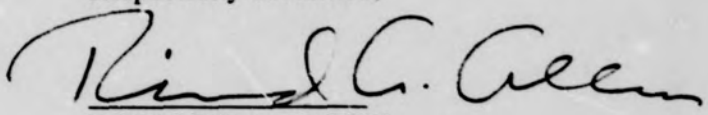
CONCLUSION

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

Respectfully submitted,



JAMES C. BISHOP, JR.
WILLIAM C. WOOLDRIDGE
J. GARY LANE
JAMES L. HOWE, III
ROBERT J. COONEY
A. GAYLE JORDAN
GEORGE A. ASPATORE
JAMES A. PASCHALL
ROGER A. PETERSEN
GREG E. SUMMY
JAMES A. SQUIRES
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23410-2191
(7575) 629-2838

RICHARD A. ALLEN
JAMES A. CALDERWOOD
ANDREW R. PLUMP
JOHN V. EDWARDS
SCOTT M. ZIMMERMAN
PATRICIA E. BRUCE
ELLEN A. GOLDSTEIN
Zuckert, Scoutt & Rasenberger, L.L.P.
888 Seventeenth Street, N.W.
Suite 600
Washington, D.C. 20006-3939
(202) 298-8660

SCOT B. HUTCHINS
Skadden, Arps, Slate
Meagher & Flom LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005-2111
(202) 371-7400

Counsel for Norfolk Southern Corporation and Norfolk Southern Railway Company

February 23, 1998

CERTIFICATE OF SERVICE

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

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

Richard A. Allen

February 23, 1998

APPENDIX A

APPLICANTS' PROPOSED FINDINGS AND ORDER

APPENDIX A

APPLICANTS' PROPOSED FINDINGS AND ORDER

FINDINGS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In Finance Docket No. 33388 (Sub-No. 26), we find: (a) that the acquisition and exercise of control of LD&RT by CSXC and CSXT and the common control of LD&RT, CSXT and other rail carriers controlled by CSXT and/or CSXC is within the scope of 49 U.S.C. § 11323 and is consistent with the public interest; (b) that the transaction will not adversely affect the adequacy of transportation to the public; (c) that no other railroad in the area involved in the transaction has requested inclusion in the transaction, and that failure to include such railroads will not adversely affect the public interest; (d) that the transaction will not result in any guarantee or assumption of payment of dividends or any increase in fixed charges; (e) that interests of employees affected by the proposed transaction do not make such transaction inconsistent with the public interest, and any adverse effect will be adequately addressed by the conditions imposed herein; (f) that the transaction will not significantly reduce competition in any region or in the national rail system; and (g) that the terms of the transaction are just, fair and reasonable. We further find that any rail employees of applicants or their rail carrier affiliates affected by the control transaction authorized in Finance Docket No. 33388 (SubNo. 26) should be protected by the conditions required by 49 U.S.C. § 11326 (*New York Dock Ry., -- Control -- Brooklyn Eastern Dist.*, 360 I.C.C. 60, 84-90 (1979)).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

conservation of energy resources.

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

ORDER

It is ordered:

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

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

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

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

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

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

   b. The NYC/PRR Assignments;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

dismissed.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

APPENDIX B

DEPOSITION EXCERPTS

TRANSCRIPT OF PROCEEDINGS

BEFORE THE

SURFACE TRANSPORTATION BOARD

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

DEPOSITION OF EVERT O. ERICKSON

HIGHLY CONFIDENTIAL

Washington, D. C.

Thursday, February 12, 1998

ACE - FEDERAL REPORTERS, INC.

Stenotype Reporters

1120 G Street, NW
Washington, D.C. 20005
(202) 347-3700

NATIONWIDE COVERAGE
800-336-6646

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

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

Have I read that correctly?

A It is Milan, the pronunciation.

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

A Yes.

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

A Yes.

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

A Yes, they can do that today.

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

Have I read that correctly?

A Read it once more.

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

A That's correct.

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

A Right.

Q Is that also true today?

A Yes.

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

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

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

A No. It is Conrail moved today.

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

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

A Yes.

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

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

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

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

A Yes.

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

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

A Yes.

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

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

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

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

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

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

A Yes.

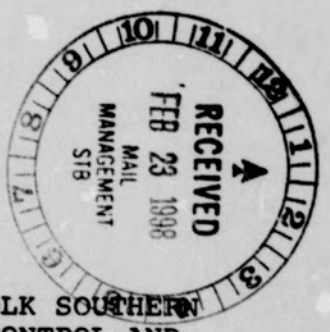
STB FD 33388 2-23-98 E 185852

185852 ORIGINAL

TDF-2

Before the

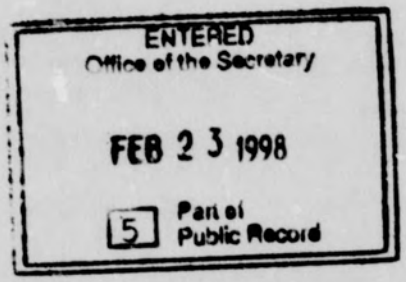
SURFACE TRANSPORTATION BOARD



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



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

Attorney for John D. Fitzgerald

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

This brief in opposition to the proposed transactions is submitted by John D. Fitzgerald, on behalf of United Transportation Union-General Committee of Adjustment (GO 386).[1/]

Protestant filed a Notice of Intent to Participate on August 7, 1997, which was followed with a verified statement, filed on October 21, 1997. The involved UTU-GCA (GO-386) unit is comprised of persons employed by Burlington Northern and Santa Fe Railway Company (BNSF). Experience with the recent BN-ATSF and UP-SP unifications is unsatisfactory. The railroad situation in the Western District is a disaster. (VS Fitzgerald, 2). The CSX-NS takeover of Conrail is viewed as creating additional problems at the territorial gateways. The problems in the Western District will become worse. (VS Fitzgerald, 2-3).

In response to protestant's request that the interest of BNSF employees be considered in determining whether the proposed transactions are in the public interest, applicants in their rebuttal assert that the Board does not consider the impact of a transaction

---

1/ General Chairman of UTU-GCA(GO 386), with offices at 400 East Evergreen Blvd., Vancouver, WA 98660.

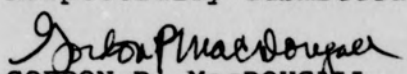
upon employees of carriers who are not applicants. (CSX/NS-176, 576 n.4).

Applicants err. The impact upon BNSF employees is to be considered. Missouri-Kansas-Texas R. Co. v. United States, 632 F.2d 392, 410-13 (5th Cir. 1980). Applicant's citation is taken out of context, and is incorrect.

CONCLUSION

The application should be denied.

Respectfully submitted,



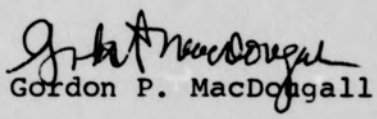
GORDON P. MacDOUGALL
1025 Connecticut Ave., N.W.
Washington, DC 20036

Attorney for John D. Fitzgerald

February 23, 1998

Certificate of Service

I hereby certify I have served a copy of the foregoing upon all parties designated on the Board's service list by first class mail postage-prepaid.



Washington DC

Gordon P. MacDougall

STB FD 33388 2-23-98 E 185839

185839

CN-15

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

CSX CORPORATION AND CSX TRANSPORTATION, INC., NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY COMPANY -- CONTROL AND OPERATING LEASES/AGREEMENTS -- CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION -- TRANSFER OF RAILROAD LINE BY NORFOLK SOUTHERN RAILWAY COMPANY TO CSX TRANSPORTATION, INC.

BRIEF OF
CANADIAN NATIONAL RAILWAY COMPANY

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

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

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

Dated: February 23, 1998

TABLE OF CONTENTS

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

CSX CORPORATION AND CSX TRANSPORTATION, INC., NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY COMPANY -- CONTROL AND OPERATING LEASES/AGREEMENTS -- CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION -- TRANSFER OF RAILROAD LINE BY NORFOLK SOUTHERN RAILWAY COMPANY TO CSX TRANSPORTATION, INC.

BRIEF OF
CANADIAN NATIONAL RAILWAY COMPANY

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

---

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

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

I. INTRODUCTION[3]

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

---

[5] See, e.g., Finance Docket No. 32760, Union Pacific Corp. -- Control and Merger -- Southern Pacific Rail Corp., Decision No. 44 at 178 (served Aug. 12, 1996) ("There must be a nexus between the merger and the alleged harm for which the proposed condition would act as a remedy."); Finance Docket No. 32549, Burlington Northern Inc. and Burlington Northern Railroad Company -- Control and Merger -- Santa Fe Pacific Corporation and The Atchison, Topeka and Santa Fe Railway Company, Decision No. 38 at 55-56 (served Aug. 23, 1995) (conditions will not be imposed "to ameliorate long-standing problems which were not created by the merger," citing BN/Frisco); Union Pacific Corp., Pacific Rail System, Inc., & Union Pacific R.R. -- Control -- Missouri Pacific Corp. & Missouri Pacific R.R., 366 I.C.C. 462, 562-65 (1982).

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,

L. John Osborn

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

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

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

Dated: February 23, 1998

Certificate of Service

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

L. John Osborn

STB FD 33388 2-23-98 E 185826

185826

SLOVER & LOFTUS
ATTORNEYS AT LAW
1224 SEVENTEENTH STREET, N. W.
WASHINGTON, D. C. 20036

WILLIAM L. SLOVER
C. MICHAEL LOFTUS
DONALD G. AVERY
JOHN H. LE SEUR
KELVIN J. DOWD
ROBERT D. ROSENBERG
CHRISTOPHER A. MILLS
FRANK J. PERGOLIZZI
ANDREW B. KOLESAR III
JEAN M. CUNNINGHAM
PETER A. PFOHL

202 347-7170

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
An Attorney for Centerior
Energy Corporation

Enclosures

STB FD . 33388 2-23-98 E . 185824

ULMER & BERNE LLP
ATTORNEYS AT LAW

185824

Internet Address
http://www.ulmer.com/

E-mail Address
ichappell@ulmer.com

Bond Court Building
1300 East Ninth Street, Suite 900
Cleveland, Ohio 44114-1583
Fax (216) 621-7488

(216) 621-8400

Columbus Office
88 East Broad Street, Suite 1980
Columbus, Ohio 43215-3506
Fax (614) 228-8561
Telephone (614) 228-8400

INAJO DAVIS CHAPPELL
Direct Dial (216) 902-8930

E

February 19, 1998

VIA OVERNIGHT MAIL

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

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

Dear Secretary Williams:

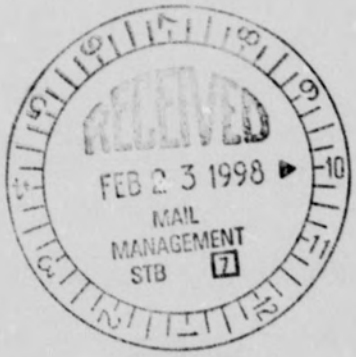
Enclosed for filing the above-captioned docket are an original and twenty-five (25) copies of Ashta Chemicals Inc. Final Brief In Support Of Request For Conditions And Request For Oral Argument (ASHT-13). A 3.5-inch disk containing the text of this pleading in WordPerfect 5.1 format is also provided.

Copies of Ashta Chemicals Inc. Final Brief In Support Of Request For Conditions And Request For Oral Argument (ASHT-13) are being served via first-class mail, postage prepaid on the Honorable Jacob Leventhal, counsel for Applicants, and all parties of record. Please date-stamp the enclosed extra copy of ASHT-13, and return it in the enclosed self-addressed envelope. If you have any questions, please contact me at (216) 902-8930. Thank you.

Very truly yours,

Inajo Davis Chappell

114:diw/765824.D1
Enclosures
cc: All Parties on Official Service List (w/encl.)



ASHT-13

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

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

ASHTA CHEMICALS INC. FINAL BRIEF IN SUPPORT OF REQUEST FOR CONDITIONS AND REQUEST FOR ORAL ARGUMENT

ASHTA CHEMICALS INC.
By: Christopher C. McCracken
Inajo Davis Chappell
Ulmer & Berne LLP
1300 East 9th Street, Suite 900
Cleveland, Ohio 44114-1583

Dated: February 23, 1998

ASHT-13

BEFORE THE
SURFACE TRANSPORTATION BOARD

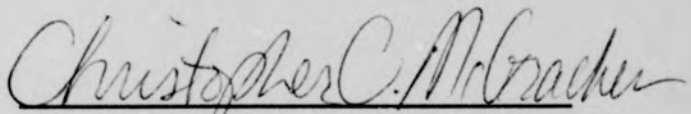
Finance Docket No. 33388

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

ASHTA CHEMICALS INC.
FINAL BRIEF IN SUPPORT OF REQUEST FOR CONDITIONS AND REQUEST FOR ORAL ARGUMENT

Now comes ASHTA Chemicals Inc., by and through counsel, and respectfully submits its Final Brief in Support of Request for Conditions and Request For Oral Argument. ASHTA Chemicals Inc. requests that the Surface Transportation Board condition approval of the within control transaction upon the establishment of a reciprocal switching arrangement or other competitive access remedy in Ashtabula, Ohio. The reasons for the request for conditions are more fully explained in the Brief attached hereto and incorporated herein.

Respectfully submitted,



CHRISTOPHER C. McCRACKEN, ESQ.
INAJO DAVIS CHAPPELL, ESQ.
Ulmer & Berne LLP
1300 East Ninth Street, Suite 900
Cleveland, Ohio 44114-1583
Telephone: 216-621-8400

BRIEF

Introduction

On October 21, 1997 ASHTA Chemicals Inc. ("ASHTA") filed its comments and request for conditions in response to the Application filed in the within proceeding. That filing, stylized as ASHTA Chemicals Inc. Responsive Application and Request For Conditions (ASHT-11), clearly outlines ASHTA's objections to the transaction as currently proposed and offers an appropriate remedy for consideration and implementation by the Surface Transportation Board (the "STB"). Applicants' Rebuttal was filed December, 1997.

This Brief will summarize ASHTA's position in an abbreviated manner. However, ASHTA requests the STB to review its requests for conditions, Verified Statements, and argument set forth in ASHT-11, utilizing an approach and analysis that acknowledges the tremendous economic and environmental impacts to shippers and industries across the country.

Approach and Analysis

Although all of the parties participating in the within proceeding have referred to this proceeding as a "merger" and have applied all of the standards and criteria historically applied to "merger" cases, ASHTA is requesting the STB to approach and analyze this control proceeding in a slightly different way. This case does not involve a traditional merger of railroads. Rather, this case involves the unprecedented carving out of the assets of one railroad between two others Because of this unique set of circumstances and facts that this case presents the STB should not be

locked into prior or traditional analysis. Rather, it is necessary for the STB to review and evaluate each claim and requested remedy carefully. The distinctiveness of the proposed transaction requires critical examination of harms presented and thoughtful remedy. Application of traditional analyses and formulae for relief will not produce the outcome that best serves the public interest. Given the unique aspects of this case, ASHTA requests careful scrutiny of its claim and proposed remedy.

Competitive Harm To ASHTA

At Page P.73 of Applicants' Rebuttal, the Applicants have lumped ASHTA into a category of two to one (2-to-1) claims. Applicants suggest that ASHTA will not suffer any competitive harm as a result of the transaction and that ASHTA cannot identify a specific anti-competitive effect or harm that flows from the proposed transaction. This claim is without merit, and embraces an analysis that does not take into account the cumulative effects of the proposed transaction on ASHTA's business. The fact is that there is no one harm or anticompetitive effect to be suffered by ASHTA flowing from the transaction. There are several impacts.

First, in addition to the harm identified to the public interest, if conditions are not imposed, ASHTA will suffer an obvious economic hardship stemming from the rerouting of direct single line (Conrail) movements to two line or multiple movements of its product. As a direct result of Applicants' current proposal, ASHTA will be harmed in its ability to service existing customers. While single line movements do allow for certain operating efficiencies when direct single line movements are utilized from the point of origination to final destination, there is no such benefit

when two line movements are involved. Because of the manner in which the transaction has been structured by Applicants, the rerouting of various rail lines has eliminated many direct routes and created the need for multi line (two or more) movements. Many of ASHTA's customers will be receiving product from different carriers so that a significant volume of ASHTA's product will no longer be shipped direct (single line movements) with one through rate.

Competitive harm to ASHTA will occur in the form of the additional costs incurred in order to ship to customers receiving product from new carriers. Because customers receiving ASHTA's products will be served by carriers other than CSX -- ASHTA's direct carrier (post-transaction), a signification portion of ASHTA's business will change from single line to double or multi line movements. It is anticipated that this change in product line movement will result in an increase in freight costs and potential loss of customers in areas where the transaction costs cannot be absorbed.

Secondly, the enormous cost of correcting logistical inefficiencies associated with Applicants' proposal clearly will hinder ASHTA's ability to compete in the chemical industry. The STB must look at more than whether or not ASHTA loses any rail transportation alternatives previously available to it. Despite Applicants' analysis, this is not the only relevant consideration. The STB must look at the variety of ways in which competitive harm is caused as a result of the transaction.

There are cumulative effects and impacts to ASHTA and other shippers that will occur as a result of the proposed transaction; some environmental, economic, competitive and anti-competitive. These impacts and effects must be factored into the STB's analysis. Because of the proposed allocation of Conrail's routes, ASHTA's product will be sold and shipped at a greater cost. ASHTA's shipping costs will be increased and revenues impacted. There is, then, substantial harm flowing from the transaction, undiminished by Applicants' conclusory statements that there is no harm and that conditions can not be imposed that allow ASHTA and other shippers to "improve" their competitive position.

Applicants contend that shippers served by a single railroad before the transaction and after the transaction suffer no competitive harm. However, underlying this theory is a static view of the transaction that fails to factor in changes in interchange points and double line movements. These changes will have an anticompetitive effect unless ASHTA responds by allocating additional economic resources to minimize the effect. Even as ASHTA adjusts and responds to avoid the loss of customers, it suffers harm in the form of economic loss.

An alternative response to the inefficiencies posed by the proposed rerouting and, in effect, the rail monopoly is for ASHTA to truck its chemical products. This alternative, however, is fraught with both economic and environmental problems. As was attested to in the Verified Statements of Elaine Sivy and Staci Zappitelli in ASHTA-11, shipment of chemical product via truck is cost prohibitive. It takes four and one-half trucks to transport chemical product that could

be shipped in one rail car. The transaction costs associated with shipment of chemical freight by truck are prohibitive and readily illustrate financial burden/economic harm to ASHTA flowing from the proposed transaction. Additionally, the potential environmental hazards presented by increasing the amount of fuel on the highways warrants the imposition of conditions. To the extent that ASHTA will suffer a possible loss in competition due to increased costs and inefficiencies resulting from double line movement, a clear remediable harm is presented. This anti-competitive harm to ASHTA, together with the harm to the public interest, requires the STB to condition the transaction to remedy these harms.

Harm to Public Interest

The relief requested by ASHTA for competitive access or reciprocal switching to be granted is appropriate because competitive harm is threatened to the public interest as well as to ASHTA. In its Rebuttal, Applicants would have the STB deny ASHTA's requested relief based on the Applicants' view that ASHTA will not suffer any competitive harm as a result of the transaction. Applicants argue that no condition can be imposed by the STB unless ASHTA and other shippers demonstrate that actual harm flows from the transaction. This actual harm argument advanced by the Applicants ignores the fact that the STB has power to remedy threatened harm to the public interest and to impose appropriate conditions, including reciprocal switching or other access remedy, even where there is no showing of actual harm. 49 C.F.R. §11103. As long as it is demonstrated

that the transaction threatens harm to the public interest, then public interest conditions can be imposed.

To the extent that the public interest is served by eliminating circuitous routing of hazardous chemical products mandating access or switching arrangements between carriers to reduce transportation of sensitive chemical material on public highways, the STB can impose such a remedy. Under 49 U.S.C. §10101(14) it is recognized that a major public policy objective is to "encourage and promote energy conservation". Reciprocal switching or other access conditions will promote this public policy, and should be implemented to prevent the inefficient movement of chemical product and corresponding waste of resources.

In ASHTA's view, a competitive access remedy in Ashtabula, Ohio, should be imposed and CSX and Norfolk Southern should be required to enter into some reciprocal switching arrangement so that the needless circuitous movement of hazardous materials can be avoided and the public interest in ensuring direct and efficient transportation of chemical materials will be furthered. The transaction, as currently proposed by Applicants, clearly threatens harm to the public interest in the safe and efficient transportation of chemical products such that the STB is permitted to narrowly tailor and impose practical conditions on the transaction.

For the reasons above and more fully described in ASHTA-11, it is clear that the imposition of an access or switching remedy in Ashtabula, Ohio would benefit the public interest. The conditions sought here are: operationally feasible; will ameliorate or eliminate the harm

threatened to the public interest; and, are of greater benefit to the public than they are detrimental to the transaction. The STB specifically is empowered to impose these conditions to remedy any threatened harm to the public interest, and it is clear that the criteria for the imposition of such conditions, set forth in the STB's UP/MP/WP Decision, 366 I.C.C. at 562 - 565, are satisfied in this case.

Reciprocal Switching Or Other Competitive Access Remedy Is Narrowly Tailored And Operationally Feasible in Ashtabula, Ohio

Regardless of whether the STB imposes the condition to remedy the harm to the public interest or to ASHTA flowing from the proposed transaction, the remedy is appropriate and feasible. The switching arrangement that ASHTA seeks in the Ashtabula area is not unduly burdensome, is operationally feasible, and serves the public interest without adversely impacting the transaction. The public interest would be well served by permitting Ashtabula area shippers of freight to employ more direct routes and access as between the two shippers would promote a more efficient use of the rails. The criteria for whether a reciprocal switching arrangement is practicable and in the public interest, identified in Delaware and Hudson v. Consolidated Rail Corp., 367 ICC 718 (1983), are easily met in this case.

Two switches already exist in the Ashtabula area that would permit competitive access or a reciprocal switching arrangement to be entered into between CSX Corporation and Norfolk Southern. As set forth in the Verified Statement of Staci Zappitelli in ASHT-11, these two

rail shipping locations exist at and near the West Yard in Ashtabula so that interchange and switching in the area is easily accomplished. Carriers utilized these locations extensively during the 1970s. It was at this existing "spur" in Ashtabula, Ohio that outbound West Yard rail cars were rerouted pursuant to a switching arrangement between the carriers. This rail interconnect could easily be reestablished and an access arrangement entered into between CSX and Norfolk Southern. Because the physical plant already exists at this location, the imposition of a interchange requirement, switching arrangement or other competitive access remedy by the STB could easily be accommodated.

Applicants' have argued that "ASHTA's request to have access to NS in addition to CSX is a request to improve ASHTA's competitive position" (Applicants' Rebuttal, Volume 1 at p-74). When both the competitive harm to ASHTA and the harm to the public interest are considered, it is clear that Applicants' argument is not well-taken. Despite Applicants' view that the imposition of switching or access conditions in Ashtabula, Ohio, would improve ASHTA's competitive position, ASHTA believes that the imposition of such a condition would simply mitigate against the obvious harmful consequences of the proposed transaction. Indeed, mitigation is necessary and ASHTA should not be penalized because it will benefit from such mitigation. The imposition of conditions by the STB would neither "improve" ASHTA's position nor hinder the acquisition of Conrail asse.s. ASHTA and the public will merely be protected from the adverse impacts of the transaction.

Request For Oral Argument

ASHTA hereby requests the opportunity to have its representative present oral argument in support of its position to the STB on June 4, 1998. Although there are numerous parties to this proceeding, ASHTA is desirous of presenting its argument orally and to answer any questions the STB may have regarding its position.

CONCLUSION

Based on the foregoing, ASHTA respectfully requests that the STB grant it the relief sought herein by conditioning approval of the transaction on establishment of a reciprocal switching arrangement or other competitive access remedy at or near the West Yard in Ashtabula, Ohio.

Respectfully submitted,

Christopher C. McCracken

CHRISTOPHER C. McCRACKEN, ESQ.
INAJO DAVIS CHAPPELL, ESQ.
Ulmer & Berne LLP
1300 East Ninth Street, Suite 900
Cleveland, Ohio 44114-1583
Telephone: 216-621-8400

CERTIFICATE OF SERVICE

I hereby certify that copies of ASHTA Chemicals Inc. Final Brief in Support of Request for Conditions and Request for Oral Argument (ASHT-13) have been served this 23rd day of February, 1998, by first-class mail, postage prepaid on The Honorable Jacob Leventhal, all counsel of record in Finance Docket No. 33388, and on all parties of record identified on the Official Service List.

Christopher C. McCracken

One of the Attorneys for ASHTA Chemicals Inc.

STB FD 33388 2-23-98 E 185817

185817

347 Madison Avenue
New York, NY 10017-3739
212 340-3000

Donald N. Nelson
President

Metro-North Railroad

AIRBORNE EXPRESS

February 20, 1998

Mr. Vernon A. Williams
Case Control Branch
ATTN: STB Finance Docket No. 33388
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 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 Mr. Williams:

Enclosed for filing in the above captioned proceeding are the original and 25 copies of the brief on behalf of Metro-North Commuter Railroad Company [MNCR-4]. A computer diskette containing the text of the brief in Word Perfect 5.1 format which is convertible into Word Perfect 7.0 also is enclosed.

Copies of MNCR-4 have been served upon all parties of record in this proceeding in accordance with the Certificate of Service attached to the brief.

If you have any questions concerning this filing, please feel free to telephone me at (212) 340-2027. Thank you for your courtesy in this matter.

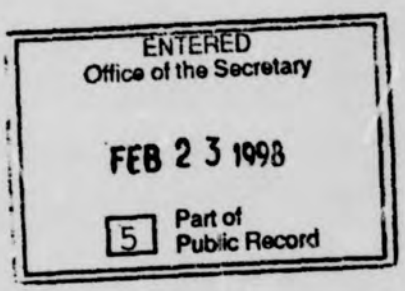
Sincerely yours,

Walter E. Zullig, Jr.
Special Counsel
Attorney for Metro-North
Commuter Railroad Company

Enclosures

[63277/WEZ]21

cc: Parties on Certificate of Service



185817
ORIGINAL

MNCR-4

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

CSX CORPORATION AND CSX TRANSPORTATION, INC., NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY COMPANY -- CONTROL AND OPERATING LEASES/AGREEMENTS -- CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION -- TRANSFER OF RAILROAD LINE BY NORFOLK SOUTHERN RAILWAY COMPANY TO CSX TRANSPORTATION, INC.

BRIEF ON BEHALF OF
METRO-NORTH COMMUTER RAILROAD COMPANY

RICHARD K. BERNARD
General Counsel

Walter E. Zullig, Jr.
Special Counsel

METRO-NORTH COMMUTER RAILROAD COMPANY
347 Madison Avenue
New York, New York 10017
(212) 340-2027

Attorneys for:

METRO-NORTH COMMUTER RAILROAD COMPANY

Dated: February 20, 1998

Due Date: February 23, 1998

ORIGINAL

MNCR-4

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

BRIEF ON BEHALF OF
METRO-NORTH COMMUTER RAILROAD COMPANY

Preliminary Statement

By comments and request for conditions dated October 20, 1997 [MNCR-2], Metro-North Commuter Railroad Company ("MNCR") requested that the Board impose certain conditions in any decision authorizing approval of the proposed transaction covered by the subject proceeding. This brief is filed in support of our request that those conditions be imposed.

MNCR is a public benefit corporation of the State of New York created pursuant to Section 1266(5) of the New York State Public Authorities Law. MNCR is a subsidiary public benefit corporation of the Metropolitan Transportation Authority ("MTA"), an entity charged with broad responsibility for transportation services in the City of New York and seven suburban counties in the New York Metropolitan Area. See New York Public Authorities Law Sections 1260-1278.

MNCR operates approximately 670 passenger trains each weekday

on its Harlem, Hudson, and New Haven Lines which radiate northward and eastward out of Grand Central Terminal in New York City. MNCR also is responsible for commuter passenger service on the Hoboken-Port Jervis Line which is on the west side of the Hudson River and serves Orange and Rockland Counties, two of the counties included within the MTA's district of responsibility. Service on the Port Jervis Line is operated by NJ Transit Rail Operations, Inc. ("NJTRO"), under contract with Metro-North. The first 31.3 miles of the operation (between Hoboken and a Division Post west of Suffern) is conducted over trackage owned by NJTRO. The remaining 66.2 miles, which are the subject of this request for condition, is conducted over a line presently owned by Consolidated Rail Corporation.[1]

I. Condition Requested

MNCR respectfully requests that as a condition of its approval of the subject transaction, the Board impose the following requirement:

- Conrail or NS, as appropriate, shall convey title to the line of railroad between the Division Post at Suffern, NY (M.P. 31.3) and CP Sparrow (M.P. 89.9) at Port Jervis, NY to MNCR, subject to a reservation of trackage rights in

[1]Conrail, Inc. and Consolidated Rail Corporation are hereinafter collectively referred to as "Conrail".

favor of CR or NS (as appropriate). The consideration for this conveyance shall be the price MNCR and Conrail tentatively agreed upon, subject to Board arbitration or some similar process to fix any other reasonable terms in the event of a failure to agree.

II. Legal Framework

The statutory provisions governing the Board's consideration of rail consolidations are set forth at 49 U.S.C. §§ 11321-27. In particular, § 11324(b) provides that in a proceeding involving the merger or control of at least two Class I railroads, the Board shall consider at least five enumerated factors. The first such factor is:

> "(1) The effect of the proposed transaction on the adequacy of transportation to the public."

Subdivision (c) of Section 11324 specifies that the Board shall approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest and that the Board may impose conditions upon the transaction.

Indeed, it has been held that the Board's "single and essential standard of approval" in railroad control proceedings is that "the [Board] find the [transaction] to be consistent with the

public interest." Finance Docket No. 32760, Union Pacific Corp., Union Pacific R.R. Co., and Missouri Pacific R.R. Co. -- Control and Merger -- Southern Pacific Rail Corp., Southern Pacific Transp. Co., St. Louis Southwestern Ry. Co., SPCSL Corp., and the Denver and Rio Grande Western R.R. Co., Decision served August 12, 1996, at 98. A key issue in all such cases is whether claimed or perceived public benefits are overshadowed by purely private benefits, which may accrue solely to the merging carriers at the expense of the public. See CSX Corp. -- Control -- Chessie and Seaboard C.L.I., 363 I.C.C. 518, 551-52 (1980).

Most of the recent railroad merger or consolidation cases have been concerned primarily with competition among rail carriers and with other modes. This case is unique in that it presents squarely the issue of the impact of the transaction upon a long established and expanding commuter railroad passenger service.

Our research indicates that the Board has not yet been called upon to decide whether the terms "adequacy of transportation to the public" as used in 49 U.S.C. § 11324(b)(1) or "public interest" as used in § 11324(c) extend to consideration of passenger service needs. In at least one railroad merger case its predecessor, the Interstate Commerce Commission, imposed a condition requiring inclusion of the entire operations of another railroad which was heavily passenger-orientated. After reviewing the essential nature of the New Haven Railroad's passenger operations, the Commission

found ". . . that this merger, without complete inclusion of NH, would not be consistent with the public interest and, accordingly, we will require all the New Haven railroad to be included in applicants' transaction." Pennsylvania R. Co. -- Merger -- New York Central R. Co., 327 I.C.C. 475 at 524. The Commission's findings were upheld by the United States Supreme Court. See, New Haven Inclusion Cases, 399 U.S. 392 at 494-5 (1970), wherein the Supreme Court quoted with approval from the opinions of the Commission and the District Court regarding the compelling need to include the New Haven Railroad in the merged Penn Central System so that adequate transportation service would remain available to the public which relied upon the New Haven.

During the years of its jurisdiction over railroad passenger train service, the Interstate Commerce Commission repeatedly stressed the public interest aspects of passenger operations. In its landmark decision in New York, N.H. & H.R. Co. Discontinuance of Trains, 327 I.C.C. 151 at page 224, the Commission found

> "There is no factual basis for the position of the trustees of the New Haven that its passenger service in the aggregate constitutes an undue burden on interstate commerce, or upon the New Haven's freight service. The record fully demonstrates that the New Haven's passenger service is an essential component of the commerce of New England."

Countless other Commission decisions have stressed the public interest aspects of railroad passenger train service. The case of

Southern Pac. Co., Discontinuance of Passenger Trains, 328 I.C.C. 14 (1965), dealt with a proposal to discontinue passenger service on trains which would continue to operate for mail and merchandise freight purposes. In denying the request, the Commission held that it would be completely unjustified to allow the carrier to subordinate its passenger traffic in such a fashion for the purpose of advancing other objectives it may have. (See 328 I.C.C. 14 at 28-29.) Other examples can be found in Pennsylvania R. Co., Discontinuance of Trains, 32[illegible] I.C.C. 921 at 933-935; Missouri Pac. R. Co. Discontinuance of Passenger Trains, 320 I.C.C. 1 at 12 (1963).

Likewise, when Penn Central sought to discontinue most of its intercity passenger train service, the Commission required continuation of most of the trains based on public convenience and necessity and public interest criteria. See Pennsylvania Transp. Co., Discontinuance of Trains, 338 I.C.C. 380 at pp. 478-479.

We respectfully submit that the statute mandates consideration of both passenger service and freight service requirements and that the needs of passenger service should be accorded even greater importance in large metropolitan areas such as the New York City area, which are seeking to alleviate the impacts of traffic congestion and air pollution.

During the years of MTA/MNCR stewardship over Port Jervis

passenger service, the number of passenger trains has increased from two daily roundtrips and one eastbound trip over a short segment of the line, to eight eastbound and nine westbound revenue passenger trains on weekdays and three roundtrips (i.e. six trains each day) on Saturdays and Sundays. There also is additional service on Friday nights and Saturday mornings.[2] Thus, our request does not pertain to a planned or proposed operation; rather, it pertains to a long established commuter service which has been expanding throughout the years and will continue to grow in the future.

III. Historic Background

Since January 1, 1983 when Conrail exited the commuter rail business,[3] NJTRO has operated commuter railroad passenger service between Hoboken, NJ, and Port Jervis, NY, under contract with MNCR. This service is operated as an extension of NJTRO's commuter service operated on the trackage it owns between Hoboken and Suffern, NY. Publicly funded commuter service over this line dates to 1973, when Metropolitan Transportation Authority, MNCR's parent body, first entered into a service agreement with the Erie Lackawanna Railway Company. During the ensuing years passenger service gradually has been expanded while the freight operations on

---

[2] See MNCR-2, V.S. Nelson, at 2-4.

[3] Section 1136 of the Northeast Rail Service Act of 1981 authorized Conrail to cease operation of rail commuter service as of that date.

the line gradually have declined.[4]

MNCR and NJTRO recently entered into a long term contract, effective July 1, 1996, which committed MNCR to make a substantial capital investment for improvements to the line and committed NJTRO to operate additional passenger train service for MNCR.[5] An interchange station known as Secaucus Transfer presently is under construction in New Jersey. Upon completion, passengers from Port Jervis Line trains will be able to transfer to NJTRO's Northeast Corridor trains to reach Pennsylvania Station in New York City. (Presently, the line terminates in Hoboken, NJ, and commuters to New York City must use the rail lines of the Port Authority Trans Hudson Corporation [PATH] in order to reach their destinations.) Between 1984 and 1996 (the last year for which complete data is available) Port Jervis Line ridership grew by 69%. Reflecting the fact that the Port Jervis Line serves both commuters and discretionary riders, Metro-North has increased service on the line during both peak and off-peak periods on weekdays as well as on weekends and holidays. Orange County, New York, served by the Line, is projected to be the fastest growing County in the MTA district over the next ten years. This trend will be accelerated by the opening of Secaucus Transfer Station in 2002. The reduced

---

[4] See MNCR-2, V.S. Nelson at 3-4.

[5] See, MNCR-2, V.S. Nelson at 4; the Agreement for Operation by NJ Transit Rail Operations, Inc. ("NJTRO") of certain Rail Passenger Service on the Main Line/Bergen County, and Pascack Valley Line for Metro-North Commuter Railroad Company, is contained in CSX/NS-176, Volume 3.

travel time and improved reliability for travel to mid-town Manhattan is expected to produce significant gains in rail ridership, both by improving Metro-North's market share among Orange County residents currently making trips to mid-town Manhattan by automobile or other means of transportation as well as by spurring overall higher growth in total travel to mid-town from Orange County. This will result in significant increases in Port Jervis Line ridership over the next 23 years. In fact, by the year 2020 Port Jervis Line ridership is expected to increase by 173% compared to 1996 levels. During this same period, MNCR plans to increase the number of passenger trains operated from 99 to 203 per week, an increase of 105%.[6]

Over the years the commuter passenger trains and Conrail freight trains have co-existed with relatively few problems. However, as indicated, more passenger trains gradually have been added and the operating agreement between MNCR and NJTRO effective July 1, 1996 provides for still further expansion of passenger service. The instant application indicates that 12 freight trains per day will be routed over the line (instead of the 4.7 or 7.9 now said to be operated).[7] The resulting high level of both passenger and freight trains will require very careful scheduling and dispatching so as to prevent the impairment of either service.

---

[6] See MNCR-2, V.S. Permut, pp. 1-3.

[7] See CSX/NS 20, Volume 3B, p. 460.

Although owned by Conrail, the Suffern-Port Jervis Line is dispatched by NJTRO from its Operations Center in Hoboken, NJ. As noted in Section V, infra, we understand that NS has agreed to continue that arrangement.[8]

IV. Capital Improvement Needs

The Operating Plan contained in the Control Application states that NS intends to spend $35 million to upgrade the 335 mile Southern Tier Line between Buffalo and Port Jervis which "will see significant traffic increases."[9] It is utterly silent as to the remaining 66 mile territory, used by MNCR's trains, between Port Jervis and Suffern.

As part of its responsibility for providing passenger service in this area, MNCR has reviewed the need for capital improvements between Suffern and Port Jervis. Particular concerns are the signal system which relies on an old trackside pole line and the fact that there are but two passing sidings in the 60 mile single track territory between CP Sterling and CP BC which can accommodate a present-day length freight train.[10] Although we assume NS also

---

[8]Regardless of the outcome of this request for conditions, NJTRO will continue to own, operate and dispatch the territory between Suffern and the NJ/NY terminal area.

[9]See CSX/NS-20, Volume 3B, page 227.

[10]MNCR -2, V.S. Nelson, page 7. (There is an additional 6060 foot siding at Campbell Hall).

recognizes this problem, the Application[11] and NS's rebuttal testimony contend that the line has adequate capacity to accommodate the existing passenger and projected freight operations. Nevertheless, MNCR estimates an expenditure of up to $88.5 million is needed for right-of-way improvements. Upon completion of these improvements, the line would be in proper condition to handle some increase above the present level of freight operations. However, in the event that the level of freight traffic should substantially exceed that projected in NS' Operating Plan, a far greater investment in physical plant (primarily for passing sidings and double track) would be needed as would very close schedule coordination.[12]

Moreover, an exceedingly large additional investment -- estimated to be $104,000,000 -- will be needed to support future planned improvements relating to passenger service.[13] As a public agency, Metro-North cannot justify expenditures of this magnitude on a privately owned railroad line over which we may have little or no control.

V. NS' Rebuttal Testimony

In the "Argument" portion of its rebuttal submission, NS

---

[11]CSX/NS-20, Volume 3B, page 304.

[12]See MNCR-2, V.S. Permut.

[13]See MNCR-2, V.S. Permut.

states that MNCR has made no showing that the proposed transaction will have any adverse effect on its commuter operations and that there is no basis for MNCR's dispatching concerns.

With regard to the dispatching issue, MNCR and NJTRO both had expressed serious concern regarding the possible termination of the present arrangement whereby NJTRO dispatches the Suffern-Port Jervis Line. Upon reading NS rebuttal materials, both agencies learned for the first time that NS does not plan to takeover the dispatching of this territory.

The rebuttal testimony regarding operating matters consists of slightly over one page of text submitted by Mr. D. Michael Mohan. In his Rebuttal Verified Statement, Mr. Mohan states that dispatching will continue to be performed by New Jersey Transit and expresses the opinion that the line segment has more than ample capacity to accommodate both freight and passenger services. He further states that "the projected increase in freight traffic is small and the current freight usage by Conrail is nominal".[14] We assume this is the same D. Michael Mohan, former President of the Southern Pacific Transportation Company, who sponsored the NS operating plan contained in CSX/NS-20. When referring to the Southern Tier Route, that operating plan states "This secondary main line will see significant traffic increases".[15] Thus the

---

[14] See CSX/NS-177, Volume 2A, R.V.S. Mohan at 55-56.

[15] See CSX/NS-20, Volume 3B at page 277.

traffic increases which Mr. Mohan deemed "significant" back in June 1997 now are characterized as "small". MNCR does, however, concur in his characterization of the present Conrail freight usage as "nominal". Indeed, the dramatic increase in freight usage which will result from this transaction is one of our primary sources of concern.

VI. Purchase Negotiations

For several months, MNCR had been negotiating with Conrail for the purchase of the subject line of railroad. These negotiations arose out of our need to control the property in order to justify the investment in capital improvements as well as our concern regarding future access to the line since our trackage rights agreement with Conrail could have been terminated on one-year's notice after 1997. A tentative understanding was reached with Conrail including a purchase price of $9.8 million. Metro-North was ready, willing and able to formalize this transaction only to be told by Conrail, during the early part of March 1997, that the proposal had to be removed from the table because of the agreement recently reached by NS and CSX to control Conrail.[16]

Metro-North stands ready to accept conveyance of this property "as is" based on the price which had been agreed upon with Conrail

---

[16] See MNCR-2, V.S. Nelson at 8; CSX/NS-177, R.V.S. Carey at 3.

subject to a reservation of trackage rights in favor of NS for its freight operations.

VII. Summary and Conclusion

MNCR submits that public interest considerations strongly support the conveyance of the subject line to MNCR since we are responsible for and obligated by New York State law to provide railroad passenger service in this territory. Clearly, under applicable statute and case law, the Board must consider the impact upon passenger service as part of its evaluation of the public interest in a railroad consolidation case.

Since 1973 Metro-North and/or its parent agency have sponsored operation of commuter passenger service on the Hoboken-Suffern-Port Jervis Line. Ridership and levels of service gradually have increased over the years. The primary area served -- Orange County, New York -- is the most rapidly growing County in the entire MTA District which comprises New York City and seven suburban counties. As part of its continuing program to expand and enhance service to this territory, Metro-North already has expanded $101.1 million for capital improvements and has identified the need for $88.4 million of near-term capital improvements as well as $104 million for long-term improvements through the year 2020.[17] In view of the large number of passenger trains operated, the

[17]MNCR-2, V.S. Permut.

magnitude of proposed improvements and the relatively small amount of freight service being operated by Conrail, Metro-North proposed acquisition of the line from Conrail. That proposal had received favorable reception until the announcement by CSX and Norfolk Southern, of their plan to acquire Conrail.

Accordingly, as a direct result of this transaction:

- Metro-North has been unable to acquire the Suffern-Port Jervis Line;

- Metro-North, without the requisite property interests in the Line, has no basis for making the capital improvements to the Line needed to support passenger operations; and

- Operation of the existing service will become more difficult and it may be impossible to implement many components of the planned service expansions.

The subject rail line is but 66 miles in length, a minute segment of the vast Norfolk Southern System which will result from this transaction. Conveyance of the line to Metro-North will neither impact Norfolk Southern's freight service nor jeopardize the economic or other benefits to flow to Norfolk Southern and CSX from this transaction.

Accordingly, if the Board should find that the transaction should be approved in the public interest, we respectfully request that such approval be conditioned upon conveyance or a long term lease of the subject line to MNCR as set forth herein.

Respectfully submitted,

Richard K. Bernard,
General Counsel

Walter E. Zullig Jr.,
Special Counsel

METRO-NORTH COMMUTER RAILROAD CO.
347 Madison Avenue
New York, NY 10017
212-340-2027

Attorneys for Metro-North
Commuter Railroad Company

Dated: February 20, 1998

Due Date: February 23, 1998

[63270/WEZ]

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of February, 1998, copies of the foregoing Brief on Behalf of Metro-North Commuter Railroad Company (MNCR-4) were served by first class U.S. mail, postage prepaid, upon:

The Honorable Jacob Leventhal
Administrative Law Judge
Federal Energy Regulatory Commission
888 First Street, N.E. Suite 11F
Washington, DC 20426

The Honorable Rodney E. Slater
Secretary
U.S. Department of Transportation
400 7th Street, S.W., Suite 10200
Washington, DC 20590

The Honorable Janet Reno
Attorney General of the United States
U.S. Department of Justice
10th & Constitution Avenue, N.W., Room 4400
Washington, DC 20530

and upon all other parties of record appearing on the Surface Transportation Board's official service list in this proceeding.

Richard K. Bernard

[63270/WEZ]

STB FD 33388 2-23-98 E 185816

185816

PATTON BOGGS, L.L.P.
2550 M STREET, N.W.
WASHINGTON, D.C. 20037-1350
(202) 457-6000

FACSIMILE (202) 457-6315

WRITER'S DIRECT DIAL

(202) 457-6335

February 23, 1998

The Hon. Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, NW
Suite 700
Washington, DC 20423-0001

Re: Finance Docket No. 33388, CSX and Norfolk Southern -- Control and Operating Lease/Agreements -- Conrail

Dear Secretary Williams:

Enclosed are the original and 25 copies of CMA-19/SPI-13, the Joint Brief of the Chemical Manufacturers Association and The Society of the Plastics Industry, Inc. Also enclosed is a diskette in WordPerfect 5.x containing the brief.

Sincerely,

Scott N. Stone

185816

CMA-19
SPI-13

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

CSX CORPORATION AND CSX TRANSPORTATION, INC.,
NORFOLK SOUTHERN CORPORATION AND
NORFOLK SOUTHERN RAILWAY COMPANY
-- CONTROL AND OPERATING LEASES/AGREEMENTS --
CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION --
TRANSFER OF RAILROAD LINE BY NORFOLK SOUTHERN
RAILWAY COMPANY TO CSX TRANSPORTATION, INC.

JOINT BRIEF OF THE CHEMICAL MANUFACTURERS ASSOCIATION AND THE SOCIETY OF THE PLASTICS INDUSTRY, INC.

Thomas E. Schick, Counsel
Chemical Manufacturers Association
1300 Wilson Boulevard
Arlington, VA 22209
(703) 741-5172

Scott N. Stone
Patton Boggs, L.L.P.
2550 M Street, N.W.
Washington, DC 20037
(202) 457-6335

Counsel for the Chemical
Manufacturers Association

Martin W. Bercovici
Keller and Heckman, L.L.P.
1001 G Street, N.W., Suite 500 West
Washington, DC 20001
(202) 434-4144

Counsel for The Society of the Plastics
Industry, Inc.

ORIGINAL

Date: February 23, 1998

CMA-19
SPI-13

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

CSX CORPORATION AND CSX TRANSPORTATION, INC.
NORFOLK SOUTHERN CORPORATION AND
NORFOLK SOUTHERN RAILWAY COMPANY
-- CONTROL AND OPERATING LEASES/AGREEMENTS --
CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION --
TRANSFER OF RAILROAD LINE BY NORFOLK SOUTHERN
RAILWAY COMPANY TO CSX TRANSPORTATION, INC.

JOINT BRIEF OF THE CHEMICAL MANUFACTURERS ASSOCIATION AND THE SOCIETY OF THE PLASTICS INDUSTRY, INC.

The Chemical Manufacturers Association ("CMA") and The Society of the Plastics Industry, Inc. ("SPI") respectfully oppose the application in this case. The risk of widespread service disruptions and congestion from this unprecedented break-up transaction outweighs the marginal benefits promised by the Applicants. Moreover, NS and CSX can pay for their purchase of Conrail stock only if they faultlessly execute their strategy of increasing traffic while cutting personnel and costs substantially.[1] If they fail, shippers -- especially captive shippers such as the members of CMA and SPI -- will suffer.

NS and CSX are respected railroads, and they undeniably have a major financial incentive to make the transaction work. Nonetheless, the same was said about the Union Pacific

[1] See discussion at CMA-10, pages 6-16.

in its merger with Southern Pacific. CMA and SPI members should not be asked to take the risk that NS and CSX will fail in an even more complex and ambitious undertaking than that attempted by the UP and SP.

Summary of Effects of Transaction on Chemical/Plastics Traffic

The proposed transaction promises slight, if any benefit to shippers of chemicals and plastics. Relatively few will gain new single system service, because relatively little of this traffic flows from southeastern points that will be the major beneficiaries of new single system service. Instead, most chemicals and plastics traffic on Conrail today is received interline from St. Louis and Chicago area gateways.[2]

Of additional concern, some chemicals/plastics shippers (representing 6,600 cars in 1995), would lose single system service, as the current Conrail route is split between NS and CSX and the movement becomes interline. These shippers are likely to see both worse service and higher rates than they now enjoy.[3]

Some shippers with movements to and from the proposed Shared Assets Areas ("SAAs") (principally the North Jersey SAA) would have a new choice of rail carrier where today Conrail is the only choice.[4] Yet those shippers face the offsetting prospect of gridlock in the North Jersey SAA, as tracks that have been rationalized by Conrail to fit the operations of a single railroad will be forced to accommodate the operations of three freight railroads (CSX, NS and

---

2 See discussion at CMA-10, pages 24-26.

3 See discussion at CMA-10, pages 24-25 and VS of John J. Grocki at 13-14.

4 These shippers represent some 21% of Conrail's 1995 carloads of chemicals and plastics traffic. See CMA-10, VS of John J. Grocki at Figure JG C-2.

the Conrail Shared Assets Operator) in addition to the heavy passenger operations that they also now support.

The Proposed Transaction Has The Potential for Worse Service to All Shippers

To borrow a popular phrase, the Applicants appear to be "in denial" about the prospect that their transaction may result in serious service problems. The North Jersey Shared Assets Area, which is an important nexus for chemical, intermodal, automotive, and other traffic, is as complex a set of tracks as those found in Houston, and every bit as prone to congestion. Even today, congestion is endemic in certain portions of that area, as acknowledged by the author of NS's operating plan.[5] Given the need post-transaction for the NJSAA to accommodate the operations of three freight railroads, that congestion could become paralyzing. The former Conrail operations officer hired as a consultant by the Port Authority of New York/New Jersey, who analyzed the Applicants' proposed operating plan for the North Jersey SAA, concluded that "should this plan be implemented as currently proposed, I have no doubt that the result would be operational paralysis in a matter of weeks." NYNJ-18 at 19. Mr. Snow, CSX's CEO, acknowledged that operations in the SAAs had the "potentiality for mischief"[6] and that NS and CSX would have to watch each other "like a hawk."[7]

More generally, the Applicants are embarking upon a management exercise of unprecedented complexity and size - dividing up the physical assets, personnel, databases, communication systems and other elements of what is now a single well-functioning railroad

[5] See CMA-10 at 14, citing Mohan depo. tr. p. 572 line 17 - p. 573 line 11.

[6] Snow depo. tr. p. 197 lines 23-24.

[7] Snow depo. tr. p. 197 line 11 - p. 198 line 1.

(Conrail) and reconstituting those elements into three parts: the new NS-Conrail system, the new CSX-Conrail system, and the residual Conrail that will operate the three SAAs. It is not enough to argue that NS and CSX have every incentive to achieve success in their transaction, nor that NS and CSX are well-managed companies. The same was said of Union Pacific; yet it has suffered disastrous failure in attempting to carry out a much simpler task -- integrating all of the lines of a single rail system (the SP) into the operations of another single rail system (the UP). To the extent that the risks of the proposed Conrail breakup are transitional, they could be ameliorated in part by the pre-implementation conditions suggested by CMA and SPI. Yet the Applicants have opposed any pre-implementation conditions that would provide even a cursory opportunity for public comment or that would require Board approval that pre-implementation steps have been satisfactorily completed.

If the Board Approves the Proposed Transaction, It Should Impose the Conditions Suggested by CMA/SPI.

CMA and SPI will not burden the record by restating in detail their requested conditions and the justification for them. The conditions, which were previously set out in full in CMA-10, Attachment 1, are re-attached for convenience hereto. The conditions are explained in full in CMA-10, pages 27-43. The following provides a very brief summary, with the numbers (A.1, A.2, etc.) referring to the numbered CMA/SPI conditions.

A. Pre-implementation Conditions

Applicants would be required to certify to the Board that the following are in place prior to beginning integrated operations over their respective portions of the Conrail system. Parties would then have 15 days to comment, and the Board would have 15 days to accept or reject the

certifications: (A.1): SAA operating and management protocols, including management information systems for the SAAs; (A.3): collective bargaining agreements; (A.4): extension or integration of NS and CSX management information systems to their respective portions of Conrail's system; and (A.5): completion of physical connections which NS and CSX received exemptions to construct. CMA and SPI believe that allowing 15 days for comment and 15 days for the Board to review and approve (or reject) the certifications are critical to ensuring that CSX and NS do not begin integrated operations without appropriate preparations, at potentially great cost to shippers.

In addition, CSX and NS would be required by CMA/SPI condition A.2 to publish baseline tariffs containing all rates and routings currently available on Conrail. These tariffs would ensure that shippers will have available rates and routings post-transaction; the tariffs would also provide a clear baseline against which shippers could assess (and if appropriate, attempt to remedy) any subsequent rate or route changes.

B. SAA-Related Conditions

The most important of the CMA/SPI SAA-related conditions, condition B.1, would require NS and CSX to agree to be fully responsible and liable for their respective shipments to/from/within SAAs. CSX and NS, after all, have consciously decided to structure SAA operations so that Conrail in conducting SAA operations would be their agent, rather than an independent common carrier. Even though NS and CSX have agreed to provide funds to Conrail should its capital be insufficient to meet liabilities, NS and CSX have also acknowledged that

there are circumstances in which they might allow Conrail to go bankrupt.[8] The members of CMA and SPI need the assurance that in the event of a major incident involving hazardous materials, involving potentially large liabilities, NS and CSX will accept responsibility for the shipments they handle as common carrier, even if Conrail is providing the physical handling on their behalf. Otherwise, NS and CSX may seek to shift blame to Conrail in order to avoid full responsibility.

CMA/SPI condition B.4 would provide certain options to shippers moving traffic under Conrail transportation contracts between points that will become jointly served post-transaction and other open points. The options would include the ability to select service by either CSX or NS, and the option to reopen the contract as to those points. In the absence of this condition, contract shippers post-transaction would be at the mercy of whatever allocations of such traffic NS and CSX may choose to make under section 2.2(c) of their Transaction Agreement.[9] In addition, such shippers who are tied to contracts might be commercially disadvantaged relative to other shippers in the SAAs who are able to take advantage of competition between NS and CSX post-transaction.

C. Other Competition and Service Conditions

Because the heaviest flows of chemicals/plastics traffic currently moving on Conrail's system are from the Southwest (principally the Gulf Coast) via St. Louis and Chicago area

[8] Depo. tr. of Romig and Sparrow p.38 lines 4-9: (by Mr. Sparrow): "As a purely financial matter, I don't believe that between [sic] we and Norfolk Southern have agreed that there are no circumstances under which we would let Conrail go bankrupt."

[9] CMA and SPI also oppose Applicants' request that non-assignment clauses of transportation clauses be nullified by the Board.

gateways to the Northeast, CMA and SPI are concerned that CSX and NS post-transaction will attempt to shift to southern gateways such as New Orleans that would result in a longer haul for NS and CSX but a higher overall rate to shippers because the originating western carriers would demand the maintenance of their revenue share despite having a shorter haul to the southern gateway.[10] Although CSX and NS have stated on the record that they do not intend to shift from current gateways, and are even making substantial investments to enhance the St. Louis/Illinois area gateways,[11] CMA and SPI request a condition confirming that these gateways will remain open on competitive terms. Recognizing the various means by which railroads in the past have effectively rendered gateways unusable, CMA/SPI condition C.1 would simply require these gateways to be kept open "on competitive rate and service terms," without attempting to tie the Applicants to specific ratios or metrics. It would be up to the shipper to prove, and the Board to judge, whether a gateway has effectively been closed.

CMA/SPI condition C.2 would require CSX and NS to keep reciprocal switching open at current points of interchange between CSX or NS and Conrail in order to preserve current competitive options. In the NITL Agreement, NS and CSX have agreed to maintain switching where Conrail now provides it, but not where Conrail now passes off traffic for switching by NS or CSX, for example, in South Charleston, WV. Applicants offer no rationale for distinguishing between Conrail-provided switching and CSX- or NS-provided switching, and CMA and SPI urge the Board to make the NITL settlement provision (¶III.B) on this issue fully reciprocal.

---

10 See CMA-10, VS of Charles N. Marshall.

11 See CMA-10 at 26-27 and Applicant testimony cited there.

CMA/SPI condition C.4 requests the Board to establish five years of oversight with quarterly reporting and opportunity for public comment. Condition C.3 states that the Applicants' performance in the oversight proceeding should be judged against the post-transaction transit times presented in their operating plans, and that the Board should also review NS' and CSX's performance on their current routes to ensure that it does not deteriorate as a result of the transaction. Condition C.5 suggests other metrics that should be monitored by the Board during the oversight proceeding.

CMA and SPI have recently explained in a separate filing why the agreement reached between Applicants and the National Industrial Transportation League ("the NITL Agreement") does not adequately address the CMA/SPI concerns or meet the CMA/SPI conditions. See CMA-18/SPI-12. CMA and SPI do not believe that the Conrail Transaction Council proposed in the NITL Agreement can or should substitute for review and approval by the Board of the pre-implementation conditions suggested by CMA and SPI. See CMA-10 at pages 28-32 and Attachment 1, discussing CMA/SPI conditions A.1, A.3, A.4 and A.5. CMA and SPI wish to clarify, however, that so long as the Council is open to any interested shipper or association, and so long as interested parties have a right to comment on implementation and oversight issues at the same time the Council expresses its views on those subjects, the Council may be of some value as an additional forum for Applicants to provide information on, and interested parties to discuss, these issues. This forum would supplement the Applicants' existing user councils, in which CMA and SPI members already participate.

CONCLUSION

CMA and SPI believe that this is a high-risk transaction that is more likely to harm shippers of chemicals and plastics than it is to benefit them. Should the Board nonetheless be inclined to approve the transaction, CMA and SPI urge it to adopt the conditions suggested by CMA and SPI (reprinted in their entirety Attachment 1 hereto), for the reasons stated previously by CMA and SPI.[12]

Respectfully submitted,

Thomas E. Schick
Assistant General Counsel
Chemical Manufacturers Association
1300 Wilson Boulevard
Arlington, VA 22209
(703) 741-5172

Scott N. Stone
Patton Boggs, L.L.P.
2550 M Street, N.W.
Washington, DC 20037
(202) 457-6335

Counsel for Chemical Manufacturers Association

[12] See CMA-10 at pages 27-42; CMA-18/SPI-12.

Martin W. Bercovici /sps

Martin W. Bercovici
Keller and Heckman, L.L.P.
1001 G Street, N.W.
Suite 500 West
Washington, DC 20001
(202) 434-4144

Counsel for The Society of the Plastics Industry, Inc.

Date: February 23, 1998

Attachment 1

CMA/SPI
PROPOSED CONDITIONS

Introduction

The Conrail break-up transaction, as proposed by Norfolk Southern ("NS") and CSX, is of unprecedented complexity. The Chemical Manufacturers Association ("CMA") and the Society of the Plastics Industry, Inc. ("SPI") have reviewed the NS-CSX application and have identified adverse effects on shippers in a broad geographic area relating to the following aspects of the proposed transaction:

- implementation of the overall transaction by NS and CSX, including integration of Conrail's facilities, operations, and collective bargaining agreements into NS' and CSX's respective systems;
- operation and management of the Shared Asset Areas ("SAAs");
- the unique division of the non-SAA portions of Conrail's established route structure between NS and CSX; and
- potential shifts of inter-territorial traffic to non-traditional gateways (i.e., Memphis and New Orleans).

The full set of conditions summarized below, if adopted by the Surface Transportation Board ("STB"), would alleviate the concerns of CMA and SPI.

A. Pre-Implementation Conditions

NS and CSX are entering into the transaction with limited information about Conrail's traffic (including its existing contractual obligations), operations, and collective bargaining agreements. In light of recent experience with other railroad acquisitions, CMA and SPI believe that implementation of the proposed transaction threatens to impair service for a substantial number of shippers. Therefore, as a condition of approval, the following must be in place before NS and CSX implement the transaction by means of their respective operating agreements with Pennsylvania Lines LLC and New York Central Lines LLC:

A.1. SAA management and operations protocols, including establishment of Management Information Systems ("MIS") for the SAAs;

A.2. Adoption of all existing tariffs and circulars that were in effect when the application was filed (June 23, 1997) and publication of supplements incorporating new routes;

A.3. Collective bargaining agreements;

A.4. Extension or integration of their own MIS by NS and CSX to their respective portions of Conrail's assets; and

A.5. Construction of connections.

CMA and SPI would support STB actions that are deemed necessary to allow NS, CSX and Conrail to work together efficiently on these matters prior to approval of the application. After approval, NS and CSX should be required to certify to the STB that they have complied with all pre-implementation conditions. Copies of these certifications should be served on all parties of record, who would have 15 days to comment. STB would review the record and accept or reject the certifications no more than 30 days after they were filed.

B. SAA-Related Conditions

The transaction will create SAAs in areas that have previously been served by Conrail on an exclusive basis. CMA and SPI are concerned about clarifying operational and shipper-carrier relationships relative to the SAAs so that shippers will be able to realize the benefits of the SAAs. Therefore, CMA and SPI seek the following conditions:

B.1. Recognizing that Conrail will operate the SAAs as an agent, NS and CSX each must be fully responsible and liable for its shipments to/from/within SAAs.

B.2. All existing bulk chemicals/plastics transloading terminals located within SAAs, including rail-to-truck terminals, must be open to both NS and CSX.

B.3. All new facilities within SAAs must be open to both NS and CSX.

B.4. Where the transaction provides contract shippers of traffic to/from/within SAAs with new competitive options (i.e., alternatives for traffic not moving to/from closed points on NS or CSX):

a) Each shipper must have an "open season" (not to exceed two years from the date of implementation of the transaction) to test service from both NS and CSX under Conrail contracts.

b) Each shipper must have the right to decide whether to have Conrail contract service performed by NS or CSX or both.

c) Each shipper must have an option to reopen its Conrail contracts.

C. Other Competition and Service Conditions

CMA and SPI seek the following specific conditions to alleviate anti-competitive effects and to prevent deterioration of service now provided by Conrail and by NS and CSX:

C.1. Interchange Issues:

a) Keep open all existing gateways and interchanges on competitive rate and service terms.

b) Prohibit increases (other than RCAF-adjusted) on rates in effect when the application was filed (June 23, 1997) for Conrail single-line traffic that becomes NS-CSX interline traffic.

C.2. Reciprocal Switching:

a) Keep open all reciprocal switching points on Conrail/NS/CSX that were open when the application was filed (June 23, 1997).

b) Specify reciprocal switching charges between NS and CSX within Conrail territory ($130 per car).

c) Eliminate reciprocal switching charges on all former Conrail-NS and Conrail-CSX interline movements that become NS and CSX single-line movements.

d) Reinstate reciprocal switching at Buffalo and Niagara Falls.

C.3. Service Standards: Hold NS and CSX to the post-transaction transit times presented in their operating plans and train schedules in this proceeding and monitor NS and CSX service not reflected in operating plans and train schedules to ensure that current NS and CSX service does not deteriorate.

C.4. Oversight Process:

a) Quarterly reports by NS and CSX filed at STB and served on all parties of record that request copies, with opportunities for comments and carrier replies.

b) Five years of STB oversight (two years of semiannual proceedings and three years of annual proceedings), with public comments, carrier replies, and expedited resolution of issues by STB.

C.5. Oversight Issues (with appropriate carrier performance metrics and evaluation of economic consequences for shippers):

a) Safety performance.

b) Customer transit times in key corridors (both new and existing NS and CSX service) [see Condition C.3].

c) Service efficiency gains (e.g., run-through trains and 286,000-pound gross rail load routes).

d) Maintenance of shipper gateway and interchange options on competitive rate and service terms [see Conditions A.2 and C.1].

e) Attainment of projected new traffic volumes.

f) Realization of projected cost savings.

g) Post-transaction financial ratios.

h) Effects of the purchase price and premium paid for Conrail, and the financial justification for the transaction.

CERTIFICATE OF SERVICE

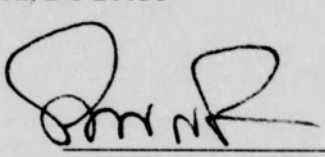
I hereby certify that I have, in accordance with the Board's Decisions in this proceeding, served copies of the foregoing brief this 23rd day of February, 1998, by first class mail upon all parties of record and by hand upon the following:

Administrative Law Judge Jacob Leventhal
Federal Energy Regulatory Commission
888 First Street, N.E.
Suite 11F
Washington, DC 20426

Dennis G. Lyons, Esq.
Arnold & Porter
555 12th Street, N.W.
Washington, DC 20004-1202

Richard A. Allen, Esq.
Zuckert, Scoutt & Rasenberger, L.L.P.
888 Seventeenth Street, N.W.
Washington, DC 20006-3939

Paul A. Cunningham, Esq.
Harkins Cunningham
Suite 600
1300 Nineteenth Street, N.W.
Washington, DC 20036



Scott N. Stone

185814

LAW OFFICES
KELLER AND HECKMAN LLP
1001 G STREET, N.W.
SUITE 500 WEST
WASHINGTON, D.C. 20001
TELEPHONE (202) 434-4100
FACSIMILE (202) 434-4646

BOULEVARD LOUIS SCHMIDT 87
B-1040 BRUSSELS
TELEPHONE 32(2) 732 52 80
FACSIMILE 32(2) 732 53 92

WRITER'S DIRECT DIAL NUMBER
(202) 434-4144
Bercovici@khlaw.com

February 23, 1998

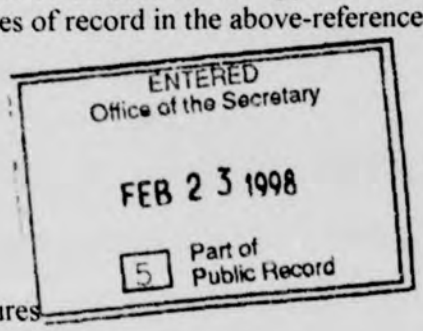
Vernon A. Williams, Secretary
Attn: STB Finance Docket No. 33388
Surface Transportation Board
Mercury Building, Room 715
1925 K Street, NW
Washington, DC 20423-0001

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

Dear Secretary Williams:

On behalf of Eighty-Four Mining Company, we are transmitting herewith an original and twenty-five (25) copies of its Brief, EFM-16. Associated with this letter, please find a 3 ½ x 5" floppy diskette in WP7.0 format, containing the text of the Brief. Also submitted herewith, please find an original and twenty-five (25) copies of the Supplemental Appendix to the Brief, EFM-17, containing the portions of the deposition of John William Fox classified as Highly Confidential and redacted in Appendix I to the Brief.

We certify herewith to making service on February 23, 1998, by hand-delivery of EFM-16 and EFM-17 on counsel for Applicants, and of EFM-16 via first-class mail, postage prepaid, upon all parties of record in the above-referenced proceeding.



Very truly yours,

Martin W. Bercovici

Enclosures

cc: All Parties of Record

185814

ORIGINAL

EFM-16

BEFORE THE

Surface Transportation Board

WASHINGTON, DC 20423

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

STB FINANCE DOCKET NO. 33388

BRIEF OF EIGHTY-FOUR MINING COMPANY

"Fair market share division is a *sine qua non* of any agreement. No one should be expected to accept market share completely out of whack with the other fellow's share."

David Goode, Chairman, Norfolk Southern Corporation
***Traffic World*, February 3, 1997, at page 50**

Martin W. Bercovici
Keller and Heckman LLP
1001 G Street, NW
Suite 500 West
Washington, DC 20001
(202) 434-4144

Attorney for Eighty-Four Mining Company

February 23, 1998

TABLE OF CONTENTS

ATTACHMENTS –

TABLE OF AUTHORITIES

Page

ICC/STB DECISIONS:

BEFORE THE

Surface Transportation Board

WASHINGTON, D.C. 20423

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

STB FINANCE DOCKET NO. 33388

BRIEF OF EIGHTY-FOUR MINING COMPANY

In the CSX/Norfolk Southern acquisition of Conrail, Eighty-Four Mining Company ("EFM") finds itself in the equivalent position to Norfolk Southern when CSX and Conrail announced their merger in mid-October 1996 . The balance in the marketplace between Norfolk Southern and its principal competitor CSX was threatened with a major tilting of the playing field in favor of CSX, as the latter would grow from virtual parity with NS to a dominant position of more than twice the NS size. "This is a very, very serious situation where there would be 70% of rail freight moving on one railroad east of the Mississippi River," explained Magda Ratajski, Vice President of Corporate Communications, Norfolk Southern Corporation.[1] Otherwise stated, "If CSX acquires Conrail without major changes to its plan, it

---

[1] *Journal of Commerce*, October 18, 1996, p. 1A.

would create an extremely uncompetitive market in the Northeast." William Bayles, Vice President, Norfolk Southern Corporation.[2]

The situation faced by Eighty-Four Mining Company is directly analogous to the circumstances faced by NS, which led to an intense campaign over four plus months, with the eventual outcome being the adoption of the NS plan of "two (rail) networks, and they have to go every place. Everyone gets fixated on maps. You are better off with networks serving all the points and addressing the market share issue. ...You have to do meaningful things to find a significant traffic base [for] the competition or he's not going to be there in the long run." James McClellan, Vice President, Norfolk Southern Corporation.[3] But from EFM's standpoint, the two rail networks do not "go every place"; and the manner of the division of Conrail creates — not resolves — market share issues.

EFM is a producer of high BTU content, mid-sulfur coal located in southwestern Pennsylvania. This Northern Appalachia area is known as the Monongahela coal region ("MGA region"), and the coal also is known as Pittsburgh or Pittsburgh-8 Seam coal. EFM operates Mine 84, one of seven MGA region mines, all rail-served, which accounted for more than 33 million tons of production in 1996. All seven mines currently are exclusively served by Conrail. Post-transaction, the Conrail lines serving the MGA region will be owned by Norfolk Southern; however, CSX and NS have agreed that CSX will receive trackage rights permitting

---

[2] *Journal of Commerce*, December 6, 1996, pp. 1A, 7B.

[3] *Journal of Commerce*, January 21, 1997, pp. 1A, 4B.

access to the lines of the former Monongahela Railway. The six mines which are the direct competitors of Eighty-Four Mining Company are located on the lines of the former Monongahela Railway, and therefore will receive dual access. While located in close proximity and along the same seam of coal, EFM's Mine 84 is served via a branch line off of the Monongahela ("Mon") rail line, which post-transaction is scheduled to be served exclusively by Norfolk Southern. Accordingly, the now settled and balanced market, with all directly competitive mines enjoying the exact same market access, will be radically changed. Six of the seven rail-served MGA region coal mines, to the exclusion of Eighty-Four Mining Company, will realize a material competitive advantage over EFM in 78% of the established market for Monongahela region coal. Thus, EFM is in the same position as Norfolk Southern, when NS Vice President for Coal Marketing John William (Bill) Fox told a meeting of the National Mining Association, "It's hard to see how controlling 75% of the utility market could be good for competition. I can't see why a 50-50 split wouldn't be much better."[4]

Unlike the proposed merger of Conrail and CSX, this is not a case of rivals attempting to obtain competitive advantage over Eighty-Four Mining Company. Rather, the tilting of the MGA region coal market against EFM is the direct product of an arbitrary division of Conrail's lines by CSX and Norfolk Southern, having unjustifiable consequences. Just as Norfolk Southern took its case to every available forum, including this Board, the public at large, the courts and Conrail's shareholders, Eighty-Four Mining Company brings its plea for relief to the

---

[4] *Journal of Commerce*, February 3, 1997, p. 1A.

Surface Transportation Board, the only forum empowered to rectify the unwarranted market prejudice flowing from the CSX and NS agreement for the division of Conrail.

EFM's position in this transaction is unique. While other parties may complain about the effect of the Conrail division on their traffic movement, or the effect *vis-a-vis* some other member of their industry or other sector, *no* other party is affected in a manner comparable to EFM where the entire market structure will change to the exclusion of one of the principal participants, and in a measurable and documentable fashion.

The relief sought by EFM, dual service by both CSX and NS comparable to that to be provided to its competitors, through either trackage rights or reciprocal switching, will not impinge on the integrity of the division of Conrail. While the relief sought herein is of no measurable impact on applicants, the failure to provide a remedy will be of monumental impact on EFM.

I. STATEMENT OF FACTS

A. Background

The facts generally are not in dispute. What is in dispute is whether there may be collateral benefits from the transaction flowing to Eighty-Four Mining Company which may

compensate for the loss of market parity, and whether the harm from the transaction should be remedied by the Board.

As set forth above in the foregoing introduction, Eighty-Four Mining Company operates Mine 84 located in the Pittsburgh Seam, in southwestern Pennsylvania. Mine 84 was purchased by EFM's parent Rochester & Pittsburgh Coal Company in 1992, and contains approximately 175 million tons of high-quality steam and metallurgical coal. EFM has renovated and rehabilitated the mine, completing the installation of the first longwall mining unit in late 1995, and a second longwall unit in late 1997. The installation of the longwall units permits an increase of production from three million tons of coal in 1996 to more than seven million tons of coal per year in 1998 and beyond. More than $150 million has been invested in Mine 84 and its associated reserves. TMM at 6-7.[5]

---

[5] Record citations to evidence introduced by EFM are to the Comments and Request for Conditions of Eighty-Four Mining Company, EFM-7. The Verified Statement of Thomas M. Majcher, Vice President of Corporate Development for Rochester & Pittsburgh Coal Company, is identified as "TMM"; the Verified Statement of Mark T. Morey, Director of Consulting Services for the Fieldston Company, Inc., is identified as "MTM"; and the Verified Statement of Professor Richard L. Gordon, Professor Emeritus of Mineral Economics and Micasu Faculty Endowed Scholar Emeritus in the College of Earth and Mineral Sciences, the Pennsylvania State University, is identified as "RLG." These verified statements may be found in EFM-7 at Tab 1. Other citations to the EFM Comments will be referred to as "EFM-7 at _____," referring either to the Comments, or to deposition extracts at Tab 2 or Exhibits at Tab 3. Deposition and related hearing extracts relating to applicants' rebuttal verified statements are found in Appendices I and II to this Brief. The deposition of NS witness Fox concerning his rebuttal verified statement is cited as "Fox Reb. Dep. at _____" and may be found in Appendix I. The "highly confidential" portions of witness Fox's deposition are submitted in a "Highly Confidential" supplement to Appendix I of this Brief, EFM-17.

The high BTU/medium sulfur quality coal produced by Mine 84 constitutes a distinct submarket within the coal mining industry. The competitive market for this coal consists of the production of Mine 84 and six other rail-served mines in the Pittsburgh Seam, located in southwest Pennsylvania and the bordering northern West Virginia Panhandle, previously identified as "MGA region" coal. TMM at 11; MTM at 5-8, 10-11; RLG at 10.[6] The primary market for this Pittsburgh Seam coal is comprised of utilities in the Northeast and Midwest presently served by Conrail. TMM at 12; MTM at 8-9; RLG at 10-13; Fox Reb. Dep. at 6, 25-26.

Mine 84 and each of the other six mines which constitute the primary sources for the high BTU/medium sulfur MGA region/Pittsburgh Seam coal are served exclusively by Conrail. Mine 84 is located on the Ellsworth Secondary line, which connects with the Conrail Mon line at Monongahela, Pennsylvania. The Ellsworth Secondary is located approximately twenty miles north of the northern terminus of the former Monongahela Railway at West Brownsville, Pennsylvania. The six mines with which Mine 84 directly competes all are located on the lines of the former Monongahela Railway. TMM at 7; MTM at 12; *see* Exhibit MTM_2, a map of the MGA region, reproduced and associated as Exhibit 1 to this Brief. Conrail acquired

---

[6] Applicants' coal marketing executives and experts concur in Mine 84's market definition. *See* EFM-7 at 5 for citations to the verified statements and deposition testimony so confirming. On rebuttal, Norfolk Southern witness Fox attempts to blur the market definition, including assertions concerning competition with barge-served mines and coals having differing properties. Fox offers no specific facts to support his allegations, and he had undertaken no studies or analysis in preparation of his testimony. *See* Fox Reb. Dep. at 8, 11-12. Further, witness Fox ignores the fact that once a utility customer determines to replace coal of a different quality with MGA region coal, a very complicated determination involving numerous factors, Fox Reb. Dep. at 52-58, the competition to source this high BTU/medium sulfur coal to rail-served utilities will in any event be Mine 84 and the six other mines producing this coal from the Pittsburgh Seam.

control of the Monongahela Railway in 1990, and merged the Monongahela Railway into Conrail in 1991.[2/] Accordingly, at all times relevant to Eighty-Four Mining Company, including the due diligence evaluation leading to the decision to purchase Mine 84 for renovation, expansion and full commercial development, Mine 84 and its direct competitors have been served exclusively by Conrail. TMM at 8-9.

B. Effects Of Conrail Acquisition On The MGA Region Coal Market

The transaction being considered by the Board entails the division of Conrail by CSX and Norfolk Southern. As affects the MGA region coal mines, Norfolk Southern will acquire the lines of the Monongahela Railway and the Monongahela main line ("Mon") and the Ellsworth Secondary line. The Mon line runs along the west side of the Monongahela River. CSX will receive trackage rights over the lines of the former Monongahela Railway, which CSX will serve via its line located on the east side of the Monongahela River, from the junction at West Brownsville. *See* Monongahela Usage Agreement, CSX/NS-25 at Ex. GG. Accordingly, CSX will secure the rights to serve the six MGA region mines located on the former Monongahela Railway. Consequently, those six mines will realize dual rail service as a result of the transaction, whereas Mine 84 will be relegated to service solely by Norfolk Southern.

2/ *See* Consolidated Rail Corp. — Control — Monongahela Ry. Co., F.D. No. 31630 (Aug. 14, 1990); Consolidated Rail Corp. — Merger — Monongahela Ry. Co., F.D. No. 31875 (Oct. 4, 1991).

Applicants have offered no rationale for this division of the MGA region coal market, other than this is the way the transaction was so structured; and indeed, applicants have conceded that neither CSX nor NS, either individually or together, applied "any specific criteria in determining that the Monongahela Area Agreement should be served by both CSX and NS." *See* EFM-7 at Tab 3, Exhibit 4.[8] Additionally, the agreement between CSX and NS provides that any extension of the former Monongahela Railway lines to serve new operating areas also will be jointly served. Monongahela Usage Agreement, CSX/NS-25 at Ex. GG, §§ 2, 11. This provision was very purposefully drawn, in contemplation of extending rail service to the "Berkshire" field operated by CONSOL, which operator presently produces two-thirds of the MGA region coal. The Berkshire mine is of the same high BTU/mid-sulfur content as produced by Mine 84 and the other MGA region mines discussed herein. MTM at 14; EFM-7 at Tab 3, Exhibit 3.

Currently, Mine 84 and its competitors along the lines of the former Monongahela Railway, all being served exclusively by Conrail, are in exactly the same competitive posture.

---

[8] On rebuttal, witness Fox states that the transaction serves to "reintroduce" competition to the former Monongahela Railway lines. Whatever the level and status of competition which may have existed before the Conrail acquisition in 1990, that is irrelevant to EFM, and further is irrelevant today from an economic standpoint. RLG at 18. Accordingly, the issue of reintroduction of competition to the Monongahela Railway lines, which has not existed for almost eight years, is immaterial to the Board in evaluating the effects of the pending transaction and the conditions which should be imposed. Moreover, EFM having invested in Mine 84 and committed to its rehabilitation two years after Conrail acquired complete control over the former Monongahela Railway, EFM has not faced the competitive imbalance witness Fox seeks to justify.

MTM at 8-9.[9] Consequently, rail transportation is a neutral factor in the purchaser's choice of mine from which to source its MGA region coal. MTM at 11. This will change radically if the transaction is approved without conditions. The effect of the division of Conrail's lines with regard to the customers for MGA region coal is highly prejudicial to Eighty-Four Mining Company. Taking into consideration both utility and non-utility customers, Norfolk Southern will exclusively serve 22% of the destination market, CSX will exclusively serve 20% of the destination market, and CSX and NS jointly will serve 58% of the destination market. MTM at 17-21.

The increase in single-line service, through expansion of the CSX and NS networks, and the introduction of competitive rail service in the northeast, are touted as major benefits of the acquisition and division of Conrail. These competitive benefits will accrue to each of the six mines on the lines of the former Monongahela Railway with which Eighty-Four Mining Company competes. Moreover, each of those mines will retain single-line service to all of the northeastern destinations constituting the primary market for MGA region coal. *See* EFM-7 at 13-14 and EFM-11 (erratum). As the transaction is structured, Mine 84 will be deprived of these opportunities and benefits.

---

[9] In his rebuttal statement, witness Fox infers that Mine 84's location provides it an advantage over the former Monongahela Railway served mines; however, on deposition he stated he did not know if Mine 84's location is of any significance. Fox Reb. Dep. at 60. Whatever the significance of Mine 84's relative position, "It's physically no closer to its markets after the transaction than it is before." Fox Reb. Dep. at 68.

II. EFM WILL SUFFER IRREPARABLE INJURY IF THE TRANSACTION IS APPROVED AS PROPOSED

A. EFM Will Be Foreclosed From Serving 20% Of The MGA Coal Market

As previously identified, and unchallenged by applicants, approximately 20% of the Conrail territory market for Pittsburgh Seam coal is scheduled to be served post-transaction exclusively by CSX. Unless this transaction is conditioned by the Board, Eighty-Four Mining Company effectively will be foreclosed from this 20% of the market since CSX will be able to source coal competitive to that produced by EFM in single-line service.[10] The testimony of CSX's Senior Coal Marketing Executive, Raymond Sharpe, as well as documents obtained through discovery from CSX, clearly recognize that CSX will husband for itself, through its pricing practices, the single-line movement where a railroad can deliver coal meeting the specifications of the utility or industrial customer.[11] Railroads protect their single-line served markets through granting favorable pricing to the single-line movements, and single-line service

---

[10] In their rebuttal, applicants confuse market access and sales, arguing that in 1996 EFM sold no coal to certain customers which post-transaction will be served exclusively by CSX. CSX/NS-176 at 458. Whether EFM had sales to particular customers in a particular year is irrelevant (although EFM did sell to other post-transaction CSX customers in 1996 and 1997). No one mine serves all customers; rather, the customer lists change from year to year. Moreover, the past is an inaccurate indicator considering that EFM has substantially expanded its production volume since 1996. TMM at 6-7.

[11] On rebuttal, NS argues that EFM is concerned about preserving single-line service which may degrade to joint-line service. CSX/NS-176 at 419-420. This is a strawman argument created by NS. EFM's concern is not that service will deteriorate from single-line to joint-line, but rather than EFM will be foreclosed from serving 20% of the marketplace inasmuch as joint-line service cannot compete with single-line service where comparable coal is available via either route.

will be superior to joint-line service.[12] The reality that railroads prefer their single-line service over participation in joint-line hauls was acknowledged not only by the CSX coal witness, but also by NS' Vice President of Coal Marketing, John William Fox, and by the economists sponsored separately by CSX and NS, Robert L. Sansom and Barry C. Harris.[13]

On rebuttal, NS coal marketing executive Fox argues that "EFM will not necessarily be foreclosed from serving [the post-transaction CSX sole-served points] as it predicts." Fox RVS at 7, CSX/NS-177 (hereafter, "Fox RVS"). In support of this theoretical assertion, Fox cites to settlement agreements having been reached with several utilities. The cited settlements, however, all relate to coal consuming locations — not coal mines — which post-transaction will be served exclusively by NS, not CSX. Thus, these settlements do not preserve EFM's access to any closed points on the CSX system. Moreover, there is no indication of whether from a practical standpoint CSX originations will be able to compete effectively in joint-line service where NS can source coal with comparable characteristics. Furthermore, there is a substantial difference between that which is theoretically possible ("not *necessarily* foreclosed") and that which is either practical or likely. CSX's Vice President for Coal Sales and Marketing candidly stated that Mine 84's competitive position could be preserved post-transaction on CSX-served routes if CSX could obtain Mine 84 coal via a switching arrangement. EFM-7 at 11-12. On deposition concerning his rebuttal testimony, NS coal

---

[12] The extensive deposition and documentary support for this self-evident proposition is detailed in EFM-7 at 11-13.

[13] *Id.* at 13.

executive Fox stated that NS would not voluntarily offer CSX a switching arrangement, and — not surprisingly — that his objective in joint-line service is to obtain the maximum length of haul. Fox Reb. Dep. at 21-22, 32-36. Obviously, absent Board intervention, EFM will have no opportunity to serve the CSX sole-served points post-transaction, considering that CSX can source equivalent coal via single-line movements utilizing the trackage rights affording access to Mine 84's competitors.

B. EFM Will Be Disadvantaged In Serving 58% Of The MGA Coal Market

As identified above, whereas CSX will receive exclusive rights to serve 20% of the MGA coal market and NS will receive sole rights to serve 22%, CSX and NS will share access to serve 58% of the market. Accordingly, 58% of the market will be open at both origin and destination to both CSX and NS for all of Eighty-Four Mining Company's competitors. Mine 84 being a closed point on the NS system, EFM will be able to serve this 58% of the market only via Norfolk Southern.

Rail competition provides leverage with regard to both pricing and service. This self-evident concept also was admitted by applicants' witnesses both in their written testimony and on deposition. *See* EFM-7 at 13. Notwithstanding, both on deposition regarding his initial testimony and in his rebuttal verified statement, NS' witness Fox sought to imply that Mine 84 will be a beneficiary of the dual rail service available to its direct competitors. EFM-7 at 14; Fox RVS at 5. When pressed on deposition, witness Fox refused to commit, to both EFM and to the

Board, that such benefits, *i.e.*, the limitations flowing from competitive rail service on the ability to extract economic rents, will flow to EFM rather than being diverted by Norfolk Southern. EFM-7 at 14. There is good reason for witness Fox's equivocation: economic analysis teaches that benefits of rail competition flow only to those realizing the competition, not to "nearby competitors captive to one of the two railroads." RLG at 17-18.[14] Accordingly, Eighty-Four Mining Company will be at a severe disadvantage in serving 58% of the market,[15] in addition to being foreclosed from 20% of the market.

C. The "Expanded NS System" Will Not Offset 78% Market Foreclosure And Disadvantage

In his rebuttal statement, witness Fox seeks to suggest that notwithstanding the foreclosure and disadvantage to EFM in the Pittsburgh Seam coal market and Conrail territory,

---

[14] Conrail, in the UP/SP merger, documented that rail captivity can bear as much as a 50% rate penalty. EFM-7 at Tab 3, Exhibit 6. Conrail's analysis was based upon polyethylene plastics traffic moving from Texas origins to Conrail destinations; and those captive Texas origins entailed plants which, similar to the contemplated post-transaction MGA coal market, were in close proximity to competitive plants served by more than one rail carrier.

[15] Certain of the dual-served customers are located in New England. EFM demonstrated that those New England locations would be subject to an additional disability, namely an inefficient three-line haul via NS as compared with a two-line haul for CSX origins. MTM at 20-21. On rebuttal, NS asserts that a settlement agreement with Canadian National resolves this problem through a haulage agreement. *See* Mohan RVS at 72-73, CSX/NS-177. Witness Mohan has never seen the agreement between NS and CN, and was testifying solely on the basis of a description of that agreement from NS staff. *See* Transcript of Discovery Conference, January 22, 1998 at 22, 27, appended as Appendix II to this Brief. Such hearsay testimony is inadmissible, and provides no basis for the Board to conclude that the additional disability with regard to the New England traffic has been resolved. Even if the CN agreement were to cure NS' operating disadvantage, the New England market still falls within the 58% of the market disadvantage to EFM due to its competitors having dual access.

EFM will somehow realize compensating benefits, based upon NS' self-interest to promote sale of Mine 84's coal, Fox RVS at 4, and due to the benefits of service from NS and "the vast expansion of single-line service... ." Fox RVS at 5.[16]

It is uncontroverted that the primary market for Pittsburgh Seam coal lies in the northeast and midwestern territories served by Conrail. *Supra* at 6. This is confirmed by record documentation from CSX, EFM-7 at Tab 3, Exhibit 7. Moreover, the utility plant destinations on the NS system are located at substantially greater lengths of haul from Mine 84 as compared with the coal mines currently serving those plants, MTM at 3, distances witness Fox conceded to be "significant." Fox Reb. Dep. at 50-52.

Without refutation of these facts, NS nonetheless identifies a "new utility market for Mine 84 coal" and identifies facilities in five southeastern states "that in 1996 consumed a total of approximately 26 million tons of coal." Fox RVS at 6. Fox also reiterates the statement

---

[16] Witness Fox also refers to the fact that the sulfur content of Mine 84's coal is among the lowest of the MGA coal competitive group, and further states that "EFM will realize a competitive advantage post-Transaction by virtue of the fact that EFM is physically closer to virtually all of the coal markets on the new NS system than the mines on the former Monongahela Railway. EFM will be closer to power plants on the NS system, as well as to lake destinations including Sandusky and Ashtabula, and ocean destinations such as Baltimore and Lambert's Point (Norfolk)." Fox RVS at 6-7. When questioned at deposition, witness Fox acknowledged that the transaction will not change the characteristics of the coal of EFM or its competitors, nor will the transaction result in a change in the physical location of any mine, utility plant, lake terminal or ocean port. Fox Reb. Dep. at 67-69. Moreover, witness Fox testified that he did not know whether the relative location of Mine 84 to its competitors is of any significance. *Id.* at 60. Whatever the relevance of the cited comments, they are not transaction related, and accordingly are not "benefits" accruing to EFM which may compensate for the adverse market effects.

in his initial verified statement that NS expects to increase coal moving between Conrail and NS territories from four million tons to twelve million tons over the next several years. Fox RVS at 8. On deposition, Mr. Fox acknowledged that NS had conducted no analysis of the suitability of MGA region coal for the utilities in the five states, or what part of the 26 million tons consumed in 1996 would be a candidate for replacement by MGA region coal. He acknowledged that such an analysis would entail factors of environmental considerations, cost, boiler specifications and transportation distance, a "very complicated" calculation. For at least one of the so-called candidate plants within the identified territory, the current coal source is within 100 miles of the plant, as compared with a 700 mile haul for Mine 84 coal, a difference admitted to be "significant." Nor could witness Fox identify what portion of the anticipated increase in coal moving between NS and Conrail territories would move south as compared with north, let alone what portion was estimated to move from the MGA coal region. Indeed, witness Fox further expressed concern that coal moving into the southeast avoid disrupting the markets of NS' existing coal mine customers. Fox Reb. Dep. at 50, 52-58, 69-71. NS' postulation of a "new utility market for Mine 84 coal" is simply a hypothetical which, when analyzed, reveals that there is neither likelihood nor substance to the impression sought to be created that the transaction will produce benefits to offset Mine 84's documented market losses.

NS' insinuation of other replacement markets for Mine 84 coal is similarly illusory. Witness Fox refers to the NS presence in the export and metallurgical coal markets. On deposition, it was established that EFM can reach the Port of Baltimore equally via Conrail and NS, Fox Reb. Dep. at 39; and the primary metallurgical coal market currently resides in Conrail

territory. *Id.* at 40-42. Thus, substituting NS for Conrail as the carrier serving EFM does not improve EFM's market position. Moreover, there is no proven metallurgical market for MGA region coal. Fox Reb. Dep. at 42-44, 46-47.[17] When the fog of obfuscation is pierced, it is clear that there is no identification of an NS replacement for EFM's market losses in the northeast. Rather, the advantage touted by NS is that it has a superior marketing organization. Fox Reb. Dep. at 39-44. NS' perception of its marketing prowess is not a transaction benefit cognizable by the Board, nor does it compensate EFM for its market foreclosure and disadvantage.

Finally, whatever advantages NS claims to offer Eighty-Four Mining Company, those same advantages are available to each of EFM's competitors. Given the similarity in physical properties, any market in the southeast for metallurgical use that Mine 84 could serve also could be served by each of its MGA region competitors. Moreover, each of those competitors would be able to serve those markets not only via NS but also via CSX, and Fox acknowledged that CSX serves both southeastern utilities and metallurgical markets. Fox Reb. Dep. at 44-45, 58-61. Consequently, to the extent there are markets for MGA region coal outside of the traditional markets in Conrail territory, the market preclusion and disadvantage suffered by Eighty-Four Mining Company simply increases, thereby compounding the injury.

* * *

---

[17] The metallurgical coal market further is relatively small, representing only 20% of the coal transported by NS, Fox Reb. Dep. at 11; and the portion of the combined Conrail/NS market will be even less since Conrail has little metallurgical coal on its system. Fox Reb. Dep. at 41.

In summary, the injury to Mine 84 is clear, unchallenged, unrefuted and unmitigated. The alleged compensating benefits to Eighty-Four Mining Company as a result of NS superseding Conrail as the serving carrier are unquantified, hypothetical and illusory. To the extent those benefits exist, those benefits will be doubly enjoyed by Eighty-Four Mining Company's direct competitors, as they receive those benefits from CSX as well as NS.

III. THE INJURY TO EFM REQUIRES THAT THE BOARD APPROPRIATELY CONDITION ANY APPROVAL GIVEN TO CSX AND NS ACQUISITION OF CONRAIL

A. Legal Standard

Railroad acquisition and control applications are evaluated under the "Public Interest" standard. 49 U.S.C. § 11324(c). Burlington Northern, Inc. — Control and Merger — Santa Fe Pacific Corp., F.D. No. 32549, Decision No. 38, at 50-51 (August 23, 1995) (hereinafter, "BN/SF"); Union Pacific Corp. — Control and Merger — Southern Pacific Rail Corp., F.D. No. 32760, Decision No. 44 at 98 (August 12, 1996) (hereinafter, "UP/SP"); Missouri-Kansas-Texas R. Co. v. United States, 632 F.2d 392, 395 (5th Cir. 1980), *cert. denied* 451 U.S. 1017 (1981), Penn Central Merger Cases, 389 U.S. 486 (1968). In reaching the public interest determination, the Act commands the Board to "consider *at least* — (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) (emphasis added).

As evidenced by the direction to consider "*at least*" the five enumerated factors, it is apparent that the public interest is a broad test, and is not to be narrowly construed. The Board so recognizes, inasmuch as the General Policy Statement for Merger or Control of At Least Two Class I Railroads states, "In examining a proposed transaction, the Board must consider, *at a minimum*: [the factors enumerated in the statute]." 49 C.F.R. § 1180.1(b)(1). With regard to whether the "public interest" test and the enumerated factors should be construed in broad or narrow fashion, one need only to recall the genesis of this transaction, *i.e.*, the agreement of merger announced October 15, 1996 between CSX and Conrail. In forging that agreement, which would have resulted in the dominant carrier in the East being twice the size of the second carrier, the parties apparently believed that the UP/SP merger decision provided the script, and that they only needed to maintain competition at "2-to-1" points in order to secure agency approval. That was not the view of Norfolk Southern. As aggressively proclaimed in its public statement, as quoted in the introduction to this Brief and from the Chairman of NS as recited on the cover page, NS advocated that the potential effects of railroad consolidation must be viewed from a broad, marketplace perspective, and not simply from the standpoint of whether an acquisition would reduce competition at a point or in a corridor. Indeed, the Interstate Commerce Commission stated in evaluating the predecessor to Section 11324:

> In evaluating "whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region," 49 U.S.C. § 11344(b)(1)(E), we do not limit our consideration of competition to rail carriers alone, but examine the total transportation market.

UP/SP at 99.

In contrast to past railroad control proceedings, this transaction does not merely involve the end-to-end consolidation of two railroads, nor does it entail consolidation within a region which may raise competitive concerns related to commonly-served points and parallel route structures. Rather, the distinguishing nature of this proceeding is that two railroads are acquiring a third railroad and dividing its markets between them. In doing so, this transaction raises issues far broader than rail transportation service in its purest form. In application of the "public interest" test, the Board must consider whether this market division may have an adverse effect upon the markets being served by the carrier to be acquired, and whether participants in those markets may be injured as a function of the manner of division of those markets. NS' economic witness Dr. Harris recognized that shippers may suffer harm from factors other than simply whether transportation options increase or decrease. EFM-7 at 18.

Under the antitrust laws, agreements between competitors to divide geographic markets or allocate customers are viewed as naked restraints of trade and are condemned as unlawful *per se*. Palmer v. Palmer BRG of Georgia, Inc., 498 U.S. 46 (1990) (*per curiam*). *See also* Timken Roller Bearing Co. v. United States, 341 U.S. 593, 598 (1951); Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 240-41 (1899). Market division agreements among potential, as well as actual, competitors are equally unlawful; and both are conclusively

presumed to have anticompetitive effects. *See* Palmer, 498 U.S. at 49-50 (market allocation "agreements are anticompetitive regardless of whether the parties split the market within which they both do business or whether they merely reserve one market for one and another for the other"). Given the general condemnation accorded to market division agreements, it is extremely important for the Board to assure in the division of Conrail that CSX and NS do no injury to markets they will serve.

Applicants, citing to the ICC's BN/Santa Fe merger decision, identify a five-part test for exercise of the Board's conditioning power. CSX/NS-176 at 38. Eighty-Four Mining Company, in this plea for relief, respectfully submits that its situation satisfies each part of that test:

(i) **There is a causal connection between the merger and the alleged competitive harm**: The harm to Eighty-Four Mining Company is a direct result from the proposed transaction. There currently is a balanced competitive market for MGA region coal. As a direct result of the structure of the transaction, Eighty-Four Mining Company will be foreclosed from approximately 20% of the market and prejudiced in an additional 58% of the market, as compared with its competitors.

(ii) **The proposed condition is narrowly tailored to remedy the alleged harm**: Eighty-Four Mining Company is requesting either that CSX be

accorded trackage rights over the Ellsworth Secondary line with the right to serve Mine 84, and associated rights of access along the Mon Branch line, comparable to the trackage rights accorded over the lines of the former Monongahela Railway, or alternatively that Norfolk Southern be directed to provide switching of Mine 84 traffic to CSX either at Homestead (at the north end of the Mon Branch line) or at West Brownsville (the junction with CSX at the south end of the Mon Branch and the Monongahela lines). The switch should be that which is either agreed upon by CSX and NS, or in the absence of agreement, determined by the Board. Switching is provided for at numerous other places in the transaction;[18] and the same terms as govern switching elsewhere should be applied in this instance. EFM-7 at 24-26.

No objection has been raised by applicants to the practicality or feasibility of either of these remedies. Currently, Conrail handles all coal traffic from Mine 84 and its six direct competitors on the Mon Branch line; and the rights granted to CSX in this proceeding will divert traffic at West Brownsville off the Mon Branch to the CSX line on the East side of the Monongahela River. Accordingly, there is no issue of operational burden from either of the alternative remedies requested by EFM; and applicants

---

[18] Switching is provided at Indianapolis and other locations, as set forth at CSX/NS-25 at 501, *et seq.*

have not challenged the requested remedy as overly broad, burdensome or otherwise impractical. The financial terms suggested are those otherwise agreed upon by NS and CSX for either trackage rights or reciprocal switching, under analogous circumstances.[19]

(iii) **Alternative remedies do not exist**: The Board has exclusive jurisdiction over rail mergers and the conditions which may be imposed thereon. There is no independent contract or statutory provision governing this aspect of the transaction which would afford EFM an alternative remedy.

As discussed in the context of the legal standard, market divisions generally are reviewed as restraints of trade and condemned as *per se* violations of the antitrust laws. *Supra* at 19-20. Applicants seek, pursuant to 49 U.S.C. § 11321(a), exemption from the antitrust laws to carry out the acquisition and division of Conrail. That authority may be conferred by the Board "*as necessary* to let that rail carrier...carry out the transaction...and exercise control or franchises acquired through the transaction." It is hypocritical for applicants to argue that EFM does not suffer injury, or that whatever injury it will suffer is not cognizable and subject to remediation by the Board, while contemporaneously seeking immunity from antitrust liability to effect the market division of Conrail's

---

[19] The fees assessed should be those applicable to unit train or other multi-car movements.

lines and the industries Conrail serves.[20] Indeed, to accept applicants' contention that there is no cognizable injury, there is no need for the Board to extend antitrust immunity to the division of Conrail's lines serving the MGA region coal market since, if there is no injury, such immunity is not "necessary" for CSX and NS to carry out the transaction.[21] The preferable route is for the Board to exercise its conditioning power to remediate the harm that otherwise would be inflicted upon Eighty-Four Mining Company.

(iv) **The requested condition would not improve Eighty-Four Mining Company's position**: As detailed above, Eighty-Four Mining Company does not seek to improve its position, but rather to maintain the *status quo* with regard to its market competitive position *vis-a-vis* its direct competitors. Mine 84 cannot be viewed in isolation, as applicants contend. As described above, EFM's situation is directly analogous to that of Norfolk Southern following the announcement of the merger agreement

---

[20] The Board in reviewing grants of immunity to motor carrier collective ratemaking activities has noted the contradiction inherent in extending antitrust immunities to activities that "would not violate the antitrust laws in the absence of antitrust immunity." National Classification Committee — Agreement, Section 5a Application No. 61, Decision served November 13, 1997.

[21] While the "as necessary" language of the statute evidences that the Board may define the scope of antitrust immunity accompanying approval of a control transaction, the Board also may *sua sponte* limit the scope of antitrust immunity under the powers conferred by Section 10502 of the Act. *Accord* Norfolk Southern Ry. Co. — Abandonment Exemption — in Fayette County, AL, STB Docket No. AB-290 (Sub-No. 190X) (served Feb. 12, 1998).

between CSX and Conrail. Those carriers pledged to keep Conrail's lines serving the Northeast open for Norfolk Southern, and the merger otherwise would not have affected Norfolk Southern's ability to operate over its system. Nonetheless, Norfolk Southern's position was that it had "no choice but to oppose" the CSX/Conrail merger.[22] Norfolk Southerns' concern was the creation of "an extremely uncompetitive market in the Northeast."[23] The test to NS was not whether its current lines and network would be affected, but rather the public interest in maintaining "a relatively balanced rail system in the East. If you get CSX and Conrail together, you start out with market dominance in the East."[24] The counterpart to market dominance is market foreclosure, and that is the situation facing EFM as its direct competitors, representing 87% of MGA region coal production, secure enhanced market access while it, with 13% of production capacity, faces m arket foreclosure and disadvantage. NS' economic witness, Dr. Harris, conceded that it would be advantageous to structure the transaction to avoid inflicting injury on individual shippers

---

[22] Magda Ratajski, Norfolk Southern Vice President of Corporate Communications, *Journal of Commerce*, October 18, 1996, p. 1A.

[23] William Bayles, Norfolk Southern Vice President, *Journal of Commerce*, December 6, 1996, pp. 1A, 7B.

[24] David Goode, Norfolk Southern Chairman, *Washington Post*, December 31, 1996, pp. E1, E3.

such as Mine 84.[25] The condition requested by EFM is narrowly tailored to preclude competitive harm caused by the transaction, and would maintain the *status quo* and not afford EFM an advantage over its position prior to the transaction.[26]

(v) **The conditions requested would not change the competitive balance among shippers**: EFM seeks not to change, but rather to preserve, the competitive balance within the MGA coal market. It is applicants who seek to radically, and arbitrarily, change the competitive balance within the MGA region coal market that currently exists, and then to erect barriers around their conduct by claiming that "it is beyond the scope of the Board's authority or sound public policy in a free market economy to

---

[25] EFM-7 at 20-21.

[26] EFM's position is fully consistent with the decision of the Interstate Commerce Commission in Illinois Cent. Gulf R. — Acquisition — GM&O, 388 I.C.C. 805 (1971), *aff'd*, Kansas City Southern Ry. Co. v. United States, 347 F. Supp. 1211 (W.D. Mo. 1972), *aff'd*, mem., 409 U.S. 1094 (1973), cited at CSX/NS-176 at 41. In that proceeding, KCS sought conditions on merger of the Illinois Central and the Gulf, Mobile and Ohio railroads which would have increased the KCS system mileage by almost one-third, afforded KCS direct access to Chicago and East St. Louis which it had not previously enjoyed, and increased its gross revenues by eight times KCS' own estimate of its potential traffic loss and 55 times the traffic loss estimated by the Commission. As recited by the United States District Court, the Commission found that the "purpose of the proposed condition is not to preserve the competitive *status quo* of KCS but rather to enrich it at applicants' expense." 346 F. Supp. at 1213. EFM seeks only to preserve its competitive *status quo*, not to improve its position, and certainly not to enrich itself at applicants' expense.

attempt to equalize the transportation alternatives of all shippers."[27] As detailed above, this is not a case of a competitive impact flowing from a settlement with another party having a consequential effect upon a shipper with regard to a portion of its marketplace.[28] Rather, the harm to Mine 84 is a direct result of the principal agreement before the Board for approval, the division of Conrail's routes and the agreement to share access to six of the seven MGA region producers of high BTU/medium sulfur coal. By asserting that the injury inflicted upon EFM is "beyond the scope of the Board's authority or sound public policy in a free market economy," applicants in essence are telling the Board and the public that they, and they alone, have the power to agree to a market division and the determination of winners and losers in the industrial sector.[29] It is not applicants, but rather the Board which is charged with the duty of protecting the "public interest" and assuring that the self-interested, and in this instance arbitrary, dealings of consolidating rail carriers do not adversely affect competition.

---

[27] CXS/NS-176 at 43.

[28] *Compare* BN/SF at 39, 99, regarding Bunge Corporation, which sought stop-off privileges regarding a route granted to the SP as a settlement in the BN/SF merger proceeding which would benefit some, but not all, Bunge's competitors.

[29] Applicants' reference to a "free market economy" is highly ironic in that applicants seek to deny free market choices to EFM, and subject EFM to monopoly transportation conditions, while conferring market choices upon EFM's direct competitors.

B. The Injury To Eighty-Four Mining Company Is Cognizable And Requires Redress

There is no doubt in the record in this proceeding that a division of Conrail with joint service being accorded to all of Mine 84's direct competitors but not to Mine 84, and the related division of Conrail's utility and other coal markets between CSX and NS to the effect of foreclosing or prejudicing EFM in 78% of the marketplace, will injure Mine 84. Not only has Mine 84 so demonstrated through its evidence, but also applicants CSX and NS have so acknowledged as detailed above. NS' economic witness, Dr. Harris, conceded in his deposition that a shipper which does not receive dual service when its competitors do so is subject to a market disadvantage. EFM-7 at 20. There is no record support or argument that the division of the MGA region coal markets entailing the grant of joint access to the six mines located on the lines of the former Monongahela Railway and limiting Mine 84 to single-carrier service is justified on any basis. Rather, the evidence is that this result occurs simply from the manner in which the map was drawn; and it is likely that there was no specific consideration given to the consequential effects upon Eighty-Four Mining Company.

Furthermore, the factors applied in evaluating rail consolidation proceedings, when looked at beyond the narrow context of the rail applicants themselves, as is warranted by the scope and unique nature of this transaction, unquestionably support a remedy for Mine 84. The second factor commanded by Congress to the Board under Section 11324(b) is "the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction." This factor looks beyond the totality of the market to the effect on

individual market participants who may not be beneficiaries of the transaction. This factor recognizes that "markets" are not amorphous concepts which have application only in theoretical economics; rather, markets are comprised of individual suppliers and individual customers. The principle underlying this factor — the public interest in assuring fully functioning and competitive markets and in avoiding undue consequences on participants in those markets — is the very consideration being brought to the Board by Eighty-Four Mining Company.

The fifth factor commanded to the Board to evaluate in Section 11324(b) addresses the effect on competition. Again, this is the very element being raised by Eighty-Four Mining Company.[30] By analogy, the Board in the UP/SP merger decision stated that it is "disinclined to impose conditions that would broadly restructure the competitive balance among railroads with unpredictable effects." UP/SP at 144. In the instant proceeding, the Board is asked to bless the division of the Monongahela coal region market between CSX and NS in a manner that would "broadly restructure the competitive balance" among coal producers. The one distinguishing factor between this situation and the caveat expressed by the Board in UP/SP is that the results here are predictable, namely the extreme prejudice to Mine 84 in the marketplace. As a matter of rail transportation policy and the public interest, just as the Board seeks to avoid arbitrarily imposing restructuring of competitive balance, so should the Board in its oversight of

---

[30] The ICC has defined competitive harm resulting from a merger as the ability to gain sufficient market power to raise rates or reduce service (or both), and to do so profitably relative to pre-merger levels. BN/SF at 54. In the context of EFM's 84's situation, the exclusion of Mine 84 from the competitive transportation market being extended to its direct competitors subjects Mine 84 to that very risk, at least from a relative perspective, *supra* at 12-13; *see also* RLG at 17-19.

railroad consolidation proceedings protect the marketplace against the applicant railroads arbitrarily doing so themselves. Markets should function based on principles of economic efficiencies, *see* RLG at 18-19, and should not be undermined due to arbitrary and artificial influences.

IV. CONCLUSION AND REMEDY

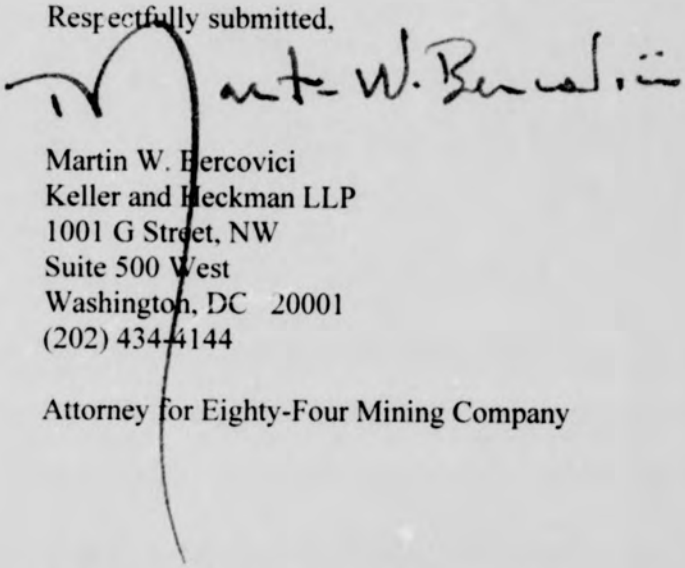
Eighty-Four Mining Company has demonstrated, without challenge, that the division of the MGA region coal market by CSX and NS in their acquisition of Conrail will have a substantial, material and adverse effect upon Eighty-Four Mining Company. EFM is one of four companies, operating seven mines, producing high BTU/medium sulfur content coal that is playing an increasingly large role in energy production as a result of Clean Air Act requirements. With its recent increase in capacity, EFM is the second largest MGA region producer. Maintaining a fully competitive marketplace is important not only to EFM, but also to the utilities and other consumers, since efficiently functioning markets produce maximum economic efficiencies for all in the distribution chain. EFM seeks no advantage arising out of this transaction, but only to maintain the level playing field it presently enjoys. EFM seeks the same outcome from rail consolidation in the East as sought by Norfolk Southern when faced with the original merger proposal between CSX and Conrail.

The condition requested by EFM is narrowly tailored to remedy the injury the transaction otherwise would inflict and is practical, feasible and non-intrusive on the structure of the

transaction. That remedy entails either the grant of trackage rights to CSX to serve Mine 84, or a requirement that NS provide switching of EFM traffic to CSX.[31] The terms of either remedial provision should be consistent with trackage rights or switching otherwise agreed upon by applicants in this transaction.

WHEREFORE, THE PREMISES CONSIDERED, Eighty-Four Mining Company respectfully urges the Surface Transportation Board to direct either that CSX be accorded trackage rights along the Mon Branch and Ellsworth Secondary lines, under similar terms and conditions as CSX will enjoy trackage rights along the lines of the former Monongahela Railway, or alternatively that Norfolk Southern be directed to provide switching of Mine 84 coal cars to CSX, either at Homestead or at West Brownsville.

Respectfully submitted,



Martin W. Bercovici
Keller and Heckman LLP
1001 G Street, NW
Suite 500 West
Washington, DC 20001
(202) 434-4144

Attorney for Eighty-Four Mining Company

February 23, 1998

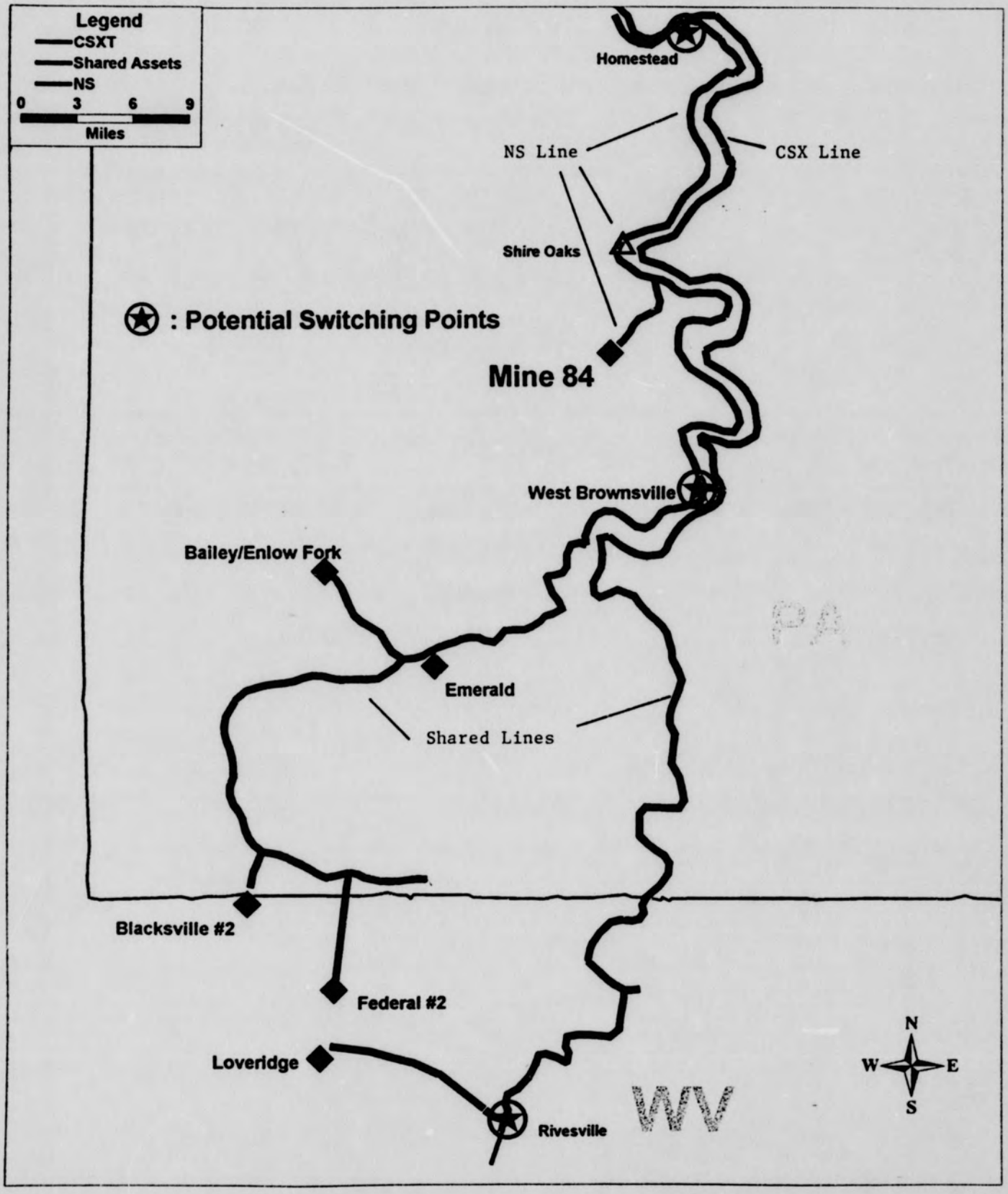
---

[31] The route miles involved are approximately 32. MTM at 22. This represents a distance less than 20% of the trackage rights granted CSX along the former Monongahela Railway; and a substantial portion of the route is along the Ellsworth secondary, the branch line serving Mine 84. As discussed *supra* at 20-22, applicants have raised no issue concerning the practicality or feasibility of the requested remedies.

US OFFICE PRODUCTS

EXHIBIT 1

MGA Coal Region



SOURCE: EFM-7, Exhibit MTM_2

APPENDIX I

REDACTED — TO BE FILED ON THE PUBLIC RECORD

APPENDIX I

JOHN WILLIAM FOX REBUTTAL DEPOSITION

NOTE: The Highly Confidential portions of this deposition are submitted in a Supplement to this Appendix I, EFM-17.

Depo of: John William Fox In Re: CSX Corp. 2-3-98 Cr68135.0

CONFIDENTIAL MATERIAL

Page 1 to Page 74

CONDENSED TRANSCRIPT AND CONCORDANCE
PREPARED BY:

ACE-FEDERAL REPORTERS, INC.
1120 G Street, N.W.
Suite 500
Washington, DC 20005
Phone: 800-336-6646
FAX: 202-737-3638

CONFIDENTIAL MATERIAL Page 1

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

DEPOSITION OF JOHN WILLIAM FOX

Washington, D.C.
Tuesday, February 3 1998
REPORTED BY:
SUSIE K. STROUD

CONFIDENTIAL MATERIAL Page 2

Deposition of JOHN WILLIAM FOX, called for examination pursuant to notice of deposition, on Tuesday, February 3, 1998, in Washington, D.C. at the law offices of Zuckert, Scoutt and Rasenberger, 888 Seventeenth Street, N.W., at 1:38 p.m. before SUSIE K. STROUD, a Notary Public within and for the District of Columbia, when were present on behalf of the respective parties:

SHARON L. TAYLOR, ESQ.
Arnold & Porter
555 Twelfth Street, N.W.
Washington, D. C. 20004-1202
(202) 942-5175
On behalf of CSX Corporation and CSX Transportation, Inc.

– continued –

CONFIDENTIAL MATERIAL Page 3

APPEARANCES (CONTINUED):

RICHARD A. ALLEN, ESQ.
Zuckert, Scoutt & Rasenberger, LLP
888 Seventeenth Street, N.W.
Suite 600
Washington, D. C. 20006
(202) 298-8660
On behalf of Norfolk Southern Railway

MARTIN W. BERCOVICI, ESQ.
Keller and Heckman, LLP
1001 G Street, N.W.
Suite 500 West
Washington, D. C. 20001
(202) 434-4144
On behalf of Eighty-Four Mining Company, Inc.

CONFIDENTIAL MATERIAL Page 4

PROCEEDINGS

Whereupon,
JOHN WILLIAM FOX
was called as a witness and, having first been duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. BERCOVICI:

Q Mr. Fox, I'm Martin Bercovici, I'm the attorney for Eighty-Four Mining Company and we had the opportunity to have a discussion back in August, as you may recall –

A I recall.

Q – concerning the same proceeding, a statement contained in the rebuttal filing on December 15. The rebuttal verified statement of John William Fox, Jr.'s, I take it, is your statement?

A Yes.

Q Do you have any changes to make to that statement?

A No, sir, I do not.

Q At the prior deposition, we discussed what we referred to in that dialogue as the Pittsburgh

CONFIDENTIAL MATERIAL Page 5

Seam, or the Pittsburgh 8 Seam, and that's also discussed in the comments of the Eighty-Four Mining Company, are you familiar with the prior discussion?

A Yes. Generally, yes.

Q For purposes of our discussion today, when I refer to the Pittsburgh Seam, or the Pittsburgh 8 Seam, what I will be talking about is the competitive market described by Mr. Majcher, that's M-a-j-c-h-e-r, in his testimony which comprises of West Virginia Mine 84 and the six mines in southern Pennsylvania and northern West Virginia, which Eighty-Four Mining Company considers to be direct competitors; is that clear?

A Yes.

Q In your statement, you discuss both utility coal and metallurgical coal, can you just give us a brief discourse on the difference between the two categories.

A Utility coal is generally characterized as energy-producing coal. Metallurgical coal is the quality of coal that's generally used in the coking process and prelude to steel making.

CONFIDENTIAL MATERIAL Page 6

Q *Do they have differing physical characteristics?*

A Not always, but sometimes they do in general, but some coals are used both ways. Some coals from a particular seam may be processed in different ways to be used for either steam coal purposes or metallurgical purposes.

Q *I believe when we had our discussion back in August, you had referred to the Pittsburgh Seam as basically a utility coal area?*

A I think that's the general – the most prevalent use of that product is for utility coal, I believe that.

Q *And does that have to do with the characteristics of the coal, or the price of it, or the physical location, or –*

A I think it's the general characteristics of the coal.

Q *And those characteristics would be sulfur content and heat content, among others, or are there other characteristics as well?*

A Those are characteristics, yes.

CONFIDENTIAL MATERIAL Page 7

Q *The rebuttal verified statement that you submitted on December 15, did you prepare that statement?*

A I – through a series of interviews and edits, you know, and wordsmithing, I participated in its preparation.

Q *Were you the primary draftsman of it?*

A No.

Q *Who was the primary draftsman?*

A I'm not even – my staff, people on my staff assisted in the preparation. I answered questions and made an outline and then it was drafted from that.

Q *And who on your staff would that have been?*

A Everyone, my whole staff, I mean, as it pertained to other – I mean, I have a staff of about 35 people, I don't recall exactly who worked on it.

Q *It took 35 people to discuss – to witness – to comment on party statements?*

A Yes.

Q *There was no one who had particular responsibility for it?*

CONFIDENTIAL MATERIAL Page 8

A I had particular responsibility for it.

Q *Did counsel assist in preparing the rebuttal statement?*

A Not to my knowledge.

Q *You are familiar with the statement and the contents –*

A It's my statement.

Q *Other than the two pages of worksheets which were submitted to the document depository – let me show you those, those are NS-80-HC-00101 and 00102. Did you consult any documents, report or other analysis in preparation of your rebuttal statement?*

A I don't recall any others. Maps, maybe, you know, just general information that I generally, you know, have in my head, I guess, is where most of it came from.

Q *The document bearing the number – last three digits 102, will you help me understand what this document is, please.*

A It's a breakdown of the coals and the metallurgical and utility groups and different categories of forwarded, received, overhead, and I can't remember what else it stands for at the moment. If somebody can help me –

CONFIDENTIAL MATERIAL Page 9

MR. MOREY: It's probably line haul –

THE WITNESS: Line haul, yeah, I guess that's what that is – no, I don't believe that's right.

BY MR. BERCOVICI:

Q *You don't believe that that's line haul?*

A I think I made myself a note.

MR. HOWE: Local probably.

THE WITNESS: Local, that's what it is.

MR. HOWE: O is overhead, L should be local.

THE WITNESS: Yeah, local is what it means. I don't know why it escapes me, but that's what it means.

MR. BERCOVICI: I appreciate that explanation, I've been puzzling over what the initials had meant.

BY MR. BERCOVICI:

Q *What is the category 830 and the category 800?*

CONFIDENTIAL MATERIAL Page 10

A 800 would be utility coal and 830 would be metallurgical.

Q *Forwarded would be coal that originated on the NS system and was interlined with another carrier for destination; is that correct?*

A Yes.

Q *And received would be the converse, that you were delivering carrier, but not the originating?*

A Right.

Q *And overhead, you're a bridge carrier, neither originating or terminating?*

A Right.

Q *Local, of course, is where the movement is handled entirely on the NS system?*

A Yes.

Q *And what are the percentages – percentages of –*

A Percentages of the total. In other words, in the utility category, 20 percent of the total are either forwarded or received, handled and interchanged, so to speak. And in the metallurgical, 30 percent are forward, received or overhead, 30

CONFIDENTIAL MATERIAL Page 11

percent of the total, they're handled in interchange.
Q And from these figures, I gather that approximately 80 percent of the coal handled by Norfolk Southern is utility coal as compared to metallurgical coal?
A Yes. Domestic metallurgical – if you added domestic metallurgical and domestic utility, I guess that would – that percentage would work.
Q Since our last discussion on August 25, are you aware of any studies that Norfolk Southern has conducted with regard to the Pittsburgh 8 coal market?
A None specifically. We look at information, we try to educate ourselves all the time as to the – as best we can to the operating conditions, and we've been there, probably, since then. I've studied it on the ground, so to speak, in person. I've – I mean, there's a lot of information being developed in connection with our – in anticipation of marketing these coals. I don't know specifically what you have in mind, but there has been activity with respect to

developing market intelligence, to the extent possible since that time.
Q But have you done any formal analysis of where the coal now moves to and what utilities would be good candidates for that coal, and matters of that nature?
A We've discussed it – from a formal analysis standpoint, I don't – we're trying to get a working knowledge of the types of coal, and the markets, and the users, and we're trying to develop a level of competence with that particular product. As far as a formal analysis, I don't think we've done that. We've used what publicly available data there is.
Q Would it be proper to characterize your activity as backgrounding information?
A Yes.
Q Page 2 of your rebuttal statement, you express your preference to resolve concerns about the effects of the Conrail acquisition through market-based negotiation and agreement rather than leaving the resolution of these issues to the Surface

Transportation Board, and you go on to state that you have reached agreement with a number of customers. The first one you mention is Pennsylvania Power & Light Company, who initiated that discussion leading to that agreement?
A We been working with the PP&L people three or four years before the Conrail consolidation. I don't know who initiated that conversation, but as long as – I suspect it goes back as long as they've been a utility using coal. NS coal marketing – N&W coal marketing before them – would have had an interest in that supply chain opportunity. So, I mean, the original – I don't know who originated those conversations, but it goes back a ways, our relationship with PP&L.
Q Does this relate to your efforts to sell coal to PP&L that led to the complaint case by PP&L against Conrail that the – before the agency?
A I don't know what led to that complaint.
Q The agreement with PP&L, are both Norfolk Southern and CSX parties to agreement?

A CSX is not a party to our agreement.
Q Is not?
A No.
Q You state that following the approval of the transaction, the – all of the PP&L plants will be solely served by NS and that you have reached agreement with them. Does that agreement permit PP&L to secure coal that's transported by CSX to their plants?
MR. ALLEN: I'm going to object to that question on the grounds that the agreement is highly confidential and of utmost commercial sensitivity and I don't see any basis for getting into the details of the agreement.
MR. BERCOVICI: He raised the agreement himself in the testimony, stated that he's resolved their – whatever issues that they had with them, and that – raised in the context that they will be exclusively served posttransaction. I think it's relevant to find out for purposes here whether or not that involves a provision for NS to serve those plants in some

fashion.
MR. ALLEN: It allows NS to serve those plants?
MR. BERCOVICI: Excuse me, allows CSX to serve those plants.
MR. ALLEN: Well, again, I'm going to restate my objection, because the details of the agreement are not relevant to his statement. He's stated that they've entered into an agreement. You can ask him whether his statement is accurate, but to get into the details of it, I think, is unnecessary and goes beyond what is appropriate.
MR. BERCOVICI: Are you instructing him not to answer?
MR. ALLEN: Yes, I am.
BY MR. BERCOVICI:
Q Regarding the agreement with Weirton Steel, W-e-i-r-t-o-n, Steel Company, can you tell us who initiated those discussions?
A I don't remember who. I think someone at Weirton did, but I don't remember the circumstances. Probably came through our Pittsburgh sales office.

Q The concerns that they had expressed, you referred to, were those concerns arising out of the

fact that they would be exclusively served by Norfolk Southern posttransaction?

A It seems to me that their concerns were to get to know NS as a carrier. They had limited experience with us and we toured their facilities and agreed to cooperate in the various benchmarking processes with respect to safety and facility and staffing and things of that nature. So we got to know them on that level, that led to commercial discussions, that we got to know more about what their transportation requirements were, their supply chain connections, they take iron ore and coke, they don't actually take coal. We didn't have any direct experience with them, and we were able to reach a comfort level with Reardon and them with NS to resolve their concerns through that process, and it took several months of attention, so to speak, visiting their facility and consulting with them at a lot of different levels with NS. It turned out to be a pretty useful

CONFIDENTIAL MATERIAL Page 17

process.

Q Is that agreement solely between Weirton and NS and does not involve CSX?

A Yes.

Q You referred to an agreement with Delmarva Power & Light, which you state has two plants in Delaware that will be solely served by NS following the transaction, that Delmarva will be able to continue to economically access coal originating on CSX, do you recall who initiated the discussions leading to the settlement with Delmarva?

A There again, our relationship with Delmarva goes back many years. We've had supply chain connections with Delmarva, we know their people, we've had business relations with them as long as I've been in coal marketing, and much before that, I'm sure. So there was an extension – a natural extension of that process.

Q Is CSX a party to that agreement?

A No.

Q What kind of arrangement did you make with Delmarva in general terms to allow them to continue

CONFIDENTIAL MATERIAL Page 18

to economically access coal originating on CSX?

MR. ALLEN: Again, I object to the question to the extent it goes into the details of the agreement. I don't see how he can answer that question without – without disclosing confidential information.

MR. BERCOVICI: He's the one who raised it, Mr. Allen, he said that there –

MR. ALLEN: But again –

MR. BERCOVICI: – that he's the one who described what the effect of the agreement is. I think we're entitled to know is that a switching arrangement, is that a joint line haul, is there trackage rights.

MR. ALLEN: Again, I object and will instruct him not to answer to the extent it requires describing details of the agreement that would be confidential under the agreement.

MR. BERCOVICI: We do have a protective order operative in this proceeding, and we are all parties to the protective order, I am; and Ms. Taylor is, I am sure; Mr. Morey is; and the board and Judge

CONFIDENTIAL MATERIAL Page 19

Leventhal in his rulings generally have favored disclosure, and, again, as I say, this is an issue that was raised directly by the witness in his statement.

If we need to, we can call the judge and get a disposition on this issue.

MR. HOWE: Wouldn't we have to call Delmarva and the other parties of the agreement?

MR. BERCOVICI: That hasn't been required, Mr. Howe, in terms of these proceedings. The agency has ruled that its protective order is sufficient to protect the interests of the other party to the agreement, and they have done that both in this proceeding and in a recent rate case ruling that was issued by the agency.

MR. ALLEN: Could you read your question again.

(The reporter read the record as requested.)

MR. ALLEN: Can we go off the record? Maybe we ought to discuss this. Why don't we – do you mind if we just –

MR. BERCOVICI: Not at all, please do.

CONFIDENTIAL MATERIAL Page 20

Let's try and get this resolved.

(Discussion off the record.)

MR. ALLEN: Having considered this matter off the record, I have decided, in view of the way that Mr. Fox discussed and relied on the Delmarva agreement, to permit him, without waiving our objections, to answer the question to the best of his knowledge regarding Delmarva, but that conclusion and instruction applies only to the Delmarva situation. So, if you can recall the question, Mr. Fox, go ahead and answer it. And I do so, by the way, in order to simply avoid having a dispute on this matter and in order to move the deposition along.

MR. BERCOVICI: Thank you.

THE WITNESS: And the question is?

BY MR. BERCOVICI:

Q I'll repeat the question, Mr. Fox. With regard to the agreement with Delmarva, what, in general terms, is the arrangement that will allow Delmarva to be able to continue to economically access coal originating on CSX, will there – is

CONFIDENTIAL MATERIAL Page 21

there a switching arrangement in place, is it a joint line haul, or do they have haulage rights?

[REDACTED]

[5]
[6]
[7]
[8]
[9]
[10]
[11]
[12]
[13] [REDACTED]
[14]
[15]
[16]
[17]
[18]
[19]
[20]
[21]
[22]

CONFIDENTIAL MATERIAL Page 22

[1]
[2]
[3]
[4]
[5] [REDACTED]
[6]
[7]
[8]
[9]
[10]
[11]
[12] *Q You further refer to an arrangement with*
[13] *Ohio Valley Coal Company; again, do you recall who*
[14] *initiated those discussions?*
[15] **A I'm pretty sure Bob Morey initiated those**
[16] **discussions.**
[17] *Q You state that this is a NS/CSX joint line*
[18] *service, do I understand that this agreement is an*
[19] *agreement with CSX, NS and Ohio Valley?*
[20] **A Yes.**
[21] *Q Page 7 of your statement, the first*
[22] *paragraph with a bullet, you state "EFM will not*

CONFIDENTIAL MATERIAL Page 23

[1] *necessarily be foreclosed from serving that*
[2] *market" – that market being the market served solely*
[3] *by CSX posttransaction – "as it predicts." You*
[4] *further reference your discussion above of various*
[5] *agreements that have been reached as part of this*
[6] *proceeding.*
[7] *Is it your intent here to state that if*
[8] *settlements can be reached, that Eighty-Four Mining*
[9] *Company can reach the posttransaction CSX exclusively*
[10] *served points?*
[11] **A In the utility market, the power generators**
[12] **are the customer who drive that process. If they**
[13] **have an interest and they can articulate that**
[14] **effectively, then it's been my experience that NS and**
[15] **CSX will cooperate. I mean, that's what's happened.**
[16] **I don't know that – I mean, there's no – it's on a**
[17] **utility-for-utility basis, each utility coal user**
[18] **would drive that process.**
[19] *Q Is this something that they would have to*
[20] *preserve in terms of their opportunity during this*
[21] *transaction proceeding before the Surface*
[22] *Transportation Board?*

CONFIDENTIAL MATERIAL Page 24

[1] **A I don't understand.**
[2] *Q For EFM to protect its ability to reach its*
[3] *customers, whose posttransaction will be CSX*
[4] *exclusive points, is it necessary that those*
[5] *customers now be active in trying to get arrangements*
[6] *such as Pennsylvania Power & Light, Delmarva,*
Weirton
[7] *Steel, and others, in order to preserve that*
[8] *opportunity?*
[9] **A I don't think the timing is significant,**
[10] **that seems to be an ongoing process. I mean, as**
[11] **previously stated, a good percentage of NS coals**
move
[12] **in interchange.**
[13] *Q When you say –*
[14] MR. BERCOVICI: Can you read back his last
[15] answer.
[16] (The reporter read the record as requested.)
[17] BY MR. BERCOVICI:
[18] *Q Are those NS coals that NS originates, is*
[19] *that what you have reference to?*
[20] **A Part of them are and part of them are**
[21] **originated on other carrier's lines, as the work**
[22] **paper that we previously discussed indicates.**

CONFIDENTIAL MATERIAL Page 25

[1] *Q In that work paper, the top line under the*
[2] *800 category, which you said is utility coal, is*
[3] *forwarded coal, would that be forwarded from*
[4] *railroads in the west as well as from other eastern*
[5] *railroads?*
[6] **A That's NS forwarded off-line. NS**
[7] **originated forwarded.**
[8] *Q Off-line?*
[9] **A Off-line.**
[10] *Q And it's the R which would be the –*
[11] **A Received.**
[12] *Q – received? And would that include*
[13] *received from western carriers as well as –*
[14] **A Yes. Yes.**
[15] *Q – other eastern carriers?*
[16] **A Some of that is eastern, yes.**
[17] *Q Of that 12 million plus tons of utility*
[18] *coal received, approximately what percentage of that*
[19] *is coming from Conrail?*
[20] **A For utility coal?**
[21] *Q For utility coal.*
[22] **A Not much, if any. I don't know**

CONFIDENTIAL MATERIAL Page 26

[1] **specifically.**
[2] *Q Are you aware of any of it coming from the*
[3] *Pittsburgh Seam?*
[4] **A I don't specifically know of any.**

Q *If that were a significant portion of the 12 million tons, do you think you would know about that coming from the Pittsburgh Seam?*
A **Yes.**
Q *On January 14, New York State Electric and Gas reported to the Surface Transportation Board that it had reached an agreement with the primary applicants, are you familiar with that agreement?*
A **Read that again, please. I didn't catch – does that –**
Q *It's not in your testimony. New York State –*
MR. ALLEN: NYSEG. Are you familiar with the NYSEG agreement?
THE WITNESS: I don't think we have an agreement. We have a kind of a letter of understanding, but the agreements haven't been formalized, I don't think. Now, that's an ongoing

CONFIDENTIAL MATERIAL Page 27

process. We have, you know, reached an understanding that should lead us to an agreement.
BY MR. BERCOVICI:
Q *Can you tell us who initiated the settlement discussions leading to that letter of understanding?*
A **Pretty sure the NYSEG coal purchasing group did.**
Q *Does that letter of understanding involve both CSX and NS as parties?*
A **I don't think so. I think CSX is a party to the arrangement, but I believe the letter that we have with NYSEG is between us – between NS and NYSEG.**

[REDACTED]

CONFIDENTIAL MATERIAL Page 28

[REDACTED]

[REDACTED]

CONFIDENTIAL MATERIAL Page 29

[REDACTED]

CONFIDENTIAL MATERIAL Page 30

[REDACTED]

Q *If I recall correctly, when we met on August 25, you stated that you understood the concerns by my client, Eighty-Four Mining Company, about the potential effects of this transaction on their operations, is that a fair recitation of –*
A **I've heard their concerns.**
Q *Do you understand what they are? I'm not asking if you agree with them, I'm asking if you understand what they are.*
A **I understand their – where they're coming from, but I'm not sure I really agree with the concerns that they have as being legitimate.**

CONFIDENTIAL MATERIAL Page 31

Q *You state on page 3 of your verified – your rebuttal statement that "to the extent that other coal/utility parties have any concerns about the control Transaction, NS remains eager to discuss*

those concerns in a business environment in an effort to reach accommodations that are mutually agreeable and commercially beneficial."
Have you approached Eighty-Four Mining Company in an effort to reach a mutually agreeable accommodation?

A We've talked with them on several occasions to try to address their concerns.

Q Have you made any formal written proposals to them?

A I don't think – I haven't personally. I don't know that anything has come out of my group, there's been quite a bit of interaction between the transaction level account manager in my group and the Eight-Four people. I don't know if they've exchanged paper or not, I have not.

Q Who would that transaction-level account manager be?

A Greg Workman is dealing with them. And I have personally met with the Eighty-Four people on several occasions, and we've discussed the matters of concern.

Q A few days before we had our discussion on August 25th, I had an opportunity to have a similar conversation with your counterpart at CSX, Mr. Ray Sharp. He stated during the deposition that it was his intent to discuss a switching arrangement with Norfolk Southern to enable CSX to obtain access to Mine 84 coal. Have you met with Mr. Sharp since August 21?

A Yeah, I think we have.

Q Have you had conversation with Mr. Sharp concerning their interest in –

A I would be surprised if he wouldn't be interested, why wouldn't he be interested?

Q Have you discussed this with him?

A Briefly.

Q Can you describe what the tenor of those discussions were?

A I'm not interested in providing CSX access

to Mine 84.

Q You state in your rebuttal statement, I'm looking at page 4, that NS intends to be very aggressive in pursuing business to locations now on Conrail that Mine 84 currently serves, does this include locations that posttransaction would be exclusively served by CSX?

MR. ALLEN: Does it include or exclude?

MR. BERCOVICI: Include.

THE WITNESS: There again, we work with the utility users and hopefully the CSX served utilities that express an interest in Mine 84 product we will be able to reach similar type successful arrangements that we have in other circumstances. But the utilities, you know, drive this process. We won't dictate which utility take 84's coal anymore than 84 will dictate, the utilities will buy their coal and select their transportation services, and they generally negotiate with us separately, we don't – they won't negotiate their transportation arrangements with NS and CSX, sometimes together, but sometimes separately, and

also apart from the coal producer. And we are actively engaged in that process at NS coal marketing to try to promote the NS coals to the marketplace with our coal producers, but the ultimate decision rests with the utility buyers.

BY MR. BERCOVICI:

Q If utility buyer is interested in procuring coal from Mine 84 and that utility buyer – or that utility, I should say, is exclusively served by CSX, would you be prepared to provide switching to CSX so that they could handle the line haul movement to the utility?

A Not – probably not switching. We would be interested in the line haul division of the revenue, if we could reach an accommodation that way. We don't – we wouldn't – I wouldn't make any kind of general commitment to provide switching for 84's coals to CSX without having more information about the conditions and destinations and revenues and the cost structure involved. There's just a lot that goes into making those kinds of decisions, and unfortunately, we're not in a very good position to

know those factors before control date, which is, I think, sometime in August now. So, you know, as a general principle, I wouldn't be in a good position to make a commitment about switching 84's coal to CSX without knowledge of the marketing conditions; operating conditions; competitive issues; cost structure; existing contractual arrangements, the kind of factors that go into those decisions.

Q But I believe you said at the beginning that you would be disinclined to provide a switching arrangement and that you would look toward a joint line arrangement; is that correct?

A Generally, that's better for us if we can – and we're – if we can get a division of the revenue, yes.

Q If you couldn't get a division of the revenue because under a joint line arrangement, CSX would not be inclined to provide a competitive joint line rate where they could source competitive coal on single line basis, would you be inclined to provide a switch so that CSX could handle the line haul

movement?

A NS would cooperate under economically feasible conditions based on knowledge of the marketing factors, all things being equal, the

competitive issues, operating conditions, cost structure, revenue implications, you know, we've got a history that indicates we will cooperate. But to make a blanket commitment to provide switching for 84's coals to CSX is not something I'm prepared to do.

Q You further state on page 4 that your intent includes developing new markets for Mine 84 coal through the expanded single-line reach of the NS system, what markets are you referring to?

A The NS-served utility markets to a large extent and certain geographic areas seem to me to be accessible and – from the 84 geographic location, certain of those utilities in Virginia, North Carolina, Kentucky, Tennessee, Ohio. Maybe not feasible into the far Southeast, Georgia, Alabama, it gets to be a little bit out of range, but we have supply chain connections with utilities that

CONFIDENTIAL MATERIAL Page 37

regularly fall in the 5-, 6-, 700 mile range, and that's, you know, just looking at the maps, it looks like to me that that would be feasible. Bearing in mind the cost structure, as we understand the Pittsburgh 8 Seam coals enjoy a competitive cost mining structure, the quality seems to be competitive and complimentary and certain of the NS-served utilities seem to be good candidates for those coals, and to the extent that they will now become single line NS origins to these destinations, that would be one market that we would approach. I'm sure our utility partners would be interested in NS developing rates from that geographic area. Another market would be the domestic metallurgical market that 84 has expressed an interest in exploring. NS will now serve directly many of the steel producing metallurgical coal customers, and we think that's a good market opportunity. I don't know specific quality of the type of coal that 84 will introduce to that market, but we have a good coal marketing team in that area, and I think they can do a good job domestically.

CONFIDENTIAL MATERIAL Page 38

Internationally, NS has, what I consider to be, a superior marketing presence in the international markets for metallurgical coal. We haven't gotten much business to show for it, but we regularly call on the international steam coal buyers, hopefully 84's product will have some appeal in that market, and we're very anxious to try to help 84 market those coals internationally if they have a metallurgical product, we think we can effectively participate in that marketing effort. Certainly, we're – NS is anxious to help promote a competitive steam product in the international market, we haven't been successful because of the – basically, the cost of NS origin coals. These coals seem to have a lower cost structure and while they enjoy a high Btu value, it seems to me that we got an opportunity. Plus, we have cross logistical complementary transloading facilities at Lamberts Point and on the lakes and on the rivers to access all off-line markets, both – a lot of off-line markets domestically and all international markets,

CONFIDENTIAL MATERIAL Page 39

and we think that 84's product will be complementary in those markets. They seem to have a lower than average sulfur value than the other Pittsburgh 8 coals. We think they've got a good product, and their operation is modern and efficient and we think they've got – we're going to have a good future together with 84 and NS, and we look forward to it.

Q Can Mine 84 coal now reach the export markets through the port of Baltimore?

A Yes. Now, it can.

Q Provided Conrail; is that correct?

A Yes.

Q So the advantage that you claim that NS brings as your marketing organization –

A Well, it's that, our contacts – a long period of relationships with metallurgical coal buyers internationally. Our blending facilities at Lamberts Point, and, you know, I think we have a higher presence in the international metallurgical market than Conrail does, because Conrail really hadn't had a metallurgical product to export of any significance. And for that reason while we're

CONFIDENTIAL MATERIAL Page 40

calling on metallurgical customers, we drop by and see the utilities and hope some day we get an opportunity to serve those markets. And I think this day will be when NS acquires this portion of Conrail, and gets a chance to market these coals.

Q You referenced the domestic metallurgical market and talked about NS serving many of the steel producers, are those steel producers that you currently serve or are those steel producers that you will serve as a result of acquiring Conrail lines?

A We've served them forever with quality NS-origin metallurgical coals, we just haven't been able to serve them directly, because they terminate on somebody else's railroad. But under this transaction, we will serve some directly, so we get to do – we'll get a single-line haul into some of these facilities that we haven't enjoyed before and – so we're anxious for that. Hopefully that will help us reduce our cost and be more competitive.

Q From your answer, I take it that some of these steel producers are sort of single – or served by Conrail today; is that correct?

CONFIDENTIAL MATERIAL Page 41

A I think that's right, yes.

Q Can I conclude from what you've said that the steel producers are buying coal which is moved in joint line in NS Conrail movements today rather than buying coal from Conrail origin mines?

A Well, like I said, Conrail doesn't have a lot of what we would consider to be metallurgical-quality coal, there's some there, and 84 has expressed an interest to get involved in that market through processing of its coals. But generally, the metallurgical coals are found in most abundance and quality on NS and CSX in the United States in the east, so they haven't had the product. Although some Conrail coals are used in the coke-making process, I've learned since I've been involved with this project, that some of them are used as fillers in the coking process in certain steel mills. We've actually introduced that concept to the – on a recent trip, just last couple weeks, introduced that concept to European steel producers. They had heard of the Pittsburgh 8 Seam coals, but they hadn't considered them as a possibility in their

CONFIDENTIAL MATERIAL Page 42

blends, but actually, domestic steel producers in the United States use successfully some of those coals in their blends.

So we'd like to promote that idea with the European steel producers, and south American steel producers and Asian steel producers, and those around the world that we call on. I don't think Conrail calls on those people that much, they may have a passing knowledge, but I think our marketing is much more – we penetrate that market much more successfully than Conrail does.

And now we've got some new products to sell, and even though we don't really have them to sell right now, we're already starting to talk to our steel producers around the world about them because it takes some time for them to get comfortable with a new – a blend component and actually test it and use it. It's a long process, but today is a good day to start it.

Q I'm just – I'm struggling a little bit, Mr. Fox, a little bit. Let's see, with regard to the metallurgical market, because we've – I think you've

CONFIDENTIAL MATERIAL Page 43

told me, is that there are steel producers in Conrail territory that could obtain Mine 84 coal for their blend purposes today in a single-line haul?

A I don't think I said that. I said in certain cases, I have heard that some Pittsburgh Seam coal has been used successfully as a blend component, I think it's a very small component of a metallurgical coal blend. It does not – it does not inherently have desirable coking qualities, but can be used as a filler in the process to supply heat. From that standpoint, I think given the price structure, the availability, that possibly it has some indication of desirability in the steel-making process outside the United States, which I don't believe it's used in.

So I'm just saying that – I mean, it's not like you can make coke out of Pittsburgh 8 Seam coal of any particular quality, I don't believe you can. I think it's got to be blended with other different quality coals, but it has, my understanding, been used as a blend component. And I think that's a very innovative idea that needs to be promoted

CONFIDENTIAL MATERIAL Page 44

internationally, and I think NS coal marketing can do that.

Q From but from a service physical access to market standpoint, to the extent that that opportunity is there, that opportunity is there through Conrail origin service as well, is that not correct?

A I don't think it's being managed very well.

Q But that's a marketing function and not a transportation function.

A Eighty-Four Mining could market their own coals internationally, I don't think they do. I think that's an area they'd like to be involved in, they'd like to get more involved in international marketing, and I don't think Conrail has provided the assistance, and I don't think 84 has had the inclination to do it on their own, so this will be a new kind of arrangement.

Q To the extent that these opportunities for Pittsburgh Seam coal in the metallurgical market exist, isn't it true that they exist not only for Mine 84, but for all of the other Pittsburgh Seam

CONFIDENTIAL MATERIAL Page 45

producers?

A To the extent they exist, although I'm hearing from the 84 that they intend to approach that market in a more serious way. I think their filing indicated that they would like to be more involved in the metallurgical markets. I don't see much activity in that respect from the Pittsburgh 8 Seam producers. They may, if that market should develop, they very well could get involved and it seems that the quality would be similar enough to allow it.

Q You understand why Mine 84 may be so interested in approaching and developing the metallurgical market, whether or not active in that market today?

A Yeah, there's generally a pretty good price differential between metallurgical coal and steam coal.

Q Are you also aware that Eighty-Four Mining Company's recently expanded the output capacity of Mine 84?

A Yes, I've heard that.

Q That they've gone from approximately 3

CONFIDENTIAL MATERIAL Page 46

million tons to 7 million tons of production?

A I don't know the numbers, but I've heard they've put on another long haul, I don't know the

numbers.
Q So is that a reasonable basis for them to now be interested in exploring any market where they can sell – or increase production?
A This is a different quality coal, and a different market, a different environment, a completely different marketing challenge to look into the metallurgical market. I think they're a little more serious about it than just saying, I've got some volume to move, gee, I think I'll dump it in the metallurgical market. It doesn't happen that way.
Q But what I'm suggesting is if they were still at 3 million tons of production, they may not have the same incentive to try and access that market as they would to having more than double their capacity; is that a reasonable business judgment?
A No, no, because if they thought they had a metallurgical quality coal, they'd be not very wise to provide it to the domestic steam market. It's a

CONFIDENTIAL MATERIAL Page 47

much more valuable product in the marketplace, and I'm relying on their statements, if they can produce a metallurgical quality coal that has some value in metallurgical blend, if that's so, then we've got some marketing to do together, because it's a value-added product, it does cost more to process; it has to be – the quality control is much more stringent; and it commands a higher price.
Q Are you using blend differently than your term "fill in" that you used a few minutes ago?
A Well, my understanding of the customary use for this coal is as a filler, but my reading of 84's intention and talking to them is that they are looking to produce a legitimate metallurgical coal, I mean, that's what I'm assuming. I don't know if they've got a different seam that they're involved with or a different process that they intend to look at, but whatever reason, we're interested to work with them on that, it's an effective product and it will be good for them and good for NS.
Q So at this point, we're talking about potential markets that are not really aware or mature

CONFIDENTIAL MATERIAL Page 48

and available markets in a commercial sense, is that –
A Well, there's a huge demand internationally for low cost, high quality metallurgical coal, and to the extent they can meet the market with quality and price, the market is there for them, there's nothing potential about it, it's there.
Q But we don't know yet whether or not their coal will meet that market?
A I rely on their expectations.
Q You also stated when we started on this line of questioning about the new markets, you talked about the Southeast utility markets, let me go back to that.
With regard to those utilities, I believe you stated at the beginning of our discussion this afternoon, that you had not conducted any specific studies, market studies of the Pittsburgh Seam market opportunities, is that –
A I had a map drawn, actually, yesterday, that indicated, you know, just some mileages and routes, I don't know if you'd call that a study, but

CONFIDENTIAL MATERIAL Page 49

just trying to get in my mind in preparation for this deposition, the relative geography for 84 coals and then, you know, based on my general knowledge of what the geographic conditions are for NS-originated coals, you know, thinking about it in miles is a very rudimentary way to look at pricing models, but it's one way, it's a relevant factor to some extent, so I mean, that – if you want to call that a study, I guess you could.
Q And in that map, did you compare route miles from Mine 84 to the utilities with the route miles to those utilities from the mines that are serving those utilities today?
A I have in my mind – I haven't done any in-depth analysis, but I have in my mind – you know, in general, NS average is something like 450 miles of line haul miles on coal movement, and that includes some miles that are short-haul miles, like to the river, you know, 50, 60 miles, a lot of traffic, about 10 million tons moves in that market, then it includes some others, so 450 of an average, and thinking about, you know, 5-, 600 miles as being kind

CONFIDENTIAL MATERIAL Page 50

of a working, you know, long-haul average, it just seems – it seems to me that Pittsburgh 8, Mine 84 coals have a legitimate opportunity and to the NS service region, and not the whole deep Southeast or Alabama markets maybe, but into the Virginia, Carolina, Kentucky, Ohio, those markets.
Q Are these the 12 plants identified on your work sheet bearing the last three numbers 101?
A I don't have all those plants, I've got seven of them, I think, shown on here on this map. I didn't go back to the work paper, but some of these were shown on the map.
Q Did you go back with regard to these utilities and – you said you did not go back and look at where they're currently procuring coal today?
A That information is available, I didn't – I didn't look at that. But I know in general, you know, how far the plants are from their traditional sources of product.

[REDACTED]

CONFIDENTIAL MATERIAL Page 51

[REDACTED]

cases. Although, I mean, there – plans are being made all the time to experiment with different products, and actually all utilities, including TVA, are looking at these Powder River Basin hauls that are, you know, 2000 miles, I think, a long ways off, so.

Q Is there –

A They don't get that coal now, but they all experiment with different ideas, different combinations.

Q Well, just to finish our question about the

[REDACTED]

CONFIDENTIAL MATERIAL Page 52

A I wouldn't argue with Mr. Morey –

Q Thank you.

A – on that.

Q In addition to the transportation – is that transportation distance significant in terms of the coal sourcing?

A The difference between 100 miles and 700 would be significant.

Q In addition to route miles, would the plant requirements with regard to Clean Air Act compliance be significant?

A That's always an issue, and it's dealt with in a lot of different ways, but it's certainly an issue now and will become more of an issue in phase 2.

Q Would boiler specifications be significant?

A I'm told that that has a bearing, but I don't know the technical aspects of boiler configurations.

Q In terms of this exhibit and your reference on page 6 of your verified statement to facilities in

CONFIDENTIAL MATERIAL Page 53

five states that in 1996 consumed a total of approximately 26 million tons of coal, wouldn't you have to do an analysis of Clean Air Act compliance requirements, boiler specifications, route miles in order to determine what coal is suitable and in what potential quantities?

A Well, to me – you know, I don't know much about coal chemistry. There are all kinds of schemes and ways to overcome the requirements or to meet the requirements of the Clean Air Act, I mean, to – buying compliance credits or blending for sulfur compliance or – but, you know, price has a lot to do with it, and I know the cost structure of – mining cost structure for Pittsburgh's coals, 84's coal is very favorable to Central App in a lot of ways. I mean, that's what I understand – I don't – I shouldn't say I know that, I understand that. And my experience has been that cheap coal burns pretty good; if you get the right price, it will go to market.

Q But you would have to do a specific analysis in order to determine whether or not that's

CONFIDENTIAL MATERIAL Page 54

actually a viable coal for that particular utility in terms of taking all those factors including price into account; isn't that correct?

A Utilities consider those factors against the price per Btu, and then they make their decisions based on a variety of issues, but the sulfur content is one of them, and it's a very significant factor. And they decide to put scrubbers on their stacks to eliminate some of the emissions, they buy credits, they blend, they negotiate price, they do a lot of things to deal with the implications of Clean Air Act requirements and deal with them effectively. And I guess my understanding is that the future for these coals, sulfur being what it is, is very good, because of the strategies that utilities have employed in making these coals desirable and usable. So I believe that the same conditions apply in the NS – the existing NS service region, and to the extent these coals are very popular in their current service region, I feel like they'll be popular in the NS-served utility markets.

Q Are you familiar with a new source

CONFIDENTIAL MATERIAL Page 55

performance standards under the Clean Air Act –

A No.

Q – for utilities?

A Not specifically.

Q Are you aware that these standards may preclude utilities from burning coal with sulfur content exceeding a certain level?

A I think that's an over simplification, I mean, I think that's – I think you've stated it properly, but I think that's an oversimplification, I think the requirements are much broader than that, and give – and you know, have emission standards that can be met through a variety of different methods. And obviously knowing whether a plant is scrubbed or not scrubbed or what their blend components are and what their boiler configurations are, all things are important, there's no question about it, but, you know, I suggest from a marketing standpoint, my basic experience that these coals can be used in blends and at scrub facilities and in different configurations successfully by a variety of utilities in our service region, and I think that

CONFIDENTIAL MATERIAL Page 56

we'll find these products to be popular.

Q The fact that these 12 utilities took approximately 26 million tons of coal or consumed approximately 26 million tons of coal in 1996 doesn't necessarily state that they are a candidate for purchasing 26 million tons of Pittsburgh Seam coal, though, does it?

A I'll be real surprised and disappointed if it displaced all the NS-origin coals. I think, you know, you're right, I mean, it's not likely that they would be displaced on a ton-for-ton basis.

Q And you can't really even state what percentage of the current coals – coal consumption could be displaced?

A No, but we've been, to some extent, conservative on the line haul basis, you know, trying to keep within that 6-, 700 mile range, which is a – I think a comfortable marketing range for coals, when we see others moving 2000 miles, 800, 900 miles to market, you know, you could easily triple that number, I mean, it wouldn't be very realistic in my mind, but I think these are legitimate opportunities

CONFIDENTIAL MATERIAL Page 57

logistically to displace some tons, there's, you know, a much more larger market than that out there, but.

Q When you talk about 2000 miles, you're talking obviously about Powder River Basin coal?

A Yeah.

Q Is that a expensive coal or a cheap coal?

A It's a cheap coal.

Q Is that low sulfur, medium sulfur, or high sulfur content?

A Low sulfur content; low Btu; high moisture, you know, it's got pluses and minuses, just like everything else.

Q So a cost and a sulfur content, that has potential compliance attractiveness to the utilities in terms of their Clean Air Act requirements; is that correct?

A Yes, but comparing the Btu value and the moisture content, it gives – it swings the other way, it depends on what the utility's burn strategy is, and how they view their economics of dispatch and what their – how much of a D rate they're willing to

CONFIDENTIAL MATERIAL Page 58

take on their facility, what their demand is, so a lot of factors.

Q It's fairly complicated calculation?

A It's very complicated, very complicated.

Q So, again, the fact that there is 26 million tons of coal consumed by these utilities doesn't mean that they're candidates for Powder River Basin coal either –

A No, but they –

Q – in any specific quantity?

A But, I mean, they're all behaving as if they're on a – they need to experiment with new blends, new configurations, new heat, try to get their efficiencies in line, they're all behaving as if they're absolutely deregulated and they're competing on a head-to-head basis with all their other utilities. So they're very anxious to look at other coals and listen about, you know, how they can improve their dispatch, you know, heat rates and their cost structures.

Q If Pittsburgh Seam coal is really an option for these utilities that you've identified, wouldn't

CONFIDENTIAL MATERIAL Page 59

that market opportunity extend not only to Mine 84, but also to Mine 84's direct competitors?

A Yes, I think it would, to the extent they're similar. 84 seems to have a little bit of a differentiation advantage with respect to sulfur. I mean, I saw a chart in one of the filings that indicated it was a little bit better than the average, so that's an advantage. It looks like to me, from looking at geography that they got a little bit of a route mile advantage, 50 miles.

Q Why is that?

A Well, that's where they are, that's geography, that's where, you know, where they are.

Q Is that because they're closer to the west Brownsville junction than the –

A They're closer to the utilities they serve than the other mine producers are.

Q Which utilities are you talking about, the utilities in Conrail territory or utilities in the Southeast?

A Yeah. Yeah, I think it applies generally to the Southeast as well, though, I think it applies

CONFIDENTIAL MATERIAL Page 60

in just about every circumstance, on NS, I don't know about CSX, but on NS.

Q If they're going to the Southeast, don't they – wouldn't they go through west Brownsville junction?

A I don't – I don't know for sure. I think we go through Columbus – well, I mean, I think they're about 50 miles closer to the markets. Now, whether that's of any significance or not, I don't know, but it seems like it might be a consideration.

Q To the extent that there is a Southeast utility market, does CSX also have a similar market?

A Yeah, yeah, they got a similar market in the Southeast.

Q And isn't it true that the other Pittsburgh Seam producers would be able to sell to – on a single-line basis to both the NS and the CSX southeastern markets?

A I really don't – wouldn't want to speak to CSX's market strategy, I don't know what they're going to do. We're going to aggressively try to introduce Pittsburgh Seam coals into our markets,

CONFIDENTIAL MATERIAL Page 61

wherever our markets are, to the extent possible.

Q Is there anything that would preclude from CSX from doing the same?

A I can't think of any reason they shouldn't.

MR. BERCOVICI: You want to take a break?

(Recess.)

BY MR. BERCOVICI:

Q Back on the record. Moving right along, Mr. Fox, I want to look at page 5 of your rebuttal

statement. And you cite to Mr. Majcher's testimony and the comments submitted by Eighty-Four Mining Company about directing its marketing activities to a "diverse geographic customer base," do you know what Mr. Majcher was referring to in that statement?

A No, I don't think I do know specifically. It probably means he's going to try to market his coals in a much wider geographic area outside his traditional marketplace in different markets, like metallurgical, export, other utilities.

Q In fact, as reflected in his statement, hasn't his market traditionally been in Conrail territory?

CONFIDENTIAL MATERIAL Page 62

A I think that's right.

Q You conclude from Mr. Majcher's statement, in taking certain passages from that statement, that in your opinion, "that EFM will benefit from gaining single-line access to points throughout the expanded NS system," is that Mr. Majcher's conclusion?

A I don't know whether it is or not.

Q Would we be here today if that were his conclusion?

A I don't know.

Q Would you like to hazard a guess?

A No.

Q Is there anything in Mr. Majcher's statement that would lead you to believe that he thinks that there will be benefit from obtaining access to a – to the single-line access to points throughout the expanded NS system?

A I don't know if there's anything in his statement that would indicate that.

Q That's simply your conclusion?

A That I don't know?

Q No, that your conclusion that you think

CONFIDENTIAL MATERIAL Page 63

that Eighty-Four Mining Company would benefit.

A I believe that Eighty-Four will benefit, and I believe Eighty-Four understands that they will benefit from NS single-line service to a variety of markets, as I have previously described.

Q You state at the bottom of page 5, that "EFM fails to recognize the benefit of the vast expansion of single line service that will be available to EFM on the NS system," doesn't this indicate th[at] -

A Well, I think they fail to fully realize the opportunities. I think that the general nature of where NS goes and what NS marketing power is is generally known to Eighty-Four. They may not know exactly what the specific opportunities are. It's time to be applying ourselves to that issue, although we can only do so much until control date and then maybe even closing date. So we're some months away, but I don't think they, Eighty-Four, fully appreciates the opportunities for coal marketing in the NS single-line service system, I don't think they completely ignore it.

CONFIDENTIAL MATERIAL Page 64

Q When you talked about the vast expansion of single-line service, are these points that can be reached today only through joint line service provided by Conrail and Norfolk Southern?

A I think that's generally true. I can't think of an exception.

Q And this follows your theme that single-line service will improve market access?

A Well, that's the most available opportunity. You know, we can get together with the end user and come up with a rate from a geographic area or from a group of mines and give – hopefully stimulate the opportunity for that movement to develop without the necessity of having to interact with another carrier. It doesn't preclude that opportunity, but it's – I will stipulate or agree that it's easier when we just do it on a single-line basis.

Q Is it simply a matter of ease or is it – are there economies and market incentives for Norfolk Southern in terms of providing single-line service?

A I mean, hypothetically, you can – I mean,

CONFIDENTIAL MATERIAL Page 65

there are cases where certainly if NS has the entire haul, it's economically beneficial. In certain cases, we'd be delighted to participate in a part of a haul, customers expect that, on one end or the other. There are a variety of – it's hard to generalize about that. There are a variety of arrangements and most of the time when we enter into an arrangement, it's economically satisfactory arrangement, but it can take all kinds of shapes.

Q Is the advantage of expanded single-line service basically, then, one of convenience?

A It does ease the transaction process, but that's not – I mean, that wouldn't be the only theory, I mean, or the only reason to have expanded single-line service just to make my life easier.

Q 58 percent of $10.2 billion is a lot of money to pay for expanded – for the ease of expanded single-line service, isn't it?

A We think it's a good deal.

Q I didn't say it was a good – I just said it's a lot of money for – if that's all you are talking about is convenience of expanded single-line

CONFIDENTIAL MATERIAL Page 66

service.

A It's a bargain.

Q That's your story and you're stuck with it; right?

Let the record show the witness didn't answer.

MR. ALLEN: Just to clarify the record, I'll ask the witness to say do you believe that – do you believe it was a bargain?

THE WITNESS: Yes, I do. I personally do believe it was a bargain.

BY MR. BERCOVICI:
Q And you're a completely unbiased witness with regard to whether it was a bargain or not, right, Mr. Fox?
(Laughter.)
A Let's just say I have a mission at this point.
Q You state on page 6, you reference the fact that among the market that EFM claims to be its competitive marketplace, the sulfur content of Mine 84 coal is among the lowest. To what extent are the

CONFIDENTIAL MATERIAL Page 67

variations in sulfur between Mine 84 and its competitive mines relate to the Conrail transaction, and to what extent is that inherent in the physical properties of the market itself?
A I don't think I understand.
Q Let me rephrase the question. The physical properties, the sulfur content of the coal, is that anything – is that related to the transaction itself, or is that a given in terms of the physical properties of the mines and the coal as they lay in the ground today?
A I think it's a geological condition, it's a fact of sulfur content.
Q So to the extent that Mine 84 coal is higher or lower than any other particular mine, is going to affect its price and its competitive position in the marketplace, regardless of who the serving carriers are; is that correct?
A Yes.
Q You further state that "EFM will realize a competitive advantage posttransaction by virtue of the fact that EFM is physically closer to virtually

CONFIDENTIAL MATERIAL Page 68

all of the coal markets on the new NS system than the mines on the former Monongahela Railway," M-o-n-o-n-g-a-h-e-l-a. Is this physical proximity a factor which is affected by the transaction, or is it affected by the transaction? Let me just ask it that way.
A I don't think I understand what "affected by the transaction" – you're talking about the NS acquisition of Conrail, that transaction?
Q Yes, that transaction, that's the one we're talking about.
A I mean, Mine 84's geography didn't change as a result of the transaction.
Q That's what I was trying to assess. So it's got the same relative position to the – to markets before the transaction as well as after the transaction?
A It's physically no closer to its markets after the transaction than it is before.
Q So after the transaction Mine 84 is the same relative distance to lake destinations, including Sandusky and Ashtabula as it was before the

CONFIDENTIAL MATERIAL Page 69

transaction?
A I should think so.
Q And it's the same physical distance from power plants on the NS system?
A Same before as after.
Q As after?
A Yes, as it moved.
Q On page 8 of your statement, you talk about the 4 million tons of interchanged coal between NS and Conrail today and the fact that that is estimated to grow to 12 million tons posttransaction. We talked before, when we were reviewing your work sheet ending in the numbers 102, about the interchanged coal and the fact that you didn't know of any of that coal today flowing from Pittsburgh Seam. In terms of the increase from 4 million to 8 million tons –
MR. ALLEN: 4 million to 12 million.
BY MR. BERCOVICI:
Q 4 million to 12 million, excuse me, by 8 million, from 4 to 12, do you have an estimate of what share of that increase will be Pittsburgh Seam coal moving into the existing NS territory?

CONFIDENTIAL MATERIAL Page 70

A I don't know that we got it specific at origin, and I don't recall the exact numbers, but we did, as I recall, evaluate the movements, because we assumed that there would be empty equipment available for back-haul movement opportunity so that we could superimpose with the anticipated mining cost factors to overcome some of the mileage deficits to get our cost in line so that we can compete on a back haul basis. And I think some of those tons, several million, a couple 3 million tons, were associated with that kind of – that assumption, that we could market effectively, a back-haul movement to utilities in our traditional NS service region. And I think we had – maybe we had a work paper on that, but I don't – I think it was in the previous – wasn't that John Williams diversion study?
MR. HOWE: I think so. It would have been –
THE WITNESS: It's part of the filing, but I don't have it with me.
BY MR. BERCOVICI:

CONFIDENTIAL MATERIAL Page 71

Q Would that have identified the coal from the Pittsburgh Seam region or simply coal from Conrail?
A Conrail; Conrail origins, I think.
Q So it would be all Conrail origins?
A Yeah, I think it did.
Q And that would be the 8 million tons?
A Well –
Q Or that would be part of the 8 million tons, so part of it is going north?
A Yeah, some of it would go back the other way.
Q Then you don't have an idea of the split

between north and south at this time?
A I would be afraid to guess, I don't remember.
MR. BERCOVICI: Go off the record for a minute.
(Discussion off the record.)
BY MR. BERCOVICI:
Q Back on the record.
Just one last administrative matter. We

have referred during the deposition to a work sheet identified as NS-80-HC-00102. I'd like to mark that as an exhibit so that it's associated with the transcript for convenient reference. And that will be Fox Exhibit 1.
(Fox RVS Exhibit 1 identified.)
MR. BERCOVICI: Mr. Fox, I appreciate your being here today and answering our questions, and your full and candid answers to us, and I have no further questions.
THE WITNESS: Thank you very much. I appreciate your kind handling.
MR. ALLEN: I have no further questions.
(Whereupon, at 3:33 p.m., the deposition was concluded.)

I HEREBY CERTIFY that I have read this transcript of my deposition and that this transcript accurately states the testimony given by me, with the changes or corrections, if any, as noted.

X

Subscribed and sworn to before me this day of , 19 .

X
Notary Public

My commission expires: .

CONTENTS

EXHIBITS

DEPOSITION NUMBER	IDENTIFIED
Exhibit 1	Fox verified statement 72

APPENDIX II

EXTRACTS OF DISCOVERY CONFERENCE

OF JANUARY 22, 1998

UNITED STATES OF AMERICA

+ + + + +

SURFACE TRANSPORTATION BOARD

+ + + + +

DISCOVERY CONFERENCE

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

Thursday,
January 22, 1998

Washington, D.C.

The above-entitled matter came on for an oral argument in Hearing Room 3 of the Federal Energy Regulatory Commission, 888 First Street, N.E. at 9:30 a.m.

BEFORE: THE HONORABLE JACOB LEVENTHAL
Administrative Law Judge

APPEARANCES:

On Behalf of Conrail:

GERALD P. NORTON, ESQ.
of: Harkins Cunningham
Suite 600
1300 19th Street, N.W.
Washington, D.C. 20036
(202) 973-7605 (GPN)

On Behalf of CSX:

DREW A. HARKER, ESQ.
of: Arnold & Porter
555 12th Street, N.W.
Washington, D.C. 20004
(202) 942-5022 (DAH)

On Behalf of Norfolk Southern Corporation and Norfolk Southern Railway Company:

PATRICIA E. BRUCE, ESQ.
of: Zuckert, Scoutt & Rasenberger
888 17th Street, N.W.
Washington, D.C. 20006-3939
(202) 298-8660

On Behalf of Eighty-Four Mining Company:

MARTIN W. BERCOVICI, ESQ.
of: Keller and Heckman, LLP
1001 G Street, N.W.
Washington, D.C. 20001
(202) 434-4144

that the Board issued, that would certainly satisfy and move the issue of the request to bring documents to the deposition.

JUDGE LEVENTHAL: Ms. Bruce?

MS. BRUCE: Well, Your Honor, again, we're taking the position that although Mr. Mohan refers to the arrangement, he never saw the document. He didn't rely upon the document. And, therefore, we're not under an obligation either to put it in the depository or to make it available upon request of a deposing party.

And Mr. Mohan has previously testified in his November deposition that he never saw that that was beyond his responsibility to actually sit down and review the document. He understands the operational aspects of it.

And NS submits that if Eighty-Four Mining or any other party to the proceeding wishes to question him on the extent of his knowledge as to the operational effect of that agreement, they are free to because there are other aspects of the agreement that are irrelevant to the movement of traffic of the

York State.

JUDGE LEVENTHAL: All right. With that agreement, if we set the deposition for the 19th of February, does that satisfy your motion?

MR. BERCOVICI: It does, Your Honor, if that's the only date that Mr. Mohan is available.

I would like to clarify again on the record while we're here today. Ms. Bruce said that Mr. Mohan had not seen the agreement, that he had understandings of it. Off the record, I believe she said that those understandings came from Norfolk Southern's personnel. And I would just like to confirm that on the record.

MS. BRUCE: Yes. He has not seen the agreement. He was told about the agreement in preparation of the operating plan and the application. And he has never seen the agreement or reviewed it.

In fact, he testified in his November 19th hearing [sic.] that he had not seen the agreement, that that wasn't part of his responsibility to review the whole agreement.

JUDGE LEVENTHAL: All right?

STB FD 33388 2-23-98 E 185812

185812

LAW OFFICES

KELLER AND HECKMAN LLP

1001 G STREET, N.W.
SUITE 500 WEST
WASHINGTON, D.C. 20001
TELEPHONE (202) 434-4100
FACSIMILE (202) 434-4646

BOULEVARD LOUIS SCHMIDT 87
B-1040 BRUSSELS
TELEPHONE 32(2) 732 52 80
FACSIMILE 32(2) 732 53 92

WRITER'S DIRECT DIAL NUMBER
(202) 434-4144
Bercovici@khlaw.com

February 23, 1998

Vernon A. Williams, Secretary
Attn: STB Finance Docket No. 33388
Surface Transportation Board
Mercury Building, Room 715
1925 K Street, NW
Washington, DC 20423-0001

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

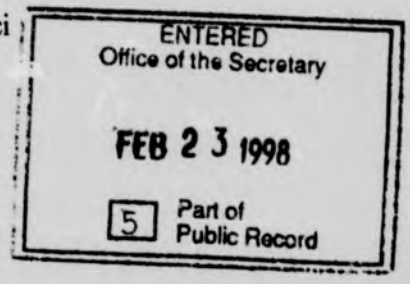
Dear Secretary Williams:

On behalf of ARCO Chemical Company, we are transmitting herewith an original and twenty-five (25) copies of its Brief, ARCO-5. Associated with this letter, please find a 3 ½ x 5" floppy diskette in WP7.0 format, containing the text of the Brief.

We certify herewith to making service on February 23, 1998, by hand-delivery on counsel for Applicants and via first-class mail, postage prepaid, upon all parties of record in the above-referenced proceeding.

Very truly yours,

Martin W. Bercovici



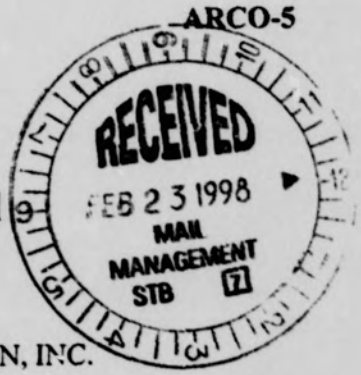
Enclosures

cc: All Parties of Record

18582

ORIGINAL

ARCO-5



BEFORE THE

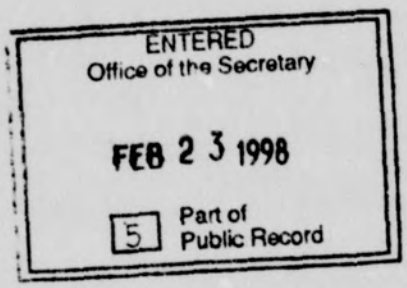
Surface Transportation Board

WASHINGTON, D.C. 20423

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

STB FINANCE DOCKET NO. 33388

BRIEF OF ARCO CHEMICAL COMPANY



Martin W. Bercovici
Keller and Heckman LLP
1001 G Street, NW
Suite 500 West
Washington, DC 20001
(202) 434-4144

Attorney for ARCO Chemical Company

February 23, 1998

ARCO-5

BEFORE THE

Surface Transportation Board

WASHINGTON, D.C. 20423

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

STB FINANCE DOCKET NO. 33388

BRIEF OF ARCO CHEMICAL COMPANY

ARCO Chemical Company respectfully submits this Brief in support of the position of the Chemical Manufacturers Association and The Society of the Plastics Industry, Inc. (CMA/SPI) concerning the maintenance of reciprocal switching post-transaction, particularly in light of the settlement agreement between applicants and the National Industrial Transportation League.

I. STATEMENT OF INTEREST

ARCO Chemical Company is a producer of chemicals at locations in Louisiana, Texas and West Virginia. As pertinent to the acquisition of Conrail by CSX and Norfolk Southern, ARCO operates a facility producing polyether polyols at South Charleston, West Virginia. The South Charleston facility is served directly by CSX. The plant is open to reciprocal switching to Conrail.

The division of Conrail between CSX and NS will result in Norfolk Southern acquiring the West Virginia Secondary line operated by Conrail through Charleston, West Virginia. ARCO became a party of record in this proceeding on August 7, 1997, in order to protect its interest in the acquisition and division of Conrail, particularly with regard to the South Charleston facility.

II. MAINTENANCE OF RECIPROCAL SWITCHING

The Chemical Manufacturers Association and The Society of the Plastics Industry, Inc. have argued in this proceeding that applicants should maintain reciprocal switching at all points within Conrail territory that were open when the application was filed. CMA-10 at 38. As succinctly stated by CMA/SPI, "The intent of this provision, again, is to prevent NS and CSX from reducing competition through the 'back door' while winning approval of their Control Application on the basis of the creation of competition." *Id.* In their rebuttal, applicants addressed the concerns expressed by CMA/SPI only in a footnote. They assert that they "have reasonably addressed the concerns of shippers on this subject [keeping open all reciprocal switching points] in their agreement with NITL...." CSX/NS-176 at 481, n. 2.

The referenced agreement with NITL was a partial settlement entered into on December 12, 1997, between CSX and NS with the National Industrial Transportation League (NITL). In that agreement, CSX agreed to

> cause any point at which Conrail now provides reciprocal switching to be kept open to reciprocal switching for ten years after the Closing Date.

CSX/NS-176 at Appendix B, p. 773 (NITL Agreement ¶ III.B.). In supplemental comments submitted December 23, 1997,[1] CMA/SPI noted that the NITL Agreement requires only that points at which Conrail now provides reciprocal switching be kept open, and that there is no obligation to maintain reciprocal switching where the switching carrier is CSX or NS and post-transaction the other carrier would be substituted for Conrail. CMA-17/SPI-11 at 13-14. The implication of the CMA/SPI comments was that the provision may have been inartfully drawn, so to apply only in a one-sided fashion. In rebuttal served on January 14, 1998, CSX and NS defended the specificity of the NITL settlement provision; and they did so not on the merits, and not on the basis of any distinction between Conrail-provided reciprocal switching on the one hand and CSX- or NS-provided reciprocal switching on the other, but rather by argument based upon technical legal considerations involving application of the Board's Intramodal Rail Competition rules, 49 C.F.R. Part 1144. CSX/NS-190 at 16-19.

III. THE BOARD SHOULD REQUIRE CSX AND NS TO MAINTAIN RECIPROCAL SWITCHING ARRANGEMENTS CURRENTLY PROVIDED TO CONRAIL UNDER THE SAME TERMS AS NITL AGREEMENT ¶ III.B.

In evaluating the pending transaction, and in determining whether to impose conditions, the Board must consider the Public Interest, including whether the transaction may have an adverse effect upon competition. 49 U.S.C. § 11324(c) and (b)(5). Applicants cite to a five-part test enunciated by the Interstate Commerce Commission in the Burlington Northern/Santa Fe

---

[1] The supplemental comments of CMA and SPI concerning the NITL Agreement were accepted into the record by the Board in Decision No. 61, with provision for CSX and NS to submit rebuttal.

merger proceeding for determining whether the Board should invoke its conditioning power.[2] ARCO respectfully submits that the instant situation warrants the imposition of a protective condition under all five prongs of the test cited by applicants.

1. There Is A Causal Connection Between The Transaction And The Alleged Competitive Harm

ARCO's concern, like that of the CMA and SPI, is that the acquisition and division of Conrail will lead applicants, and particularly in ARCO's case, CSX, to terminate long-standing reciprocal switching arrangements. The reciprocal switching arrangement at South Charleston has existed for decades. There is a very apparent reason for this arrangement to exist: CSX operates primarily into the southeast, whereas Conrail serves the northeast. There is some overlap in service from South Charleston, as both can deliver traffic to the gateway points with the western carriers. Nonetheless, the reciprocal switching arrangement has worked well for decades, and enables ARCO Chemical Company, and other producers located in the South Charleston area, to receive service from both CSX and Conrail.

If the pending acquisition of Conrail is approved by the Board, post-transaction CSX and NS both will serve not only the southeast, but also Conrail territory. The specificity with which the NITL settlement term was drawn, and the vigor with which applicants defend its one-sided nature in their rebuttal to CMA/SPI, give rise to concern that CSX indeed may intend to reduce competition through the "back door" as cautioned by CMA/SPI in their principal

---

[2] Finance Docket No. 32549, Burlington Northern, Inc. & Burlington Northern R.R. — Control & Merger — Santa Fe Pacific Corp. & Atchison, Topeka & Santa Fe Ry., Decision No. 38 at 55-56 (*served* Aug. 23, 1995), cited at CSX/NS-176 at 36-43.

comments initially raising the prospect of the potential for cancellation of reciprocal switching. ARCO Chemical Company is concerned that the narrow, one-sided nature of the NITL settlement provision creates a perverse rationale, if not incentive, for cancellation of reciprocal switching at South Charleston. Were that to occur, CSX undoubtedly would rationalize its action through reliance on the maxim, *expressio unius est exclusio alterius*. This risk arises solely as a result of the transaction, with CSX and NS replacing Conrail in the northeast.

2. The Proposed Condition Is Narrowly Tailored To Remedy The Potential Harm

ARCO supports CMA/SPI in seeking extension of the NITL Agreement ¶ III.B. to reciprocal switching provided by CSX or NS to Conrail, as well as the reciprocal switching provided by Conrail to CSX or NS. Applicants certainly believe that maintenance of the status quo for a prescribed period of time was a reasonable measure to alleviate shipper concerns over the elimination of Conrail-provided reciprocal switching; and application of the same provision on a reciprocal basis where CSX or NS is the switching carrier is a tailored and appropriate measure.

3. Alternative Remedies Are Not Practically Available

In rebuttal to CMA/SPI, applicants engage in an extensive discussion regarding the legalities of cancellation of switching arrangements, including citation to the Board's Intramodal Rail Competition rules, 49 C.F.R. Part 1144. Those rules are narrowly prescribed, going beyond the issue of competition as a policy objective, which is cited by applicants as

justification for approval of the acquisition and division of Conrail. Rather, the Part 1144 rules require consideration of affected revenues, route efficiency, rates, revenues, costs, etc. Whether those rules are available must be evaluated under specified traffic conditions. Regardless of those elements, the Board in reviewing the pending transaction must evaluate whether there may be an adverse effect on competition among rail carriers. The Board need not subject the shipper community to the risk that applicant carriers are giving lip service to their stated intention to preserve and enhance competition while in reality subjecting shippers to the potential burdens of litigation which may or may not provide an effective remedy to preserve the competition the transaction is intended to maintain and enhance. The only effective remedy is for the Board to extend the NITL settlement provision to reciprocal switching provided by CSX and NS.

4. The Proposed Condition Would Not Improve The Proponents' Condition

ARCO Chemical Company does not seek to improve its current position. Indeed, it had not requested affirmative relief until applicant carriers themselves implied that they may seek to terminate existing reciprocal switching provisions through their narrowly worded NITL settlement provision. ARCO Chemical simply seeks to maintain the status quo, and the ability to utilize both carriers operating in the South Charleston switching district to serve traffic moving to and from its plant.

5. The Requested Condition Would Not Serve To Adjust Competitive Balance Among Shippers

In seeking to maintain the status quo, ARCO seeks no change in the competitive balance between and among shippers. Indeed, as set forth herein, the intent is to maintain competitive balance between serving railroads; and ARCO is aware of no effect of maintenance of the status quo with regard to any change in competitive balance between or among shippers.

IV. CONCLUSION

ARCO Chemical Company respectfully submits that applicants CSX and NS should be held to their representations that the acquisition and division of Conrail will enhance competitive rail service within the east. While ARCO is hopeful that the narrowness of the NITL settlement agreement, and the vigorous defense of the one-sided nature of that provision, are not intended to mask an intent to eliminate competitive rail service which currently exists between CSX on the one hand and Conrail or NS on the other once the transaction is approved, ARCO respectfully submits that the Surface Transportation Board must protect the shipping public against the potential for this transaction to result in such a reduction in competition. The Board, accordingly, is urged to utilize its conditioning power to extend the NITL settlement Agreement ¶ III.B. to reciprocal switching provided by CSX and NS as well as that currently provided by Conrail.[3]

---

[3] In approval of the Union Pacific/Southern Pacific merger, the Board similarly enhanced settlement terms entered into by applicants with the Chemical Manufacturers Association, to give those terms full application to protect shippers at large. *See* Union Pacific Corp., et al. — Control and Merger — Southern Pacific Rail Corp., et al., Finance Docket No. 32760, Decision No. 44 (continued...)

WHEREFORE, THE PREMISES CONSIDERED, ARCO Chemical Company respectfully urges the Surface Transportation Board to modify and expand the NITL settlement with regard to maintenance of reciprocal switching as discussed herein.

Respectfully submitted,

Martin W. Bercovici
Keller and Heckman LLP
1001 G Street, NW
Suite 500 West
Washington, DC 20001
(202) 434-4144

Attorney for ARCO Chemical Company

February 23, 1998

[3/](...continued)
(concerning, *e.g.*, new facilities and transloading facilities, build-in/build-out options, contract reopenings, and BNSF access to the Lake Charles area), served August 12, 1996.

STB FD . 33388 2-23-98 E . 185811

18584

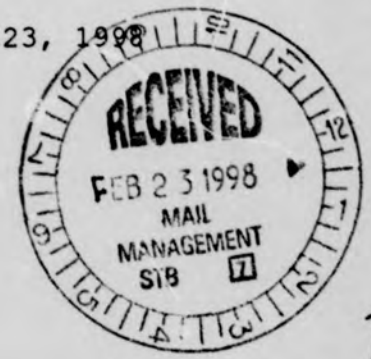
TRANSPORTATION • COMMUNICATIONS
INTERNATIONAL UNION

ROBERT A. SCARDELLETTI
International President
MITCHELL M. KRAUS
General Counsel
CHRISTOPHER J. TULLY
Assistant General Counsel

AFL-CIO, CLC

LEGAL DEPARTMENT

February 23, 1998



VIA HAND DELIVERY

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

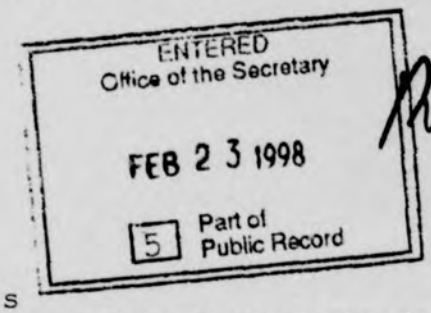
Re: Finance Docket No. 33388, CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company -- Control and Operating Leases/Agreements -- Conrail Inc. and Consolidated Rail Corporation

Dear Mr. Williams:

Enclosed please find an original and twenty-five copies of Brief of the Transportation• Communications International Union (TCU-15) in the above-captioned matter.

Also enclosed is a 3.5-inch IBM compatible floppy disk containing the above documents.

Thank you for your attention to this matter.



Very truly yours,

Mitchell M. Kraus

Mitchell M. Kraus
General Counsel

MMK:fm
Enclosures
CC: The Honorable Jacob Leventhal
All Parties of Record (per Service List)

3 Research Place • Rockville, MD 20850 • (301) 948-4910 • FAX (301) 330-7662

185811

TCU-15

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

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

BRIEF OF THE TRANSPORTATION•COMMUNICATIONS INTERNATIONAL UNION

I. Introduction

In TCU's initial Comments (TCU-6), which are incorporated herein by reference, we urged that this application not be approved because of the impact on competition, loss of jobs, and serious problems with service and safety. We urged that any approval should be conditioned upon enhanced New York Dock protection. We asked the Board to reject certain Appendix A proposals from both Applicants. We specifically took exception to NS' plan to replace the Conrail collective bargaining agreements with NS agreements, as well as CSX's proposals to create a field seniority district and transfer Conrail employee seniority to Jacksonville, even though there would be no jobs available to them there. Finally, we urged that employees covered by on-property job stabilization agreements or Conrail SUB plans be fully protected from the loss of such benefits under Article I, Section 3 of New York Dock.

We reiterate and expand on these positions below.

II. Service and Safety Concerns Dictate That This Merger Not Be Approved.

A review of the aftermath of the most recent "mega-merger" in the rail industry -- the Union Pacific's 1996 acquisition of the Southern Pacific -- is particularly appropriate in assessing the potential service and safety consequences of the pending transaction. The UP, as the Applicant in that proceeding, had promised:

> The merged system will have shorter routes, expanded single-line service, faster schedules, more frequent and reliable service, and improved equipment supply. The merged system will be stronger financially, and will overcome the service problems and capital constraints that affect SP. . . .

Union Pacific Corp., Union Pacific Railroad Co. and Missouri Pacific Railroad Co. -- Control and Merger -- Southern Pacific Rail Corp., Southern Pacific Transportation Co., St. Louis Southwestern Railway Co., SPCSL Corp. and the Denver and Rio Grande Western Railroad Co., ICC Finance Docket No. 32760, Railroad Merger Application (UP/SP-22), Vol. 1 (November 30, 1995), at 8 (emphasis added).

The actual consequences of that transaction were quite different, as the Board is well aware. Service on the newly-merged carrier suffered from unprecedented bottlenecks both in Houston and in UP/SP's intermodal port facilities in Los Angeles, as well as service breakdowns elsewhere in the Southwestern United States. At

one point during the summer of 1997, by UP/SP's own reckoning, over 500 trains were delayed along the UP/SP system because of power, lack of crews (due to federal Hours of Service regulations), or congestion. Further, more than 60 UP/SP trains were delayed for more than seven days, and 150 had been held up for more than three days. Union Pacific's Report on Service Recovery, STB Ex Parte No. 573 (December 1, 1997), at 10.

The safety repercussions of the UP/SP merger were equally grave. As Edward English, the FRA's Director of the Office of Safety Assurance & Compliance, noted in his October 21, 1997, comments to the Board, UP/SP experienced nine fatalities in the nine months between January-September 1997, five of which resulted from derailments and collisions which occurred between June and August of 1997. Verified Statement of Edward English, DOT-3, STB Finance Docket No. 33388, at 3. Further, other UP/SP derailments, collisions and other incidents which did not result in fatalities continued a disturbing trend on that carrier. Id.

The service and safety parallels between the UP/SP merger and the present transaction are too important for the Board to ignore in considering this merger. Although the Applicants go to great lengths to distinguish the present transaction from the UP/SP merger, those distinctions -- namely the SP's size, financial health and quality of its rolling stock -- are not relevant to the underlying causes of the UP's subsequent service and safety

problems. As explained more fully below, the most prominent reasons cited for the service and safety problems on the UP after the merger were (1) excessive job abolishments on the SP, which made integration of the two systems more difficult, and (2) an existing corporate culture that placed train operations above safety considerations.

To the extent that the differences between the transactions raised by the Applicants are at all relevant, the value of those distinctions has been greatly overstated. First, while the SP system was larger than Conrail in terms of trackage, Conrail is also a Class I rail carrier with over 11,000 miles of track running through 12 states; further, the nature of the territory through which Conrail operates -- i.e., densely populated urban areas in the Northeast -- would seem more likely to contribute to congestion and service problems (see, e.g., the Houston and Los Angeles terminal problems on the UP) than mere length of trackage. Second, the creation of "Shared Asset Areas" in New Jersey and Detroit, with little concrete explanation of how traffic within those areas would be managed (as opposed to UP/SP's Houston terminal, where one carrier controlled), would seem to create a more likely atmosphere for service problems.

As explained below, the Board should not approve this transaction because of the safety and service problems that are likely to arise. If the Board chooses to approve the transaction,

such approval should be expressly conditioned upon close oversight by the Board and the FRA of subsequent CSX and NS operations, and strict compliance by those carriers with conditions set down by those agencies to ensure safe, quality freight rail service.

A. The Excessive Number of Job Abolishments Proposed by the Applicants Will Impede Their Ability to Improve Service to Either Their Own or to Conrail Customers.

As indicated in our Comments, the competitive impacts of this transaction will leave shippers to pay higher prices with little or no improvement in service, rail employees without jobs or working under far less equitable conditions, and the shippers to suffer the consequences of deteriorating service.

The Applicants' assurances of improved service after implementation of the pending transaction are extremely doubtful. As we set forth below, the Applicants' proposal to severely reduce agreement as well as non-agreement employees will inevitably hamper their efforts to provide efficient service.

One of the most often cited causes for service problems arising out of the UP/SP merger was UP's unpreparedness in dealing with the integration of SP's computer and customer service systems.[1] The resulting chaos in terms of directing and keeping

---

[1] See, e.g., November 26, 1997, Comments of California Public Utilities Commission in STB Ex Parte No. 573; December 3, 1997, Comments of Society of Plastics Industries, Inc. in STB Ex Parte No. 573; comments delivered by Craig G. Robitaille, President and CEO of Accu Chem Conversion, Inc., before December 3, 1997, STB Hearing Regarding STB Ex Parte No. 573.

track of freight traffic greatly added to the service problems experienced by UP after the merger. These problems could have been prevented, or at least mitigated, by a sufficient number of SP clerical employees who were familiar with the existing SP system. The institutional knowledge of these employees would have played an important role in coordinating the SP computer and customer service systems with that of the UP, with minimal impact on the service provided by the carrier.

When the UP and SP merged in 1996, however, 1,078 of these clerical positions were abolished by the merged carrier. Labor Impact Exhibit, UP/SP-24, STB Fin. Docket No. 32760, Vol. 3, at 408-10, 422. The justifications provided by the UP for these abolishments were approximate annual savings of $28 million for the railroad, "while improving our responsiveness to our customers' needs." Labor Impact Exhibit, UP/SP-24, Vol. 3, at 88. Needless to say, neither of the anticipated results of these abolishments have been achieved by the UP.

As with the UP/SP merger, the Applicants here propose to consolidate their crew management, customer service and computer functions upon consummation of the transaction. In doing so, however, they propose to abolish 830 clerical positions, all but 100 of which will be abolished within the first year of the transaction. CSX/NS-20, Vol. 3A, at 532-34; Vol. 3B, at 512-14. Neither the Applicants' Labor Impact Exhibits nor their Rebuttal

provide information as to how many of each specific position is to be abolished. This lack of information makes it practically impossible for the Board to responsibly assess the potential service impacts that will occur due to lost institutional knowledge resulting from these abolishments.

In reviewing the impacts of the UP/SP merger, the manner in which SP management jobs were abolished is also instructive. As a result of these wholesale abolishments, few individuals with any knowledge of how the SP system had been run were left to assist UP with its integration of that system. This lack of institutional knowledge further hindered the ability of UP to effectively coordinate SP's rail operations with its own.

The same pattern appears to be repeating itself in this transaction. The Applicants have proposed to eliminate some 1,170 Conrail non-agreement positions[2] throughout the system, while retaining and transferring 847 positions. See CSX/NS-20, STB Fin. Docket No. 33388, Vol. 3A, at 539-41; Vol. 3B, at 519-21. These job abolishments raise particular concern because it is at this time unclear exactly which positions are being retained, and whether the individuals in those positions have sufficient

---

[2]The Applicants' Labor Impact Exhibit footnotes this figure to say that this number is actually lower (826 positions) when one factors in those who are eligible for Conrail's Voluntary Severance and Voluntary Retirement Programs. This footnote is, however, not relevant for purposes of this discussion -- the institutional knowledge of these individuals is lost regardless of whether their jobs are abolished or they voluntarily retire or resign.

experience with Conrail to ensure that changes in the Conrail culture can be smoothly implemented.

The corporate culture of Conrail will have to be integrated with that of NS and CSX, respectively, as a result of this transaction. In light of the UP/SP experience, the high abolishment level of agreement and non-agreement positions will significantly impede this initial process.

B. The Proposed Transaction Will Give Rise to Major Safety Problems.

The safety debacle that resulted from the merger of the Union Pacific and Southern Pacific Railroads last year, combined with troublesome pre-existing safety issues on the Applicants and Conrail, demonstrates that the proposed merger raises serious safety issues. While the Applicants take great pains to distinguish the facts of the UP/SP merger from this transaction, the relevant similarities between these transactions are unmistakable.

By now, the disastrous safety consequences of the UP/SP merger are well-known both to the Board and to the rail community at large. The Federal Railroad Administration, which reviewed the safety impacts of that merger, concluded that the transaction had resulted in "a fundamental breakdown in basic railroad operating procedures and practices essential to a safe operation." Federal Railroad Administration, Summary of Union Pacific Railroad Safety Assurance Assessment (September 10, 1997), at 1. Among those

"practices essential to a safe operation" to which the FRA alluded were train inspection procedures and detection of hazardous materials defects. The agency noted that

> [i]n many instances it appears that the corrective costs for regulatory compliance [with required train inspection and hazardous materials procedures] were weighed against the probability of FRA penalty costs and the railroad chose not to make the changes that would have ensured regulatory compliance.

Preliminary Comments of the United States Department of Transportation, STB Finance Docket No. 33388 (October 21, 1997), at 9.

In certain key respects, safety problems of the Applicants and Conrail are parallel to those of UP/SP. For example, in an October 1997 report on CSXT's Safety Assurance Compliance Program, FRA found that CSXT managers were emphasizing train operations over the safe operation of those trains; further, the FRA observed that harassment and intimidation of employees who raised safety concerns was evident in various departments and locations throughout the CSXT system. FRA, Executive Summary, Safety Assurance and Compliance Program Report for CSX Transportation, Inc. (October 16, 1997), at ix-x. Likewise, in November 1997, the FRA noted that it had submitted or would be submitting over 220 violations against NS for failure to follow proper FRA train inspection procedures[3] and

---

[3]Specifically, the FRA noted that at certain facilities NS was conducting federally required pre-departure inspections ("Appendix D inspections") while the train was rolling by. These inspections, which are outlined in Appendix D of 49 C.F.R. Part 215, may be

for operating trains on which some of the brakes were not functioning properly. See November 6, 1997, memorandum from FRA Motive Power & Equipment Safety Inspector Larry D. Ewing to FRA Region 1 Administrator David Myers, at 2. (Attachment to TCU-14.) Further, Conrail's own record for non-compliance with freight car inspection regulations -- as demonstrated by its refusal to follow "block swapping" inspection procedures that were adopted pursuant to a joint study between Conrail, the TCU and the FRA -- compounds the safety issues raised herein. See TCU-12, at pp. 6-8.

The parallels between the UP/SP merger and the participants in the current transaction are telling. In both mergers, the FRA has specifically cited the tendency of those transactions' participants to stress train operations over safety. Despite the Applicants' efforts to distinguish themselves from UP/SP in terms of the territorial size of the acquired carrier and the quality of its

---

conducted by train crews rather than qualified mechanical inspectors (QMIs) and are designed to detect imminently hazardous conditions (e.g., leaning or listing car body, insecure coupling, broken or cracked wheels, brakes that failed to release) on a train at a location where freight cars are added and where no QMIs are stationed.

In order to conduct such inspections, however, the FRA has held that the train being inspected must not be in motion. In the November 1997 memo, FRA Motive Power & Equipment Safety Inspector Larry Ewing noted that, "On numerous occasions NS officials, the corporate level included, have been informed that FRA does not recognize this roll-by procedure as a proper inspection and that it should cease immediately. NS officials feel that the roll-by inspection is adequate and refuses to take corrective action." (See attachment to TCU-14.)

rolling stock, the FRA's review demonstrates that the corporate cultures of NS and CSX are remarkably similar to that of UP when it comes to prioritizing safety. Because of the danger posed to rail safety, the Board should not approve any transaction where the acquiring carrier(s) is governed by such a culture. If the Board does approve this application, however, it must closely oversee (with the close cooperation of the FRA) its implementation to ensure that safety is accorded the first priority.

C. The Safety Integration Plans Proposed by the Applicants Are Insufficient to Address Key Safety Issues.

The Board has required the Applicants to submit draft safety integration plans (SIPs) to provide for the safe implementation of the present transaction. STB Finance Docket No. 33388 (Decision No. 52) (November 3, 1997). As noted by the TCU in its February 2, 1997, comments (TCU-12), the SIPs submitted by the Applicants fall far short of the mark in several important respects.

First, as to necessary freight car inspections, the proposed SIP makes only a vague promise that the Applicants will utilize "qualified employees" to conduct the necessary inspections. As the TCU noted in its response, both Applicants have sought to maximize the use of train crews -- rather than qualified mechanical inspectors (QMIs) -- to perform such inspections. The United Transportation Union (UTU), the union which represents train crews, acknowledges that these employees are often ill-trained and unqualified to conduct adequate inspections. Further, the added

time required of train crews to conduct such inspections places an even greater stress on the ability of those employees to comply with federal Hours of Service laws.

Second, the Applicants' assurances in the SIP that necessary inspections will be conducted in accordance with federal regulations is contradicted by their own past behavior. NS' refusal to take corrective action with respect to the conducting of "roll-by" Appendix D inspections, despite FRA's explicit warnings that such practices violated its interpretation of Appendix D, renders that carrier's vague assurances dubious. Likewise, as noted in TCU's comments on the Applicants' proposed SIPs (TCU-12), CSX's assertions that it will properly train conductors to perform necessary inspections is undermined by FRA findings that a substantial number of freight cars had moved out of that carrier's Augusta, Georgia facility -- where the carrier had replaced qualified mechanical inspectors with train crew inspections -- with numerous undetected defects. (TCU-12, at 3). Further, both CSX and Conrail have failed to comply with federal inspection regulations where freight cars were "block swapped." (TCU-12, at 6-8). Accordingly, a simple assurance from the Applicants that they will comply with federal regulations is insufficient.

Third, neither the Applicants' SIPs nor their rebuttal addresses TCU's concerns about the impact of the transaction upon Applicant CSX's already understaffed crew management system. In

its Safety Assurance and Compliance Report for CSXT, the FRA found that inefficiencies in CSX's Jacksonville crew calling operation "added to extended duty days and overall fatigue for operating employees." TCU-6, Johnson Statement, Exh. B, at vi. These inefficiencies are in large part the result of that carrier's understaffing of crew callers by anywhere from forty to fifty positions. The consummation of this transaction will no doubt result in a drastic increase in workload for crew management employees, which will consequently exacerbate this already overwhelming situation.[4] This is particularly true when one considers the expedited twenty-four week schedule the Applicants have set for implementing the transfer of Conrail crew management work to Jacksonville. Despite the grave operational and fatigue issues raised in the TCU's initial comments (TCU-6), CSX made no real effort in either its rebuttal or in its SIP to address how it will overcome these problems.

Because the Board has an obligation to ensure that the transactions approved subject to its jurisdiction are implemented

---

[4]As noted above, CSX's crew management operations are already undermanned by between forty and fifty positions. Under CSX's operating plan, only forty of Conrail's crew callers will be transferred to Jacksonville. Therefore, even if one assumes that all forty of those crew callers fill the already existing gap in CSX's crew management operations, no crew callers will be available to handle the drastic increase in crew management duties that will result from the proposed closing of the Conrail crew calling center in Dearborn, Michigan. We note, however, that since the FRA report discussed above, CSX has hired and is attempting to hire additional crew callers.

safely, the TCU respectfully submits that the Board should not approve this transaction as submitted by the Applicants. If the Board does choose to approve this transaction, however, the TCU further submits that it should do so only on condition that the STB, along with the FRA, maintain close oversight of the safety aspects of its implementation.

III. The Board Should Impose Enhanced Protection as a Condition of Approving This Application.

Applicants have acknowledged that the proposed merger is subject to New York Dock Conditions. In our Comments, TCU has urged that this Board should impose enhanced New York Dock Conditions -- namely that, in addition to New York Dock, the Board should require attrition protection and that employees facing relocation be permitted to elect separation allowances. TCU urged that the unique circumstances of this merger justified such enhanced protection based on the following factors: first, unlike virtually any other merger, the instant applications involve two very profitable carriers dividing up a third profitable carrier; second, employees have made unprecedented sacrifices to provide for the survival of Conrail; and third, Conrail top and middle management are enjoying unprecedented severance packages.

In response, Applicants have cited ICC and STB decisions rejecting attrition protection, as well as decisions holding that employees can be required to relocate to follow their work.

Applicants' discussion of these precedents fails to take note of the factually distinguishable circumstances herein.

Applicants acknowledge that job abolishments will fall principally on the clerical, carmen and maintenance of way crafts. (CSX/NS-176, p. 572.) A review of the Labor Impact Statement reveals that abolishments fall heaviest on TCU-represented employees with expected job losses of 830 clerical and 320 carmen positions. Both NS and CSXT maintain job stabilization agreements with TCU covering the clerical craft, as does every other Class I railroad, except Conrail. These agreements commonly referred to as "Feb. 7 Protection" provide for attrition protection. Only Conrail does not have such protection. Equity dictates that this type of attrition protection be extended to TCU-represented Conrail employees, as well as the other craft employees, who will be less affected by the merger.

Second, while Applicants urge that separation pay as an option for those being required to relocate has been previously rejected, we note that, in both of the recent mega-mergers involving BN/Santa Fe and UP/SP, such separation pay was provided for clerical employees in master implementing agreements. In both mergers, as in the instant application, the labor impact statements showed that TCU-represented employees were the most affected by job abolishments.

Contrary to the position of Applicants, we now show that the Board has the authority to impose the enhanced protections requested and that, for the reasons set forth above, it should do so.

A. STB Has Authority to Impose Enhanced Protection.

Applicants argue in their rebuttal that as a matter of law the Board may not grant enhanced protection. Applicants contend that the legislative history of the ICC Sunset Bill provides new limitations on the Board's authority to craft fair and equitable labor protection.

The language of Section 11326 of United States Code Title 49 clearly provides for a minimum, rather than a maximum, level of protection for employees affected by a rail consolidation, merger, or acquisition. Specifically, the statute requires that, with respect to such transactions,

> the Board shall require the carrier to provide a fair arrangement **at least as protective** of the interests of employees who are affected by the transaction as the terms imposed under section 5(2)(f) of the Interstate Commerce Act before February 5, 1976. . . .

49 U.S.C. §11326(a) (emphasis added). In its appellate review of the ICC's initial imposition of New York Dock conditions, the Second Circuit Court of Appeals held:

> the imposition of any employee protective provision which can be traced directly to either the 'New Orleans conditions' . . . or the Appendix C-1 conditions [i.e., the bases of the New York Dock conditions] clearly should be unobjectionable as embodying the **minimum** degree of

> protection contemplated by 49 U.S.C. §11347 [now § 11326].

New York Dock Rwy. v. United States, 609 F.2d 83, 94 (2d Cir. 1979) (emphasis added). Further, the Second Circuit held that

> it is beyond challenge that within its discretion the ICC may fashion employee protective conditions that are tailored to the special circumstances presented in individual cases. Moreover, in fulfilling its statutory duty to 'require a fair and equitable arrangement' to protect employee interests in certain types of rail carrier transactions, **the case law clearly establishes that the ICC has the discretion to require a greater degree of employee protection than that required as the statutory minimum.**

Id., at 91-92 (emphasis added; citations omitted).

The Board (and its predecessor, the ICC) has also previously acknowledged that New York Dock is a minimum level of benefits, and that it has the power to impose a greater level of protections for the benefits of employees affected by a transaction. Railroad Consolidation Procedures, 363 I.C.C. 784, 793 (1981), codified at 49 C.F.R. §1180.1(f). To impose a higher level of protective benefits, one must demonstrate that unusual circumstance warrant more stringent protections. Id.; see also STB Finance Docket No. 32760 (Decision No. 44), slip op. at 172.

In their efforts to rebut TCU's argument that the Board should impose enhanced New York Dock benefits, the Applicants interpret Congress' passage of the ICC Termination Act, P.L. 104-88 (1995), as an "endorsement of New York Dock's six years of protection" for employees affected by a transaction involving a Class I rail

carrier. CSX/NS-176, at HC-588-89. In doing so, however, the Applicants misread both the underlying law and the applicable legislative history.

Nothing in the legislative history of the ICC Termination Act suggests that Congress "endorsed" New York Dock as being a maximum level of protection. With respect to transactions between and among Class I and Class II rail carriers (relevant to the Applicant carriers), both the House and the Senate bill incorporated the language of §11326's immediate predecessor -- 49 U.S.C. §11347 -- without further comment. See H. Conf. Rep. No. 104-422, 104th Cong. 1st Sess. 192-93 (1995), reprinted at 1995 U.S. Code Cong. and Admin. News 877-88. The conference report refers to the actual terms of New York Dock in discussing the protective terms that must apply to transactions between a Class II and Class III railroad, or between two or more Class III railroads, which Congress reduced (and, in the case of transactions between Class III railroads, eliminated entirely) in the 1995 Act. Although that report language describes New York Dock protections as "the existing ICC standard," House Conf. Rep. No. 104-422, at 192, nothing in that language suggests a departure from the Second Circuit's (or, for that matter, the Board's) interpretation of New York Dock as a minimum level of protection, which the Board has discretion to exceed in appropriate circumstances.

Nothing in the legislative history supports the Applicants' view that Congress "endorsed" New York Dock as not only the minimum protective conditions, but also as the maximum conditions the Board could impose. Had Congress intended to deviate from the ICC's and Second Circuit's holdings that New York Dock was the minimum level of protective conditions, it would have done so by clear statutory language which was notably lacking therein. Clearly, the Board has the statutory authority to impose the protections requested by TCU. We now show why it should do so.

B. The Unique Circumstances Herein Warrant the Imposition of Enhanced Labor Protection.

Applicants do not dispute that a major factor contributing to Conrail's turnaround from bankruptcy to the profitable carrier of today was the major decrease in the number of jobs and increase in employee productivity. Rather, Applicants take the view that the sacrifice of employees whose positions were abolished is not a basis upon which to provide enhanced protective benefits for those whose positions were not abolished. Applicants argue that the current employees did not lose their jobs and, therefore, they made no sacrifices to build Conrail. (CSX/NS-176, p. 595.)

This argument ignores the fact that employees, as a group, made significant sacrifices as the result of job abolishments. The benefit of these sacrifices should be provided to employees as a group, and not to management in the form of separation pay. Second, current employees had to become significantly more

productive in order for Conrail to become profitable. It is this dramatic increase in productivity which is the cornerstone of Conrail's success. The combination of job loss and dramatic increases in productivity warrant the enhanced protection requested.[5]

In our comments, TCU cites the high cost of managerial separation and dislocation allowance as further support for ehhanced benefits. Applicants claim that these costs stem from the early allocation of Conrail's ESOP, not from severance pay. Contrary to Applicants' view, this ESOP was not made available to Conrail's contract employees on the same basis as management, since contract employees would have been required to pay for the ESOP with contract concessions. ESOP allocations in 1996 and 1997 were made even to managerial employees who had chosen not to participate in the ESOP. Moreover, Applicants' argument also does not account for CEO LeVan's $22 million severance or the severance paid to the 75 members of top management who will receive separation as a result of their individual employment contracts. Clearly, non-agreement employees and management are being provided generous severance benefits not offered to contract employees.

---

[5]Further, while in 1985 Conrail ultimately made its remaining employees whole for the 1981 wage deferral, those whose jobs had been abolished were never made whole.

IV. Applicants' Appendix A Proposals.

Both CSXT and NS acknowledge that on their current systems they administer multiple collective bargaining agreements for the clerical and carmen craft and class. The existence of these multiple agreements are the legacy of the mergers which formed these two carriers. Contrary to this past practice, NS maintains that it is necessary for it to apply the applicable NS agreement (NW, Southern, etc.) on its allocated portion of Conrail. Unlike NS, CSX states that it is not seeking to impose its own agreements on its allocated portion of Conrail.

TCU's position is that the same practice regarding collective bargaining agreements should be followed in this merger as in prior mergers. In the absence of a transfer of work, the existing collective bargaining agreements -- covering facilities on CSXT, NS and Conrail -- should remain in effect at the same locations where they had always applied. When work is transferred, generally the agreement at the receiving location should apply. (TCU-6 at p. 18.)

A. NS Appendix A Proposals: NS' Effort to Impose Its Agreements on the Allocated Portion of Conrail Should Be Rejected.

NS maintains that, as the acquiring carrier, it should be able to impose its agreements on its allocated portion of Conrail. As we set forth in our Comments, this position is contrary to past

practice, as well as to well-established New York Dock arbitration rulings.

NS has pointed to no prior mergers where its concept of the "acquiring" carrier's rights has been applied. Significantly, as noted above, it was not applied by NS itself to the mergers which formed it, since the collective bargaining agreements of its predecessors in the clerical and carmen craft and class remain in effect. Similarly, in neither of the two most recent major mergers between BN/Santa Fe and UP/SP, have those carriers imposed single clerical, carman or supervisor collective bargaining agreements on the acquired carrier's system, as proposed by NS herein. TCU has reached master implementing agreements for the clerical craft and class on both BN/Santa Fe and UP/SP. Both master implementing agreements provide that the agreements on the previous separate carriers shall continue to remain in effect. Employees that are transferring to follow their work will be covered by the collective bargaining agreement in effect at the location receiving the work.[6]

TCU has not reached master implementing agreements for the carmen craft and class in either merger. Consolidation of carmen

---

[6] Applicants state that, prior to the merger with SP, UP had a single clerical collective bargaining agreement with the TCU covering the various carriers which were then part of UP. (Verified Statement Peifer/Spenski, Vol. 2A, p. 25.) While accurate as far as it goes, the statement is misleading. The single agreement covering C&NW, MOPAC and UP was attained through collective bargaining and not through New York Dock procedures, which involved several quid pro quos. These agreements were entered October 16, 1993, and July 7, 1995.

work has been accomplished by individual implementing agreements. In each case, the agreement applied was the one in effect at the receiving location. Nor has TCU reached a master implementing agreement for supervisors.

NS' position regarding the supremacy of its agreements is also contrary to arbitral authority. In CSXT, IBEW and TCU (Radio Repair Coordination), a case cited by Applicants (CSX/NS-178 at p. 248), Arbitrator Simon considered CSXT's proposed coordination of radio repair work then being performed throughout its system at its Louisville, Kentucky, facility. The arbitrator found that the generally accepted practice among referees was to adopt the "controlling carrier" principle. It is clear that this concept is quite different from NS' claimed authority as the acquiring carrier. As explained by Arbitrator Simon, the controlling carrier is the one which controlled the existing facility. Since radio repair work at the Louisville location, where the work was being consolidated, was subject to the L&N/TCU collective bargaining agreement, it was that agreement, and not the IBEW agreements from the transferred location, which was applicable. (CSX/NS-178, Vol. 3B, at pp. 272-73.)

Carrier efforts to override specific provisions of operating craft agreements have been limited to specific seniority districts where changes were claimed to be needed to implement interline operations, and not the replacement of one agreement with another.

See, e.g., UTU, BLE and CSX (O'Brien) (1997) CSX-NS 178 at p. 492, 508 ("Except for the elimination of their current seniority districts and the closing of some supply points for crews, the present collective bargaining agreements on the B&O, C&O, WM and RF&P will continue unchanged"). Moreover, as we demonstrate below, seniority rules in the operating crafts play a far different role in restricting work assignments than for the carmen, clerical and supervisory crafts.

Applying these principles to the instant matter, the Conrail agreements should remain in effect on the NS allocated portion of Conrail. Where NS transfers work to its allocated portion, Conrail agreements should remain in effect. There is simply no precedent for applying NS agreements across the board to all Conrail locations, and NS has cited no decisions in support of this novel and far-reaching theory.

As we set forth in our Comments, NS' claim that Conrail agreements must be entirely replaced by NS agreements in order to attain public transportation benefits falls short of the mark. (TCU-6, pp. 9-14.) Similarly, its claims that Conrail agreements would prevent it from implementing a uniform payroll procedures and training are clearly frivolous. NS cannot point to a single New York Dock decision justifying the override of a collective bargaining agreement on the basis that fewer agreements are more efficient to administer. Under this reasoning, agreements could

always be overriden. While NS has urged it must be able to apply NS agreements to the Conrail shops, it is clear that it can transfer work between NS and Conrail shops under the normal New York Dock procedures. As acknowledged in deposition (Spenski Deposition, pp. 384-85), NS cannot, and has not, cited a single Conrail agreement provision which would inhibit it from performing work transferred from NS to Conrail shops.

In no other merger involving clerical, carmen or supervisor crafts has the acquiring carrier overriden the existing collective bargaining agreements on the acquired carrier. NS has not presented a single Conrail bargaining provision which it alleges will prevent it from operating efficiently. NS has cited no public transportation benefit to be attained from such an override, particularly for the clerical and carmen craft. Therefore, the Board should reject NS' claim that it can categorically override and replace all existing Conrail agreements.

B. CSX's Appendix A Proposals.

CSX has three proposals in Appendix A which directly impact the clerical craft and class represented by TCU. These are its proposals to (1) establish a single field seniority district encompassing a number of separate seniority districts on Conrail and CSXT; (2) apply Conrail's collective bargaining agreement to all locations within the field seniority district; and (3) transfer the seniority of Conrail clerical employees to a CSX Jacksonville

roster, without offering the affected employees a position in Jacksonville.

1. CSXT's Proposal To Establish a Single Field Clerical Seniority District Should Be Rejected.

CSXT proposes to consolidate several Conrail seniority clerical rosters with eight separate seniority rosters under the B&O and C&O collective bargaining agreements to form a single seniority district encompassing a number of states from Illinois, Indiana, Ohio and Michigan to Maryland, Pennsylvania, New York and Massachusetts. The geographic scope of this district is likely to cause significant relocation burdens on clerical employees.

With the exception of a transfer of work between CSXT's facility at Walbridge, Ohio, and Conrail's Stanley Yard at Toledo, CSXT plans no work transfers between locations in this giant district. TCU has never entered an implementing agreement calling for such a massive consolidation of seniority rosters on the acquiring and acquired carriers.

Although virtually no work and no employees will be transferred within this new planned seniority district, CSX proposes to override the existing seniority districts under the applicable Conrail and CSX agreements, and then to place the newly created seniority district under the Conrail collective bargaining agreement. In its rebuttal comments, CSX urges that such a consolidated seniority district is required to assure that current Conrail employees now performing only Conrail work will be able to

perform Conrail and CSXT work after the merger. "In order to assign clerical work in the field as part of an integrated operation, CSX must be able to assign clerical work without regard to whether the clerical employee is a CSX or Conrail employee." (CSX/NS-177, p. 30.) No further explanation is offered for this conclusion.

Significantly, CSX does not suggest how a merging of seniority rosters cures any barrier in assigning work among employees in the new field district. CSX has not pointed to a single seniority or other rule which would have to be overridden to permit such assignment. Indeed, such assignments, particularly when not requiring transfer of employees, are routinely accomplished under New York Dock procedures without disturbing existing seniority districts. Further, in the instant matter, CSX has identified only a very limited amount of work which it would transfer within this district.

This situation is in sharp contrast to arbitration awards involving the operating crafts. In a recent decision involving operating crafts, CSX maintained that the consolidation of seniority rosters among the C&O, WM, RF&P and the B&O was necessary to facilitate interline operations. See UTU and BLE and CSXT, CSX-178, p. 492. In that case, CSX argued that it needed to merge the separate seniority rosters in order to change the crew reporting and supply points. Only through such changes, CSX argued, could

it, for example, use a WM operating employee on a C&O train. The situation for clerical employees is in marked contrast. Seniority rules do not restrict the clerical work an employee will perform. CSX clerical employees will be able to perform any Conrail work transferred to CSX facilities under current seniority rules, and CSX does not claim otherwise.[7]

Simply put, it is not necessary for clerks, unlike the operating crafts, to travel hundreds of miles in the performance of their duties. Changes in seniority rules are not needed to permit clerks to perform transferred work.

CSX has provided no basis for the merging of these rosters, and continuing the current rosters in place will not hamper CSX's ability to assign transferred work.

2. CSX Has Provided No Justification for Overriding the CSX Agreement in the Field Seniority District.

Even assuming that some change in the seniority rules was warranted, as claimed, CSX has offered no basis for overriding the applicable CSX agreement with Conrail's agreement, except for the convenience of administering one agreement. The examples cited by Applicants to justify the override of collective bargaining

---

[7]The award involving Conrail/Monongahela and UTU (LaRocco 1992) CSX/NS-178 pp. 229, 245-46, is based on the same effect of operating craft rules which could bar a Conrail engineer from operating on the former MGA property. As noted above, clerical work rules do not have the same restrictions on the assignment of consolidated work. We further note that this case involved the merger of Class I and Class III carriers.

agreements do not deal with the clerical craft generally, or CSX's proposed field seniority district in particular. (CSX/NS-176, pp. 662-63.)

In support of its position, CSX cites the consolidation of dispatching work in Jacksonville, and the heavy car repair work in Raceland, Kentucky, under the former C&O agreements. In both examples, transferred work was covered by the collective bargaining agreement applicable at the receiving location. (CSX/NS-177, p. 24.) This same pattern is reflected in Exhibit G to the Spenski/Peifer Verified Statement, CSX/NS-177, p. 85. In each cited example, the collective bargaining agreement at the receiving location continued in effect.

TCU acknowledges that hundreds of clerks have been transferred from various points on the former B&O, C&O and L&N to the general office in Jacksonville and placed under the SCL-TCU agreement applicable at Jacksonville. (CSX/NS-177, p. 24.) This, however, provides no support to permit CSX to change the applicable collective bargaining agreement for numerous CSX clerks, who remain at the same location where they have always worked, within the proposed field seniority district.

Finally, we note that CSX's claim that there are costs to administering two agreements has never been found as a basis to override a collective bargaining agreement. If such a justification were acceptable, then agreements could always be

overridden, a situation no doubt to the carriers' liking, but one that is at odds with the applicable standard of necessity.

The hollowness of this justification is particularly apparent since CSX has acknowledged its intention to otherwise keep its agreements in place on its system except for the field seniority district and to keep the Conrail agreements in place on its allocated portion of Conrail. Only in the field district does CSXT intend to override one collective bargaining agreement with another.

In summary, CSXT has provided no basis to override the existing seniority districts within the proposed field district, and no basis to override the applicable CSX agreement with Conrail's agreement within this proposed district. Both proposals should be rejected by the STB.

3. CSX's Proposal to Transfer to Jacksonville the Seniority of Clerical Employees For Whom Positions Are Not Immediately Available Would Violate Article 1, Section 6 of New York Dock, and Is Otherwise Unprecedented.

CSXT has proposed transferring the major clerical functions from Conrail facilities to Jacksonville, Florida, forming five consolidated seniority districts -- Customer Service, Crew Management, Finance-Revenue, Finance-Expenditures, and Headquarter Functions. In each case, CSXT anticipates that many of the affected clerical employees will not be needed to follow their

work. Notwithstanding, CSXT plans to transfer those affected employees' seniority onto the Jacksonville roster.[8]

As we noted in our initial comments to the proposed transaction, the Board has previously found that New York Dock Article 1, Section 6(d) "clearly limits the right of transfer of recalled employees, other than as required by existing CBA's to locations that do not require a change of residence." STB Finance Docket No. 28905 (Sub-No. 28) (August 21, 1997), at 6 (emphasis added); see also STB Finance Docket No. 28905 (Sub-No. 25) (January 11, 1994) for a similar decision.

While CSXT lamely attempts to distinguish the two STB decisions, cited above, which uphold arbitrator decisions rejecting CSXT's efforts to require its "dismissed" employees to relocate, this Board has clearly held that Article 1, Section 6(d) limits the carrier's ability to do so. STB Finance Docket 28905 (Sub-No. 28) (August 21, 1997) and STB Finance Docket 28905 (Sub-No. 25) (January 11, 1994). See discussion TCU-6, pp. 16-17.

In our Comments, we noted that transferring an employee's seniority without a job raises significant and unprecedented equity issues for affected Conrail and CSXT clerical employees. (TCU-6, p. 17.) CSXT counters by urging that such issues are normally addressed in implementing agreements and present no "unique circumstances." (CSX/NS-176, p. 605.) Contrary to CSXT, these

---

[8]Vol. 3A, pp. 497-501, CSX/NS-20.

equity issues are not only unique, but unprecedented, as made clear by its inability to cite any prior implementing agreements, STB or ICC decisions, or arbitrator awards on point.

CSXT concludes by claiming that requiring furloughed former Conrail employees to relocate to Jacksonville is necessary to realize the efficiencies of the transaction. (CSX/NS-176, p. 605.) Even if true, this statement is irrelevant. The relocation requirements of dismissed employees are part of the New York Dock Conditions, and CSXT must provide these protective conditions, regardless of the impact on efficiency.

Those employees not needed to follow their work to Jacksonville at the time it is being consolidated will be entitled to a dismissal allowance under New York Dock. As a condition of receiving protective benefits, a "dismissed" employee must accept available work in his original seniority district or comparable work in other crafts, which does not require relocation. By transferring seniority, without offering positions, CSXT intends that employees will be required to accept future positions in Jacksonville or forfeit their dismissal allowance.

In TCU's Comments (TCU-6), we maintained that the transfer of employees' seniority without offering the employee the opportunity to follow the transferred work is unprecedented in the railroad industry. In discovery, CSXT could not cite a single instance where it had previously transferred work and transferred the

seniority of affected employees in dismissed status. (Deposition Spenski/Peifer, p. 43.) In its rebuttal, CSXT maintains that it has entered implementing agreements listing surplus employees on a seniority roster when work was not available for them at the new location. (CSX/NS-176, p. 604.) In spite of this claimed past practice, CSXT could cite but two examples from its own history and none from the rest of the industry. (CSX/NS-177, pp. 57-58.) As we discuss below, neither of the situations cited by CSXT are on point.

CSX first cites the 1984 coordination of L&N clerical work to CSX's Queensgate Yard in Cincinnati.[9] In that situation, however, the L&N yards from which work was transferred were all located within a thirty-mile radius of the Queensgate Yard, and dismissed employees would not have been required to relocate in order to take a position at the Queensgate facility. Under New York Dock, "dismissed" employees are required to accept positions not requiring a change in residence. The Queensgate agreements are, therefore, not relevant to TCU positions regarding CSXT's efforts to require "dismissed" employees to relocate for available positions. Obviously, an agreement requiring a dismissed employee to accept available work within a thirty-mile radius of his former job location is totally inapposite to CSXT's claims herein that it

---

[9]This coordination was actually comprised of several separate transactions, including the transaction cited by CSX.

be permitted to require employees to relocate hundreds of miles from Philadelphia, Pittsburgh and Dearborn to Jacksonville.

CSX's "precedent" irvolving the consolidation of its dispatching functions in 1988, and the transfer of dismissed dispatcher seniority to Jacksonville is equally unpersuasive. In that situation, the dispatchers in question had been promoted from the clerical craft to dispatchers, retaining dual seniority with the right to bid back into the clerical craft. When CSX announced the consolidation of dispatching functions, those dispatchers for whom no vacancies were available in Jacksonville had the opportunity to either bid back into the clerical craft at their existing location, or to remain dispatchers and become a dismissed employee (with New York Dock benefits) with their seniority transferred to Jacksonville. In the instant matter, affected clerical employees will have no such fallback seniority rights to another craft.

In summary, CSX's efforts are contrary to the express terms of New York Dock, have previously been rejected by the STB, and are contrary to all prior applications of New York Dock.

V. Applicants Agree That Article I, Section 3 of New York Dock Conditions Preserve Employees' Rights to Job Stabilization and SUB Protections.

In our Comments, we pointed out that existing job stabilization agreements provided protection on the basis of "attrition protection" -- that is, employees do not have to show a

nexus between a furlough and another event such as a merger to qualify for protection. It was our understanding that CSXT's position was that employees in the field seniority district would have the option of electing their on-property job stabilization agreements only when affected by the merger. Stated differently, we understood Applicants' position to be that an employee furloughed because of a reduction in force would not be entitled to opt for job stabilization protection unless he could also show he was adversely affected by the merger.

In their rebuttal, Applicants state that TCU's concerns resulted from an "apparent misunderstanding." The Applicants assure us that:

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

CSX/NS-176, p. 603. We take these assurances to mean that employees covered by CSXT or NS job stabilization agreements and Conrail SUB Plan or subsequently bargained stabilization agreements may elect protection under those agreements if adversely affected, even though they may be working under different collective bargaining agreements as a result of the merger.

Any future application of New York Dock Conditions should be consistent with the Applicants' assurances set forth above.

VI. Conclusion

Based on the foregoing, we respectfully request that the Board take the following action:

- Decline to approve this merger; or alternatively
- Impose enhanced New York Dock conditions requiring attrition protection for all employees and separation allowance to those required to relocate;
- Closely monitor, along with the FRA, Applicants' Safety Implementation Plans;
- Reject NS' proposal to replace all Conrail collective bargaining agreements with its own agreements;
- Reject CSX's proposal to establish a field seniority district;
- Reject CSX's proposal to apply Conrail collective bargaining agreements to current CSX facilities in the proposed field seniority district;
- Reject CSX's proposal to transfer Conrail clerical employee seniority to Jacksonville, where no jobs are available to those employees at that location; and
- Clarify that all affected employees are covered by Article I, Section 3 of New York Dock so as not to lose Feb. 7, SUB or other on-property protections.

Respectfully submitted,

Mitchell M. Kraus
General Counsel
Christopher Tully
Assistant General Counsel
Transportation•Communications
International Union
3 Research Place
Rockville, MD 20850
(301) 948-4910

Dated: February 23, 1998

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief was mailed this 23rd day of February, 1998, via first-class mail, postage prepaid. to all parties of record in this proceeding.

STB FD . 33388 2-23-98 E . 185810

185810

GENESEE TRANSPORTATION COUNCIL

GTC-3

February 23, 1998

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

E

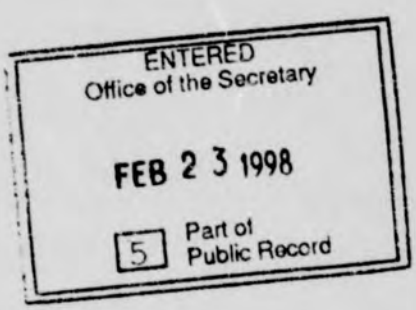
Re: Finance Docket No. 33388, *CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company -- Control and Operating Leases/Agreements -- Conrail, Inc. And Consolidated Rail Corporation*

Dear Secretary Williams:

Enclosed for filing in the above captioned docket are the originals and twenty-five copies of the **Brief in Support of Request for Conditions**, by the **GENESEE TRANSPORTATION COUNCIL,** as outlined in the **Verified Statement of H. Douglas Midkiff.**

Also enclosed is a 3.5-inch IBM compatible disc, formatted in the Word Perfect 7.0 format, as file named GTC-3.wpd.

The verified statement contains a Certificate of Service showing hard copies have been mailed, by first class mail, postage prepaid, to Administrative Law Judge Jacob Levanthal and to all parties of record and to counsel listed on the Certificate, with Messrs Allen, Sipe, Lyons, and Cunningham each receiving three copies.



Respectfully submitted,

GENESEE TRANSPORTATION COUNCIL

By: _____

H. Douglas Midkiff
Transportation Specialist

HDM/wp

Enclosures

Copies: Administrative Law Judge Jacob Levanthal and
Parties of Record

65 West Broad Street • Suite 101 • Rochester, New York 14614-2288 • 716-232-6240 • Fax 716-262-3106

GTC- 3

BEFORE THE SURFACE TRANSPORTATION BOARD

FINANCE DOCKET 33388

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

Brief in Support of Request for Conditions

by the

GENESEE TRANSPORTATION COUNCIL,
ROCHESTER, NEW YORK

VERIFIED STATEMENT

OF

H. DOUGLAS MIDKIFF

Due Date: February 23, 1998

BEFORE THE SURFACE TRANSPORTATION BOARD

FINANCE DOCKET 33388

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

Brief in Support of Request for Conditions

by the

GENESEE TRANSPORTATION COUNCIL,
ROCHESTER, NEW YORK

Comes now H. Douglas Midkiff, of the Genesee Transportation Council, hereinafter referred to as the GTC, and files this brief in the above described proceeding, as an argument in support of the GTC request for establishment of conditions, as outlined in the Verified Statement of Comments and Request for Conditions filed on October 21, 1997. I am the same H. Douglas Midkiff described in that statement. (See Section 2 of GTC-2, Midkiff V. S.)

GTC is the metropolitan planning organization for nine counties in Upstate New York. For a description of the GTC, the GTC Planning Region, and existing rail service, please see Sections 3 and 4 and Appendix II of my Verified Statement in GTC-2. Policy matters of the GTC are determined by the GTC Policy Committee.[1] In November, 1996, after announcements by CSX and NS that each intended to acquire Conrail, the Policy Committee decided that it was exceedingly important that, whichever railroad was the

---

[1] For a list of the Policy Committee members, see Appendix I to this statement. The membership is composed of elected or appointed representatives of various governmental agencies in the region.

winner in the "bidding war", GTC should ask the Surface Transportation Board[2] to rationalize routes and impose conditions that will provide rail competition to industries in the Rochester region, including competitive access to the Monongahela coal fields.[3]

1. Summary of Requested Conditions

As noted, on October 21, I filed a statement in behalf of the GTC nine-county region. Since the proposed acquisition plan meets many of the GTC objectives, I expressed GTC's support, *in principle*, but listed areas of concern and made requests for establishment of certain conditions of approval, as follows:

1. To allow for more vigorous participation by the short-lines and to foster competition between CSX and NS, we called for removal of arbitrary restrictions established by Conrail that prohibit the lines from interchanging traffic with competing carriers, such as the "firewall" at Genesee Junction Yard in Chili, Monroe County, NY, between the Livonia Avon & Lakeville (LAL) and Rochester & Southern (RSR). (See description of LAL operation and Footnote 8, p-8, Section 9, p-18, and Paragraph F, Section 16, p-39, GTC-2, Midkiff V. S.)

2. We illustrated with maps and text the lack of viable north-south routes between the GTC region and points in the Southeast, which could put the GTC area at a disadvantage in competing for business in that rapidly growing part of the country. As a condition of approval, we asked the STB to require NS to report on its plan for offering truck competitive intermodal service from the Rochester area to the Southeast and on the feasibility of a suggested shorter route via the Maryland-Virginia Gateways to the Southeast. (See Sections 11 and 12, beginning at p-25, and Paragraph B, Section 16, p-36, and Appendices IV and VI, GTC-2, Midkiff V. S.)

3. To deal with the problem of expected substantial increases in the volume of truck traffic

---

[2] Hereinafter referred to as the STB or Board

[3] See GTC Resolution 96-15 in Appendix II to this statement and Section 5, GTC-2, at p-10.

on the region's transportation infrastructure, we called for establishment of intermodal facilities in Rochester on the CSX and a terminal on the NS at Exit 42 on I-90 near Geneva, NY. (See discussion in Section 5, beginning at p-13, Footnotes 14 and 15, p-14, Section 10, p-23, Section 13, p-30, and Paragraph C, p-37, GTC-2, Midkiff V. S.)

4. We called attention to the high switching charges and, in particular, those assessed for switching coal to RG&E's Russell Station steam plant in Rochester and asked STB to require new owner CSX to reduce the charge to a level no more than 120% of variable cost. We do not have the resources to compute that figure, but believe it to be substantially less than the current level of $390 per car, which effectively prohibits the RSR from competing for the coal traffic. We also asked for STB oversight of the proposed CSX/NS joint usage agreement for accessing the Monongahela coal fields, the source of coal for Kodak, RG&E, and other utilities. (See Section 8, p-17, Section 14, p-32, and Paragraph D, Section 16, p-38, GTC-2, Midkiff V. S.)

5. We asked that new owner CSX be required to maintain the tracks used by Amtrak in the Empire Corridor to standards that will permit operation at present, or higher, speeds and to give priority handling to Amtrak trains. (See Section 15, p-33, and Paragraph H, Section 16, p-41, GTC-2, Midkiff V. S.)

2. GTC Reaction to the Applicants' Rebuttal

I have read and pondered the response of the Applicants.[4] I cannot accept the basic premise of their rebuttal, i.e., the Board should summarily reject any requests for conditions that are designed to correct situations that existed before the application was filed. In spite of ICC and Board precedents to the contrary, I cannot believe the Board will fail to remedy problems that existed prior to the filing date, no more than I can believe a responsible doctor will ignore a pressing medical problem of a patient just because the patient's insurance company will not pay for treatment of pre-existing conditions.

---

[4]The term Applicants and the use of CSX and NS refer to CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company

I believe the Board, in recognition of the unique character[5] of this proceeding and the implications of a merger that will establish the rail system for the Nation east of the Mississippi River, must take this opportunity to broaden its view of what constitutes "adequacy of transportation to the public" and "public interest", as those terms are used in 49 U.S.C. §11324, (b), (1) and (2), ICC Termination Act of 1995.[6] I believe the Board must recognize the pre-existing problems cited by GTC and others, and establish conditions to correct them in order to provide or enhance competitive rail service, as touted by the Applicants. If the problems that evolved during 21 years of Conrail domination are not corrected, they will diminish the benefits from the transaction the Applicants are proclaiming. If these problems are left unattended, they will reduce the adequacy of the competitive rail transportation the Applicants claim the CSX/NS/Conrail Transaction will produce, which is clearly not in the public interest.

3. Adequate Transportation and the Public Interest

The Applicants argue, in support of their a joint application in Docket 33388, that going from one railroad to two railroads in the Northeast changes an "inadequate rail transportation situation" to an "adequate rail transportation" situation, but the term "adequacy" goes beyond mere numbers. For example, eliminating Conrail-imposed interchange restrictions on short-lines in the GTC region can change an "inadequate" situation to an "adequate" one.[7] Establishing a CSX intermodal facility in Rochester can

---

[5] See Section 1, at p-13, CSX/NS-176 of Applicants' Rebuttal, the heading of which reads, in part, "THIS TRANSACTION, UNIQUE IN THE HISTORY OF RAIL COMBINATIONS . . . ". (underscoring supplied) The first paragraph of the same section reads, in part "This Transaction will reconfigure the railroad industry in the eastern United States . . . ".

[6] Applicants claim that GTC conditions address pre-existing problems, rather than harm caused by the Transaction. GTC believes the Board must consider the "adequacy of transportation to the public" and the benefits that can redound to the "public interest", as a result of the Transaction, as well as the "harm" it may cause. By establishing GTC's "laundry list" of conditions, as they are so-described by the Applicants, the Board would "clean up" a host of problems, resulting in more adequate transportation and substantial benefits for the region. See CSX/NS-176 at Section III-C, beginning at p-36, and Section XIII, beginning at p-410.

[7] See Section 4, p-8, GTC-2 for a description of the importance of the LAL operation to the Rochester economy. Also see Appendices IX and X to GTC-2, which are copies of letters from

(continued...)

change an "inadequate" situation into an "adequate" situation, since it would result in more adequate rail service than Rochester-area shippers have at present. The intermodal service at present would have to be described as "inadequate" if Rochester-area exporters, who, in 1996, exported $14 billion worth of goods,[8] do not have access to a local rail intermodal facility. They are forced to watch Conrail "stack trains" carrying export containers pass through the city without stopping. On the domestic front, opening routes between Southern Tier junctions and Harrisburg and Hagerstown, that will provide intermodal service from the Rochester region to the Southeast competitive with the service the Applicants propose to offer shippers in the eastern part of New York and the Shared Assets Area of New Jersey, will change an "inadequate" situation to an "adequate" situation.[9]

The Applicants argue that acquisition and control by CSX and NS is "strongly in the public interest" and cite numerous cases that the Applicants' believe support that view. However, I maintain that the interpretation of what constitutes the "public interest" in this transaction must be broader than the view taken in the cases cited by the applicants, which involved what were, in comparison, the relatively simple mergers of larger, more financially secure, railroads with smaller lines, or with lines less financially secure. None of them involved the "carving up" of a major railroad and dividing the assets between the merger partners.

Aside from the intensive letter writing campaign carried on by the Applicants, it is clear that the desire for an adequate, better, and more competitive, rail system, to replace the largely

---

[7](...continued)
local governmental agencies urging Board action to remove interchange restrictions that prevent interchange between the LAL and RSR.

[8] See last paragraph of Section 3, p-4, GTC-2, and Appendices III and IV to this statement.

[9] See Paragraphs B and C, Section 16, p-36 & 37, and Sections 11, 12, and 13, GTC-2.

indifferent and unresponsive Conrail, has led to the impressive list of supporters.[10] Close reading of the letters of support and comments entered into the record reveal that many believe that simply replacing Conrail with CSX or NS will provide competitive rail service only under certain conditions and in certain areas.

It is true that, if acquisition and control is approved, many rail users in the Rochester region will gain competitive rail service and will have a choice of using the CSX directly, or NS in connection with the RSR, but replacing Conrail with CSX or NS will do nothing to improve rail competition for customers of short-line railroads in the GTC region if Conrail-imposed interchange restrictions prevent access to both carriers, when it is physically feasible to make the connections. Area rail customers located on the LAL and FRR will continue to be restricted to access to only one Class 1 carrier, viz., the CSX. Rail customers on these two lines have every right to ask, if competition is as good for the Northeast as CSX and NS are claiming, why isn't it good for them and the short-lines that serve them?

4. STB Has the Opportunity to Create a Truly Competitive Rail System

Some of the requests for conditions and responsive applications have been labeled as "opportunistic" by the Applicants. I believe the large number of requests for conditions stems from the fact many of the commenters have recognized that, in this proceeding, they at last have an opportunity to legitimately bring problems before the STB in a relatively simple and inexpensive manner. During the early years of Conrail operation, many who had suffered the service failures of bankrupt railroads took a "nurturing" attitude toward the new government-financed railroad that replaced them. However, since Conrail was privatized and has become subject to the pressure of Wall Street analysts to improve earnings, it has become harder to overlook the abandonments, service cuts, the closing

---

[10] Typical of the letters is the Verified Letter of Support by Mark Stearns, President, Mark & Associates, Inc., Norfolk, VA (CSX/NS-21, Volume 4D, at p-298), which states: " . . . when only one company is able to operate in a particular market, service suffers and the price is non-competitive. While there may have been an historical reason for insulating northeastern railroading from competition, that time is past, and it is time for customers . . . to have service by more than one rail carrier . . ."

of regional offices, reductions in capacity, disinterest in small shippers, and other actions taken by a carrier acting with what could be described as the arrogance of a monopoly, yet few have made formal complaints.[11]

There has been no "watchdog" committee, or organization, standing by to enter complaints or to oppose every Conrail action in the past several years. For example, because Conrail concentrated on east-west traffic, in contrast to the proposed plans of CSX and NS, few in the GTC region recognized the significance of the 1989 Conrail abandonment of the Gang Mills-Jersey Shore segment to intermodal service between the region and the Southeast. Likewise, while several firms in the region protested the closing of the Conrail intermodal terminal in Rochester in 1992, no formal complaints were made. Moreover, the remedies are fewer with passage of the Staggers Act and subsequent ICC and STB decisions.[12] Evidentiary standards can make access to the ICC, now STB, difficult and the process is more expensive with passage of the ICC Termination Act and Congressional reductions in the STB budget.[13]

In many respects, because of its unique character and scope, Docket 33388 may be compared to a constitutional convention, in which voters seize the opportunity to correct problems never envisioned when the constitution was framed. The fact that the problems existed before the application in Docket 33388 was filed does nothing to diminish their

---

[11] For a broader discussion, see Section 6, beginning at p-11, and particularly p-13, GTC-2.

[12] Parenthetically, I reiterate that, while Eastman Kodak Company's corporate representative to the Chemical Manufacturers Association's Distribution Committee and as CMA Rail Committee chairman and chairman and vice-chairman of the Distribution Committee, I supported passage of the Staggers Act. (See Section 2 of GTC-2, Midkiff V.S.) However, I and other Committee members did so on the premise that competition would be the regulator. In 1980, I never envisioned that, because of liberal interpretation of its provisions, there would be wholesale approval of acquisition, control, and mergers of railroads that would result in just two major carriers west of the Mississippi River and that only two will survive east of the Mississippi when this proceeding is over.

[13] For a discussion of the problems of local groups and public entities in participating in ICC/STB proceedings dealing with the selling of short-lines, see Section 9, GTC-2, specifically Footnote 17 and the paragraphs beginning on p-19, GTC-2.

importance, nor the need for the STB to consider them.

5. Applicants Acknowledge Problems Exist

It is interesting that the Applicants, while relying on the argument that no conditions of approval can be established to correct pre-existing problems, have acknowledged that they exist. In fact, they have "fashioned" remedies for some of them. Applicants' Rebuttal states CSX has "expressed a willingness to discuss the matter of the intermodal facility with GTC following the integration of the Conrail lines."[14] (underscoring supplied) Despite the fact GTC surveys show that over 37,000 intermodal containers/trailers were shipped from Rochester in 1993, the first full year after the Conrail facility was closed,[15] and that virtually all of this traffic now moves over the highways, it is difficult to believe that CSX will devote any more time to the Rochester region than Conrail has. For all practical purposes, CSX will have no direct competition with the NS. Rochester shippers will have to stand in line for attention and will get it only after CSX addresses competitive problems in the Shared Assets Areas and other locations with more competition. That is why GTC is asking the STB to establish conditions.

6. RSR-NS Partnership

GTC has asked the Board to require NS to become a full partner with RSR to provide competitive service to CSX in Rochester, by offering coordinated schedules and competitive rates for conventional and intermodal traffic via Silver Springs.[16] The Applicants state that ". . . the Board does not need to order NS to join with R&S (sic) as a full partner because . . . NS and R&S (sic) will have, and have already started developing, a

---

[14] See Section XV, last paragraph on p-470, CSX/NS-176.

[15] See Section 10, p-23, GTC-2.

[16] See Appendix XII to GTC-2, in which Eastman Kodak Company, the region's largest manufacturer and receiver of coal, supports the GTC position.This is representative of the type of comments GTC has received.

partnership to compete with CSX in the Rochester area."[17] GTC has received no communications from CSX, NS, or GWI regarding the contents of the agreements. As a Party of Record in this proceeding, I received a copy of a last minute filing and letter to Secretary Williams by Mortimer B. Fuller III, Chairman and CEO of Genesee & Wyoming, Inc. (GWI), in which he announced that CSX and NS have addressed the impact of the Transaction on GWI and that "CSX has entered into a definitive agreement with GWI embodying these understandings", hence, no responsive application would be filed in behalf of BPRR, ALY, RSR, and P&S. Since the agreement was negotiated behind closed doors and none of the substance has been made public, GTC does not know what impact it will have on competitive service in Rochester and must rely on the Board to protect competitive service in Rochester.

7. Removing Conrail-imposed Interchange Restrictions on Short-Lines

In responding to GTC's request for removal of Conrail-imposed restrictions that prevent area short-lines from interchanging with other railroads, Applicants' Rebuttal implies that the restrictions would not have been imposed had the purchaser been willing to pay a higher price. In Applicants' Rebuttal, they state: "(GTC) Condition 5 seeks to alter interchange limitations that were negotiated between Conrail and short line purchasers; the purchase price thus reflected the availability or lack of availability of interchange with other carriers . . .".[18]

As I pointed out in my Verified Statement, "elected officials and economic development leaders in the communities threatened with the loss of rail service eagerly work with prospective short-line operators to purchase the lines. Objections are rarely raised." Moreover, "the short-lines are generally in no position to select the end points nor to object to the imposition of restrictive conditions, fearing the selling price will be increased and with

---

[17] See Section XIII, first full paragraph beginning on p-412 , and Section XV, first paragraph p-471, CSX/NS-176.

[18] See Section XIII, p-411, CSX/NS-176

it, a corresponding increase in the amount of public subsidy, since most will need tax concessions to make a profit or public funding to finance the purchase."[19] If, as the above Rebuttal statement implies, competitive rail service was up for sale for the right price and knowing the great lengths Conrail has gone to prevent short-line access to competitive carriers, it is doubtful the short-line purchasers and the communities seeking to preserve rail service could afford it.

8. Summation

To summarize, Rochester and the GTC nine-county region would have more adequate transportation and the regional economy would benefit from the Transaction if:

(a) CSX establishes an intermodal terminal in Rochester, so Rochester shippers can participate, on a competitive basis, in the service CSX proposes to open up on the NYC Water Level Route between Boston/New York and points in the Midwest, Southwest, and on the West Coast. Moreover, Rochester's $14 billion exporting community can use rail intermodal instead of trucking containers to Montreal, Toronto, Chicago, and the Port of New York, thereby reducing transportation costs and easing the pressure on the region's existing transportation infrastructure.

(b) the region could get truck competitive intermodal service between the region and points in the Southeast east of I-75, thereby allowing the region to compete with shippers in the eastern part of the State who will enjoy the new North-South intermodal lanes. This could be accomplished if NS constructs a new intermodal terminal at Exit 42, I-90, near Geneva and Lyons, NY, or, in the alternate, cooperates with RSR to build one in the RSR Brooks Avenue Yard in Rochester, and opens up joint through routes and service between Rochester and the Southeast via a Southern Tier Junction and Harrisburg and Hagerstown.

---

[19] See Section 9, beginning at p-19, and Footnote 17, Midkiff V. S., GTC-2.

(c) the Board requires CSX to remove Conrail-imposed interchange restrictions on the LAL and the FRR, so area customers located on those lines will also enjoy the benefits of competitive rail service.

(d) CSX is required to reduce the Rochester reciprocal switching charge from its current level of $390 per car to a level not in excess of 120% of variable cost, thereby removing a barrier to competitive traffic.

(e) the Board establishes oversight of the Monongahela Usage Agreement, to ensure fair and impartial enforcement of its terms.

(f) CSX is required to honor its promise to upgrade the Amtrak Empire Corridor between Buffalo and Schenectady from Class 4 to Class 5.

9. Closing Statement

In Section 6 of my Verified Statement, beginning at p-11 of GTC-2, I described how the GTC position in Docket 33388 was developed. The relatively modest conditions GTC has requested come from discussions with contacts GTC established to pursue a goods movement planning program, as mandated by the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA). The list of contacts, which was established in 1993 and which has been amended frequently, consists of transportation executives of area businesses, utilities, short-line railroads, trucking companies, third party brokers, economic development agencies, industrial development agencies, and others. GTC's position was developed from round table discussions, one-on-one meetings, responses to GTC com- nications, telephone calls, and questionnaires. As I stated, the views are as close to "grass roots" as you can get.

GTC ships and receives no freight. It is in this proceeding simply because it believes the efficient and economical movement of goods and materials to, from, and within the GTC

region is vital to the health of the regional economy.[20] Competitive rail service is just one of the tools we need to compete in the global economy. For a section of the country that exports $14 billion worth of goods and services, that statement is not a platitude.

Some of the companies in the region are members of the Chemical Manufacturers Association, the Society of the Plastics Industry and the National Industrial Transportation League, all of which are parties of record to Docket 33388. Eastman Kodak Company and Rochester Gas & Electric are parties of record. They and some of the short-lines have submitted statements in the proceeding, but GTC is the funnel through which most of the region's shippers are getting their views before the STB.

I cannot understand the opposition to the conditions we have requested. With possible exception of the request to protect Amtrak's schedules by upgrading the Conrail Water Level Route between Buffalo and Schenectady from Class 4 to Class 5 and the request to eliminate short-line interchange restrictions, the conditions requested by GTC are designed to provide the Applicants with opportunities for increased business. Even elimination of the interchange restrictions will be beneficial, since competitive rail service will give shippers and receivers on the short-lines a better opportunity to "grow" their business, and upgrading the Water Level Route to Class 5 will speed up CSX intermodal traffic.

In closing, I say that I recognize the monumental task the Board has in producing a fair and equitable decision in Docket 33388. I am confident that it recognizes the uniqueness of the joint application, which, if approved, will establish the rail system east of the Mississippi River for generations to come. That is why it must broaden its interpretation of what constitutes a valid request to establish a condition. It must judge a condition on its own merits. If establishing the condition can be shown to be in the public interest by enhancing the adequacy of transportation, it should be immaterial whether the problem it will correct

---

[20] For expressions of the importance of, and support for, the conditions GTC is requesting, see Appendices V and VI to this statement.

existed before the Transaction, or was derived from it.

Respectfully submitted for the

GENESEE TRANSPORTATION COUNCIL,

H. Douglas Midkiff
Transportation Specialist

HDM/wp

VERIFICATION

I, H. Douglas Midkiff, declare, under penalty of perjury, that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this verified statement.

By _____
H. Douglas Midkiff

Notary _____

KATHLEEN A. TUFF
Notary Public, State of New York
Qualified in Monroe County
No. 01TU5087654
Commission Expires Nov. 3, 1999

CERTIFICATE OF SERVICE

I, H. Douglas Midkiff, hereby certify that, on 2/19/98, I have mailed by first class mail, postage prepaid, to the parties listed below and to all parties of record, copies of the brief of the GENESEE TRANSPORTATION COUNCIL, in support of its request for establishment of conditions of approval in STB Finance Docket 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.*

_____
H. Douglas Midkiff

GENESEE TRANSPORTATION COUNCIL

Copies to: **Administrative Law Judge Jacob Levanthal**
Federal Energy Regulatory Commission
888 First Street, N. E. Suite 11F
Washington, DC 20426

James C. Bishop, Jr.
William C Wooldridge
J. Gary Lane
James L. Howe III
Robert J. Cooney
George A. Aspatore
Roger A. Petersen
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510-9241

Richard A. Allen
James A. Calderwood
Andrew R. Plump
John V. Edwards
Zuckert, Scoutt & Rosenberger, LLP
888 Seventeenth Street, N. W.
Suite 600
Washington, DC 20006-3939

John M. Nannes
Scot B. Hutchins
Skadden,Arps,Slate,Meagher, Flom, LLP
1440 New York Avenue, N. W.
Washington, DC 20005-2111

Mark G. Aron
Peter J Schudtz
CSX Corporation
One James Center
902 East Cary Street
Richmond, VA 23129

P. Michael Giftos
Paul R. Hitchcock
CSX Transportation, Inc.
500 Water Street
Jacksonville, FL 32202

Dennis G. Lyons
Drew A. Harker
Michael Caglioti
Arnold & Porter
555 12th Street, N. W.
Washington, DC 20004

Samuel M. Sipe, Jr.
David H. Coburn
Steptoe & Johnson, LLP
1330 Connecticut Avenue
Washington, DC 20036

Timothy T. O'Toole
Constance L. Abrams
Consolidated Rail Corporation
Two Commerce Square
2001 Market Street
Philadelphia, PA 19103

Paul A. Cunningham
Gerald P. Norton
Harkins Cunningham
1300 Nineteenth Street, N. W.
Suite 600
Washington, DC 20036

APPENDIX I

GTC POLICY COMMITTEE

Roger Triftshauser, Genesee Co. Legislature
Dennis House, Livingston Co. Board of Supervisors
Dennis A. Pelletier, Monroe Co. Legislature
John D. Doyle, Monroe County Executive
Bonnie Coles, Monroe County Planning Board
Daniel C. Hogan, Monroe County At-Large
Keith E. Griswold, Monroe County At-Large
William Kelly, Monroe Co. Assoc. Of Town Supervisors
Donald C. Ninestine, Ontario Co. Board of Supervisors
Marcia B. Tuohey, Orleans County Legislature
Patsy Amidon, Seneca Co. Board of Supervisors
Louis DeLisio, Wayne Co. Board of Supervisors
Paul Agan, Wyoming Co. Board of Supervisors
Robert H. Multer, Yates County Legislature
William A. Johnson, Mayor, City of Rochester
Lois Giess, Rochester City Council
Elizabeth Wallace, Rochester City Planning Council
Juanita Alvarez, City of Rochester At-Large
Marvin E. Decker, Genesee/Finger Lakes Regional Planning Council (G/FLRPC)
William R. Nojay, Rochester-Genesee Regional Transportation Authority (R-GRTA)
John Cahill, NYS Dept.. of Environ, Conservation
Lewis M. Gurley, Region 4, NYS Dept. of Transportation
John R. Platt, NYS Thruway Authority
Charles A. Gargano, Empire State Development Corp.

Karl Horn, Secretary (non-voting)
Representatives (non-voting) of Federal Aviation, Highway, and Transit Administrations

APPENDIX II

GENESEE TRANSPORTATION COUNCIL

RESOLUTION

RESOLUTION 96-15 **Authorizing the Genesee Transportation Council to become a party to the proceedings of the Surface Transportation Board on matters of proposed Conrail mergers or acquisitions**

WHEREAS

1. Conrail, Inc. is the dominant rail carrier in the Northeast and the Rochester region, being the only Class 1 rail carrier that operates over its own tracks to provide connections to the region's shippers and short-line railroads;

2. Conrail, Inc. has agreed to merge with the CSX Corporation, a far larger railroad that blankets the Southeast, a portion of the Middle Atlantic states, and the eastern Midwest, thereby creating a single railroad of nearly 30,000 miles, with potential revenue of $14 billio

3. A CSX/Conrail merger would eliminate competitive rail service to many major population centers, including Rochester, by reducing rail service from two railroads to one and because of loss of access to competing railroads by the short-lines serving them;

4. The Norfolk Southern Corporation (NS), a major CSX competitor, has made a counter offer, which would also reduce the service to major population centers, though not to the same degree, resulting in a 60% market share compared to a 70% share of a CSX/Conrail merger;

5. Railroads compete with each other, not just the trucks and other modes, and the balance between railroads must not be eliminated by mergers;

6. Maintaining the economic efficiency and competitive standing of the region's manufacturers in the global economy requires balanced and competitive rail service to prevent increases in the delivered cost of coal to the region's power utilities, and to prevent increases in the cost of transporting inbound raw materials and supplies and distributing area products, especially to the ports;

7. Requests for acquisition or merger between Conrail and CSX or NS must be considered by the Surface Transportation Board, which, despite concerns over the consolidation of market power, is likely to approve a Conrail merger with either CSX or NS in order to promote cost savings and increase productivity;

8. It appears the Surface Transportation Board will ultimately determine the future make-up of the merged railroad before approving acquisition or merger proposals, and will seek to establish balance between a merged Conrail and the remaining carrier;

NOW, THEREFORE, BE IT RESOLVED

1. That when the Surface Transportation Board initiates proceedings to consider the merger or acquisition of Conrail by either CSX or NS, the Genesee Transportation Council participate in the proceedings and exercise its right to petition the Board to take note of regional concerns over the possible loss of competitive rail service and ask the Board to establish routes and attach conditions that will protect rail competition in New York State and the GTC region.

2. That copies of this resolution be transmitted to the Commissioner of the New York State Department of Transportation and other Metropolitan Planning Organizations in New York State, urging their participation and expressing our willingness to participate in a cooperative effort.

CERTIFICATION

The undersigned duly qualified Secretary of the Genesee Transportation Council certifies that the foregoing is a true and correct copy of a resolution adopted at a legally convened meeting of the Policy Committee of the Genesee Transportation Council held on November 21, 1996.

Date:_____

_____

Karl H. Horn, Secretary
Genesee Transportation Council

APPENDIX III

The CHAMBER

Greater Rochester Metro Chamber of Commerce

55 St. Paul Street • Rochester, NY 14604-1391 • Tel (716) 454-2220 • Fax (716) 263-3679

February 9, 1998

Mr. H. Douglas Midkiff
Transportation Specialist
Genesee Transportation Council
65 West Borad Street, Suite 101
Rochester, NY 14614

Dear Mr. Midkiff:

The Chamber is pleased that the Genesee Transportation Council has taken the lead in putting the views of the region before the Surface Transportation Board as it considers the acquisition and control of Conrail by CSX and Northern Southern, in STB Finance Docket 33388.

As you state, the efficient and economical movement of goods, to, from, and within, the GTC region is vital to the health of the regional economy. Competitive rail service is just one of the tools we need to compete in the global economy. Since a major part of the economic activity in the region is tied to exports, the ability to compete in the global economy is especially significant for the Rochester area.

I have previously furnished you with information that more than 2,000 companies in the nine-county region exported $14 billion worth of goods and services in 1996. On a per capita basis, that puts Rochester among the top 10 exporting areas in the country, with total exports from the region exceeding the exports of 39 of the 50 states.

At present, many of our exporters truck export containers to Toronto, Montreal, Halifax, and Chicago, for rail movement beyond to the West Coast, and to the Port of New York/New Jersey. They do this because all-truck costs are competitive with cost via truck-rail through the nearest intermodal terminals in Syracuse and Buffalo, when the extra drayage costs and additional lead times required to ship via Buffalo and Syracuse are taken into consideration. These additional costs and time requirements would be substantially reduced if the containers could be loaded on rail cars in Rochester, thereby increasing our competitive edge and, at the same time, easing the pressure on the region's highways. Rochester shippers could then enjoy the inherently lower cost to ship via rail. Consequently, your request that the Board require CSX to establish an intermodal facility in Rochester is right in line with our goal to make our export community more competitive.

Very truly yours,

Charles M. Goodwin
Vice President
International Trade & Transportation

I, Charles M. Goodwin, declare under penalty of perjury, that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this verified statement.

By _____
Charles M. Goodwin

APPENDIX IV

TRAILER TRANSPORT SYSTEMS, INC.

MAIN OFFICE - ROCHESTER
900 Jefferson Rd. - Admin. Bldg.
Rochester, New York 14623
Phone: (716) 427-2080
Fax: (716) 427-0559

SYRACUSE
8149 Morgan Road
Clay, New York 13041
Phone: (315) 652-4600
Fax: (315) 652-1874

BUFFALO
13290 Colonial Woods
Alden, New York 14004
Phone: (716) 937-4738

PHILADELPHIA
1426 Oakwood Road
Coatesville, PA 19320
Phone: (610) 384-5082
Fax: (610) 384-2888

October 6, 1997

Mr. H. Douglas Midkiff, Transportation Specialist
Genesee Transportation Council
65 West Broad Street, Suite 101
Rochester, NY 14614-2210

Re: Finance Docket 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 Corp.

Dear Mr. Midkiff;

We are pleased the Genesee Transportation Council is a Party of Record in the above referenced proceedings. The GTC's participation in behalf of the nine county region it serves gives us the opportunity to express our support, in principle, for the manner in which CSX and NS have agreed to divide Conrail, as described in the joint application filed in the above referenced proceeding.

Trailer Transport Systems, Inc. is an Intermodal Marketing Company (IMC) headquartered in Rochester, NY with offices in Buffalo and Syracuse. As and IMC we have volume contracts with all the major rail carriers, including CR, CSX, NS. We move thousands of loads comprised of various commodities throughout the country annually.

The Rochester area has been without a local intermodal facility since Conrail closed it's ramp back in the early nineties. As a result we have more trucks on the roads and highways of the area, and less competition for truckload traffic, hence, more stress on the infrastructure and higher rates for shippers and receivers in this area. The long, expensive drays to either Buffalo (NS) or Syracuse (CR) intermodal facilities do not offer a competitive rate or service option. A local intermodal facility would attract thousands of long-haul transcontinental truckloads which now move via highway.

I, David Buschner, declare under penalty of perjury that the foregoing is true and correct. Further I certify that I am qualified and authorized to file this verified statement.

Respectfully submitted,

David Buschner
President

DBB/ms

Appendix V

City of Rochester

FAX (716) 428-6059
TDD/Voice 232-3260

William A. Johnson, Jr.
Mayor

City Hall, Room 307-A
30 Church Street
Rochester, New York 14614-1284
(716) 428-7045

February 13, 1998

Mr. H. Douglas Midkiff, Transportation Specialist
Genesee Transportation Council
65 W. Broad Street, Suite 101
Rochester, New York 14614

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 Mr. Midkiff:

In November, 1996, I and other members of the Genesee Transportation Council Policy Committee unanimously adopted the attached resolution authorizing the Central Staff to participate in the Surface Transportation Board's consideration of the acquisition and control of Conrail by CSX and Norfolk Southern. I am pleased that the Central Staff has taken the lead and is effectively putting the views of the region before the Board.

Since 1968, the City of Rochester has seen the number of railroads serving the City shrink from five leading carriers, to one major railroad and a short-line carrier. As you have pointed out to the Board, the proposed acquisition of Conrail by CSX and NS offers the Surface Transportation Board the opportunity to allow the City's shippers to once again enjoy the benefits of competitive rail service, which is just one of the tools we need to compete in the global economy.

The internationally known firms that call the Rochester area home, such as Eastman Kodak Company, Xerox, Bausch & Lomb, the Gleason Corporation, ITT Automotive Electrical Systems, the General Motors Delphi Division, and Gould Pumps, need good rail service to compete. Since a major part of the economic activity in the region is tied to exports, with over $14 billion worth of goods and services exported in 1996, it is especially important that our local companies have the ability to ship their goods in export containers through a local intermodal facility. The City supports your efforts to get CSX to establish a local intermodal facility.

Sincerely yours,

William A. Johnson, Jr., Mayor

I, William A. Johnson, Jr., declare, under penalty of perjury, that the foregoing is true and correct. Further, I certify that, as Mayor of the City of Rochester, New York, I am qualified and authorized to file this verified statement.

By _____
William A. Johnson, Jr.

GENESEE TRANSPORTATION COUNCIL

RESOLUTION

RESOLUTION 96-15 **Authorizing the Genesee Transportation Council to become a party to the proceedings of the Surface Transportation Board on matters of proposed Conrail mergers or acquisitions**

WHEREAS

1. Conrail, Inc. is the dominant rail carrier in the Northeast and the Rochester region, being the only Class 1 rail carrier that operates over its own tracks to provide connections to the region's shippers and short-line railroads;

2. Conrail, Inc. has agreed to merge with the CSX Corporation, a far larger railroad that blankets the Southeast, a portion of the Middle Atlantic states, and the eastern Midwest, thereby creating a single railroad of nearly 30,000 miles, with potential revenue of $14 billio

3. A CSX/Conrail merger would eliminate competitive rail service to many major population centers, including Rochester, by reducing rail service from two railroads to one and because of loss of access to competing railroads by the short-lines serving them;

4. The Norfolk Southern Corporation (NS), a major CSX competitor, has made a counter offer, which would also reduce the service to major population centers, though not to the same degree, resulting in a 60% market share compared to a 70% share of a CSX/Conrail merger;

5. Railroads compete with each other, not just the trucks and other modes, and the balance between railroads must not be eliminated by mergers;

6. Maintaining the economic efficiency and competitive standing of the region's manufacturers in the global economy requires balanced and competitive rail service to prevent increases in the delivered cost of coal to the region's power utilities, and to prevent increases in the cost of transporting inbound raw materials and supplies and distributing area products, especially to the ports;

7. Requests for acquisition or merger between Conrail and CSX or NS must be considered by the Surface Transportation Board, which, despite concerns over the consolidation of market power, is likely to approve a Conrail merger with either CSX or NS in order to promote cost savings and increase productivity;

8. It appears the Surface Transportation Board will ultimately determine the future make-up of the merged railroad before approving acquisition or merger proposals, and will seek to establish balance between a merged Conrail and the remaining carrier;

NOW, THEREFORE, BE IT RESOLVED

1. That when the Surface Transportation Board initiates proceedings to consider the merger or acquisition of Conrail by either CSX or NS, the Genesee Transportation Council participate in the proceedings and exercise its right to petition the Board to take note of regional concerns over the possible loss of competitive rail service and ask the Board to establish routes and attach conditions that will protect rail competition in New York State and the GTC region.

2. That copies of this resolution be transmitted to the Commissioner of the New York State Department of Transportation and other Metropolitan Planning Organizations in New York State, urging their participation and expressing our willingness to participate in a cooperative effort.

CERTIFICATION

The undersigned duly qualified Secretary of the Genesee Transportation Council certifies that the foregoing is a true and correct copy of a resolution adopted at a legally convened meeting of the Policy Committee of the Genesee Transportation Council held on November 21, 1996.

Date:_____

_____

Karl H. Horn, Secretary
Genesee Transportation Council

Appendix VI

MONROE COUNTY

Office of the County Executive

John D. Doyle
County Executive

February 11, 1998

Mr. Douglas Midkiff, Transportation Specialist
Genesee Transportation Council
65 West Broad Street, Suite 101
Rochester, New York 14614

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 Mr. Midkiff:

In November, 1996, I and other members of the Genesee Transportation Council Policy Committee unanimously adopted the attached resolution, that authorized the Central Staff to participate in the Surface Transportation Board's consideration of the acquisition and control of Conrail by CSX and Norfolk Southern. I am pleased that the Central Staff has taken the lead and is effectively putting the views of the region before the Board.

The efficient and economical movement of goods, to, from, and within, the GTC region is vital to the health of the regional economy. Competitive rail service is just one of the tools we need to compete in the global economy is especially significant for the Rochester area.

There are approximately 1,100 manufacturing firms located in Monroe County. This includes, among others, the internationally known firms of Eastman Kodak Company, Xerox, Bausch & Lomb, the Gleason Corporation, ITT Automotive Electrical Systems, the General Motors Delphi Division, and Gould Pumps. I am told that the equivalent of over 44,000 rail carloads moved in and out of the region in 1995, with the majority of them originating and terminating in Monroe County. Obviously, we need good rail service.

I support the establishment of the conditions you are requesting.

Sincerely yours,

John D. Doyle
County Executive

JDD/bm

Attachment

I, John D. Doyle, declare, under penalty of perjury, that the foregoing is true and correct. Further, I certify that, as County Executive of the County of Monroe, New York State, I am qualified and authorized to file this verified statement.

By _____
John D. Doyle

GENESEE TRANSPORTATION COUNCIL

RESOLUTION

RESOLUTION 96-15 **Authorizing the Genesee Transportation Council to become a party to the proceedings of the Surface Transportation Board on matters of proposed Conrail mergers or acquisitions**

WHEREAS

1. Conrail, Inc. is the dominant rail carrier in the Northeast and the Rochester region, being the only Class 1 rail carrier that operates over its own tracks to provide connections to the region's shippers and short-line railroads;

2. Conrail, Inc. has agreed to merge with the CSX Corporation, a far larger railroad that blankets the Southeast, a portion of the Middle Atlantic states, and the eastern Midwest, thereby creating a single railroad of nearly 30,000 miles, with potential revenue of $14 billio

3. A CSX/Conrail merger would eliminate competitive rail service to many major population centers, including Rochester, by reducing rail service from two railroads to one and because of loss of access to competing railroads by the short-lines serving them;

4. The Norfolk Southern Corporation (NS), a major CSX competitor, has made a counter offer, which would also reduce the service to major population centers, though not to the same degree, resulting in a 60% market share compared to a 70% share of a CSX/Conrail merger;

5. Railroads compete with each other, not just the trucks and other modes, and the balance between railroads must not be eliminated by mergers;

6. Maintaining the economic efficiency and competitive standing of the region's manufacturers in the global economy requires balanced and competitive rail service to prevent increases in the delivered cost of coal to the region's power utilities, and to prevent increases in the cost of transporting inbound raw materials and supplies and distributing area products, especially to the ports;

7. Requests for acquisition or merger between Conrail and CSX or NS must be considered by the Surface Transportation Board, which, despite concerns over the consolidation of market power, is likely to approve a Conrail merger with either CSX or NS in order to promote cost savings and increase productivity;

8. It appears the Surface Transportation Board will ultimately determine the future make-up of the merged railroad before approving acquisition or merger proposals, and will seek to establish balance between a merged Conrail and the remaining carrier;

NOW, THEREFORE, BE IT RESOLVED

1. That when the Surface Transportation Board initiates proceedings to consider the merger or acquisition of Conrail by either CSX or NS, the Genesee Transportation Council participate in the proceedings and exercise its right to petition the Board to take note of regional concerns over the possible loss of competitive rail service and ask the Board to establish routes and attach conditions that will protect rail competition in New York State and the GTC region.

2. That copies of this resolution be transmitted to the Commissioner of the New York State Department of Transportation and other Metropolitan Planning Organizations in New York State, urging their participation and expressing our willingness to participate in a cooperative effort.

CERTIFICATION

The undersigned duly qualified Secretary of the Genesee Transportation Council certifies that the foregoing is a true and correct copy of a resolution adopted at a legally convened meeting of the Policy Committee of the Genesee Transportation Council held on November 21, 1996.

Date:_____ _____

Karl H. Horn, Secretary
Genesee Transportation Council