract we had with IPL.

Q If I use the word "threat" to describe something you said, will you take it in the same noncritical sense that you told me you meant it when

that each of those movements to which you refer were kinds of movements that occurred for special reasons. They're not -- or were not intended to be ongoing movements.

Q Was it effective in getting you to negotiate lower rates with Mr. Knight -- that he was routing traffic over Conrail as well as directly in on your railroad?

A Mr. Knight told me the competition that we had to meet was truck competition.

Q I didn't ask you what he said. I am asking whether from your standpoint the fact that IP&L routed traffic in over Conrail and not just directly in on you, did that have an effect on your negotiations leading up to that contract?

A I don't recall that it did.

Q You didn't want IP&L to route traffic that way, did you? You wanted all the business you could get for yourself directly?

A Going to Stout plant?

Q Yes.

MS. TAYLOR: Is that a question?

City of East Cleveland

News Release

For Immediate Release
February 18, 1998

Contact: Eric Brewer
216 681 2209

Mayor White retaliates against Mayor Onunwor for supporting CSX deal

Mayor White cuts off discussion about a water department transfer

EAST CLEVELAND - Hours after Mayor Emmanuel Onunwor signed an agreement with CSX officials supporting the rail company's plan to increase train traffic within its borders, Cleveland Mayor Michael White ordered Water Commissioner Julius Ciaccia to cut-off water department transfer discussions with the city.

"It is unfortunate that my brother and my mentor, whom I respect dearly, will take such a position," Mayor Onunwor said. "In my view, the CSX transportation plan, and the conversion of East Cleveland from master meter to direct services are two separate issues that have no relationship whatsoever. Unfortunately, my brother does not see it that way."

Mayor Onunwor expressed surprise at Mayor White's quick and un-Christian-like retaliation against his community, saying that it was nothing more than an attempt to punish him for not following his wishes. Mayor White has been a constant critic of the CSX/Conrail merger.

"As has been his pattern, Mayor White is attempting to intimidate those who disagree with him into accepting his way of thinking," Mayor Onunwor said. "The real world doesn't operate that way."

Mayor Onunwor said CSX officials, which included CSX Chairman John Snow, made an honorable attempt to negotiate the differences the rail line and the community had with each other. He said the agreement he signed this morning with CSX allows his community to receive $2.2 million in cash to improve East Cleveland's safety and service departments; $480,000 in cash to residents for use in abating noise for about 120 homes directly alongside the rail lines; between $850,000 and $1,000,000 to landscape property alongside the rail line that CSX will own that is now owned by Conrail; the promise of 15 percent of the jobs at the intermodal facility; economic development assistance in attracting new companies into the community; and the opportunity to identify residents to work with contractors rebuilding the Conrail Collinwood yard.

"I did what I thought was in the best interest of my community, and will do it again if the need ever arises," Mayor Onunwor said.

Mayor Onunwor said East Cleveland was taken for granted during Cleveland and the Ohio Rail Development Commission's (ORDC) negotiations with CSX. During a meeting at ORDC Chairman James Betts' Cleveland law offices on February 17, 1998, Mayor Onunwor said his Chief of Staff, Eric Brewer, was shocked to learn that officials from both (Tom O'Leary and City of Cleveland Law Director Sharon Sobol Jordan) had indicated that East Cleveland was supportive of ORDC's negative position on the CSX/Conrail merger. Mayor Onunwor said officials from ORDC had never communicated with the city.

Mayor Onunwor said he originally signed a letter agreeing with Cleveland's alternative plan after it was faxed to him at the last minute by someone in Mayor White's law department. Mayor Onunwor said the letter simply came to his office with a signatory page, and was presented to him as if the protest needed to be lodged with the Surface Transporation Board in Washington, D.C. within hours or else the city would lose its ability to have its concerns met at a later date.

"I met with Mayor White and I trusted his judgement at the time," Mayor Onunwor said. "After I had the opportunity to examine the issues for myself, I realized that Mayor White was not in opposition to CSX's merger, he was simply attempting to negotiate the best deal he could for his city. According to Mayor White's plan, East Cleveland - as always - gets left out of the equation."

Mayor Onunwor said his discussions with CSX officials were totally above-board. Unlike the adversarial role that Mayor White has with Cleveland City Council members and Cleveland residents, Mayor Onunwor said East Cleveland City Council members and residents were aware of the negotiations with CSX every step away of the way. He said CSX met with over 150 residents at a Town Hall meeting, and addressed a standing-room only crowd of residents at a February 17 City Council meeting. Mayor Onunwor said City Council members unanimously and enthusiastically voted to support the agreement at its February 17 meeting, an agreement which was met with applause from the residents in attendance.

Mayor Onunwor said he is deeply disappointed that Mayor White has taken the adversarial position that he's taken with East Cleveland. He said Mayor White and other officials must respect the fact that East Cleveland's needs must be met first, and that they may not always be in agreement with the needs of people in other communities.

- 30 -

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SLOVER & LOFTUS

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February 23, 1998

BY HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
Case Control Branch
ATTN: STB Finance Docket 33388
1925 K Street, N.W.
Washington, D.C. 20423-0001

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

Dear Secretary Williams:

Enclosed for filing under seal in the above-referenced proceeding, please find a separately packaged original and twenty-five (25) copies of the HIGHLY CONFIDENTIAL VERSION of the "Brief of Centerior Energy Corporation" **(CEC-17)**. In accordance with the Board's order, we have enclosed a Wordperfect 5.1 diskette containing this filing.

Also enclosed for filing please find an original and twenty-five (25) copies of the REDACTED, PUBLIC VERSION of the "Brief of Centerior Energy Corporation" **(CEC-18)**.

We have included an extra copy of each of these filings. Kindly indicate receipt by time-stamping these copies and returning them with our messenger.

Sincerely,

Frank J. Pergolizzi

Frank J. Pergolizzi
An Attorney for Centerior Energy Corporation

Enclosures

185829

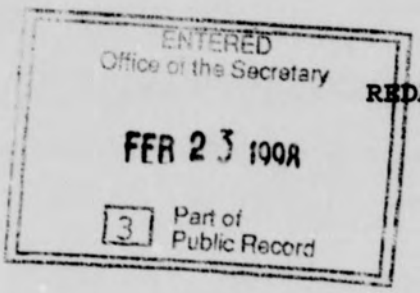
CEC-18

BEFORE THE
SURFACE TRANSPORTATION BOARD

CSX CORPORATION AND CSX TRANSPORTATION, INC., NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY COMPANY -- CONTROL AND OPERATING LEASES/ AGREEMENTS -- CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION	Finance Docket No. 33388

BRIEF OF
CENTERIOR ENERGY CORPORATION

(now known as FIRSTENERGY CORPORATION)



REDACTED, PUBLIC VERSION

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Dated: February 23, 1998

BEFORE THE
SURFACE TRANSPORTATION BOARD

CSX CORPORATION AND CSX TRANSPORTATION, INC., NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY COMPANY -- CONTROL AND OPERATING LEASES/ AGREEMENTS -- CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION	Finance Docket No. 33388

BRIEF OF CENTERIOR ENERGY CORPORATION

(now known as FIRSTENERGY CORPORATION)

In accordance with the procedural schedule in effect in this proceeding, Centerior Energy Corporation ("Centerior")[1] hereby submits this Brief in opposition to the proposed acquisition and division of Conrail (the "Conrail Control Transaction" or the "Transaction") by CSX Corporation and its rail affiliates ("CSX") and Norfolk Southern Corporation and its rail affiliates ("NS") (collectively the "Applicants"). Centerior respectfully submits that unless protective conditions are imposed, the proposed acquisition and division of Conrail's assets between CSX and NS should not be approved.

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[1]Following the filing of Centerior's Comments in this proceeding, Centerior consummated a merger with Ohio Edison to form FirstEnergy Corporation. For ease of reference in this Brief, however, we will continue to refer to Centerior by its prior name.

SUMMARY

The evidence submitted by Centerior in this proceeding establishes that the proposed division of Conrail will significantly harm Centerior in three respects. See Comments of Centerior Energy on the Proposed Division and Acquisition of Conrail, dated October 21, 1997 (CEC-05). Through this evidence, Centerior has demonstrated that approval of the transaction: (1) would eliminate a single-line Conrail routing for coal movements from southeastern Ohio coal mines to Centerior's Cleveland-area generating stations (i.e., the Lake Shore, Eastlake and Ashtabula Stations); (2) would impair the competitiveness of Centerior relative to utility shippers who will be better positioned to take advantage of new (or improved) joint access at both origin and destination as a result of the transaction; and (3) would expose Centerior, as an exclusively-served shipper, to pass-through of the substantial acquisition premium that CSX and NS have paid for the Conrail assets. Verified Statement of Michael A. Kovach ("Kovach V.S."), at 9.

Centerior also showed that the Applicants recognized the harm inherent in eliminating the availability of single-line service. See Supplemental Comments of Centerior Energy, dated December 10, 1997 (CEC-14). Rather than deal with Centerior to correct this problem, the Applicants chose instead to enter an agreement (the "Ohio Valley Agreement" or "the agreement") with one of Centerior's historic long-term Ohio coal suppliers, the

Ohio Valley Coal Company ("Ohio Valley"). Id. The Ohio Valley Agreement represents an arrangement that, while portrayed as the solution to Centerior's problems, instead illustrates the dangers of being held captive at destination by one of the Applicants (in this case CSX). This agreement represents a back room deal that was designed, contrary to the Applicants' self-serving characterization, not to benefit Centerior, but to quiet one of the merger's most vocal opponents. As Centerior showed in its Supplemental Comments (and as further explained below), the Ohio Valley Agreement has a substantially anticompetitive effect on Centerior, as well as on other Ohio coal suppliers.

In order to remedy each of the above-listed harms, Centerior requests that the Board condition any approval of the Transaction upon a grant to Norfolk Southern of trackage rights to serve Centerior's Cleveland-area stations. Kovach V.S., at 18-19.[2] Specifically, Centerior requests that the Board grant NS trackage rights over CSX between the Lake Shore Station and "CP 124" located east of Ashtabula, Ohio, including rights to enter the above line through the Buffalo Connecting Track and Cleveland Connecting Track, for the limited purposes of transporting loaded and empty trains of coal to and from the Ashtabula, Eastlake and Lake Shore Stations.

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[2]Centerior also requests that the Board quantify the amount of the acquisition premium and direct Applicants to exclude that amount from their net investment bases for regulatory costing purposes.

Even if the Board does not grant the requested trackage rights, it should condition approval of the Transaction upon a modification of the Ohio Valley Agreement to ensure that it protects Centerior, and not just the Applicants and Ohio Valley. As Centerior demonstrated in its Comments, these rights are operationally feasible, are narrowly tailored, and will ameliorate the harms caused by the Transaction and/or the Ohio Valley Agreement.

The Applicants do not dispute the feasibility of the requested trackage rights. Instead, in opposing Centerior's request for conditions, the Applicants rely heavily on the Ohio Valley Agreement as the necessary fix to Centerior's concerns. The Applicants also rely heavily on the claim that Centerior will not be harmed because it is simply experiencing the substitution of one monopolist (CSX) for another (Conrail). This simplistic analysis of the competitive impact of the Transaction ignores three very real differences between Centerior's pre-acquisition relationship with Conrail, and the circumstances Centerior would face if the Conrail division were approved without conditions.

First, while Conrail was relatively indifferent to whether Centerior purchased its coal from Ohio origins or the equally distant MGA region, CSX surely will favor its other origins over Ohio sources. Second, Conrail, unlike CSX, has not offered substantial competitive advantages to Centerior's electric utility industry competitors. Third, Conrail has not incurred a huge acquisition premium that will need to be passed-

through to exclusively-served shippers. Finally, and we believe most importantly, Conrail did not enter an agreement affecting Centerior's transportation rates and rights with respect to its coal supplier, but rather dealt directly with Centerior as to those matters.

For these reasons, and for the reasons stated in Centerior's Comments and Supplemental Comments, Centerior submits that the Board should impose a protective condition granting Centerior's requested trackage rights. Alternatively, the Board should condition any approval of the Transaction upon the modification of the Ohio Valley Agreement to ameliorate its anticompetitive impact.

ARGUMENT

I.

The Applicable Legal Standard

Pursuant to the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995) ("ICCTA"), the proposed Conrail division is subject to review and approval by the Board. The applicable statutory provisions governing the Board's approval of rail consolidations are set forth at the ICCTA, 49 U.S.C. §§ 11321-27. These provisions, which recodified the standards that governed rail consolidations under the prior Interstate Commerce Act, require consideration of the following 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).

Moreover, as the Board has explained, the "single and essential standard of approval" for merger transactions is the public interest standard set forth at § 11324(b)(1) and (2). See Finance Docket No. 32760, Union Pacific Corp. -- Control and Merger -- Southern Pacific Rail Corp., Decision served August 12, 1996, at 98 ("UP/SP Merger"), petition for review pending, Docket No. 96-1373, Western Coal Traffic League v. STB, (D.C. Cir.).[3] To determine whether a merger is in the public interest, the Board balances the claimed economic and operational benefits of the merger against any potential competitive harm.

The Board looks to various criteria to determine whether markets served by the merging carriers will suffer competitive

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[3] Citing, Missouri-Kansas-Texas R. Co. v. United States, 632 F.2d 392, 385 (5th Cir. 1980), cert. denied, 451 U.S. 1017 (1981); Penn-Central Merger and N&W Inclusion Cases, 389 U.S. 486, 498-99 (1968).

harm. These factors include: the effectiveness of intramodal competition (predominantly trucking); loss of potential rail routings; the number of market participants; and the participants' respective market shares. See UP/SP Merger, at 100.

The Board's general policy statement governing mergers also emphasizes the importance of competition:

> ... [T]he [Board] does not favor consolidations that substantially reduce the transport alternatives available to shippers unless there are substantial and demonstrable benefits to the transaction that cannot be achieved in a less anticompetitive fashion. Our analysis of the competitive impacts of a consolidation is especially critical in light of the Congressionally mandated commitment to give railroads greater freedom to price without unreasonable regulatory interference.

49 C.F.R. § 1180.1(a)(emphasis added).

Finally, the Board has broad authority to facilitate the public interest by imposing conditions on rail consolidations. See Union Pacific -- Control -- Missouri Pacific; Western Pacific, 366 I.C.C. 459, 562-64 (1982), aff'd sub nom. Southern Pacific Transp. Co. v. ICC, 736 F.2d 708 (D.C. Cir. 1984), cert. denied, 469 U.S. 1208 (1985) ("UP/MP/WP"); Santa Fe Southern Pacific Corp. -- Control -- Southern Pacific Transp. Co., 2 I.C.C.2d 709, 807-08 (1986). Such conditions may include a requirement that one carrier grant to a rival trackage rights and access to necessary facilities. 49 U.S.C. § 11324(c).[4] In

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[4]For example, the Board might require that the merged entity (continued...)

addition, the Board previously has exercised its authority to compel merging parties to enter into agreements to implement conditions of one form or another. See, e.g., UP/SP Merger, at 186 (requiring the applicants to submit agreed upon terms with the City Public Service Board of San Antonio, TX).

The criteria for imposing conditions to remedy anticompetitive effects of a proposed merger were described as follows in the BNSF Merger decision:

> [W]e will not impose conditions unless we find that the consolidation may produce effects harmful to the public interest (such as a significant reduction of competition in an affected market), and the conditions will ameliorate or eliminate the harmful effects, will be operationally feasible, and will produce public benefits (through reduction or elimination of the possible harm) outweighing any reduction to the public benefits of produced by the merger.

BNSF Merger, at 55-56 (citing UP/MP/WP, 366 I.C.C. at 562-565). Proponents of conditions have also been required to show that the requested condition addresses the adverse effects of the transaction and is narrowly tailored to remedy those effects. UP/SP Merger, at 145 (citing UP/CNW, slip op. at 97); Milwaukee --

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(...continued)
grant trackage rights to one or more other railroads over portions of the new combined railroad, in order to maintain competition. This remedy was employed extensively in both the UP/SP Merger and in Finance Docket No. 32549, Burlington Northern Inc. -- Control and Merger -- Santa Fe Pacific Corp., (Decision served August 23, 1995 ("BNSF Merger"), aff'd Western Resources, Inc. v. STB, 109 F.3d 782 (D.C. Cir. 1997).

Reorganization -- Acquisition by GTC, 2 I.C.C.2d 427, 455 (1985). As will be shown below, Centerior's requested conditions satisfy all of these criteria.

II.

The Transaction Will Harm Centerior

There are a variety of demonstrable respects in which the Conrail Control Transaction will harm Centerior. First, in light of the acknowledged superiority of single-line service to interline service, Centerior will be adversely impacted at Ashtabula, Eastlake and Lake Shore by the loss of single-line service from southeastern Ohio coal origins. See Centerior Comments at 7-13. The Applicants do not contest this point, and in fact, rely to a great extent upon the efficiency of single-line service as a leading benefit of their Transaction. See, e.g., Application, Vol. 1, Verified Statement of Mr. John W. Snow, at 9; id., Vol. 2A, Verified Statement of Mr. Raymond L. Sharp, at 8-9.[5]

Second, the Conrail Control Transaction will hinder Centerior's supply choices because it will create a new short-

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[5]The December 11, 1997 settlement agreement that the Applicants entered into with the National Industrial Transportation League ("NITL") fails to resolve Centerior's concerns. In particular, this agreement provides only three years of relief to parties like Centerior that will lose single-line service options, and only requires that the Applicants hold rates to RCAF-U adjusted levels. See Applicants' Rebuttal, Vol. 1, at 773-74. This short-term "fix" will not ameliorate the lasting harm of the Transaction.

haul problem for CSX. Id. at 13-16. At the present time, Conrail is able to provide origin-to-destination service to Centerior from both southeastern Ohio and the MGA region. Because Conrail enjoys a long-haul on both the Powhatan No. 6 and MGA sources (and therefore is not in a position where it might dramatically reduce its own profits), Conrail has been indifferent to Centerior's supply choice. See Verified Statement of Frank S. Harris II ("Harris V.S."), at 12. Given the structure of the Transaction, as is discussed supra, however, the current movement from Ohio Valley to Centerior's Ashtabula and Eastlake stations will become an interline movement in which CSX will only participate to a very limited extent (approximately 49.2 miles for movements to Ashtabula, and only 10.1 miles for movements to Eastlake). See Kovach V.S., at 11.

One of the fundamental principles of railroad pricing is that a destination monopolist will not voluntarily (and under the Board's interpretation of the law, need not) "short-haul" itself. See, e.g., Docket Nos. 41242 et al., Central Power & Light Co. v. Southern Pacific Transp. Co., at 7 (Decision served December 31, 1996), petitions for review pending, Docket Nos. 97-1081 et al., MidAmerican Energy Company v. STB, (8th Cir.); Deposition of Mr. Raymond L. Sharp (dated August 21, 1997) at 170-72 (acknowledging that carriers with exclusive access to a given destination have the ability to dictate the use of their long-hauls); Deposition of Mr. John H. Williams (dated August 12, 1997) at 381 (agreeing that railroads prefer not to short-haul

themselves).[6] In other words, a carrier with exclusive access to a utility plant will price its services from different origins/interchanges in such a manner as to dictate the utility's use of whichever transportation option will provide greatest profit to the subject carrier. CSX therefore will instead favor its new MGA origins, for which it will be able to earn a much greater profit, at Centerior's expense. Harris V.S., at 11-13.[7]

Third, in addition to harming Centerior directly in the foregoing manner, the Transaction also will harm Centerior in an indirect fashion through the enhancement of the competitive position of Centerior's rival utilities. Specifically, the Transaction will afford certain Conrail-served utilities new or improved access to dual-carrier service from origin to destination. See Harris V.S., at 14-15; Kovach V.S., at 14-17. Since Centerior and these utilities compete for off-system sales, and since these utilities will be able to generate electricity in a less costly manner (due to this new or improved joint access),

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[6]Centerior included relevant excerpts from these deposition transcripts in the Appendix to its Comments.

[7]Of course, CSX may quote joint rates with NS for movements from Powhatan No. 6, but CSX's division of such rates will likely be such that CSX will earn at least as much as it would earn on a long-haul movement. Id. at 8. This heightened division, coupled with NS's need to at least recover its costs, would undoubtedly impair the competitiveness of Powhatan No. 6 coal on a delivered cost basis.

Centerior's ability to make off-system sales will be prejudiced. Harris V.S., at 14-16; Kovach V.S., at 15.[8]

Finally, the proposed Transaction will harm Centerior due to the multi-billion dollar premium that CSX and NS have agreed to pay for the acquisition of Conrail. In this regard, Witness Harris indicates that the Conrail acquisition premium amounts to some $ billion for the Board's revenue adequacy purposes, and some $ billion for jurisdictional threshold purposes. Harris V.S., at 17. While the testimony submitted by CSX paints a picture of an easy recovery of this added "investment," Centerior suspects that CSX will attempt to recoup its premium investment through increasing rates paid by exclusively served shippers. As a shipper with single-carrier service at each of its Cleveland-area plants, Centerior is extremely concerned with this possibility, which the Applicants' Rebuttal appears to confirm.[9]

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[8]Significantly, Centerior does not oppose the increased competition that the Applicants have afforded to these other utilities. To the contrary, Centerior fully supports the introduction of competition into the eastern rail market. Centerior, however, does not believe that the Applicants should be permitted to disrupt the competitive balance that currently exists by depriving Centerior of a similar benefit.

[9]In particular, the Applicants's Rebuttal filing indicates that the Applicants will "have no difficulty" recovering the full amount of the acquisition premium. See Applicants' Rebuttal, Vol. 1, Narrative, at 34 ("Debt financings effected in connection with the acquisition by CSX and NS of CRR's common stock will add to their fixed charges. However, . . . CSXC and NSC will have no difficulty absorbing these additional fixed charges. The

(continued...)

The Applicants' principle defense to the harm identified by Centerior is the Ohio Valley Agreement. As the Applicants' assuredly state:

> Applicants have done exactly what one would think Centerior would want -- reaching a contractual arrangement that makes it economically feasible for Centerior to continue to make use of one of its traditional coal suppliers notwithstanding the change from single-line to interline service . . . .

Applicants' Rebuttal, Vol. 1, Narrative at 441.[10] As explained below in Section III, this Agreement is hardly the answer to Centerior's problems.

Applicants also rely heavily on the notion that Centerior will not suffer competitive harm because of the various forms of competition that are available. In presenting this view, the Applicants point to theoretical competitive options allegedly

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(...continued)
Transaction is expected to be accretive to both CSX and NS shareholders within three years."). Validating the worst fears of destination-captive shippers, the Applicants add that "railroads must be given an opportunity to earn (if market conditions and the demand for service permit) a competitive rate of return on the current value of their invested capital." Id. at 109 (emphasis added).

[10] See also id. at 420 (stating that the Agreement will "protect rates and service"); Rebuttal Verified Statement of Robert L. Sansom ("Sansom Reb. V.S."), at 19 ("CSX has agreed to extend, OVCC's single line rates to Eastlake and Ashtabula"); Applicant's Rebuttal to Centerior's Supplemental Comments at 3 (stating that the Agreement "fully addresses not only OVCC's concerns but the issue raised by Centerior").

available to Centerior, including shifting of generation between its various generating units. Sansom Reb. V.S., at 18-30. They also cavalierly dismiss the significance of enhancing the competitive position of Centerior's competitors and suggest, without any empirical support, that the use of alternative forms of transportation for limited portions of Centerior's coal movements translates into the ability to use those alternatives to discipline the carriers' rail rates. Id. at 20-26. Each of these defenses, like the Ohio Valley defense, is without merit and should not serve as a basis for denying the requested trackage rights.

III.

The Ohio Valley Agreement Does not Ameliorate the Transaction's Harm to Centerior

Notwithstanding the Applicants' repeated claims of having benefitted Centerior, the Ohio Valley Agreement does not ameliorate the harm that Centerior will experience as a result of the Transaction. To the contrary, certain aspects of the agreement preclude any legitimate suggestion that the agreement resolves Centerior's concerns.

A. Centerior is not a Party to the Agreement

Even if the Ohio Valley Agreement presented an ideal plan to ameliorate the harm of the Transaction to Centerior (which it does not), Centerior still would require some additional means to resolve its opposition to the Transaction. In

particular, since Centerior is neither a party to, nor a third-party beneficiary of, the agreement,[11] Centerior has no ability to protect any "rights" that it supposedly has under the agreement in the event that the Applicants and Ohio Valley elect to modify -- or even rescind -- the agreement the day after the Board approves the Transaction. This glaring defect, in and of itself, confirms the inaccuracy of the Applicants' repeated suggestion that the existence of the agreement somehow protects Centerior from harm.

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[11]Ohio law, which is to be utilized in interpreting the Ohio Valley Agreement (see Supplemental Comments of Centerior, Counsel's Exhibit No. __ (CE-1), at 12, ¶ 10), specifies that non-parties may seek enforcement of contracts only in limited circumstances. See, e.g., American Rock Mechanics, Inc. v. Thermex Energy Corp., 608 N.E.2d 830, 833 (Ohio Ct. App. 1992) ("In order for a third person to enforce a promise made for his benefit, it must appear that the contract was made and entered into directly or primarily for the benefit of such third person."). The Applicants themselves have confirmed that their primary motivation in entering the Ohio Valley Agreement was to resolve Ohio Valley's opposition to the Transaction, and was not to benefit Centerior. See Rebuttal to Supplemental Comments, at 7 (Centerior's argument regarding the absence of any binding commitment to constrain rates for service to Centerior over a given period of time "overlooks the fact that Applicants settled with OVCC, not Centerior."). In addition, and as discussed infra, the ability of Applicants and Ohio Valley to avoid the

B. The Agreement will not Apply if Ohio Valley and the Applicants are Successful in their Collective Efforts to Market Ohio Valley Coal to Other Customers

Second, Paragraph 2 of the Ohio Valley Agreement specifies that the term of the Agreement "

." Supplemental Comments of Centerior, Counsel's Exhibit No. __ (CE-1) at 9. Paragraph 7 then provides that the agreement

Id. at 11.

At best, paragraph 2 demonstrates that the "solution" to the single-line problem is a short fix. At worst, however, this language confirms that the "term" of the Ohio Valley Agreement is illusory. As noted, Centerior has no guarantee that it will

The ability of the Applicants and Ohio Valley, through their own actions, to

Significantly, the Applicants acknowledge that Centerior is correct in this respect. In particular, the Applicants admit that the Ohio Valley Agreement will not apply if "OVCC finds more profitable outlets for its coal . . . ." Rebuttal to Supplemental Comments at 7. The Applicants only reply to Centerior's observation of this glaring inadequacy in the Ohio Valley Agreement is to suggest that Centerior's argument:

> . . . overlooks the fact that Applicants settled with OVCC, not Centerior. Each of the Applicants customarily seeks to expand the markets for the shippers located on its lines. In the special case of OVCC, which faces the loss of single-line service to a major customer, it is entirely appropriate for Applicants to work with OVCC in an effort to find mutually beneficial commercial arrangements that help it to find attractive outlets for its coal.

Id. (emphasis added). This is precisely the point of Centerior's argument that the agreement does not resolve its concerns with the Transaction. Specifically, this language confirms that it is evident to all parties involved (including the Applicants), that the Applicants "settled with OVCC, not Centerior." In other words, the Applicants suggest that they should not be faulted if the Ohio Valley Agreement does not offer any binding commitment with respect to Centerior. Centerior submits that a necessary corollary to this statement is that the Applicants should not mischaracterize the agreement as being one which resolves Center-

ior's concerns with the Transaction. Centerior further submits that if the Applicants believe that this agreement truly is "the solution," they should not object to the Board's imposition of a condition that holds them to the agreement in a way that assures that Centerior, and not just Ohio Valley, can reap its benefits.

Furthermore, the Board should require that this obligation be enforceable by Centerior at least through the entire term of the Ohio Valley Agreement. Indeed, given the fact that the acknowledged harm will continue beyond that point, Centerior submits that it would be appropriate for the relief to continue for at least ten years.

C. The Agreement Requires the Applicants to

Third, paragraph 5 of the Ohio Valley Agreement requires the Applicants to "

:

Centerior's Supplemental Comments, Counsel's Exhibit No. __ (CE-1), at 10-11 (emphasis added). Disclosure of this rate information, of course, would constitute a violation of 49 U.S.C. § 11904.

Perhaps recognizing the potential problem with § 11904, the Applicants have filed a self-serving, "clarifying" statement indicating that the agreement will not result in a disclosure of Centerior's rates to Ohio Valley. See Rebuttal to Centerior's Supplemental Comments, Exhibit A, Supplemental Verified Statement of Mr. Raymond L. Sharp, at 1 ("[T]o be perfectly clear, the [Ohio Valley] Agreement does not require or permit CSXT or NSR to divulge any rates in a Centerior transportation contract to OVCC.").

As explained by Mr. Sharp, "this provision simply states that CSXT and NSR are required

." Id. Centerior strongly disagrees. Paragraph 5 of the agreement speaks for itself -- and says something entirely different than the "interpretation" offered by Mr. Sharp. This paragraph states plainly and unequivocally that "

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(emphasis added). If the Applicants meant something else, they were not very effective in their drafting. As it stands, this language poses a threat to Centerior that its rates will be

disclosed to Ohio Valley. Such a disclosure would provide a competitive advantage to Ohio Valley vis-a-vis other coal suppliers, and a clear detriment to Centerior when negotiating with a supplier that would have access to its transportation rates.

The Applicants' creative interpretation of paragraph 5 is not sufficient to protect Centerior in this regard. Centerior submits that the only sure remedy to protect it from such anti-competitive, and potentially unlawful, behavior is to grant the requested trackage rights. Alternatively, Centerior submits that the Board can provide some protection by imposing a condition on any approval of the Transaction that prohibits the Applicants from disclosing Centerior's rates under any scenario. Given the Applicants' attempt to rewrite paragraph 5 through their Rebuttal Comments, they cannot legitimately contest the imposition of a condition that would enable Centerior to enforce its rights so they are not disadvantaged by the Applicants' dealings with its supplier.

D. The Agreement Favors Ohio Valley Origins to the Exclusion of All Other Southeastern Ohio Mines

Beyond the defects as to potential enforcement, illusory term, and disclosure of confidential rates, the Ohio Valley Agreement is anticompetitive to the Ohio coal market. Specifically, the agreement

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See Centerior Energy Corporation's Supplemental Comments (CEC-14), Counsel's Exhibit No. __ (CE-1), at 9 (emphasis added). This limitation works to the detriment of both Centerior and all other southeastern Ohio coal origins from which Centerior also will lose its pre-Transaction, single-line service option.

Since all southeastern Ohio coal origins that were accessible via Conrail single-line service before the Transaction (i.e., Ohio Valley and its competitors) will lose that accessibility, the

is a great coup for Ohio Valley, and a great loss for other Ohio producers hoping to serve Centerior. Following any approval of the Transaction, Ohio Valley will find itself in the enviable position of being the only southeastern Ohio coal producer with the ability to

Needless to say, when entering subsequent negotiations with Centerior , Ohio Valley will have a significant advantage over other Ohio producers and may have the ability to adjust its coal prices to offset any purported advan

ages Centerior would obtain through

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Although the Applicants concede that Centerior utilizes rail transportation to ship "non-Ohio Valley" coal from southeastern Ohio origins to its Cleveland-area plants,[12] the Applicants nevertheless claim that Centerior's concerns regarding the limited scope of the Ohio Valley Agreement are a recently concocted effort to benefit from the Transaction. Specifically, in both their December 15 Rebuttal and their December 30 Rebuttal to Centerior's Supplemental Comments, the Applicants insist that Centerior's concerns regarding "non-Ohio Valley" southeastern Ohio origins have not been a part of Centerior's position in this case from its beginnings (and therefore do not merit the Board's consideration). See, e.g., Applicants' Rebuttal, Vol. 1, Narrative, at 442 ("Having lost any claim respecting [Ohio Valley], Centerior argues that it will lose single-line service from other Ohio coal origins."); Applicants' Rebuttal to Centerior's Supplemental Comments, at 8 ("Recognizing that the [Ohio Valley] Agreement moots its principal complaint about the Transaction, Centerior has shifted its ground and now argues that it will lose single-line service from other Ohio coal origins.") (emphasis added).

In fact, Centerior has argued consistently in this proceeding that it is concerned with the loss of pre-Transaction

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[12] See Rebuttal to Centerior's Supplemental Comments at 8.

single-line service from all of the coal origins in southeastern Ohio. See Centerior Comments (CEC-05) at 2 (seeking protection from "the loss of single-line service from southeastern Ohio coal origins"); id. at 13 ("Centerior will be adversely impacted at Ashtabula, Eastlake and Lake Shore by the loss of single-line service from southeastern Ohio coal origins."); Kovach V.S., at 13 ("[E]ven if the Ohio Valley agreement satisfies Ohio Valley's concerns, it does nothing for the other Ohio coal producers that could supply coal to Centerior via the existing single-line Conrail route."); id. ("[T]he Board should recognize the fundamental unfairness of the Conrail division and its elimination of the single-line option from southeastern Ohio mines -- including the Ohio Valley Powhatan No. 6 Mine and other mines located on the same line") (emphasis in original). The Applicants' effort to minimize Centerior's argument in this fashion is inapposite.

* * *

Centerior believes the best way to keep the Applicants honest is to impose the requested trackage rights condition. Absent that relief, however, the Board should condition any approval of the Transaction upon:

> (1) a requirement that the Applicants enter an agreement enforceable by the Board[13] to offer rates and service commitments to Centerior (from all southeastern Ohio

[13] Cf. UP/SP Merger, at 186 (requiring agreement as to the City Public Service Board of San Antonio, TX).

origins from which Centerior's three Cleveland-area plants formerly could receive coal via single-line Conrail service) that will be the same as those rates and service commitments set forth in Centerior's current contract(s) with Conrail which were effective on January 1, 1997; and

(2) a requirement that the obligation to offer such rates shall extend for a minimum period of ten (10) years from the separation date, as defined in the Ohio Valley Agreement at ¶ 2.

IV.

The Applicants Have Not Presented Any Credible Showing That Centerior's Competitive Position Will Not Be Harmed

In addition to arguing that the Ohio Valley Agreement cures all of Centerior's problems with the Transaction, the Applicants also allege that Centerior is not harmed because it can generate a high level of competition, in various forms, that will serve to constrain the rate-making practices of the Applicants. In support of this proposition, the Applicants rely on the highly theoretical testimony of Witness Sansom. As demonstrated below, however, the Applicants have failed to demonstrate that Centerior's competitive position will not be harmed by the Transaction.

The Applicants' position is unsupported by any showing that the alleged competition is "effective competition." To be "effective," under the Board's governing standards, competition must exert "pressure on [a] firm [providing a good or service] to perform up to standards and at reasonable prices, or lose desir-

able business." Market Dominance Determinations, 365 I.C.C. 118, 129 (1981); cf. Docket No. 41191, West Texas Utilities Co. v. Burlington Northern R.R., Decision served May 3, 1996, at 13, aff'd sub nom. Burlington Northern R.R. v. STB, 114 F.3d 206 (D.C. Cir. 1997) ("The issue then is whether WTU could obtain alternative energy at prices sufficiently low to pose a meaningful threat to BN.").

Rather than demonstrate the presence of effective competition, Witness Sansom relies on a limited amount of trucked and barged coal received by Centerior over the past several years at its Cleveland-area stations. Sansom Reb. V.S. at 20-22. In particular, witness Sansom identifies Centerior's past use of trucking for limited movements of coal, and erroneously characterizes a rail-to-barge-to-truck mode as a "movement" that Centerior utilizes to transport coal to Ashtabula. Id. at 21-22. Witness Sansom also refers to the generating units owned by Ohio Edison, the other half of the FirstEnergy merger. He fails, however, to offer any empirical support for his simplistic conclusion that these facilities would improve the transportation options of the Cleveland-area Stations.

As witness Kovach explained in his deposition in this proceeding, Centerior has limited capability to receive coal via truck and could not increase that capacity without substantial investment. Deposition of Mr. Michael A. Kovach (December 5,

1997), at 61-62.[14] Mr. Kovach also explained that the alleged "barge movement" that the Applicants rely upon was in fact an emergency situation where the Pinney Dock was utilized for a limited storage arrangement and that he was unaware of any situation where coal was moved on a rail-to-barge-to-truck basis other than for unusual circumstances. Id. In sum, Mr. Kovach made clear that while trucking and barging coal was theoretically possible, Centerior selects transportation based on determinations of practicality and feasibility, as well as economics. Id.

Applying those principles of practicality and feasibility, neither trucks nor barges have been able to supplant rail as the principle mode of transportation for substantial volumes of coal to the Cleveland-area stations. The Applicants, and witness Sansom, offer no empirical evidence that would support a different conclusion.

The Applicants suggestion that Centerior can also constrain the Applicants' rail rates by backing down and shifting generation on its system is also lacking in any support. As witness Kovach explained:

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[14]The relevant excerpts of this deposition transcript are included within the Appendix to this Brief.

Kovach V.S., at 8-9.[15]

While witness Sansom offers a theoretical discussion of the threat of manipulating generation by Centerior, he offers no support for his conclusion that substituting the higher cost generation referred to by Mr. Kovach would serve as effective or feasible competition.

Finally, the Applicants dismiss Centerior's claim that it will suffer competitive disadvantage because of the new (or improved) joint access that the Applicants have provided to certain other utility shippers. Here again, the Applicants effectively ignore the testimony of Centerior's witnesses. Id. at 14-17; Harris V.S., at 14-16. Mr. Kovach explained that Centerior directly competes for power sales with several utilities that are obtaining improved access as a result of the Transaction. For example, Mr. Kovach noted, "[t]he Detroit Shared Assets Area is an area that is virtually adjacent to Centerior's service territory and is an area in which Centerior will directly compete for energy sales to many large industrial consumers such as the automobile industry." Kovach V.S., at 15.

In response, witness Sansom suggests that the enhancement of these competitors' rail options should not matter to

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[15]As Mr. Kovach further noted, the Lake Shore plant was placed in cold storage in 1996 and is currently not in service. Id. at 7.

Centerior.[16] In support of this proposition, Sansom notes that Detroit Edison already has a competitive advantage over Centerior's stations. Sansom Reb. V.S., at 432. Apparently, the Applicants believe that assuring that this advantage is perpetuated is of no consequence to Centerior. As Centerior's Comments make clear, this is not the case.

V.

The Requested Trackage Rights Condition

Centerior submits that the Board can remedy each of the above concerns by imposing trackage rights over CSX's line between Collinwood Yard and Ashtabula station that would enable NS to transport coal trains to and from Centerior's Ashtabula, Eastlake and Lake Shore stations. This remedy will ameliorate the harmful effects of the transaction as it relates to the loss of single-line service from Ohio coal origins. It will protect Centerior from this loss, as well as other non-Ohio Valley coal mines in southeastern Ohio. It will also ameliorate the disadvantage Centerior will suffer vis-a-vis other utilities that have been competitively enhanced and will provide a measure of protec-

---

[16]In his verified statement in support of the application, witness Sansom noted that 75% of a utility's operating cost is tied to delivered fuel. Sansom V.S., at 6. As witness Harris explained, the ability of the enhanced utilities to lower their delivered fuel cost with the benefits of improved access will surely provide them with a competitive advantage over shippers, like Centerior, that are experiencing a reduction of their single-line service options. Harris V.S., at 14-16.

tion from the Applicants' collective and individual ability to pass-through the acquisition premium.

The Applicants have admitted that trackage rights of the limited nature requested by Centerior are indeed "operationally feasible," as required by Board precedent. In particular, the principal witness responsible for developing the NS Operating Plan, Mr. D. Michael Mohan, testified that he was unaware of any operational constraints that would preclude Centerior's proposed trackage rights solution. Deposition of D. Michael Mohan (dated September 17, 1997) at 302. Centerior raised the feasibility issue in its Comments (id. at 17), and Applicants were silent in Rebuttal on this point.

Moreover, the arbitrariness of the Applicants' decisions concerning joint access rights in the Cleveland area further supports the request that NS' rights be extended in the narrow form requested herein. For example, CSX will have trackage rights over the Youngstown Line, and thus would be in position to continue Centerior's single-line route if it just had been given access to NS' River Line. Likewise, NS can originate the southeastern Ohio movements on its River Line and take one of two routes: (1) it can proceed through Cleveland and move as far as Collinwood Yard -- and accordingly, come short of Ashtabula (by 49.1 miles) and Eastlake (by 10.1 miles);[17] or (2) it can

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[17]NS can also use this route to pass the Lake Shore Station (which lies 4.8 miles west of Collinwood Yard), but cannot serve (continued...)

proceed over the River and Youngstown Lines as far as Ashtabula -- and accordingly, come short of Ashtabula by 3.1 miles to the east, and Eastlake by 36.0 miles to the west. See Harris V.S., at Exhibit __ (FSH-1). Again, a modest extension of rights already existing would enable NS to serve the Ashtabula, Eastlake, and Lake Shore Stations.

Such an extension of the rights agreed to by the Applicants would also be consistent with 49 C.F.R. § 1180.1(a). As noted supra, reductions in transportation alternatives should only be allowed where "there are substantial and demonstrable benefits that cannot be achieved in a less anticompetitive fashion." Id. This is certainly not the case in the Cleveland area. The reduction in Centerior's transportation alternatives easily can be remedied by extending the trackage rights NS will enjoy over CSX to Collinwood Yard and would not disrupt the purported benefits of the transaction. Harris V.S., at 16.

As the foregoing demonstrates, the Applicants clearly carved up the Conrail assets in a manner designed to ensure that Centerior would be exclusively in the hands of CSX. The Applicants easily could have extended the joint access rights in the Cleveland area to accommodate Centerior without disrupting the operations of their respective systems, and should be required to do so as a condition of approval to the Transaction.

(...continued)
the plant under the limited trackage rights that it will receive from CSX.

VI.

Competitive Access

An additional basis to grant the requested trackage rights exists under 49 U.S.C. § 11102(a). Pursuant to this section, the Board may order CSX to provide NS access, for a fee, over its "terminal facilities," including main line track for a "reasonable" distance outside the terminal, if the STB finds that compelling the trackage rights is "practicable" and in the "public interest." These rights would encompass CSX's track between: (i) Collinwood Yard and Eastlake; (ii) Collinwood Yard and Lake Shore; and (iii) Ashtabula, Ohio and the Ashtabula Station.

Both Collinwood Yard (located 4.8 miles east of the Lake Shore plant in Cleveland, Ohio) and Ashtabula, Ohio constitute terminal facilities under the Board's governing standards. See, e.g., CSX Corp. -- Chessie and Seaboard Coast Line Industries, 363 I.C.C. 518, 585 (1980) ("CSX"). The Applicants statements in this very proceeding further confirm that both Collinwood Yard and Ashtabula, Ohio are terminals.[18]

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[18]The Application itself categorizes the Collinwood facility amongst CSX's "Other Yards and Terminals" and states that:

> After the acquisition, CSX will operate into Conrail's Collinwood Yard at Cleveland, OH, which will become a major midwest hub for its intermodal network.
>
> . . . Collinwood is used as a classification

(continued...)

The Applicants also acknowledge that Ashtabula, Ohio will be a point of interconnection of NS' and CSXT's lines (through which significant volumes of traffic move), therefore confirming that Ashtabula should be classified as a terminal:

> Today, Conrail is the only railroad that directly serves Ashtabula. CSX has trackage rights to Ashtabula over Conrail lines, but must absorb the destination switch charge, giving Conrail an additional competitive advantage. After the Acquisition, with access to Ashtabula on former Conrail lines, CSX will be an effective competitor. CSX will transport MGA coal, B&O coal, C&O coal, and L&N coal to Ashtabula for transfer onto vessels for deliveries in the Great Lakes region and for east-west movement along the new Northeastern Gateway service route.

See Application, Vol. 3A, at 166.[19]

(...continued)
facility for eastbound multi-level traffic and is also an interchange point with NS.

See Application, Vol. 3A, at 154, 198.

[19]Significantly, the Application provides for NS trackage rights from Collinwood Yard west to Cleveland. See Application, Vol. 3B, at 104 ("NS will have overhead trackage rights on Conrail's Short Line from Quaker to Berea, OH, and overhead trackage rights on Conrail's Chicago Line from CP-181 to Collinwood Yard for purposes of interchange with CSX."); id. at 240 (map depicting NS trackage rights to Collinwood Yard). CSX also will interchange at Ashtabula, and will be able to operate via trackage rights on NS's Youngstown Line. Id. at 109 ("CSX will have overhead trackage rights on Conrail's Youngstown Line to access Ashtabula Harbor facilities."). CSX will also control the interlocking at the crossing of the Harbor Connecting Track with Conrail's Youngstown and Chicago Lines."). Movements from Ohio
(continued...)

Significantly, Centerior's Cleveland-area generating stations are located within a reasonable distance of a terminal. The distance from Collinwood Yard to Lake Shore is 4.8 miles (and is actually over tracks on which NS already will have trackage rights, but will otherwise lack the right to serve the Lake Shore plant); from Collinwood Yard to Eastlake, 10.1 miles; and from Ashtabula to Ashtabula Station, 3.1 miles. These distances qualify easily under the Board's standard.

As noted above, the trackage rights that Centerior seeks are practicable. The Applicants have not offered any rebuttal, either in discovery or in their Rebuttal filings, to warrant a contrary conclusion.

The requested trackage rights also are in the public interest. The Applicants' questionable agreement with Ohio Valley satisfies even the heightened standard of the Board's public interest analysis that is applicable outside of the context of a merger proceeding. In particular, in its seminal decision in Midtec Paper Corp. et. al. v. Chicago and North Western Transportation Company (Use of Terminal Facilities and Reciprocal Switching Agreement, 3 I.C.C.2d 171 (1986) ("Midtec"), the Commission explained this element of proof in greater detail:

(...continued)
Valley, and other Ohio origins, would move northward over the Youngstown line and then eastward through the Connecting Track for ultimate delivery to Ashtabula Station.

> [In analyzing the record], we were attentive to the possibility of classical categories of competitive abuse: foreclosure; refusal to deal; price squeeze; or any other recognizable forms of monopolization or predation. We also considered whether there was any evidence of abuses under the competitive standards of the Rail Transportation Policy, including inadequate service or excessive prices. . . .

Id. at 173-74.

Certainly, the Applicants' actions meet the less stringent public interest standard as it has been applied in the context of a pending merger. In such proceedings, the Board allows parties to meet the public interest standard without proving the existence of anticompetitive conduct. Specifically, in the recent UP/SP merger decision, the Board considered the question of terminal trackage rights in the context of a merger. The competitive access approach was necessary in that case because the incumbent carrier was not one of the applicants, and therefore was not subject to the Board's conditioning power under 49 U.S.C. § 11324.[20] To the contrary, the incumbent carrier was the Kansas City Railway ("KCS"), and BNSF sought trackage rights

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[20] Cf. Denver and Rio Grande Western R.R. and Missouri-Kansas-Texas R.R. v. St. Louis Southwestern Ry., Finance Docket No. 30759 (ICC served January 9, 1987); Rio Grande Industries, Inc. -- Pur. & Track. -- CMW Ry., 5 I.C.C.2d 952 (1989); Rio Grande Industries -- Purchase and Related Trackage Rights -- Soo Line R.R. Line Between Kansas City, MO and Chicago, IL, Finance Docket No. 31505 (ICC served Nov. 15, 1989).

over three segments of KCS' line as a means to effectuate the broad settlement agreement between UPSP and BNSF.[21]

The Board allowed BNSF to operate over KCS' lines without any showing (otherwise required under Midtec) that KCS had engaged in anticompetitive conduct:

> Whether the ICC ever applied its relatively exacting Midtec precedent in the context of a merger is a matter or some debate.[] In any event, we believe that it is inappropriate to do so here, and, to the extent that ICC cases suggest otherwise, we specifically overrule them. Instead, we will apply the broad "public interest" standard that is in section [11102(a)] itself. Congress gave us broad authority in both the public interest standard in section [11102] and in the public interest standard of section 11343. Thus, we believe that it is appropriate for us to retain the flexibility to use the terminal trackage rights provision to prevent carriers opposing a merger from blocking our ability to craft merger conditions that are clearly in the public interest as the ICC did in the past.

UP/SP, at 169 (emphasis added).

Finally, the requested trackage rights will not interfere with the incumbent's operations. Specifically, if Centerior were to obtain competitive access, there would be no net change in traffic over the relevant lines. Instead, only the identity of the delivering carrier would change from CSX to NS.

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[21]Specifically, BNSF needed to operate over a short portion of KCS' lines to allow it to provide a competitive service alternative to UPSP service.

CONCLUSION

For all of the foregoing reasons, the Transaction will have substantial adverse competitive effects on Centerior. If the Board decides to grant the Application, it should condition this approval on:

1. A grant to NS of trackage rights over the line of CSX between the Lake Shore Generating Station and "CP 124" located east of Ashtabula, Ohio, including rights to enter the above line through the Buffalo Connecting Track and Cleveland Connecting Track, for the limited purposes of transporting loaded and empty trains of coal to and from Centerior's Ashtabula, Eastlake and Lake Shore generating stations;

2. In the alternative, a grant of terminal trackage rights (under 49 U.S.C. § 11102) in favor of NS in the manner described above;

3. In the event that the Board declines to grant trackage rights to Centerior in accordance with either § 11324 or § 11102, it should require the Applicants to enter an agreement: (i) enforceable by the Board; (ii) to offer rates and service commitments to Centerior (from all southeastern Ohio origins from which Centerior's three Cleveland-area plants formerly could receive coal via single-line Conrail service) that will be the same as those rates and service commitments set forth in Centerior's current contract(s) with Conrail which were effective on January 1, 1997; (iii) which precludes the disclosure of Centerior's confidential rail rate information to any third party; (iv) which applies to all southeastern Ohio origins from which Centerior's three Cleveland-area plants formerly could receive coal via single-line Conrail service; and (v) which obligates the Applicants to offer

such rates and services for a minimum period of ten (10) years from the separation date, as defined in the Ohio Valley Agreement at ¶ 2; and

4. The quantification of the amount of the acquisition premium and the exclusion of such amount from the Applicants' net investment bases for regulatory costing purposes.

Respectfully submitted,

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Dated: February 23, 1998

APPENDIX

TRANSCRIPT OF PROCEEDINGS

BEFORE THE

SURFACE TRANSPORTATION BOARD

CSX CORPORATION AND CSX TRANSPORTATION INC., NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY COMPANY -- CONTROL AND OPERATING LEASES/AGREEMENTS -- CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION	STB Finance Docket No. 33388

DEPOSITION OF MICHAEL A. KOVACH

THIS DOCUMENT CONTAINS CONFIDENTIAL MATERIAL

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

Washington, D. C.

Friday, December 5, 1997

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MR. ROSEN: Yeah.

MR. PERGOLIZZI: Just give me a second.

MR. ROSEN: Sure.

MR. PERGOLIZZI: I think I do want to ask just one or two questions for clarification points so there's not any confusion on the record.

EXAMINATION

BY MR. PERGOLIZZI:

Q Just so that we're clear on the use of Pinney Dock, has Centerior moved coal through Pinney Dock for purposes other than the limited storage arrangement you described with respect to Powhatan number 6 coal?

A Not that I'm aware of in my year and a half in this job. I don't recall us ever doing --

Q You discussed the use of the least cost approach to selecting fuel choices. Am I correct -- can you tell me whether you also consider issues of practicality and feasibility in selecting fuel choices?

A Well, yeah, you have to consider practicality and feasibility, you know -- as you say,

you know, for example, trucking at Eastlake at this point, you know, once again, without a significant capital investment, we probably wouldn't be able to do much more than we're doing now. Plus, since it's in such a residential neighborhood that I'm not sure feasibility, you have to be limited to what you can and can't take and you have to look at practicality issues also. Just because it's least cost on this sheet doesn't mean it's necessarily chosen. In fact, that's why I said, I couldn't quite tell from that sheet. You'd also look at different things, if a mine doesn't appear to be very reliable even though they're a least cost, you might not take that mine if you've heard certain things.

Q With respect to the environmental compliance plan of 1995, that was Kovach Number 6, you discussed the issue of fuel switching. Am I correct -- strike that.

Was the Ohio Valley Coal Company contract in place at the time you prepared this environmental compliance plan revised between January '95 and January '97?

CERTIFICATE OF SERVICE

I certify that I have this 23rd day of February, 1998, served Highly Confidential copies of the foregoing Brief by hand upon Applicants' counsel:

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I further certify that copies of the Redacted, Public Version of the foregoing Brief were served by first class mail, postage prepaid on:

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The Hon. Janet Reno
Att'y Gen. of the United States
U.S. Dept. of Justice
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and upon all other parties of record in Finance Docket No. 33388.

Andrew B. Kolesar III

Andrew B. Kolesar III

STB FD . 33388 2-23-98 E . 185827

185827

ORIGINAL

Before the

SURFACE TRANSPORTATION BOARD

VOR-2

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

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Attorney for Village
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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

Village of Riverdale, protestant, submits this brief in accordance with Decisions Nos. 6, 12, and 52. Protestant filed a notice of intent to participate, which it followed with a verified statement by its Mayor, on October 21, 1997.[1/]

The applications to dismember Conrail in this and in related proceedings would have a negative impact upon Village of Riverdale.

Riverdale is the siet for major rail operations, and for heavy industry. Two major railroad yards are the Blue Island yard of the Indiana Harbor Belt Railroad Company, and the Barr yard of CSXT. Among the industries located in Riverdale is Acme Steel.

Riverdale is a community of approximately 14,500 population. It is in Cook County. In addition to IHB and CSXT, Riverdale is also served by Illinois Central, Conrail, Baltimore & Ohio Chicago Terminal Railroad Company, and by Metra, the latter an electric commuter railroad. Riverdale is a station on Gateway Weste .. Railway Company, although not physically served by that carrier.

1/ The verified statement was in error given an acronym "JCS-1" instead of VOR-1, for JCS-1 was given an August 22, 1997 filing by another party.

The verified statement of Riverdale's Mayor pointed out the adverse projections of applicants with regard to the Chicago area, of which Riverdale is a part.

The Surface Transportation Board should not approve the breakup of Conrail on the record advanced in this proceeding.[3/]

Respectfully submitted,

Thomas R Bobak jr

THOMAS R. BOBAK
313 River Oaks Drive
Calumet City IL 60409

Attorney for Village
of Riverdale

February 23, 1998

Certificate of Service

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

Calumet City, IL

Thomas R Bobak jr

THOMAS R. BOBAK

3/ Protestant is unaware of any rebuttal by applicants concerning Riverdale's presentation. (CSX/NS-194).

STB FD . 33388 2-23-98 E . 185823

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OFFICES IN
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185823

February 20, 1998

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

VIA FEDRAL EXPRESS

E

RE: 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, STB Finance Docket No. 33388

Dear Secretary Williams:

Enclosed please find an original and 25 copies of Brief of the City of Indianapolis in Support of Its Request for Conditions.

Also enclosed is a diskette formatted in WordPerfect 5.2 with the document.

Very truly yours,

Michael P. Maxwell, Jr.

Counsel for City of Indianapolis, Indiana

mja
Enclosures
cc: U.S. Secretary of Transportation
U.S. Attorney General
Judge Leventhal
3317 MPM J:\DOCS\MPM\PUBL\20XV_1 94531

CI-8

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

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

BRIEF OF THE CITY OF INDIANAPOLIS IN SUPPORT OF ITS REQUEST FOR CONDITIONS

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UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
SURFACE TRANSPORTATION BOARD

CI-8

Finance Docket No. 33388

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

BRIEF OF THE CITY OF INDIANAPOLIS IN SUPPORT OF ITS REQUEST FOR CONDITIONS

The City of Indianapolis (the "City") hereby files its Brief in Support of Its Request for Conditions. The City incorporates by reference the Comments and Supporting Evidence of the City of Indianapolis in Opposition to the Application of CSX Corporation, et al., Unless Competitive Conditions are Imposed (CI-5 and CI-6, hereinafter "Comments"), which were filed with the Board on October 21, 1997. In addition, the City would make the following further comments in connection with the Applicants' Rebuttal filed with the Board on December 15, 1997.

With respect to the situation in Indianapolis, the Applicants' Rebuttal misses the proverbial forest for the trees. This is because the Applicants do not in any significant way address the overall impact of the proposed transaction on the competitive environment in Indianapolis. Instead, they only address how those elements of the transaction for which the City has requested conditions maintain the status quo. It is the overall impact of the proposed transaction, however, that is of particular concern to the City. This overall impact is that the

proposed transaction does not give NS the physical presence, ability or incentive to compete with CSX in Indianapolis, and it allows CSX to have total physical and management control over the quality and cost of service NS can offer to Indianapolis customers. In short, because under the proposed transaction CSX will have by far the highest traffic density, the only direct access to local industries, the shortest route structure to major markets from Indianapolis and an overwhelming physical, investment and management presence in Indianapolis, NS will not be a viable competitor to CSX in the Indianapolis market. Accordingly, from the viewpoint of overall impact, the proposed transaction does not maintain the status quo in Indianapolis.

Based on the foregoing and the reasons and evidence provided in its Comments, the City would request that the Board not approve the proposed transaction unless it imposes the conditions requested by the City. These conditions are essential to ameliorate the anti-competitive impact of the proposed transaction to the City of Indianapolis as a whole. This is of particular importance in view of the fact that Indianapolis is, in the words of the Applicants, "by far the largest '2 to 1' point created by this transaction."

Respectfully submitted,

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Finance Docket No. 33388

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

CERTIFICATE OF SERVICE

I hereby certify that I have served this 20th day of February, 1998, a copy of the foregoing Brief of the City of Indianapolis in Support of its Request For Conditions to Applicants' attorneys and on all other persons of record in this proceeding.

Michael P. Maxwell, Jr.

3317 MPM J:\DOCS\MPM\PUBL\20U6_1 94398