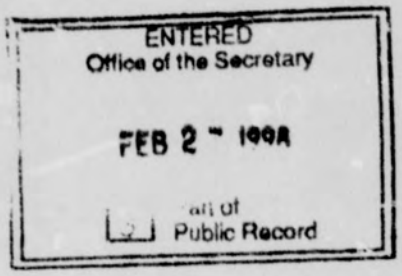
STB FD 33388 2-26-98 E 186049

(RCWS-4)

186045

UNITED STATES OF AMERICA

BEFORE THE
SURFACE TRANSPORTATION BOARD



STB FINANCE DOCKET NO. 33388

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

BRIEF IN SUPPORT OF COMMENTS AND REQUEST FOR CONDITIONS
OF
RESOURCES WAREHOUSING & CONSOLIDATION SERVICES

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Counsel for Resources Warehousing
& Consolidation Services, Inc.

A. Description of Interest and Line at Issue

Prior submissions of Resources Warehousing & Consolidation Services, Inc. RWCS, most notably RCWS-2 and RWCS-3, describe the interest of RWCS and the line segments of concern to it in these proceedings. For ease of reference, the description will be repeated here.

Resources Warehousing & Consolidation Services Inc. (RWCS) has offices, warehouses and terminal facilities located at 2200 Secaucus Road, North Bergen, NJ. Commonly owned Land Bridge Terminal Inc. (LBT) is also located at that address.

RWCS, a freight forwarder, provides warehousing, consolidation, and intermodal services for international trade from warehouse and terminal facilities owned and operated by RWCS - LBT being the terminal operator. RWCS is a significant intermodal terminal facility in Northern New Jersey.

RWCS intermodal facilities are located on the southern terminus of a north-south rail line owned and served by the New York Susquehanna & Western (NYSW). The Delaware Ostego Corporation (DO) owns the NYSW. The RWCS terminal lies between the North Bergen and Croxton Terminals, north of the Kearny - APL Terminal facility. RWCS has committed to substantial development and expansion of its intermodal facilities on property owned at its present location. All of RWCS facilities are located within the North Jersey Shared Asset Area (NJSAA).

B. Summary of Issues/Position

RWCS seeks imposition of condition to ensure equal or dual access to service from both NS and CSX. The CSX/NS agreement to acquire DO makes less clear the nature of rail services that may be available to RWCS. RWCS has had discussions

with DO, CSX and NS regarding rail service options at its facilities. Although RWCS has requested additional information clarifying the DO arrangement, it has been advised the agreement is confidential and proprietary in nature and that DO will continue operations for the foreseeable future..

RWCS has been constructively engaged in negotiations with the Applicants for service opportunities or commitments for its current intermodal facilities as well as its planned expansion.

RWCS supports the transaction proposed by the Applicants and does not anticipate difficulty in ultimately achieving satisfactory service options or commitments.

C. Discussion

1. Applicable Standards

These proceedings commenced by the primary applicants are governed by statutory provisions set out in the Interstate Commerce Act (ICA or Act) 49 U.S.C. 11321-11327 and regulations at 49 CFR Part 1180. ICA Section 11324 identifies the elements essential to determining public interest as well as provides specific grant of authority to impose conditions necessary and consistent with the public interest. 49 U.S.C. 11324(b) and (c).

The statutory criteria has been applied in such recent significant cases as F.D. No. 32760, Union Pacific - Control and Merger - Southern Pacific Rail Corp. (Decision No. 44) (August 12, 1996) UP/SP; F.D. No. 32549, Burlington Northern Inc. and Burlington Northern Railway Co. - Control and Merger - Santa Fe Pacific Corporation and the Atchison Topeka and Santa Fe Railway Company, Decision No. 038 (August 23, 1995) (BN/SF); F.D. No. 32133, Union Pacific Corp. - Control - Chicago and

Northwestern Transp. Co., (February 21, 1995) (UP/CNW); F.D. No. 30800, Union Pacific Corp. - Control - M-K-T Railroad Company 4 ICC 2nd 409 (1988) (UP/MKT); F.D. No. 3200, Rio Grand Industries - Control - SPT Co., 4 ICC 2d 834 (1988) (RGW/SP); and F.D. No. 30400, Santa Fe Southern Pacific Corp. - Control - STP Co., 2 ICC 2nd 709 (1986) (SF/SP).

The regulations implementing statutory policy were adopted following issuance of a policy statement in Rail Consolidation Procedures, 363 ICC 784 (1981) which clarifies the incorporation of the numerous elements of public interest in evaluating consolidation and balancing potential benefits against potential harms to the public. See 49 CFR 1180.1, General Policy Statement for Merger or Control of at Least Two Class I Railroads.

2. Conditional Remedies Sought By RWCS Are Consistent With Public Interest.

RWCS requests equal access to both NS and CSX rail service both to and from its terminal facilities, similar to the dual access the Applicants have already proposed for other facilities in the North Jersey Shared Assets Area (NJSAA) such as the APL Terminal in Kearny.

RWCS accepts the Applicant's statement that "in fact, however, RWCS will be provided the dual access it seeks". CSX/NS-176, Applicants Rebuttal, Vol. 1, pp. 167-168. The Applicants note that RWCS is served now and will in the future be by the DO/NYS&W and may connect to NS via Passiac Junction and to CSX via connection to be built to North Bergen to Little Ferry.

Although Applicants have failed to disclose the terms and conditions of their agreement, NS and CSX have in fact purchased NYS&W and are the co-owners. RWCS is concerned that in the course of the service, either NS or CSX may discriminate in favor of their own facilities within the shared asset area. Accordingly, RWCS requests the imposition of a condition to ensure (a) that the interconnect is built to allow access to CSX at North Bergen/Little Ferry, and (b) that neither NS nor CSX takes steps to restrict the opportunity for equal or dual access.

3. Conclusion

The absence of Applicant detail for this specific access issue as well as concern over the shared asset area operations in general warrant imposition of condition specifically tailored to meet this specific harm, which condition Applicants concede is both operationally feasible and consentually agreeable. The condition requested will not diminish but neither will enhance service/competition benefits contemplated by this transaction. The remedy requested is consistent with the public interest.

Dated: February 26, 1998

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Consolidation Services, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief in Support of Comments and Request for Conditions of Resources Warehousing & Consolidation Services, Inc. were mailed, via first class mail, postage prepaid, this 26th day of February, 1998 to Administrative Law Judge Jacob Leventhal, Federal Energy Regulatory Commission, 888 First Street, NE, Suite 11F, Washington, DC 20426, counsel for applicant parties and parties of record, in accordance with the rules of the Surface Transportation Board.

Paul H. Lamboley

STB FD . 33388 2-26-98 E . 186046

186046

(STW-4)

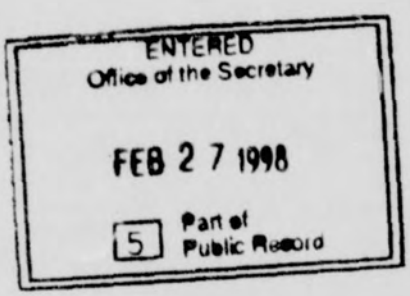
UNITED STATES OF AMERICA

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 33388

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

**BRIEF IN SUPPORT OF COMMENTS AND
REQUEST FOR CONDITIONS OF
SOUTHERN TIER WEST REGIONAL PLANNING AND DEVELOPMENT BOARD**



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Counsel for Southern Tier West
Regional Planning and
Development Board

A. Description of Interest and Line at Issue

Prior submissions of Southern Tier West Regional Planning and Development Board (STW), most notably STW 1 and STW-2, describe the interest of STW and the line segments of concern to it in these proceedings. For ease of reference, description will be repeated here.

The Southern Tier West Regional Planning and Development Board ("STW") is a regional planning board representing the New York State counties of Allegheny, Cattaraugus, and Chautauqua located in the southwestern corner of New York State. For purposes of this proceeding, STW also represents the county of Steuben, also in New York State.

The STW region is served by an east-west Conrail (CR) line known as the "Southern Tier Extension", which runs 146 route miles from Hornel, New York to Corry, Pennsylvania. See accompanying map attached as Exhibit A. Formerly part of the main line of the Erie Lackawanna Railway Company (EL), it connects at Hornel with Conrail's Buffalo-Jersey City "Southern Tier Line." Between Corry and Meadville, Pennsylvania, the former Erie Lackawanna main line is owned by the Northwest Pennsylvania Rail Authority. Between Meadville and Youngstown, Ohio, it is owned by Conrail. At Corry, connection is made to the Emporium-Erie line of the Allegheny & Eastern Railroad ("ALY"), a Class III carrier.

The STW region is also served by three north-south lines. Conrail's Buffalo-Harrisburg line intersects the Southern Tier Extension at Olean, New York. The Buffalo & Pittsburgh Railroad ("BPRR") is a Class II railroad whose line passes over the Southern Tier Extension east of Salamanca, New York. BPRR and ALY are

subsidiaries of Genesee & Wyoming, Inc. Finally, the New York and Lake Erie Railroad ("NY&LE") operates as a Class III carrier between Gowanda, New York and Conewango, New York. It possesses a dormant connection with the Southern Tier Extension at Waterboro, New York.

Conrail and Norfolk Southern operate separate main lines along the shore of Lake Erie in Chautaugua County. Inasmuch as these lines are at the periphery of the STW region, and do not connect with the Southern Tier Extension, this filing does not address them.

The Southern Tier Extension is unique in that it has been the subject of almost constant controversy between Conrail and state and local agencies since the early 1980's. This very public controversy has worked to dissipate the confidence of rail users, and contributed to a precipitous decline in rail usage and industrial activity in communities served by the Southern Tier Extension. When the New York State Department of Transportation ("NYSDOT") surveyed rail usage along the line 1980, annual volume was 4488 carloads; at this time, annual volume is about 500 cars.

B. Summary of Issues/Positions

There are two general issues involved in the relief requested by STW in these proceedings, should control be approved:

First, the principle issue is whether the contractual obligation(s) of Conrail to the State of New York (NYS), in which STW has a third-party beneficial interest, should be imposed as conditions. Apart from whether this case is a proper forum for contract interpretation and enforcement which it may not be, the Board nonetheless may impose the contract obligation as a condition in these control proceedings.

Second, a related question is whether absent Conrail's repair of damage to the line segment between Olean and Hornel caused by washouts at Alfred, Scio and Belmont, New York, a defacto abandonment results from the condition of the rail line for which remedial conditions are appropriate.

C. Discussion

1. Applicable Standards

These proceedings commenced by the primary applicants are governed by statutory provisions set out in the Interstate Commerce Act (ICA or Act) 49 U.S.C. 11321-11327 and regulations at 49 CFR Part 1180. ICA Section 11324 identifies the elements essential to determining public interest as well as provides specific grant of authority to impose conditions necessary and consistent with the public interest. 49 U.S.C. 11324(b) and (c).

The statutory criteria has been applied in such recent significant cases as F.D. No. 32760, Union Pacific - Control and Merger - Southern Pacific Rail Corp. (Decision No. 44) (August 12, 1996) UP/SP; F.D. No. 32549, Burlington Northern Inc. and Burlington Northern Railway Co. - Control and Merger - Santa Fe Pacific Corporation and the Atchison Topeka and Santa Fe Railway Company, Decision No. 038 (August 23, 1995) (BN/SF); F.D. No. 32133, Union Pacific Corp. - Control - Chicago and Northwestern Transp. Co., (February 21, 1995) (UP/CNW); F.D. No. 30800, Union Pacific Corp. - Control - M-K-T Railroad Company 4 ICC 2nd 409 (1988) (UP/MKT); F.D. No. 3200, Rio Grand Industries - Control - SPT Co., 4 ICC 2d 834 (1988) (RGW/SP); and F.D. No. 30400, Santa Fe Southern Pacific Corp. - Control - STP Co., 2 ICC 2nd 709 (1986) (SF/SP).

The regulations implementing statutory policy were adopted following issuance of a policy statement in Rail Consolidation Procedures, 363 ICC 784 (1981) which clarifies the incorporation of the numerous elements of public interest in evaluating consolidation and balancing potential benefits against potential harms to the public. See 49 CFR 1180.1, General Policy Statement for Merger or Control of at Least Two Class I Railroads.

2. Conditional Remedies Sought by STW are Consistent With the Public Interest.

The imposition of the conditional remedies sought by STW is consistent with statutory and regulatory criteria, and is appropriate to ensure that the transaction complies with public interest requirements.

In STW-2, conditions requested were as follows:

a. NS should be required to detail its plans for the Southern Tier Extension;

b. Conrail should be required to repay moneys owed to the State of New York Department of Transportation (NYSDOT) under the Southern Tier agreement, or alternatively, NS should be required to enter into an assumption and extension of the Southern Tier agreement;

c. Conrail or NS should be required to repair the washouts in Alfred, Scio and Belmont, New York or otherwise restore the line to operable status;

d. Service and maintenance commitment under the Southern Tier agreement should be extended for five years.

At this juncture, it would appear that the record contains various representations concerning NS plans for the Southern Tier Extension. In general terms, STW is willing to accept those statements.

With respect to the specific request for NS to assume the obligations of Conrail under applicable agreements with NYSDOT, STW accepts the statement made by the Applicants in rebuttal that "NS will assume the obligations of Conrail with respect to the TSC-Wellsville Agreement and the December, 1990 Amendment". CSX/NS-176, Applicants Rebuttal, Vol. 1, p. 561

Further, with respect to repair of washouts at Alfred, Scio and Belmont, New York, STW will accept the statement that "if Conrail is obligated to make repairs on this line, then NS will honor the obligation to the extent it exists after the closing date". Id. at p. 562.

STW believes the acknowledged undertaking by NS in rebuttal is appropriate basis for imposition of conditions in this transaction because the Applicants generally contend that Section 11321(a) of the Act broadly authorizes the Board to set aside private contractual obligations such as those that exist between Conrail and NYSDOT, in which STW has a third-party beneficial interest. STW acknowledges that the principle contract obligations run to the NYSDOT but contends that portions of the agreement run directly to the benefit of STW and its interest in the Southern Tier Extension. For that reason, STW is appropriate party to seek such relief. STW notes that this relief is consistent with, and supported by the State of New York's own submissions.

Further, Applicants argue that STW's concerns address pre-existing circumstances not associated with the transaction. However, if the Conrail obligations under agreement with NYSDOT are not acknowledged and assumed by NS in this transaction, it is very clear that NS failure to do so will exacerbate the existing conditions, and will, in fact, be the proximate cause of the deterioration of the line from this point in time. NS failure would result in no further role or use of the line, and the defacto abandonment of the line as well as the termination of common carrier service obligations under Section 11101.

In short, NS failure to assume the obligation of the agreements with the State of New York is not a pre-existing condition but rather, would be a consequence of this transaction. Accordingly, this transaction is properly subject to the imposition of condition to prevent that situation from occurring - notwithstanding the good faith declarations by NS of its willingness. There is then, a sufficient nexus between the control transaction and the harm which the condition seeks to ameliorate. See UP/SP Decision No. 44 at 178.

Contrary to Applicants' assertion, a competitive harm is not the only harm to be evaluated under the public interest criteria. The fifteen (15) elements of Section 10101 Rail Transportation Policy (RTP), are engrafted within the public interest standard to be applied in consolidation merger proceedings. Competition is but one of the elements to be fostered under the RTP. There are additional general policies to promote safe and efficient rail transportation along with the development continuation of a sound transportation system, and to operate facilities and equipment without detriment to public health and safety while encouraging and promoting energy conservation.

Specifically, Section 11324 provides that the Board shall consider at least five factors, the first of which includes "the effect of the proposed transaction on the adequacy of transportation to the public". Section 11101 also provides that a rail carrier providing transportation or service subject to jurisdiction of the Board "shall provide the transportation or service on reasonable request". Failure to assume the obligation of the agreements with the State of New York would violate not only the general policies of the RTP but specific sections of the Act as well. For that reason, conditions sought by the STW are appropriate.

3. Conclusion

STW's proposed condition will ameliorate a demonstrable harm by preventing the exacerbation and termination of rail service. The condition is tailored to remedy a specific harm. It is certainly feasible and apparently agreeable. It will not diminish the benefits of the proposed transaction. Rather, it may serve to enhance the benefits to the Applicants as well as the general public that the transaction contemplates.

Dated: February 26, 1998

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Regional Planning and
Development Board

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief in Support of Comments and Request for Conditions of Southern Tier West Regional Planning and Development Board were mailed, via first class mail, postage prepaid, this 26th day of February, 1998 upon Administrative Law Judge Jacob Leventhal, Federal Energy Regulatory Commission, 888 First Street, NE, Suite 11F, Washington, DC 20426, counsel for applicant parties and upon other known parties of record attached hereto, first class mail, prepaid, in accordance with the rules of the Surface Transportation Board.

Paul W. Lamboley

STB FD 33388 2-23-98 E 185880

185880

BEFORE THE
SURFACE TRANSPORTATION BOARD

ORIGINAL

Finance Docket No. 33388 (Sub-No. 80)

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

WLE-8

BRIEF OF RESPONSIVE APPLICANT WHEELING & LAKE ERIE RAILWAY COMPANY

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DATED: FEBRUARY 23, 1998

ERRATA SHEET
(Replacement page 37)

congestion. Its route structure also allows carriers such as NS to bypass congested facilities in both Cleveland and Pittsburgh. Parsons VS at 36; Wait VS at 76, 78. While NS witness Friedman suggests that W&LE's lines are not up to NS' standards for through traffic, NS' periodic proposals[28] to use W&LE's mainline as an NS "spill over" route undercuts his testimony. NS' investment of capital to upgrade this route would be relatively inexpensive when compared to the massive capital needed to upgrade Conrail lines.

G. W&LE'S CONDITIONS ARE REASONABLE, PRACTICABLE REMEDIES AMELIORATING THE TRANSACTION'S ADVERSE IMPACTS ON W&LE

W&LE has requested five general categories of relief as follows:[29]

(1) Haulage rights, with underlying trackage rights protecting Chicago traffic flows;

(2) Haulage rights, with underlying trackage rights (providing new market access) and offered in settlement;

(3) Haulage rights, with underlying trackage rights (providing new market access) but not offered in settlement;

(4) Contractual issues.

In determining whether to grant relief sought by a party as a condition of a rail merger or consolidation, the Board considers whether (1) the condition addresses the effects of the

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[28] In its most recent and now withdrawn settlement proposal, NS had proposed trackage rights over W&LE's mainline as an NS secondary route.

[29] Specific conditions are set forth at pages 33-4 of Parsons' VS.

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TABLE OF AUTHORITIES

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388 (Sub-No. 80)

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

WLE-8

BRIEF OF RESPONSIVE APPLICANT
WHEELING & LAKE ERIE RAILWAY COMPANY

I. INTRODUCTION

Pursuant to the procedural deadlines set by the Board in Decision Nos. 6, 12 and 52, respectively served on May 30, 1997, July 23, 1997 and November 3, 1997, Wheeling & Lake Erie Railway Company ('W&LE") hereby files its brief.[1] In "CSX/NS-194," the

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[1] Hereafter, CSX Corporation and CSX Transportation, Inc., will be referred to -- both separately and collectively -- as "CSX." Likewise, Norfolk Southern Corporation and Norfolk Southern Railway Company will be referred to -- both separately and collectively -- as "NS." Finally, Conrail, Inc. and Consolidated Rail Corporation will be referred to -- both separately and collectively -- as "Conrail." Together, CSX, NS and Conrail will be referred to hereafter as "the Applicants."

As relevant here, the Applicants originally submitted their Application to acquire control of Conrail and its lines on June 23, 1997. Thereafter, on October 21, 1997, W&LE, among other parties, filed a Responsive Application. Applicants responded to the W&LE and to a variety of other commenters, protestants, and responsive applicants in their Rebuttal, filed on December 15, 1997, as "CSX/NS-176." Also, on January 15, 1998, the W&LE submitted its Reply Evidence and Argument as WLE-7. As permitted under the Board's procedural guidelines, W&LE submits this brief supporting its Responsive Application.

Applicants identify at what points in their Rebuttal they discuss issues relevant to the W&LE in the above-docketed proceeding.[2]

Today, W&LE, a marginally profitable class II regional railroad which has financially restructured and been gaining in strength, has established itself as a valuable transportation asset serving over 200 on-line shippers in an industrialized area of Ohio, western Pennsylvania, northern West Virginia, and western Maryland. Its position as a strong competitive "regional" carrier with multiple direct connections to three class I's and ten short line rail carriers make W&LE's service critical to the industrial economies of Ohio, West Virginia, Pennsylvania and Maryland. See, "Opposition, Comments, And Requests for Protective Conditions of the Ohio Attorney General, Ohio Rail Development Commission and Public Utilities Commission of Ohio" (hereafter, "OAG-4") at 13.

W&LE opposes the Application by CSX and NS to acquire and divide the lines of Conrail, absent remedial conditions to protect it and its shippers. Although the Applicants claim that the Transaction is pro-competitive, it has serious anti-competitive impacts in certain areas, certainly in the W&LE operating area and most probably in the Pittsburgh-Chicago Corridor. [See Comments and Request for Conditions by the Pennsylvania House Transportation Committee at 25-26, (Senate concurred) filed October 15, 1997. See, also WLE-4, Verified Statement of Larry Parsons at 24-6 ("Parsons VS")]. W&LE has demonstrated in an analysis done in a

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[2] Hereafter, W&LE uses the term "Transaction" generally to refer to the series of agreements to control, lease, and operate rail lines and facilities. Also W&LE will refer to the Primary Application encompassed by Finance Docket No. 33388 as "the Application."

common sense manner, with careful detail for its entire traffic base, that the Transaction -- without pro-competitive conditions -- would divert as much as one third of W&LE's traffic and revenue with devastating consequences for the railroad, its shippers, and the many communities it serves. Without the relief sought, W&LE's continued viability is seriously threatened.

W&LE's inevitable insolvency will result from the "market inversion" that will occur when NS -- presently W&LE's principal friendly connection and partner -- acquires major portions of Conrail, W&LE's principal competitor. This involves a vertical integration with control of origination and destination points. Upon consummation of the Transaction, this market inversion will permit NS to divert to single-line haul up to one third of W&LE's traffic and revenues. Unless the Board acts promptly and decisively to protect W&LE's shippers and communities by imposing pro-competitive conditions, this market inversion will foreclose W&LE's present joint-line traffic by diverting it to the routes NS will offer following its acquisition of certain Conrail lines. Such diversions will render W&LE insolvent by no later than the year 2001, forcing W&LE during the five year Board oversight period to seek post-consummation inclusion.[3] The serious service, rate

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[3] Throughout this brief, W&LE uses the term "inclusion" in a very specific way, to cover the entirety of a potential series of events which may or may not accompany a request for inclusion relief from the Board. As W&LE has made clear in the preceding paragraph, should it fail to obtain the relief it now seeks in this brief, W&LE will seek during the oversight phase of this proceeding to have its company included as a part of the assets to be acquired by the Applicants. W&LE recognizes that Board review and disposition of a W&LE inclusion request could be a complex and time-consuming process. W&LE has indicated that, without appropriate protective relief, it might, depending on other events, stave off insolvency until about 2001, but this is

and competitive uncertainties that scenario presents (along with numerous complex regulatory problems) make the inclusion option unacceptable to the W&LE, to the States in W&LE's operating areas, and to W&LE's shippers, large and small. Moreover, inclusion would eliminate both significant rail competition and essential services that W&LE today provides for its many customers.

There is a more acceptable and promising alternative to inclusion, and it is urged by W&LE, Ohio, and W&LE's shippers. The Board has the ability to use this proceeding to address certain of the Transaction's adverse impacts, rather than waiting for an inclusion request to create a crisis for the shippers and communities W&LE serves in the near future. In order to ameliorate the Transaction's adverse impacts and to protect the public interest, W&LE seeks pro-competitive protective conditions and trackage rights to protect revenues, traffic flows and essential services. The conditions provide W&LE new opportunities to compete to replace revenues lost as a direct result of the Transaction. W&LE realizes that the Board has observed problems arising from the unfortunate experiences with both of the recent western merger cases, and requests that the Board carefully address W&LE's issues at this time (where there has been vocal shipper and political support and clear warnings regarding the perceived impacts of the Transaction) rather than waiting to resolve them at a later and

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far from assured. Should W&LE find itself insolvent while awaiting disposition of its pending inclusion application, the W&LE will of course seek bankruptcy protection. This development will naturally further complicate the Board's review of the inclusion request and will thrust greater uncertainty upon W&LE's shippers. The active process described immediately above is what W&LE contemplates when it employs the term "inclusion" throughout this document.

much more difficult time. W&LE respectfully asks the Board to take advantage of the opportunity to avoid a regional crisis in the making.

II. RELIEF REQUESTED

As conditions to approval, W&LE seeks the following relief:

1. Haulage rights, with underlying trackage rights, to Chicago;

2. Haulage rights, with underlying trackage rights to Toledo;

3. Acquisition of the NS Huron Branch from Shinrock to Huron and the Huron Dock on Lake Erie;

4. Haulage/local trackage rights from Benwood to Brooklyn Jct., WV, and access to customers such as PPG and Bayer at Natrium, WV;

5. Trackage rights to stone quarries and distribution facilities at Bucyrus, Alliance, Maple Grove (specifically with access to the Northern Ohio & Western Railway, Ltd.), Spore, Wooster, Macedonia, Twinsburg, and Ravenna, OH;

6. Haulage rights, with underlying trackage rights, to Wheeling Pittsburgh Steel at Allenport, PA;

7. Haulage rights, with underlying overhead trackage rights, on CSX for access to the Ohio Edison Power plant at Niles, OH, and for interchange to the Buffalo & Pittsburgh Railroad at Erie, PA;

8. Acquisition of the Conrail Randall Secondary between Cleveland (MP 2.5) and Mantua, OH (MP 27.5);

9. Access to Reserve Iron & Metal (a "2 to 1" shipper) in Cleveland, OH;

10. Access to Weirton Steel, Weirton, WV;

11. Reverse joint facility maintenance obligations;

12. Guarantee of fairness and nondiscriminatory treatment on any haulage and trackage rights granted.

In addition, W&LE asks the Board to retain oversight jurisdiction over the Transaction for five years after consummation, with specific jurisdiction to entertain an inclusion petition on an expedited basis should W&LE become insolvent during the oversight period.

III. SUMMARY OF ARGUMENT

The unconditioned acquisition by NS of lines presently owned and operated by Conrail will seriously damage W&LE's established commercial partnership with NS. This "market inversion" will drastically change the W&LE-NS relationship. NS will become W&LE's principal competitor, instead of its principal partner. By serving many of W&LE's shippers directly at both the origins and destinations, NS can and will foreclose that traffic to W&LE. Absent ameliorative conditions, W&LE's witnesses Marketing Vice President Reginald Thompson, Controller Michael Mokodean, and economic and diversion study expert Wilbert A. Pinkerton uniformly predict that the Transaction will allow NS to divert one third of W&LE's traffic and revenue rendering W&LE insolvent by, at the latest, the year 2001. See, WLE-4, Verified Statements of Reginald Thompson at 93-97, 99, and 101 (Thompson VS); Michael Mokodean at 154-5 ("Mokodean VS"), Wilbert A. Pinkerton at 115, 118, and 120 ("Pinkerton VS"); and W&LE-7 Reply Verified Statements of Reginald Thompson at 24 ("Thompson RVS") and Wilbert A. Pinkerton at 36-40, 43-4 ("Pinkerton RVS"). W&LE would be forced to seek inclusion during the Board's post consummation oversight period, seriously compromising rail competition and jeopardizing essential rail service, creating for its shippers overwhelming service concerns

and rate uncertainty, and generating massive regulatory problems for both federal and state courts and agencies.

Although Applicants question the extent of the Transaction's impact on W&LE, they readily concede there will be some adverse impact in the form of revenue diversion. See, CSX/NS-19, Verified Statement of Howard A. Rosen, Table 5 at 176 ("Rosen VS"); Verified Statement of John H. Williams, Attachment JHW-4 at 88 ("Williams VS"). For three very specific reasons, a vast disparity -- in the range of $10 to $13 million -- exists between W&LE and Applicants regarding the size of those diversions. First, W&LE bases its revenue loss projections on a detailed analysis of 100% of its actual traffic for its 1996 Fiscal Year whereas Applicants use a 1% Waybill Sample for the 1995 Calendar Year. Second, W&LE's vastly larger diversion analysis reflects the simple truth that a carrier that can offer single line service has a distinct competitive advantage over a carrier that must interline with other carriers. Finally, W&LE's practice of forecasting future losses by applying historic annual growth rates based on its most recent performance and Five Year Plan is a more accepted approach than that employed by Applicants which assumes no growth for future years.[4] While W&LE's financial picture has shown steady improvement since its financial restructuring in 1994, Transaction-related losses clearly established by Thompson and Pinkerton will make the refinancing of a $13.1 million balloon debt payment due in

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[4] The approach suggested by the Applicants' own expert (Mr. Williams) for projecting W&LE losses is in stark contrast to the extremely aggressive growth projections contained in the Application.

FY2000 impossible and would accelerate the need to seek inclusion. Pinkerton VS at 117, 130; Mokodean VS at 153.

Absent Board relief, W&LE will be unable to provide competitive rail service soon after the transaction. For the many customers who have specifically chosen to locate on W&LE to insure nondiscriminatory competitive access to all three eastern class I railroads, W&LE's insolvency will jeopardize these customers' investments.[5] By its nature, a regional railroad like W&LE can offer its customers and communities it serves the critical competitive connections that are so necessary to successful industrial development. For that reason alone, W&LE's failure would be a serious economic loss for the State of Ohio as well as Pennsylvania and West Virginia. The essential rail service which W&LE provides to the hundreds of customers it serves exclusively will likewise be destroyed. W&LE would not retain essential service to these customers by "shedding" or truncating its network through selective abandonments as Applicants advocate.[6]

In view of the devastating impacts established by W&LE management and its diversion expert, W&LE seeks ameliorative conditions addressing requirements to recoup lost revenues. W&LE seeks these conditions in the form of opportunities to compete and to develop new revenue to replace that diverted by the Applicants. The conditions sought by W&LE here are not only eminently reasonable but operationally feasible and are much more in the

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[5] A list of new and expanded shipper operations located on W&LE since 1992 is attached as Exhibit A hereto. This list identifies shipper facilities served solely by W&LE.

[6] See, CSX/NS-21, Rebuttal Verified Statement of James W. McClellan at 344-346 ("McClellan RVS").

public interest than they might be detrimental to the Transaction. In many cases they represent settlement relief already offered by NS in writing and subsequently withdrawn during this proceeding. [The NS settlement offer to W&LE was previously submitted to the Board under seal.]

Throughout these proceedings, W&LE has watched with great interest the post-consummation outcome of the Union Pacific-Southern Pacific case[7] (not to mention the problems for shippers in the BNSF merger). UP-SP and BNSF shippers are now speaking up forcefully about the massive problems that have arisen. This proceeding presents the Board with a pre-Transaction opportunity to address critical eastern rail service issues in the W&LE operating area by listening to W&LE's vocal shippers and the various agencies of the States of Ohio and Pennsylvania and by granting W&LE's requested conditions so that it can remain an integrated regional rail carrier and competitor.

Finally, as a major policy matter, W&LE asks the Board to recognize the role that short line and regional railroads can play to relieve congestion. The W&LE could act not only as a competitor and provider of essential services but also as an "operational safety valve" to relieve congestion in the W&LE area of the eastern rail system (and potentially in the Pittsburgh-Chicago corridor if the Chicago rights are granted). A viable W&LE also would be willing and able to provide an efficient route bypassing Cleveland, offering Applicants an operating alternative and enabling the Board

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[7] FD. No. 32760, Union Pacific Corporation, et al -- Control And Merger -- Southern Pacific Rail Corporation, et al, __ S.T.B. ____ (served August 12, 1996, hereafter cited "Union Pacific-Southern Pacific" or "UP-SP").

to implement for Cleveland the type of relief granted to some communities in the Union Pacific-Southern Pacific oversight case.

IV. STATEMENT OF FACTS

Headquartered in Brewster, OH, W&LE[8] employs over 350 skilled and motivated employees and operates over more than 800 route miles and trackage rights. W&LE serves hundreds of communities in Ohio, western Pennsylvania, northern West Virginia, and western Maryland. Using a fleet of 46 locomotives and about 2,000 freight cars, W&LE handles approximately 120,000 car loads of traffic generating more than $40 million in revenue in FY1997.

Around 1991, the "new" W&LE first encountered financial difficulties when most of the high sulphur coal traffic anticipated in and vital to its initial business plan[9] vanished due in part to regulatory changes occasioned by the Clean Air Act of 1990. Continued financial problems led the company's investors and lenders to terminate the initial management and replace them with a new team headed by current Chairman and CEO Larry Parsons in 1992. Parsons VS at 25 and 29.

Over the last several years, W&LE's management has rebuilt the company; more than doubled its non-coal revenues;

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[8] For a history of the original W&LE, see Parsons VS at 22, 23, and 26-8.

[9] The original business plan depended upon due diligence work performed by NS witness John Williams. The plan depended greatly on the high revenues that the coal traffic would generate. Parsons VS at 25 and 29. Compare, Williams study with WLE-7, the Reply Verified Statement of Mort Lowenthal at 76-77 ("Lowenthal RVS") and the Reply Verified Statement of Richard Soucie at 78-79 ("Soucie RVS"). Curiously, NS never took the opportunity to depose W&LE economic and diversion witness Wilbert Pinkerton or Marketing Vice President Reginald Thompson about their analysis of these matters.

negotiated significant commercial concessions with W&LE's lenders and equity holders as well as NS; restructured and remained in compliance with its debt obligations; substantially improved its physical plant with internally generated funds as well as funding from Ohio and Pennsylvania; rehabilitated and refinanced locomotives; restructured its car fleet; acquired rail lines which served Akron, OH; expanded the Canton, OH, service area; and established service to Benwood, WV.[10] (The W&LE found creative ways to finance these acquisitions.) Parsons VS at 27-8, 30; WLE-7, Reply Verified Statement of Larry Parsons at 6-7 ("Parsons RVS"). W&LE also obtained access to Huron Dock on Lake Erie, commenced service to several other new markets, and has created many new business opportunities for itself and its shippers.

W&LE continues to gain operational, marketing, and financial strength, as evidenced by the fact that its operating ratio for the last two quarters has been in the low 80% range. Parsons RVS at 6. Superior service and attention to specific shipper needs is cited in the numerous supporting letters and verified statements representing a majority of W&LE's traffic base. W&LE has been successful in developing new traffic and slowly has turned the corner financially. But for the serious uncertainties posed by the proposed Transaction, W&LE should enjoy financial success in the future. Parsons RVS at 4-5; WLE-7, Reply Verified Statement of Edward Burkhardt at 74-5 ("Burkhardt RVS"); WLE-4, Verified Statement of Fred Zagar ("Zagar VS") and Verified Statement of Edward J. DeSalvio ("DeSalvio VS").

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[10] W&LE acquired the Canton and Benwood lines in 1992 and the Akron properties in 1994.

In 1994 as part of the financial restructuring, the new management bought the railroad and restructured its debt. By 1997, W&LE had found sufficient new traffic to replace the lost coal revenue, withstand a ten and one half month strike by its largest customer, Wheeling-Pittsburgh Steel, and turn W&LE into a profitable carrier. Parsons VS at 26-30; Parsons RVS at 6-7. W&LE would be heading for a stable, profitable future but for the market inversion the Transaction will cause.[11] The fact that W&LE could weather these problems, especially the strike of its major customer, does not mean that it can overcome the disabling effect of this Transaction. As discussed below, W&LE witnesses Parsons, Thompson, Mokodean, and Pinkerton have established that insolvency will occur due to this Transaction. Parsons VS at 30-1; Pinkerton RVS at 115; Mokodean VS at 154; Pinkerton RVS at 43; and Thompson RVS at 24. Because of this Transaction, management's numerous accomplishments are all at risk.

Any consideration of W&LE's requests for relief requires an understanding of W&LE's important role for Ohio's and Pennsylvania's economy. Many of W&LE's new shippers such as HVC, Inc., and Step 2 Company relied on W&LE's ability to afford them neutral, nondiscriminatory multiple class I railroad access in deciding to locate on line. See, Verified Statements submitted in WLE-4 by Timothy Maegly HVC, Inc. ("Maegly VS"); Thomas Murdough,

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[11] Under these circumstances, it is interesting that NS witness James McClellan would question the views of W&LE's outside board member, investors, and bankers by describing W&LE as "an already sinking enterprise." McClellan RVS at 346. It is ironic that he would press the argument of W&LE's financial vulnerability.

Jr., Step 2 Company ("Murdough VS"). Similarly, W&LE provides for other shippers (including NEOMODAL) and industrial sites located at the Stark County Industrial Park ("NEOCOM")[12] neutral, nondiscriminatory rail access to any of the eastern class I carriers and several class III railroads presently serving Ohio, Pennsylvania, West Virginia, and Maryland. If W&LE were forced to abandon or discontinue those routes, shipper access to multiple rail connections would be severed. Maegly VS; OAG-4, Verified Statement of George Stern VS at 2-3, 12-13 ("Stern VS").

For W&LE's customers such as Wheeling Pittsburgh Steel[13], Timken Steel, Republic Engineered Steels, and Ashland Petroleum (now Marathon), W&LE is the only rail carrier offering competition to the other serving class I railroad. In that respect, W&LE functions as a "rate policeman" by constraining rates. See, WLE-4, Verified Statement of James Johnson, Empire Wholesale Lumber Company at unnumbered page 3 ("Johnson VS"). If W&LE were to disappear, those industries would become "2-to-1" shippers, captive either to NS or CSX, with the likely result that rates would rise and service quality and/or frequency would fall.

In 1994, W&LE's parent company, The Wheeling Corporation, established as a sister railroad, the Akron Barberton Cluster

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[12] Stark County Industrial Park's access to multiple class I railroads and to NEOMODAL through W&LE has been important for selling this facility to industries considering it for a plantsite location. See, WLE-4, Verified Statement of Steven Pacquette at 2.

[13] The W&LE presently serves Wheeling Pittsburgh by moving its ore from boats docking at the Huron Dock on Lake Erie, a facility presently leased from NS on a short term basis to Wheeling Pittsburgh's plant at Mingo Jct, OH. Stern VS at 8-9, Thompson at 30, and Williams at 776.

Railway ("ABC") to serve shippers in the Akron area by acquiring the Akron & Barberton Belt switching carrier and additional trackage and customers when Conrail announced its intention to exit the Akron market. Wait VS at 72-73; Parsons VS at 27; Johnson VS at unnumbered page 2; and Verified Statement of Richard L. Erickson, Akron Regional Development Board. W&LE services to ABC have been vitally important to this area.

For many Akron area customers such as Georgia Pacific, Akron Storage, and GenCorp,[14] W&LE is the only serving railroad for its destination. Similarly, when CSX decided to withdraw from the Canton market, it sold its lines to W&LE. Former CSX customers such as McCann Plastics, Belden & Blake, and US Ceramics now depend upon W&LE for their rail service. Should W&LE be forced to terminate service, those firms would experience higher transportation costs or serious deterioration of service. U.S. Ceramics has already stated its fears about inclusion and return to a dependence on class I service. See, WLE-4, Verified Statement of Daniel Spadafora, United States Ceramic Tile Company ("Spadafora VS").

A substantial amount of W&LE's business moves in single line service from origin to destination on W&LE. For example, because of W&LE's cost structure, attention to service, and competitive rates, stone terminals located on W&LE have more than doubled since 1992. Without this rail service, customers would be forced to rely on truck transportation with adverse impacts on energy consumption, the environment, and highway safety and

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[14] Stern VS at 5; Johnson VS at unnumbered page 2; WLE-4, Verified Statement of Stanford Hagler, GenCorp ("Hagler VS").

maintenance. W&LE has been increasingly successful in developing aggregate traffic, which Ohio's class I railroads have not only ignored but demarketed. Were it not for W&LE, this traffic would move by truck or not at all. Stern VS at 3, 7-8, 15; Thompson VS at 99.

V. ARGUMENT

A. W&LE REVENUE LOSSES RESULTING FROM THE TRANSACTION WILL CAUSE W&LE TO BECOME INSOLVENT

The result of the analysis of revenue losses discussed in Section B, below, will be a substantial cash deficit for W&LE, beginning at $(1.6) million in FY1999 and reaching $(4.2) million at the end of FY2001. Pinkerton VS 115-116, 130-132, 146-151. Although these figures may not seem material in the context of the billions involved in the Applicants' Transaction, they are critical and almost certainly insurmountable for the W&LE.

While the W&LE has shown steady recovery since its financial restructuring under new management in 1994, it still faces very tight capital constraints. Most importantly, it must refinance a balloon debt payment of $13.1 million due in FY2000. Pinkerton VS at 117 and 130; Mokodean VS at 153. Based upon its performance since 1994 and continued achievement of the 1996 Five-Year Plan, it would be feasible for a refinancing on favorable terms, thus enabling W&LE to continue improving service to its customers. However, the losses resulting from the proposed Transaction will make it impossible to refinance the balloon since W&LE will be in a cash deficit position of $(3.1) million in FY2000 rather than the planned position of $1.6 million positive cash

balance. See, Pinkerton VS at 115, 117, 130-1; Mokodean VS at 153-4. Further, even if the balloon could be refinanced on normal terms, W&LE could not survive the resulting principal and interest obligations because it would face increasing cash deficits beyond FY2000 as described above. Moreover, Mr. Pinkerton's conclusions are conservative because they do not reflect the financial impact of a recession or other adverse changes in the overall economic climate. Parsons VS at 31; Thompson VS at 130; Pinkerton RVS at 43.

In sum, the revenue losses certain to occur if the Transaction is approved without W&LE's ameliorative conditions will render the W&LE financially nonviable in a very short time, with inclusion the only prospect.

B. W&LE'S REVENUE LOSS ANALYSIS IS BASED UPON THE MOST CURRENT ACTUAL DATA AVAILABLE, CONSERVATIVE ASSUMPTIONS AND PROJECTIONS REFLECTING RECENT W&LE PERFORMANCE

The vast disparity in revenue loss estimates ($9.3 to $15.0 million) by W&LE for the relevant years versus $1.5 to $2.0 million by Applicants[15] for 1995 base year) occurs for three fundamental reasons. When careful consideration of each of these reasons is given to the analysis as presented in W&LE's Responsive Application by witnesses Thompson and Pinkerton (W&LE Responsive Application, at 91-151) and further explained in W&LE's Reply Statement by Messrs. Thompson and Pinkerton again (W&LE-7, "Reply of Responsive Applicant Wheeling & Lake Erie Company", at 20-45), the analysis demonstrates the conservative nature of W&LE's revenue

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[15] See, Pinkerton VS at 122; Williams VS at 773-4, 788, and 791.

loss projections and the factual errors and bias in Applicants' approach and conclusions.

First, W&LE bases its revenue loss projections on a detailed analysis of 100 percent of its actual traffic for its Fiscal Year 1996 (July 1995 through June 1996) whereas Applicants derive their estimates from analysis based upon the STB 1% waybill sample for calendar year 1995. Since W&LE's revenue loss estimates were developed for specific customers, commodities, origins, destinations, service requirements and rate levels, they are inherently more accurate than Applicants' sample-based estimates. This is due in part to the limited coverage of the 1% waybill sample (especially for the types of moves handled by W&LE), and also due to the fact that Applicants used global decision rules regarding routing alternatives (single line versus joint line service) and commodity type (STCC Code) to determine potential for diversion between railroads. Pinkerton VS at 117-8, 120, and 128; Thompson RVS at 21-3. Further, even when the global decision rules had indicated diversion to Applicants' superior single line service, Applicants' expert (Williams) included only 50 percent as lost revenue for W&LE. Finally, Applicants' approach fails to recognize revenue already lost by W&LE as a consequence of the proposed transaction as discussed in detail by Thompson and Pinkerton. Williams RVS at 773-4, 788-9, and 791. (For further explanation of Mr. Williams' obvious analytical errors, see the Memorandum dated July 17, 1997, from R.M. Thompson to L.R. Parsons, accompanying Parsons VS, at 58-9.)

The second principle difference is due to very divergent views between W&LE experts and Applicants' experts regarding the effectiveness of NS and CSX single line service as a competitive alternative to W&LE joint line service with one or the other Applicant. One of the asserted justifications for the Applicants' proposed transaction is the substantial benefits of single line over joint line service and the ability to grow revenue due to increased single line service. Volume I of Application at 3; Thompson RVS 22-3. Because W&LE agrees with Applicants on this critical point, W&LE's revenue loss projections assume the superiority of single line service over joint line service (even with the high-quality, shipper-oriented services provided by W&LE in its joint line operations). Without reiterating evidence already in the record, much of the difference between W&LE's revenue loss projections and those of the Applicants reflect disagreement between the experts regarding W&LE's ability to retain traffic currently interlined with NS in competition with Conrail after NS is in a position to provide single line service in its own right over Conrail routes it will acquire. Compare, Williams RVS at 774-81 with Thompson VS at 93-7.

The diversion assumptions made by Williams -- that W&LE will retain traffic with joint line service (including NS) against more efficient NS single line competition not only runs contrary to logic (and contrary to Applicants' position regarding benefits of the Transaction) but also contrary to legal precedent as well. Lamoille Valley R. Co. v. I.C.C., 711 F.2d 295, 318-9 (D.C. Cir. 1983) ("Lamoille Valley") and Guilford Transportation--Control--

B&M, et al, 5 I.C.C.2d 202, 218-9 (1988) (ICC and D.C. Circuit recognized the power of a vertically-integrated, regulated monopolist to abuse its market power. Another competitive consideration that is related to losses resulting from the superiority of single line service is the negative effect from NS and CSX becoming dominant rail carriers for some of W&LE's most important customers. The Applicants would be capable of offering bid packages (i.e., tying arrangements) for rail services which will exclude W&LE from consideration for moves for which it would otherwise be an effective competitor. Specifically, W&LE anticipates that NS will gain substantial traffic at certain facilities (Wheeling Pittsburgh Steel's Allenport, PA, plant for example) by reason of its acquisition of Conrail. NS could use its dominant position at Allenport to tie rates at other locations such as Mingo Jct., Yorkville, and Martins Ferry (all of which W&LE serves) to broader "package" quotes for all of this customer's facilities. (W&LE access to Allenport would prevent this type of discrimination. Thompson VS at 98-9.)

Further, Williams chose to omit revenue losses that have already occurred in the period since the Transaction was formulated. Williams totally wrote off the $3.6 million annual revenue (W&LE estimates for FY1996) for the short-lived intermodal train (which was subject to a five year haulage agreement that was terminated on questionable grounds) that W&LE operated between Bellevue and Hagerstown in conjunction with NS (between the end points of Detroit and Norfolk). While NS alleges that it terminated that train due to W&LE service failures, there is

evidence in the record indicating that NS and CSX actions were partially responsible for reliability problems. Williams RVS at 774-5; Thompson RVS at 29-30. It is really strange and not entirely coincidental (which Williams fails to explain) that NS terminated the train at the time it reached an agreement with CSX to acquire and divide Conrail. Id. Although the W&LE-NS routing is substantially more direct than the all NS routing through Cincinnati, Knoxville, and Roanoke, the W&LE-NS routing is inferior to an NS-Conrail routing via Cleveland-Pittsburgh-Hagerstown. Thus, if Applicants' proposed transaction is approved, this represents a significant permanent revenue loss to W&LE.

The third major reason for the large discrepancy in revenue loss projections is Williams' approach to forecasting losses in future years when they actually will occur for the W&LE. As noted above, Williams' estimates of $1.5-2.0 million are based upon a one percent sample of Calendar Year 1995 data without any provisions for growth in future years. W&LE experts began their analysis with complete FY1996 data. However, the actual impact of the proposed transaction will begin to affect W&LE in its FY1999 (July 1, 1998 to June 30, 1999), other than interim effects such as the loss of intermodal train revenue discussed above. Thus, projections for future years were required. Compare, Williams RVS at 781-4 with Pinkerton VS at 120-30, Pinkerton RVS at 36-41.

Although Williams chose to base his loss estimates on static sample figures for Calendar Year 1995, W&LE experts correctly developed estimates for future years when the negative effects would be occurring. Pinkerton developed his estimates for

FY1999, 2000 and 2001 by applying the growth rates contained in W&LE's most recent Five-Year Plan (prepared in October 1996) to the losses by commodity type in Thompson's analysis of 1996 traffic. Id. Contrary to Williams' allegations that this methodology is flawed, and its results are inflated, the use of historic annual growth rates is well accepted in forecasting and Pinkerton's supporting assumptions regarding timing of the losses are conservative. Pinkerton RVS at 35, 40, 43-4. As shown in Pinkerton's Reply Statement, W&LE's actual revenue growth from FY1992 to FY1997 was 6.8 percent (in spite of substantial losses in coal) while the projected growth for the period FY1998 to FY2001 is only 3.9 percent. Pinkerton RVS at 41. These figures are in stark contrast to Applicants' projections for their own revenue growth on traffic acquired in the Transaction of 158-182 percent per year for the first three years (the resulting revenues are an important component of Applicants' Justification for the Transaction). See, Volume I, "CSX-NS-18" at 123-7. Further, W&LE's projected losses are conservative since Mr. Pinkerton assumed that the losses would be only 50 percent of the full projected levels in FY1999. This Pinkerton calculation produces losses in FY1999 (one year after anticipated merger implementation) of $9.3 million, reaching $15.0 million in FY2001 when the full impact of the diversion to Applicants will be unavoidable. Pinkerton VS at 118-22.

In conclusion, W&LE's diversion evidence and resulting revenue loss projections were founded on the most current data available and generally accepted forecasting methodology, and are consistent with W&LE's performance in recent years. By contrast,

Mr. Williams' diversion figures and loss estimates use erroneous assumptions, make no provision for growth in future years and are inconsistent with Applicants' own optimistic revenue growth predictions based upon the competitive advantage of new single line service. Pinkerton RVS 43-4. If the Transaction is approved as proposed by the Applicants, W&LE revenue losses which are based upon a conservative loss analysis will almost certainly exceed the projections presented by Pinkerton and will mean financial failure and inclusion no later than W&LE's FY2001.

C. AN UNCONDITIONED APPROVAL OF THE TRANSACTION WILL CAUSE W&LE INSOLVENCY, SIGNIFICANTLY REDUCE COMPETITION, AND CREATE NUMEROUS NEW "2-TO-1" POINTS ALONG THE W&LE SYSTEM

In the most recent instances where the Board has reviewed the consolidation of class I rail carriers, it has generally acted to prescribe protective relief in those instances where a party has demonstrated either that the transaction in question would: (1) eliminate for a shipper or a community the loss of a competitive rail option, or (2) threaten "essential services." FD No. 32549, Burlington Northern Inc., et al. -- Control And Merger -- Santa Fe Pacific Corporation, et al, __ I.C.C.2d __ (served September 21, 1995, hereafter ("BNSF"), slip op. at 54-6. More significantly, the ICC and now the Board have established as a national policy the goal of protecting rail competition where it exists before a transaction is consummated. Of particular concern to the Board is the preservation of competition at potential "2-to-1" points. UP-SP at 12, 16-7, 101, 103-4. Both the Board and prior rail merger applicants have assiduously addressed whether a shipper or a short line carrier would become a "2-to-1" point, and merging rail

carriers have typically attempted to ensure that otherwise adversely affected "2 to 1" shippers have access to competing line-haul carriers.

In the event that W&LE does not receive the relief it seeks, virtually every customer it serves on this railroad will face the almost certain prospect that it will become a "2-to-1" shipper. This is so because when W&LE is forced to seek inclusion, those W&LE lines that either are (1) "absorbed" by NS and/or CSX under what might be a lengthy and adverse inclusion proceeding, or (2) ultimately spun off (if not abandoned first) by the Applicants, are likely to connect only to a single class I carrier. Thus, the demise of the W&LE or its inclusion into the NS or CSX systems will have tremendous and irreversible anti-competitive consequences for nearly all W&LE shippers.

W&LE provides a unique function as a regional railroad. While it is able to, and does, serve as an "origin-to-destination" carrier in many instances, its cost structure also permits it to serve effectively as a neutral conduit for interchange with three class I carriers -- NS, CSX and Conrail through a variety of interchange gateways. Indeed, as so much of the testimony provided by its shippers makes clear, the W&LE's truly neutral access to various class I connections affords W&LE's customers the competitive benefits they would lose if they became "captive" to either NS or CSX. See, e.g., Maegly VS; WLE-4, Verified Statement of R. Dean Jolley, Jr., Ohio Packaging Corporation ("Jolly VS"); letter dated October 15, 1997 from Pat E. Burdette, Ashland

Petroleum Corporation (now Marathon), to Vernon A. Williams.[16] This demonstrates the big difference between being "captive" on a class I railroad as opposed to being "captive" on a class II carrier with multiple class I carrier options. See, e.g., Wall Street Journal, Feb. 6, 1998, attached as Exhibit B.

For the hundreds of shippers whose facilities are served by only W&LE, the economic realities of the Transaction are quite simple. A W&LE that obtains protective relief enabling it to survive (and prosper) post-Transaction will extend to its customers the ability to connect to both NS and CSX, much like a shipper located on a traditional short line railroad that is served equally by competing class I connections. Under an inclusion scenario, W&LE shippers would become captive to a single class I carrier (or a short line railroad without the benefit of multiple class I connections). Thus, the hundreds of W&LE customers served directly and exclusively by W&LE today are potentially textbook examples of "2-to-1" shippers.

In other cases, W&LE serves customers in direct competition with a class I carriers. Such shippers include Timken Steel, Republic Engineered Steels and Ashland Petroleum (now

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[16] In fact, many shippers have deliberately chosen to locate on the W&LE because this railroad provides an impressive array of routing options in connection with all three of the existing eastern class I (or "line-haul") carriers. Such shippers recognize that locating on W&LE affords them the opportunity to have Conrail, CSX and NS compete for their long-haul business. Additionally, such shippers realize that they can effectively avail themselves of every rail-served point in the eastern U.S. by virtue of their class I access options via W&LE. See, Jolley VS and Maegly VS.

Marathon).[17] If W&LE were lost, so also would be lost the direct rail competition enjoyed by these shippers. Under such circumstances, and as W&LE's supporting shippers have stressed time and again, the W&LE serves a significant competitive purpose -- it is a "rate policeman" that keeps other rail carrier rates in check. See, Johnson VS at unnumbered page 2; and WLE-4, Verified Statement of Gary Hauenstein, Countrymark Co-Op. W&LE takes great pride in knowing that the quality of service and reasonable rates it offers can and do allow shippers to stay in business, to stay in markets that would otherwise be lost, and to expand in markets that might otherwise prove unprofitable.

If the Board is persuaded that W&LE's future is endangered as a result of the Transaction, then it must also recognize the immediate need to protect the vast array of W&LE shippers that face the loss of all competitive service. The "2-to-1" issue presented here is simple and straightforward, and it presents perhaps the most critical threat to intramodal competition raised anywhere in this Transaction. If the Board will take the appropriate steps to ensure W&LE's continued viability, then it need not venture into the minefield of lost competition or essential services (a subject presented immediately below), and it need not force W&LE's shippers to face disturbing transportation uncertainties as W&LE unravels.

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[17] W&LE serves only four companies that would not face the prospect of becoming "2-to-1" shippers -- USX, LTV Steel, Aristech and Koppers. Even of these, however, both USX and Aristech have expressed concerns about the potential loss of W&LE services.

Finally beside the significant competitive harm in the current W&LE-served region, W&LE points out the continued relevancy of the DOJ Antitrust Division analysis completed in the mid 1980s because of the concerns about competitive harms when NS attempted to acquire Conrail more than a decade ago. NS has clearly been focused, if not obsessed, with Conrail for years and a W&LE insolvency and inclusion make the entire Pittsburgh to Chicago corridor a regional competitive problem once again. McClellan RVS at 334.

D. AN UNCONDITIONED CONRAIL ACQUISITION THREATENS THE ESSENTIAL RAIL SERVICE PROVIDED BY W&LE TO ITS CUSTOMERS

As W&LE has made abundantly clear throughout, if the Application is granted without appropriate protective conditions, W&LE will be faced with economic collapse and will be forced to seek to be included in the Transaction. When W&LE must ultimately seek inclusion to avoid financial collapse, it has not established, and cannot now present, a "blueprint" as to just how its lines are likely to be treated by the Applicants. However, by the Applicants' own testimony, inclusion would result in the elimination of some essential services -- the precise scope of such elimination depending upon the decisions of people like NS' James McClellan.[18]

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[18] W&LE cannot now predict with certainty which of its current customers will lose essential services as a consequence of the Transaction. However, the Applicants' testimony makes it clear that severe changes in marketing and service would occur in the event that they were to accede to W&LE's lines. McClellan RVS 344-6.

Board and ICC precedent provides for a comprehensive analysis in assessing whether or not a railroad consolidation threatens essential services. To prevail, a carrier seeking protective conditions to preserve essential services is expected to demonstrate that the loss or reduction of rail service resulting from a railroad consolidation will -- (1) visit significant economic losses upon shippers due to increased transportation costs; (2) saddle local economies with added hardship and unemployment; (3) threaten special harm to particular industries more reliant on rail service; or (4) prove otherwise contrary to shipper and public interest. See, Lamoille Valley, supra, 711 F.2d at 309-313.[19]

Since Lamoille Valley, the Board has further clarified the circumstances under which it will act to protect essential services. Specifically, in UP-SP the Board was clearly motivated to protect the interests of the Texas Mexican Railway ("Tex-Mex") and its shippers, because that railroad had demonstrated it would incur losses so steep that they threatened its very existence. UP-SP at 148. In that case, the Board viewed the consequences of the UP and SP consolidation holistically, and recognized that the loss of the Tex-Mex would be devastating to shippers based on that railroad. The Board properly employed a public interest analysis confirming that threats to many shippers (30 shippers in the case

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[19] Under the analysis prescribed by Lamoille Valley, the Board is directed always to determine first whether the transaction in question would result in "inadequate" transportation alternatives, and then to assess whether the protective conditions requested are in the public interest. Id. at 313.

of Tex-Mex) is a sufficient basis for imposing protective relief. Moreover, in the case of Tex-Mex, the Board deemed it unnecessary to engage in an extensive analysis of the degree of harm each Tex-Mex shipper would suffer, but acted instead on the basis that the transaction held the potential to "endanger" what the Board accepted as Tex-Mex's essential services. See, Id. 149-50.

W&LE currently furnishes essential services to its shippers -- indeed, through their rebuttal testimony, the Applicants admit that W&LE does play such a role for at least some of the shippers it serves. In connection with this topic, the Applicants allege (without a shred of supporting evidence) that W&LE's essential services would be preserved no matter the outcome of the Transaction. According to NS witness McClellan:

> Because W&LE serves very few facilities on an exclusive basis, the W&LE is not generally an essential facility. If the W&LE fails, it is my judgment that virtually all of the essential services would be protected by other carriers. McClellan RVS 345-6 (emphasis added).[20]

In so stating, Mr. McClellan actually admits that W&LE does provide essential services. He only says that these essential services will be "protected by other carriers." For those "few facilities"

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[20] Ordinarily, self-serving "assurances" given by a party to a rail consolidation proceeding warrant limited credence. See, Lamoille Valley at page 318 (quoting Norfolk & Western - Control - Detroit, Toledo & Ironton, 360 I.C.C. at 512). However, it is interesting and ironic that Mr. McClellan, instead of offering assurances that NS would ameliorate service concerns, has offered his draconian view of proper market and service realities for W&LE shippers. (McClellan RVS at 344-6.) (Consider also Mr. McClellan's other observations on this subject presented later in this section.)

that W&LE serves on an exclusive basis,[21] the Applicants implicitly acknowledge that W&LE's services are essential. Finally, one cannot tell to what extent the Applicants would preserve essential services in the event that W&LE should cease to exist, since Mr. McClellan suggests only that "virtually" every current W&LE customer will have its essential services protected. By Mr. McClellan's own conjecture, he allows that some undefined number of shippers will suffer the loss of essential services.

One very clear example of an essential service that W&LE provides its customers is the rail transport of stone and aggregate. W&LE serves numerous on-line stone quarries located in northwestern and north central Ohio. Of particular note are two stone shippers participating independently in this proceeding -- National Lime and Stone Company ("National") and Wyandot Dolomite, Inc. ("Wyandot"). National and Wyandot have both asserted to the Board that cost-effective rail transportation is imperative to their respective economic well-being. See, e.g., NLS-2, Verified Statement of Ronald W. Kruse, at 2-3 and Wyandot-3, Verified Statement of Timothy A. Wolfe, at 2-3 (hereafter "Wolfe VS"). Both have demonstrated that rail transport is essential (and that truck transport is not practicable) for large volume shipments transported over distances exceeding about 70 miles. Finally, both shippers (and particularly Wyandot) have confirmed that W&LE uniquely serves distribution facilities in eastern Ohio where National and Wyandot aggregate is most marketable. Id.

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[21] In reality, the "few" facilities that W&LE serves exclusively total well over 100 customers.

National and Wyandot (and, by analogy, all other aggregate shippers served by W&LE) fully depend upon the unique, single-carrier services provided by W&LE. (Already, the majority of Wyandot's rail needs are provided by W&LE. See, Wolfe VS at 3.) Without a full replication of the low cost, single-carrier routings National and Wyandot and other aggregate shippers enjoy today via W&LE, they may very easily be forced out of business.

Although it is improbable that aggregate shippers like National and Wyandot might in some instances divert enough traffic to trucks to "get by" as truncated operations, even so such shipper adjustments could not be more contrary to the public interest.[22] As a direct harm to the public interest, many more heavy trucks would be added to Ohio's roads to replace lost rail service. These trucks would only serve to increase the delivered cost of stone, would eliminate jobs at the stone quarries, further congest Ohio's highways, spew larger volumes of pollution into Ohio's air, and, most ironically, destroy the very roads this cargo is oftentimes used to repair. In this case, the Board is challenged to consider more than the interests of W&LE and its aggregate shippers. It must also be prepared to address the very important concerns of the many Ohio communities that will pay an indirect price for the loss of W&LE's essential services.

Another example of W&LE's essential services involve the NEOMODAL terminal in northeastern Ohio. Indeed, there cannot be a

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[22] "... if a shipper cannot earn a fair return, or can do so only by sharply curtailing operations, the Commission probably ought to inquire further into the desirability of protective conditions." Lamoille Valley at 312.

clearer case of a railroad customer's existence being so closely linked to the survival of the rail carrier that serves it exclusively. Without the connecting services that the W&LE provides today, NEOMODAL (an intermodal facility whose existence, by definition, depends upon the very availability of direct railroad access) would be forced out of business. The Transaction's threat to NEOMODAL's existence meets fully the standard embraced by the Board -- and previously upheld by the United States Court of Appeals, District of Columbia Circuit -- in Lamoille Valley. Closure of NEOMODAL would result in job losses and potentially also the closure or relocation of related industries located near the intermodal facility, all of which defeats the very economic objectives NEOMODAL was designed to accomplish. The impact of the loss of rail service to NEOMODAL would have an extensive and destructive impact upon the local economy -- exactly the type of consequence that the D.C. Circuit had earlier admonished the ICC to avoid.[23] Ultimately, NEOMODAL's failure would be contrary to the very public interest objectives which brought federal ISTEA funds to take trucks off the roads and freight onto rail. The Board should consider the public interest and public policy when assessing W&LE's essential services.[24]

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[23] "... [A]lternate service may be inadequate if a major shipper whose facility is important to the local economy cannot switch [to trucks], even if most shippers can use the alternate service. Again, we urge the Commission, in cases of doubt, to proceed beyond the threshold 'essential services' stage of its inquiry." Lamoille Valley at 312.

[24] The Board must consider W&LE's protective conditions, designed to preserve essential services to determine first if a shipper's need of a rail carrier is "essential," and

The Applicants would have the Board accept that NEOMODAL is itself not an "essential" service, and that trailers and containers delivered to this facility could (and, in their view, should) be drayed instead to points such as Cleveland and Chicago. See, CSX/NS-19, Rebuttal Statement of Peter Rutski, 397-400. The Board should consider in this case the stance of the City of Cleveland and its environs to assess whether or not NEOMODAL's future existence is necessary and truly in the public's best interest. Cleveland continues strenuously to object to the concentration of rail activity that the Transaction will visit upon the city. Bringing more intermodal traffic into Cleveland will only add to traffic congestion, stress on highway infrastructure, air quality degradation, and other environmental harms that Cleveland (and the State of Ohio in general) is trying earnestly to avoid.[25] Whether or not the Applicants believe NEOMODAL is essential, the City of Cleveland and the communities nearest to NEOMODAL will tell the Board otherwise.

Whatever shape a W&LE inclusion would take -- **and W&LE again seeks to make clear that it is seeking relief to protect**

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then must ask "whether the protective conditions sought... are in the public interest." Id. at 313.

[25] In this regard, the Board should weigh the "Comments in Opposition and Request for Conditions of the City of Cleveland, Ohio" (hereinafter, "CLEV-4") at page 15, where Cleveland implores the Board to consider alternatives to increased rail and intermodal activity in the municipal area. In CLEV-4, Christopher P. Warren warns that expanded intermodal activity within Cleveland will put serious strain on the city's infrastructure. See, Verified Statement of Christopher P. Warren at pp. 3-4 (CLEV-4). NEOMODAL is just the right relief valve for Cleveland's concerns.

against the necessity of seeking inclusion -- it is clear that the Applicants advocate a series of "austerity measures" that would result in the elimination of some unidentified lines and presumably also the elimination of service to various shippers. Specifically, the Applicants cavalierly assert that W&LE should forsake its "lesser" shippers (for which W&LE service is no less essential) in favor of the larger volume customers that form the backbone of W&LE's business:

> [f]rom my own experience in railroad restructuring, the right answer for the W&LE is to downsize its system, protecting, and promoting those markets where it has a significant presence ...while shedding the relatively hopeless parts of its system. McClellan RVS at 345.

Assuming one accepts the Applicants' own admission that at least some shippers depend upon W&LE service as essential service, then one must read Mr. McClellan's further observation that W&LE should withdraw from "hopeless" routes[26] as a clear message -- either W&LE will be forced to terminate service to some (hopeless?) shippers in an effort to stay afloat post-Transaction,

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[26] As far as "hopeless" routes go, W&LE is aware that NS has contemplated routing traffic over W&LE's Orrville-Bellevue line as a Cleveland by-pass. Such a routing would address two Transaction-related impacts -- one private [W&LE's financial condition] and one public [Cleveland congestion]. As to the first, NS' use of W&LE's trackage would be beneficial financially to W&LE in terms of trackage rights fees. But there is also a very compelling public interest justification. By using this line, NS can significantly reduce Cleveland rail congestion by means of a line that traverses south of the City. Moreover, this line can serve as an operational "safety valve" in the event of a class I derailment or other service disruption. Despite their criticisms in the record here, NS officials have seriously studied using this line. Wait RVS 49; Friedman RVS at 139. Inclusion could very easily result in the elimination of this potentially critical by-pass route and would therefore only further frustrate the public interest.

or the Applicants will do it themselves following inclusion.[27] While certain larger shippers may be more secure under the Applicants' analysis, virtually every shipper served exclusively by W&LE faces the prospect of being located on the "hopeless" line segment to be discarded -- and it is exactly that as yet unknown shipper(s) who will face the loss of essential service.

E. THE BOARD'S POWER TO APPROVE INCLUDES THE POWER TO CONDITION TO PREVENT COMPETITIVE HARMS

49 U.S.C. § 11323 requires the Board to approve any transaction involving the acquisition of control by two carriers of another carrier whether through stock control, management, or the acquisition and operation of carrier facilities. The applicable statutory standard requires the STB to consider certain factors in determining whether to approve any transaction involving the acquisition of control between two or more class I carriers, and W&LE requests the Board to focus on the following two:

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[27] This is not the first time that a class I carrier has attempted to instruct a smaller company as to how it should run its railroad. Union Pacific had attempted in an earlier railroad consolidation to recommend cost-cutting to a smaller railroad seeking protective relief -- CC&P. The ICC quickly dismissed UP's self-serving and patronizing "advice" and remarked:

> We realize that the economics of a small carrier like CC&P are not entirely the same as those of a large carrier like UP, and we therefore give little credence to UP's cost-cutting advice to CC&P.
>
> Union Pacific Corporation, et al. -- Control -- Chicago and North Western Transportation Company, 1995 WL 141757 (I.C.C.) *84 (served March 7, 1995) (hereafter, "UP-CNW").

NS's unsolicited "suggestions" in response to W&LE are just as self-serving as UP's were in "UP-CNW"-- although they may actually be more enlightening.

* the effect of the proposed transaction on the adequacy of transportation to the public; and

* whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region. See, 49 U.S.C. § 11324(b).

In reviewing a transaction submitted for its consideration, the STB, like the ICC before it, can approve or deny it or can approve it with conditions that ameliorate or address specific concerns. In deciding whether to impose conditions, the Board examines the alleged anticompetitive consequences of the transaction as well as harm to the public interest. As the ICC stated:

> The basic consideration for determining whether a need for a public interest condition exists is whether the transaction will have anticompetitive consequences (or threaten other possible harm to the public interest). If a transaction does not pose any problems of possible harm to the public interest, then no public interest conditions should be imposed. If a transaction threatens harm to the public interest, then public interest conditions should be imposed if they are operationally feasible, ameliorate or eliminate the harm threatened by the transaction, and they are of greater benefit to the public than they are detrimental to the transaction. Union Pacific -- Control -- Missouri Pacific; Western Pacific, 366 I.C.C. 462, 563-564 (Sept. 24, 1982) (hereafter, "UP/MP/WP").

More recently, the STB stated:

> We will adhere to the criteria for imposing conditions set out in UP/MP/WP ... Conditions will not be imposed unless the merger produces effects harmful to the public interest (such as a significant loss of competition) that a condition will ameliorate or eliminate. Union Pacific-Southern Pacific at 144.

F. THE ICCTA AND THE PUBLIC INTEREST REQUIRE THE BOARD TO PRESERVE AND PROTECT REGIONAL RAILROADS AS A SOLUTION TO MERGER RELATED CONGESTION

Recent railroad mergers and consolidations have created a new role for regional and short line railroads, as an operational "safety valve" to the congestion and operating problems that are now besetting their class I railroad counterparts. The new wave of class I railroad "mega mergers" have created new operating problems never before experienced in the American railroad industry. Railroad consolidations combined with changes in traffic flows, an apparent reversal in the historic declines in railroad traffic, and an overly aggressive abandonment policy have created congestion problems of monumental proportions. In fact, W&LE's Chairman Larry Parsons, a veteran of the western railroad industry, believes that the UP-SP congestion problems pale by comparison to what could happen in the East. Parsons VS at 37. Unlike in the UP-SP case where the Board did not anticipate and possibly had no reason to anticipate the problems that did arise, the Board is in a position to take strong action here to prevent the sort of traffic "meltdowns" that have occurred out West.

W&LE urges the Board to recognize as a matter of policy that short line and regional railroads have a major role to play to relieve potential congestion. For example, W&LE has moved CSX traffic between Benwood and Willard, OH, to improve transit times for CSX shippers. At one time this service for a foreign carrier constituted as much as 5% of W&LE's traffic base. Stern VS 3-4. NS has also used W&LE as a haulage carrier. W&LE has the physical plant and the wherewithal to be a significant player in resolving

congestion. Its route structure also allows carriers such as NS to bypass congested facilities in both Cleveland and Pittsburgh. Parsons VS at 36; Wait VS at 76, 78. While NS witness Friedman suggests that W&LE's lines are not up to NS' standards for through traffic, NS' periodic proposals[28] to use W&LE's mainline as an NS "spill over" route undercuts his testimony. NS' investment of capital to upgrade this route would be relatively inexpensive when compared to the massive capital needed to upgrade Conrail lines.

G. W&LE'S CONDITIONS ARE REASONABLE, PRACTICABLE REMEDIES AMELIORATING THE TRANSACTION'S ADVERSE IMPACTS ON W&LE

W&LE has requested five general categories of relief as follows:[29]

(1) Haulage rights, with underlying trackage rights protecting Chicago traffic flows;

(2) Haulage rights, with underlying trackage rights protecting existing traffic flows and offered in settlement;

(3) Haulage rights, with underlying trackage rights, protecting existing traffic flows but not offered in settlement;

(4) Market access addressing specific issues; and

(5) Contractual issues.

In determining whether to grant relief sought by a party as a condition of a rail merger or consolidation, the Board considers whether (1) the condition addresses the effects of the

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[28] In its most recent and now withdrawn settlement proposal, NS had proposed trackage rights over W&LE's mainline as an NS secondary route.

[29] Specific conditions are set forth at pages 33-4 of Parsons' VS.

Transaction; (2) the condition is narrowly tailored to remedy those effects; (3) the Transaction produces effects harmful to the public interest which the condition will ameliorate or eliminate; and (4) the condition is operationally feasible and produces net public benefits. UP-SP at 144-5. As the Ohio Attorney General, Ohio Rail Development Commission, and the Public Utilities Commission of Ohio have all shown[30], the Transaction will have dire consequences in the form of -- (1) competitive harm to W&LE's shippers and communities and (2) loss of essential rail service.[31] W&LE's conditions are carefully tailored to ameliorate specific harm, both by preserving competition and essential rail service and by making W&LE financially whole for the life threatening revenue losses that it would otherwise experience. Moreover, as W&LE's President and Chief Operating Officer, Steven Wait, has carefully shown, each of these conditions is operationally feasible and reasonable and produces public benefits that outweigh any adverse effects to the Transaction. Wait VS at 73-89; Wait RVS 50-60.

Applicants have rejected out of hand every condition proposed by W&LE. Applicants would have the Board believe that should W&LE obtain the requested rights, it would lack the operational and financial ability to provide service over these lines. For example, Applicants suggest that should W&LE gain Chicago access by trackage rights, it would be financially

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[30] OAC-4, at 10-1, 47-8.

[31] Consider also the statements of the Transportation Committee of the Pennsylvania Senate, filed with the Board on October 15, 1997, at pages 25-26.

overextended, it would lack the ability to supervise train crews, that safe operations would be compromised, and that its crews lack familiarity with the trackage to be traversed. CSX/NS-177 Rebuttal Verified Statement of John Friedmann at 1[illegible]-31 ("Friedmann RVS"); CSX/NS-177 Rebuttal Verified Statement of John Orrison at 530-33 ("Orrison RVS"). The facts are otherwise.

W&LE's lenders have spoken forcefully about the need to grant the requested relief. They express no concern that an extension of W&LE's operations would lead the carrier to become overextended, financially or otherwise. Zagar VS at 2; DeSalvio VS at 2. W&LE has no plans to initiate a major new service unless it sees a potential financial justification and would initially use haulage rights while developing this market. Also, as Mr. Wait has explained, the Applicants' concerns about W&LE's operating competence and traffic congestion lack foundation. Wait RVS at 47-59. Regarding specific conditions, W&LE states as follows:

Chicago access. W&LE has requested haulage rights with underlying overhead trackage rights to Chicago to preserve existing traffic flows for NEOMODAL and various other shippers including GenCorp.; HVC, Inc.; Step 2 Company; Owens Corning Fiberglass; Aristech; and Republic Engineered Steels. (This is also a condition wholly supported by the Ohio Steel Commission.).[32] Numerous commenters including W&LE have predicted that an unconditioned approval of the Transaction will result in serious congestion and operating problems that surpass those experienced

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[32] As their reply verified statements, submitted separately, demonstrate.

out West. Parsons VS at 37. By granting W&LE overhead Chicago rights, it will be able to bypass CSX's congested Willard Yard and NS' Bellevue Yard and operate to Chicago, thereby reducing train delays[33] for both W&LE and CSX. Moreover, the Chicago rights will give W&LE a valuable opportunity to bid for new traffic, in some cases traffic that moves by highway today instead of rail. As W&LE has shown through the testimony of witnesses Thompson, Mokodean, and Pinkerton, it badly needs those revenues to offset income lost due to traffic diversions. Thompson VS 93-7, 9; Mokodean VS at 154; Pinkerton VS at 112-120, 122, and 130. Finally, witness Wait has explained at great length the operational feasibility and reasonableness of W&LE's proposal. Wait RVS at 50-1. On balance, any impact on CSX's operations should be minimal compared to the tremendous shipper and public benefits that will result. Aside from the usual shipper benefits such as improved transit times and access to more markets, the Chicago rights offer one unusual public benefit. Various witness have testified as to the need for good rail service to the Neomodal facility including Chicago rail access. If Neomodal losses that service, it stands to go out of business. Neomodal's loss not only means the loss of a company and jobs. It means the loss of an innovative "public private partnership and federal and state funds. See, SDB-4, Response of the Stark Development Board; WLE, Verified Statement of Douglas Sibila, Peoples Services, Inc., and Parsons VS at 36.

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[33] According to W&LE witness Wait, shipment delays have run as many as 8 to 10 days. Wait VS at 73. Neomodal has suffered delays moving its traffic through Willard Yard. Wait VS at 68.

Market access formerly offered in settlement. The second category of relief W&LE proposes are a series of haulage/trackage and access rights which Applicants have offered W&LE in settlement in the past (and have now withdrawn). The fact that Applicants have previously offered these rights to W&LE in settlement discussions suggests that the alleged operating problems are either grossly overstated or nonexistent. Once again, the conditions sought address several overriding effects of the Transaction upon both W&LE and its shippers. These rights address these impacts by preserving existing traffic movements, some of which W&LE has worked hard to develop. Stern VS at 8-9; Thompson VS at 99. A grant of these rights will have virtually no adverse impact on Applicants as witness Wait has carefully explained. Wait VS at 75, 78-80; Wait RVS at 52.

These rights offer major public and private benefits. Aside from obvious benefits to W&LE, several unique public interest benefits would also occur. Significantly, Ohio stone producers will be able to continue using rail to move their traffic for short distances. As witness Stern has testified, stone shippers can move their product more cheaply by rail than by truck thereby reducing the cost of highway and building construction. Routing this product by rail will avoid the unnecessary highway wear and congestion, energy consumption, and environmental pollution that truck transportation will cause. Stern 3, 4, and 6-7. Finally, other shippers will retain competitive options in terms of sources of supply and markets for their products.

New market access opposed by Applicants. A third category of rights involves situations where W&LE will bring competitive rail service to shippers.[34] As are all of W&LE's conditions, its requests here are narrowly focused and produce public benefits. The Brooklyn Jct. rights will permit W&LE to serve two captive shippers at Natrium, WV, such as PPG and Bayer. The revenues that W&LE will be able to bid for will help offset the serious revenue losses elsewhere. Thompson RVS at 75. The Niles and Allenport rights will enable W&LE to better serve two customers that W&LE has worked hard to develop and will enable W&LE to continue competitive service for Wheeling Pittsburgh Steel. Stern VS at 8-9; Thompson VS at 98-9; Thompson RVS at 30. None of these rights would present significant operating problems as Mr. Wait has explained, and the public benefits are obvious and outweigh any possible negative impacts. Wait VS at 74-5, 78-80, 83-4; Wait RVS at 51-3.

Once again, these requests address specific adverse impacts in the form of serious revenue loss and the loss of competition for adversely affected shippers [Reserve Iron, a potential "2-to-1" customer and Weirton Steel, a major steel company]. Thompson RVS at 99-100. The rights are operationally feasible and desirable. The public benefits in terms of competition outweigh any adverse Transaction impacts. Finally, the sale of the Randall Secondary to W&LE will not only assist it with

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[34] Among these requests are the following: (1) haulage/local trackage rights over CSX from Benwood, to Brooklyn Jct., WV., (2) trackage rights over CSX to Niles, OH, and (3) market access to Wheeling Pittsburgh's mill at Allenport, PA.

new revenues but provide shippers with the more responsive types of service and marketing W&LE is able to offer. It would also preserve a potential Cleveland commuter corridor which W&LE would be willing to offer to the public.

Contractual issues. W&LE's requested conditions include certain issues involving enforcement of performance standards under haulage/trackage rights contracts and a revision of W&LE's obligations under joint facility agreements. Regarding the former, W&LE wants the Board to put "teeth" in agreements granting its haulage/trackage rights and market access requests. Specifically, W&LE wants reasonable provisions that do not unduly discriminate against W&LE on haulage and trackage rights. W&LE's request address certain adverse Transaction impacts (delays and financial impacts) that are only likely to get worse as rail lines become more congested. By putting enforcement provisions in operating agreements, W&LE stands a better chance of moving its trains with reasonable reliability over Applicants' railroads and satisfying shipper needs. Wait VS at 85-89.

Reforming joint facility contracts to ensure that those who get the major contract benefits pay a proportionately higher price for that joint facility is not only fair, but it helps reduce W&LE's overhead. Again, the adverse effect on the Transaction are minimal while the benefit is great. Interestingly, CSX acknowledges the reasonableness of W&LE's request.[35] Logic and

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[35] According to CSX operating witness Orrison, "[g]iven the heavier traffic on the CSX side, we consider it fair to assume the track maintenance. The facility currently is maintained by WLE on a proportional use basis. CSX would readily

fairness require the Board to change the agreement so that W&LE merely pays Applicants for its proportional use of a joint facility and no more.

VI. CONCLUSION

As it has established with clear and convincing evidence in its earlier Responsive Application (WLE-4), the Transaction harms W&LE with certain and irreversible revenue losses which will result in the railroad's demise before 2001. But the W&LE's economic collapse (should the Board permit that to happen) will not take place in a vacuum. Instead, caught in the vortex of W&LE's financial downward spiral, virtually each and every one of W&LE's customers and communities will either face the loss of essential services or will -- at best -- lose access to both CSX and NS and become "2-to-1" shippers with resultant significant loss in competition in the region and devastating impact on their companies. In addition, if the Board does nothing to preserve the W&LE, the routing advantages it would offer as a bypass to congested municipal areas will become a lost opportunity.

W&LE recognized from the moment that the Applicants proposed the Transaction that its economic impact on the W&LE would be substantial. Exactly how much this is so was only later borne out in the detailed studies performed by Messrs. Thompson, Mokodean and Pinkerton. The W&LE was presented with two choices. Either it acted immediately to seek inclusion in the Transaction (as another

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agree to a change so that CSX would do the work and bill WLE its share rather than WLE doing the work and billing CSX." Orrison RVS at 539-540.

railroad, the New York, Susquehanna & Western, had indicated it would do prior to its settlement with the Applicants) or it could request protective conditions sufficient for it to survive and continue furnishing services essential to its shippers. W&LE chose the latter option, largely because it recognized that inclusion would present to the Board and to a host of W&LE's shippers a new morass of service and competition issues. Simply put, W&LE's choice to file a Responsive Application was a far less disruptive and far more certain approach to resolve the harms of the Transaction.

The only way for the W&LE to remain viable and to protect the array of essential services it provides is to secure new revenue opportunities not available on the current reaches of its system. Realizing that new revenue is only available by expanding its market access, W&LE has carefully crafted a series of operating rights (both trackage rights and haulage rights) that are designed fully to protect its future existence without imposing undue hardship on the Applicants. In its Responsive Application and again in this brief, W&LE has clearly shown that there will be a significant loss of competition, a loss of essential services, and public harm if its relief request is not granted. It has also established that its requests are reasonable, and it has proven that the conditions it seeks are operationally feasible.

W&LE has shown that its Responsive Application protects its future existence (itself a clear public benefit). W&LE has also demonstrated that the relief it seeks promotes operating efficiencies through improved rail routings, expanded competition,

and preservation of intermodal activity -- factors that underscore the "collateral" public interest benefits flowing from W&LE's requests.

Prompted by economic necessity, and fully aware of its critical role as a regional carrier in Ohio, Pennsylvania, West Virginia and Maryland, W&LE hereby implores the Board to consider the support it has obtained from a variety of corners, including its many shippers and the State of Ohio. The Board has recently found itself at the forefront in resolving unanticipated rail service dilemmas that have erupted since the consummation of the UP-SP and Burlington Northern-Santa Fe consolidations out west. The competitive and operational challenges already presented the to the Board in this Transaction are complex enough. The prospective failure of W&LE -- without the relief its requests -- promises to take difficult rail service matters to a totally new dimension. For all of the foregoing reasons, W&LE and its hundreds of concerned employees urge the Board to grant W&LE's Responsive Application in full.

Respectfully submitted,

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DATED: FEBRUARY 23, 1998

EXHIBIT A

NEW AND EXPANDED SHIPPER OPERATIONS LOCATED ON W&LE SINCE 1992

1.	Harrison Mining	Nelm #1	Captive-new	Coal
2.	Step 2	Streetsboro, OH	Captive-new	Plastics
			Expansion	Consumer Products
3.	Tri-Tech Plastics	Streetsboro, OH	Captive-new	Plastics
4.	Mondial Plastics	Streetsboro, OH	Captive-new	Plastics
5.	Jesse Stewart	Rook, Pa	Captive-new	Grain
6.	Sunrise Cooperative	Clarksfield, OH	Expansion	Grain
		Monroeville, OH		
7.	GenCorp	Mogadore, OH	Expansion	Latex
8.	*AGW Services*	Akron, OH	Expansion	Plastics
9.	Chemical Associates	Akron, Oh	Expansion	Fatty Acid
10.	New Eezy Gro.	Sycamore, OH	Captive-new	Fertilizer
11.	Lamson & Sessions	Carrollton, OH	Captive-new	Plastics
12.	Midwest Industrial Sup.	Canton, OH	Captive-new	Liquid Plastics
13.	HVC, Inc.	Medina, OH	Captive-new	Chemicals
14.	Terra International	Norwalk, OH	Captive-new	Fertilizer
15.	M.A.Hannah Resin	Massillon, OH	Captive-new	Plastics
16.	Sterilite Corp.	Massillon, OH	Captive-new	Plastics
17.	Hinds Company	Barberton, OH	New	Plastics
18.	Peoples Services	Brewster, OH	Expansion	Plastics
19.	Neomodal	Navarre, OH	New	Intermodal
20.	Holmes Lumber	Hartville, OH	New	Lumber
21.	Georgia Pacific	Akron, OH	New	Paper
22.	Inland Container	Streetsboro, OH	New	Paper
23.	National Lime & Stone	Canton, OH	New	Limestone
24.	Integrated Limestone	Canton, OH	New	Limestone
25.	Osborne Inc.	Medina, OH	New	Limestone
26.	Portage Limestone	Kent, OH	New	Limestone
27.	National Lime & Stone	Cadiz, OH	New	Limestone
28.	OCF	Medina, OH	Expansion	Minerals
29.	Georgia Pacific	Mogadore, OH	Expansion	Lumber
30.	U.S.Ceramic Tile	E. Sparta, OH	Expansion	Minerals
31.	Medina Supply	Medina, OH	Expansion	Limestone
32.	84 Lumber	Orrville, OH	New	Lumber
33.	U.S.Steel	Irwin, Pa	Expansion	Steel
34.	Ohio Coatings	Martins Ferry, OH	New	Steel Coatings
35.	Whitacre Engineering	Sandyville, OH	New	Steel Transload
36.*	Wyandot Dolomite	Carey, OH	Expansion	Limestone
37.*	National Lime & Stone	Carey, Oh	Expansion	Limestone
38.*	France Stone	Flat Rock, OH	Expansion	Limestone
39.*	Rogers	Parkertown, OH	Expansion	Limestone

* Those expansions were served by additional competing railroads but which expansions were put in because of increased business at Wheeling's aggregate terminals.

New = 25 Expansion = 15

EXHIBIT B

Reprinted from THE WALL STREET JOURNAL.

FRIDAY, FEBRUARY 6, 1998

Opening Lines

Tired of Costs, Delays Of Railroads, Firms Lay Their Own Tracks

Utilities Are Leading Trend In Building Short Spurs To Bring In Rival Service

But It's a Daunting Project

By Daniel Machalaba
Staff Reporter of The Wall Street Journal

HOUSTON — As head of fuels for Houston Lighting & Power Co., Janie Mitcham got fed up with its railroad service. So she persuaded the utility to spend $24 million to build its own 10-mile rail line.

Now, "Janie Rail" allows the company to enjoy the benefits of transport competition. In recent years, Burlington Northern Santa Fe Corp. brought Wyoming coal to Houston Lighting's huge W.A. Parish generating station 35 miles southwest of downtown. But with the new connecting line, the utility can pick up some of the coal from Union Pacific Corp., which is willing to charge 25% less to get the new business. In addition, the Houston Industries Inc. subsidiary can choose between the railroads if service problems crop up.

"You can switch railroads and get out of an emergency situation," the 39-year-old Ms. Mitcham says.

Around the country, small quasi-railroads are being built by companies tired of slipping rail service and high freight rates. The trend resembles the antirailroad sentiment of a century ago, but now it is big corporations, not small farmers, taking on the carriers. These corporations complain that railroad consolidations have created empires for a handful of carriers that control crucial freight shipments for hundreds of manufacturers and retailers.

Many Lines Planned

So far, more than a dozen new lines have been built, and at least 25 more are possible. The players range from Dow Chemical Co., which is considering a $100 million link to chemicals and plastics plants in Freeport, Texas, to Southern Co., a giant utility building its fourth line. Utilities, especially, are scrutinizing freight bills because deregulation puts them under unprecedented pressure to cut costs.

Janie Mitcham

Most of the lines run less than 10 miles and aren't full-fledged railroads. The shipping company lays tracks and uses its own cars; a big railroad provides locomotives, crews and connecting service.

Yet these lines are a remarkable response to the rate and service issues raised by rail mergers, including the messy delays last fall on Union Pacific, the nation's largest railroad. Building track of any length these days is a daunting task. MidAmerican Energy Holdings Co. spent years getting environmental permits and had to install welded rail near a high school to curb annoying "clickety-clack" noise.

"The Union Pacific built a railroad faster from the Missouri River to California than we built our six-mile line," says Donn Bauerly, a supervising engineer for the Des Moines, Iowa, company.

But the main obstacle to many upstarts is the rail giants themselves, which contend that their service isn't so bad, note that their rates have dropped and blame many delays on bad weather. They also note legal, logistical and competitive problems of the customer-owned lines.

Crossing Tracks

One upstart in Alabama built its track across a Norfolk Southern Corp. route to enable it to get deliveries from CSX Corp., a Norfolk Southern rival. In response, Norfolk Southern limited the movement of CSX trains on its tracks. "It's like Ford going to General Motors and saying, 'Let us use your assembly plant,'" says Tom Bayrer, Norfolk Southern's director of coal marketing. "It just creates havoc."

Burlington Northern has fought some of the harshest battles, filing lawsuits, arguing before regulators and, in the case of Janie Rail, bringing in its own security force to try to stop construction of an access road across Burlington's track. It once sought to charge Omaha Public Power District $28 million to cross its track to the Nebraska utility's plant. Regulators set a lower fee: $5,320. Burlington then agreed to sell the 57 mile line for $7 million to the utility, which plans to use the line to reach Burlington and Union Pacific tracks.

In part, the flurry of rail projects was set off by a 1988 ruling by the Surface Transportation Board's predecessor, the Interstate Commerce Commission. The ruling made it easier for one railroad to build a line across another's track and invade its once-exclusive turf.

But rail customers say they also are entering this business because of the impact of railroad consolidations. Only five big U.S. railroads are left, down from 40 in 1980, and one, Conrail Inc., is about to be split up by two others. Another giant may emerge, however, if Canadian National Railway Co. succeeds in its effort to acquire Illinois Central Corp.

By some estimates, 90% of rail customers are captive to a single railroad, and some complain that they are paying 20% to 30% more than they would in a competitive market. Moreover, the industry's on-time performance has declined in some major markets. Between Chicago and New York, for example, many freight shipments are five hours slower today than in the 1980s.

In theory, shippers can complain to the Surface Transportation Board, but that course is expensive, time-consuming and effective only in extreme cases. Moreover, the Clinton administration had left one of the federal board's three commission slots vacant for more than a year; it eventually nominated a candidate, but confirmation is still weeks away.

Few companies have been as frustrated by all this as Southern Co., which pays railroads more than $900 million a year to haul coal to its power plants. For years, its officials say, Norfolk Southern refused to give it reliable delivery times at its Plant Gaston generating facility southeast of Birmingham, Ala., so the utility never knew when to schedule workers to unload the coal. "They'd say they'll be there by 5 p.m. but might not show up until 6 the next morning," says David Putman, a general manager in the Atlanta-based utility's fuel-services department.

Norfolk Southern's Mr. Bayrer blames the late coal deliveries on problems in loading trains at the mine. "We are in discussions with Southern Co., and we are trying to improve that," he adds.

But Southern has become a powerhouse in upstart railroading. At its Plant Miller northwest of Birmingham, Ala., bulldozers are tearing through hilltops and piney

(over please)

woods to lay new rail bed. The generating plant already has two rail lines, including one Southern built a few years ago.

Learning Railroading

Company officials have been taking courses in track maintenance, inspection and repair. One celebrated the company's Southern Electric Generating Co. Railroad in a song: "The Stego Railroad's six miles long. Do Da Do Da. It may be short but it's mighty strong. Oh Do Da Day." Enthusiasm isn't surprising. "You don't see many people at our transmission lines watching the electrons go through," Mr. Putman says. "But you see people at railroad lines. They stop and take pictures."

The romance of the railroads aside, Southern uses the tracks to pressure carriers for better service. One of its new lines connects with CSX, which is trying to outperform Norfolk Southern; among other things, it has sent new, high-powered locomotives to pull trains to Southern's feeder line. In all, Southern will spend $40 million on its four railroads but says it already has recouped more than that in lower fuel costs.

Other companies, and especially small ones, have had less luck dealing with big railroads. In the prairie of eastern South Dakota, officials in the little town of Big Stone City have been promoting plans for a three-mile track to reach a local short-line railroad and provide an alternative to Burlington Northern Santa Fe.

Otter Tail Power Co., which operates a generating plant in the town, figured it could lop 25% off its $17 million-a-year coal-hauling contract if it had alternative service. Nearby, Dakota Granite Co. also was hoping for better service; it says Burlington's freight cars have sometimes been weeks late, only to show up full of gravel or other leftovers from previous loads. Last fall, a big granite shipment missed a freighter sailing to Italy, causing a costly, weeks-long delay. "We figured if we had two railroads, we'd have access to twice as many cars," says Chuck Monson, Dakota Granite's general manager. "Things would only improve."

Defending the Franchise

But Burlington, which declines to comment on the complaints, went straight to federal court in Minneapolis, arguing that any new line would invade its "exclusive franchise" on rail shipments out of that part of the state. Burlington upgraded the original tracks, "and we have some right to recover a return on our investment," says Greg Swienton, a Burlington senior vice president. Both a federal judge and appeals court agreed, leaving Big Stone with one rail line and 20 miles from the nearest interstate highway.

"We have the water, power and workers," says Big Stone City Mayor Val Ransch. "All we need is competitive transportation."

At Houston Lighting, Ms. Mitcham has learned the difficulties of building a rail line. To carve out a route for the new track at its W.A. Parish generating plant, the utility agreed to sidestep historical sites, such as an old graveyard. It also went to state court and got condemned some land held by cattle ranchers who weren't eager to have a rail line on their properties, and it put barbed-wire fencing on both sides of its track to keep cattle off it.

To build the line, work crews moved 380,000 cubic yards of soil, enough to fill 20 mile-long freight trains. During construction, a coffer dam collapsed, setting back completion of a bridge over the Brazos River for months. And work stopped when a drowned man's body washed up on the riverbank, and when the local bomb squad set off 19 sticks of dynamite found at an old oil field nearby.

Burlington Northern Santa Fe threw up its own obstacles, in court and before regulators. On one occasion it prompted a showdown, sending two railroad policemen to stop a power-company crew working on a construction road across its track. Grabbing his camera, one agent shot a photo of a backhoe perched on the rails-evidence that the rail project posed a safety hazard to Burlington trains.

'Animosity' Acknowledged

Burlington officials acknowledge some "animosity" in past dealings with some customers, but say they now are avoiding confrontations. "That had to change, and we have tried to rebuild a number of those bridges," Mr. Swienton says.

But such problems aside, Houston Lighting has begun to reap the benefits of Janie Rail. The utility estimates that a contract with Union Pacific will initially save more than $10 million a year from the Parish plant's $196 million-a-year freight bill. The savings may increase to about $50 million a year in 2000, when most of the rest of the plant's coal contracts turn over.

Rail service is another matter. Houston Lighting opened Janie Rail just before Union Pacific slid into its rail-service breakdown. The carrier acknowledges that coal deliveries to the power plant ran as much as a week late but says things are improving. Meanwhile, Ms. Mitcham switched some coal deliveries *back* to Burlington Northern Santa Fe.

Nevertheless, Ms. Mitcham, a lawyer and an engineer by training, takes setbacks in stride. She recalls how skeptical staffers once called her project "The Rail of Dreams," and says neither big railroad took her plans seriously at first, dismissing them as threats to drive down coal rates. But when Union Pacific representatives came to her office last year to apologize for the service failures, she felt confident enough to jokingly pull out a toy gun and blast them with foam darts. "They stood there and took it," she says.

CERTIFICATE OF SERVICE

I hereby certify that I have this 23rd day of February 1998 served the foregoing Brief of Responsive Applicant Wheeling & Lake Erie Railway Company by messenger delivery upon Applicants' counsel and to all other parties of record by first class mail, properly addressed with postage prepaid.

Robert A. Wimbish

Robert A. Wimbish

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ORIGINAL

BEFORE THE

SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

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

E

WYANDOT-5

BRIEF OF WYANDOT DOLOMITE, INC.

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Counsel for Wyandot Dolomite, Inc.

DATED: February 23, 1998

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SURFACE TRANSPORTATION BOARD

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

WYANDOT-5

BRIEF OF WYANDOT DOLOMITE, INC.

I. INTRODUCTION

Pursuant to the procedural deadlines set by the Board in Decision Nos. 6, 12 and 52, respectively served on May 30, 1997, July 23, 1997, and November 3, 1997, Wyandot Dolomite, Inc. ("Wyandot") hereby files its brief in the above-docketed proceeding.

By way of background, and as is relevant here, Wyandot filed on October 21, 1997, comments and requests for protective conditions to the Primary Application,[1] entitled "Comments and

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[1] Hereinafter, Wyandot will refer to the Primary Application encompassed by Finance Docket No. 33388 as "the Application." Similarly, the series of related control and lease and operating agreements set forth in the Application will be referred to throughout at "the Transaction." CSX Corporation and CSX Transportation Inc., hereinafter will be referred to -- both separately and collectively -- as "CSX." Hereinafter, Norfolk Southern Corporation and Norfolk Southern Railway Company will be referred to -- both separately and collectively -- as "NS."

Requests for Protective Conditions of Wyandot Dolomite, Inc." (Wyandot-3). The Applicants responded to Wyandot, and to a variety of other commenters, protestants, and responsive applicants in their Rebuttal, filed on December as "CSX/NS-176."[2] As permitted under the Board's procedural guidelines, Wyandot submits this brief in support of the protective conditions it seeks in the event that the Board approves the Transaction.

II. SUMMARY OF REQUESTED RELIEF

In Wyandot-3, Wyandot made clear that it will suffer substantial economic harm if the Transaction is consummated as currently proposed. The harm Wyandot faces flows from operational inefficiencies which will result from the division between two carriers (NS and CSX) of a certain rail route by which Wyandot currently transports a significant portion of its rail-borne traffic. In the event that the Board should grant the Application, Wyandot requests that the Board condition its approval upon the following four protective conditions:

1. That NS shall be obligated to assume trackage rights operations over lines to be operated by CSX post-Transaction between Wyandot's facilities at Carey, OH, and a connection with a line to be operated by NS at Crestline, OH. (The condition shall be implemented to reflect the exact route by which Conrail today transports aggregate between Carey and Alliance.)

Hereinafter, Conrail Inc. and Consolidated Rail Corporation will be referred to -- both separately and collectively -- as "Conrail." Together, CSX, NS and Conrail will be referred to separately and collectively as "the Applicants."

[2] In "CSX/NS-194," the Applicants identify at what points in their Rebuttal they discuss issues relevant to Wyandot.

2. That the trackage rights to be granted to NS, as described in part one, shall be made mandatory, and that NS shall possess a common carrier obligation to serve Wyandot as a result of its access to Carey, OH.

3. That NS shall retain in effect for five years a rate (or rates) for the movement of aggregate traffic between Carey (Wyandot) and Alliance (East Ohio Stone Co.) that is no higher than that currently charged by Conrail.

4. That should NS prove unwilling or unable to provide service between Wyandot's Carey facility and East Ohio Stone Co. at Alliance upon a reasonable request for service, and pursuant to the conditions 1 through 3 set forth above, or if NS should abandon or otherwise relinquish its rights of access to or between Carey and Alliance, then the Board must, upon appropriate request from Wyandot, reopen this proceeding. Upon such reopening, the Board shall, at Wyandot's election, direct another rail carrier of Wyandot's choosing to provide Carey to Alliance service.

5. (Withdrawn)[3]

The Applicants have devoted a minimum of attention to Wyandot's request for protective relief, evidently because they can only conceive of the Board imposing conditions where the requesting party shows either: (1) the loss of competition in the relevant market, or (2) that the relief will protect against the loss of essential services. (See, "Applicants' Rebuttal" - Vol.1, CSX/NS-176 at 509-510). The four protective conditions outlined above are designed to correct certain new inefficiencies that would otherwise be introduced into the movement of Wyandot's product post-Transaction They are also designed to protect the essential services that Wyandot receives today. The Board's

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[3] Wyandot withdraws Condition No. 5 for the reasons set forth in Section III - E, below.

authority (and indeed its duty) to ensure that railroad transactions are accomplished with a minimum of adverse consequences to shippers and the general public -- including the reduction or elimination of Transaction-created operating inefficiencies -- is discussed in the sections that follow.

III. STATEMENT OF FACTS

As it explained in its pleading of October 21, 1997, Wyandot is a rail-oriented producer of aggregate and limestone. The majority of its roughly two million tons of annual production is shipped by rail from its facility at Carey in northwestern Ohio to several points in eastern Ohio. Today, Wyandot is served by three rail carriers -- CSX, Conrail, and the Wheeling & Lake Erie Railway Company ("W&LE"). Of these three carriers, W&LE handles the majority of Wyandot's rail-borne product.[4]

Conrail's current role in transporting Wyandot product may not be quite as large as W&LE's but it is every bit as critical to Wyandot's financial well-being. Of particular note is Conrail's transport of Wyandot aggregate from Carey to East Ohio Stone Co., a stone and aggregates distributer located in Alliance, OH. This move of about 225,000 tons per year -- approximately 20% of Wyandot's annual stone sales -- covers a distance of just 125 miles. Central to the success of the business to East Ohio Stone Co., is the fact that Wyandot enjoys

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[4] In most cases where W&LE provides service to Wyandot, W&LE is the only carrier to serve both the origin and destination points.

the efficiencies (and lower costs) of single-carrier service between Carey and Alliance.[5]

If approved without appropriate conditions, the Conrail route between Carey and Alliance will be split -- with the western portion going to CSX and the eastern part to NS.[6] There is not now (and, barring effective relief, will not be tomorrow) an alternate single-carrier route between these two points. Because NS and CSX together are exceedingly unlikely to be able to provide the same level of efficient, low cost service that Conrail provides today between Carey and Alliance, Wyandot stands to lose the East Ohio Stone Co. business post-Transaction. Most important to the Board's analysis is the fact that neither NS nor CSX have offered any long-term assurances that they will provide service between Carey and Alliance at rates (and transit times) that are as good as or better than those offered today by Conrail.[7]

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[5] Today, Conrail serves Wyandot by virtue of trackage rights over a CSX-owned line extending from Upper Sandusky, OH, to Carey, OH. At Upper Sandusky, Conrail trains return to "home rails" and complete the run to and from Alliance. See, map attached as Exhibit A.

[6] As currently proposed, NS would acquire Conrail's main line between Crestline and Alliance, while CSX would control the line between Crestline and Upper Sandusky. As an element of the Transaction, NS would obtain trackage rights over the line that extends between Crestline and Upper Sandusky, but NS would not inherit Conrail's existing trackage rights between Upper Sandusky and Carey. In order to fully replicate the service that Conrail provides Wyandot today, NS would need only to receive the very same Conrail trackage rights over the approximately 10 miles of rail line between Carey and Upper Sandusky.

[7] In fact, neither CSX nor NS openly disputes Wyandot's assertion that it will ultimately lose the business it enjoys

IV. ARGUMENT

Never before has the Board (or its predecessor, the Interstate Commerce Commission -- "ICC") assessed the impacts of a transaction which will divide the assets of a carrier the size of Conrail between two equally powerful and far flung mega-railroads such as CSX and NS. The Applicants present the Transaction as something revolutionary, and there is no denying that, for the Board, it presents a far different scenario than did Union Pacific's application to control the Southern Pacific system or the merger of the Burlington Northern and Santa Fe rail systems.

In both the UP-SP and BN-Santa Fe consolidations, perhaps the central issue before the Board and the ICC was (and as those transactions continue to move forward, still is) the preservation of meaningful levels of transportation competition for shippers located along these western systems. To be sure, this competition issue does emerge in places in the present NS-CSX-Conrail transaction, but there is an issue novel to this proceeding for which UP-SP and BN-Santa Fe offer little useful precedent. Specifically, what will the Board do to protect the interests of those parties, such as Wyandot, who will become what have been called "1-to-2" shippers? Will the Board, like some misguided Robin Hood, permit this transaction to benefit some

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with East Ohio Stone Co., in the event that the Transaction is consummated without the trackage rights relief Wyandot seeks.

shippers while allowing others like Wyandot to pay the price for "progress?"

A. Joint-line service for aggregate is uneconomical

No one can honestly argue that industries such as Wyandot will be served as well or as economically in joint-line service as they are by single-carrier service. In fact, Wyandot's evidence, ICC and Board analysis in earlier railroad transactions, and the Applicants own statements prove that the ultimate result of the Transaction will be to foreclose Wyandot from competing for East Ohio Stone Co. business.

Since 1995, Wyandot has utilized two-carrier rail service in only two instances. In both cases, the carriers handling the aggregate moves were a combination of regional and short line railroads -- W&LE/RJ Corman and W&LE/Ohio Central RR -- and the movements involved only a very modest amount of traffic for a short term.[8] In fact, Wyandot has been limited in its ability to secure other customers in eastern Ohio for the very reason that two-carrier service over the short distances involved is much less cost effective.[9]

The Board has itself noted on more than one occasion that, as between the same two points, single carrier service is

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[8] See, Interrogatory Responses 6 and 8 of "Highly Confidential Responses to CSX Corp. et al. First Set of Interrogatories and Requests for Production of Documents to Wyandot Dolomite, Inc." -- Wyandot-4; selections attached as Exhibit B.

[9] Id.

preferable to multiple carrier service. In its most recent foray into major railroad consolidations, the Board recited longstanding Board/ICC policy in favor of extended single-line service, noting that significant "unquantifiable" benefits typically flow from such arrangements. See, Finance Docket No. 32760, Union Pacific Corporation, et al. -- Control and Merger -- Southern Pacific Rail Corporation, et al., Decision No. 44 (served August 12, 1996) slip op. at 113 (hereinafter, "UP-SP"). Conversely, the Board noted in the same proceeding that shippers losing single-carrier service as a consequence of a railroad transaction are adversely affected and that such circumstances effectively "take the railroad system backwards." Id., at 158. Finally, as a commodity, the ICC had taken what amounts to "judicial notice" of the economics of aggregate transport:

> [For aggregates], truck transport is prohibitively expensive for the long haul; crushed stone is a high-bulk, heavy loading commodity, for which motor carriers are effective for distances of less than 75 to 100 miles.[10]

The ICC's findings on this subject were central to fashioning protective relief for Texas-based aggregate producers in a prior railroad consolidation proceeding.

One needn't consult Wyandot's earlier pleadings or ICC/Board precedent to confirm that Wyandot -- and aggregate shippers like it -- will suffer harm as a result of the Transaction. Nor does it appear that anyone takes seriously the

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[10] Union Pacific Corp. et al. -- Control -- MO-KS-TX Co. et al., 4 I.C.C. 2d 409, 464 (May 13, 1988) (hereinafter, "UP/MKT").

assertion that for typically "short-haul" commodities like crushed stone, two carrier service is as good as single carrier routings.[11] Consider the Applicants' own statements in this regard. One need only look as far as the testimony offered by such Applicants' witnesses as John W. Snow and Darius W. Gaskins, Jr., for their explicit acknowledgement that two-carrier service, especially for such commodities as sand and aggregate, puts shippers at a decided disadvantage vis-a-vis single carrier routings.[12] Further, in reply to Martin Marietta Materials' MMM-2 filing, the Applicants state that, "Compared to lime, stone aggregates generally move at a lower rate per ton and thus generally do not move in a joint-line rail service as frequently as lime." See, "Applicants' Rebuttal," Vol. 1 at 502 (emphasis added). Implicit in such comments is the Applicants' admission that, as a matter of railroad economics, joint-line handling of aggregate is usually a cost-prohibitive proposition.

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[11] On this note, the Applicants have attempted to address Wyandot's concerns not by making marketing commitments that will continue to keep the existing Carey to Alliance route economically viable. Instead, the Applicants offered an alternate, and unacceptable, single carrier route apparently involving trackage rights to be conveyed to another rail carrier. See, "Verified Statement of D. W. Seale," Applicants' Rebuttal at 7.

[12] See, excerpted portions of deposition testimony of Messrs. Snow and Gaskins appended to "Comments and Request for Conditions of Martin Marietta Materials, Inc." (MMM-2).

B. The Board Possess the Authority to Impose Conditions to Thwart Inefficient Rail Service

Clearly, 49 U.S.C. § 11324(c) gives the Board broad authority to impose conditions upon railroad consolidations. Congress has given the Board expansive and general guidelines concerning its review of Class I railroad consolidations in 49 U.S.C. § 11324(b), as follows:

> (b) In a proceeding under this section which involves the merger or control of at least two Class 1 railroads, as defined by the Board, the Board shall 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 employee 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.

The Board's assessment of any railroad transaction is further reinforced by the "Rail Transportation Policy" set forth at 49 U.S.C. § 10101, which -- at subparagraphs (3) and (5) -- mandates promotion of an efficient rail transportation system and the fostering of sound economic conditions in transportation. Addressing §10101's predecessor -- 49 U.S.C. §10101a -- the Board stated that, "We are also guided by the rail transportation policy, 49 U.S.C. 10101a, added by the Staggers Act... The 15 elements of that policy set forth in section 10101a, taken as a

whole, emphasize reliance on competitive forces, not government regulation, to modernize railroad operations and to promote efficiency." UP-SP at 99-100.

Certainly, in most cases, the Board (and before that, the ICC) has addressed its broad authority to impose conditions in an effort to undo the "anti-competitive" consequences of railroad consolidations. However, unlike the apparent position of the Applicants, the Board is not constrained to consider imposing conditions only when a loss of competition or "essential services" is threatened. Instead, the Board has a greater duty to ensure that the "public interest" is not harmed. That the "public interest" standard focuses not merely on competition is clear in the following statement of the ICC:

> The basic consideration for determining whether a need for a public interest condition exists is whether the transaction will have anticompetitive consequences (or threaten other possible harm to the public interest). If a transaction does not pose any problems of possible harm to the public interest, then no public interest conditions should be imposed. If a transaction threatens harm to the public interest, then public interest conditions should be imposed if they are operationally feasible, ameliorate or eliminate the harm threatened by the transaction, and they are of greater benefit to the public than they are detrimental to the transaction.
>
> Union Pacific -- Control -- Missouri Pacific; Western Pacific, 366 I.C.C. 462, 563-564 (Sept. 24, 1982) (emphasis added) (hereinafter, "UP/MP/WP").

More recently, the Board has embraced the condition criteria set forth in UP/MP/WP, and has re-confirmed that its broad power to impose conditions is not solely focused upon

competition, but can be used to address any harm to the public interest:

> We will adhere to the criteria for imposing conditions set out in UP/MP/WP ... Conditions will not be imposed unless the merger produces effects harmful to the public interest (such as a significant loss of competition) that a condition will ameliorate or eliminate.
>
> UP/SP at 144 (emphasis added).

Thus, the Board's duty to assess the inefficient consequences of a railroad transaction go hand-in-hand with its measurement of the typical efficiency gains heralded with each major rail consolidation.

Presumably a result of serious accidents and traffic gridlock in the western United States -- attributable in large part to the difficult consolidation of the Union Pacific and Southern Pacific Railroads -- the Board has determined it prudent to more carefully assess the safety impacts of the Transaction. To this end, the Board has required the filing of Safety Integration Plans ("SIP"), has permitted interested parties to offer comments on these SIPs in connection with the Draft Environmental Impact Statement, and has adjusted the procedural schedule governing the Application. While the focus on safety is not directly related to either preservation of competition or essential services, the SIPs process is unquestionably an appropriate action for the Board. It is ludicrous to assume that the Board would be powerless (especially given that it claims "broad authority" under the circumstances) to impose conditions directed to preserving efficient rail operations, when it appears

unchallenged that the Board may impose conditions directed to promote safe rail operations.

C. The inefficient, cost-increasing consequences of the Transaction that would otherwise be in store for Wyandot are contrary to the public interest and can be eliminated with the conditions Wyandot seeks

Wyandot does not argue that the Transaction in general denies to many shippers the potential benefits of more efficient rail services. For products that move greater distances than aggregate, the transaction may lower transportation costs and eliminate wasteful interchanges between carriers. That does not mean that the shipping world should be divided between "winners" and "losers," especially where those that would fall into the "losers" category (like Wyandot) would be paying a price so that others may enjoy better service. In this case, the new inefficiencies and likely increased costs Wyandot and East Ohio Stone Co. would bear if the Transaction is approved without conditions constitutes harm to the public interest warranting relief.

Consider the following harms to the public interest if -- (A) the Transaction is approved without appropriate conditions and (B) Wyandot is unable to continue its rail-served stone business with East Ohio Stone Co.:

1. Wyandot will eliminate as many as 10 jobs at its Carey facility;
2. Wyandot will be virtually unable to compete for customers it can now market on Conrail lines east

of Crestline, OH (Wyandot will actually suffer reduced market access, and it will not gain, as a result of the transaction, access to any new "replacement" markets); and

3. East Ohio Stone Co., and other consumers of aggregate in eastern Ohio may have to resort to truck transloading, thereby increasing the delivered price of the stone, placing more heavy trucks on Ohio's roads, increasing air pollution and road congestion, and ultimately violating the Board's Rail Transportation Policy goals.

These are the very real potential consequences of the Transaction, and nowhere do the Applicants challenge Wyandot's factual assertions and projections. Indeed, the Applicants admit that Wyandot will suffer harm, but they insist that the Board is powerless to do anything about it. The Applicants cavalierly dismiss Wyandot's predicament with the following remark: "[This is not] Transaction-related harm of the sort that the Board and its predecessor have remedied in prior control proceedings" ("Applicants' Rebuttal," Vol. 1 at 510).[13] Sadly, the Applicants forced interpretation of prior Board and ICC precedent merely reveals how thoughtless they have become toward Ohio stone

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[13] To the contrary, the harms complained of here by Wyandot constitute a loss of essential services, as will be explained below. The Board has stated time and again that it can and will take action to correct Transaction-related harms threatening essential services to shippers.

producers. Contrary to the Applicants' callous take on the situation, Wyandot's is exactly the sort of harm that the Board is mandated to remedy.

Fortunately, the above-enumerated adverse impacts of this transaction are sufficiently narrow in scope that they may be corrected with equally narrow Board-imposed conditions. In this case, the trackage rights relief Wyandot would have imposed upon NS would serve to replicate Conrail's existing service route from Carey to Alliance and return.[14] It would require trackage rights operations over only a small stretch of CSX mainline. The conditions -- particularly Conditions 2 through 4 -- would also ensure that NS does more than pay "lip service" to the transportation upon which both Wyandot and East Ohio Stone Co. depend.

As mentioned above, the trackage rights relief entails only a short stretch of rail line, and is operationally feasible. In this regard, the Board should consider the vast array of trackage rights operations NS and CSX will inherit over various lines in Ohio if the Transaction is consummated. (For example, NS would enjoy trackage rights access to the current Conrail line west of Crestline, OH.) Finally, the parties best able to assess the operational impacts of the trackage rights relief Wyandot

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[14] Haulage rights, while they might be appropriate in other situations, would not overcome the problems Wyandot faces. While haulage would effectively permit single-line marketing by NS for Wyandot, it would not eliminate the inefficient interchange that would still have to take place at some point between CSX and NS to complete the Carey to Alliance haul.

requests -- the Applicants -- have offered nothing to seriously disprove their feasibility in this case.[15]

D. The relief Wyandot seeks protects essential services

Wyandot's single-carrier route between Carey and Alliance is an essential service as that term is defined in Lamoille Valley R. Co. v. I.C.C., 711 F.2d 295 (D.C. Cir. 1983) (hereinafter, "Lamoille Valley"). As Wyandot has already made clear, it depends upon economical single-carrier service in order for it to be competitive in more distant markets (such as East Ohio Stone Co.) where there is a high volume demand for aggregate. Without effective preservation of the existing Conrail service to East Ohio Stone Co. (or an all-NS routing post-Transaction), Wyandot has demonstrated that it is highly unlikely to secure this business in the future. Wyandot has also shown that losing the East Ohio Stone Co. business would result in about a 12% loss in annual revenues, and would necessitate the elimination of as many as 10 Wyandot employees. See, Wyandot-3, Verified Statement of Timothy A. Wolfe, pp. 1-3. In other words,

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[15] Applicants merely suggest that the requested trackage rights could have a "potentially disruptive effect." "Applicants' Rebuttal" Vol. 1 at 510. They ignore the fact that the trackage rights relief is sought as between the Applicants themselves, and (at least at the outset) does not involve an "interloper" third party rail carrier. The claim of "potential disruption" is disingenuous at best, inasmuch as NS had offered W&LE access to East Ohio Stone Co. as a replacement to the lost Conrail single-line service. See, "Applicants' Rebuttal," Vol. 2B, Seale RVS at 7 (p. 497). As best Wyandot can determine, the W&LE trackage rights offer would have entailed operations over an NS main line that would have been no less "disruptive" than NS operations over future CSX lines.

the "alternatives" to an all-NS routing between Carey and Alliance -- specifically, a either a joint CSX-NS rail haul or tracking -- would be inadequate. As a result, the Board should grant Wyandot the relief its has requested.

Normally, "essential services" arguments have been raised by carriers asserting that a railroad transaction will threaten the a particular carrier's ability to provide rail service to customers located along its lines. It turns out, however, that the real test for essential services focuses on the "adequacy" of alternative service available to shippers. See, Lamoille Valley at 311 ("Congress... instructed the ICC to consider 'adequacy of transportation to the public'"). There is no basis to assert that "essential services" claims cannot be made by a shipper such as Wyandot rather than a railroad. Nor is there any "threshold" requirement in the law that requires a shipper to allege the loss of all rail service to avail itself of an "essential services" claim.

As Wyandot's evidence has established, mere availability of rail service is not the critical factor for aggregate shippers. Instead, given the economic circumstances under which the aggregate industry competes, the real question is whether or not an aggregate shipper has single-carrier service. As Wyandot has demonstrated above, most aggregate shippers do in fact depend upon single-carrier service in order to compete in more distant markets. See, Lamoille Valley at 312 (In assessing whether to impose protective conditions, "[t]he [Board] may want

to consider whether most shippers in a particular industry rely on rail service... If most shippers do rely on rail service, then alternate service is probably not an adequate substitute"). Once again, for Wyandot and for most aggregate shippers, two-carrier service is not an adequate substitute. Two-carrier service is no-carrier service.

Wyandot has established what will happen to it if it loses the East Ohio Stone Co. business. Wyandot will be forced to reduce its production and cut jobs. According to Lamoille Valley, the Board is entrusted to consider such harms in granting protective relief.[16] While an assessment of shipper harm appears first under a Lamoille Valley analysis, the Board cannot end its analysis without weighing other public interest factors. See, id. at 313. Clearly, the loss of single-carrier route efficiencies and increased costs relating thereto are exactly the kinds of harms that are contrary to the public interest.[17]

Should East Ohio Stone Co. find alternate sources of aggregate (a matter of no solace to Wyandot), it will likely obtain this commodity via truck delivery. Aggregate prices will

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[16] Id. ("... if a shipper cannot earn a fair return [from using alternate transportation], or can do so only by sharply curtailing operations, the [Board] probably ought to inquire further into the desirability of protective conditions").

[17] "Private benefits [that is, benefits to rail carriers in a transaction] that result in reduction in competition are considered detrimental [to the public interest] if they permit the carrier to raise rates without improving service, reduce the quality of service at a higher rate to harm essential services."

Milwaukee -- Reorganization -- Acquisition by GTC, 2 I.C.C. 2d 161 at 213 (Sept. 12, 1984).

be inflated to ref ect this more costly means of delivery, and additional trucks will translate into more highway wear and tear, more air pollution, and more roadway congestion.[18] Should the Board elect not to grant the relief Wyandot has requested, it must also accept that it does so at considerable expense to Wyandot, Wyandot's employees, East Ohio Stone Co., and the communities that will see increased truck activity to and from aggregate distribution terminals. On the other hand, if the Board grants Wyandot's request, it will simply be imposing a condition that preserves exactly a 10-mile trackage rights operation exercised today by Conrail.

E. W&LE service between Carey and Alliance is not an acceptable "solution" to the harms Wyandot will experience as a result of the Transaction

As is evident from Part II, Summary of Requested Relief (above), Wyandot has since October 21, 1997, re-assessed its rail service options, and has withdrawn its request to obtain single line service from Carey to Alliance via the W&LE. Wyandot's reason for withdrawing Condition No. 5 is quite simple. Wyandot simply cannot afford to devote nearly all of its rail traffic to one carrier. W&LE is already Wyandot's largest rail service provider,[19] and diverting the existing East Ohio Stone Co.

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[18] "Intermodal diversions may result in public benefits... rail service that attracts traffic away from other modes is a benefit because shippers can be provided with a more fuel-efficient transportation service." Id.

[19] Wyandot acknowledges that W&LE's single-line service is essential to Wyandot's financial well being.

traffic to a W&LE route would only make Wyandot that more dependent upon one railroad. In fact, were the Board to impose W&LE trackage rights access to East Ohio Stone Co. as a condition to the Transaction -- particularly in the absence of the relief requested in Conditions 1 through 4 -- W&LE would control about 85% of all of Wyandot's rail traffic.

Wyandot recognizes that, for NS and CSX, Wyandot's aggregate business may not be as appealing as other commodities. This may be one of the key reasons why the Applicants are so reluctant to do the responsible thing and provide for NS trackage rights between Carey and Upper Sandusky, OH. Indeed, the Applicants' behavior toward other Ohio shippers of stone and like commodities (Martin Marietta Materials and National Lime and Stone Company, for example) shows a uniform intent to virtually abandon stone traffic where possible.[20]

Whatever truly motivates the Applicants to resist NS single-carrier aggregate service between Carey and Alliance, it is not enough to justify forcing Wyandot into the untenable position of "putting all of its eggs into one basket." Like most shippers, Wyandot finds it in its economic best interest <u>not</u> to commit nearly all of its traffic to a single railroad.[21] For the

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[20] Because the Applicants manifest such an apparent aversion to handling additional aggregate traffic, Wyandot has requested in Condition 4 that it retain the right to designate another carrier (other than either of the Applicants) to operate between Carey and Alliance.

[21] In fact, not only would a W&LE trackage rights "solution" for Carey to Alliance traffic require Wyandot to devote more traffic to W&LE, it would only further concentrate in

Board either to deny altogether Wyandot's requests for relief, or to "solve" Wyandot's problems by way of expanding W&LE operations would permit NS and CSX out of a problem that ought best to be esolved by those who would seek create it in the first place. In fact, it would be contrary to established Board and ICC policy to impose upon W&LE (not one of the Primary Applicants) a condition that, if rejected or unsuccessfully carried out by W&LE, would impede consummation of the Transaction. See, Boston & Maine Corp. -- Trackage Rights, 360 I.C.C., 239, 241-242 (June 20, 1979). Thus, the Board ought first to look to those who create a problem when imposing Transaction-related relief -- in this case, NS and CSX, and not W&LE.

F. The Applicants' Settlement Agreement with the National Industrial Transportation League does not adequately address the adverse consequences of the Transaction

Wyandot is aware that the National Industrial Transportation League ("NITL") has executed an agreement with NS and CSX which, in part, purports to address "1-to-2" situations. That agreement will do virtually nothing for Wyandot. A section of that agreement (hereinafter, the "NITL Agreement") identified as Section E - "Interline Service," provides that, for such traffic as Wyandot's Carey - Alliance aggregate, the Applicants will retain in effect for three years after consummation of the Transaction the existing Conrail rate (subject to RCAF-U

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the hands of W&LE those eastern stone markets in which Wyandot competes.

increases), and that the Applicants will "work with ['1-to-2' shippers] to provide fair and reasonable joint line service." This is a provision that fails to provide Wyandot any sort of true future assurances concerning its East Ohio Stone Co. business.

The NITL Agreement will not help Wyandot for three reasons. First, the NITL Agreement fails adequately to address the reduction in service that will assuredly accompany the joint-line service Wyandot would receive. Second, it does not address car supply. Third, and most importantly, it would <u>at best</u> protect Wyandot's access to East Ohio Stone Co. for only three years, whereupon it is altogether certain that this business would evaporate for reasons explained above. For short-haul business such as Wyandot's aggregate traffic to Alliance, the NITL Agreement is nothing more than a three-year "stay of execution." No matter how "fair" or "reasonable" Applicants' joint line service might be between Carey and Alliance, it will under no circumstances be enough to keep the traffic moving three years after consummation of the Transaction.

V. CONCLUSION

Wyandot Dolomite, Inc. is a small, family-owned business located in northwestern Ohio. The commodities it ships are largely dependent upon rail, and most of Wyandot's production is transported by train. Because the aggregate Wyandot sells is by its nature a fungible and low value commodity, Wyandot's

ability to sell its product is constrained by geography -- the further away the consumer, the more expensive the delivered product no matter the transportation mode. The highly-touted expanded single-line service the Applicants promise as a benefit of the Transaction has no meaning to Wyandot. As a practical matter, Wyandot will not, as a result of the Transaction, find itself enjoying competitive rail access to markets for which it is now non-competitive.

Wyandot can perceive no instances where it would be benefitted by the Transaction, and neither, it appears, do the Applicants. Instead, as all parties acknowledge, Wyandot will only suffer harm as a consequence of the potential loss of single carrier service to East Ohio Stone Co. -- one of Wyandot's key customers. The only question becomes whether the harm Wyandot has demonstrated it will suffer as a result of the Transaction is the sort that the Board has the ability and duty to remedy.

In the preceding sections, Wyandot has shown that prior ICC and Board precedent, the public interest objectives contained in 49 U.S.C. §11324, the Rail Transportation Policy of 49 U.S.C. §10101, and the "essential services" standards set forth in Lamoille Valley mandate the relief that Wyandot seeks from the Board. As far as the specific relief Wyandot seeks (NS single line service between Carey and Alliance), it is intended not only to preserve certain railroad operating efficiencies that Wyandot enjoys today, but it is also designed to protect the essential services upon which Wyandot currently depends.

The scope of the relief Wyandot requests is narrowly-tailored to remedy the harm. The trackage rights to be granted to NS (along with the attendant rights and responsibilities NS would assume) involve only about 10 miles of trackage, and would replicate exactly trackage rights Conrail currently possesses and exercises between Upper Sandusky and Carey, OH. (Wyandot again makes clear that W&LE service between Carey and Alliance, as a "substitute" for NS single line service, would be contrary to Wyandot's best interests. In that regard, Wyandot asks the Board whether it is in the public interest to force a shipper to more completely rely upon the services of only one carrier when other railroads are also available.)

Wyandot urges the Board carefully to consider the interests of the smaller parties to this proceeding, because Wyandot may very well qualify as one such "smaller party." Despite its relative size and its overall impact on the transaction, Wyandot's concerns, and the harms it has shown it will suffer absent appropriate Board action, are no less important to it or to the markets it serves in this corner of the midwest. The Board must not lose sight of its duty to protect the public interest, and it must not ignore smaller shippers -- such as Wyandot -- that the Board is uniquely capable to protect against avoidable abuses. For these reasons, Wyandot Dolomite, Inc. respectfully requests that the Board impose the four

protective conditions set forth above, should it approve the subject Application.

Respectfully submitted,

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Counsel for Wyandot Dolomite, Inc.

DATED: February 23, 1998

Rail Carriers Serving Wyandot as of 10/21/97

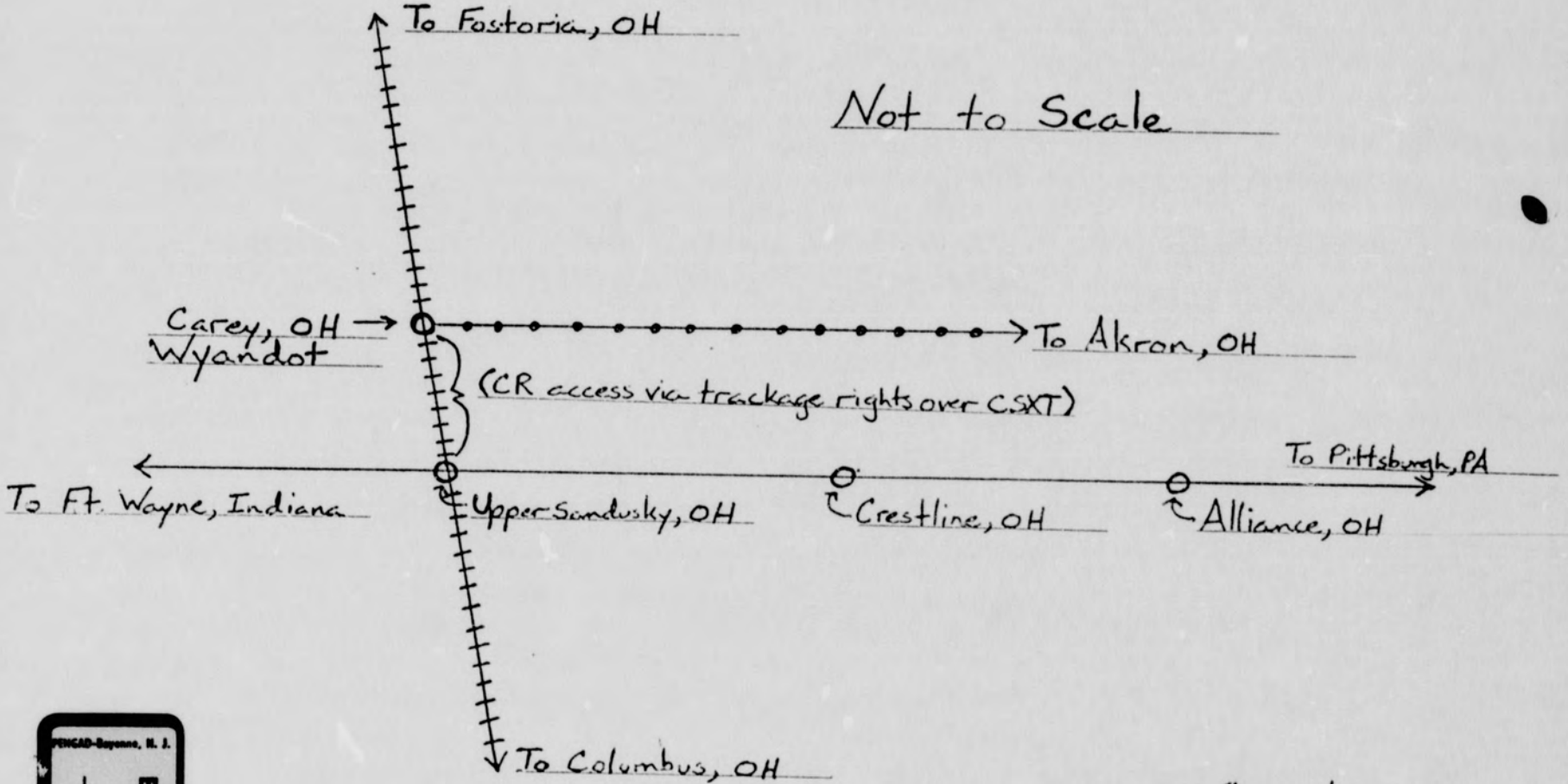

EXHIBIT A

[redacted]

Interrogatory No. 5. For each movement for which the answer to Interrogatory No. 4 is affirmative, please state:

a. For 1995 and 1996, the annual volume of the product that moved via barge in tons and as a percentage of Wyandot's total volume of sales of the product;

b. The transportation rate in dollars per ton;

c. The scheduled and average actual transit time for the barge movement from origin to destination.

Answer:

Since no such traffic moved by barge, there is no

information exists that is responsive to Interrogatory No. 3.

Interrogatory No. 6. Identify each person to whom Wyandot shipped or from whom Wyandot received any product since January 1, 1995, that was shipped by joint-line rail movement (whether or not shipping was arranged by Wyandot or the customer) and separately for each such person state:

a. The products by their 5-digit STCC codes;

b. The origin points of any joint-line rail movements;

c. The destination points of any joint-line rail movements;

d. The locations of each interchange point involved in a joint-line movement;

e. Separately for each product sold to that person and for each joint-line rail movement, state:

(i) the annual volume of product shipped expressed in carloads and tons and as a percentage of Wyandot's total volume of sales of the product;

(ii) the annual volume of product shipped expressed in dollar revenues exclusive of the cost of rail shipment;

EXHIBIT B

[redacted]

(iii) the annual price, rate, or charge of the shipment.

Answer:

The only such shipments took place in 1995 as follows:

Leek Materials Co. - Midvale Plant (Midvale, OH)
Mr. Tony Leek
124 Darrell Rd.
Akron, OH 44305

a. STCC Code 14219

b. Wyandot Dolomite, Inc. (Carey, OH)

c. Midvale, OH

d. Brewster, OH

e. Leek Materials / Midvale, OH

i. 1995 Leek Materials:
[redacted] car loads; 20,827 total tons
2% of total sales

ii. [redacted] in total revenue

iii. 1995 rail rate = [redacted] per ton
Origin = Wheeling & Lake Erie RR
Destination = R.J. Corman RR
(R.J. Corman's rate is not known)

Miller Mining Co.
Mr. Olan Miller
P.O. Box 525
Sugarcreek, OH 44681

a. 14219

b. Wyandot Dolomite, Inc. - Carey, OH

c. Sugarcreek, OH

d. Brewster, OH

e. Miller Mining Co.

[redacted]

i. 1995 Miller Mining Co.:
243 carloads; 24,346 total tons
2% of total sales

ii. $[redacted] in total revenue

iii. 1995 rail rate = $[redacted] per ton
Origin = Wheeling & Lake Erie RR
Destination = Ohio Central RR

Interrogatory No. 7. Identify all documents constituting, referring to, or relating to any study or consideration of joint-line rail shipments of Wyandot's products to any person identified, or which should be identified, in response to Interrogatory No. 6.

Answer:

Wyandot has no such documents. However, all documents that are in some way responsive in these interrogatories are included with this response, and have been added to Wyandot's document depository.

Interrogatory No. 8. Identify each person to whom Wyandot has offered to sell but has not yet sold any product for delivery after the date of service of this document that Wyandot expects will be shipped by joint-line rail movement (whether or not shipping was or will be arranged by Wyandot or the customer) and separately for each such person state:

a. The products by their 5-digit STCC codes;

b. The origin points of any expected joint-line rail movements;

c. The destination points of any expected joint-line rail movements;

d. The locations of each interchange point involved in any expected joint-line movement;

e. Separately for each product offered to that person and for each expected joint-line rail movement, state:

(i) the annual volume of product expected to be shipped expressed in carloads and tons and as a percentage of Wyandot's total volume of expected sales of the product;

(ii) the annual volume of product expected to be shipped expressed in dollar revenues exclusive of the cost of rail shipment;

(iii) the annual price, rate, or charge of the expected shipment.

Answer:

There is only one such person as follows:

R&J Trucking
Mr. Mark Carroe
8063 Southern Blvd.
Boardman, OH 44512

a. STCC Code 14219

b. Carey, OH

c. Youngstown, OH via Conrail and the Ohio Central RR

d. Interchange at Hazelton Yard in Youngstown, OH

e. (i) approximately 2,000 to 4,000 car loads; 200,000 to 400,000 tons; projected 12 to 25% of Wyandot's anticipated 1998 total stone sales.

(ii) Projected total annual revenues of approximately [redacted] to [redacted]

(iii) Price, rate, charges are still under negotiation. However, it is highly unlikely at this time that Wyandot will successfully secure this contract because the rail service costs associated with this proposed joint line move are, as yet, too high.

Interrogatory No. 9. Identify all documents constituting, referring to, or relating to any study or consideration of joint-line rail shipments of Wyandot's products to any person identified, or which should be identified, in response to Interrogatory No. 8.

CERTIFICATE OF SERVICE

I, Robert A. Wimbish, hereby certify that I have this 23rd day of February, 1998, served true copies of the foregoing Brief of Wyandot Dolomite, Inc., upon counsel for the Primary Applicants via messenger delivery and upon ALJ Jacob Leventhal and all parties of record by means of U.S. mail, first class postage prepaid, or by means of more expeditious delivery.

Robert A. Wimbish

STB FD . 33388 2-23-98 E . 185876

U. S. Department of Justice

Antitrust Division

185876

325 7th Street, N.W., Suite 500
Washington, DC 20530

February 23, 1998

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

Re: Conrail Control Case -- STB Finance Docket No. 33388

Dear Secretary Williams:

I am enclosing for filing an original and 25 copies of the Brief of the United States Department of Justice (DOJ-2). Our Brief contains highly confidential material and so it should be filed under seal. I am also enclosing 25 copies of a public (redacted) version of our Brief. Finally, I am enclosing two 3.5 inch disks containing the highly confidential and public versions of our Brief in Word Perfect 6.1 format.

We are serving the highly confidential and public versions of this filing on the Applicants and all other Parties of Record known by the Department to be entitled to access to highly confidential material under the protective order in this proceeding. All other Parties of Record who are not on the highly confidential restricted service list will receive the public version of this filing.

Thank you for your assistance in this matter. If you have any question please feel free to call me at 202-307-6357.

Sincerely yours,

Michael P. Harmonis

Michael P. Harmonis
Attorney
Transportation, Energy and
Agriculture Section

Enclosures

cc: The Honorable Jacob Leventhal
Parties of Record

STB FD 33388 2-23-98 E 185872

185872

BEFORE THE
SURFACE TRANSPORTATION BOARD

ARU-32

Finance Docket No. 33388

CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corp. and Norfolk Southern Ry. Co.--Control and Operating Leases/Agreements--Conrail Inc. and Consolidated Rail Corporation Transfer of Railroad Line by Norfolk Southern Railway Company to CSX Transportation, Inc.

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Date: February 23, 1998

BEFORE THE
SURFACE TRANSPORTATION BOARD

ARU-32

Finance Docket No. 33388

CSX Corporation and CSX Transportation, Inc.,
Norfolk Southern Corp. and Norfolk
Southern Ry. Co.--Control and Operating
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Date: February 23, 1998

TABLE OF CONTENTS

INTRODUCTION

This brief is submitted by the Allied Rail Unions (ARU)[1] in connection with the Board's consideration of the application of by CSX Corp. and its subsidiaries ("CSX") and Norfolk Southern Corp. and its subsidiaries ("NS") for Board approval of their acquisition of control and division of the Consolidated Rail Corp. ("Conrail"), as well as the operation of portions of the current Conrail lines by their subsidiaries, CSX Transportation ("CSXT") and Norfolk Southern Railroad ("NSR").[2]

In their Comments, the Allied Rail Unions asserted that the Transaction should be denied as inconsistent with the public interest because of its likely adverse effects on rail employees, on the safety of railroad operations and on competition in the Northeast; and because the Applicants have failed to demonstrate that there will be sufficient public benefits from the Transaction to justify its approval given its likely adverse impacts.

The ARU further contended that if the Board does approve the Application, such approval should be accompanied by declarations that current rates of pay, rules and working conditions and other rights, privileges and benefits under existing collective bargaining agreements ("CBA") must be preserved; that Applicants have failed to demonstrate any necessity for overriding any terms of existing CBAs; and, that any approval of the Application would not constitute explicit or implicit

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[1] "Allied Rail Unions" means the American Train Dispatchers Department/BLE ("ATDD"), Brotherhood of Locomotive Engineers ("BLE"), Brotherhood of Maintenance of Way Employes ("BMWE"), Brotherhood of Railroad Signalmen ("BRS"), International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers ("IBB"), International Brotherhood of Electrical Workers (IBEW), The National Conference of Firemen & Oilers/SEIU ("NCFO"), Sheet Metal Workers' International Association ("SMWIA"), and Transport Workers Union ("TWU").

[2] CSX and NS will be referred to jointly herein as "Applicants", their application will be referred to herein as "Application" and the proposed acquisition of control and division of Conrail and the separate operation of its lines by CSX and NS will be referred to herein as the "Transaction".

sanction for Applicants' plans to abrogate or modify existing CBAs. The ARU believes that such declarations would be necessary because the Applicants have acknowledged that they will use any approval of the Transaction as support for their planned CBA changes. Applicants seek to enlist the government as their agent for reordering their private relations with their employees. Such an outcome would not only be inconsistent with the ICCTA, it would undermine the Railway Labor Act ("RLA"), 45 U.S.C. §151 *et seq.* and be destructive of labor relations in the railroad industry. The potential adverse consequences include subversion of the statutory scheme governing labor relations in this industry; continuing litigation involving labor, management and the Board; poor employee morale which will adversely affect service; and, possibly the exercise of self-help in response to unilateral action by the Applicants. *See United States v. Lowden*, 225,233-236 (1939), *see also* the history of railroad industry labor relations since 1983 and the Federal Railroad Administration reports on UP and CSXT.[3]

Applicants have filed an extensive response to the ARU Comments (approximately one-fifth of Applicants' Rebuttal, CSX/NS-176 ("Rebuttal"), is devoted to responding to labor issues). This brief will summarize and emphasize the key points in the ARU Comments and will

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[3] In its Comments the ARU noted that implementation of CBA changes outside RLA processes was violative of the RLA and ICCTA, and that "unions", generally (not all ARU Unions), would respond by striking. Comments at 57. ARU also noted that several organizations intended to follow longstanding industry practice and negotiate under the RLA with respect to the impact of the Transaction on employees, and that those organizations would be justified in responding to unilateral changes by resorting to self-help (Comments at 78-79). Applicants claim that they understood these two generally worded phrases in a 163 page document to mean that all of the ARU unions had decided to serve section 6 notices and to strike. This apparent perception of Applicants seems to have been predicated on a deliberate misreading of general and ambiguous language and/or a failure to actually read the declarations submitted by the ARU (particularly those referred to in connection with the cited remarks) which clearly indicated that only one ARU Union (BRS) had actually decided to serve Section 6 notices, only one ARU Union (BLE) was then considering such a course of action, that the other ARU Unions were silent on that point and that no union expressed plans for a strike. *E.g. compare* Mason Declaration (particularly ¶6) with Fleming Declaration. To date only BRS has served a Section 6 notice and no organization has any current intent to strike.

respond to Applicants' rebuttal. ARU respectfully refers the Board to the Comments for more detailed discussion of the facts and all of the ARU legal arguments. ARU also respectfully refers the Board to the recent article by William G. Mahoney in the *Transportation Law Journal* Vol. 24, No. 3 (Spring/Summer 1997), *The Interstate Commerce Commission Surface Transportation Board as Regulator of Labor's Rights and Deregulator of Railroads' Obligations: The Contrived Collision of the Interstate Commerce Act with the Railway Labor Act* ("Mahoney Article"), with respect to the historical development of the issues relating to the effect of ICC/STB decisions on CBA rights and the startling transformation of the ICC/STB into a heavy-handed labor relations regulator in the name of transportation deregulation.

ARGUMENT

I. APPLICANTS HAVE FAILED TO SHOW THAT APPROVAL OF THE TRANSACTION IS IN THE PUBLIC INTEREST

In order to approve the Application, the Board must find that Applicants have demonstrated that the Transaction is consistent with the public interest; special emphasis applies to the interests identified at 49 U.S.C. §11324(b), but the Board's responsibility includes assessment of the public interest generally (*McLean Trucking Co. v. United States*, 321 U.S. at 67, 80). The evidence and argument offered by Applicants are not sufficient to support a finding that the Transaction is consistent in the public interest.

A. Effects On Employees

As ARU noted in its Comments, Applicants' own filings in this proceeding demonstrate that the transaction is likely to have significant adverse impact on the employment of rail workers, in that more than 4,000 positions (hopefully 2,900 net) will be eliminated and more than 2,300 jobs will be transferred to distant locations. Applicants have sought to minimize the significance of this aspect of the Transaction by describing the job losses and transfers as relatively insignificant

and suggesting that their projections for possible increases in employment in the future should mitigate the adverse effect of the Transaction on employees. Rebuttal at 572, 577. However, the loss of a job or transfer to a work location hundreds of miles distant are not insignificant to the employees involved or their families. Moreover, Applicants have stated that the heaviest employment impact will be in the maintenance of way, carmen and clerical crafts; and Applicants have not suggested that the increases in hiring that they project will be in any of the crafts that will suffer significant job losses (Rebuttal at 572). The ARU therefore submits that the projected job losses and transfer impacts of the Transaction demonstrate that it would not be consistent with the public interest as expressed in 49 U.S.C. §11324(b)(4). *See Great Northern Merger*, 328 ICC 460, 481 (1966) in which a merger application was denied because of its likely negative impact on employees and communities.

Another very significant impact of the Transaction on employees (absent issuance of the declarations sought by ARU) is that the CBA and general RLA rights of Applicants' employees will be abrogated by Applicants under color of STB approval of their Application. And the loss of these contract rights would not be compensated under the monetary benefits provisions of the New York Dock conditions because those provisions protect employees only from losses in earnings and moving expenses, not losses in non-compensation contract rights. The Board is obligated to consider Applicants' plans in this regard as militating against approval of the transaction not only because of Section 11324(b), but also because of the Board's obligation to consider the requirements and policies of other federal laws.

The Supreme Court has repeatedly held that the ICC/STB may not act as if the legal environment for its decisions is limited to its own statute. Rather, it must consider the commands and policies of other laws and attempt to accommodate other laws by limiting its decisions so that it does not "trench upon" other laws, and by minimizing any conflicts that cannot be prevented.

McLean Trucking, supra.; *Burlington Truck Lines v. United States*, 371 U.S. 156 (1963); *Denver and Rio Grande Western R.R. v. United States*, 387 U.S. 485 (1967). *See also New York Shipping Ass'n. v. FMC*, 854 F. 2d 1338 (D.C. Cir. 1988).

In *McLean Trucking* the Court stated that the ICC was required to consider the anti-trust laws and could not "disregard their policy". 321 U.S. at 86. In *Burlington Truck*, the Court stated that must be careful to account for the possible effects of its decisions "on the functioning of the national labor relations policy"; that the Commission acts in a "most delicate area" when its decisions can affect the labor laws; that the "policies of the Interstate Commerce Act and the labor act necessarily must be accommodated one to the other"; and, that the ICC must take care not to "trench upon" the labor law because its decision could contravene national labor policy. 371 U.S. at 172-173. In *Denver Rio Grande and Western*, the Court reiterated its statement in *McLean* that "in executing [the policies of the ICA] the Commission may be faced with overlapping and at times inconsistent policies embodied in other legislation enacted at different times and with different problems in view. When this is true, it cannot, without more, ignore the latter." 387 U.S. at 494.

More recently, the D.C. Circuit followed the Supreme Court's holdings in these cases in its *New York Shipping* decision. The D.C. Circuit stated that when there is a possible conflict between an agency's enabling statute and another law, the agency is required to identify the relevant polices of the other law, analyze its potential courses of actions and their effects on the other law, attempt to act in accordance with its enabling statute without infringement on the other law, attempt to minimize any conflict; and if conflict cannot be averted, it must explain why there are no alternatives to a decision that will result in a conflict and how the course taken minimizes potential conflict. 854 F. 2d at 1363-65, 70. The Court further noted that these obligations were especially forceful when "the agency's organic legislation" specifically requires consideration of

the public interest such that the policies of other laws are effectively incorporated into the agency's own enabling statute. *Id.* at 1371-72. Thus, the Supreme Court has repeatedly held, over a thirty-year period, that the ICC must consider the policies of other laws, and the D.C. Circuit noted the continuing vitality of that line of cases and provided specific guidelines as to how agencies are to demonstrate that they have given due and adequate consideration to laws other than their enabling statutes.

Recent ICC/STB decisions have failed to comply with this precedent with respect to the commands and policies of the RLA. The Commission/Board has either ignored the RLA, or blithely asserted that the RLA and RLA-based CBAs must give way in all respects whenever a railroad claims that the RLA or a CBA will somehow impede its goals or prevent attainment of maximal cost savings to be derived from changes in operations, even those that are tangential or remotely related to the underlying approved transaction.

From review of the record here it is apparent that Applicants seek the same outcome with respect to this Transaction. As is shown in the ARU Comments, in Applicants' Rebuttal and is emphasized below, implementation of Applicants' Operating Plans would result in significant changes to existing CBAs without compliance with RLA processes. Applicants would simply eliminate the Conrail CBAs and all of their terms for the overwhelming majority of Conrail employees. *See* Operating Plans Vol.s 3A and B, and transcripts of deposition of CSX and NS labor relations V.P.s Peifer and Spenski; *see also*, ARU Comments at 102-127.[4]

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[4] CSX and NS argue that there will be no abrogation of the Conrail CBAs because they will continue to apply in the Shared Asset Areas ("SAA") and in a few other places. But his bit of sophistry will not avail them under the *McLean Trucking* line of cases. Under the plans of CSX and NS as outlined in their Appendices A to their Operating Plans, the vast majority of union-represented Conrail employees will lose their Conrail CBA rights. That is an outcome that should not occur under the approach described in *McLean Trucking*, *Burlington Truck*, *Denver Rio Grande and Western* and *New York Shipping*. The policies of the RLA are concerned with te rights of employees covered by the statute and RLA CBAs, not with CBAs in the abstract, separate from the employees they are designed to benefit.

Applicants actually urge the Board not to accommodate the RLA by limiting conflict with CBAs to selection of forces and assignment of employees mechanisms for creation of consolidated rosters for consolidated territories and facilities (already permitted by the Washington Job Protection Agreement ("WJPA"), with Conrail CBAs to apply in former Conrail territories and facilities. Applicants seek ratification of their plans to effectively eliminate the Conrail CBAs, *and all of their terms*, on all lines and at all facilities to be operated by CSXT and NSR. Applicants would do so even though various former Conrail facilities will be staffed entirely, or almost entirely, by former Conrail employees and there will be no interchange of employees between current CSX and NS facilities and those former Conrail facilities after they come to be operated by CSX and NS. And Applicants plan to apply their own CBAs on various Conrail lines in territories where former Conrail lines and former Conrail employees will clearly predominate. Applicants intend to ignore various Conrail CBA provisions that provide beneficial rates, rules or working conditions to employees even when such provisions would not in any way impede actual operations, solely on the basis of administrative ease or expense.

Applicants have repeatedly defended themselves by asserting that the CSX and NS CBAs contain terms "similar" to those of Conrail CBAs and that, on balance, it is difficult to say whether one agreement is qualitatively more or less beneficial for employees when all terms are considered. *E.g.* Rebuttal at 581, 636-637, 680. Even if these general assertions were to be accepted by the STB at face value they would not excuse the patent RLA violations. The RLA does not provide carriers with a defense that a unilateral change is permissible when new terms may be viewed as relatively similar to old terms, nor does it provide a defense that the loss of one right may be counterbalanced by an arguable gain with respect to some other right. The RLA certainly does not give the carrier or some agency the power to make or authorize unilateral changes in such circumstances. Thus, Applicants' plans would result in maximal, rather than

minimal conflict with the RLA and approval of their plans would put the Bard in the position of making no effort to accommodate the policies of the RLA. Accordingly, Applicants' plans with respect to CBAs militate strongly against approval of the Application because, unless the Board issues the declarations sought by ARU, approval of the Application would be inconsistent with the requirements of the McLean Trucking line of cases.

B. Efficiency And Safety

The ARU also submits that considerations of safety and adequate service militate against approval of the Application. The problems experienced by UP in absorbing both CNW and SP demonstrate that these large scale consolidations can produce serious service difficulties. Applicants have attempted to minimize these concerns by simply disassociating themselves from UP and by noting their prior consolidation experiences. Rebuttal at 724. However, it is clear that there is no precedent for a split-up like the one planned by CSX and NS, and that the property and traffic to be integrated in this case far exceeds those of prior CSX and NS consolidations. Additionally, prior CSX and NS consolidations did not take place after rampant downsizing through reduction of employment and elimination of lines, yards and sidings. Applicants claim that success of the Transaction depends on increased traffic, but it is questionable whether they have the capacity to safely and efficiently coordinate and move the levels of traffic that they anticipate.

The Federal Railroad Administration has recently issued reports that have disclosed massive safety problems on UP and CSXT, and have noted that many of the problems on those railroads reflected industry-wide trends with respect to reductions in employment and an industry-wide culture where safety is clearly not a primary concern. Applicants have responded to issues raised about post-Transaction safety by saying that "it won't happen to us", but UP surely thought the same thing and CSXT is the subject of one of the two FRA reports. Moreover, as is shown in the ARU response to Applicants Safety Integration Plans (ARU-31), Applicant's

prescriptions for safe operations are less than adequate. Indeed their heavy reliance on promotion of a positive, open safety culture involving workers and their unions based on mutual respect and trust will be undermined by their autocratic labor relations cultures.

This Transaction presents the Board with serious questions about its effects on the adequacy of service and safety of operations after its consummation. Those questions remain unresolved and they therefore militate against approval of the Transaction.

C. Effects Of The Transaction On Competition

If this Transaction is approved there will be two major carriers in the East and two in the West. A transcontinental merger will surely follow. Applicants prefer to look at competition questions on microcosmic level; i.e. what will be the effect of the Transaction on shippers of a particular commodity in a particular area. And the ICC/STB has refrained from looking to the likely impact of a Transaction on future transactions. However, recent experience shows that each transaction approved by the ICC/STB has spawned another one. And experience in the railroad industry has shown that concentration leads to cartels which exploit shippers, communities and workers. This country is headed into a situation in which there will be only a handful of major rail carriers. Such concentration is likely to have an adverse effect on competition generally and it too militates against approval of the Application.

D. Applicants Have Failed to Show That The Balance of Public Interest Considerations Tilts in Favor of the Transaction

Applicants have responded to the concerns raised by the ARU and by others by citing their own "evidence" which they say shows that the Transaction will yield benefits to the public. But, as the ARU noted, Applicants' "evidence" is sheer speculation. Applicants have taken offense at that characterization of their public benefits "evidence" and they have asserted that ARU and others have not refuted their evidence. Rebuttal at 24-25. However, it cannot be disputed that

Applicants' evidence is based on *projections* about what *might* happen with respect to key elements of the Transaction, including but not limited to: new patterns of service, new traffic, competition from other railroads and other modes of transportation and employment. Such evidence is clearly speculative. Additionally, it is precisely the same type of evidence relied upon by UP, which has, to date been shown to be both speculative and wrong.

Moreover, it is not up to ARU or other commentators to prove that the Transaction would not be in the public interest. Applicants seek approval of the Transaction so they must present persuasive evidence and argument that the Transaction would be in the public interest and satisfactorily answer any questions with respect thereto. And it is the job of the Board to decide whether the Transaction is in the public interest based on the record in these proceedings. Applicants have not made such a showing and the record does not permit the Board to make the finding sought by the Applicants.

Furthermore, Applicants have not refuted ARU's showing that $186 million of the projected annual "benefits" of this Transaction are derived from reduction in employment alone; and approximately $280 million of the projected $466 million in projected annual benefits to be derived from operating savings are asserted to necessitate overriding of employee CBA rights. *See* ARU Comments at 35-38, 60; Summary of Benefits, Application Vol. 1 at 124-127. Thus, much of the claimed "public interest benefit" of the Transaction is dependent on diminution of employee rights, so any balancing of the public interest must account for the fact that the claimed advantages to the public-at-large would depend on losses to rail workers. Such a balance of benefits is not sufficient to support a finding that the Transaction is consistent with the public interest.

ARU submits that since Applicants have failed to show that approval of the Application would create a clear net public interest benefit; since Applicants plans would clearly violate the

RLA; and, since Conrail currently provides adequate service, there is no basis for the Board to find that the Transaction is in the public interest under 49 U.S. C. §11324.

II. IF THE BOARD APPROVES THE TRANSACTION, IT SHOULD ISSUE THE DECLARATIONS SOUGHT BY ARU REGARDING THE IMPACT OF THE APPLICATION ON COLLECTIVE BARGAINING AGREEMENT RIGHTS AND DUTIES

ARU submits that if the Board decides to grant the Application, it should condition its approval by issuing declarations that: 1) rates of pay, rules and working conditions and other rights, privileges and benefits of Applicants' employees must be preserved; 2) action at odds with existing CBAs may be effected only upon demonstration that the change is actually necessary to the Transaction (the actual acquisition of control, merger, and division of Conrail for separate operations) in the ordinary usage of the word "necessary", as opposed to when a change is deemed merely convenient or cost effective; 3) no such showing of necessity has been made by the Applicants; and, 4)STB approval of the Transaction would not constitute explicit or implicit endorsement of the CBA changes outlined in the Application. *See* ARU Comments at 53. ARU respectfully submits that it is important for the STB to address these points and to issue the requested declarations for a number of reasons.

First, the issues are squarely raised by the respective filings of the ARU and the Applicants. Applicants revealed their plans to essentially abrogate the Conrail CBAs and presented an alleged legal basis for doing so in their Application. A substantial record on this point was developed in the discovery phase of this proceeding. ARU developed a specific factual record showing that Applicants' plans would involve elimination and modification of numerous CBA rights of Conrail employees. ARU also presented an extensive legal argument on this point and Applicants filed an extensive response in their Rebuttal. Accordingly, the record is fully developed for the Board to address these issues.

Second, as is explained above, the decisions in *McLean Trucking*, *Burlington Truck*, *Denver Rio Grande Western* and *New York Shipping* require that the Board address these issues by identifying the areas of potential ICCTA–RLA conflict, by crafting its decision in order to prevent or minimize such conflict and by justifying any perceived inability to avoid conflict.

Third, after fifteen years of litigation, the law in this area remains inconsistent and unclear. As is explained fully below, the law is not settled as Applicants' claim (Rebuttal at 608, 639). The lead cases are *Norfolk & Western Ry. v. American Train Dispatchers Ass'n.*, 499 U. S. 117 (1990) ("*Dispatchers*") and *Railway Labor Exec.s Ass'n v. U.S.* 987 F. 2d 806 (D.C. Cir. 1993)("*Executives*"). In *Dispatchers* the Supreme Court held that Section 11341(a) (now Section 11321(a)) could override the RLA, but did not address whether Art. I §2 of the *New York Dock* conditions independently preserves CBA rights. Executives generally held that while Art. I §2 mandates the preservation of CBA rights though not every "word" of a CBA confers a right that must be preserved; and, that CBA rights may be overridden only on showing of necessity for sufficient public transportation purpose. Both cases are still on remand for ICC/STB formulation of a coherent rationale. The post- *Dispatchers* and *Executives* cases in the D.C. Circuit (*American Train Dispatchers Ass'n v.* ICC, 26 F. 3d 1157 (D.C. Cir. 1994) ("*ATDA v. ICC*"), and *United Transportation Union v. STB*, 108 F. 3d 1425 (D.C. Cir. 1996) ("*UTU v. STB*")), have affirmed only that scope and seniority rules may be overridden when necessary to achieve a public transportation benefit, and not that any CBA right may be ignored whenever it is cost effective to do so. STB case law is also confused. In 1983 and 1985, the ICC broke with many years of precedent and held that CBA provisions must give way to carrier implementation plans. In 1990, in *CSX Corp-Control- Chessie System, Inc. et al.*, 6 ICC 2d 715 (1990) ("*Carmen II*"), the ICC backtracked some and held that the 1983 and 1985 decisions had gone too far, and that Art I §2 does preserve CBA rights. Recent decisions have essentially returned to the 1983/1985 approach

without overruling Carmen II or explaining the inconsistency. Thus, it is important that the Board actually attempt to articulate a coherent rationale in this area in a concrete factual setting such as this case where the facts have been developed and the issues have been fully joined.[5]

Fourth, recent ICC/STB decisions have perverted the role of the STB so it and its arbitrators now effectively micro-manage railroad industry labor relations by providing government sanction for carrier initiated changes in CBAs through mandatory interest arbitration and mandatory STB review of arbitral awards. And this unprecedented regulation of labor is all justified in the name of deregulation of the industry. This development has been destructive to labor relations in the railroad industry, and given the scope of the Transaction here, failure to deal with the issues raised by the ARU will extend such destruction to most rail workers east of the Mississippi.

Because of the importance of ARU's requested declarations to labor relations in the railroad industry and the proper role for the STB, ARU respectfully submits that the Board must address the issues raised by those declarations. Due to the contradictory presentations offered by ARU and the Applicants, this brief will review the statutes, controlling precedent and the historical development of the law in this area, and will then show that given the stated plans of the Applicants regarding the CBA rights of their employees, the Board should issue the declarations sought by ARU if the Application is approved.[6]

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[5] Applicants accuse the ARU of failing to acknowledge that it seeks a change in current ICC/STB law. Rebuttal at 608. ARU did not intend to be mysterious about this, and believed its position to be self-evident. While the appellate decisions on this subject have affirmed STB decisions in the very narrow areas of scope and seniority, recent ICC/STB decisions on this subject have been very broad, erroneous and contrary to prior authority regarding abrogation of CBA rights generally (even at odds with the *Carmen II* decision). ARU does indeed seek a reversal of recent ICC/STB caselaw on Art. I §2.

[6] ARU also notes that it concurs in the United Transportation Union's argument that employee of the Delaware & Hudson Ry. be covered by the New York Dock protections imposed in this proceeding because of the serious impact approval of the Transaction will have on those

A. Applicants' Plans To Abrogate The Terms of the Conrail CBAs Are Clearly Contrary To The RLA And Are Not Permitted By The Plain Language Of The ICCTA

1. Applicants' Plans To Change The CBA Terms Applicable To Conrail Workers Through STB Order And STB Compulsory Arbitration Are Violative Of The Most Fundamental Elements Of The Railway Labor Act

The Railway Labor Act requires railroad labor and management to "exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions". 45 U.S.C. §152 First. Carriers are prohibited from changing existing rates of pay, rules and working conditions except pursuant to the notice, negotiation and mediation procedures of RLA Section 6. 45 U.S.C. §§2 Seventh and 6. In *Detroit and Toledo Shore Line R.R. v. UTU*, 396 U.S. 142 (1969), the Supreme Court held that the RLA was designed to prevent strikes over the formation or change of CBAs by providing "an elaborate machinery for negotiations, mediation, *voluntary* arbitration and conciliation" with a requirement that each party make every reasonable effort to make and maintain agreements and to refrain from changing the status quo until the negotiation/mediation machinery is exhausted. *Id.* at 149 (emphasis added). The Court noted that the status quo requirement is central to the design of the RLA in that it can prevent strikes by restricting the ability of carriers to unilaterally change CBAs. *Id.* at 152-153, 152 n. 19, 155. However, the RLA specifically rejected *compulsory* arbitration of CBA terms. *Id.* At 148, 149 n. 14; *see also* 45 U.S.C. 157. The RLA is entirely "process oriented". The statute mandates participation in negotiation and mediation, but it is indifferent to the terms that are ultimately obtained whether by agreement, mediation or exercise of self-help upon completion of the Act's processes. In *Terminal R.R. Ass'n. v. BRT*, 318 U.S. 1,6 (1943), the Supreme Court stated that the RLA is designed to provide a means by which agreement may be reached, the terms reached

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employees.

"may be as bad as the employees may tolerate or be made good as they can bargain for", it "does not fix or authorize anyone to fix generally applicable standards for working conditions".

Thus, two fundamental elements of the RLA are a requirement that labor and management refrain from altering the status quo until statutory dispute resolution processes are completed, and a limitation of government involvement to mediation and voluntary arbitration with compulsory interest arbitration specifically rejected. Applicants' plans to move the vast majority of Conrail workers to their own CBAs, without any preservation of any terms of the Conrail CBAs and without compliance with RLA processes would be clearly contrary to the RLA.

2. Neither The Plain Language Of The ICCTA Nor Decisions Regarding Its Purpose Support Applicants' Claim That An STB Order Or STB Arbitration Decision Can Authorize Them To Change The Rates Of Pay, Rules And Working Conditions For Conrail Workers

The relevant portions of the ICCTA here are those pertaining to control and merger transactions; originally Section 5, then Sections 11341-47 and now Sections 11321-26. As is discussed above, Sections 11323 and 11324 provide that carriers and persons who control carriers may engage in mergers and control transactions only upon STB determination that such transactions are consistent with the public interest generally, and with the specific public interests identified in Section 11324(b). These provisions of the statute were enacted as a reaction to inadequacy of the rail transportation system that had developed prior to World War I. *St. Joe Paper Co. v. Atlantic C. L. R.R. Co.*, 347 U.S. 298, 305, 317 (1954). The 1920 Act sought to promote efficient rail transportation by encouraging consolidations, notwithstanding general anti-trust concerns; by authorizing the ICC to approve consolidations deemed to be in the public interest; and by formation of a master plan for national consolidations. *Id.* at 304-306, 317-320, *Lowden, supra.*, 308 U.S. at 232; *County of Marin v. United States*, 356 U.S. 412, 417. The 1940 Act rejected the master plan and forced consolidations under such a plan. That Act accepted the

notion that consolidations were to be encouraged but would remain permissive, and transactions that were not consistent with the public interest would be rejected. *St. Joe Paper*, 347 U.S. at 304-306; *County of Marin*, 356 U.S. at 417.

Because the consolidations which were to be encouraged would adversely affect rail workers, because the RLA-based WJPA did not cover all railroads and because ICC devised employee protections were not mandatory, the 1940 Act required the ICC to impose conditions for the protection of employees on approvals of merger, control and other multiple carrier transactions. *Dispatchers*, 499 U.S. at 132-33; *New York Dock Ry. v. ICC*, 609 F. 2d 83, 87-88 (2d Cir. 1979) ("*New York Dock v. ICC*"). The statutory employee protection requirement is now expressed in Section 11326; after augmentation in 1976, it provides that in connection with approval of a transaction under Section 11324, the Board shall require the carriers involved in an approved transaction to provide employee protections at least as protective as those imposed under former Section 5(2)(f) and those established under 49 U.S.C. §24706(c) [formerly Section 405 of the Rail Passenger Service Act]. This requires that the protections imposed must be at least as protective of employees as both the former New Orleans conditions and the Amtrak C-1 conditions.[7] Among the C-1 protections that were imported into the protections applied by the ICC/STB in compliance with Section 11326 is the requirement that rates of pay, rules and working conditions and other rights privileges and benefits be preserved. *New York Dock Ry. Control BEDT*, 360 ICC 60, 84 (1979) ("*New York Dock*"). Once a transaction is approved, the carriers and persons involved are exempt from other laws to the extent necessary to let them

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[7] ARU realizes that some, including former ICC Associate General Counsel John McCarthy, have argued that the statute does not requires imposition of protections at the C-1 level, but only the specific protections identified in Section 405 of the RPSA. However, that contention was expressly rejected in *New York Dock v. ICC*. Some, including Mr. McCarthy have argued that the D.C. Circuit broke with the Second Circuit on this point. ARU will demonstrate below that such a claim is spurious. The D.C. Circuit never expressed such intention and ICC decisions have specifically held that the statute requires C-1 level protections.

carry out the approved transaction.

Thus the goal of the RLA is to encourage peaceful resolution of disputes over rail industry rates of pay, rules and working conditions through statutory procedures short of compulsory arbitration. The goal of the relevant sections of the ICCTA is to authorize consolidations that are in the public interest with the assurance that other laws will not prevent them from going forward, but subject to protections for affected employees including preservation of their existing rates of pay, rules and working conditions.

3. The Language Of The Statutes And The Caselaw Concerning Their Interaction Refute Applicants' Claim That The ICCTA Permits Them To Abrogate The CBA Rights Of Conrail Workers

There is no inherent conflict between the RLA and the ICCTA, indeed, until recently, labor relations issues related to consolidations were resolved by negotiations. *See* Mahoney Article at 257-258; Mahoney Declaration ARU Vol. III at 206-213. In the event of an actual conflict, Section 11321(a) can exempt the carriers involved from an RLA violation, but only to the extent necessary to carry out the approved transaction. *Dispatchers*, 499 U.S. at 127-132. Moreover, as is noted above, the STB is required to craft its decisions so as to avoid or minimize conflict with the RLA. *McLean Trucking*, *Burlington Truck*; *see also Pittsburgh & Lake Erie R.R. v. RLEA*, 491 U.S. 490 (1989)–RLA and ICA should be read to give effect to each statute; rail unions are not required to seek or be bound by ICA protections. *Id.* at 510, 514. Since the status quo provision of the RLA is central to its design, and since the RLA specifically rejected compulsory arbitration of disputes over changes in rates of pay, rules and working conditions, the Supreme Court's holding that the ICC/STB must attempt to avoid conflict with the RLA and must minimize any actual conflict is especially forceful here where Applicants seek to abrogate all terms of the Conrail CBAs for most Conrail employees and to instead unilaterally apply the rates

of pay, rules and working conditions under their own CBAs to those employees.[8]

Additionally, Art. I §2 of the New York Dock conditions is a specific ICCTA-based mandate for preservation of rates of pay, rules and working conditions and other rights privileges and benefits under applicable CBAs. Indeed it would be hard to imagine how a provision to protect CBA rights could have been framed more clearly and affirmatively. Article I §2 specifically used the RLA phrase *"rates of pay, rules and working conditions"* and then made reference to other "rights privileges and benefits", then used the language of command, *"shall"*[9], and then used the word *"preserved"*, which cannot reasonably be understood to permit abrogation, change or modification. The plain language of Art. I §2 is clear, affirmative and mandatory; if carriers are held to compliance with its express terms, there is no conflict between the RLA and ICCTA.

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[8] Applicants dispute the assertion that they plan unilateral changes, noting that they intend to employ *New York Dock* "negotiations" and then "arbitration". Rebuttal at 611. But as is shown above, even if they have properly characterized *New York Dock* arbitration that would not eliminate the conflict with the RLA which expressly rejected compulsory arbitration of changes in CBAs. In any event, as ARU noted in its response to the Draft Environmental Impact Statement (ARU- 31 at 4-7), the sort of negotiations and arbitration that have occurred in recent years under *New York Dock* could not reasonably be characterized as bilateral. The process has become one whereby arbitrators and the Board rubber-stamp the plans of the carriers, and when an arbitrator fails to accept the position of the carrier, the Board reverses the arbitrator. The ICC took control by holding that *New York Dock* arbitrators are functionally agents of the STB whose decisions are reviewable by the ICC/STB. Additionally, it pronounced that *New York Dock* arbitrations are to ratify any changes designed to realize that sort of efficiencies that the carriers presumably desired in effecting the approved transaction even when that is merely a reduction in labor costs. *CSX-Corp. Control--Chessie System, (O'Brien Review Decision)* F.D. No. 28905 (Sub-No. 27) (12/7/95). Moreover, the ICC/STB has reduced Art. I §2 of the *New York Dock* conditions to virtual meaninglessness. Id. As a result, arbitrators have begun to simply impose the plans which the carriers have described. *E.g. O'Brien Review Decision* and decisions cited in Applicants' Rebuttal at 659-661, 673-674; ARU Vol III at 268). It is therefore entirely appropriate to describe the current *New York Dock* process as unilateral. It certainly is at odds with the RLA.

[9] "Shall" connotes a command indicating that an action is not discretionary. *Anderson v. Yungkau*, 329 U.S. 482,485 (1947); *MCI Telecommunications Corp. v. FCC*, 765 F. 2d 1186, 1191 (D.C. Cir. 1985), *citing Escoe v. Zerbst*, 295 U.S. 490, 493 (1935); *Amalgamated Transit Union v. Donovan*, 767 F. 2d 939, 944 (D.C. Cir. 1985).

Art. I §4 of the conditions does provide a non-RLA mechanism for negotiation of arrangements for selection of forces and assignment of employees pursuant to implementation of an approved transaction, and that mechanism includes mandatory interest arbitration of disputes over appropriate arrangements for selection of forces and assignment of employees. As is explained below, the D.C. Circuit has held that this provision allows for selections of forces and assignment of employees for consolidated operations and facilities that would not otherwise be permitted under pre-transaction CBAs. It must also be noted however, that the WJPA is an RLA agreement which was the source of current Art. I §4, and it similarly provides for arbitration of arrangements that allow for selections of forces and assignment of employees for consolidated facilities and operations that would not otherwise be permitted under pre-transaction CBAs, so there is no inherent conflict between Art. I §4 and the RLA when the use of Art. I §4 is limited to selection and assignment, i.e. staffing, issues.

Thus under the plain language of the RLA and ICCTA and the employee protective conditions, pre-transaction rates of pay, rules and working conditions and rights privileges and benefits must be preserved. Both the RLA and the statutorily mandated Art. I §2 expressly require the preservation of pre-transaction rates of pay, rules and working conditions. And selection of forces and assignment of employees for consolidated operations and facilities can be accomplished without conflict between the two statutes.

Additionally, review of the purposes of the two statutes reveals that they are indeed complementary regimes and that application of the ICCTA does not necessitate negation of the RLA. The goal of encouraging consolidations that are in the public interest is not thwarted or impeded by requiring that the carriers respect the substantive terms of the agreements that they have voluntarily accepted under the RLA, especially since mechanisms are available to allow for staffing arrangements for consolidated operations and facilities notwithstanding pre-existing

restrictions in scope and seniority rules that might have complicated assignment of employees form different carriers to work in consolidated territories or facilities. Preservation of CBA rights can prevent carriers participating in a transaction from unilaterally applying the rates of pay, rules and working conditions that are most economically advantageous. However, the various iterations of this statute (Sections 1[20] 5, 11341-47 and 11321-26) contain no language even suggesting that they are designed to aid carriers in reducing their costs. And the Supreme Court decisions which construed those provisions and specifically discussed their purpose are devoid of any intimation that reduction in carrier labor costs was a goal of Congress. Moreover the Supreme Court has repeatedly held that the ICC/STB must consider the mandates and policies of other laws, including the labor laws and must fashion its decisions so as to avoid, or at least minimize, conflicts with other laws.

Consequently, given the plain language of the RLA and ICCTA, the holdings of decisions regarding the purposes of those statutes, the repeated Supreme Court admonitions to the ICC/STB to consider and accommodate other laws, the Applicants stated plans to abrogate the Conrail CBAs necessitate issuance of the declarations sought by the ARU.

B. Decisions Dealing Specifically With The New York Dock Conditions Do Not Support Applicants Claim That The Conditions Authorize Them To Refuse To Apply The Conrail CBAs To Conrail Employees

Contrary to the assertions in Applicants' Rebuttal at 609-615, 638-647, judicial decisions applying the New York Dock conditions do not support their claim that STB authorization of the Transaction will allow them to abrogate the Conrail CBAs and unilaterally apply their own CBAs to the Conrail workers.

In *New York Dock v. U.S.*, the Second Circuit specifically held that Section 11347 required that the ICC's protective conditions incorporate not only the New Orleans conditions, but also the Appendix C-1 conditions which included the provision from which Art. I §2 was

copied. 609 F. 2d at 93-94. The Court expressly rejected a contention by the carriers that Section 11347 required only the expressly identified minimum group of protections in Section 405 of the RPSA, and not the more specific protections devised for Appendix C-1 pursuant to Section 405, which included the progenitor to Art. I §2. *See also Wilmington Term. RR.--Purchase and Lease*, in which the ICC stated that: 1) Appendix C-1 "was the model for the conditions we adopted under 49 U.S.C. 11347" (7 ICC 2d 60, 69 n.12 (1990), *citing New York Dock v. U.S.)*, and 2) that *New York Dock v. U.S.* "makes clear that 'terms established under section 405' means only the so-called Appendix C-1 conditions, on which the Commission modelled [sic] its *New York Dock* conditions", (6 ICC 2d 799, 823(1990)). Thus, there is no basis for a claim that Section 11326 and the *New York Dock* conditions do not require the preservation of rates of pay, rules and working conditions, in addition to other rights, privileges and benefits under pre-transaction agreements.

In *Executives*, the D.C. Circuit noted that Section 11347 incorporated the protections required by Section 405 and that Section 405 itself mandated arrangements including "'such provisions as may be necessary for (1) the preservation of rights, privileges and benefits...to such [rail] employees under existing collective bargaining agreements'....". 987 F. 2d at 813-814. However, the Court concluded that it would be "obviously absurd" to conclude that "every word of every CBA" established a right, privilege or benefit. *Id.* at 814. The Court held that some CBA modification was permissible, but the ICC could not modify a CBA "willy-nilly". *Id.* at 814.

The Court in Executives noted that the ICC itself had adopted a necessity limitation on CBA modifications and had stated that labor had the right to "'rely primarily on the RLA for those subjects traditionally covered by that statute'". *Id.* at 814, *citing Carmen II*. The Court further stated that a finding of necessity must be linked to a public transportation benefit from the underlying transaction, in that case a lease, but not "merely to transfer wealth from employees to

their employer". *Id.* at 815. The Court noted that the ICA identified various policy goals such as safe, adequate and efficient transportation and sound economic conditions for carriers, but that in the decision under review, the ICC had made reference only to general "public interest factors", alluding to "creation of a more competitive and efficient carrier" and a concern that "rail service can cease". *Id.* The Court said that it could not determine whether the Commission believed that the cited benefits "would arise solely from modifying the CBAs-in which case they would not be cognizable, per the analysis above" or whether the underlying transaction would yield benefits that could not be realized except by modifying the CBAs. *Id.* From the arbitrator's decision in that case it appeared that the modifications were for benefits solely from CBA relief, if that was so, if "enhanced service levels would result solely from the reduced labor cost stemming from the modifications to the CBAs–when a producer's marginal cost declines it increases its output, *i.e.* service" then there was no necessity for the changes. *Id.* The case was therefore remanded to the Commission (*id.*) where it has languished ever since then.

The D.C. Circuit next addressed this subject in *ATDA v. ICC* on review of an ICC decision upholding an arbitrator's acceptance of a carrier's consolidation of all dispatching work at a facility where no CBA applied. The Court noted that the Executives decision had held that CBA rights, privileges and benefits were "immutable", but had remanded the case for a determination as to whether rates of pay, rules and working conditions fell within the RPSA protected "rubric" of rights, privileges and benefits. 26 F. 3d at 1163. The Court rejected the view that any CBA term that "blocks a rail consolidation" may be annulled since such an approach was contrary to Executives(id.), and it reiterated that proof of necessity for overriding a CBA provision must be based on a public transportation benefit which cannot arise solely from a CBA modification itself; rather, "independently of the CBA, the transaction must yield enhanced efficiency, greater safety, or some other gains". *Id.* at 1164. The Court further stated that the view

expressed in the ICC decision that "the necessity predicate is satisfied whenever a CBA is an impediment to a transaction clearly misstates the necessity standard." *Id.* at 1165, internal quotations omitted. However, the *ATDA v. ICC* court found that the only CBA provision at issue in the case was a scope rule which the, as the union conceded, did not confer rights that were infringed by the ICC order. *Id.* at 1163.

The D.C. Circuit's most recent decision on this subject was *UTU v. STB*. There the carrier sought to merge seniority rosters that had been developed on previously separate railroads, and to eliminate application of pre-existing CBAs for employees placed on the consolidated roster. 108 F. 3d at 1426-1427, 1430. The ICC found that the merger of the rosters would yield efficiency benefits in the form of cost reduction and faster transit times and authorized the consolidation. *Id.* at 1427, 1430-1431. The D.C. Circuit found that the only contested CBA changes in that case were with respect to seniority rights, and it affirmed the ICC's decision. 108 F. 2d at 1426-1427, 1430.

The Court noted that the ICC in New York Dock had held that rates of pay, rules and working conditions and collective bargaining and other rights privileges and benefits must be preserved (*id.* at 1429-1430). It also noted that Executives had found rights, privileges and benefits to be "immutable" (108 F. 3d at 1429), and that other changes could be made only upon a showing of necessity which must be based on a transportation benefit to the public, and not from the CBA modification itself.

The Court found that no one had contended that the seniority provisions in that case fell within the Article I §2 protection of rates of pay, rules and working conditions so that phrase was not at issue. *Id.* at 1430 n. 4. The Court then held that the ICC's view that "other rights, privileges and benefits" referred to fringe benefits and other ancillary emoluments, as opposed to more central aspects of pay, rules and working conditions, was not unreasonable, and that it was

not unreasonable to conclude that seniority does not fall within the protection of rights, privileges and benefits so defined. *Id.* at 1430. In this regard the Court also noted that the Commission had found that seniority provisions had historically been altered in connection with consolidations so they were not within the rights, privileges and benefits protected by Art. I §2 and could be modified on a showing of sufficient necessity. *Id.*

Applicants have characterized the Court's statement in footnote 4 as dictum. Rebuttal at 645. ARU submits that a statement which limits the scope of a holding, by saying that a particular question is not an issue in the case, and thus is not part of the holding, cannot be dismissed as mere dictum. In any event, it is clear that the Court only addressed the "other rights, privileges and benefits" component of Art. I §2 and not the rates of pay, rules and working conditions component. Since the Court recognized that there were two components to the CBA preservation in Art. I §2, its ruling on the latter component could not be construed as somehow holding that rates of pay, rules and working conditions need not be preserved. Applicants also contend that the D.C. Circuit could not have acknowledged the need for preservation of rates of pay, rules and working conditions because such a requirement would have subsumed the holding of the case and would have been at odds with the holdings in the prior D.C. Circuit cases; and that *UTU v. STB* answered all questions in this area and was thus the "end of the litigation cycle as to the meaning of" Section 11326 and Art. I §2. Rebuttal at 646. But all the Court said that it affirmed in *UTU v. STB* was that seniority was not a right privilege or benefit as that term had reasonably been defined by the Board. Moreover, there is no conflict between ARU's reading of *UTU v. STB* and the prior D.C. Circuit cases for the following reasons: 1) neither *Executives* nor *ATDA v. ICC* had accepted any interpretation of the scope of the Art. I §2 preservation of rates of pay, rules and working conditions, indeed *ATDA v. ICC* considered that an open question (26 F. 3d at 1163); 2) the holding in *Executives* that not every word of a CBA must be preserved does not mean that the

preservation requirement is limited to the comparatively narrow area of fringe benefits and excludes the "the more central aspects of employment"; 3) *ATDA v. ICC* rejected the Commission's view that arbitrators may annul any CBA provision that blocks a rail consolidation as being in conflict with *Executives* (*id.*); 4) the only CBA overrides affirmed in *ATDA v. ICC* and *UTU v. STB* were provisions concerning scope and seniority which relate to staffing for consolidated operations and facilities as opposed to rates of pay and other substantive rules and working conditions; 5) overriding of CBA seniority and scope provisions relates to selection of forces and assignment of employees which requires harmonization of Art. I §2 and Art. I §4 implementing arrangement processes and which rail labor has conceded historically had been affected by WJPA implementing arrangement processes and 6) Applicants' view of *Executives*, *ATDA v. ICC*, and *UTU v. STB* would mean that the Court had sanctioned a reading of Art. I §2 that eliminated its rates of pay, rules and working conditions component even though it is plainly a part of the New York Dock conditions and is plainly required by Section 11326 through its direction to incorporate the Appendix C-1 conditions, and even though the Court gave no hint of any intent to judicially rework the statute and the conditions.[10]

Review of these D.C. Circuit decisions shows that they do not support Applicants' position. The Court has not endorsed the view that the Art. I §2 protection is limited to rights.

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[10] In this regard the Applicants appear to be echoing the conclusion of Mr. McCarthy that the D.C. Circuit sub silentio departed from the Second Circuit and concluded that Section 11326 requires only preservation of rights, privileges and benefits, and not rates of pay, rules and working conditions, because it viewed the statute as mandating ICC adoption of only RPSA Section 405 and not Appendix C-1. As is shown in the ARU Comments at 87-95, this view is fundamentally erroneous. The D.C. Circuit did not use any language from which one might infer that it intended to take the rather significant step of departing from the Second Circuit's reasoning in *New York Dock v. U.S.* in decisions that actually cited *New York Dock v. U.S.* Mr. McCarthy's view is also at odds with the Commission's own decisions in *Wilmington Terminal, supra*, which held that the statute mandated incorporation of the Appendix C-1 conditions (6 ICC 2d at 823). Moreover, regardless of whether the statute required the ICC's conditions to include the C-1 protection for rates of pay, rules and working conditions, the actual conditions contain that protection and neither the Board nor a court can remove that protection retroactively.

privileges and benefits and excludes rates of pay rules and working conditions, and they did not even hint at rejection of the Second Circuit's holding that the statute mandated the C-1 protections, not just the basic list of minimal protections in Section 405 of the RPSA. Additionally, none of the D.C. Circuit decisions has sanctioned any override of any CBA provision other than scope and seniority provisions. Applicants' claim that these constitute the end of the litigation cycle on these questions has no support in any fair reading of *UTU v. STB* or the prior D.C. Circuit decisions.

Applicants have also relied heavily on the Supreme Court's decision in *Dispatchers* (Rebuttal at 611), but that does not advance their position. The holding in that case was limited to the to narrow conclusion that §11341(a) immunity from other law can include obligations under CBAs. 499 U.S. at 119, 127, 133. Indeed, the Court assumed without deciding that the override the RLA in that case had been done with due consideration given to the employee protection requirements, and that the override was "necessary" within the meaning of Section 11341(a). Id. at 127.[11] The Court concluded its decision by stating that the scope of the Section 11341(a) immunity may be limited by Section §11347, and that the decision expressed no opinion on that question. Id. at 134.[12] Accordingly there is no basis for the claim that the Dispatchers decision would support Applicants' abrogation of the CBA rights of Conrail employees notwithstanding Section 11326. ARU submits that review of these various decisions reveals that the current state of the law under judicial decisions in this area is as follows:

a. Section 11321 can override CBAs, but Section 11326 and Art. I §2 are independent bases for mandatory CBA preservation;

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[11] In this regard, it is also significant that the Court was aware of the *Carmen II* decision which held that Art. I §2 contained a requirement for preservation of agreement terms. 499 U.S. at 126 n.2 and 128 n.3.

[12] On remand the ICC recognized that these issues remained open. 1992 ICC Lexis 233 at 20-21.

b. *Burlington Truck* and *McLean Trucking* require the STB to consider and accommodate the RLA and the policies of the RLA and to explain any inability to do so, (this also supports a broader rather than narrower reading of Art. I §2, and undercuts a reading of Art. I §4 that vitiates Art. I §2);

c. Art. I §4 allows for selection of forces and assignment of employees inconsistent with scope and seniority rules, but there is no judicial precedent for the claim that it authorizes changes in substantive rates of pay, rules and working conditions once arrangements for staffing for consolidated operations and facilities are completed; in particular, Art. I §4 does not provide a basis for elimination of individual rates of pay, rules and working conditions;

d. Rights, privileges and benefits are properly defined as fringe benefits and ancillary emoluments, but the content of rates of pay, rules and working conditions has not yet been determined, and the degree to which they may be affected has not yet been determined;

e. Necessity is more than mere convenience or savings from CBA modification alone, mere reduction in the carriers marginal costs by reduction in labor costs does not constitute necessity

C. The Historical Relationship Between The RLA And ICA And The History Of The Employee Protections Provides No Support To Applicants

Applicants have asserted that some seventy years of history in the railroad industry, especially the last fifteen years, supports their view of the relationship between the ICA and RLA and the continuation of CBA rights after ICC/STB approval of a transaction. Rebuttal at 606, 615-627, 639-647. They accuse ARU of presenting a "false history". *Id.* at 615. However, it is Applicants who are fabricating history. Their self-selected and self-serving mischaracterization of events is not only without support in the actual historical record, it is even contrary to the ICC's own analysis in *Carmen II*. The failure of Applicants to even consider *Carmen II* is especially significant because they rely heavily (Rebuttal at 606, 639) on ICC decisions in 1983 and 1985[13] that were repudiated by the ICC in *Carmen II*.

[13] *Denver & Rio Grande Western R.R. Co.--Trackage Rights*, Finance Docket No. 30000 (Sub-No. 18) (served October 25, 1983) ("*DRGW*"), and *Maine Central R.R.--Exemption*, F.D. No. 30522 (served September 16, 1985) ("*Maine Central*").

Because the Applicants and ARU gave extensive conflicting presentations on this point, ARU will make a summary, chronological presentation here in outline form, with as little narrative as is possible. ARU respectfully refers the Board to its Comments and the Mahoney Article for more detailed discussions.

a. 1920 Act- Consolidations in the public interest are to be approved by ICC if they conform to the ICC merger plan; involved carriers and persons would receive immunity to overcome restrictions of anti-trust an other laws that would prohibit carrying into effect transaction approved by ICC. *Dispatchers*, 499 U.S. at 119-120 and 137(dissent), *County of Marin, supra.*,356 U.S. at 417, *Lowden* 308 U.S. at 230-232); [there was no RLA in effect to be overridden so it cannot be said that the 1920 Act was intended to nullify the RLA in ICC approved consolidations]

b. 1926-RLA enacted to provide mechanism for collective bargaining in railroad industry; [no exception for ICC approved consolidations].

c. 1936-WJPA entered to facilitate consolidations that would affect employees; agreement negotiated under RLA; allowed for selection of forces and assignment of employees for consolidated operations and facilities not otherwise permitted by CBAs.

d. 1939-*Lowden v. U.S.*, Supreme Court upholds ICC decision approving lease but conditioned on compensation protections for employees.

   i. ICC authority to impose protections for employees, 308 U.S. 225.

   ii. Transaction would yield dismissals and displacements of employees resulting in savings to the carriers; those savings at the expense of rail labor would equal 75% of the savings to the carriers as a result of the transaction. *Id.* at 233.

   iii. Since carrying-out of transaction would have harsh consequences for employees and adverse impact on morale, requiring mitigation of injury to employees was permissible. *Id.* at 233.

   iv. Court says one must disregard history of rail labor relations to say just and reasonable treatment of workers has no relationship to transportation policy (*id.* at 234); just and reasonable treatment promotes efficiency which suffers through loss of employee morale when demands of justice ignored (*id.* at 236); one cannot say that just and reasonable treatment will not promote public interest. *Id.* at 238.

   v. no denial of due process by extending to carrier privilege of relief from cost of performance of carrier duties on condition that savings be applied, in

part, to compensate employees for loss occasioned by exercise of privilege. *Id.* at 240.

vi. [No mention at all made that monetary benefits were for loss of CBA rights].

[Thus employee protection benefits were not (as Applicants claim, Rebuttal at 618) a quid pro quo for the carriers' ability to change CBA terms, rather the benefits were the quid pro quo for the carriers in gaining government perm ssion to engage in a transaction which would result in savings to the carriers primarily through the elimination of jobs][14]

e. 1940 Act-ICC directed to impose employee protections in consolidations, but the statute generally prescribed fair and equitable arrangements to protect employee compensation. [Act did not specify an implementing arrangement process or arbitration, and did not intimate any overriding of CBAs]. 49 U.S.C. §5(2)(f)

f. From 1940s through 1970s- labor and management negotiate attrition agreements. *See* Mahoney Article at 257-58 and 257 n.92, and Mahoney Declaration ¶s 7-8.

g. 1967-*Southern Ry. Co. -Control-Central Of Georgia*, 331 ICC 151 (1967)("*Southern Control*")

i. Due to complete exclusion of Central of Georgia employees ICC from post-transaction rosters for consolidated operations, ICC expressly directs negotiation and arbitration for implementing arrangement for selection of forces and assignment of employees.

ii. According to the ICC, this was the first explicit application of the WJPA §§4 and 5 implementing arrangement negotiation/arbitration process to ICC protective conditions. *Id.* at 152, 172.

iii. ICC specifically said (*id.* at 164) that its earlier *Southern Control* decision had been the first ICC decision to require mandatory arbitration as part of its employee protections. See also 317 ICC 557, 566, 590 (1962); *New York Dock v. U.S.* 609 F. 2d at 95 n. 13.

iv. ICC noted that imposition of procedures similar to WJPA §§ 4 and 5 would allow selection of forces and assignment of employees from employees of both Southern and Central and commingling of their work. *Id.* at 165-166, 172-173, 186.

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[14] The analogy to the instant case is striking. As ARU has shown (Comments at 35-38) a significant amount of the savings expected by Applicants will be from the elimination of jobs. And within three years of implementation, the total savings from the elimination of jobs will exceed Applicants' total anticipated employee protection costs.

v. ICC further noted that to transfer work from Central to Southern or to commingle their work could be done only by disregarding some basic provision of CBAs (*id.* at 165-166), so there would be a need for reference to a superseding CBA or negotiation for CBA changes, but the WJPA is such a superseding contract, it provides means for satisfying RLA and CBA. *Id.* at 165.

vi. ICC said that CBAs and WJPA should continue. *Id.* at 168. It held that the rights of employees under CBAs are preserved by the use of WJPA §§4 and 5 for selection and assignment. They must therefore be part of conditions whether expressly stated or by incorporated by reference in the conditions. Id. at 166.

vii. The ICC further stated that the protective conditions are imposed on carriers seeking *permissive* authority to engage in consolidations [not on employees]; the protections are the minimum rights for affected employees; their rights under CBAs, the WJPA and Section 5(2) are separate, distinct and independent; CBA rights are *private* rights whereas §5(2) rights stem from the ICC statutory obligations, *the protective conditions are rights that apply after forces are adjusted in accordance with CBAs* (*id.* at 169-170); transactions must be accomplished in compliance with the RLA (*id.* at 170 *citing Burlington Truck* and *McLean Trucking*).[15]

[The *Southern* decision shows that the ICC did not perceive its own protections as trumping the RLA. It further shows that the ICC did not view the monetary protections in the employee protective conditions as a quid pro quo for the carrier's ability to override agreements. Additionally, it shows that the ICC perceived the potential area of RLA-ICA conflict to be with respect to selection of forces and assignment of employees, but found no such conflict because of the WJPA. It also shows that the Art. I §4 procedures could not have been part of trade-off whereby the employees received monetary benefits and the carriers received the ability to use implementing arrangement arbitration to abrogate CBAs. *How could such arbitration be part of that kind of trade off if, according to the ICC, (compulsory) implementing arrangement arbitration was not part of its conditions until the first Southern decision?*]

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[15] Review of pages 169-171 of the Southern decision reveal that the most egregious fallacy in Applicants false history is their statement (Rebuttal at 620 n.47) that ARU's characterization of *Southern Control* as respecting the RLA and CBA rights (ARU Comments at 71)is just fantasy. It must be noted that ARU actually quoted a full paragraph of the decision whereas Applicants have merely described *Southern Control* in their own terms and quoted isolated portions of sentences. The decision itself is quite clear that CBA rights are to be respected and that it is because the WJPA was an RLA agreement that its procedures for selection of forces and assignment of employees could be utilized for the creation of consolidated rosters for consolidated operations and facilities notwithstanding scope and seniority rules in on-property CBAs.

h. 1976– In the first deregulation legislation, the statutory directive for employee protections is amended to require conditions at least as protective as the New Orleans protections, as modified by *Southern Control*, and the Appendix C-1 protections which included the protection of CBA rights as to rates of pay, rules and working conditions as well as other rights, privileges and benefits the Appendix C-1 provision on which Art. I §2 was based.

i. 1979–In *New York Dock*, ICC adds to its protections those provided under the C-1 conditions, including Art. I §2.

j. 1979- In *New York Dock v. U.S.* the Second Circuit rejects the carriers' claim that the statute required only provisions for the protections expressly identified in Section 405 of the RPSA; it affirms the ICC that the statutory requirement includes the conditions imposed under RPSA, *i.e.* Appendix C-1. 609 F. 2d at 94.

k. 1983 and 1985-- ICC issues *DRGW* and *Maine Central* decisions, holding that to the extent a CBA conflicts with implementation of a transaction approved by the ICC, the CBA must give way; ICC orders and not the RLA govern employee-management relations in connection with an approved transaction. *DRGW* at 6, *Maine Central* at 6.

l. 1987--*Carmen* and *Dispatchers* arbitration awards are issued upholding actions contrary to CBAs. ICC holds that the awards are proper under Section 11341(a). 1989--D.C. Circuit reverses ICC in *Carmen* and *Dispatchers* cases.

m. *Carmen II* issued while *Carmen/Dispatchers* pending. ICC holds that:

i. The RLA was designed to assure meaningful collective bargaining, it is not to be undermined by merger implementation procedures. 6 ICC 2d at 719.

ii. Although Section 11341(a) RLA override authority is limited by Art. I §2, Congress surely did not mean to preclude *all* CBA changes; but parties should not be easily relieved of contract obligations that are voluntarily undertaken; to the greatest extent possible, CBA terms are to be preserved (*id.* at 720-721); also cites *Pittsburgh and Lake Erie*- RLA and ICA are complementary regimes. *Id.* at 721.

iii. ICC is returning to the "era of accommodation" between the RLA and ICA, noting WJPA referee Bernstein's holding that the WJPA is the key that unlocks rules preventing transfers and consolidation of work, and the similar view expressed in *Southern Control*. *Id.* at 735.

iv. During the era of accommodation, parties referred to selection of forces and assignment of employees but the meaning of that phrase is not clear, noting that parties and arbitrators did dovetail seniority rosters which would have required abrogation of some CBA provisions [presumably scope and seniority], it is therefore *assumed* that arbitrators did permit

occasional limited modification of CBAs. *Id.* at 742-743.

v. Sections 4 and 5 are heart of WJPA. *Id.* at 733. *Southern Control* held that the WJPA permits consolidated operations and compliance with the RLA. *Id.* at 736.

vi. Art. I §2 can not be a complete bar to merger related changes but, at a minimum, the preservation of CBA rights means that employees can rely on their CBAs for their basic and continuing conditions of employment, this reading of Art I §2 is consistent with Southern Control. *Id.* at 749.

vii. *DRGW* and *Maine Central* went too far; they upset the balance between labor and management; the ICC now rejects that approach, holding that Art. I §2 limits the Section 11341 authority to override CBAs. *Id* at 750-752. Art. I §4 permits arbitrators to modify CBAs when necessary to permit mergers, but only after balancing labor's legitimate interest in relying on the RLA for changes in pay, rules and working conditions and management's need to implement operating changes to achieve the benefits of merger. Reject labor's view that there may be no CBA modification; and, reject management's view that CBAs may be modified if they are inconvenient to a merger, contract rights must be respected or "preserved". *Labor has a legitimate right to rely primarily on the RLA for subjects traditionally covered by that statute. Id.* at 752-753.

[While the ICC did not accept rail labor's view as to the scope of Art. I §2 in Carmen II, it clearly rejected the *DRGW/Maine Central* approach, which is essentially the view advocated by the Applicants here. Among other things, the ICC recognized that the Art. I §2 protections do apply to rates of pay, rules and working conditions, that any CBA override must be related to selection of forces and assignment of employees, not to changes in substantive terms for the purpose of lowering costs; and, that Art. I §4 arbitrators are to respect the RLA and CBAs and that any CBA modifications that they do permit must be minimal. Additionally, *Carmen II* squarely refutes Applicants' false history to the extent that they claim that the protections always subsumed the RLA and CBA rights, and that Art. I §4 arbitrators have virtually unfettered authority to override CBAs].[16]

n. 1990--*Wilmington Terminal*

i. Affirms *Carmen II* analysis (6 ICC 2d at 814),

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[16] *Carmen II* remains valid even after Dispatchers. Although the Supreme Court did reverse the D.C. Circuit's decision in *Carmen/Dispatchers*, *Carmen II* was never vacated or reversed and the ICC/STB never acted on the remand order. Additionally, the ICC said that it was addressing the Art. I §§2 and 4 questions independent of the Section 11341 question that was pending before the Supreme Court. 6 ICC 2d at 720. And regardless of the vitality of the holding in that case it clearly refutes the "history" offered by Applicants. In any event, the analysis and reasoning of *Carmen II* were adopted in *Wilmington Terminal*. 6 ICC 2d at 814.

ii. *Rejects rail labor view that Art. I §2 requires carry-over of CBAs to purchasers of rail lines because then changes in pay, rules and working conditions would be imposed without RLA bargaining that is guaranteed to labor and management.* *Id.* at 820.

iii. *Carry-over of CBAs would involve interest arbitration through Art. I §4, but arbitrators are not supposed to exercise authority over rates of pay, rules and working conditions*, Carmen II affirmed that Art. I §4 arbitrators are limited to selection of forces and assignment as per 1940-80 practice, *Section 4 arbitrators are not authorized to determine pay scales or work rules; new terms are to be negotiated not imposed under either the ICA or RLA.* *Id.* at 820-821 n. 33.

iv. The Section 11347 reference to "terms established under section 405" means that the Appendix C-1 conditions were required. *Id.* at 823.

o. 1991-- In *Dispatchers* the Supreme Court holds that Section 11341 can override the RLA and CBAs, but assumes that requirements of "necessity" and §11347 have been met and notes that issues as to necessity and as to whether Art. I §2 is a separate limitation on CBA overrides are not decided.

p. 1993–In *Executives* the D.C. Circuit states:

i. Rights, privileges and benefits must be preserved but not every word in a CBA must convey a right, privilege or benefit; ICC may not modify CBA willy-nilly. 987 F. 2d at 814.

ii. If the alleged public benefit of a transaction is merely to derive savings from abrogating CBAs, there is no necessity for overriding the CBAs.

q. Remand orders after Dispatchers and Exec.s D.C. Cir remanded for coherent rationale-1992 ICC LEXIS 233 at 22; but no action ever taken on remand. See Mahoney article at 287.

r. 1994– In *ATTD v. ICC*, the D.C. Circuit holds that:

i. A scope clause is not a protected right, privilege or benefit. 26 F. 3d at 1163.

ii. Rejects the views that arbitrators may override any CBA provision that blocks a consolidation and that a CBA override is permitted whenever a CBA is an "impediment" to a transaction. CBA rights are "immutable." *Id.* at 1163, 1165.

s. 1996– In *UTU v. STB* the DC. Circuit affirmed the ICC holdings that rights, privileges and benefits mean ancillary emoluments and fringe benefits, and that

seniority does not fall within that protection, noting that it had not been contended that seniority provisions fall within rates of pay, rules and working conditions so that phrase was not at issue. 108 F. 3d at 1430 n. 4.

This review of the history of the interaction between the RLA and ICA and of the development of the employee protections shows that:

a. The Section 11321 immunity was not specifically designed to override RLA and CBAs since the RLA was enacted after the immunity provision was added to the ICA;

b. The monetary employee protection benefits were not adopted as a quid pro quo for the ability of carriers to change CBAs through Art. I §4 procedures since that is not stated in the Lowden rationale for the protections or in the Southern Control decision; and since the ICC stated in Southern Control that mandatory Art. I §4 arbitration was first added to the protections in the first Southern Control decision in 1962;

c. In *Southern Control*, ICC recognized that the ICA and RLA rights are separate, independent and distinct; that the WJPA §§ 4 and 5, and the ICC-imposed implementing arrangement process would permit selection of forces and assignment of employees for new rosters for consolidated operations and facilities which on-property CBAs would otherwise prohibit, that the RLA must be accommodated; and, that the protections are imposed for the benefit of employees *not* carriers;

d. The 1976 amendments to the ICA and the New York Dock conditions added Art. I §2 to the protections so even if implementing arrangement arbitrations previously could have changed CBA rights, Art. I §2 was a subsequent express protection of CBA rights;

e. The 1976 amendments to the ICA required that the protections imposed by the ICC incorporate the New Orleans protections as modified by *Southern* and the Appendix C-1 protections, including rates of pay, rules and working conditions, not just the New Orleans conditions and the specifically identified protections in RPSA Section 405;

f. The *DGRW* and *Maine Central* decisions were repudiated in *Carmen II*, this refutes Applicants on a key element of their "history";

g. *Carmen II* recognized that Art. I §2 protects rates of pay, rules and working conditions, and concluded that any Art. I §4 overriding of CBA rights was to be minimal and limited to selection of forces and assignment of employees; *Wilmington Terminal* affirmed the *Carmen II* analysis and held that Section 11347 required imposition of the Appendix C-1 protections which included protection of rates of pay, rules and working conditions, and held that Art. I §4 arbitrators are

limited to selection of forces and assignment of employees and may not "interest arbitrate" new rates of pay and work rules;

ii. *Dispatchers* never decided whether *New York Dock* preserves CBA terms, even if Section 11341 would allow them to be overridden;

i. All that the D.C. Circuit has affirmed with respect to the application of Art. I §§2 and 4 is that scope and seniority may be changed, but that is effectively the same authority provided to carriers by negotiation under the WJPA;

j. The D.C. Circuit has not addressed the rates of pay, rules and working conditions component of Art. I §2.

ARU submits that the foregoing demonstrates that the seventy years of history in the railroad industry do not support the Applicants' position, and that it is Applicants, not the ARU, who have offered a "false history".

D. Applicants' Plans To Abrogate The Conrail CBAs For The Vast Majority Of Conrail Workers Necessitate Issuance Of The Declarations Sought By ARU

If The Board approves the Application, it should issue the declarations sought by ARU because Applicants' plans to use the Board's order and New York Dock procedures to eliminate the Conrail CBAs for the vast majority of Conrail workers, and to place them under NSR and CSXT CBAs, would violate Section 11326 and be inconsistent with the Board's obligation to respect and accommodate the RLA as is described above.

1. Applicants Plan To Change The CBA Rights Of Conrail Workers

Applicants clearly plan to eliminate the Conrail CBAs for the vast majority of Conrail workers and to place them under NSR and CSXT CBAs. The ARU Comments explain Applicants plans in this regard, and demonstrate how those plans will result in the loss of CBA rights for Conrail workers, so this brief will only summarize the changes and the losses of rights and respond to the Rebuttal on these points.

Applicants have expressly stated it is their intention that, except for employees in the SAAs and operating employees for New England lines allocated to CSXT, current Conrail

workers will no longer be covered by the Conrail CBAs, but will be placed under CSXT and NSR (generally N&W) CBAs. Applicants have also acknowledged that many of these employees will be working at the same locations or in the same territories that they currently work for Conrail. Many of these employees will not even be combined with CSXT and NSR employees because the Conrail properties to be divided between CSX and NS will be largely separate operating regions. Applicants' plans in this regard are perhaps most audacious with respect to the shop craft employees and dispatchers to be allocated to NS, and shop craft employees at several Conrail shops to be allocated to CSXT. Those employees will continue to work in Conrail facilities where all, or virtually all, of the employees involved will be Conrail workers. After implementation, there will be no interchange of employees at those facilities with employees at pre-transaction NSR or CSXT facilities; indeed, Applicants have made much of their desire for "point seniority" for shop craft workers. Applicants also straight-forwardly acknowledge that they do not plan to negotiate under the RLA to effect the changes in CBA coverage of the Conrail workers, but rather will use this agency's order and Art. I §4 procedures to implement their planned changes.

In its Comments, the ARU showed in extensive detail, how Applicants' plans would deprive Conrail workers of various beneficial rates of pay, rules and working conditions. Comments at 102-124. In this portion of its brief, ARU will summarize and highlight certain CBA rights that would be lost under Applicants' plans. ARU respectfully refers the Board to its Comments for a more comprehensive discussion with citations to supporting declarations.

ARU has shown that placement of Conrail workers under CSXT and NSR CBAs would deprive them of a number of beneficial compensation provisions. For example, the shop craft workers and signalmen on Conrail have certain higher level pay grades that establish rates of pay above the standard Conrail rates for those crafts and above the national standard rates. ARU Comments at 104. Applicants have responded by noting that all three railroads are parties to

national agreements with respect to pay. Rebuttal at 582. However, although the standard rates on Conrail, NSR and CSXT are comparable, employees who are moved to the NSR or CSXT agreements would lose the higher grade rates. Employees currently holding these higher graded positions would receive *New York Dock* benefits for the difference for up to 6 years, but then would lose the advantage of the higher rates. And employees who currently are compensated at the standard rates would lose the opportunity to move to higher graded positions as they gained experience. A similar problem exists with respect to the Conrail -ATDD CBA. The standard ATDD CBAs provide that employees are paid below the full pay level for several years as they gain experience; but on Conrail employees progress to the full pay level more quickly. ARU Comments at 106. The loss of the opportunity to move to higher graded positions, or to do so more quickly is not covered at all by the *New York Dock* conditions, so Applicants defense on that basis (Rebuttal at 582) is without force.

Additionally, the Conrail-ATDD agreement contains the "APAR" contingent compensation agreement (*id.* at 107) which is not available on CSXT or NSR (CSX and NS have attempted to compare the 401 K plans on the various carriers (Rebuttal at 583), but they have not addressed the APAR provision). The Conrail CBAs with the shop craft unions, BRS and ATDD all have rules that are beneficial to employees with respect to voluntary acceptance of overtime before mandatory assignment, and higher levels of compensation for overtime work. ARU Comments at 116-117, 120.

Thus ARU has demonstrated that transfer of Conrail workers to CSXT and NSR CBAs will result in changes in rates of pay for those employees.

ARU has also demonstrated that various Conrail scope and seniority rules are more precise and more firm than the CSXT and NSR rules. ARU Comments at 109-112. These rules are important because they protect an employee's continuing ability to do certain types of work.

Applicants have focused on these rules (particularly with respect to the shop craft workers) to the extent that they might bar movement of work between former Conrail and NS and former Conrail and CSXT and have argued that such rules must be negated to allow them to consolidate the formerly separate operations. Rebuttal at 609-610, 675. But ARU has that shown creation of consolidated rosters through selection of forces and assignment of employees may be accomplished under the WJPA (or under proper *New York Dock* Art. I §4 negotiation/ arbitrations). However, once that is done, the existing scope and seniority rules can and must continue to apply; for example, after NSR staffs the Altoona shops predominantly with Conrail shop workers, the Conrail scope and seniority rules would determine which work would be done by which crafts at those shops.[17] Accordingly, loss of these scope and seniority rights would be a significant change in rules and working conditions for Conrail workers.

The Conrail CBAs also tend to have more advantageous rules for employees with regard to priority for current employees in bidding for new positions, and qualification periods for current employees on new positions. ARU Comments at 118-120. The Conrail agreements also have more advantageous safety and health rules with respect to protective gear and sanitation (*i.e.* the lack of flush toilets for operating employees on NS). ARU Comments at 122-123.

The Conrail CBAs provide a number of beneficial procedural protections in disciplinary cases that are not provided by CSXT and NSR. ARU Comments at 121. Applicants have responded to ARU on this point by asserting that all three railroads are subject to due process requirements for discipline. Rebuttal at 582. However, Applicants have not stated that their CBAs provide the same protections as are provided under the Conrail CBAs. Due process is a

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[17] The specific concerns of NS with respect to the effect of the existing scope rules on it plan to assign GE locomotives to the Roanoke shops and the GM locomotives to the Altoona shops is addressed below; that discussion completely eliminates any legitimate concerns that NS may have in this regard.

somewhat amorphous concept; there can be many different types of protections for due process. Presumably the States thought they provided due process before the 1960s, but the Supreme Court determined that Fourteenth Amendment guaranteed a higher level of due process than was afforded by many States. Accordingly, Applicants have not refuted ARU's claim of a potential change in rules and working conditions with respect to discipline if Conrail employees are moved to CSXT and NSR CBAs.

ARU has also shown that putting Conrail employees under CSXT and NSR CBAs will mean losses of "other rights, privileges and benefits". For example, most Conrail workers are covered by Supplemental Unemployment Benefit Plans ("SUB"), and have personal leave, sick leave and bereavement leave rules that are more advantageous than those on CSXT or NSR. ARU Comments at 125-126. Applicants do not intend to preserve these rights. Indeed they deny that these are "other rights privileges and benefits" under Art. I §2 as that term has recently been defined as fringe benefits and ancillary emoluments, claiming that only "vested" rights fit that definition. Rebuttal at 650-651. However, if any group of rights would constitute fringe benefits it is supplemental unemployment benefits and leave rules. By attempting to limit rights, privileges an benefits to retirement benefits and health benefits in an industry where retirement befits are established by law, and all workers are covered by a national health plan, Applicants merely show that they are attempting to define Art, I §2 out of existence. Applicants also claim that Conrail workers will not lose their SUB rights because they can choose to retain them under Art. I §3 of the conditions. Rebuttal at 650 n. 74. But, other than the prohibition against "pyramiding" benefits, employees do not have to choose between their *New York Dock* benefits and their "other rights, privileges and benefits"; those CBA rights are protected by Art. I §2.

Applicants have not refuted ARU's showing that their plans would lead to specific losses of advantageous rates of pay, rules and working conditions and other rights privileges and benefits

of current Conrail workers. Except for the handful of responses that ARU has noted and refuted above,[18] Applicants' principal response is the assertion that the CSXT , NSR and Conrail CBAs are "substantially similar" and that *most* employees will continue to have collective bargaining rights, will continue to be represented by the same unions and will be working under agreements with *many* of the same or *similar* rules. Rebuttal at 581-582. However, they have effectively admitted that there will be some employees who will lose representation and/or their current representative, and most will lose at least some rules or rights. The requirement that rates of pay, rules and working conditions and other rights, privileges and benefits be preserved is not satisfied if only most employees have many of the same or similar rights and rules.

Applicants have also argued that it is not feasible to make qualitative judgements about the relative merits of the various CBAs, noting that an agreement that may be weak in one area may be stronger in another. Rebuttal at 636-637. However, Art. I §2 requires that rates of pay, rules and working conditions and other rights, privileges and benefits be preserved, not that there may be changes if employees who lose a CBA right in one area gain rights in some other area. Thus, the fact that an employee who is moved to a new agreement loses a beneficial safety rule but gains a beneficial assignment rule does not mean that Art. I §2 is satisfied. And a carrier cannot complain that it should not be required to preserve a discipline rule because it has a qualification rule that is better for employees. Art. I §2 mandates the preservation of CBA rights; if a carrier chooses to place workers under its own CBAs that have some terms that are the same as the workers' old CBAs in many respects and more beneficial to those employees in some respects, it still must preserve the old rules that are more advantageous than its rules. Thus, the fact that it is hard to determine whether one CBA is on balance more or less advantageous to employees is

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[18] Applicants did not even attempt to rebut most of the losses of CBA rights delineated by ARU.

simply irrelevant, since the important inquiry is whether individual CBA rights have been preserved.

From review of the ARU Comments, Applicants Rebuttal and the foregoing, it is clear that Applicants' plans involve changes in the rates of pay, rules and working conditions and rights, privileges and benefits of Conrail employees; and that Applicants claims of substantial similarity of many rules and net comparability defenses are unavailing. The Board must recognize that the facts of record in this case support ARU's contention that Applicants plan to use the Board's order and the Art. I §4 procedures to impose their own CBAs and to thereby change the CBA rights of Conrail workers.

2. Applicants' Showing Of Necessity For Their Planned CBA Changes Is Inadequate Under Controlling Precedent

The ARU submits that, under Section 11326, the *New York Dock* conditions and the controlling judicial precedent discussed above, provisions of pre-Transaction CBAs that involve rates of pay, rules and working conditions or other rights, privileges and benefits are binding on the Applicants, although Applicants may be permitted to create consolidated rosters and staff positions through selection of forces and assignment of employee mechanisms sanctioned under the WJPA (or properly limited proceedings under Art. I §4 of the conditions). Accordingly, no showing of necessity by Applicants would be sufficient to permit them to make the changes in rates of pay, rules and working conditions that they plan to make except with respect to selection and assignment issues and CBA terms that do not involve rates of pay, rules and working conditions. In any event, their showing of "necessity" for their alleged need to change any CBA rights has been plainly inadequate.

Applicants' Rebuttal contains the same necessity arguments that they offered in their Application and discovery responses which were refuted in ARU's Comments (at 127-161) so

ARU respectfully refers the Board to its Comments and will focus on several major points here.

Applicants' principal argument is that they believe that preservation of existing CBAs would prevent them from consolidating operations and facilities, requiring them to run their pre-Transaction properties and the Conrail properties allocated to them as still separate entities, thereby negating the asserted advantages of the Transaction. Rebuttal at 608-610, 653-661, 667-677. However, ARU has shown that through the WJPA §§4 and 5 or a proper *New York Dock* Art. I §4 procedure (i.e. one limited to selection of forces and assignment of employees), Applicants can arrange their staffing to take advantage of consolidated operations and facilities while preserving the substantive terms of the Conrail CBAs. For example, Applicants can make arrangement for consolidation of shops and dispatching offices by staffing those facilities and assigning the employees there post-Transaction work which might come from more than one pre-Transaction railroad, they still can apply the Conrail CBAs at those facilities. Indeed, NS has indicated that Conrail's Altoona shops and the Conrail dispatching offices allocated to NS will be staffed entirely or almost entirely by Conrail workers, and CSX has indicated that several Conrail shops allocated to CSXT will be staffed entirely with former Conrail employees. There is absolutely no reason, and certainly no necessity, for applying any agreements other than the Conrail agreements at those facilities. Applicants have also indicated that they want to change the Conrail seniority districts for maintenance of way workers and signalmen because many districts will be divided among CSXT, NSR and residual Conrail, and because they desire to have larger seniority districts than currently exist on Conrail (indeed they desire very large seniority districts). On the other hand, they acknowledge that the newly acquired (former Conrail) territories will be separate divisions or regions for engineering purposes, and that most maintenance of way workers and signalmen will continue to work out of fixed headquarters, often the same headquarters as at present, and will not be responsible for covering the entire large geographic areas that they seek

for their new districts. Rebuttal at 667, 680-681. Applicants also concede that operating employees will not typically be required to operate trains across the full length of their planned large operating employees districts. See e.g. ARU Comments at 156-157. Applicants concerns about staffing and new seniority districts can be addressed through WJPA and/or proper Art. I §4 proceedings by selecting and assigning forces for new, larger, but not huge, districts that are consistent with the division of Conrail properties and Applicants planned post-transaction operations, while the Conrail CBAs are maintained for the employees once the new districts are established. Thus, Applicants' general concerns about their ability to effectively staff and operate consolidated territories and facilities under the current Conrail CBAs are insubstantial and certainly do not rise to the level required to show a necessity for eliminating the rights of Conrail employees under the Conrail CBAs.

Applicants' more specific necessity arguments fare no better. Applicants attempted to identify only a few rules that they perceived as demonstrating the need for abrogation of the Conrail CBAs. However, review of Applicants' discussion of those rules (Rebuttal at 661-663, 671-672, 675) shows how weak their arguments are. Several of the rules cited by Applicants actually deal with scope and seniority provisions that can be addressed through a little creativity and WJPA and Art. I §4 procedures. For example, they complain that certain seniority rules are inconsistent with respect to the content and timing of posted notices for bids. Rebuttal at 662. To some extent, announcements that provide the most notice and most information that is required under the conflicting rules will satisfy all of the rules involved; and new procedures for posting and bidding could be addressed in WJPA and Art. I §4 implementing arrangement procedures, and might be properly arbitrated under those procedures. CSXT has cited only a single instance of inconsistent scope rules; those regarding "switch heaters". *Id.* This highly specific and idiosyncratic problem could not possibly constitute a reason to eliminate the entire CBAs for a

whole craft! In any event, it is a problem that can be handled in implementing arrangement procedures; after it is resolved, the basic CBAs can continue to be applied with respect to their substantive terms. NS has similarly cited a scope conflict between BRS and IBEW agreements regarding communications work. Rebuttal at 677. This is a situation that has been present on railroads for many years without hobbling their operations. It is also a potential conflict that is exaggerated by Applicants plans to have unnecessarily large seniority districts, with smaller districts there will be fewer such conflicts. Ultimately this too is something that can be addressed by implementing arrangement negotiations, it certainly is not a basis for eliminating an entire CBA.

CSXT has also pointed to alleged problems with respect to the operating crafts such as "classification of trains en route" (an unexpected reconfiguration of cars), "deferments" (a change in reporting time due to train delay) and "lap back" (a return to a point already passed). These rules all are said to be inconsistent on the different railroads in that some rules permit the practices and others require payment of one to a few hours of pay in the event of such actions. None of these rules would in any way impede Applicants from consolidating their operations, joining their work forces or operating consolidated territories efficiently; indeed they hopefully would not have to reclassify en route, change starting times or lap back on more than an occasional basis. The only effect of these rules is that employees would receive penalty pay when these unexpected events occur. It is clear that these rules will not in any way hinder consolidation of operations or work forces, they certainly do not constitute proof of necessity for elimination of entire CBAs.

NS has cited shop craft scope rules that would prohibit repair or maintenance of former Conrail GE locomotives at NS shops and NS GM locomotives at the Conrail Altoona shops as a basis for eliminating the Conrail CBAs entirely in Altoona and applying N&W CBAs at shops that will staffed almost entirely by current Conrail employees. NS has also noted that the shop craft

unions have argued for the retention of their scope rules under the Conrail CBAs. NS has not demonstrated a necessity for NS' planned imposition of the N&W CBAs at the Altoona shops.[19]

As ARU has repeatedly observed, the WJPA provides a mechanism to allow for the selection of forces and assignment of work in connection with consolidation of work, and this can be done through a proper Art. I §4 implementing arrangement. The effect of the Transaction at the Altoona shops and the employees at those shops is similar in effect to a simple change in ownership, virtually everything else will remain the same. If NS does decide to consolidate all GM locomotive repairs at the Altoona shops and all GE locomotive repair work at the of the Roanoke shops, those shops can be staffed under the WJPA or an appropriate Art. I §4 arrangement. Once locomotives are assigned to either Roanoke or Altoona, the CBAs that have long been in place at those facilities, and the contractual divisions of work among the crafts at those facilities, can be applied again to the work and the workers at Roanoke and Altoona.

In any event, the problem identified by NS could not possibly justify evisceration of the Conrail CBAs in their entirety at the Altoona shops. In order to achieve what it believes is a more efficient way of primary distribution of locomotive maintenance work NS would remove all of the substantive terms of the Conrail CBAs at the Altoona shops. But all that needs to be done is to assign locomotives to particular shops for maintenance, overcoming any problem in such assignments cannot constitute a basis for elimination all pre-existing rules at the Altoona shops, especially when almost all of the employees at those shops are currently employees of Conrail working under Conrail CBAs. ARU also notes that the GE/GM assignment plan can not possibly support elimination of the Conrail CBAs covering carmen at the Altoona car shops because those

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[19] NS has acknowledged that once the Transaction is implemented, it does not anticipate movement of employees between the Altoona and Roanoke shops, nor does it plan common supervision of those shops so there is no other possible justification for NS' plan to impose the N&W CBAs at the Altoona shops. ARU Comments at 150-151.

shops work on rail cars not locomotives so the carmen CBA scope rules could not possibly interfere with the GE/GM assignment plan.

To be absolutely clear on this point the ARU shop craft unions expressly state that they will not interpose scope rules or classification rules under the Conrail and N&W CBAs as bars to NS' plan to assign NS GM locomotives to the Altoona shops and Conrail GE locomotives to the Roanoke shops. The ARU shop craft unions will only assert that once locomotives are assigned to the shops and work is to be performed at the shops, the work and the employees performing the work will be subject to the agreements currently applicable at those shops. With this representation by the ARU shop craft unions, the ARU has refuted the only justification offered by NS for its plan to impose the N&W CBAs on Conrail shop craft employees. ARU notes that CSXT has offered no justification whatsoever for its plan to apply CSXT CBAs at the Indianapolis, Albany and Buffalo shops, or at other shops where Conrail employees will clearly predominate. *See* ARU Comments at 133-137.

NS is also without justification for its plan to apply NS CBAs at the dispatching offices that it will acquire from Conrail. The ARU demonstrated that NS has acknowledged that it will merely take over Conrail dispatching desk at former Conrail offices, that those desks will be responsible only for former Conrail lines, that the offices will be supervised separately and that there will be no interchange of employees among those offices or between those offices and current NS dispatching offices. ARU Comments at 151-152. Applicants have utterly failed to demonstrate a reason, much less a "necessity" for elimination of the ATDD–Conrail CBAs at the dispatching offices it acquires from Conrail.

Thus, none of the specific "necessity" arguments offered by Applicants have any force. Indeed, the few examples they cite and the obvious weakness of the arguments they did offer highlight the lack of foundation for their entire claim of a need to apply their own CBAs rather

than the Conrail CBAs on the acquired territories, if these examples are the best that they can show, it is apparent that there is no merit to their position.

Applicants have continued to assert that the Conrail CBAs must be sacrificed in order to ease their administration of the contracts. Rebuttal at 663-664, 678-679. ARU's comments refuted that point and Applicants have done nothing to add substance to a clearly insubstantial argument. ARU Comments at 127-133. That it might be *easier* for Applicants to have fewer agreements to administer does not mean that it is *necessary* to the Transaction for them to administer fewer agreements.[20] They may have shown convenience, they have not shown necessity. *See ATDA v. ICC* rejecting "impediment" test for necessity. 26 F. 3d at 1165. Moreover, the notion of eliminating CBAs merely for administrative convenience is plainly at odds with the mandate of *McLean Trucking* and *Burlington Truck*.

Ultimately, Applicants fall back on the claim that application of their own CBAs will save them money. Rebuttal at 634-635. ARU argued in its Comments that reduction of Applicants labor costs is not *per se* a public transportation benefit and nothing Applicants have said refutes that argument. Among other things, ARU has demonstrated that even the assumption that labor cost savings to Applicants will be passed along to shippers and then to consumers is of dubious validity, especially given an increasingly oligopolistic market and the history of the railroads. ARU Comments at 47-52, 83-83. ARU also demonstrated that recent trends with respect to railroad

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[20] In response to the Unions' refutation of the administrative convenience argument noting that Applicants already administer multiple agreements for each craft so the Conrail CBAs would just be one more set of agreements to administer, Applicants state that they do not customarily administer separate agreements in consolidated territories. Even if this claim were true and valid, it would still be without force. Applicants cannot say they would be unable to administer another set of CBAs, indeed actually operating many more lines of railroad is surely a much greater administrative burden than they would assume in administering multiple CBAs. Their preference is not a basis for finding of necessity. Additionally, for many of the crafts here, the facilities or territories acquired will be separate from existing CSXT or NSR facilities and territories.

profits and rail worker wages further undermines the validity of such assumptions. *Id.*[21] But the most fundamental reason for rejecting this argument is that even if Applicants did pass their saving through to shippers, and shippers in turn passed their savings on to consumers, that is still not public transportation benefit; rather, that would be a series of private benefits. There is no reason why a government agency should give its imprimatur to the railroads' plan to reduce their labor costs by eliminating freely undertaken contractual obligations. In essence, the Applicants assert that they would improve service through reductions in their marginal costs by CBA modifications, but the D.C. Circuit in Executives rejected that approach. 987 F. 2d at 815. Indeed, such an arrangement is merely transferring wealth from rail workers to the railroads; even if the railroads share the taken wealth with shippers, that is still not a cognizable public benefit which would support a finding that elimination of the employees' contractual rights is a public transportation benefit. *Executives*, 987 F. 2d at 815. Instead, it would be an abject taking. Applicants have accused ARU of believing that increased profits are somehow "dirty". Rebuttal at 634. ARU does not dispute the railroads right to pursue and make honest profits. However, the making of profits by using a government agency to invalidate voluntarily undertaken contractual commitments is indeed deserving of condemnation.

It must also be noted that, in their Application, CSX and NS repeatedly stated that the public transportation benefits of the proposed Transaction would be such things as improved networks, better and shorter routings, more efficient utilization of equipment, better blocking and

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[21] Applicants have taken issue with ARU's demonstration that during the period of increased railroad profitability, real wages for rail workers have stagnated. Rebuttal at 636, comparing rail worker earnings with the CPI-W. However, Applicants have not addressed the substantial body of evidence and charts offered by ARU. ARU Comments at 47-52 and Vol. III at 289-303. In any event their dismissal of ARU's claim based on the CPI-W to earnings comparison is without validity since the earning comparison is improper in that it fails to control for the effects of job abolishment, concentration of work in higher paid positions and increased overtime. Only by comparing increases in profits to increases in wage rates could Applicants address the point made by ARU and this they have not done.

duced interchanges, and shorter transit times. *See* Application at 3- 5, 12-24, ARU Comments at 129-131. In attempting to support their claim that elimination of the Conrail CBAs for the vast majority of Conrail employees was necessary for a public transportation purpose Applicants failed to demonstrate how elimination of the CBAs would advance any of the public transportation benefits that they have cited as justifying the Transaction. And the justifications that they have offered, as demonstrated above, were patently specious or easily refuted. Accordingly, Applicants have failed to show that their plans to apply their own CBAs on the Conrail territory that they plan to operate is necessary to the Transaction.

Thus, given the language of the statute and the conditions, controlling judicial precedent and Applicants' own statements regarding their plans and their justifications for their plans, it is clear that, if the Board approves the Application, it should issue the declarations requested by ARU as a condition of such approval.

CONCLUSION

For all of the foregoing reasons, the Application should be denied. If approval is granted, it should be conditioned on issuance of the declarations requested by the ARU.

Respectfully submitted,

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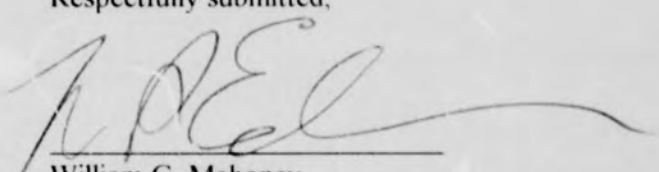

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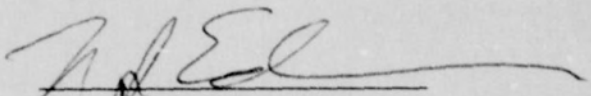
I hereby certify that I have caused to be served one copy of the foregoing Brief For The Allied Rail Unions, to applicants and parties on the restricted list by first-class mail on February 23, 1998 and to parties on the attached service list on February 24, 1998.



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DONALD E. CROSS (1923-1986)

ORIGINAL

February 23, 1998

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

-185864

RE: Finance Docket No. 33388, CSX Corporation, et al. -- Control and Operating Leases/Agreements -- Conrail Inc., et al.;

-185867

Finance Docket No. 33388 (Sub-No. 26), CSX Corporation and CSX Transportation, Inc. -- Control -- The Lakefront Dock and Railroad Terminal Company; and

-185868

Docket No. AB-290 (Sub-No. 197X), Norfolk and Western Railway Company -- Abandonment -- Toledo Pivot Bridge in Lucas County, OH

TLCPA-5

COMMENTS OF THE TOLEDO-LUCAS COUNTY PORT AUTHORITY AND STATEMENT OF SUPPORT FOR THE APPLICATION

Dear Secretary Williams:

I am writing on behalf of the Toledo-Lucas County Port Authority ("TLCPA") in connection with the above-captioned proceedings. Pursuant to the procedural schedule established by the Board, TLCPA is required today to submit a brief in support of its "Request for Protective Conditions, Opposition to Abandonment, and Comments of the Toledo-Lucas County Port Authority" ("TLCPA-4"). TLCPA will not submit a brief today, but, for the reasons provided below, rescinds and withdraws its various requests for relief as contained in TLCPA-4, and hereby informs the Board that it has satisfactorily resolved its concerns with the Primary Applicants.

During the past few weeks TLCPA and the Toledo Metropolitan Area Council of Governments ("TMACOG"), have engaged

in discussions with representatives of the Norfolk Southern Corporation ("NS"). The product of these negotiations is a letter agreement dated February 18, 1998 (hereinafter, the "Letter Agreement"). The Letter Agreement is attached hereto as Exhibit A, and should be added to the Board's procedural record.

As required under Section 5 of the Letter Agreement, TLCPA rescinds and withdraws TLCPA-4 and hereby states that it now supports the Application subject to the terms and conditions of the Letter Agreement.

Please note that TLCPA requests that it remain a party of record in this proceeding. Further, TLCPA gives notice that it reserves the right to participate as necessary in the oversight phase of this proceeding, should the Board approve the Application.

Thank you for your attention.

Sincerely,

Robert A. Wimbish

Counsel for the Toledo-Lucas County
Port Authority

Attachment - Exhibit A

cc: Robert E. Greenlese (TLCPA)
James W. McClellan (NS)

NORFOLK SOUTHERN

EXHIBIT A

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James W. McClellan
Vice President
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February 18, 1998

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Mr. David Dysard
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Toledo Metropolitan Area Council
of Governments
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Re: CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company -- Control Operating Leases/Agreements -- Conrail, Inc. and Consolidated Rail Corporation, Finance Docket No. 33388 ("Application")

Dear Sirs:

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

1. Toledo Docks

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

2. Pivot Bridge

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

3. Vickers Grade Separation

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

4. Toledo-Maumee Line

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

5. TLCPA and TMACOG Support

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

Very truly yours,

James W. McClellan
Vice President-Strategic Planning

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

ACCEPTED:

TOLEDO-LUCAS COUNTY
PORT AUTHORITY

By_____

Title_____

Date_____

TOLEDO METROPOLITAN AREA
COUNCIL OF GOVERNMENTS

By_____

Title_____

Date_____

3. Vickers Grade Separation

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

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

Very truly yours,

James W. McClellan
Vice President-Strategic Planning

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

ACCEPTED:

TOLEDO-LUCAS COUNTY PORT AUTHORITY

By James A. Hartung

Title President

Date 19 February 1998

TOLEDO METROPOLITAN AREA COUNCIL OF GOVERNMENTS

By William L. Wright

Title Executive Director

Date February 14, 1998

CERTIFICATE OF SERVICE

I, Robert A. Wimbish, hereby certify that I have this 23rd day of February, 1998, served true copies of the foregoing document upon counsel for the Primary Applicants via messenger delivery and upon ALJ Jacob Leventhal and all parties of record by means of U.S. mail, first class postage prepaid, or by means of more expeditious delivery.

Robert A. Wimbish

STB FD 33388 2-23-98 E 185862

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E

Congress of the United States
House of Representatives

February 17, 1998

Ms. Linda J. Morgan
Chairman
Surface Transportation Board
1925 K St. NW #820
Washington, D.C. 20423

Re: Finance Docket No. 33388

Dear Ms. Morgan:

I, Dennis J. Kucinich, a Member of Congress representing Ohio's 10th Congressional District and a Party of Record to this proceeding, hereby authorize my appointed representative, Martin D. Gelfand, Attorney at Law, to file the enclosed Brief before the Surface Transportation Board in the matter of the proposed Conrail Railroad Control Application, Finance Docket No. 33388. .

I further certify that I will serve copies of the attached Brief upon all Parties of Record in this proceeding, by first class mail, on or before February 23, 1998, as required by the Surface Transportation Board. Executed on February 17, 1998 to be hand-delivered on or before February 23, 1998.

Sincerely,

Dennis J. Kucinich

Dennis J. Kucinich
Member of Congress

DJK:mg

SWORN & subscribed before me a notary public this 17th day February 1998

Ramon Aponte
notary

RAMON APONTE, Notary Public
STATE OF OHIO
My Commission Expires DEC. 15, 2001

185862

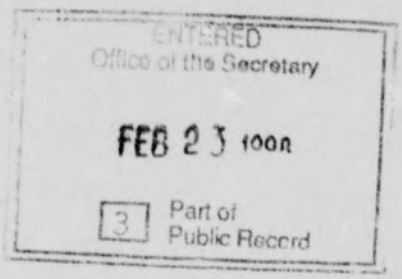
[PUBLIC]

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33388

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

BRIEF IN OPPOSITION TO, AND IN SUPPORT OF CONDITIONS TO, THE RAILROAD CONTROL APPLICATION FOR THE ACQUISITION OF CONRAIL ON BEHALF OF DENNIS J. KUCINICH, A PARTY OF RECORD TO THE PROCEEDING AND THE REPRESENTATIVE OF OHIO'S TENTH CONGRESSIONAL DISTRICT



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February 20, 1998

[PUBLIC]

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33388

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

BRIEF IN OPPOSITION TO, AND IN SUPPORT OF CONDITIONS TO, THE RAILROAD CONTROL APPLICATION FOR THE ACQUISITION OF CONRAIL ON BEHALF OF DENNIS J. KUCINICH, A PARTY OF RECORD TO THE PROCEEDING AND THE REPRESENTATIVE OF OHIO'S TENTH CONGRESSIONAL DISTRICT

Congressman Dennis J. Kucinich, representing the 10th Congressional District of Ohio and as a Party of Record to the Conrail Railroad Control Application, hereby submits this Brief to the Surface Transportation as part of the procedural record to Finance Control Docket No. 33388.

I. Executive Summary: Congressman Dennis J. Kucinich, a Party of Record to the Proposed Railroad Control Application for the Acquisition of Conrail, Opposes the Application as Proposed as Being Against the Public Interest and Requests that the Surface Transportation Board Place Conditions on the Acquisition Should it Decide to Grant Approval of the Application.

In June, 1997, CSX Corporation and Transportation, Inc. ("CSX") and Norfolk Southern Corporation and Railway Co. ("Norfolk Southern") filed a railroad control application with the Surface Transportation Board ("STB") to acquire control of Conrail Inc. and the Consolidated Rail Corporation (Finance Docket No. 33388).

As part of the merger application, Norfolk Southern proposed increasing freight traffic on the Cleveland-Lorain-Vermilion route from 13.5 trains per day to 37.8 trains per day, a near-tripling of the freight train traffic along that route. The Cleveland-Lorain-Vermilion route is currently owned in its entirety by Norfolk Southern and is used mostly for through cargo. As part of the application, Norfolk Southern will acquire the part of Conrail that also runs from Cleveland to Vermilion through Berea to the southwest of Cleveland. The Cleveland-Berea-Vermilion route, also known as the Conrail Mainline, currently serves shippers in the Cleveland area.

Upon learning of the plan to triple the freight train traffic along the Cleveland-Lorain-Vermilion corridor, Congressman Kucinich realized that the proposed merger would have significant effects on Ohio's 10th Congressional District, both economically and the environmentally. He applied to the STB to become a Party of Record, and was granted Party of Record status as part of the Railroad Control Application process in Finance Docket No. 33388. He has filed both Responsive Environmental Reports, and Responsive Comments, Protests, and Requests for Conditions, as part of the procedural schedule established under STB Finance Docket No. 33388 Decision No. 6. This Brief supports and supplements other filings that Congressman Kucinich has already submitted into the record for Finance Docket No. 33388.

Congressman Kucinich, through his filings with the STB to date, has made clear his opposition to the merger as proposed. Under the Railroad Control Application filed with the STB, the tripling of freight traffic along the Cleveland-Lorain-Vermilion route would have an adverse effect on the quality of life to residents of Cleveland's Cudell and Edgewater neighborhoods and the Cities of Lakewood, Rocky River, Bay Village, and Westlake, as well as communities to the West of the 10th Congressional District in Lorain County.

Furthermore, the routing of Norfolk Southern trains along the Cleveland-Lorain-Vermilion corridor diverts important freight business from Cleveland area's shippers. The Cleveland area is an important manufacturing and service industry center. Northeast Ohio is home to alloy, automotive, chemical, electric, energy systems, engraving, fabricating, food and agricultural, glass, hydraulics, industrial instrument, lighting, lubricant, machinery, medical equipment, metal, packaging, paper, piping, plastic, pneumatic, printing, pump and compressor, recycling, stamping, tire, tool and die, valve, wire, wood, and many other companies that depend

on rail shipping in order to stay competitive. Diversion of freight traffic from routes that serve shippers in favor of a rail line in a densely populated residential area with no industrial rail sidings would be detrimental to the Cleveland area's economy.

Reduction in competition among freight rail carriers will have a detrimental effect on rates charged to shippers. Under a provision of the Transportation Act of 1920 that is still in effect, the transaction will be exempt from all antitrust laws after the merger is approved by the STB. See 49 U.S.C. § 11321(a). Thus, if the merger is approved, the reduction in rail competition could result in anticompetitive price fixing and route restructuring that would be immune from antitrust laws.

Currently, Conrail competes with CSX for shippers' business along the Cleveland-Berea corridor and Conrail competes for shippers' business with Norfolk Southern between Vermilion and Berea. With the loss of Conrail, shippers in the Greater the Cleveland area are concerned about losing freight rail competition.

The merger is also likely to squeeze out another competitor for rail service to the Cleveland-area shippers. The Wheeling & Lake Erie Railway Company (WLE), a major regional rail carrier, will be at risk of losing business when origins and destinations are controlled by single Class I railroads under the terms of the Railroad Control Application. Norfolk Southern the Class I railroad from which WLE was spun off, will make the transition from WLE's largest partner to WLE's largest competitor.

Norfolk Southern's plan to divert its freight traffic from the Cleveland-Berea-Vermilion line in favor of the Cleveland-Lorain-Vermilion route will frustrate the efforts of communities and regional planning authorities in the Cleveland area to institute a commuter rail system that would serve the transportation needs of the region. It may also have detrimental effects on other railroads in the region. Furthermore, the merger will result in a loss of jobs, as well as result in Cleveland-area shippers losing competition among carriers. Because of these economic effects of the merger that the STB must consider in making its decision on the merits of the merger, the STB should not approve the merger as proposed.

As an alternative to the merger as proposed, the STB should consider a plan to create an

independent, neutral, dispassionate regional entity that would control freight and passenger rail in the Cleveland area. The new regional entity would serve shippers in the area, as well as the railroads that serve shippers in the area. The entity would also serve the transportation needs of the region by allowing commuter rail traffic along railroad lines that are not suited for high-volume freight train traffic.

This independent neutral regional entity will be a model for intra-urban rail transportation in the 21st Century. Using the best competitive features of the air transportation system, this plan would use a dispatching system similar to the air traffic control systems of most modern airports. It also incorporates the methods used by other deregulated utilities, such as the telephone industry.

A dispassionate regional operating entity for the Cleveland area will ensure that shippers within the intra-urban region will have competitive rail service in addition to the competitive truck service that they already enjoy. Without such an entity, service will be limited to carriers with both access to, and control of, the lines that those carriers own. Access will also be granted to one or more passenger rail companies willing to serve commuters in the Cleveland area. By granting control of the regional lines to a dispassionate independent entity, the best interests of all parties will be served.

II. If the STB Considers All Factors Mandated By Congress Under the Interstate Commerce Commission Termination Act and Preceding Legislation, then the STB Must Deny the Merger as Proposed or Impose Conditions on the Merger that will Alleviate Anti-Competitive Effects.

Under § 11323(a)(3) of the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"), the U.S. Surface Transportation Board ("STB") must approve and authorize any "[a]cquisition of control of a rail carrier by any number of rail carriers." See 49 U.S.C. § 11323(a)(3). Section 11324 describes generally each of the issues the STB must consider in a proceeding involving such an acquisition:

> In a proceeding under this section which involves the merger or control of at least two Class I railroads, as defined by the Board, the Board shall 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.

See 49 U.S.C. § 11324(b).

In 49 U.S.C. § 11324(c), Congress mandates that the STB apply a public interest standard. See United States v. Lowden, 308 U.S. 225, 230 (1939) (applying the term "public interest" within the context of having a "direct relation to the adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities"). The Interstate Commerce Commission (ICC) further specified the factors that must be considered in determining whether a transaction meets the public interest standard. Specifically, the ICC stated, "In considering the public interest, we must consider the interest of carriers, shippers, and consumers, and weigh the competing interests where conflicts occur." See Norfolk & W.R. Co. v. Detroit, T. & I. R. Co., 360 I.C.C. 498, 508 (1979). The statute also authorizes the STB to impose conditions on the transaction to alleviate any anti-competitive effects.

> The Board shall approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest. The Board may impose conditions governing the transaction, including the divestiture of parallel tracks or requiring the granting of trackage rights and access to other facilities. Any trackage rights and related conditions imposed to alleviate anti-competitive effects of the transaction shall provide for operating terms and compensation levels to ensure that the effects are alleviated.

See 49 U.S.C. § 11324(c).

In the proposed transaction involving Norfolk Southern and CSX's acquisition of Conrail, the STB must apply a public interest standard and is authorized to impose conditions on the merger to alleviate anti-competitive effects. In the proposed merger, the STB must consider the effects on the public interest. Among the effects of the proposed merger is the frustration of

Cleveland-area interests in a commuter rail system that would include the west side of Cleveland and Cleveland's western suburbs of Lakewood, Rocky River, Bay Village, Westlake, and the suburbs and cities in Lorain County. The STB must also consider the effect of the merger on other local carriers such as the WLE or the Greater Cleveland Regional Transit Authority ("GCRTA"). Furthermore, the STB must consider the effect that the merger will have on the employees in the Cleveland area who would lose their jobs or whose jobs would be threatened. Still another effect that the STB must consider is the adverse effect on shippers in the Cleveland area. Each of these issues must be addressed to the satisfaction of the public interest standard that the STB is required to consider in §§ 11324(b) and 11324© or the merger should be denied.

Alternatively, a win-win proposal for the carriers, shippers, and consumers of the Cleveland area would the establishment of: (1) a third party entity to operate the rail lines in the Cleveland area that currently carry rail cars for Norfolk Southern, CSX, and Conrail; and (2) an independent dispatching entity to control the flow of all freight and passenger traffic in and through Northeast Ohio. This proposal will alleviate the concerns of Norfolk Southern that led to its proposal to triple freight train traffic on the West Shore line through Cleveland, Lakewood, Rocky River, Bay Village, Westlake, and Lorain. This proposal will also alleviate the anti-competitive effects of leaving the shippers along the Cleveland-Berea corridor to be serviced by only one carrier as currently proposed by Norfolk Southern in the Conrail application.

III. The STB Should Consider that Shippers in the Cleveland Area Will Be Harmed by the Anticompetitive effects of the Conrail Acquisition Plan as Proposed and Deny the Application on that Basis.

In considering the public interest, see Lowden, 308 U.S. at 230, the STB is required to consider the interests of carriers, shippers, and consumers, and weigh the competing interests where conflicts arise. See Norfolk & W.I. Co., 360 I.C.C. at 508. The Railroad Control Application does not give adequate consideration to the interests of shippers, interests that must be considered by the STB before approving the application as proposed. Unless these considerations are considered and resolved, either by agreement of the parties, or as conditions of the merger, the STB should disapprove the application.

A. The STB Should Reject the Merger Because it Creates an Anticompetitive Environment for Shippers in Northeast Ohio.

Shippers in Northeast Ohio will lose competition among carriers if the merger, as proposed, is approved. Shippers who currently benefit from competitive pricing of freight rail service will have no guarantee of competition among carriers once the merger is approved.

A decrease in rail competition in the east, from three Class I carriers (CSX, Norfolk Southern, and Conrail) to two (CSX and Norfolk Southern) may result in higher rates to shippers. The railroads' intent to aggressively pursue increased intermodal business will result in other shippers absorbing increases in order to pay for the $10.3 billion Conrail acquisition. Fewer choices will result in higher rates for the same or poorer service. Results of the Union Pacific acquisition of Southern Pacific serve as evidence of the risk. The potential impact on smaller railroads such as WLE could result in less competition if these railroads are not protected as a condition of the acquisition.

Reserve Iron & Metal, L.P., (RIMCO), a scrap processor with facilities at 4431 West 130th Street in Cleveland, is the largest processor of blast furnace iron in the United States and ships to several mills which are dually served by Conrail and WLE. See Verified Statement of Linda Bornancin [hereinafter, "Bornancin,"] in Responsive Application of Wheeling & Lake Erie Rwy. Co., Oct. 21, 1997, Support Statements [hereinafter, "WLE Responsive Application"]. RIMCO shipped 3,167 cars over the WLE, all of which moved in joint line service with CSX. See Bornancin. In each case, Conrail offered direct competition. See id. Although ideally, Norfolk Southern would replace Conrail's position in the RIMCO yard, RIMCO has not yet been able to confirm that possibility with anyone at Norfolk Southern. See id. WLE's presence in RIMCO's yard would reduce the impact of the loss of Conrail and would prevent RIMCO from becoming captive to CSX only. See id. Such access would also contribute to the continued viability of WLE as a competitive carrier in the East, ensuring that companies such as RIMCO have a competitive choice in freight rail carriers.

Other shippers in Northeastern Ohio have also warned that the Railroad Control Application, as proposed, would be detrimental to shippers. Stanley Slesnick, president of Slesnick Iron & Metal at 927 Warner Road, S.E., in Canton, Ohio, warns that without WLE's

competitive presence,

> I am convinced that Slesnick Iron & Metal rail service would deteriorate Unfortunately, W&LE's viability has been severely jeopardized by the Conrail control proceeding.
>
> It is well known in the shipper community that Wheeling & Lake Erie had made tremendous efforts to provide excellent rail service despite its heavy debt load. We who depend on W&LE also know of its effort to find additional traffic opportunities, for which it asks only the ability to compete, to offset the traffic it will lose when NS takes over Conrail's franchise in W&LE territory and diverts it to NS single system routing. We fully support W&LE in this corrective effort.
>
> To put it simply, [shippers] need W&LE as both a provider of essential services, and as a competitive ratemaker. We fully support W&LE's efforts to find a solution to its crippling loss of traffic as a result of NS takeover of Conrail properties.

Verified Statement of Stanley Slesnick, in WLE Responsive Application, Support Statements.

Similarly, Janet Zwisler, the Transportation Coordinator with River Valley Paper Company in Akron, Ohio, foresees problems for shippers if the merger as proposed is approved.

> At the present time we have accessibility to Conrail and CSXT which most of our customers use. We have no idea how a rail giant such as NS will treat us with regard to competitive rates and how we will be treated with them as sole carrier to our siding. As we see it, without the presence of the Wheeling Lake Erie our rail service and rates are in jeopardy. Unfortunately, Wheeling Lake Erie's viability has been severely affected by the Conrail proceeding.
>
> It is well known in the shipper community that Wheeling Lake Erie has made tremendous efforts to provide excellent rail service despite its heavy debt load. We who depend upon Wheeling Lake Erie also know of its efforts to find additional traffic opportunities, for which it asks only the ability to compete, to offset the traffic it will lose when the Norfolk Southern takes over Conrail's franchise in Wheeling Lake Erie territory and diverts it to Norfolk Southern single system routing. . . .

Verified Statement of Janet M. Zwisler, in WLE Responsive Application, Support Statements.

David A. Carlson, president of Rub-R-Road, a rubber paving compounds firm in Kent, Ohio, noted that as a small shipper, he is concerned with "being able to even have rail service to

our facility. In the past Conrail was not interested in our small business and offer no service even though we have a rail facility in place on our property." Verified Statement of David A. Carlson, in WLE Responsive Application, Support Statements (emphasis in original). Carlson goes on to note that his company's growth in recent years is attributable to having a viable regional carrier willing to service a small shipper such as Rub-R-Road. See id.

Once the merger is approved, NS and CSX will be immune from antitrust action by any party alleging anticompetitive behavior. Under the Transportation Act of 1920, U.S. law provides:

> The authority of the [STB] under this subchapter is exclusive. A rail carrier or corporation participating in or resulting from a transaction approved by or exempted by the Board under this subchapter may carry out the transaction, own and operate property, and exercise control or franchises acquired through the transaction, without approval of a state authority. *A rail carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that rail carrier, corporation, or person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction.*"

See U.S.C. § 11321(a) (emphasis added). According to the U.S. Supreme Court, the exemption under § 11321(a) is "clear, broad, and unqualified. . . . By itself, the phrase 'all other law" indicates no limitation." Norfolk and Southern Rwy. Co. v. American Train Dispatchers' Ass'n., 499 U.S. 117, 128-29 (1991).

Nevertheless, the U.S. Supreme Court has also held that "[w]here merging companies are major competitive factors in a relevant market, the elimination of significant competition between them, by a merger or consolidation, itself constitutes a violation of section 1 of the Sherman Act." United States v. First National Bank & Trust Co., 376 U.S. 665, 671-72 (1964). The Court cites United States v. Southern Pacific Co., 258 U.S. 214 (1922), in which the Court held that "one system of railroad transportation cannot acquire another, nor a substantial and vital part thereof, when the effect of such acquisition is to suppress or materially reduce the free and normal flow of competition in the channels of interstate trade." Id at 230-31.

The STB is under a statutorily mandated obligation to specifically investigate and balance the competitive disadvantages to shippers. See Norfolk & W. I. CO., 360 I.C.C. at 508. As part of

that test, the STB must look at all the noncompetitive aspects of the proposed merger. If it does so, it should find that the proposed merger is anticompetitive and should deny the merger.

B. Without Adequate Competition, Shippers' Service Will be Adversely Affected and Shippers Will be Forced to Use Truck Transportation to Remain Competitive, Thereby Creating Adverse Environmental Consequences

Decrease in rail competition from three Class I carriers to two Class I carriers would also result in poorer service to shippers. Increased rail traffic with fewer rail employees will result in poorer service. This will ultimately result in higher costs and lost business to shippers. This is the lesson of the Union Pacific merger. Disruption of service in the transition after the acquisition will be the result of the changes proposed. Fewer cars will be available to shippers and thereby fewer shipments. Increased rates and poorer service will encourage more truck movements, resulting in more road congestion, pollution, road wear, and inconvenience.

If shippers in the Cleveland area lose competition among freight rail carriers, they will be forced to find other ways to move their deliveries in efficient and economical ways. Among new options that the shippers will have to explore will be use of freight truck service. However, many of these shippers have sidings for freight rail service. Not only will a switch from rail to truck be inconvenient and less economical than competitive freight rail service, but it will have implications to the freight rail industry, and to the environment.

Under the terms of the Railroad Control Application, Norfolk Southern intends to route its east-west shipping through the Cleveland area along the Cleveland-Lorain-Vermilion corridor. The plan, as proposed, will increase traffic along the Cleveland-Lorain-Vermilion corridor from approximately 13.5 trains per day, to approximately 37.8 trains per day. This will divert freight rail traffic from shippers currently serviced by Conrail to a route where there are very few shippers.

Norfolk Southern has proposed rerouting 17.7 trains per day from the Cleveland-Lorain-Vermilion route in favor of the Cleveland-Berea-Vermilion route. See Letter from Bruno Maestri, System Director for Norfolk Southern, to Elaine K. Kaiser, "Subject: Norfolk Southern Mitigation Proposal for Lakewood, Rocky River, West Lake, and Bay Village, Ohio and on to Vermilion, Ohio, Nov. 25, 1997, at 8, [hereinafter, "Maestri"], in Draft Environmental Impact Statement for Finance Docket No. 33388, Dec. 12, 1997, Appendix S, [hereinafter, "DEIS"]. However, the

rerouting of these trains will entail infrastructure changes that will allow for an increase in rail traffic through Berea, Ohio, and Olmsted Falls, Ohio. See Maestri, at 4-7. The estimated cost of the mitigation is $46,950,000. See id. at 9. Norfolk Southern, although a co-applicant, and proponent of the Railroad Control Application, has made its proposed mitigation contingent upon "local, state and federal authorities to obtain the necessary funding to permit these projects to go forward to construction." See id.

[Congressman Kucinich has been informed by Norfolk Southern representatives that the company is offering to provide $15 million of the approximately $47 million mitigation proposal. Congressman Kucinich supports all efforts to reach a negotiated settlement that will result in no additional freight traffic on the Cleveland-Lorain-Vermilion route while providing adequate protection in the form of grade separations for the Cleveland-Berea-Vermilion route. However, as of this filing date, no such agreement has been reached. NS representatives have stated that in the event that an agreement cannot be reached, the railroad company will proceed with the merger as it was originally filed. Therefore, all Parties of Record must proceed under the assumption that no agreement exists, and will remain in opposition to the merger until an agreement is filed, and accepted, by STB.]

Among the shippers that will be harmed by the diversion of trains from the Cleveland-Berea-Vermilion corridor in favor of the Cleveland-Lorain-Vermilion corridor are the members of the Western-Elmwood-Berea Corporation ("WEBCO"). WEBCO is a twenty-three year old industrial based economic development corporation serving the interests of the shippers that would be detrimentally affected. Among the 40 members of WEBCO are chemical, paper, glass, paint and varnish, tool, battery, lighting, instrument, dairy, distilling, finishing, manufacturing, and warehouse companies. In her written statement to the Federal Railroad Administration ("FRA") at the FRA's hearing in Lakewood on September 21, 1997, WEBCO Executive Director Anita R. Brindza testified:

> The WEBCO membership is opposed to any decision by the Surface Transportation Board that will divert freight traffic now being served by CONRAIL on the line that runs through the heart of the west side manufacturing district to the area of the airport and city of Berea. WEBCO does not support putting additional freight on the Westshore line that runs through the heart of residential neighborhoods in

Cleveland and the west suburbs.

> Receipt of raw materials and shipping of finished products by WEBCO members and other industrial plants is now virtually *"invisible"* to the residential population of Cleveland and its suburbs due to the availability of below grade or above grade track service that CONRAIL provides. Most residents remain unaware of the large machinery, paper products, chemical, steel, automotive components and other raw materials and finished products that are shipped weekly in and out of the west side via rail.
>
> If companies were forced into making a decision to only ship via truck, surface traffic would quadruple. For every rail car that is now utilized, it would take three or four tractor trailers to service the company's needs. Quadrupling truck traffic exponentially increases the likelihood of accidents throughout our area.

See Anita R. Brindza, Statement to the Federal Railroad Administration, September 21, 1997, in Responsive Application of Congressman Dennis J. Kucinich, October 21, 1997, at 7, Attachment 2 [hereinafter, "Kucinich Plan"] (emphasis in original).

As indicated in the above statement, the proposed transaction would adversely affect shippers in the Cleveland area. Not only would the transaction adversely affect competition among rail carriers for shippers' business, but it would adversely affect the rail industry itself to the extent that shippers currently using rail, and shippers that are equipped with rail sidings, may decide to use truck transportation instead of rail. The proposed transaction would also have an adverse effect on the environment if shippers opt to use freight truck transportation where freight rail would be otherwise more efficient and economical, but for the effect that lack of competition among carriers has a detrimental effect on prices to shippers.

The STB must analyze whether "the proposed transaction would have an adverse effect on competition among rail carriers in the affected region," i.e., the Cleveland area, if the merger were to be authorized by the STB as proposed. See 49 U.S.C. § 11324(b)(5). Once it analyzes for the adverse effect the transaction will have among rail carriers, the STB should reject the Conrail merger application, as proposed, because of its adverse effect on competition.

IV. The Railroad Control Application, as Proposed, Raises Competitiveness and Antitrust Issues that the STB Should Find Detrimental to Competition among Rail Carriers in the Northeast Ohio Region.

The ICCTA requires that in a proceeding which involves the merger of at least two Class I

railroads, the STB must consider "whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region or in the national rail system." See 49 U.S.C. § 11324(b)(5). In the Railroad Control Application now before the STB in Finance Control Docket No. 33388, the STB must apply the requirement set up by Congress in § 11324(b)(5) before making its decision.

The WLE, a regional railroad serving northern Ohio, could preserve competition in the Cleveland area if it is granted access to shippers under the terms of the merger. See Part III, supra. However, the merger, as proposed in the Application, would threaten the existence of the WLE. The threat to WLE as a result of the proposed Railroad Control Application presents competitiveness and antitrust issues that the STB needs to consider as it makes its decision about whether or not to allow the transaction to take place. Moreover, there is evidence from the Union Pacific merger that failure to preserve important regional railroads could result in chaos in the industrial East as has been the case in the West.

WLE, in its current corporate form, was created as a result of "significant concern" by the Department of Justice's Antitrust Division regarding NS's Pittsburgh/Chicago corridor. The divestiture that created the WLE was ordered by the Antitrust Division. See Verified Statement of Larry R. Parsons, Oct. 17, 1997, at 24 [hereinafter "Parsons"], in WLE Responsive Application; see also, Letter from J. Paul McGrath, Assistant Attorney General, Antitrust Division, U.S. Dept. of Justice, to Elizabeth H. Dole, Secretary of Transportation, Jan. 29, 1985 [hereinafter "Antitrust Division"], in Parsons, Appendix A, at 41.

The Antitrust Division's concern stems from an earlier attempt by Norfolk Southern to acquire Conrail. In his letter to Secretary Dole, Assistant A.G. McGrath notes:

> The Department of Justice . . . would oppose the proposed merger unless its competitive problems are remedied through a prior or concurrent divestiture of assets that is approved by the Attorney General. Appropriate divestiture must include divestiture of Conrail and/or Norfolk Southern rail assets along the designated corridor to one or more independent acquirers, other than CSX or any entity owned or controlled by CSX, that would provide long-term, viable, and competitive rail service to locations along the corridor. Such divestiture would preserve the vast bulk of the competition that would have been eliminated by the merger.

See Antitrust Division, at 41-42. The areas of "significant concern," as noted by Parsons, above,

include the Ohio counties of Cuyahoga, Jefferson, Lucas, Stark, and Lorain. See id. at 45. In Jefferson County, the Antitrust Division's "concern [was] particularly acute because the number of competing railroads would be reduced from two to one." See id. In Cuyahoga, Lorain, Stark, and Lucas Counties, as well as counties in Indiana, Michigan, and New York State, "the competitive situation would not be much better, because the number of rail alternatives would be reduced either from three to two or from four to three. We have determined that . . . non-rail transport alternatives are inadequate substitutes for rail transport in these markets." See id. Thus, the WLE was created out of the Antitrust Division's concern that any acquisition of Conrail by Norfolk Southern would result in serious competitiveness problems that would potentially violate federal antitrust laws. In response to the Antitrust Division's divestiture demand, Norfolk Southern spun off the portion of its railroad that is now WLE. See Parsons, at 24.

As part of the divestiture, NS became the WLE's largest interchange partner in terms of revenue percentage, accounting for more than 25% of WLE's revenue. See Verified Statement of Reginald M. Thompson, id. at 92. On the other hand, WLE competes with Conrail at more common points than with any Class I carrier. See id. Thus, when NS acquires Conrail, it will move from WLE's largest partner to WLE's largest competitor. As noted by WLE Vice President Thompson:

> When our most significant joint line partner assumes the role of our most pervasive head-to-head competitor, our railroad world will change dramatically, if not turn upside down. For instance NS will now be in a position to directly compete for a major share of our most significant shippers. Importantly, a number of these major shippers, who presently rely on W&LE joint line services, may find themselves captive to NS if W&LE is eliminated by bankruptcy, inclusion, or just plain nonviability. In the first two cases, the shippers may find themselves in the 2-1 category under current board jurisprudence; in the last, they simply will have inadequate competition. . . . In short, even without addressing specific loss assumptions, the Conrail acquisition will have a profound impact on the Ohio and Pennsylvania rail market.

See id. at 93.

Service to Cleveland-area shippers that might otherwise be provided by WLE may be limited to CSX only, should the merger be approved as proposed. Under the terms of the merger, there is no requirement that NS take over shipping contracts and serve shippers currently served by Conrail. In fact, NS has already indicated that it wants to redirect shipping away from the

Cleveland-Berea-Vermilion corridor that serves Cleveland shippers in favor of the Cleveland-Lorain-Vermilion corridor that does not serve Cleveland shippers. A November 25, 1997, letter from NS Bruno Maestri to the STB indicated a willingness of Norfolk Southern to redirect some of its increased traffic from the Cleveland-Lorain-Vermilion corridor to the Cleveland-Berea-Vermilion corridor. See Maestri, at 8-10. NS's position responds only to the environmental concerns of the West Shore communities, and not the anticompetitiveness of the transaction itself. As can be best read into the Norfolk Southern's application and mitigation proposal, neither Norfolk Southern nor CSX supports competitiveness among carriers in the post-acquisition economic environment.

WLE runs a significant risk of being eliminated by the proposed acquisition. If that happens, shippers will be adversely affected. See Part III, supra. Moreover, elimination of WLE will also undo the effects of the Antitrust Division's divestiture order. Therefore, the merger, as proposed, should not be allowed.

V The Loss of Jobs, and Resultant Effect on Safety, as a Result of the Proposed Merger Needs to Weigh In Against the Proposed Merger in the STB's Analysis.

According to the merger application, the affected railroads will suffer a net loss of 2,654 jobs, many of which are positions designed to maintain safe railroad cars and track conditions. These layoffs are system-wide. The consequences for the general public could be very serious considering the movement of hazardous material and nuclear waste by rail through the densely populated residential communities of Cleveland and the West Shore. Table 1 is a summary of anticipated layoffs by NS resulting from the proposed acquisition of Conrail.

These anticipated layoffs come after almost two decades of declining maintenance and safety personnel on railroads. For example between 1985 and 1995, Union Pacific doubled the ratio of its car shipments to workers from 85:1 to 170:1. Freights trains at one time were served by five or six people, but are now frequently staffed by one engineer and one conductor. See Nurith C. Aizenman, "The Case for More Regulation," The Washington Monthly, October 1997, at 17, in Responsive Environmental Report of Congressman Dennis J. Kucinich, Oct. 1, 1997, Appendix 6 [hereinafter, "Kucinich Environmental Report"].

Railroad employees are expected to work 12-hour shifts, take eight hours off, then return to work. But despite the 12-hour limit, the FRA recently found that Union Pacific routinely violates this limit, keeping workers on the job as long as 17 hours. Furthermore, rail workers can be called back to the job with little more than two hours notice. One Norfolk Southern engineer was quoted in *The Washington Monthly* as saying: "I've been forced to go out when I was so exhausted I hallucinated. I've seen things that weren't there, almost gone past signals I thought were one color when they were another." See id.

At the same time that railroads have significantly reduced staff, the Federal Railroad Administration (FRA) has reduced the number of safety inspectors due to budget cuts. Currently, there are 380 inspectors for over one million cars and 300,000 miles of track. See id. at 19. The General Accounting Office ("GAO") released a report in July, 1997 which found that the number of safety inspections conducted by FRA decreased by 23 percent, and fewer resources are allocated to responding to concerns about workplace injuries.

Table 1: MERGER-RELATED JOB LOSS[1]

JOB DESCRIPT.	NO. ABOLISHED	NO. CREATED	NET LOSS
Boilermakers	5	5	0
Carmen	330	18	312
Clerical	834	4	830
Electricians	53	53	0
Engineers	245	457	-212
Laborers	46	14	32
Machinists	85	77	8
Trackmen	473	0	473
Nonagreement	1,170	8	1,162
Police	46	3	43

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Supervisors	78	5	73
Sheet Metal Workers	37	9	28
Signalmen	25	10	15
Dispatchers	25	0	25
Trainmen	329	487	-158
Yardmasters	25	2	23
TOTALS	**3,806**	**1,152**	**2,654**

The decrease in safety inspections results from FRA instituting a new cooperative safety program in 1993. Rather than use violations and civil penalties against railroads for noncompliance with safety regulations, FRA has emphasized cooperative partnerships with other federal agencies, railroad management, labor unions, and the states. See U.S. General Accounting Office, Rail Transportation: Federal Railroad Administration's New Approach to Railroad Safety, July 1997, at 4 [hereinafter "FRA's New Approach"] in Kucinich Environmental Report, Appendix 5.

Because railroad safety has improved greatly over the last three decades — due in large part to technological advances — GAO could not determine the effectiveness of FRA's program. However, it should be noted that "FRA has implemented its Safety Assurance and Compliance Program with 33 railroads. This method has improved the safety on many large railroads, *but Norfolk Southern Corporation has refused to participate until FRA substantiates safety problems at the railroad*" (emphasis added). See id. at 5 (emphasis added). That a major railroad company would refuse to participate in a safety program instituted by the federal government does not bode well for the residents of Northeast Ohio and the nation as a whole who rely upon the federal government as well as the railroad for their very safety.

Accidents at railroad crossings are the leading cause of deaths associated with the railroad industry; almost half of all rail-related deaths are caused by collisions of trains and vehicles at public crossings. See Phyllis F. Scheinberg, U.S. General Accounting Office, Railroad Safety: DOT Faces Challenges in Improving Grade Crossing Safety, Track Inspection Standards, and Passenger Car Safety, April 1, 1996, at 1 [hereinafter "Scheinberg"] in Kucinich Environmental

Report, Appendix 7. One thousand (1,000) people die each year as a result of grade-crossing accidents. See FRA's New Approach, at 4. Ohio was among the top five states for having the highest number of rail crossing fatalities in the United States during 1991 through 1993; however, subsequent safety programs have led to a 75 percent decline in rail crossing accidents. See U.S. General Accounting Office, Railroad Safety: Status of Efforts to Improve Railroad Crossing Safety, August 1995, at 16, in Kucinich Environmental Report, Appendix 9.

Despite the decline, there are still approximately 100 fatalities at railroad crossings in Ohio annually. GAO recommends several strategies for reducing the number of grade crossing accidents, the most effective being to close them. Given the composition of the west side of Cleveland and West Shore communities — which are bisected by the Cleveland-Lorain-Vermilion line, with hospital and other emergency services on one side of the tracks and significant numbers of people on the other — this strategy is not viable. Another strategy recommended is to install lights and gates. But GAO notes: "However, lights and gates provide only a warning, not positive protection at a crossing." See Scheinberg, at 3. A third strategy is to install four-quadrant gates with vehicle detectors, but these can cost upwards of $1 million per crossing. With 27 crossing in Lakewood along 2.7 miles of track, this alternative is impractical. Therefore the increase in freight traffic represents an extreme safety hazard which cannot be reasonably mitigated.

As part of its decision-making process in the proposed merger, the STB must consider the interest of rail carrier employees affected by the proposed transaction. See 49 U.S.C. 11324(b)(4). The merger, as proposed not only has a significant impact on the Cleveland area, but the nation as a whole. In addition, the loss of jobs will further effect the safety of the railroads' operations, both in Northeast Ohio, and the nation. In considering the effect on jobs, and the effect that job losses will have on safety, the STB should reject the merger application as proposed.

VI The STB Should Reject the Railroad Control Application as Proposed for its Failure to Consider its Effect on Transportation to the Public.

The Greater Cleveland Regional Transit Authority ("GCRTA"), the regional bus and rapid transit carrier for the Cleveland area, currently runs three rapid transit lines from Cleveland's east

side to downtown Cleveland, the Blue and Green Lines from the eastern suburb of Shaker Heights, and the Red Line, originating in the eastern suburb of East Cleveland. The Red Line continues from downtown's Tower City to Cleveland Hopkins Airport at the southwestern edge of Cleveland. Plans are currently underway for a Red Line expansion to Berea. Beyond Berea, the population becomes less dense as the Conrail line heads west through Olmsted Falls, Olmsted Township, Lorain County, and points west that are served by that line. While the GCRTA Red Line serves the City of Cleveland as it heads through the west side, it turns to the south as it abuts the City of Lakewood on Cleveland's western edge to the north. Thus, the densely populated suburban areas to the west of downtown Cleveland, i.e., Lakewood, Rocky River, Bay Village, Westlake, Avon Lake, and Lorain, are not served by commuter rail.

Prior to Norfolk Southern's announcement in August of 1997 of its proposal to triple the freight train traffic along this line, Norfolk Southern had planned to abandon the West Shore tracks. See Kucinich Plan, at 5. Abandonment would have made possible the use of the Cleveland-Lorain-Vermilion line for commuter rail, as proposed by the local communities and the GCRTA.

According to a 1989 study by the Northeast Ohio Areawide Coordinating Agency ("NOACA"), the Cleveland-Lorain-Vermilion line "still handles significant through traffic, but not nearly as much as on Conrail's parallel line," i.e., the Cleveland-Berea-Vermilion line which runs through the less densely populated areas identified above. See id. at 5-6. Even at the time of the NOACA report, Norfolk Southern had plans to abandon this line. See id. at 6.

The local communities generally want commuter rail, although not as an addition to freight traffic. In addition to any plans that the GCRTA may have to make use of the currently lesser-used Cleveland-Lorain-Vermilion line, the local communities would have the option of selecting another operator of the commuter line had Norfolk Southern maintained its position on the abandonment. By introducing additional choices of passenger carriers, there would have been cost savings in operations. Having a choice of operator would result in better marketing and responsiveness to community needs.

With Norfolk Southern's proposed acquisition of Conrail's Cleveland-Berea-Vermilion line, communities, commuters, and passenger rail operators will be best served if Norfolk

Southern returns to its original plan of abandoning, or at least not increasing use of, the Cleveland-Lorain-Vermilion line. Norfolk Southern will be able to ship cargo to points west along its own Cleveland-Berea-Vermilion rail line through a less densely populated region, freeing up the northern trackage for passenger traffic. The merger application as proposed, however, fails to make use of the Conrail line through the less densely populated southern area, but inste proposes to triple the freight traffic through the more densely populated northern area.

The proposal has the additional economic effect of driving down housing prices in the affected area. Local realtors have complained that increasing the train traffic through the densely populated western suburbs are driving prospective home-buyers away. See id.

The proposal, therefore, has the effect of providing inadequate transportation to the public in the western suburbs of Cleveland and Lorain County, while simultaneously devaluing property. See 49 U.S.C. § 11324(b)(1). As proposed, the merger application should be rejected.

VII The Merger, as Proposed, Poses Serious Environmental Consequences and Should Be Rejected on the Basis of the Environmental Problems it will Cause.

The Railroad Control Acquisition, as proposed, will cause severe environmental consequences for Northeast Ohio. These environmental problems must be addressed by the STB, directly, or indirectly through the Section on Environmental Analysis. The following are capsulized summaries of the specific environmental problems that the merger would cause Northeast Ohio communities. Unless these problems are resolved, the STB should deny the merger, or approve the merger with conditions that resolve these environmental problems.

A. Bay Village: Bay Village is Cuyahoga County's northwestern most suburb, and is 97 percent residential with a population of 17,000 occupying 4.5 square miles. The Cleveland-Vermilion route is the southern border of the city. There are railroad crossings at five of the six roads entering the city, and one grade separation at the easternmost end of the city. All emergency medical services are provided by St. John West Shore Hospital, which is located south of the tracks in Westlake. See Kucinich Environmental Report, Appendix 2, at 19-20.

Bay Village Schools transport a significant number of students to public and parochial schools outside Bay Village. Because the railroad tracks form the southern boundary of the city,

almost all of these trips require crossing the tracks. More than 100 students come from the south side of the railroad tracks to attend St. Raphael's parochial school. See Kucinich Environmental Report, Appendix 3.

For all the above reasons, the STB should address the effect of the transaction on the safety of the City of Bay Village. The STB should deny the transaction unless the additional trains proposed for the City of Bay Village are rerouted.

B. Berea: The City of Berea wou'd be disproportionately affected by the proposed Conrail acquisition. As part of the Railroad Control Application, NS and CSX have proposed increasing freight traffic on the Berea-Greenwich and Short-Berea routes from 27.9 trains per day to 101.5 trains per day. NS and CSX have also proposed decreasing the freight traffic along the Cleveland-Vermilion route through Berea from 52.4 trains per day to 28.4 trains per day. The net post acquisition increase in trains per day through Berea, if the merger were to be approved as originally proposed, would be from 80.3 trains per day, to 129.9 trains per day, an increase of 49.6 trains per day, or a 61.8 percent increase. See Dennis J. Kucinich, Comments on the Draft Environmental Impact Statement, Feb. 2, 1998, at 15 [hereinafter, "Kucinich Environmental Response"].

Under the aforementioned plan, NS proposed increasing freight traffic along NS's Cleveland-Lakewood-Vermilion route from 16.4 trains per day to 34.1 trains per day, an increase of 17.7 trains per day. On November 25, 1997, NS amended its application to reroute the additional 17.7 trains originally proposed for Cleveland-Lorain-Vermilion, to the Cleveland-Berea-Vermilion route. The additional 17.7 trains per day under the amended proposal would increase Berea's train traffic from 129.9 trains per day to 147.6 trains per day. This represents an 83.8 percent increase in train traffic through Berea above the pre-acquisition baseline of 80.3 trains per day. See id.

The Berea-Greenwich route is an northeast-southwest line southwest of Cleveland, Ohio, originates in the southwest corner of Cuyahoga County, traverses the southern half of Lorain County, and approaches Greenwich from the southeast corner of Huron County. The Short-Berea route traverses the southwestern quarter of Cuyahoga County from downtown Cleveland to Berea, Ohio. These two routes constitute the local segment of the Cleveland-Indianapolis route.

The Conrail mainline along the Cleveland-Berea-Vermilion route traverses the southwest quarter of Cuyahoga County from downtown Cleveland through Berea, Ohio, and across the northern half of Lorain County to Vermilion. See id. at 15-16.

These Berea routes traverse heavily populated urban/suburban residential neighborhoods. They are also situated within an important commercial district of Cuyahoga County which makes heavy use of intermodal transportation, including rail and truck transportation, and air traffic at the adjacent Cleveland Hopkins International Airport. See id. at 16.

An 83.8 percent increase in train traffic will cause local and commercial transportation along Ohio Route 237 (Front Street), Sheldon Road, West Street, and Bagley Road in Berea, Ohio Route 252 (Columbia Road) and Maple Way in Olmsted Falls, and Fitch Street in Olmsted Township, causing the surrounding communities to bear a disproportionate burden of inconvenience due to heavy train traffic along the Conrail mainline and the Cleveland-Indianapolis route. This burden includes interference with police and fire crews reaching emergency situations; ambulances and other emergency medical services reaching injured and sick individuals and transporting them to the hospital; school buses transporting schoolchildren to and from schools; access of residents of these communities to their homes and other destinations; and access of trucks and other commercial vehicles to their pickup and delivery destinations. Grade separations on each of the aforementioned routes would be an appropriate mitigation against the effects of an 83.8 percent increase in rail traffic the proposed merger will cause.

C. **Brooklyn:** Brooklyn, Ohio, is a west-side residential and industrial suburb bordering Cleveland at Brooklyn's west, northwest, and east sides, and bordering Parma, Ohio, at its south side. Three sets of railroad tracks currently traverse Brooklyn. A Conrail line, formerly Cleveland's Short Line, crosses Brooklyn parallel to Brookpark Road near Brooklyn's southern border. Another Conrail line abuts Brooklyn's northwest border with a spur crossing Ridge Road just south of the northernmost tip of Brooklyn. And a CSX line from Cleveland to Medina crosses Brooklyn from the northeast edge to the southwest edge.

The Draft Environmental Impact Statement did not address the environmental effects that the proposed Conrail merger will have on the City of Brooklyn. The STB should address the following environmental concerns of the City of Brooklyn.

- If the Conrail merger is approved, what noise and safety mitigation will be offered to the residents living adjacent to the Conrail line parallel to Brookpark Road? Residents on Idlewood Drive, Summer Lane, Kennedy Drive, Southwood Drive, Autumn Lane, Springwood Drive, and Melody Lane live in homes abutted by the Conrail tracks to the south and Interstate 480 to the north. The only evacuation routes in the event of a hazardous material spill at that segment of the rail line are Idlewood Drive at the eastern edge of the neighborhood, and Southwood Drive at the western edge of the neighborhood. A derailment along this section of track would pose a clear and immediate threat to public safety. An increase in trains will increase the risk of a hazardous waste spill in the event of a derailment. Furthermore, an increase in trains will increase the noise levels experienced by residents living adjacent to the tracks on Idlewood Drive. Noise mitigation may be necessary.

- The Cleveland-Medina CSX route crosses American Road in Brooklyn. American Road is the access road for employees of American Greetings, Brooklyn's largest employer, employing approximately 3,000 workers. An increase in train traffic along this line will result in an increase in delays for American Greetings's workers and could result in traffic queues as far as Tiedeman Road. The SEA should investigate whether mitigation against the effects of traffic delays on American Road would be warranted.

- The Cleveland-Medina CSX route also abuts the Spring Crest-Pepper Ridge Drive neighborhood, which is already subject to significant noise from train traffic. Sixty-three homes are located there. The SEA should investigate whether noise mitigation is warranted if there is an increase in train traffic as a result of the merger.

- The Conrail line abutting the northwest edge of Brooklyn crosses Ridge Road at an at-grade crossing. Ridge Road is a major north-south commuter route between Cleveland and the southwestern suburbs. The SEA should investigate the effect that an increase in train traffic along this Conrail route would have on commuter traffic on Ridge Road, and recommend mitigation as appropriate.

See Congressman Dennis J. Kucinich, Addendum to Comments on the Draft Environmental Impact Statement, Feb. 4, 1998.

D. Cleveland: The Cudell and Edgewater communities are on the West Side of Cleveland. Within these two communities, there are 8,800 people, 1,300 of which are elderly persons who live alone. There are 85 structures that border the railroad tracks. Twenty percent (20 percent) of those are multifamily homes. Some are as close as 14 yards from the tracks. The fire station and emergency medical services are located south of the railroad tracks while the bulk of the population is north. There is only one grade separation where traffic can continue while a train traverses the city. See Kucinich Environmental Report, Appendix 2, at 27-29. Separating

the grades in this area would not be economically feasible. The only resolution to this problem is to divert any additional freight traffic away from this corridor.

In addition, according to the February 2, 1998, environmental filing by the City of Cleveland, the DEIS "minimizes [its] scope by focussing on regional impacts rather than on direct impacts to the many communities located along the railroads' lines in the Cleveland area." See Comments of the City of Cleveland, Ohio on the Draft Environmental Impact Statement, Feb. 2, 1998, at 1-2. Cleveland's comments continue, "By looking broadly at the issues, rather then on the serious adverse impacts the transaction will have across Cleveland and throughout its neighboring communities, the study minimizes the impacts on minority and low income populations who would bear the worst brunt of the proposed transaction. See id. at 2.

The STB should address the effect of the transaction on the safety of the Cudell and Edgewater communities in the City of Cleveland. The STB should also investigate the effects of the transaction on minority and low income communities in the City of Cleveland and neighboring municipalities. The merger, as proposed, does not adequately address these concerns, and should therefore be denied. Unless the STB sets conditions upon the merger that adequately address these concerns, the Railroad Control Application should be denied.

E. Cuyahoga Heights: Cuyahoga Heights is an industrial and residential community along the east shore of the Cuyahoga River due south of Downtown Cleveland. For many years, Cuyahoga Heights has asked Conrail to repair overpasses and tracks within the boundaries of the community. However, Conrail has not responded to Cuyahoga Heights's request, according the Louis J. Bacci, Mayor of Cuyahoga Heights.

Under the terms of the proposed Railroad Control Application, freight rail traffic is likely to increase through Cuyahoga Heights. The application should be denied unless the Village of Cuyahoga Heights gets the relief it has previously requested of Conrail, including the repair of grade separations at E. 49th Street and Grant Avenue. Moreover, tracks on Canal Road need to be repaired. Furthermore, noise mitigation is needed for homes that are 20-25 feet from the tracks. Unless conditions are set by the STB that require mitigation for Cuyahoga Heights, the transaction should be denied.

F. Lakewood: The immediate western suburb of Cleveland has a population of

60,000 occupying 5.6 square miles. Lakewood is the most densely populated area between New York and Chicago. The Cleveland-Vermilion line bisects the city into northern and southern sections with 27 crossings, more per mile than any other city in the country. See Kucinich Environmental Report, at 4.

Fifty percent (50%) of Lakewood's residents live north of the tracks. There is only one grade separation where traffic can continue in a north-south direction while a train traverses the city. Lakewood Hospital, located south of the tracks, provides medical emergency services. Similarly, two of the three fire stations and the police station are located south of the tracks. At the northernmost point of Lakewood, there are several high-rise apartment complexes and many residential homes along Lake Erie that would be isolated from two of the three fire stations and the police station. See id., Appendix 2, at 22-24.

There are eight public and private schools located near the railroad tracks; however, Lakewood does not use buses for its nearly 10,000 school children. Lakewood children walk or bicycle to and from school, and this often requires that they cross the tracks. Though railroad safety education is provided to elementary school children, railroad tracks could be considered an "attractive nuisance" whereby minors are drawn to unsafe objects. See id., Appendix 2, at 80-81.

For all the above reasons, the STB should address the effect of the transaction on the safety of the City of Lakewood. The STB should deny the transaction unless the additional trains proposed for the City of Lakewood are rerouted.

G. Olmsted Falls: The City of Olmsted Falls would be disproportionately affected by the proposed Conrail acquisition. As part of the Railroad Control Application, NS and CSX have proposed increasing freight traffic on the Berea-Greenwich and Short-Berea routes from 27.9 trains per day to 101.5 trains per day. NS and CSX have also proposed decreasing the freight traffic along the Cleveland-Vermilion route through Berea from 52.4 trains per day to 28.4 trains per day. The net post acquisition increase in trains per day through Berea, if the merger were to be approved as originally proposed, would be from 80.3 trains per day, to 129.9 trains per day, an increase of 49.6 trains per day, or a 61.8 percent increase. See Kucinich Environmental Response at 15.

Under the aforementioned plan, NS proposed increasing freight traffic along NS's

Cleveland-Lakewood-Vermilion route from 16.4 trains per day to 34.1 trains per day, an increase of 17.7 trains per day. On November 25, 1997, NS amended its application to reroute the additional 17.7 trains originally proposed for Cleveland-Lakewood-Vermilion, to the Cleveland-Berea-Vermilion route. The additional 17.7 trains per day under the amended proposal would increase Berea's train traffic from 129.9 trains per day to 147.6 trains per day. This represents an 83.8 percent increase in train traffic through Olmsted Falls above the pre-acquisition baseline of 80.3 trains per day. See id.

The Berea-Greenwich route is a northeast-southwest line southwest of Cleveland, Ohio, originating in the southwest corner of Cuyahoga County, traverses the southern half of Lorain County, and approaches Greenwich from the southeast corner of Huron County. The Short-Berea route traverses the southwestern quarter of Cuyahoga County from downtown Cleveland to Berea, Ohio. These two routes constitute the local segment of the Cleveland-Indianapolis route. The Conrail mainline along the Cleveland-Berea-Vermilion route traverses the southwest quarter of Cuyahoga County from downtown Cleveland through Berea, Ohio, and across the northern half of Lorain County to Vermilion. See id. at 15-16.

These routes through Olmsted Falls traverse heavily populated urban/suburban residential neighborhoods. They are also situated within an important commercial district of Cuyahoga County which makes heavy use of intermodal transportation, including rail and truck transportation, and air traffic at the adjacent Cleveland Hopkins International Airport. See id. at 16.

An 83.8 percent increase in train traffic will cause local and commercial transportation along Ohio Route 237 (Front Street), Sheldon Road, West Street, and Bagley Road in Berea, Ohio Route 252 (Columbia Road) and Maple Way in Olmsted Falls, and Fitch Street in Olmsted Township, causing the surrounding communities to bear a disproportionate burden of inconvenience due to heavy train traffic along the Conrail mainline and the Cleveland-Indianapolis route. This burden includes interference with police and fire crews reaching emergency situations; ambulances and other emergency medical services reaching injured and sick individuals and transporting them to the hospital; school buses transporting schoolchildren to and from schools; access of residents of these communities to their homes and other destinations; and access of trucks and other commercial vehicles to their pickup and delivery destinations. Grade separations

on each of the aforementioned routes would be an appropriate mitigation against the effects of an 83.8 percent increase in rail traffic the proposed merger will cause. See id.

H. Olmsted Township: Olmsted Township is an unincorporated township in the southeastern corner of Cuyahoga County. It is one of the fastest growing communities in Cuyahoga County, both in terms of residential and commercial development. According to Olmsted Township Trustee Robert A. Venefra, Stearns Road would be an appropriate location for a grade separation to protect the Olmsted Township community from problems associated with increased rail traffic through the township. The STB should set a condition on the merger, if the merger is approved, that requires a grade separation at Stearns Road in Olmsted Township.

I. Rocky River: Rocky River is bisected by the Cleveland-Vermilion line. More than 20,000 people occupy 4.5 square miles. Both the fire and police stations are located south of the tracks while a significant portion of the population lives north of the tracks. There are four crossings and only two grade separations. See Kucinich Environmental Report, at 5.

For all the above reasons, the STB should address the effect of the transaction on the safety of the City of Rocky River. The STB should deny the transaction unless the additional trains proposed for the City of Rocky River are rerouted.

J. Westlake: The northern border of Westlake is the Cleveland-Vermilion line. This suburb has a population of 27,000 occupying 16.5 square miles. There are five grade crossings, and only one grade separation for EMS personnel to travel from St. John West Shore Hospital to Bay Village (a smaller suburb immediately north which relies upon St. John for EMS personnel) when trains are traveling through the area. See id.

For all the above reasons, the STB should address the effect of the transaction on the safety of the City of Westlake. The STB should deny the transaction unless the additional trains proposed for the City of Westlake are rerouted.

IX As a Condition of the Merger, the STB Should Require That a Neutral Railroad Operating Entity Be Established to Alleviate Problems Identified in the Mandatory Section 11324(b) Analysis.

As an alternative to the merger as proposed, the STB should consider a plan to create an independent, neutral, dispassionate regional entity that would control freight and passenger rail in the Cleveland area. The new regional entity would serve shippers in the area, as well as the railroads serving shippers in the area. The entity should be an established railroad company not a party to the merger that could effectively maintain tracks and dispatch trains where appropriate to any situation. The entity would also serve the transportation needs of the region by allowing commuter rail traffic along railroad lines that are not suited for high-volume freight train traffic.

A. Neutral Independent Carrier to Serve Cleveland Area.

As a condition of the merger, the STB should establish an independent, third party entity, that would control the switching and signaling for trains running along all rail lines in the Cleveland area. The new regional railroad entity and the jointly owned tracks should be dispatched by an independent dispatcher, located in a new computerized train control center located in downtown Cleveland. This regional computerized dispatching center will be linked electronically and continuously with CSX and Norfolk Southern dispatching centers elsewhere in the country.

The independent dispatcher will expedite the passage of all passenger and freight trains in Northeast Ohio to avoid scheduling conflicts and any unnecessary delays for any railroad operating company. The Ohio Rail Development Commission, Norfolk Southern, CSX, Amtrak, GCRTA, and any other commuter train operating companies, will jointly establish schedules and priorities, a unified operating matrix for the region, and a rapid dispute-resolution mechanism, with Federal Railroad Administration, review to permit the centralized independent dispatcher to serve the best interests of all railroad companies.

B. The independent regional entity will provide for a more competitive environment than will be available under the proposed merger without such an entity.

The independent regional entity provides for a more competitive environment than the

proposed Shared Asset Areas ("SAA") proposed for North Jersey, South Jersey, and Detroit, in the Conrail merger application. See 3B Railroad Control Application 20-24, 390. The SAA scenario provides for a residual entity that will retain the name "Conrail" and will allow for shared assets in these regions currently serviced by Conrail, CSX, and Norfolk Southern.

SAAs would not be a viable alternative for the Cleveland area because of the significant potential for abuse under an SAA scenario as proposed in the CSX/NS application. Under the proposal, residues of Conrail will still exist for the purpose of controlling the dispatching, switching, and signaling for the proposed areas. The Conrail residue will be jointly controlled by both Norfolk Southern and CSX without any independent input or oversight, a hypothetical but enough of a possibility to evoke a "public interest" test.

The proposal is a ready-made scenario for price-fixing between the two railroads because the immunity from antitrust and other federal and state law under 49 U.S.C. §11321 protects the railroads from judicial recourse by shippers after the STB approves the SAAs. See 49 U.S.C. § 11321(a), which reads, in pertinent part: "The authority of the [STB] under this subchapter is exclusive. A rail carrier or corporation participating in or resulting from a transaction approved by or exempted by the Board under this subchapter may carry out the transaction, own and operate property, and exercise control or franchises acquired through the transaction, without approval of a state authority. *A rail carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that rail carrier, corporation, or person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction.*" (Emphasis added). According to the U.S. Supreme Court, the exemption under § 11321(a) is "clear, broad, and unqualified . . . By itself, the phrase 'all other law" indicates no limitation." Norfolk and Southern Rwy. Co. v. American Train Dispatchers' Ass'n., 499 U.S. 117, 128-29 (1991). In such a scenario, there could be a tacit understanding between the two railroad that Norfolk Southern will be the transporter in one area while CSX will be the transporter in another.

Both railroads may testify to their most honorable intentions before the STB during this decision-making process. However, it is essential that the STB consider that the railroads'

professed intentions are but a snapshot in time. Once the STB makes its decision, shippers will have little recourse in the event that the railroads make decisions that have detrimental competitive effects that contradict the testimony that the railroads are making during this decision-making process. See id. See also, id. at 119 ("A carrier in an approved consolidation 'is exempt from the antitrust laws '" (quoting 49 U.S.C. § 11341(a), the forerunner to § 11321(a) of the ICCTA)).

On the other hand, the STB itself, in rendering a decision about a merger or consolidation such as that which is proposed for Conrail, is not exempt from the antitrust and other laws the carriers will be exempt from once the STB decision is made. See, e.g., McLean Trucking Co. v. United States 321 U.S. 67, 78 (1944) ("[I]t is admitted the Commission with propriety may approve a rail consolidation, otherwise prohibited by anti-trust laws, *in order to bring about needed or desirable improvement in services and economies in operation.*") (Emphasis added). The independent regional entity will allow for independent ownership of the rail lines in the heavily trafficked Cleveland area without interfering with the ownership of the railroads' production, competition, and service to shippers.[2]

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[2] This proposal is analogous to the deregulation of other utilities such as telephone service. In the past, the Bell System controlled both long-distance telephone service and the telephone lines used for local and long-distance calls. Under deregulation, independent regulated entities retain or will retain control over transmission and distribution of the services while deregulated companies compete for production and service contracts. Thus, in the case of the phone companies, long-distance companies compete for the "product," or long distance service. Under this proposal, Norfolk Southern and CSX will continue to compete for shipping contracts. However, under this proposal, there will be little risk of conflicts between the carriers over the use of rail lines accessible to shippers that could impede competition as would be the case under the proposed merger conditions. With dispatching, switching, and signaling controlled by the neutral independent entity, conflicts over tracking rights by one carrier over lines owned by the other, will be eliminated.

Another model for this proposal is that used by the airline industry. For airlines, there is a documented set of rules for priority (operations) and cost allocation, (accounting in the railroad industry). The functional equivalent in the railroad industry, is a common set of operating rules is called the "General Operating Code of Rules". The "General Operating Code" is a set of rules, which are recognized as about the most generic of standard rules. There are derivatives of those base rules that are unique to a region and operating circumstances. Those derivative rules are slightly modified by the railroads implementing them in a defined region, with all carriers (railroads) agreeing to subscribe to that set of rules, within that region. In the airline

In the Conrail merger application, as proposed, the shippers in Cleveland between Downtown and Berea currently served by Conrail and CSX will likely be served by CSX only. Norfolk Southern will acquire a Conrail line from Downtown to Berea that runs west from Berea to Vermilion parallel to and south of the West Shore line, thus offering potential competition through Cleveland's south and west sides. However, Norfolk Southern's proposal to triple the freight traffic along the West Shore line is at the expense of shippers' access between Cleveland and Vermilion through Berea. The rationale for tripling the traffic through Lakewood, Rocky River, Bay Village, and Lorain, is that CSX will control the junction at Berea. Because CSX and Norfolk Southern are historic rivals, Norfolk Southern naturally does not want its cars threatened by its competitor's control through the Berea junction. Yet there is a way to stop the tripling of freight traffic through the west side while at the same time addressing Norfolk Southern's concerns.

The solution to Norfolk Southern's problem through Berea is for all the carriers through the Cleveland area to divest their interests in the rail lines as described below in favor of a neutral independent regional carrier. The neutral entity would control all dispatching, switching, and signaling from a Downtown Cleveland location, opening competitive access for all carriers to shippers in the Cleveland area.

The trains themselves, along with all shipping contracts, will be under the sole purview of the railroads, as selected by the shippers. Norfolk Southern, CSX, and other carriers, will be able to operate their trains along any track currently owned by Norfolk Southern, CSX, Conrail, or other railroad in the Cleveland area, subject to availability and necessity as determined by the independent entity. The regional entity will exist under articles of incorporation and bylaws that preclude its acting with prejudice for or against any railroad using its rail lines. Therefore,

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industry, the terminal operating enterprise may control one or more of several functions depending upon the physical conditions, the municipal airport management, and other circumstances: gate access and timing, ramp control, jetways, baggage handling systems and rolling stock, even terminal maintenance and concessions. Most airlines keep close control over interline baggage since it is mission-critical. Airline scheduling is highly formalized, so the daily routine is quite structured. The parallels are obvious, except that rail scheduling is a lot looser, both in concept and in practice. The more formalized the schedule, the easier it is to delegate operations control and dispatching to a third party under a set of rules for priority.

competition for the railroads' "product," will be retained for shippers in the Cleveland area. There will be no risk of railroads' anti-competitive abuse in the Cleveland area as there would be without judicial recourse under the SAA proposals for North Jersey, South Jersey, and Detroit. See 3B Railroad Control Application 20-24. Thus, the anti-competitive effect of Norfolk Southern diverting its freight traffic from the industrial areas of Cleveland to the residential areas of Lakewood and the other western suburbs would be eliminated by a neutral entity that would dispatch, switch, and signal with fairness as mandated by its articles of incorporation and bylaws.

C. Independent Regional Entity: Boundaries and Description.

A longstanding policy of U.S. railroads and the Federal Railroad Administration is to separate commuter traffic from freight traffic as much as possible. The Cleveland area has long been underserved with respect to commuter rail. Regional agencies such as the Northeast Ohio Areawide Coordinating Agency, and the Greater Cleveland Regional Transit Authority, as well as local communities and residents, have called for more commuter service along the region's existing rail lines.

The following boundaries and description of the independent regional rail entity is one that will set the stage for urban and suburban railroad service for the 21st Century. This description allows for an emulation of airline operations and control, as discussed above. It allows for separation of commuter and freight lines wherever possible.

Congress has given the STB, through the ICCTA, the authority to help build the railroad network of the 21st Century by emulating the best aspects of the airline industry's air traffic control system. The key to the airline industry's success is dispassionate and effective control that is fair and consistent in dealing with all carriers, whether serving shippers or passengers. The airline model can be easily transposed for the railroad industry where there are many natural conflicts due to line sharing. These conflicts can only be resolved through a dispassionate system such as the one outlined in this filing and described below. If implemented in the Cleveland area, this system will be a model for other cities and regions throughout the country.

1. Selected rail lines with heavy freight traffic, ample grade separations, and little commuter rail potential, should be jointly owned and accessed by Norfolk Southern and CSX for high-volume freight service if the merger is approved.

Certain lines with heavy freight traffic, ample grade separations, and little potential for regional commuter rail use, should be jointly owned and accessed by Norfolk Southern and CSX if the STB approves the Conrail merger. These lines are double- or triple-tracked, and in certain segments, quadruple-tracked. They are heavily used freight lines that are grade-separated from most highway and road crossings, and pass by most of the principal freight customers in Northeast Ohio. The customers along these lines deserve access to both railroads for competition purposes.

Except for the track that runs from Union Avenue in Cleveland to Hudson, Ohio, these tracks are of little regional interest other than customer service and competition. The track between Union Avenue and Hudson, however, is the best route for commuter rail between Cleveland and Akron.

The following Conrail lines should be jointly owned and accessed by Norfolk Southern and CSX if the STB approves the merger:

a. The entire mainline from Berea, Ohio, to the Lakefront in downtown Cleveland, and Northeast to Madison/Perry in Lake County where there exists a connection between the Conrail line and the existing Norfolk Southern line to Buffalo.

b. The mainline from the Lakefront southeast to Ravenna to the point where it intersects the CSX mainline. As noted above, there is a regional interest in using part of this line for commuter rail between Cleveland and Hudson.

c. The Cleveland shortline from Collinwood Yard to Rockport Yard in Brookpark near the Cleveland Hopkins Airport.

d. The Clark branch (former Cleveland Union Terminal) from Berea to West 25th, and the Flats in Cleveland to the point of intersection with the existing Norfolk Southern line.

2. Selected rail lines with less direct access to shippers, ample grade crossings, and a promising potential for regional commuter traffic, should be divested by their current owners as term of the merger and turned over to an independent operating entity.

There is strong interest in Northeast Ohio to begin using commuter rail between various heavily populated suburbs and downtown Cleveland's Tower City. Cleveland's suburbs have offices and industrial parks that employ many of Northeast Ohio's residents. Westlake, Solon, and Mentor, for example, are growing in the number of residential, commercial, and industrial centers in all three directions radiating from downtown Cleveland.

All three of these suburbs, and many others, are crossed by rail lines in existence today. These are single tracked and run through the centers of these and other heavily populated areas. Very few freight customers are served along these lines.

Existing customers deserve competitive access between Norfolk Southern and CSX. Such access would not be possible under the current proposal. The Cleveland-Lorain-Vermilion lines can and should form the core of an important and necessary commuter rail system for Northeast Ohio. These lines must be placed in an independent dispassionate entity because Norfolk Southern and CSX have shown little, if any, concern for the local and regional commuter train interests.

The same regional railroad that would operate the freight services on the new independent rail entity could also operate the commuter trains or contract with a separate commuter train operator. This regional railroad, as chosen by the STB and the Federal Railroad Administration, could also be the independent dispatching entity for the jointly owned and accessed tracks listed in section 1, above.

The former Cleveland Union Terminal right-of-way currently owned by the Greater Cleveland Regional Transit Authority (GCRTA) should be made part of this regional entity in order to permit inter-city passenger trains and regional commuter trains access to Tower City from the various main lines. The ownership of the Cleveland Union Terminal right-of-way by the regional entity would also permit an important and alternative freight crossing of the Cuyahoga River. This crossing, currently used only by the Windermere-Airport Rapid Transit line, is on a fixed high-level bridge and has a quadruple rail right-of-way that is not affected by ship traffic along the river. The other freight crossings use lift bridges over the Cuyahoga River.

Competitive access could be deterred by heavy ship traffic on the river. Ownership of the quadruple track right-of-way will serve the public interest by allowing both freight and commuter traffic from all railroads east-west access when the lift bridges are blocked by river traffic.

The following railroad lines and property shall be placed into a separate railroad operating company, apart from Norfolk Southern and CSX:

a. The existing Norfolk Southern Mainline from Bellevue, through Lorain, Lakewood, Cleveland, Euclid, and Painesville, to a point near Madison/Perry in Lake County, where there is a connection to the parallel Conrail line to Buffalo.

b. The existing and entire Conrail Randall Secondary Line from East 40th (near Interstate 490) Southeast past Union Avenue, Solon, Geauga Lake and Sea World, to its endpoint in Portage County, just beyond the city of Aurora.

c. The former Cleveland Union Terminal property (now owned by GCRTA which has its lines running parallel to this property) from West 25th to the Cuyahoga River Viaduct, and from Tower City to East 40th near the GCRTA yards and Interstate 490, located within the City of Cleveland.

d. The former Cleveland Union Terminal property running parallel with the Norfolk Southern, GCRTA and Conrail shortline railroad properties from East 40th to Superior Avenue in Cleveland.

e. The air rights over Canal Road just south of Tower City, between the viaduct and former Cleveland Union Terminal property.

f. The CSX line from Lorain South to Elyria to the Norfolk Southern Mainline (ex-Conrail).

g. The existing CSX line in Summit and Stark Counties, running south from Akron to Canton, including access to the Canton station on the ex-Conrail (Pennsylvania) East-West mainline.

h. The entire rail line owned by the Summit County Port Authority (ex-Erie) from Portage County west to Akron via Ravenna and Kent.

I. The ex-Conrail line from Hudson to downtown Akron via Cuyahoga Falls.

j. All existing and future rights to freight contracts with shippers and

businesses located on or near these rail lines.

k. Norfolk Southern and CSX should be directed by the STB to fully cooperate in the addition of new connections from this new regional operating entity to their mainlines, and shall jointly maintain all existing rail connections in order to facilitate the transfer of freight cars.

VIII Conclusion and Recommendations

The Surface Transportation Board ("STB") is required by statute to consider several factors before authorizing the merger proposed in the Conrail application under Docket No. 33388. These factors include: the effect of the merger on the adequacy of transportation to the public; whether the proposed merger would have an adverse effect on competition in the affected region or the national rail system; the interest of rail carrier employees affected by the proposed merger; and the effect on the public interest of failing to include other rail carriers in the area in the proposed merger. See 49 U.S.C. § 11324(b). Section 11324© of the ICCTA mandates that the STB apply a public interest standard, See United States v. Lowden, 308 U.S. 225, 230 (1939); Norfolk & W.R. Co. v. Detroit, T & I. R. Co., 360 I.C.C. 498, 508 (1979), and authorizes the STB to impose conditions on the transaction to alleviate any anti-competitive effects. See 49 U.S.C. § 11324(c). **The STB must consider these issues now and resolve them. If not, the railroads will be immune from judicial review of the anti-competitive effects of the merger and other federal, state, or local laws that might otherwise govern the railroads' operations**. See 49 U.S.C. § 11321(a); Norfolk & Western Railway Co. v. American Train Dispatchers' Ass'n, 499 U.S. 117, 119 (1991).

In order to comply with its Congressional mandate and to protect the public interest from the anti-competitive effects of the merger, the STB should consider the following recommendations:

1. **The STB should reject the merger because it is anti-competitive**. Currently, shippers along the Cleveland-Berea axis are served by two railroads, Conrail and CSX. If Norfolk

Southern and CSX proceed as proposed in the merger application, shippers along that axis will no longer have choice among rail carriers because Norfolk Southern will divert the service it is acquiring from Conrail in favor of the tracks it already owns along the Cleveland-Lorain-Vermilion route. The STB should reject the merger proposal because it limits shippers' choice of rail carriers and is therefore anti-competitive.

2. **The STB should reject the merger because it is detrimental to the railroad industry.** If shippers in the Cleveland area are limited to only one rail carrier, then the only alternative they will have is to hire freight truck carriers. If shippers hire trucks where trains would have been otherwise more appropriate, the railroad industry will be hurt. Moreover, air quality will suffer with the additional use of trucks where trains would have been otherwise more appropriate. Furthermore, the quality of life among residents who live on or near the roads that the trucks must use to reach the shippers will be hurt. Therefore, the STB should reject the merger proposal because it will hurt the railroad industry when shippers opt for truck service where rail service would have been otherwise more appropriate.

3. **The STB should reject the merger because it is inconsistent with needs of shippers in the Cleveland area.** Norfolk Southern's plan to triple the train traffic along the Cleveland-Lorain-Vermilion line is inconsistent with shippers' needs in Northeast Ohio because it diverts freight train traffic from shippers along the highly commercial and industrial Cleveland-Berea axis in favor of the densely residential suburbs along Cleveland's west shore. In considering the needs of shippers in the Cleveland area, the STB should reject the merger because it is inconsistent with shippers' need for rail service.

4. **The STB should reject the merger because it fails to include other area rail carriers.** In Norfolk Southern's proposal to triple freight train traffic along the Cleveland-Lorain-Vermilion line, it fails to consider that much of the through freight traffic can be diverted along WLE's Bellevue-Canton route. WLE can provide trackage rights to Norfolk Southern for freight that

does not need to travel along the Cleveland-Lorain-Vermilion, or the Cleveland-Berea-Vermilion routes. Diversion of freight traffic along the Bellevue-Canton route will enhance the safety of affected areas, free up trackage for shippers along the Cleveland-Vermilion axes, and free up trackage for commuter rail. The STB should reject the application, as proposed, because it fails to consider other area railroads' ability to serve the area in a way that is competitive and in the public interest.

5. **The STB should reject the merger because it will result in lost jobs.** As a result of the merger, the affected railroads will suffer a net loss of 2,654 jobs. Many of these jobs are directly related to maintenance of the trains, tracks, safety. This job loss will be detrimental to the economy and will affect the safe and efficient operation of the affected railroads. Because of the heavy job loss and potential safety problems associated with the merger, the STB should reject the merger application.

6. **The STB should reject the merger because it frustrates Cleveland regional efforts to institute area-wide commuter rail.** Planners, communities, residents, and other interested parties have long planned for an area-wide passenger and commuter rail system to serve Northeast Ohio. These plans have been consistent with Norfolk Southern's plan to abandon, or limit, freight service along its Cleveland-Lorain-Vermilion rail line. The Cleveland-Lorain-Vermilion line is situated in the densely populated western suburbs of Cleveland and in other areas with little need for freight rail service. Freight service between Cleveland and Vermilion can better be served on the Conrail line that Norfolk Southern proposes to acquire. The Cleveland-Berea-Vermilion line is better equipped to handle heavy freight because of its multiple tracking. For through freight that need not be carried through Cleveland, Norfolk Southern can use the WLE line to Bellevue which connects to Norfolk Southern tracks to points west. Freight traffic along the Cleveland-Lorain-Vermilion line should be limited to freight needed by shippers along that line, freeing that line for commuter rail to serve the transportation needs of Northeast Ohio. Thus, the STB should find that the merger, as proposed, is inconsistent with the transportation

needs of the Northeast Ohio region. The STB should reject the proposal.

7. **The STB should reject the merger because it is harmful to the environment in Greater Cleveland.** The merger as proposed would have detrimental effects to the communities of Bay Village, Berea, Brooklyn, Cleveland, Cuyahoga Heights, Lakewood, Olmsted Falls, Olmsted Township, Rocky River, and Westlake in Cuyahoga County. Unless the STB sets conditions on the merger to mitigate the environmental effects to these communities, the proposed transaction should be denied.

8. **As an alternative to rejecting the merger altogether, the STB should consider requiring, as a term of the merger, the establishment of a neutral, independent, railroad operating entity that would serve the Northeast Ohio area fairly and impartially.** The STB is authorized to set limitations upon the merger in order to serve the public interest. As a term of the merger, the STB should set up a third-party rail operating entity that would serve the Northeast Ohio area in a fair and impartial manner. The independent entity would use existing rail lines and control the dispatching, switching, and signaling, along all Northeast Ohio rail lines in a way that is fair to all carriers, promotes competition for shipping, and incorporates the transportation needs of the residents of Northeast Ohio. Operating in a manner that emulates the best qualities of public utility deregulation, and the airline industry's air traffic control systems, the new regional entity would be a model for intra-city rail service for the 21st Century.

VERIFICATION

Martin D. Gelfand, makes oath and says that he is Staff Counsel for Congressman Dennis J. Kucinich, that he is authorized to file and verify the foregoing brief in opposition to, and in support of conditions to, the Railroad Control Application for the acquisition of Conrail on behalf of Dennis J. Kucinich, a party of record to the proceeding and the representative of Ohio's Tenth Congressional District, in STB Finance Docket No. 33388, and that he has carefully examined all the statements and analysis in the foregoing brief, that he has knowledge of the matters stated therein, and that all representations set forth therein are true and correct to the best of his knowledge, information, and belief.

Martin D. Gelfand

Sworn and subscribed before me, a notary public, this 20th day of February, 1998.

Notary Public

Edith L. Reed
Notary Public State of Ohio, Cuy. Cty.
My commission expires May 20, 2002