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TELEX 440274 FACSIMILE (202) 986-8102

WRITER'S DIRECT DIAL
(202) 986-8050

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February 23, 1998

VIA HAND DELIVERY

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

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

Dear Secretary Williams:

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

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

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

Very truly yours,

Michael F. McBride

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

Attorneys for Indianapolis Power & Light Company

Enclosures

cc: All Parties on the Certificate of Service

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PUBLIC VERSION

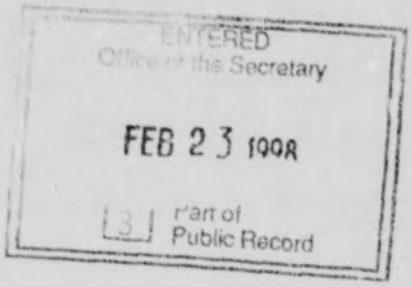
UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
SURFACE TRANSPORTATION BOARD

IP&L-11

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

SUPPLEMENTAL BRIEF OF INDIANAPOLIS POWER & LIGHT COMPANY IN SUPPORT OF REQUEST FOR CONDITIONS IN IP&L-3 AND IN SUPPORT OF THE RESPONSIVE APPLICATION OF INDIANA SOUTHERN RAILROAD, INC. (ISRR-4)



Michael F. McBride
Bruce W. Neely
Brenda Durham
John M. Collins
LeBOEUF, LAMB, GREENE & MacRAE, L.L.P.
1875 Connecticut Ave., N.W., Suite 1200
Washington, D.C. 20009-5728
(202) 986-8000 (Telephone)
(202) 986-8102 (Facsimile)

Attorneys for Indianapolis Power & Light Company

Due Date: February 23, 1998
Dated: February 23, 1998

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SUPPLEMENTAL BRIEF OF INDIANAPOLIS POWER & LIGHT COMPANY IN SUPPORT OF REQUEST FOR CONDITIONS IN IP&L-3 AND IN SUPPORT OF THE RESPONSIVE APPLICATION OF INDIANA SOUTHERN RAILROAD, INC. (ISRR-4)

Introduction and Summary

The proposed transaction would seriously harm existing rail transportation competition in Indianapolis. The impact on Indianapolis Power & Light Company ("IP&L" or "IPL") would be severe because it will eliminate a major provider of rail transportation in Indianapolis, Conrail, and not adequately replace it with Norfolk Southern or another substantial competitor to CSX (which also now serves Indianapolis). In fact, CSX and NS have acknowledged that Indianapolis is the largest "2 to 1" metropolitan area affected by the proposed transaction, see generally Application, Vol. 2A at 147-49 (Hart V.S.), yet they have not proposed that NS have an ownership interest in Indianapolis or direct access to local shippers (with one exception, a General Motors Plant). If NS can have access to that GM Plant, why can't NS or Indiana Southern have access to IPL's two Indianapolis Powerplants, Stout, and Perry K? Obviously, CSX and NS do not have a good answer to that question.

Instead, CSX and NS have proposed an inefficient and costly combination of operating conditions, trackage rights fees, and a switching charge applicable to NS's operations in Indianapolis. NS, in turn, will have to pass through the costs associated with its operations to shippers, thus greatly inhibiting its ability to compete with CSX in Indianapolis. Even NS's own Witness, Michael Mohan, acknowledged that "Indianapolis will be primarily served by CSX." CSX/NS-20, Application, Vol. 3B at 28. Given the terms of the proposed transaction, this is no wonder.

Instead of allowing NS to compete on equal footing with CSX, Applicants have proposed instead that NS will have "overhead" trackage rights with direct access to only one facility, a GM Plant. NS would be barred from serving shippers directly through local trackage rights (except for the one GM Plant), it would be barred from serving shippers via existing build-out or build-in options, or from serving new facilities, and it would not be able to interchange with any shortline other than CSX's subsidiary The Indiana Rail Road ("INRD"). Furthermore, all NS traffic will have to be routed through the Hawthorne Yard where NS will have to depend on CSX for dispatching. Notably, the terms under which NS may use the Hawthorne Yard have not been specified by CSX or NS.

In addition, Applicants' proposal (which apparently was at CSX's insistence) would impose on NS a trackage rights fee and a switching charge, rather than one or the other. Moreover, the proposed trackage rights fee is too high and the switching charge, while allegedly "cost-based," could not be audited by shippers or even the Board unless the Board requires it, thus allowing the possibility of unreasonable or inaccurate costs being passed through to shippers. Taken together, these aspects of the proposed transaction effectively ensure that NS will be unable to compete on equal footing with CSX in Indianapolis, just as Witness Mohan admitted. When NS Chairman Goode was asked how IPL could be confident that NS would compete in Indianapolis, he pointed to NS's investment in the overall transaction. But when asked what investment NS would have in Indianapolis, he responded "I guess I'm not aware of any that's planned in the transaction thus far." IP&L-3, Ex. No. 5 (Goode Dep'n Tr. 45).

The CSX/NS proposal for Indianapolis directly conflicts with NS's "Principles of Balanced Rail Competition." IP&L-3, Ex. No. 5 (McClellan Dep'n Ex. No. 1). If those Principles had controlled the outcome, the proposal would have provided for an ownership interest in rail assets for NS in Indianapolis or trackage rights with direct access to local shippers, as NS clearly prefers. See IP&L-3, Ex. No. 5 (McClellan Dep'n Tr. 79) ("we had made a major effort with our principles of balanced [rail] competition to state that the vision of the Northeastern solution should look something like what we have in the Southeast"). Instead, as NS Witness McClellan admitted: "We negotiated something different." Id. (McClellan Dep'n Tr. 86).

CSX Witness Hart's testimony invited shippers to seek redress from CSX if the proposed arrangements are not sufficient to preserve existing competition (CSX/NS-19, Application, Vol. 2A at 149). However, at least in Indianapolis, Applicants -- especially CSX -- have been unwilling to carry through on their commitments by addressing the obvious problems with their Indianapolis proposal, and admit that they are reluctant to make any changes in the proposed transaction.

Since CSX would acquire Conrail's lines in Indianapolis, and would perform "pickup/delivery" services for NS and other carriers, CSX is the primary obstacle to resolving the problems in Indianapolis. Among the problems are that CSX portrays INRD, its subsidiary,[1] as "independent" and a competitor of CSX. That fiction has led CSX to suggest in

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[1] CSX Transportation, Inc. owns 89 percent of Midland United Corporation, which owns 100 percent of The Indiana Rail Road Company ("INRD"). See CSX/NS-17, Application Vol. 1 at 271. INRD President Hoback owns the other 11 percent of Midland United, but he admits

(continued...)

discovery responses IPL will receive adequate competition at its Stout Plant from CSX and INRD, and that the Stout Plant, therefore, is not a "2 to 1" destination. As discussed in IPL's October 21 Supplemental Comments, the Board's regulations, a decision in this proceeding (the discovery ruling of Judge Leventhal), Supreme Court precedent, and Applicants' own documents and witnesses' statements demonstrate that CSX controls INRD. CSX and NS apparently have abandoned the pretext that CSX will compete with its subsidiary at the Stout Plant, but refuse to admit the result of abandoning that pretext -- that Stout is a "2 to 1" destination.

Once it is understood that CSX controls INRD, it is obvious that the Stout Plant is a "2 to 1" facility, as CSX and NS apparently are treating IPL's Perry K Plant, and that IPL needs direct access to both the Stout and Perry K Plants from a carrier other than CSX/INRD to maintain its existing competition. IPL can also build out to Conrail from the Stout Plant, or be served by a truck transloading facility built along the Conrail line, but under the proposed transaction could not build out to the Conrail line for service from a competitor to CSX -- realistically, either Indiana Southern Railroad ("Indiana Southern" or "ISRR") or NS.

Make no mistake, the proposed transaction will not improve or even preserve the competitive environment for railroad service to IPL in Indianapolis. On the contrary, it will diminish IPL's competitive options, and those of other Indianapolis shippers, NS will either enter the Indianapolis market at a significant disadvantage, or not be there at all, and the

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[1](...continued)
INRD is subject to the financial control of CSX (Hoback Dep'n Tr. 11, 15), and, as Judge Leventhal found, there is no better form of control.

transaction will destroy Indiana Southern's ability to compete in Indianapolis. NS cannot realistically expect to compete with CSX on equal terms, and CSX/INRD will have the power through ratemaking action to eliminate Indiana Southern from Indianapolis in its capacity as destination carrier at both IPL Plants there. At his deposition, CSX witness Thomas Hoback, Chairman, President and CEO of Indiana Rail Road, finally conceded that CSX would have the power and opportunity to raise IPL's rates. Hoback Dep'n Tr. 208 (Attachment 1 hereto). With only overhead trackage rights, NS will not be able to offer IPL service comparable to that available today from Conrail.

Even worse, NS has not even considered what service it will be able to offer IPL in Indianapolis after the proposed transaction becomes effective. This was borne out by the deposition testimony of NS's Executive Vice President for Operations, Mr. Stephen C. Tobias. Mr. Tobias is the senior official at NS with responsibility for operations. He candidly admitted that he did not know how NS could provide service to either IPL's Stout Plant or the Perry K Plant in Indianapolis. He also confirmed that the limited trackage rights that NS will have in Indianapolis will not permit NS to provide local service to IPL. IP&L-3, Ex. No. 5 (Tobias Dep'n Tr. 154-56).

Since filing its Supplemental Comments on October 21, 1997 (IP&L-3) in which IPL asked the Board to protect IPL's current competition options by granting local trackage rights to NS, IPL learned of and supports the trackage rights requested by Indiana Southern Railroad, Inc. ("ISRR") in its Responsive Application (ISRR-4). ISRR requested trackage rights to serve IPL's Stout and Perry K Plants. Such rights would preserve IPL's current rail-to-rail competition between ISRR and CSX's subsidiary INRD, and would be efficient. Today,

ISRR, in interchange with Conrail, can serve Stout via switch (using INRD). INRD serves Stout directly, and can serve Perry K via switch over Conrail. ISRR also uses Conrail as a destination carrier at the Perry K Plant. Conrail is not affiliated with either ISRR or INRD and thus is a neutral destination carrier, whereas CSX clearly would not be neutral, but would certainly favor its subsidiary INRD in setting rates or in delivering coal.

Accordingly, IPL strongly opposes the proposed transaction unless the Board revises the proposed arrangement to make ISRR and NS equal competitors with CSX/Indiana Rail Road in Indianapolis, as Conrail is today. In so requesting, IPL is not seeking any advantage over today's circumstances, because Indianapolis today has balanced competition between Conrail and CSX/INRD, and IPL seeks only to preserve that balanced competition. Indiana Southern serves IPL now, and NS could in the future, for different sources of coal, both of which Conrail could handle. Each may be needed by IPL, Indiana Southern to move Indiana coal, and NS to move low-sulfur eastern or western coal if IPL should use that. Unlike Conrail, which now can compete on both sets of movements, neither ISRR or NS alone can competitively serve both needs.

The simple and effective way to preserve balanced competition is by designating Indianapolis a shared assets area and by granting Indiana Southern's requested trackage rights to serve IPL's Stout and Perry K Plants. If NS is an equal owner of Conrail's tracks in and around Indianapolis with CSX, NS and CSX/INRD will be able to compete on equal footing. Applicants have endorsed this approach for New Jersey, Detroit, and Philadelphia, as a means of ensuring more effective competition. NS should also be required to acquire ownership interests in the Avon and Hawthorne Yards, so that both companies have ownership interests in

yards in Indianapolis, thereby allowing NS to compete effectively with CSX. Moreover, NS would be entitled under those circumstances to equal access to short lines in and around Indianapolis, such as ISRR. This approach would allow NS and CSX to compete in the marketplace without the need for constant regulatory involvement (although oversight would still be necessary). The trackage rights requested by Indiana Southern are also necessary to preserve IPL's current rail-to-rail competition between ISRR and INRD thus allowing it to remain competitive in Indianapolis, and they, too, will require oversight.

In the alternative to a shared assets area, NS should have fully effective trackage rights that provide direct access to shippers in Indianapolis, as its own Principles espouse. Not only would local trackage rights allow direct access to shippers, but the inefficient routing of all traffic through Hawthorne Yard would be unnecessary and NS would be able to provide local service, service via build-ins and build-outs, and service to new facilities, especially to IPL's Stout and Perry K Plant. In short, direct access to local shippers would enable NS to compete with CSX on an equal footing, as Conrail does today with Indiana Rail Road at Stout and with CSX/INRD at Perry K (via a short truck haul from the Stout Plant of rail-delivered coal).

If Indianapolis is not required to be a shared assets area, the terms and conditions of the trackage rights and switching services provided by CSX to NS (whether under the proposed plan or in connection with the fully effective trackage rights proposed by IPL) and to ISRR must be improved, to permit NS and ISRR to compete effectively, as detailed below:

First, NS and ISRR must not be charged <u>both</u> a trackage rights fee and a switching charge. If NS or ISRR provides direct service to a shipper, <u>only</u> a trackage rights fee is appropriate.

Second, the trackage rights fee of 29 cents per car mile is too high. The fee should instead be set at CSX's variable costs, as the Applicants have stated they will do with any applicable switching charge. This would inhibit CSX from always undercutting NS or ISRR in competing for a shipper's traffic. The proposed fee is higher than the level UP charges BNSF as a result of the trackage rights awarded BNSF in the Union Pacific/Southern Pacific merger proceeding, and the Board is well aware of BNSF's inability to compete equally with UP using those trackage rights. See, e.g., BNSF's Quarterly Reports filed in Finance Docket No. 32760. By reducing the proposed trackage rights fee, Indianapolis shippers have a chance at maintaining the balanced competition they currently enjoy.

Third, IPL supports the cost-based switching charge proposed by CSX, provided that (1) the charge will equal CSX's actual costs, (2) the shippers are allowed to audit the costs that CSX claims it incurred, (3) the Board will review such charges expeditiously if challenged, (4) the switching charge will be equally applicable to ISRR, and (5) a different per-car charge is established for unit-train or trainload shipments than for single-car shipments. Again, this will ensure that NS and ISRR are able to compete on equal footing with CSX.

Fourth, if CSX provides the direct service, only a switching fee is appropriate. CSX proposes to impose both a trackage rights fee and a switching charge, which will result in NS and ISRR being unable to provide competitive service to Indianapolis shippers.

In addition, Applicants' proposals for Conrail lines outside of the immediate Indianapolis area could result in substantial harm to IPL, because NS will not be able to compete effectively with CSX for the movement of western coal to Indianapolis if that becomes necessary to comply with IPL's environmental obligations under the Clean Air Act. Today,

CSX has a direct route to Indianapolis from Chicago, and Conrail has a direct route from St. Louis. Under the proposed transaction, CSX would be able to interchange with the western carriers at either Chicago or St. Louis and efficiently move the coal to Indianapolis. In contrast, NS's proposed routes from Chicago and St. Louis to Indianapolis are circuitous and inefficient. Furthermore, Kansas City may not be a viable interchange to NS for western coal because of long-standing congestion problems there and because UP and BNSF will not want to be "short hauled" but instead will quote rates to interchanges east of Kansas City, such as St. Louis and Chicago, as interchange points for western coal shipments, that would effectively preclude IPL from interchanging at Kansas City.

Accordingly, it is critical that the Board provide continuing expeditious oversight to ensure that any IPL traffic via Kansas City or other interchanges to NS from western carriers will be handled efficiently with non-discriminatory rates quoted to Kansas City. It is essential to maintaining balanced competition that the western carriers do not discriminate against Kansas City in favor of Chicago or St. Louis where NS is at a competitive disadvantage. In the alternative, NS should be granted trackage rights on a non-discriminatory basis over CSX lines from St. Louis or Chicago to Indianapolis to ensure that NS can effectively compete with CSX for the movement of western coal to Indianapolis.

Lastly, of greatest importance to railroad customers and to companies which depend on railroad transportation, CSX and NS are paying the largest acquisition premium ever paid for a railroad -- many billions over either Conrail's market value (pre-transaction) or book value.[2]

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[2]Unless the context specifically requires otherwise, we refer to either value as

(continued...)

(We say "many" because Applicants' have now informed us that Applicants' Witness Whitehurst made an almost $3 billion error in his calculation of the "fair market value" of Conrail, and that instead of $17.242 billion (CSX/NS-177, Rebuttal, Vol. 2B, p. P-668), CSX and NS now claim that the purchase price for Conrail was over **$20 billion**, including assumed liabilities, deferred taxes, and transaction expenses. Thus, at this point, it cannot be known with certainty **what** the exact amount(s) of the acquisition premium(s) is for regulatory costing purposes.) Regardless of the exact amount of the premium(s) (which could change in any event when Price Waterhouse finishes its evaluations), the Board must decide what, if any, impact the premium(s) will have on railroad revenue adequacy determinations, the jurisdictional threshold, captive shipper rates and the Rail Cost Adjustment Factor ("RCAF"). These matters are addressed below, and in the Brief of National Industrial Transportation League, et al., to which IPL is a party. If Applicants' predictions that efficiencies and growth in their businesses will pay for the acquisition premium, then adoption of shipper protections will do Applicants no harm. But if the price paid for Conrail does lead them to seek rate increases, the Board will have served the public by not permitting that result. Either way, shipper protections should be adopted.

IPL also addressed these matters in its October 21, 1997 Joint Comments with Atlantic City Electric Company (ACE, et al.-18)("Joint Comments") and its own Supplemental Comments filed the same date (IP&L-3). To avoid repetition, we hereby incorporate by reference throughout in this Brief entire sections of those Comments and the Joint Brief of

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[2](...continued)
"acquisition premium."

NIT League, et al. filed contemporaneously with this Supplemental Brief. Thus, although this Supplemental Brief largely addresses issues and evidence that have arisen since October 21, the Board should read this Supplemental Brief together with both the Joint and Supplemental Comments filed by IPL on October 21, 1997 and IPL's Joint Brief with NIT League, et al. to understand IPL's position on all of the issues affecting it.

Argument

I.

THE APPLICABLE LAW.

To avoid repetition, we hereby incorporate by reference the text following the same argument heading in the Supplemental Comments (IP&L-3) filed October 21, 1997. In addition, IP&L submits the following argument:

Before approving an application for acquisition of control over a railroad, the Board must find that the transaction is "consistent with the public interest." 49 U.S.C. § 11324 (c) (1997); Western Resources, Inc. v. Surface Transp. Bd., 109 F.3d 782 (D.C. Cir. 1997). In making such a finding under § 11324, the Board must consider certain factors, including:

- the proposed transaction's effect on the adequacy of transportation to the public;
- "the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction;"
- the transaction's total fixed charges; and
- "whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region or in the national rail system."

Toward that end, the Board must "balance the gains in operating efficiency and market capability that result from consolidation against any reduction in competition or harm to essential

services." Western Resources, 109 F.3d at 784. If the transaction is found not to be in the public interest, the Board has the authority to impose conditions upon a proposed merger to remedy any resulting harms. 49 U.S.C. § 11324(c).[3]

In Decision No. 29 in this proceeding, the Board outlined the circumstances under which it would impose conditions on a railroad consolidation. First, it must be found that the consolidation might "produce harmful effects on the public interest," such as a "significant reduction of competition in an affected market." Id. at 3. Second, any conditions imposed would need to be "operationally feasible" and designed to "ameliorate or eliminate the harmful effects" of the proposed consolidation. Id. Third, the proposed conditions must produce benefits to the public that outweigh "any reduction to the public benefits produced by the merger." Id.

1. The Adverse Competitive Effects of a Proposed Acquisition Are Paramount Considerations.

A primary consideration in determining if a merger is in the public interest is "whether the proposed transaction would have an adverse affect on competition among rail carriers in the affected region." 49 U.S.C. § 11344 (b)(5); see also 49 C.F.R. § 1180.1(c)(2)(1996); Missouri-Kansas-Texas R. Co. v. United States, 632 F.2d 392, 395 (5th Cir.), cert. denied, 451 U.S. 1017

[3]In fact, the statute is pro-competitive. Through the passage of the Railroad Revitalization and Regulatory Reform Act of 1976 ("4R Act"), Pub. L. No. 94-210, and subsequent pro-competitive enactments such as the Staggers Rail Act of 1980, Pub. L. No. 96-448 ("Staggers Act") and the ICC Termination Act of 1995, Pub. L. No. 104-88 ("ICCTA"), Congress' has made clear its intent to promote competition. Therefore, at a minimum the Board must preserve existing competition and arguably should require pro-competitive conditions if it approves the transaction proposed by CSX and NS. Even if the Board adheres to the view of preservation of existing competitive options, the relief sought by IPL only preserves rather than enhances competition.

(1980) (the "public interest" considerations include the anti-competitive effects of a proposed merger).

Over the years, the ICC has considered a number of factors in determining whether a proposed merger would have adverse effects on competition in the markets it has identified as relevant. This analysis of competitive harm is described by the ICC as follows:

> Competitive harm results from a merger to the extent the merging parties gain sufficient market power to raise rates or reduce service (or both), and to do so profitably, relative to premerger levels.

Burlington Northern Inc. and Burlington Northern Railroad Company -- Control and Merger -- Santa Fe Pacific Corporation and the Atchison, Topeka and Santa Fe Railway Company, Finance Docket No. 32549, Decision No. 38 (served August 23, 1995) ("BN/SF") at 54. In another decision, the ICC held that conditions could be imposed on a railroad merger where it was found, among other things, that the merger would produce harmful effects to the public interest, such as the case where there would be a significant reduction to the competition in an affected market. Union Pacific -- Control -- Missouri Pacific, Western Pacific, ("UP/MP/WP") 366 I.C.C. 462, 562-65 (1982).

The Board's regulations also address competitiveness concerns and provide that consolidations are not favored if they could "substantially reduce the transport alternatives available to shippers unless there are substantial and demonstrable benefits to the transaction that cannot be achieved in a less anti-competitive fashion." 49 C.F.R. § 1180.1(a). As a result, the Board has broad authority to impose conditions to "ameliorate potential anti-competitive effects" of a proposed merger. 49 C.F.R. § 1180.1(d)(1).

The Board is also guided by the Rail Transportation Policy in reviewing this merger application, which emphasizes the importance of ensuring competition within the railroad industry. See Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company -- Control and Merger -- Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver And Rio Grande Western Railroad Company, Decision No. 44 at 99 (August 6, 1996) ("UP/SP"). Specifically, Congress provided that in regulating the railroad industry, it is the policy of the United States Government to:

> ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense . . . and prohibit predatory pricing and practices [and] to avoid undue concentrations of market power.

49 U.S.C. § 10101 (4) and (12) (1997).

2. The Relevant Market Is for Rail Transportation, Not Motor or Water Transportation.

In previous consolidation proceedings, the ICC evaluated competitive effects by (a) defining the existing markets, (b) measuring the anticipated effects on those markets, and (c) then determining whether the anticipated effects in those markets would be useful. E.g., UP/MP/WP, 366 I.C.C. at 503. The Commission typically assumed that the relevant market has two components -- product and geographic. Id.; Santa Fe Southern Pacific Corporation -- Control -- Southern Pacific Transportation Company, 2 I.C.C. 2d 709, 737 (1986)("SF/SP").

The Commission has used a variety of approaches and tests for identifying the relevant

markets.[4] As in other merger proceedings, the "product" in this proceeding is rail freight transportation. Unless the facts justify, motor and water carrier freight transportation should not be included in the same product market for purposes of determining the competitive effects of this proposed merger, because those "products" are not likely to provide sufficient constraints on the Applicants' market power over the shipments of coal after the merger. Here, railroads have an inherent advantage over other modes for the long distance transportation of bulk commodities such as coal, as IPL's evidence has shown.

II.

INDIANAPOLIS SHOULD BE A SHARED-ASSETS AREA.

To avoid repetition, we hereby incorporate by reference the text following the same argument heading in the Supplemental Comments (IP&L-3) filed October 21, 1997 at pp. 13-18. We add only that the recent announcement of an agreement between Union Pacific and BNSF to jointly own and operate the Houston - New Orleans line demonstrates that the railroad industry increasingly views the sharing of assets in large markets to be the effective

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[4]For example, the Commission often used the Department of Justice ("DOJ") Merger Guidelines to assist in defining what is a relevant market. The Guidelines define a market as a "product or group of products and a geographic area in which it is sold such that a hypothetical, profit-maximizing firm, not subject to price regulation, that was the only present and future seller of those products in that area would impose a 'small but significant and nontransitory' increase in price above prevailing or likely future levels." SF/SP at 737-38, quoting DOJ Merger Guidelines § 2.0 (issued June 14, 1984). In most cases, DOJ uses a price increase of 5% lasting one year as the measure of a "small but significant nontransitory increase." SF/SP at 738; see also UP/MP/WP at 504 (the relevant geographic market has been defined as "areas in which providers of a particular product or service operate to which purchasers can turn for such products or services").

way to preserve competition and operational efficiency, as CSX and NS agreed to do in New Jersey, Detroit, and Philadelphia. Indianapolis deserves the same consideration.

III.

IN THE ALTERNATIVE, NS SHOULD HAVE DIRECT ACCESS TO IPL'S PERRY K AND STOUT PLANTS, BOTH PERRY K AND STOUT SHOULD BE TREATED AS "2 TO 1" DESTINATIONS, AND IN ANY EVENT IPL SHOULD BE FOUND TO BE ABLE TO BUILD OUT TO CONRAIL FROM THE STOUT PLANT.

To avoid repetition, we hereby incorporate by reference the text following the same argument heading in the Supplemental Comments filed October 21, 1997 at pp. 18-27. In addition, IPL submits the following argument:

It is CSX's 89-percent ownership of Indiana Rail Road (CSX/NS-17, Application, Vol. I, p. 271), and its admitted control of it, as Judge Leventhal found, that is at the core of the anti-competitive problems affecting Indianapolis shippers. That common ownership is also the reason why IPL's Stout and Perry K Plants are "2 to 1" destinations. CSX, at least previously in this proceeding, maintained the fiction that it will compete with Indiana Rail Road, see, e.g., Sharp Dep'n Tr. 14-15 (Attachment 2 hereto), despite its 89-percent ownership interest in it. However, Mr. Hoback, INRD Chairman, conceded at his deposition that INRD would not compete with CSX at the Stout and Perry K Plants. Hoback Dep'n Tr. 108 (Attachment 3 hereto).[5] In their December 15, 1997 Rebuttal, CSX and NS abandoned that fiction and, instead, now claim that IPL's real competitive constraint on INRD's rates is the use of trucks, which is discussed more fully below.

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[5]This may account for the absence of Mr. Sharp as a Rebuttal Witness since he was the author of the theory that CSX and INRD would compete at Stout and Perry K.

Nevertheless, to dispel there be any remaining doubt concerning Stout's and Perry K's "2 to 1" status, Mr. Sharp's colleague, Mr. William M. Hart, Vice President of Corporate Development for CSX Transportation, Inc., described the Board's test characterizing a "2 to 1" facility, and thus explained why Stout and Perry K are "2 to 1" facilities, as follows:

> A shipper is defined as a 2-to-1 if either (1) Two railroad lines physically enter its facility and those lines would be under common ownership after the transaction, or (2) A railroad's line physically reaches its facility, but the shipper has a second switching service option with a second rail carrier through reciprocal switching, trackage rights or haulage.

CSX/NS-19, Application, Vol. 2A, p.146. Mr. Hart's definition of a "2 to 1" point is under-inclusive, because it omits those destinations, such as IP&L's Stout Plant, that have the ability to be served via a "build-out" to a railroad not affiliated with the railroad that has an existing line into the facility, and he may have intended to limit switching access to "reciprocal switching." No such limitation on switching access has heretofore been imposed by the ICC/STB. However, if the Board were to require that IPL have reciprocal switching to qualify as a "2 to 1" point (even though it should not so require), the attached Conrail Tariff CR 8001-D, effective May 22, 1997, demonstrates that IPL has a reciprocal switch tariff. (Attachment 4 hereto). The current rail options at the Stout and Perry K Plants satisfy the Board's tests as a "2 to 1" destinations.[6]

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[6]Stout can be served via a build-out to Conrail, or a truck transloading facility on the Conrail line, and it can be served by Indiana Southern/Conrail via switching. Under the terms of the transaction proposed by CSX and NS, if CSX takes exclusive control of Conrail's lines, all means of physical access into Stout will fall "under common ownership," to use Mr. Hart's term, yet CSX and NS apparently do not admit that the Stout Plant is a "2 to 1" destination. Applicants do admit, however, that Perry K is a "2 to 1" destination.

In the Application (CSX/NS-25, Application, Vol. 8C, p. 525), CSX and NS included "Indianapolis Power and Light" as a "2 to 1" shipper in Indianapolis, without specifying which

(continued...)

Using Mr. Hart's own definition, Conrail's line (over which Stout can be served with Indiana Southern-origin coal via switch on Indiana Rail Road or directly via a build-in/build-out or truck transloading facility) would come "under common ownership," and thus Stout would clearly be a "2 to 1" facility. In fact, at his deposition Mr. Hart admitted that the Stout Plant would be a "2 to 1" destination if Indiana Rail Road were treated as CSX (IP&L-3, Ex. No. 5):

> Q. If a carrier has access via a switching charge to a plant that is directly served by another railroad and those two railroads were to merge, where one were to acquire the other, is it your understanding that that would be a two-to-one situation as defined on your Exhibit No. 2?
>
> A. Yes.
>
> . . . .
>
> Q. . . . If, and I'm asking you to assume this for purposes of my question, Conrail has access to the Stout Plant via switching and CSX were the delivering carrier to the Stout Plant, do I take your previous answer to be that the Stout plant would be under my assumption a two-to-one plant?

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[6] (. . . continued)
IPL destination(s) -- Stout or Perry K or both -- were included. In discovery, therefore, IPL inquired about the ambiguity, and CSX and NS finally admitted that Perry K was a "2 to 1" facility, but denied Stout was (although not in so many words, instead saying only "Stout is served by Indiana Rail Road," without clarifying what they meant by that).

In their December 15, 1997 Rebuttal, CSX and NS admit that their list of "2 to 1" shippers in Indianapolis was under-inclusive (CSX/NS-176, Rebuttal, Vol. 1, p. P-60, referring to "Exhibit I" in CSX/NS-178, Rebuttal, Vol. 3C, pp. 638-39). But revised Exhibit I still merely lists "Indianapolis Power & Light" as one of the 66 "2 to 1" shippers, without specifying the destination intended.

Nevertheless, despite Applicants' refusal to treat Stout as a "2 to 1" facility, the Board's other tests for such designation are also fulfilled because Indiana Rail Road serves the Stout Plant directly and Stout can also be served by Indiana Southern/Conrail via switch over Indiana Rail Road (CSX/NS-177, Rebuttal, Vol. 2A, Hoback V.S., p. P-195, Orrison V.S., p. P-653), via build-in/build-out, or via a truck transloading facility built along the Conrail line.

A. Yes.

Q. Now, if we change my hypothetical to substitute Indiana Rail road for CSX, would you treat the Stout plant as a two-to-one point?

A. The second case?

Q. Is Conrail via switching and Indiana Railroad which you testified is owned by CSX.

A. Now, the Indiana Railroad is an independently run operation. I don't think it's the same case.[7]

CSX and NS make many inaccurate statements in their Rebuttal. In one such inaccuracy, CSX and NS state that Perry K Plant "will gain two carrier access, an improvement over the status quo." See CSX/NS-176, Rebuttal, Vol. 1, p. P-365. But CSX Witness (and INRD President) Hoback admitted that Perry K currently has two rail-carrier access, Indiana Southern via switch over Conrail and Indiana Rail Road via switch over Conrail. See CSX/NS-177, Rebuttal, Vol. 2A, p. P-198 (noting Conrail charge for moving INRD-origin coal to Perry K). The transaction proposed by CSX and NS would eliminate Conrail, the neutral destination carrier, and Perry K would instead be served only by CSX, which would clearly not be neutral as to whether coal was originated by its subsidiary Indiana Rail Road or by Indiana Southern. This is a reduction in the competitive status quo, not "an improvement," as CSX would have it. This is unsatisfactory to IPL because CSX would clearly favor its subsidiary, INRD, as compared to

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[7]Applicants' refusal to treat the Stout Plant as a "2 to 1" destination, and, for that matter, the confusion surrounding whether even Perry K is a "2 to 1" destination, contradict Mr. Hart's testimony accompanying the Application (CSX/NS-19, Application, Vol. 2A, p. 149) that, for any "2 to 1" shipper who comes forward, CSX "stands ready to address that shippers' [sic] concerns."

Indiana Southern or NS, whereas Conrail had no incentive to favor either of IPL's origin carriers (since neither is affiliated with Conrail).

Because it owns 89 percent of Indiana Rail Road, because 3 of 5 members of Indiana Rail Road's Board of Directors are CSX employees (including CSX's Mr. Sharp), and because CSX admits it controls Indiana Rail Road, CSX will have strong economic incentives to favor INRD- or CSX-origin coal if CSX/INRD controls access to the Stout and Perry K Plants, and obviously will do so.

CSX 31 HC 000179. For all of these reasons, the Stout and Perry K Plants should be found to be "2 to 1" destinations, and NS and ISRR should have direct access to them.

The mere fact that IPL relied less on the Indiana Southern/Conrail routing as competition to INRD does not somehow disqualify the Stout Plant from "2 to 1" status. As BNSF put it recently in its latest "Quarterly Progress Report" (BN-SF-PR-6) in Finance Docket No. 32760, the Union Pacific merger proceeding, at 17 n.12, there is "no de minimis rule applied by the Board in determining whether a shipper's pre-merger competitive options have been reduced," and here IPL's use of ISRR/Conrail in 1995-96 was significant, not de minimis. In contrast, its use of trucks has been non-existent, yet CSX claims that trucks, not ISRR/Conrail, is IPL's real option. That is absurd; CSX Witness Vaninetti told INRD and CP Rail that

See ISRR-9, Crowley, V.S., Vaninetti Ex. No. 2 (filed Jan. 14, 1998). So, too, CSX Witness Vaninetti told INRD that IPL could not use

other Plants more and Stout less to "discipline" the railroads at Stout, because it was already doing so, notwithstanding his Rebuttal testimony. Therefore, IPL's only real competitive option at Stout is ISRR/Conrail, which it would lose as a result of the proposed transaction. The Stout Plant therefore qualifies as a "2 to 1" destination.

In any event, a build-out to Conrail from the Stout Plant is feasible. In IP&L-3 (filed October 21, 1997), we demonstrated the feasibility of a build-out to the "Conrail Stub." See IP&L-3, IP&L Exhibit Nos. 1, 2, 3 and 4. Also, Mr. Michael A. Weaver, Manager of Fuel Supply at IPL, described two other feasible build-out options from Stout to Conrail. See ISRR-9, Weaver V.S. at 20.

CSX Witnesses Kuhn and Vaninetti criticize the cost estimate of the build-out proposed by IPL Witness Porter and argue that his estimate should have included additional expenses, which would not even double the costs of the build-out. See CSX/NS-177, Rebuttal, Vol. 2A, Kuhn V.S., pp. P-310-11. Even including Mr. Kuhn's additional costs, Mr. Weaver testified that the "build-out" from Stout to Conrail is feasible. See ISRR-9, Weaver V.S. at 19-22. Mr. Weaver explained:

> [i]f the Stout Plant were to operate for only 20 more years, the total costs claimed by Mr. Kuhn would be distributed over the costs of shipping approximately 30 million tons of coal (20 years times 1.5 million tons per year), and would amount to about when the construction costs are amortized over the removing life of the Stout Plant. The Stout Plant is likely to operate for more than 20 years, because it is now so hard to site new powerplants, and yet demand for electricity continues to grow. Mr. Kuhn's extra costs would also be offset by elimination of the switching charge imposed by Indiana Rail Road (approximately) which would no longer be necessary (and which could also increase when the current IP&L/INRD Contract expires in about).

Id. at 20-21.

Mr. Thomas E. Crowley, President, L. E. Peabody & Associates, Inc., analyzed IPL Witness Porters's and CSX Witness Kuhn's estimated build-out costs and determined that the cost to exercise the build-out option over a 20-year-recovery period equals per-ton, respectively. ISRR-9, Crowley V.S. at 28-29. Under either cost estimate, Mr. Crowley opined that the costs of the build-out are "considerably reasonable." Id.

Furthermore, Dr. Peter A. Woodward, testifying on behalf of the Department of Justice, stated that Mr. Porter's proposed build-out was feasible even if its actual costs were three times Mr. Porter's estimated cost. See ISRR-9, Weaver V.S., Attachment 8.

Mr. Crowley and Dr. Woodward also testified that the build-out operates as competitive leverage over CSX's subsidiary INRD. See ISRR-9, Crowley V.S. at 25-29 and Weaver V.S., Attachment 7. The ICC and STB recognize the competitive leverage offered by build-out options.[8] In the BN/SF Merger the ICC stated:

> The negotiating leverage provided by the build-out option will disappear with the merger. . . . To preserve the competitive status quo, we have crafted a condition that will permit OG&E to maintain its existing build-out option.

Id. at 68.

More recently the STB stated:

> We will grant the build-out relief sought by Entergy vis-a-vis its White Bluff plant, and thereby preserve the White Bluff build-out status quo, transport coal trains to and from White Bluff via the

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[8]See UP/SP, Decision No. 44; BN/SF, Decision No. 38.

White Bluff-Pine Bluff build-out line, if and when that line is ever constructed by any entity other than UP/SP.

UP/SP at 185.

Based on evidence and precedent, IPL's build-out option to Stout is feasible and must be meaningfully preserved. To do so, both ISRR and NS must have direct access to the Stout Plant and to the Perry K Plant.

IV.

IF INDIANAPOLIS IS NOT A SHARED ASSETS AREA, NS SHOULD BE CHARGED A TRACKAGE RIGHTS FEE (IF IT PROVIDES DIRECT SERVICE TO IPL'S PLANTS), OR A SWITCHING CHARGE (IF CSX PROVIDES DIRECT SERVICE), BUT NOT BOTH.

To avoid repetition, we hereby incorporate by reference the text following the same argument heading in the Supplemental Comments (IP&L-3) filed October 21, 1997 at pp. 27-31. The same rationale for charging NS only a trackage rights fee or a switching charge, but not both, applies equally well to ISRR, if it is IPL's origin carrier for Stout and Perry K.

V.

IF INDIANAPOLIS IS NOT A SHARED ASSETS AREA, THE TRACKAGE RIGHTS FEE AND THE SWITCHING CHARGE PAID BY NS SHOULD BE SET AT CSX'S COSTS, WITH A DIRECT PASSTHROUGH TO THE SHIPPERS, AND THE BOARD AND SHIPPERS MUST BE ALLOWED TO AUDIT AND CHALLENGE THOSE COSTS IF APPROPRIATE.

To avoid repetition, we hereby incorporate by reference the text following the same argument heading in the Supplemental Comments (IP&L-3) filed October 21, 1997 at pp. 31-33.

VI.

THE PROPOSED TRANSACTION SHOULD NOT BE PERMITTED TO DISRUPT TODAY'S BALANCED COMPETITION FOR MOVEMENTS OF WESTERN COAL TO INDIANAPOLIS.

To avoid repetition, we hereby incorporate by reference the text following the same argument heading in the Supplemental Comments filed October 21, 1997 at pp. 34-37. In addition, we address Applicants' claim on Rebuttal that IPL would likely use scrubbers and high-sulfur Indiana coal rather than low-sulfur coal at its Stout Plant.

Applicants insist that "[w]estern coal is not now and is unlikely to become a cost-effective supply of coal for IP&L." CSX/NS-177, Rebuttal, Vol. 2B, Vaninetti V.S., p. P-516. Mr. Vaninetti claims that Western coal can not compete with Indiana coal due to its distance from the Stout Plant. While IPL recognizes that transporting coal over shorter distances is less expensive than longer hauls, Phase II of the existing Clean Air Act Amendments of 1990 and the ever-evolving environmental constraints may force IPL to use new sources of coal. IPL is now under an obligation to reduce its sulfur dioxide emissions, and that obligation will grow under Phase II of the Clean Air Act. When -- not if -- IPL uses low-sulfur coal at Stout cannot be predicted precisely, but is a function of the relative cost of sulfur dioxide emission allowances, which is uncertain. In fact, Mr. Vaninetti estimates that such allowances are worth about $100 per ton of sulfur dioxide but estimates that such allowances could increase in value to as much as $263/ton. CSX/NS-177, Rebuttal, Vol 2B, Vaninetti V.S., p. P-515; see also CSX/NS-177, Rebuttal, Vol. 2B, Sansom V.S., p. P-427 ("allowances will rise to over $200/ton SO_2"). The point is that neither CSX nor IPL knows when IPL will have to use low-sulfur coal at its Stout Plant, but some day it must be assumed

that it will, under today's laws and regulations. Given the trend in environmental regulation, the likelihood is that that day will come sooner rather than later.

The Board is being asked to make permanent changes in the rail map of the United States. IPL's right to preserve its existing competition for two-carrier access to Western coal, from Conrail via St. Louis or CSX via Chicago, must not be sacrificed merely because it does not now need to exercise that option.

Mr. Vaninetti's reliance on testimony offered by IPL witnesses in 1992 is quite far off the mark. Since that time, utility deregulation has clearly become foreseeable, if not a reality. In 1992, IPL's testimony advocated capital expenditures in scrubbers at its Petersburg Plant to respond to Clean Air Act requirements. Today, given the uncertainties of the deregulated world utilities are now or soon will be living in, CSX Witness Vaninetti conceded that IPL would not be as likely to make major capital expenditures, but rather would seek its lowest-cost coal source that would allow it to meet its obligations. See Vaninetti Dep'n Tr. 143 (Attachment 5 thereto). That would likely be coal from the Powder River Basin or other Western sources which Mr. Vaninetti himself testified in the UP/SP merger proceeding had become competitive at distances comparable to the distance from the PRB to the Stout Plant. Vaninetti Dep'n Ex. No.1 ; see ISRR-9, Crowley V.S. at 20-21. That is why retaining IPL's existing Western rail competition is essential; someday, IPL will almost certainly have to use low-sulfur coal at the Stout Plant.

VII.

ISRR'S REQUESTED TRACKAGE RIGHTS TO SERVE THE PERRY K AND STOUT PLANTS SHOULD BE GRANTED.

ISRR's request for trackage rights to serve IPL's Stout and Perry K Plants would preserve IPL's current rail-to-rail competition between ISRR/Conrail, and CSX's 89-percent-owned subsidiary INRD, for supplies of Indiana coal to the Stout and Perry K Plants, and would be efficient. Today, Indiana Southern, in interchange with Conrail, can serve Stout via switch (using INRD). INRD serves Stout directly, and can serve Perry K via switch over Conrail. Indiana Southern also interchanges with Conrail as a destination carrier at the Perry K Plant. Conrail is not affiliated with either ISRR or INRD, and thus is a neutral destination carrier as between ISRR and INRD, whereas CSX clearly would not be neutral, but would certainly give a preference to its subsidiary INRD.

Therefore, ISRR's requested trackage rights will merely retain the existing rail-to-rail competition at the Stout and Perry K Plants from the Indiana coal fields. Indiana Southern's requested trackage rights are essential in order to prevent the severe anti-competitive effects that will result if CSX acquires Conrail's lines in Indianapolis, as proposed by NS and CSX. Unless Indiana Southern can continue to compete with CSX/Indiana Rail Road at Perry K and Stout, both Plants will become captive to CSX/Indiana Rail Road.

The trackage rights requested by Indiana Southern would allow it to act as a delivery carrier at IPL's Stout and Perry K Plants. Without those trackage rights, Indiana Southern-origin traffic could be subject to higher switching charges and poorer dispatching than CSX/Indiana Rail Road-origin traffic. There is every reason to expect CSX to favor its own traffic, even in

dispatching, while Conrail, which does not originate coal for IPL at either the Stout or Perry K Plants, has no such incentive.

As the Board has become painfully aware in its Ex Parte No. 573 proceeding, Rail Service in the Western United States, competition and adequate service from all serving carriers is critical in major metropolitan areas, such as Los Angeles and Houston. The same rationale applies to Indianapolis. Under the transaction proposed by CSX and NS, 67 of the 84 "2 to 1" shippers are located in Indianapolis.[9] Arguably, Indianapolis would be susceptible to more inefficient routings and likely rate increases than any other area affected by the proposed transaction, because of the number of "2 to 1" shippers there, the proposal to route NS traffic through Hawthorne Yards, and the competitive "bottleneck" CSX/Indiana Rail Road would create. If the Board grants Indiana Southern's requested trackage rights, Indiana Southern could continue to act as a competitor to CSX/Indiana Rail Road for Indiana coal and thus preserve the competition between Conrail and CSX/INRD that would otherwise be lost in Indianapolis.

Without imposition of conditions such as those requested by Indiana Southern, IPL's unit trains of coal, if handled by NS, will be sent to the Hawthorne Yard for switching by CSX, which is wholly unnecessary, because Mr. Orrison of CSX admitted that ISRR-originated coal that interchanged with CSX would not go into and out of Hawthorne Yard but rather would be switched as IPL's ISRR/Conrail trains are today, at the intersection of the former Belt and INRD.

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[9]Applicants admit that 66 of the 83 "2 to 1" shippers are located in Indianapolis. CSX/NS-176, Rebuttal, Vol. 1, p. P-60. We have added 1 to the numerator and denominator since Applicants refuse to acknowledge Stout's obvious "2 to 1" status, and apparently excluded it from their count. Either way, 80 percent of the shippers Applicants concede are entitled to relief from the Board are located on that portion of Conrail to be acquired by CSX in Indianapolis and could be served by Indiana Southern.

Orrison Jan. 9, 1998 Dep'n Tr. 25-27 (Attachment 6 hereto). Mr. Hoback admitted that the best place to interchange a train going to Stout would be at the "top of the hill" (the intersection of the former Belt and INRD). Hoback Dep'n Tr. 91 (Attachment 7 hereto). IPL has a right to have its own cars handled in an efficient manner that reflects the efficiencies of unit-train service. The handling of those IPL's coal unit trains not carried by CSX, as proposed by CSX and NS, is entirely inconsistent with the purpose and function of a switching yard, such as the Hawthorne Yard. It also is inconsistent with the premise for the proposed transaction. As CSX's Chairman Mr. Snow testified:

> Q: And the applicants are advocating efficiency as one of the benefits of the proposed transaction, correct?
>
> A: We're not advocating it. We're saying that one of the benefits of the transaction will be greater efficiency.

Snow Dep'n Tr. 163 (Attachment 8 hereto); see also CSX/NS-17, Application, Vol. 1, Goode V.S. at 324, 336, and 338. It would contradict CSX's and NS's premise of "efficiency" for their proposal to require IPL's coal unit trains, which it owns and thus has a right to have handled efficiently, to go into and out of a switching yard, when they do not do so today, and there is no need for them to do so. Indeed, Mr. Fox, NS's Vice President-Coal Marketing, admitted at his deposition that NS and CSX would probably agree not to route IPL's coal unit trains into and out of Hawthorne Yard, despite what NS and CSX proposed in their Application, see IP&L-3, Ex. No. 5 (Fox Dep'n Tr. 149-52). IPL wants Mr. Fox's concession reflected in the Board's Order, for, as Ronald Reagan would say, "Trust but verify."

Notably, CSX's Vice President-Service Design, John W. Orrison, who is CSX's operations Witness in this proceeding, could not think of any operational reasons to criticize

Indiana Southern's proposal to serve the Stout and Perry K Plants. CSX/NS-177, Rebuttal, Vol. 2A, Orrison V.S., pp. P-518-21. That is not surprising, because direct service via Indiana Southern would clearly be more efficient than relying on CSX to switch the traffic than going into and out of Hawthorne Yard. Clearly, therefore, if efficiency is the test, as it must be, Indiana Southern's proposal is far superior to the CSX/NS proposal.

The trackage rights requested by ISRR would best preserve the status quo because ISRR uses Conrail, a neutral destination carrier, to deliver Indiana coal for it today. Conversely, as provided by the transaction proposed by CSX and NS, CSX/Indiana Rail Road would obviously not be neutral as between IPL's originating carriers, ISRR and INRD. IPL's concerns are well-justified given that CSX has already demonstrated

which is clearly either ISRR or NS). The transaction proposed by CSX and NS puts CSX, without conditions in place to protect IPL, in the position to accomplish its stated economic goals. IPL therefore requests that the Board grant Indiana Southern's requests to serve the Stout and Perry K Plants.

VIII.

APPLICANTS' CLAIMS THAT TRUCK DELIVERIES OF COAL OR ELECTRICITY FROM IPL'S PETERSBURG PLANT ARE THE COMPETITION AT IPL'S STOUT PLANT ARE BOTH UNTRUE AND IRRELEVANT.

Now that Applicants have apparently abandoned the fictions that the Stout Plant is not a 2-to-1 destination and that CSX will compete with its subsidiary INRD, their new and absurd fall-back position is that IPL's true competition at Stout comes from truck deliveries of

coal or electricity from IPL's Petersburg Plant. These claims are both untrue and irrelevant to IPL's loss of one of its current two rail options at Stout.

A. Applicants' Contention That IPL Can Use Trucks to Create Competition at Its Stout Plant Is Wrong.

Messrs. Hoback and Vaninetti insist that IPL's real competitive constraint on INRD's rates into Stout is the use of trucks (CSX/NS-177, Rebuttal, Vol. 2A, pp. P-194-201, Vol. 2B, pp. P-504 to -07), and therefore IPL will not suffer any loss of its competitive options as a result of the acquisition of Conrail by CSX and NS.

What Mr. Vaninetti failed to mention was that

For all coal mines serving the Stout Plant,

CSX/NS-177, Rebuttal, Vol. 2B, p.506.

In fact, when IPL was negotiating a new contract with INRD, it used ISRR/Conrail and then INRD for switching, and the rail rate for that alternative

ISRR-9, Weaver V.S. at 10. Mr. Hoback of INRD agreed to lower IPL's rate in return for a volume commitment of at least

He agreed to retain IPL's , but only because ISRR/Conrail would get no more than ISRR-9, Weaver V.S. at 10.

) The fact that IPL used the option of ISRR/Conrail to convince INRD to lower its rate to Stout by about which reduction Mr. Vaninetti notes, but erroneously ascribes to trucks, only demonstrates that INRD's rates were so

Otherwise, since Mr. Vaninetti claims that IPL's current route is truck-competitive, its prior rate from INRD, which was about

Yet, while that higher rail rate was in effect,

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[10]Mr. Vaninetti claimed that trucks have a $1 per ton cost advantage over rail loadings and unloadings, but admitted in his deposition that he had not been to the Stout Plant, was not familiar with the costs of unloading there, and could not say if his claimed saving even applied to Stout. Vaninetti Dep'n Tr. 124-34 (Attachment 9 hereto). Mr. Hoback admitted that IPL knows best what its costs of unloading are. Hoback Dep'n Tr. 116 (Attachment 10 hereto). If trucks were the lower-cost mode, why would most utilities use rail deliveries of coal?

if the Board were to accept the CSX/NS position, in order to move 100 percent of Stout's coal needs (about 1.5 million tons per year) by truck, approximately 60,000 truck loads would be required per year. (1.5 million tons divided by 25 tons/truck equals approximately 60,000 truck loads.) On a daily basis, Monday through Friday, under that scenario, about 230 trucks (60,000 trucks divided by 260 days equals about 230 trucks/day) would enter (and the same number would leave) the Stout Plant

Even CSX Witness

and INRD President Hoback acknowledges that this interchange is congested. Hoback Dep'n Tr. 180 (Attachment 11 hereto). That is a total of 460 trucks loads per day.

Messrs. Vaninetti and Hoback

disregard the efficiencies associated with unit-train service,

To

paraphrase Mr. Vaninetti, CSX's "last minute" claim that trucks constitute IPL's real competition at the Stout Plant contradicts CSX's earlier, and now apparently abandoned, insistence that IPL did not need protection for Stout as a "2 to 1" facility because CSX would compete vigorously with Indiana Rail Road! CSX's new-found advocacy of trucks is merely an

attempt to divert the Board's attention from the real issue -- which is retention of IPL's current two rail-carrier access. (It is also ironic, in view of the railroad industry's longstanding attacks on the alleged safety problems with, and environmental impacts of, trucking. See IPL's Comments on the draft EIS (IP&L-10, filed February 2, 1998.))

Although Mr. Vaninetti contends that Conrail's participation in the Indiana coal industry is limited (CSX/NS-177, Rebuttal, Vol. 2B, Vaninetti V.S., pp. P-509 to -11 ("Conrail Has a Negligible Role in the Indiana Coal Industry")), the exception is Conrail's role in transporting coal to Stout and Perry K. Conrail's role is integral to the competitive balance IPL now enjoys at the Stout and Perry K Plants. Conrail acts as a neutral destination carrier at Perry K and Stout for Indiana Southern- and Indiana Rail Road-origin coal. If CSX takes over Conrail's lines, it would eliminate Conrail's important function as a neutral destination carrier and therefore would eliminate the competition between Indiana Southern and Indiana Rail Road.

Under the Indiana Rail Road-IPL Contract (CSX/NS-178, Rebuttal, Vol. 3D, p. 396), Indiana Rail Road is now entitled to originate at least of the coal used annually (including via truck). However, before that Contract took effect in 1997, Mr. Vaninetti concedes that Indiana Southern originated of coal for IPL's Stout Plant, with of that routed over Conrail. CSX/NS-177, Rebuttal, Vol. 2B, Vaninetti V.S., p. P-510.

demonstrates the importance of the Indiana Southern/Conrail routing as an effective competitor to Indiana Rail Road when the Contract was executed in 1996. Indiana Southern/Conrail was the effective competitor to Indiana Rail Road, until Indiana Rail

Road lowered its rate to retain IPL's Stout business in 1996. This is also the answer to Mr. Hoback's testimony.

Mr. Knight's deposition testimony (which solely concerned one coal origin IPL used, Farmersburg, and, which Mr. Vaninetti took out of context, as IPL's Mr. Weaver testified in his Rebuttal V.S. for ISRR), stated that the truck rates to Stout were higher than the rail rates. And when Mr. Knight testified that "this was not something two railroads were going head-to-head on," he merely meant that, because of the need to pay Indiana Rail Road a switching charge and to rely on Conrail and Indiana Rail Road to deliver coal originating on Indiana Southern, the competition between Indiana Southern and Indiana Rail Road is not "head-to-head," i.e., fully effective, as a free market would be. Obviously, he was not denying that Indiana Southern/Conrail is a competitor to Indiana Rail Road, because that was the alternative IPL used until its new Contract with Indiana Rail Road took effect in 1997, and it caused sufficient competition to cause INRD to lower IPL's rate to the Stout Plant.

CSX and NS denigrate the Conrail/Indiana Southern competitive option despite the fact that IPL used the Indiana Southern/Conrail alternative extensively in 1995-96. However, Applicants themselves relied on 1996 statistics to support their claim of a lack of competition for Niagara Mohawk Power Corporation because it suited their purposes. See CSX/NS-176, Rebuttal, Vol. 1, at pp. P-139, -145, and -449. Applicants therefore cannot deny that 1996 data are highly relevant.

Moreover, Witness Vaninetti's argument about "Conrail" not being a competitor in the "Indiana coal market" ignores the fact that Indiana Southern is a major factor in the Indiana coal market (see CSX/NS-177, Rebuttal, Vol. 2B, Vaninetti V.S., Table 3, p. P-510) and that Indiana

Southern's line serving Indianapolis (and thus, indirectly, Stout) was a spin-off from Conrail. Obviously, that spin-off would not have occurred but for their mutual conclusion that it would be more economical for Indiana Southern to provide that service than for Conrail to do so. It is thus misleading to claim that hauling coal over Indiana Southern/Conrail "is a substantially inferior alternative to competition with two-line hauls involving INRD. . ." (id. at p. P-510).

B. Applicants' Contention That IPL Can Run Its Petersburg Plant More, and Its Stout Plant Less, to "Discipline" the Railroads, Is Wrong.

Applicants rely on Mr. Vaninetti to allege, in essence, that IPL does not know how to operate its powerplants in a cost-effective manner. Without any factual basis for his opinion, Mr. Vaninetti states that if IPL were to run its Petersburg or Pritchard Plants (which are not affected by this proceeding) more, it could run the Stout Plant less and thereby "discipline" rail rates: "For instance, generation could be increased at ISRR-served Petersburg or Pritchard to put pressure on INRD's deliveries to Stout and vice-versa," CSX/NS-177, Rebuttal, Vol. 2B, pp. P-507 to -09. This is both untrue and, frankly, insulting. With all respect, it is silly to think that IPL would not run Petersburg (which produces power at the lowest cost of any of IPL's Plants on an incremental-cost basis) and instead run Stout (which is a higher-cost Plant) when it only needs power from one of the two Plants. Because Petersburg is IPL's lowest-cost Plant and because IPL is obligated to its rate payers, it always run it first when it is available.[11] Mr. Vaninetti knew

[11]Mr. Vaninetti relied on Petersburg's and Stout's "capacity factors" for his speculation. Id. at p. P-508. Based on Petersburg's capacity factor of 66 percent calculated using the gross capacity of the Plant, Mr. Vaninetti concludes that IPL could run Petersburg more and Stout less. But the relevant capacity factor is a measure of the total power generated in a year as compared to the total net capacity of the Plant, on that basis, Petersburg's capacity factor is 74.4 percent. See CSX/NS-177, Rebuttal, Vol. 2B, Vaninetti V.S., Table 2, p. P-508, and Vaninetti Dep'n Ex.

(continued...)

of no time when IPL ran Stout and not its Petersburg Plant when Petersburg was available. Vaninetti Dep'n Tr. 184-85 (Attachment 12 hereto).

Thus, IPL already does -- automatically -- what Mr. Vaninetti recommends, and does not need assistance from Applicants to know which of its Plants to operate first. Mr. Vaninetti's unfounded assertion concerning IPL's other opportunities to run Petersburg or Pritchard more and Stout less should be disregarded. See, BN/SF, Decision No. 38 at 77 (despite utility's ability to shift electric production to other plants or purchase power from the grid, the Board concluded such leverage over rail carriers was not sufficient to dismiss concerns over drop in rail competition).

C. It Is Irrelevant That IPL Could Use Trucks to Move Some Coal to Stout, or That Conrail Carried less Coal to Stout Than INRD.

IPL's requested conditions merely preserve the status quo. It is irrelevant to IPL's current two rail carrier options that IPL has the additional option of shipping coal to its Stout Plant via trucks. This is a railroad acquisition proceeding, and the issue, therefore, is the effect of the proposed transaction on railroad competition, not whether each facility affected by the transaction theoretically has non-railroad transportation options. Those are issues for the market dominance phase of a rate proceeding, not here. See supra, Argument Section I.

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[11] (...continued)
No. 5. Such a factor can never be 100 percent because of the need to do maintenance, and in reality is usually well less than 100 percent, because during off-peak periods, IPL's demand for power is well below its total capacity. During such times, it can sometimes avoid the need for power from its Stout Plant, and even from some of the units of the Petersburg Plant, by reducing the output of the Plants. That is why Petersburg's capacity factor is "only" 74.4 percent, and Stout's is 46.8 percent. Vaninetti Dep'n Ex. No. 5. The Petersburg Plant always run first when it is available and when IPL needs all of the power from the Plant.

Prior Board decisions have protected shippers at "2 to 1" points without considering whether they have truck or economic dispatch options. We are not aware of any merger or control proceeding in which the Board deprived a facility of a second rail carrier option simply because that shipper could in theory also use trucks (especially without proof that trucks constitute effective competition at similar rates). The trackage rights requested by Indiana Southern provide the means for IPL to retain its existing rail carrier options at Stout and Perry K. Under ICC/STB precedent, IPL is entitled to preserve its existing rail competition, even if it could truck some coal to either Plant.

It is equally irrelevant in maintaining IPL's current service options that each of its two rail carrier options do not ship equal amounts of coal to its Plants, or for that matter any coal to its Plants. It is the potential of either carrier to originate coal (together with fixed switching charge at Stout) that provides IPL with the competitive options that are at risk under the transaction proposed by CSX and NS. Mr. Vaninetti so testified in the UP/SP proceeding. See ISRR-9, Crowley V.S. at 12-13.

IX.

IPL IS AT GREAT RISK OF RATE INCREASES IF IT LOSES ISRR/CONRAIL, ITS TRUE COMPETITION AT ITS STOUT PLANT.

Unless the Board intervenes to preserve IPL's true competition, ISRR, IPL will become captive to CSX/Indiana Rail Road. Without its current second rail option, IPL is at great risk of rate increases because its true competitive option will cease to operate as a "discipline" on rail rates that would be offered by CSX/INRD.

Applicants' Witness Vaninetti admitted that IPL used competition to secure a reduction for coal deliveries via INRD to its Stout Plant. He is correct, but the competition was ISRR/Conrail, IPL's historical and systematic supports this conclusion. That must be so, because if the rate now is as Mr. Vaninetti claims, why did IPL not before the rate was reduced?

Thus, IPL is the clearest possible example of a shipper which will be harmed by the proposed transaction unless the Board adopts the shipper protection remedies identified below. If IPL were to lose the competition that secured it a rate reduction, there would be nothing to prevent CSX/INRD from restoring IPL's rate to the previous, significantly higher level after the expiration of the current INRD/IPL Agreement.

X.

THE ACQUISITION PREMIUM PAID BY APPLICANTS WILL ADVERSELY AFFECT RAILROAD REVENUE ADEQUACY DETERMINATIONS, THE JURISDICTIONAL THRESHOLD, AND CAPTIVE SHIPPER RATES, WITHOUT BOARD PROTECTION FOR SHIPPERS.

IPL pays millions of dollars per year for rail transportation of coal, much of which is transported by Applicants. IPL is concerned that the acquisition of Conrail may result in rate increases for coal transportation, as well as distortions in the jurisdictional threshold in 49 U.S.C. § 10707(d)(1)(A) of the Board's railroad rate regulation under and in the Board's determinations of railroad revenue adequacy under 49 U.S.C. § 10704(a)(1). For the convenience of the Board, we summarize below IPL's position on these issues. We addressed these matters at length in ACE, et al.-18, filed October 21, 1997.

CSX and NS are paying the largest acquisition premium ever paid for a railroad -- many billions over either Conrail's market value or book value.[12] As stated previously, we say "many" because Applicants' have now informed us that Applicants' Witness Whitehurst made an almost $3 billion error in his calculation of the purchase price for of Conrail, and that instead of $17.242 billion (CSX/NS-177, Rebuttal, Vol. 2B, p. P-668), CSX and NS now claim it is over **$20 billion**, including assumed liabilities, deferred taxes, and transaction expenses. See Erratum filed January 20, 1998 (CSX/NS-195). Thus, at this point, it cannot be known with certainty **what** the exact amount(s) of the acquisition premium(s) is, for either revenue adequacy or regulatory costing purposes. **However, it does not matter what the exact amount is, because the Board must address the issue regardless of the exact amounts, and the amount of the premium could change in any event when Price Waterhouse finishes its evaluations.**

Under the Board's accounting procedures, the amount CSX and NS have paid for Conrail can be translated into premiums in the billions of dollars that would, absent the Board's intervention, materially affect the purported revenue adequacy or inadequacy of CSX and NS, and the calculation of the jurisdictional threshold for each railroad:

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[12]Unless the context specifically requires otherwise, we refer to either value as "acquisition premium."

SUMMARY OF CSX AND NS
PREMIUM PAID FOR CONRAIL
($ IN MILLIONS)

	For Revenue Adequacy Purposes	For Jurisdictional Threshold Purposes
CSX[1]	$3,827	$3,248
NS[2]	$5,286	$4,485
	$9,113	$7,733

1/ Based on 42% of the total premium.
2/ Based on 58% of the total premium.

Source: ACE, et al. Ex. No. 2, Crowley V.S. at 29.[13]

According to Applicants' Witness Whitehurst, the correct amount of the acquisition premium is $9.550 billion (CSX/NS-177, Rebuttal, Vol. 2B, p. P-669). (He refers to it as a "write up of the value of acquired Conrail assets," id., but there is no distinction between that unwieldily phrase and "acquisition premium," so we use "acquisition premium" for brevity.) **Again, it does not matter the precise amount of the acquisition premium; what matters is that it exists, and it is a very large number.**

Accordingly, there are four crucial public interest issues which affect many, if not all, shippers and that must be resolved by the Board in this proceeding:

1) The acquisition premium and its effect on revenue-adequacy calculations;

2) The asset-value write-up and its effect on regulatory costing calculations;

[13]The premiums for revenue adequacy and jurisdictional costing procedures differ because of differences in the procedures for computing revenue adequacy and the jurisdictional threshold. Acquisition price is used for revenue adequacy whereas fair value is used for jurisdictional threshold purposes.

3) The probability that captive shippers will face higher freight rates as a result of the acquisition premium and asset-value write-up; and

4) The use of the Rail Cost Adjustment Factor (RCAF) without adjustment for productivity improvements, resulting in (a) rates to captive shippers higher than the "stand-alone cost" ("SAC") level, and (b) in adjustments to other charges that do not track the railroads' cost changes.

In their Joint Verified Statement incorporated herein by reference (ACE, et al.-18, Ex. No. 1), Drs. Kahn and Dunbar explain:

> As a matter of both economic and regulatory principle, market values simply cannot be allowed to affect regulatory prices, since that would involve the fatal circularity recognized by the Supreme Court 50 years ago: if a company is allowed to earn a "reasonable" return on whatever price it pays for an asset, that will in turn determine the price it is willing to pay, up to the present discounted value of the future stream of unconstrained monopoly profits. Instead of a regulated price being determined by cost, independently determined, the cost will itself be determined by price, and, in turn, "justify" whatever price maximizes profits. No sensible system of regulation can allow such an outcome.

For the authority Drs. Kahn and Dunbar had in mind, see FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944), citing with approval Missouri ex rel. Southwestern Bell Tel. Co. v. Public Service Comm'n of Missouri, 276 U.S. 262, 289 (1923) (Brandeis and Holmes, JJ., dissenting); see also, Duquesne Light Co. v. Barasch, 488 U.S. 299 (1989).

Indeed, **any** significant acquisition premium and asset-value write-up will, under current accounting procedures of the Board, produce a lower return on investment for revenue adequacy purposes as well as raise the effective jurisdictional threshold used for ratesetting. This will place every captive shipper at risk of higher rates as a result of this transaction.

CSX and NS have argued that making **any** change in the Board's policies or procedures would constitute impermissible "retroactive" relief (CSX/NS-176, Rebuttal, Appendix A, p. A-5), but that is not so. ACE, et al. raised this issue, in this proceeding, almost immediately after the filing of the notice of the Application, and raised it again when Applicants sought approval of their voting trust to acquire Conrail, **in cash,** before the Board's approval could be obtained. The Board assured ACE, et al. and the public generally that the acquisition premium and its effects would be an issue in the proceeding. Decision No. 4 (served May 2, 1997) at 3. **It was not until after that date that CSX and NS spent most of the money they expended to purchase the remainder of Conrail and place their shares in a Board-approved voting trust; thus, their expenditures prior to that date, while not unlawful, were wholly without Board approval or opportunity for the shippers and the public to be heard.** That being the case, Applicants' retroactivity argument is both wrong and comes with exceedingly ill grace, since Applicants contended that we were too early when the issue was first raised, but are too late now to raise it. The Board must follow through on its commitment to address this issue no later than its decision acting on the Application, and may not adopt Applicants' spurious "retroactivity" argument.

The threat of rate increases exists whether or not Applicants are now following the "one-lump theory" or are not otherwise now engaging in profit maximization. (Neither the Board nor Applicants can simply assert that they are not, and treat its rebuttable "one-lump theory" presumption as a conclusive presumption. Previously, the ICC merely said, and the Court of Appeals affirmed on this basis, that it was adopting a **rebuttable** presumption that railroads are already maximizing the available profits from captive traffic. Western Resources, supra, 109 F.3d at 378 (affirming the ICC's BN/SF decision)). Use of the acquisition premium and asset-

value write-up for revenue adequacy determination and regulatory costing purposes provides the railroads with still another opportunity to increase freight rates to captive shippers. Shippers, especially IPL, would be at risk of rate increases, even if there were no acquisition premium, because as Drs. Kahn and Dunbar and ACE, et al. Witness Crowley show, this transaction will **increase** the market power of CSX and NS. The substantial acquisition premiums being paid gives CSX and NS every incentive to raise rates, and the effect of paying the premiums will give them the ability to raise rates now at or below the jurisdictional threshold.

Thus Applicants' pricing managers will have incentive to raise rates assessed captive shippers without fear of subsequently having those rates found to be in excess of a maximum reasonable level -- and even to test the new limits. And where rates are challenged by shippers, many that previously would have been subject to regulatory scrutiny no longer will be so because the jurisdictional threshold effectively will have been raised; and those rates that are subject to regulatory scrutiny and found to be unreasonable, are in danger of being reestablished by regulators at a higher level than they otherwise would be set.

Clearly, a central challenge for the Board is to recognize that captive shippers are at risk of higher freight rates as a result of this transaction. Therefore, the Board has a duty to mitigate that harm by devising appropriate protections for captive shippers.

At a minimum, the Board should order that the acquisition premium not be considered in calculating revenue adequacy, and that the asset-value write-up not be included in the calculation of the jurisdictional threshold or in determining stand-alone costs. Furthermore, the Board should order that any use by Applicants or the Board of the RCAF include a productivity adjustment. Otherwise, every maximum rate established at a stand-alone level, and subsequently

adjusted under the RCAF without provision for productivity improvements, will immediately establish a new rate in excess of the SAC level, which would violate the ICC's premise in adopting the SAC test (i.e., that it is not economically justifiable that any rate exceed that level). Coal Rate Guidelines -- Nationwide, 1 I.C.C.2d 520 (1985), aff'd sub nom. Conrail v. United States, 812 F.2d 1444 (3d Cir. 1987).

Also, the statutory requirement that the RCAF "shall" include a productivity adjustment (49 U.S.C. § 10708(b)) requires that all switching and other charges imposed by CSX and NS must be required to be adjusted by use of the RCAF with a productivity adjustment unless the parties agree to use another measure. Not only is this a statutory requirement, but also on policy grounds a cost escalation formula must be adjusted for productivity to avoid adjustments in excess of cost. Congress adopted the RCAF to provide regulatory immunity for cost-based increases; immunized increases must therefore not be adjusted by amounts higher than the railroads' actual costs.

Already, CSX and NS are signaling to regulators and stockholders that in light of Union Pacific's difficulties, CSX and NS are likely to move more slowly in integrating Conrail, which will affect both the magnitude and timing of the projected merger benefits.

In this regard, it is interesting to note the comment of Wall Street analyst James J. Valentine of the firm of Salomon Smith Barney. Mr. Valentine wrote recently:[14]

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[14] James J. Valentine, "A Wall Street Perspective," in Frank N. Wilner, *Railroad Mergers: History, Analysis, Insight* (Omaha: Simmons-Boardman Books, 1997), at 346, 348.

> After government approval [of a railroad merger] was received, and the railroads were combined into one entity, Wall Street began to receive restated historical financial statements that didn't receive much notice. However, when the railroads started to report fantastic year-over-year improvements in the first quarter of their mergers, I went back and discovered that the 'restated' historical figures did not add up to the two combined entities, but rather they had an additional cost element that made the previous year look abnormally bad, which in effect made the year-over-year comparisons for the first four quarters of a merger look fantastic.
>
> Furthermore, in at least two instances, from the time that the original merger savings were announced to a year and a half later when the railroads were combined as one entity, management had essentially lowered the benefits expected for the shareholders.

If Applicants' predictions that efficiencies and growth in their businesses will pay for the acquisition premium, then adoption of shipper protections will do Applicants no harm. But if the price paid for Conrail does lead them to seek rate increases, the Board will have served the public by not permitting that result. Either way, shipper protections should be adopted.

Ensuring that shippers are not at risk of paying higher rates as a result of the acquisition premium and asset-value write-up is to do no more than hold Applicants to their own statements -- that they have taken the risk of recovering the acquisition costs and that the costs will be paid not through rate increases but through increased competition and efficiencies. See, e.g., the May 8, 1997 "Dear Customer" letter from CSX Executive Vice President John Q. Anderson included in ACE, et al.-18, Ex. No. 3, submitted October 21, 1997:

> Many of you have asked if we will be forced to raise prices to fund fund our acquisition of Conrail. In response, let me say that our plans are to grow our business aggressively and to attack a market that's 86% dominated by business moving on the highway. Improved service and efficiency available from an enhanced CSX rail system should allow us to put together price and service packages that make inroads into this market and help us to meet our growth objectives. Competitive factors will also come into play as there will now be two Class I railroads vying for

> business in many of the markets now dominated by one carrier. **In short, we do not see raising prices as the path to funding this acquisition, we see efficiency and new business growth.**

As NS Vice President James McClellan admitted, recovery of the acquisition premium was "a risk NS takes." McClellan Dep'n Tr. 86 (see ACE, et al.-18, Ex. No. 3). We agree; if CSX and NS can recover the premiums they paid without raising rates, that would be unobjectionable. But if CSX and NS try to take advantage of their shippers, the shippers have every right to demand that the Board not provide them the right to force shippers to do so. After all, the shippers had absolutely no role in the decision of CSX and NS to pay the premiums, and we asked the Board to prevent the premiums from being paid until our objections to the payment could be heard. While the Board did not do so, it put CSX and NS on notice that the premiums would be an issue in the proceeding. Decision No. 4 (at 3). Clearly, then, Mr. McClellan was right, and the risk NS and CSX took must not become the shippers' burden, as Mr. Anderson said.

Conclusion

Therefore, the Board should not approve the proposed transaction unless it adopts the following protective conditions:

1. Indiana Southern be granted overhead trackage rights between MP 6.0 on its Petersburg Subdivision and IPL's Perry K Plant located on Conrail;

2. Indiana Southern be granted overhead trackage rights between MP 6.0 on its Petersburg Subdivision and IPL's Stout Plant located on the INRD;

3. Indianapolis is to be a "shared assets area," including an equal sharing of trackage, the Avon and Hawthorne Yards, and direct access to each of the short lines that serve Indianapolis;

4. Regardless of the access remedy adopted for Indianapolis, IPL must continue to have the right to build out to the Indianapolis Belt so as to be served directly by ISRR or NS at its Stout Plant;

5. In the alternative to condition No. 3, NS should have direct access to local shippers, direct access to short lines serving Indianapolis such as ISRR, and especially direct access to IPL's Stout and Perry K Plants;

6. Both Perry K and Stout Plants should be deemed "2 to 1" points;

7. ISRR and NS (if Indianapolis is not a "shared asset area") should be required to pay CSX either a trackage rights fee set at CSX's costs, or a switching charge set at CSX's or Indiana Rail Road's costs (depending on which carrier delivers the traffic to IPL's plants) but not both, on a direct passthrough basis to IPL;

8. Traffic in Indianapolis handled by NS, especially IPL's unit trains of coal, need not be delivered to, or picked up from, the Hawthorne Yard, but instead may be delivered by NS, or picked up by NS, directly from shippers;

9. Oversight of CSX's switching services will be provided to ensure that ISRR and NS (if Indianapolis is not a "shared asset area") receive efficient, non-discriminatory service;

10. The Board and the Indianapolis shippers, including IPL, must have the ability to audit CSX's costs that are the bases for the trackage rights fee and the switching charge that NS must pay, with the Board empowered to review and prescribe a lower, reasonable fee or charge, if appropriate, on an expedited basis;

11. Indefinite oversight is required to ensure that traffic via Kansas City or other interchanges to NS from western carriers is efficient;

12. The transaction should not be permitted to take effect until all necessary labor implementation agreements and detailed operations plans are in place;

13. Union Pacific and BN/SF be required, if requested by IPL or NS, to participate in a through rate with NS at Kansas City on a nondiscriminatory basis vis-a-vis Chicago and St. Louis, or, in the alternative, CSX be required to give NS access on a nondiscriminatory basis over one of its lines from St. Louis or Chicago to Indianapolis, so that NS can compete effectively with CSX for probable western coal movements to Indianapolis, as Conrail could today; and,

14. IPL must be provided equal access for NS and CSX/INRD at Stout and Perry K for the receipt of coal, as Drs. Kahn and Dunbar recommended. If the Board is disinclined to adopt this remedy it should in the alternative require NS and CSX to accept "bottleneck rate" jurisdiction for IPL, as Drs. Kahn and Dunbar also recommended. Finally, if the Board is disinclined to adopt either of these two remedies, the Board must impose a rate cap with adjustments for cost changes using the Rail Cost Adjustment Factor (Adjusted) for IPL, subject

to oversight, at both its Perry K and Stout Plants, as Drs. Kahn and Dunbar recommended in the alternative to their preference for structural remedies.

Respectfully submitted,

Michael F. McBride

Michael F. McBride
Bruce W. Neely
Brenda Durham
John M. Collins
LeBOEUF, LAMB, GREENE & MacRAE, L.L.P.
1875 Connecticut Ave., N.W., Suite 1200
Washington, D.C. 20009-5728
(202) 986-8000 (Telephone)
(202) 986-8102 (Facsimile)

Attorneys for Indianapolis Power & Light Company

Due Date: February 23, 1998
Dated: February 23, 1998

BEFORE THE

SURFACE TRANSPORTATION BOARD

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

DEPOSITION OF THOMAS G. HOBACK

Washington, D.C.

Friday, January 9, 1998

REPORTED BY:

SARA A. EDGINGTON

this question, so there's no sense going back.

MR. MC BRIDE: This is a different question.

MS. TAYLOR: Can I talk to the witness?

MR. MC BRIDE: Yes, but let the record reflect the witness is consulting with his counsel if he wishes.

(Witness conferred with counsel.)

THE WITNESS: Are we back on the record?

BY MR. MC BRIDE:

Q We've never been off, but your discussion with your counsel was not on the record. The question is pending.

A If I understand you, you are asking me if I believe CSX would have the power to charge rates to Perry K, and my belief is yes, they would have the opportunity to raise the rates, to reduce the rates, to keep the rates the same.

Q And they could do different things for Indiana Railroad and Indiana Southern; correct?

A If they chose to do that, I believe they could.

BEFORE THE

SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

CSX CORPORATION AND CSX TRANSPORTATION, INC.

NORFOLK SOUTHERN CORPORATION AND

NORFOLK SOUTHERN RAILWAY COMPANY

-- CONTROL AND OPERATING LEASES/AGREEMENTS --

CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION

RAILROAD CONTROL APPLICATION

~~HIGHLY CONFIDENTIAL~~ PUBLIC (9/22/97)

Washington, D.C.

Thursday, August 21, 1997

Deposition of RAYMOND L. SHARP, a witness herein, called for examination by counsel for the Parties in the above-entitled matter, pursuant to agreement, the witness being duly sworn by JAN A. WILLIAMS, a Notary Public in and for the District of Columbia, taken at the offices of Arnold & Porter, 555 Twelfth Street, N.W., Washington, D.C., 20004-1202, at 10:00 a.m., Thursday, August 21, 1997, and the proceedings being taken down by Stenotype by JAN A. WILLIAMS, RPR, and transcribed under her direction.

Q. Indianapolis Power & Light's traffic into the Stout plant, for example?

A. Are you referring to the current contract that's in existence or current movements or potential movements?

Q. Current and potential.

A. I've had discussions with Mr. Knight, yes.

Q. And does CSX have a subsidiary which in turn owns 89 percent of the Indiana Railroad?

MR. ROSEN: If you know.

THE WITNESS: I don't have specific knowledge as to the aspect the way you mentioned it, but it's my understanding we have a controlling interest in the Indiana Railroad.

BY MR. McBRIDE:

Q. And, in fact, are you now or will you shortly be on the board of the Indiana Railroad?

A. I am now on their board.

Q. So would you think it reasonable to conclude that CSX and Indiana Railroad are not exactly arm's-length competitors of one another?

A. No, I would not think that's the case.

Q. Explain to me why you think CSX and Indiana Railroad Company are head-to-head

competitors?

MR. ROSEN: I don't think that's what he said.

But you can answer the question.

THE WITNESS: I'm not sure that I said what you just asked me to repeat.

BY MR. McBRIDE:

Q. Then I'll start with that and I'll ask you if you believe that CSX and Indiana Railroad Company are head-to-head competitors?

A. The answer would depend on which traffic you're talking about.

Q. Okay. How about traffic that comes in on CSX origins and then interchanges with Indiana Railroad?

A. It would seem to me we would not be direct competitors where we interchange traffic to them.

Q. Under what circumstances would you regard yourself, CSX, that is, as a competitor of Indiana Railroad?

A. Where traffic was available that could be awarded to either Indiana Railroad or to CSX, we would be competitors.

Q. Who has the sole physical access into

BEFORE THE

SURFACE TRANSPORTATION BOARD

- - - - - - - - - - - - - - - - -x

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

- - - - - - - - - - - - - - - - -x

DEPOSITION OF THOMAS G. HOBACK

Washington, D.C.

Friday, January 9, 1998

REPORTED BY:

SARA A. EDGINGTON

distinction between us and CSX.

Q Fine. But I take it you're not here testifying that you compete with CSX?

A That's not my purpose, no, sir.

Q Do you compete with CSX?

A Yes, sir.

Q For coal business to Stout?

A No, sir.

Q For coal business to Perry K?

A No, sir. Our competition is for general merchandise.

Q Do you know why Mr. Sharp didn't provide any rebuttal testimony, by the way?

A No, sir.

Q He's still in good health, I take it?

A I don't know. I haven't seen Mr. Sharp for months.

Q Well, I thought because he's on your board, you might know.

A I don't know.

Q Once CSX took control, though, do you now feel some obligation to run coal matters by

SUPPLEMENT
TO

MDSBC CR 8001-D
MDOT CR 8001-D

NYDOT CR 8001-D
PSCWV CR 8001-D

ICC CR 8001-D

CONSOLIDATED RAIL CORPORATION

IN CONNECTION WITH PARTICIPATING CARRIERS NAMED ON PAGES 7 AND 8 OF TARIFF AS AMENDED

SUPPLEMENT 1
TO

FREIGHT TARIFF CR 8001-D.

LOCAL AND JOINT FREIGHT TARIFF

NAMING

RULES AND CHARGES ON SWITCHING AND OTHER ACCESSORIAL SERVICES

AT STATIONS ON

CONSOLIDATED RAIL CORPORATION,

AND OTHER CARRIERS NAMED IN TARIFF

FOR INTRASTATE APPLICATION, SEE ITEM 215.

SWITCHING AND ACCESSORIAL SERVICES TARIFF

POSTPONEMENT NOTICE

The effective date of Original Page 187-A, Item 89125, is hereby postponed from "April 3, 1995" to "April 10, 1995".

ISSUED MARCH 15, 1995

EFFECTIVE APRIL 3, 1995

ISSUED BY
CONSOLIDATED RAIL CORPORATION
2001 MARKET STREET - 23C
P.O. BOX 41423
PHILADELPHIA, PA 19101-1423

(Published by Railroad Publication Services, Atlanta, GA 30325)

RDY

CONSOLIDATED RAIL CORPORATION TARIFF CR 8001-D

8TH REVISED PAGE 12

ITEM 3

ALPHABETICAL LIST OF STATIONS ON CR (EXCEPT AS OTHERWISE PROVIDED) AT WHICH RULES, REGULATIONS AND CHARGES APPLY; ALSO INDEX OF STATIONS AT WHICH SPECIFIC RULES, REGULATIONS AND CHARGES APPLY

STATION NAME	STATION NUMBER	ITEM NUMBERS
INDIANA		
Dunlap-----	15611	11750, 12000 to 12030
East Chicago---		(D) (ZZ)
East Gary--	15511	11750, 12000 to 12030
Edinburg---	8481	11750, 12000 to 12010, 12030
Elkhart----	15612	10150, 12000 to 12030
Emporia----	15231	11750, 12000 to 12030
Fairland---	15124	11750, 12000 to 12030
Fairmount--	15225	11750, 12000 to 12030
Farmland---	15003	11750, 12000 to 12030
Fillmore---	15040	11750, 12000 to 12030
Ft Benjamin Harrison-	15024	11750, 12000 to 12030
Fort Wayne-	77247	10250, 12000, 12030, 17600
Fortville--	15071	11750, 12000 to 12030
Frankfort--	8610	11750, 12000 to 12020 12030
Gas City---	6934	11750, 12000 to 12010, 12030
Gary-------	77394	11750, 12000 to 12010, 12025 to 12030
Gibson (Lake Co)-	75520	(See Chicago, IL)
Goshen-----	75609	10340, 12000 to 12020
Grasselli--	-----	(See Chicago, IL)
Greencastle	78718	800, 11750, 12000 to 12020
Greenwood--	8471	11750, 12000 to 12020
Hammond----	-----	(See Chicago, IL)
Harrisville	15001	11750, 12000 to 12020
Hartford City------	6928	11750, 12000 to 12020, 12030, 17650
Hartsdale--	7104	11750, 12000 to 12020
Henryville-	8570	11750, 12000 to 12020
Highlands (Lake Co)-	15702	11750, 12000 to 12020
Hoagland---	8394	11750, 12000 to 12020
Indiana Harbor----	77408	(See Chicago, IL)
Indianapolis-----	78463	1580, 10475, 12000 to 12030, 14900 to 14915, 17715, 19029
Jeffersonville-----	78578	11750, 12000 to 12020, 12030, 17720
Kendallville-----	77567	11750
Kersey-----	15690	11750, 12000 to 12020
LaFayette--	15276	12000 to 12030
LaFontaine-	15221	11750, 12000 to 12030
Lapel------	57635	11750, 12000 to 12010, 12030
LaPorte----	15622	10630, 12000 to 12030, 17800
Lebanon----	78604	12000 to 12030
Leesburg---	15210	11750, 12000 to 12030
Ligonier---	15606	11750, 12000 to 12030
Linwood (Madison Co)------	15229	11750, 12000 to 12030
Linton----	15412	11750, 12000 to 12030
Maples-----	7240	12000, 12010
Marion-----	76941	1765, 10750, 12000, 12010, 12030, 17900
Michigan City------	15510	10790, 12000 to 12030 17930
Midwest (Portage)-	15632	10810, 12000 to 12020, 12025, 12030, 15350
Milford (Kosciusko Co)------	15208	11750, 12000 to 12030
Milford Jct	15207	11750, 12000 to 12030
Millersburg (Elkhart Co)-------	15608	11750, 12000 to 12030

For explanation of abbreviations and reference marks, see concluding page(s) of this tariff.

ISSUED DECEMBER 12, 1996

EFFECTIVE DECEMBER 13, 1996

ISSUED BY
CONSOLIDATED RAIL CORPORATION, 2001 MARKET STREET - 23C, P.O. BOX 41423, PHILADELPHIA, PA 19101-1423

CONSOLIDATED RAIL CORPORATION TARIFF CR 8001-D

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MDPSC CR 8001-D
MDOT CR 8001-D
NYDOT CR 8001-D
ICC CR 8001-D
PSCNY CR 8001-D

SECTION 2
ABSORPTION OF SWITCHING CHARGES
(Subject to provisions of Item 820, except as otherwise specified)

ITEM 1575

A HOMESTEAD, PA
(CSX TRANSPORTATION, INC.)

1. Applies on all freight (See EXCEPTION 1), in carloads, when the rate to or from CR tracks at Homestead, PA, or Homestead Transfer, PA, is $10.97 or over per ton as provided in Item 820.

EXCEPTION

1. The absorption arrangement will not apply on Dolomite, Furnace or Foundry Limestone or on Iron Ore, except in the absence of through rates on these commodities via Homestead Transfer, PA.

ITEM 1580

INDIANAPOLIS, IN
(INDIANA RAIL ROAD COMPANY)

1. Subject to the provisions of Item 820, CR will absorb switching charges of the Indiana Rail Road Company (INRD).

2. Conrail will absorb the following maximum amounts per car on inbound and outbound traffic to or from the Indianapolis Power and Light Co. (Elmer W. Stout Generating Station):

Bituminous Coal, other than Ground or Pulverized, in packages (Indiana intrastate)	$17.00 per car
Bituminous Coal, other than Ground or Pulverized, in packages (other than Indiana intrastate)	$18.00 per car
Lignite Coal or Lignite Coal Briquettes	$19.00 per car

ITEM 1600

JOHNSTOWN, PA
(CONEMAUGH & BLACK LICK RAILROAD COMPANY)

1. The switching charges of the CBL, as published in its tariffs lawfully on file with the ICC will be absorbed, unless otherwise stated in tariffs, on all carload road-haul traffic out of the lawfully published rates to or from Johnstown, PA as provided in Item 820.

ITEM 1640

KANKAKEE, IL
SOYBEAN OIL MEAL

1. On carloads of soybean oil meal switched from the Borden Company at the General Foods Corp., both within the Kankakee, IL switching limits. The switching charges will be absorbed by CR upon presentation of paid freight bill and evidence of reforwarding via CR in road-haul service within twelve (12) months from date of switching bill.

ITEM 1700

LOUISVILLE, KY

1. CR will absorb, subject to the provisions of Item 820, the switching charges of CSXT, PAL and NS at Louisville, KY and stations in the Louisville, KY switching limits as listed in NOTE 31 of the Official List of Open and Prepay stations, ICC OPSL 6000 Series.

ITEM 1765

MARION, IN
(CENTRAL RAILROAD COMPANY OF INDIANAPOLIS)

1. Subject to the provisions of Item 820, CR will absorb switching charges of the Central Railroad Company of Indianapolis (CERA).

ITEM 1775

MASSILLON, OH

1. On switching charges published by the Minichillen & Tuscarawas Railway Company, Conrail will absorb $87.00 per car.

For explanation of abbreviations and reference marks, see concluding page(s) of this tariff.

ISSUED JULY 13, 1995

EFFECTIVE JULY 15, 1995

ISSUED BY
CONSOLIDATED RAIL CORPORATION, 2001 MARKET STREET - 23C, P.O. BOX 41423, PHILADELPHIA, PA 19101-1423

CONSOLIDATED RAIL CORPORATION TARIFF CR 8001-D

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ILCC 371
NDPSC CR 8001-D

NDOT CR 8001-D
SDDOT CR 8001-D

ICC CR 8001-D
PSCAN CR 8001-D

SECTION 3
DEFINITION OF SWITCHING LIMITS AT SPECIFIC POINTS

ITEM	STATION	SWITCHING LIMITS
10425	Hasbrouck Heights, NJ	From station switch, Hasbrouck Heights to Naylor Street, Teterboro, NJ. Including Teterboro, NJ Station No. 30766.
10450	Homestead, PA	East - CSXT Connection. West - Waste Machine Co.
10470	Huntingdon, PA	East - 4th Street. West - Penn Electric.
10475	Indianapolis, IN	Indianapolis Line - East - Arlington Ave. Old Lafayette Main - North - End of Track at 29th St. Zionsville Industrial - North - West 30th St. Crawfordsville Branch - North - Monarch Beverage Co. at Rockville Rd. St. Louis Line - West - Raceway (County Line) Rd. Petersburg Secondary - West - Trans City Warehouse, West of Interstate 465. Louisville Secondary - South - East Raymer Ave. Shelbyville Secondary - East - Emerson Ave. Panhandle East - East - End of Track at Post Road. 38th Street Runner - East - End of Track at Post Road. Crawfordsville Branch - North - Monarch Beverage Co. at Rockville Rd.
10480	Jackson, MI	North - Interstate 94. South - (Jackson Industrial) - End of Track. East - U.S. Route 127. West - Robert Lake Co.
10497	Jamestown, NY	East - Main Street. West - Chadakoin River.
10484	Jeanette, PA	North - End Bull Run Branch. South - Jeanette Industrial End of Track. East - 2nd Street. West - Connection between Main Line and Jeanette Industrial.
10488	Jersey City, NJ	From Hudson River west to Chestnut Ave., including Waldo Ave Yard and Hudson Street Extension.
10490	Johnson City, NY	Southern Tier Line: East - Whipples Lumber Co. West - Susquehanna River. Vestal Industrial Track: East - Main Street. West - Susquehanna River.
10495	Johnstown, PA	South - CSXT Interchange at Railroad Street. East - Mile Post 271. West - East connection Junction Song Hollow Extension.
10530	Kalamazoo, MI	North - (Kalamazoo Secondary) - Allen St. (CSX Industrial) - End of Track at James River Corp. South - (Kalamazoo Secondary) - Milham St. (Upjohn Secondary) - Cork St. CR - GTW Joint Property, including the GMC Flint Automotive Div., GMC and Kilgore Yard. East - (Michigan Line) - East End Botsford Yard. West - (Michigan Line) - Michigan State Hospital.
10540	Kankakee, IL	East - Interstate 57. West - West End West Kankakee Yard.
10570	Kenton, OH	West - (Alger Industrial) - Imperial Cup. North - Wayne St. South - Marter Building.

For explanation of abbreviations and reference marks, see concluding page(s) of this tariff.

ISSUED OCTOBER 24, 1994

EFFECTIVE NOVEMBER 15, 1994

ISSUED BY
CONSOLIDATED RAIL CORPORATION, 2001 MARKET STREET - 23C, P.O. BOX 41423, PHILADELPHIA, PA 19101-1423

CONSOLIDATED RAIL CORPORATION TARIFF CR 8001-D

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NDPSC CR 8001-D | NDOT CR 8001-D, NYDOT CR 8001-D | ICC CR 8001-D, PSCW CR 8001-D

SECTION 4
GENERAL SWITCHING CHARGES
SWITCHING CHARGES AT CR STATIONS AS INDICATED BY NAMES AND NUMBERS IN ITEM 3
(To be Used Only in the Absence of Specific Charges in Section 5)
RATES IN DOLLARS PER CAR

ITEM 12000

INTRA-PLANT SWITCHING

1. The charge for an intra-plant switch movement from one location in a yard or plant of a firm or industry to another location within the confines of the same yard or plant of the same firm or industry will be ---------- $103.00

ITEM 12010

INTRA-TERMINAL SWITCHING

1. The charge for an intra-terminal switch movement from one location within the switching limits of a station to another location within the switching limits of the same station (see Exception):

Privately owned or leased cars (Note 2)--	$ 0
Railroad cars----------	$350.00 497.00

Exception: The charge for an intra-terminal switch movement of railway freight cars moving on own wheels (Note 1) will be---- 368.00

Note 1-Applies on STCC's 37 422 05; 37 422 13; 37 422 17; 37 422 33; 37 422 43; 37 422 93; 37 422 99).

Note 2-Rate applies only on private equipment with no per diem/mileage rate; mileage allowance payments will not apply.

ITEM 12020

LEASED TRACK MOVEMENTS

1. The switch charge for any switch movement between a leased track served directly by Conrail located within the switching limits of a station on cars having a prior movement in CR road-haul service and plants or industries located on CR within the switching limits of the same station will be---------- $193.00

ITEM 12030

INTER-TERMINAL SWITCHING

1. The non-absorbed switch charge for any switch movement between a location on CR and junction with a connecting carrier whether or not preceded or followed by a line-haul movement via the connecting carrier will be as follows (see Exception):

Privately owned or leased cars (Note 2)--	$ 3480.00
Railroad cars ----------	688.00

Exception: The non-absorbed switch charge for any switch movement of railway freight cars moving on own wheels (Note 1) will be---------- 368.00

Note 1-Applies on STCC's 37 422 05; 37 422 13; 37 422 17; 37 422 33; 37 422 43; 37 422 93; 37 422 99).

Note 2-Rate applies only on private equipment with no per diem/mileage rate; mileage allowance payments will not apply

ITEM 12065

INTER-TERMINAL SWITCHING - PCT

1. The non-absorbed switch charge for any switch movement between a location on PCT and junction with a connecting carrier whether or not preceded or followed by a line-haul movement via the connecting carrier will be as follows:

Privately owned or leased cars ----	$616.00
Railroad cars ----------	508.00

ITEM 12050

RECIPROCAL SWITCHING - PCT

1. The charge for any switch movement between tracks located on PCT and point of interchange with connecting carriers when such charges are absorbed in whole or in part on traffic received from or moved to a point outside switch limits of the same station will be ---------- $390.00

For explanation of abbreviations and reference marks, see concluding page(s) of this tariff.

ISSUED JULY 12, 1995 | EFFECTIVE AUGUST 7, 1995

ISSUED BY
CONSOLIDATED RAIL CORPORATION, 2001 MARKET STREET - 25C, P.O. BOX 41423, PHILADELPHIA, PA 19101-1423

CONSOLIDATED RAIL CORPORATION TARIFF CR 8001-D

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SECTION 6
RECIPROCAL SWITCHING (Except as Noted)

INDIANAPOLIS, IN

ITEM	BETWEEN NAME	BETWEEN ADDRESS	DISTRICT LOCATION	AND JUNCTION WITH CSXT, INBD PER CAR
	AAA Warehouse	801 South Emerson	CR	$ 390.00
	ADM Milling	1300 Bethel Ave	CR	(D) $ 390.00 (D) $8692.00 (D) $ 209.00
	Allison Gas Turbine Anderson Box Co., Inc. Ashland Chemical Butler Paper Caito Foods Capitol City Metals Carter Lee Lumber	2355 South Tibbs 4557 W Bradbury 8315 E 33rd Street 1911 Stout Field 3120 N Post Road 2210 Oliver Avenue 1621 West Wash St		
	Central Soya	1160 W 18th St	CR	(D) $ 390.00 (D) $8692.00 (D) $ 209.00
	Central States Warehouse Chrysler Indianapolis Foundry Citizens Gas Coke Utility (CCD) Citizens Gas Coke Utility Conner Corporation	3019 Roosevelt 1100 South Tibbs Ave @ Cancel Prospect 3500 E. 20th St.	CR	$ 390.00
17719 (Cont'd)	Countrymark Cooperative Countrymark Cooperative	2435 Kentucky Ave 1901 S Sherman Dr	CR	(D) $ 390.00 (D) $8692.00 (D) $ 209.00
	Creative Expressions Group D A Lubricant Eli Lilly Eli Lilly Ford Indianapolis Gene Conreaux General Alum Chemical General Alum Chemical GN CLCD Indianapolis (Aparts)(Note 1) GN CLCD Indianapolis Grocers Supply (D) Housman Corporation Heritage Environmental Service (Note 1) (CCD) Heritage Environmental Service Hill and Griffith	3580 North Arlington 1331 W 29th St Stock Yard Plant #1 Stock Yard Plant #2 6900 English Ave Cancel 1508 S Keystone Speedway, IN 201 S Harding 340 White River Pkwy 6310 Stout Field North Drive 2899 Arthington Blvd Emerson Ave, Beech Grove 7901 W Morris St	CR	$ 390.00

NOTE 1 - Not open to Reciprocal Switching.
(D) - EFFECTIVE July 19, 1997.

For explanation of other abbreviations and reference marks, see concluding page(s) of this tariff.

ISSUED JULY 18, 1997

EFFECTIVE AUGUST 8, 1997
(Except as Noted)

ISSUED BY
CONSOLIDATED RAIL CORPORATION, 2001 MARKET STREET - 23C, P.O. BOX 41423, PHILADELPHIA, PA 19101-1423

CONSOLIDATED RAIL CORPORATION TARIFF CR 8001-D

7TH REVISED PAGE 149

SECTION 6
RECIPROCAL SWITCHING (Except as Noted)

INDIANAPOLIS, IN

ITEM	BETWEEN NAME	BETWEEN ADDRESS	DISTRICT LOCATION	AND JUNCTION WITH CSXT, INRD PER CAR
	Hoosier Wood Preservers	3605 Farnsworth		
	Illinois Cereal Mills	1730 W Michigan St		
	Indianapolis Newspaper	139 East South St		
	Indianapolis Power and Light	3600 N Arlington		
	Indianapolis Shredding	311 Shelby St		
	Interstate Warehousing, Inc.	6001 W Minnesota St		
	Interstate Warehousing	1401 S Keystone Ave		
	John Sexton Co	1800 Churchman Ave		
	Kerr McGee Chemical	1650 South Earhart St		
	Max Katz Bag Co Inc	233 S LaSalle		
	Merico	404 S Kitley Ave		
	Merchandise Warehouse	5000 S Shelby		
	Merchandise Warehouse	1414 S West St		
	Metal Service Supply	916 Harrison St		
	Mid America Warehouse Co.			
	Monarch Beverage	7900 Rockville Rd		
17715 (Concluded)	Monsey Products Co.	4351 West Morris St	CR	$300.00
	(1 & 2) National Starch Chemical	1515 Drover St		
	Navistar International	5565 Brookville Rd		
	Olin Brass	1800 S Holt Rd		
	Pakway Container Corp	2135 Sout Field Rd		
	Paper Manufacturing	8525 East 33rd		
	Pechiney World Trade USA, Inc.	1500 S. Tibbs Ave.		
	Quaker Oats	2002 South East St		
	Queens Group Industries	620 S Belmont		
	Quemetco, Inc	7870 W Morris St		
	Reilly Industries	1500 S Tibbs Ave		
	Rugby Building Products	254 S Kitley Ave		
	Schuchman Metals	839 Langsdale Ave		
	Snyder Services	0 Cancel		
	Southeastern Supply	3916 Prospect St		
	St Clair Warehouse	1908 St Field W Dr		
	Stone Container	6400 English Ave		
	Thomson Consumer Electronics	600 N Sherman Dr		
	Ulrich Chemical	3111 N Post Rd		
	Van Water Rogers	7425 E 30 St		
	Weyerhaeuser	3000 S Shelby		
	Willamette Industries	2900 N Franklin Rd		

NOTE 1 - Not open to Reciprocal Switching.

For explanation of other abbreviations and reference marks, see concluding page(s) of this tariff.

ISSUED MAY 1, 1997 EFFECTIVE MAY 22, 1997

ISSUED BY
CONSOLIDATED RAIL CORPORATION, 2001 MARKET STREET - 23C, P.O. BOX 41423, PHILADELPHIA, PA 19101-1423

CONSOLIDATED RAIL CORPORATION TARIFF CR 8001-D

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SECTION 7
INTERMEDIATE SWITCHING

ITEM	APPLICABLE AT	BETWEEN POINTS OF INTERCHANGE WITH		LOADED OR EMPTY CHARGE PER CAR (EXCEPT AS NOTED)
19005	Buffalo----------NY	One connecting line----------	Another connecting line--	$175.00
19007	Chicago----------IL	CRL	CRL	(I,D) 280.00
19021	Cincinnati----------OH	One connecting line----------	Another connecting line--	$182.00
19022	Cincinnati----------OH	CTBA, IORV	CR, CSXT, NS----------	(I,D) $258.00
19023	Cleveland----------OH	One connecting line---------- (Except as Noted)	Another connecting line-- (Except as Noted)	$186.00
		Exception: When movement is between the following carriers, charge will be as shown:		
		CSXT, NS----------	FIR----------	(I,D) $390.00
19024	Columbus----------OH	CCBA, CUSH	CSXT- NS----------	$ 90.00
19025	Detroit----------MI	One connecting line----------	Another connecting line--	$127.00
19026	East St Louis---------IL	One connecting line---------- ALS, TRRA	Another connecting line-- GARE	(I,D) $75.00
19026.5	Effingham----------IL	IC	EFAR	(I,D) $90.00
19027	Erie----------PA	NS ALY	ALY ERC	$189.00
19028	Hagerstown----------MD	One connecting line----------	Another connecting line--	$150.00
19029	Indianapolis----------IN	IMRR	CSXT	$116.00
19030	Lansing----------MI	CN	CSXT	(I,D) $225.00
19031	Lima----------OH	CSXT CSXT CN IORV NS	IMRC SPEE IMRC IMRC SPEE	$182.00 (I,D) $ 60.00 $137.00 $137.00 (I,D) $ 60.00
19035	Middletown----------OH	CSXT at Middletown----------OH	IORV at Monroe----------OH	(I,D) $160.00 (I,D)(I,D) $150.00
19036	Muncie----------IN	NS	Muncie & Western RR (Gill tracks 1 and 2)----	$100.00
19038	South Bend----------IN	CSS CN, CSS	CN NS	$182.00
19090	Streator----------IL	ATSF	BN	$185.00
19100	Utica----------NY	NHJA	NYSU	$170.00
19103	Youngstown----------OH	NVRY	OHPA	$175.00

For explanation of other abbreviations and reference marks, see concluding page(s) of this tariff.

ISSUED NOVEMBER 20, 1997 — EFFECTIVE NOVEMBER 21, 1997

ISSUED BY
CONSOLIDATED RAIL CORPORATION, 2001 MARKET STREET - 23C, P.O. BOX 41423, PHILADELPHIA, PA 19101-1423

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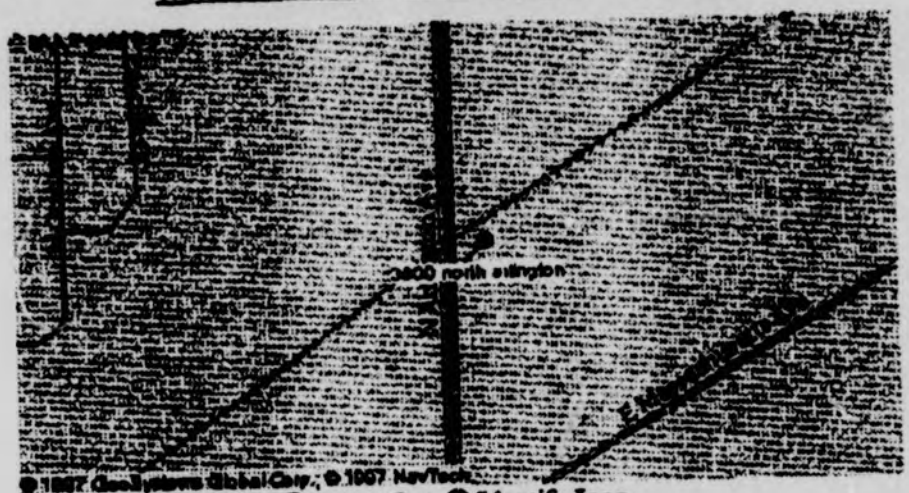

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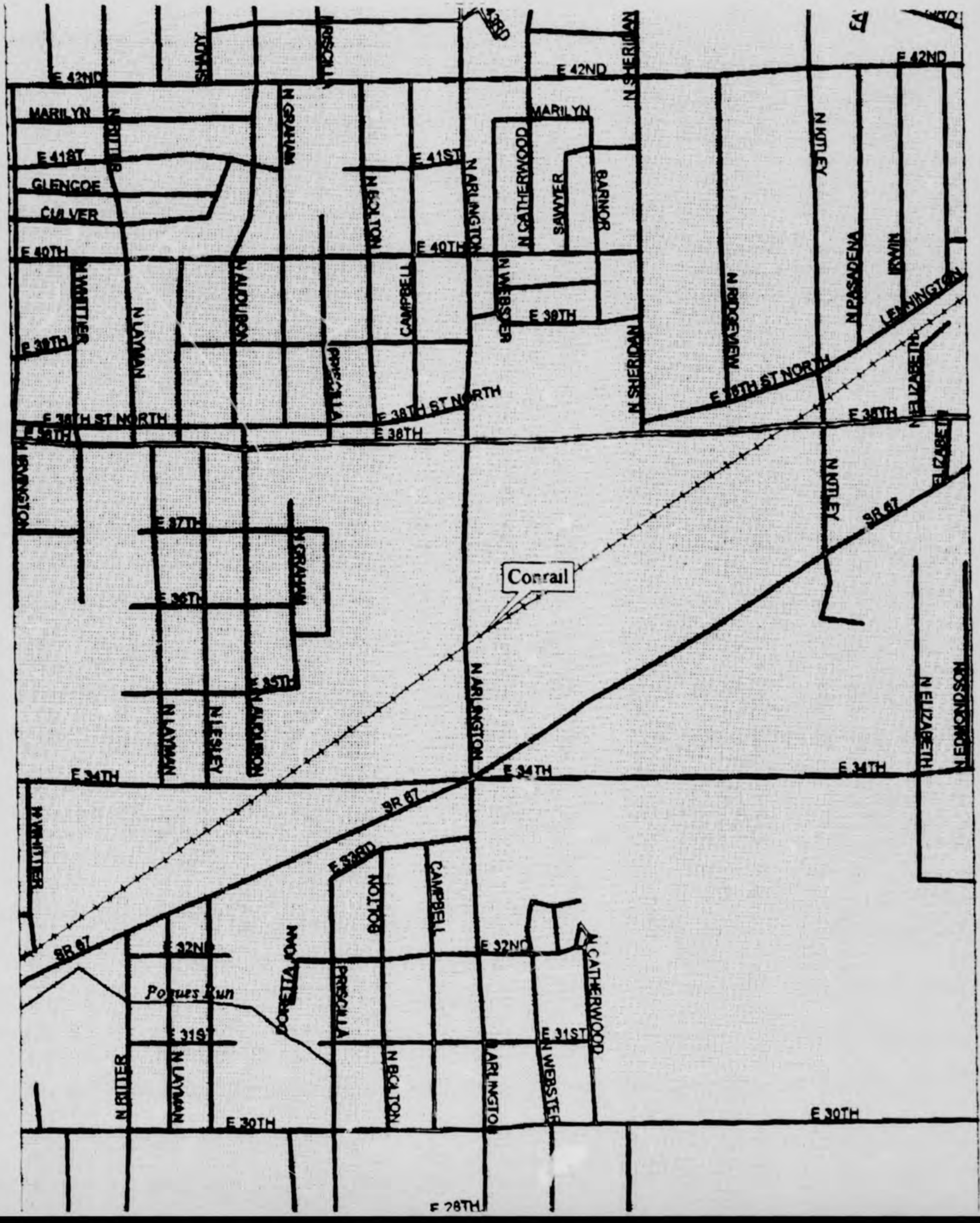
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N WEBSTER
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N PASADENA
IRWIN
LENNINGTON
E 38TH ST NORTH
E 38TH
N ELIZABETH
N IRVINGTON
E 37TH
E 36TH
E 35TH
N LESLEY
Conrail
SR 67
E 34TH
N EDMONDSON
E 33RD
BOLTON
E 32ND
LORETTA JOAN
Pogues Run
E 31ST
N CATHERWOOD
E 30TH
E 28TH

BEFORE THE

SURFACE TRANSPORTATION BOARD

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

DEPOSITION OF GERALD E. VANINETTI

Washington, D.C.

Thursday, January 8, 1998

REPORTED BY:

SUSIE K. STROUD

A That's right.

Q Do you know what estimates IP&L used in determining whether it should build scrubbers in Petersburg rather than buy lower sulfur western coal?

A It's my understanding that sulfur emission -- sulfur emission allowance prices would have to be in excess of $1600 to justify switching over to Powder River Basin coal, but I don't know what kind of numbers they were using internally.

Q You don't know that they used $400 for sulfur dioxide credit in 1992?

A No, I do not.

Q Does that sound like a reasonable number at that time based on what other people were projecting?

A It sounds high.

Q If the number had been lower, like the $100 that they're selling for today, give or take, might they have made a different judgment about using PRB coal instead of scrubbing Indiana coal?

A No, it goes the other way, Mike. You have to -- if emission allowance prices were high, in the range of $1620, then they could justify switching

COPY

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

The deposition of **JOHN W. ORRISON** was taken on Friday, January 9, 1998, commencing at 9:05 a.m., at the offices of Steptoe & Johnson, L.L.P., 1330 Connecticut Avenue, N.W., Washington, D.C., before Josett F. Hall, Registered Merit Reporter and Notary Public.

Q. Oh, I'm sorry.

A. And it says in here that today -- this is at the bottom of the page under item number 2, the second sentence?

Q. Yes.

A. "Today, ISRR can interchange with Conrail for subsequent movement to the Stout Plant. There is no operating reason why post-transaction ISRR's ability to handle coal movements delivered to the Stout Plant will be affected at the least. At post-transaction CSX will assume that role."

You described that operations to me in your first questions and so that that operation would not require the train to go to the Hawthorne Yard.

Q. Okay. I didn't understand that from reading this, and I appreciate your clarification.

So that would mean that an Indiana Southern train would connect -- destined for the Stout Plant would connect with CSX where on that

routing?

A. When we started this line of discussion this morning, you indicated to me that the ISRR brings trains up the former Petersburg secondary track to this milepost 6?

Q. Uh-huh.

A. And that Conrail then takes that train up the Conrail stub, around this semicircle and down to the Stout Plant, but they don't take it to the Stout Plant; they actually give it to the INRD at that location to go to the Stout Plant.

Q. Okay.

A. That operation does not require the train to go to Hawthorne Yard.

And so if that's the current operation, what we're trying to say here is that that's my understanding of the current operations, that CSX will play that intermediate role, the role that Conrail currently plays as an intermediary to put a crew on the train at milepost 6 and take it this short distance down so the INRD

can get on the train and take it to the Stout Plant.

Q. So in other words, CSX will not take that train up to the Hawthorne Yard to interchange with INRD; it will in fact do the interchange as Conrail does today at the Raymond Street Interchange?

A. That's what the last sentence on the bottom of page 655 is trying to relate.

Q. Okay. I appreciate that clarification.

All right. Now, let's switch them from Stout and talk a bit about Perry K.

Under what circumstances will IP&L coal trains be moved into the Perry K Plant without being routed to the Hawthorne Yard?

A. Would you read back the question, please.

(The record was read as follows:)

"QUESTION: Under what circumstances will IP&L coal trains be moved into the Perry K Plant without being routed to the Hawthorne Yard?"

Attachment 7
Page 1 of 2

BEFORE THE

SURFACE TRANSPORTATION BOARD

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

DEPOSITION OF THOMAS G. HOBACK

Washington, D.C.

Friday, January 9, 1998

REPORTED BY:

SARA A. EDGINGTON

on what is now the existing Conrail main line and around into Hawthorne yard that way.

Q But if we could forget the color of the locomotive and we were just trying to get the train there in the most efficient way -- you understand what I mean by saying forgetting the color of the locomotive?

A Strictly from an operational standpoint, from our standpoint, probably the best place to interchange a train would be at the top of the hill.

Q Now, I am going to show you a page from the highly confidential volume 2B which is not where your testimony is located, but the page is marked public, from IPL's discovery production. There's no problem here. I'm simply indicating this was a document Mr. Vaninetti included in his testimony, but it's from the trade press, so I don't think we're going to have any problem under the confidentiality restrictions of the proceeding.

MR. MORELL: I have the nonconfidential page.

BY MR. MC BRIDE:

BEFORE THE

SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

CSX CORPORATION AND CSX TRANSPORTATION, INC.

NORFOLK SOUTHERN CORPORATION AND

NORFOLK SOUTHERN RAILWAY COMPANY

-- CONTROL AND OPERATING LEASES/AGREEMENTS --

CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION

RAILROAD CONTROL APPLICATION

HIGHLY CONFIDENTIAL

Washington, D.C.

Thursday, September 18, 1997

Deposition of JOHN W. SNOW, a witness herein, called for examination by counsel for the Parties in the above-entitled matter, pursuant to agreement, the witness being duly sworn by MARY GRACE CASTLEBERRY, a Notary Public in and for the District of Columbia, taken at the offices of Arnold & Porter, 555 Twelfth Street, N.W., Washington, D.C., 20004-1202, at 10:00 a.m., Thursday, September 18, 1997, and the proceedings being taken down by Stenotype by MARY GRACE CASTLEBERRY, RPR, and transcribed under her direction.

appropriate person to talk about that, although Mr. Hart might be as well.

Q. Would CSX have any objection to taking the traffic of the sort I just described at some point other than the Hawthorn yard and bringing it to the Stout plant?

A. We may or we may not and I wouldn't be the one who would know.

Q. I see. Do you understand that a lot of shippers own their own coal cars these days?

A. These days and many days in the past.

Q. And you understand that a shipper who owns its own cars might prefer to have the most efficient arrangement for the delivery of coal?

A. In which regard they're not much different from shippers of coal generally.

Q. Right, but you do understand that?

A. Sure. That's true of all coal shippers that I'm aware of.

Q. And the applicants are advocating efficiency as one of the benefits of the proposed transaction, correct?

A. We're not advocating it. We're saying that one of the benefits of the transaction will be greater efficiency.

BEFORE THE

SURFACE TRANSPORTATION BOARD

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

DEPOSITION OF GERALD E. VANINETTI

Washington, D.C.

Thursday, January 8, 1998

REPORTED BY:

SUSIE K. STROUD

trucks go by every 10 seconds or 5 seconds. One truck every 18 minutes is negligible, one truck every 6 minutes is less negligible, but still -- the public perception of congested trucks, this isn't a lot of trucking.

Q Wait a minute now. First of all, you know, do you not, that the plant is not on the interstate highway, so at some point the trucks are going to have to go on a city street?

A Sure.

Q And they're going to have to go into the plant?

A Right.

Q And you testified you've never been there?

A That's right.

Q And you've testified about what you understand to be the savings of unloading by truck versus rail; correct?

A Right.

Q Do you know, even though you haven't been there, that the Stout plant has unloading facilities already in place?

A I'm aware of those railcars.

Q Do you know whether you can use trucks to load into those facilities?

A To unload?

Q To unload.

A Trucks can unload -- you can unload trucks just about wherever you need to, so you don't have to have a facility, per se.

Q Let's investigate that for a minute. I think you earlier testified that you're aware of railcar thawing sheds?

A That's correct.

Q Have you ever seen a railcar thawing shed that might not accommodate a truck?

A I don't know if I've ever looked at one. Usually thaw sheds are located separately from the railcar unloading facility. But this assumes that you want to unload your trucks in the railcar unloading facility. What I'm saying is the trucks in a lot of cases will unload on a stockpile.

Q But do you know that, at Stout, when they unload the coal from railcars, it goes directly into

the bunkers where the coal is stored to fire the plant, or do you not?

A That is very typical in a power plant that part of the coal could be diverted directly, but in most -- well, in all cases, it is primarily diverted out into the stockpile.

Q Can you testify under oath that the coal could be trucked in and go directly into the bunkers?

A I haven't been into the plant so I can't say that. I will say though that I have been involved in situations where I have gone in with the trucking company I've worked for, and we have converted such facilities to be able to accommodate trucks. It's not a big deal, Mike.

Q Well, you're not testifying, I take it, that, at Stout, it costs a dollar a ton or so more to unload by rail than by truck, are you?

A I've put a number to it, that's $2 in total.

Q No, no. $2 was a rate number. I'm reminding you of a $1 a ton for unloading costs in your testimony?

A I have no $1 unloading cost in my testimony.

Q I think you do. Why don't you turn to HC-504, your page 5, look at the last sentence of the first paragraph, under your truck competition heading. It reflects "ability afforded by truck transporting on a differential in loading and unloading costs and sometimes upset the current advantage of more than a dollar a ton in direct transportation costs"?

A Right.

Q Was that testimony intended to indicate that it can cost a dollar a ton more to unload by rail than by truck?

A No, it's talking about loading and unloading, so loading at the coal mine and unloading at the power plant, and all the other costs that go with it.

Q Well, are you testifying that it costs more to move a ton of coal by truck than by rail to the Stout plant, or are you not so testifying?

A From the Farmersburg mine?

Q What was this paragraph -- does this paragraph apply to Stout? Let me ask that first.

A Yeah.

Q It does, even though you've never been there?

A Yeah.

Q Well, and you don't know how they unload the coal there, do you?

A They unload it in a railcar, I know how they unload railcars, I don't know how they unload trucks.

Q Do you know the cost of unloading coal of rail versus truck at Stout?

A No, I'm not aware that they have ever unloaded trucks at Stout.

Q So this sentence couldn't apply to Stout because you don't know what the process is; correct?

A That's my estimate on the basis of a lot of experience doing these kinds of things.

Q But if I were to tell you that IP & L believes it's cheaper to unload by rail than by truck. Do you have any information about Stout

specifically to contradict that?

A No, I don't.

Q And, in fact, do you know that when coal is moved by truck in the winter, it can freeze?

A Yes, sir.

Q And do you know that the wind chill factor is a bigger problem for a truck than a railroad car?

A Not unless you accommodate it by piping your exhaust gases back into the chamber where you're hauling the coal. And I've worked on projects in the Rocky Mountains where it gets considerably colder, you have colder wind chill factors where you're doing that to have, in essence, a portable thaw shed. Your chamber is heated so the coal doesn't freeze and stick to the inside of the trucks. In addition, you can put conditioning agents; you can put ~~sleek~~ slick a sheets on the insides of the trucks to keep it from hanging up. That's one of the advantages to truck is you don't have frozen coal problems if you design for it.

Q Let's not talk in general, let's talk about Stout. Are you aware they have a railcar thawing shed at stock?

A I'm not aware of that.

Q Are you aware of whether they have any kind of truck accomodater?

A I'm not aware.

Q Now, let's talk about your general knowledge about railcar thawing sheds. Are you aware that they get heated up to a very considerable temperature?

A That does not surprise.

Q Do you know that?

A No, I don't.

Q Have you ever seen a railcar thawed in a thawing shed?

A Yes, sir.

Q Did it get very hot in there to thaw the coal?

A Yes, it did.

Q Hot enough, do you think, to burn up the tires, if you put a truck in there as opposed to the railroad car?

A I wouldn't know.

Q You wouldn't know.

A That assumes that the truck has to unload in the thaw shed.

Q Right.

A And that's a very strange assumption.

Q Well, where would you thaw the truck if you were taking coal to Stout via truck, where would you thaw it?

A My point is you would not thaw the truck out. You would design the truck properly so that nor the coal does not freeze into the truck. You just go right out into the stockpile and dump it, you don't have to contend with frozen coal if you're running trucks with the proper design.

Q That's the ideal that you just testified to?

A Yeah.

Q But in reality you know that coal sometimes freezes in trucks; correct?

A If you don't design for it, sure.

Q And what happens when coal freezes in a truck, how do you get it out? You either have to get a thawing shed to get it out or you have to wait for

the temperature to rise so it cools; right?

A There's a bunch of circumstances you can thaw out a truck. I'm not aware of anybody ever thawing a truck in a thaw shed.

Q Well, do you know that you cannot unload a truck in the railcar thawing shed at Stout?

A I don't know that one way or the other. The circumstances you describe are things that I used to contend with on a regular basis while working with Savage. The cost you incur in thawing railcars is a significant cost, you're consuming electricity or gas to thaw out these railcars, and one of the costs involved is the use of trucks. So you avoid these costs, you design the trucks properly and you go out and stockpile and unload the coal.

Q But you don't know what the cost of unloading coal at Stout was?

A No, I don't.

Q And do you know what the rates were for moving coal by truck versus rail to Stout?

A No, I don't.

Q So you don't know whether your $2 per ton differential figure that you cited is, in fact, applicable at Stout, do you?

A I would be very surprised if it were not applicable.

Q But you don't know for a fact that it's true?

A I don't know for a fact it's true.
Q And in any event, you made the statement on the bottom of page 7 that the $2 per ton differential only about Farmersburg; isn't that correct?
A Yeah, a specific situation involving Farmersburg and Stout.
Q Do you know that the differential is greater from all the other mines that service Stout?
A I haven't looked at the other mines relative to Stout.
Q So you don't know that either?
A No.
Q You testified about PRB coal, Powder River Basin coal, in your article which you indicated that the market for that went as far east as someplace around Illinois. Do you remember that?
A Yes, sir.
Q That article was written about 1993 or '4, I guess you said?
A '94.
Q I'm referring to HC 526. Since that time, the market for PRB coal has moved further east,

BEFORE THE

SURFACE TRANSPORTATION BOARD

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

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DEPOSITION OF THOMAS G. HOBACK

Washington, D.C.

Friday, January 9, 1998

REPORTED BY:

SARA A. EDGINGTON

comes in by truck, however, you've testified and your testimony says it would go to the stockpile; correct?

A It could go to the stockpile.

Q Does the rail unloading facility permit a truck to put it straight into the bunker?

A Does the rail unloading facility permit a truck --

Q To lift the bed and put the coal into the bunker.

A I had the understanding, again from Mr. Knight, that it would be possible to have the coal unloaded in such a way as to go on the stockpile, eliminating the double handling. And I believe he told me that -- I'm trying to recall other parts of the conversations that we had, and I just can't recall them right now.

Q I gather you're trying to tell me that you think IP&L knows more about these facilities and how to unload coal at the Stout plant than you, Tom Hoback, do?

A Yes, sir.

Q Now, taking you back a few years, were you

BEFORE THE

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

DEPOSITION OF THOMAS G. HOBACK

Washington, D.C.

Friday, January 9, 1998

REPORTED BY:

SARA A. EDGINGTON

truck stop and go north on Harding Street to Stout? Would that be a likely route for those trucks?

A I believe it would be, yes, sir.

Q You live in Indianapolis?

A Yes, sir.

Q Do you know that interchange?

A Yes, I do.

Q Is that a congested interchange often?

A There are many congested interchanges in Indianapolis.

Q Is that one?

A And that is one of them.

Q Are there oftentimes trucks there because of the Flying J truck stop?

A I was not aware of that.

Q Have you seen trucks lined up at that interchange?

A Yes, sir.

Q Getting onto Harding Street or coming off of Harding Street?

A But because I've seen trucks lined up there doesn't mean that the intersection wouldn't be able

BEFORE THE

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CSX CORPORATION AND CSX	:	
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INC. AND CONSOLIDATED RAIL	:	
CORPORATION	:	

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DEPOSITION OF GERALD E. VANINETTI

Washington, D.C.

Thursday, January 8, 1998

REPORTED BY:

SUSIE K. STROUD

A Petersburg.

Q Do you have any knowledge of IP&L ever running Stout and not Petersburg when Petersburg was available to generate power?

A I have not evaluated that.

Q Well, I thought you were testifying that IP&L could run Petersburg more and Stout less to present some competition to the railroads?

A Yes, yes, they could.

Q And so I'm asking you when that ever could occur?

A It may have occurred already for all I know.

Q No, I'm asking you if you know that there has ever been a time that IP&L could run the Petersburg plant and didn't.

A I don't know.

Q You don't know?

A No, I don't know that.

Q If, in fact, IP&L always runs the Petersburg plant first when it's available, then are they doing what you suggested in your testimony they

could be doing to create some competition?

A Yes.

Q And if they also ran Stout, even though they only needed power from Petersburg, but they ran Stout for system stability purposes, you wouldn't be critical of that, would you?

A No, that's a typical practice.

Q Do you know whether that's what they do or do you not know?

A I do not know.

Q So can you say that there was ever a time when IP&L could have run Petersburg instead of Stout and didn't do so?

A I don't know if that's ever been the case.

Q Do you know that IP&L chooses to operate Petersburg first and Stout second on the basis of economic dispatch?

A I think we inferred that in our analysis in 1995.

Q Okay. Now, I apologize, I didn't bring extra copies of this, but I have something I want to mark as your Deposition Exhibit 5 which the client

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**

CERTIFICATE OF SERVICE

I hereby certify that I have served, this 23rd day of February, 1998, a copy of the foregoing "Supplemental Brief of Indianapolis Power & Light Company in Support of Request for Conditions in IP&L-3 and in Support of the Responsive Application of Indiana Southern Railroad, Inc.(ISRR-4)" (IP&L-11), by first-class mail, postage prepaid, or by more expeditious means, upon all parties of record. The "highly confidential" version was served on persons on the Highly Confidential Restricted Service List only; a redacted version was served on all other parties of record. The following persons were served by hand delivery:

Office of the Secretary
Case Control Unit
ATTN: STB Finance Dkt. 33388
Surface Transportation Board
Mercury Building
1925 K Street, N.W.
Washington, DC 20423-0001

Mr. Vernon Williams, Secretary
Surface Transportation Board
Mercury Building
1925 K Street, N.W.
Washington, DC 20423-0001

David M. Konschnik, Director
Office of Proceedings
Surface Transportation Board
Mercury Building
1925 K Street, N.W.
Washington, DC 20423

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

John V. Edwards, Esq.
Patricia Bruce, Esq.
Zuckert, Scoutt
& Rasenberger, L.L.P.
Brawner Building
888 17th Street, N.W.
Washington, DC 20006-3939

Drew A. Harker, Esq.
Chris Datz, Esq.
Susan Cassidy, Esq.
Arnold & Porter
555 12th Street, N.W.
Washington, DC 20004-1202

David A. Coburn, Esq.
Steptoe & Johnson
1330 Connecticut Avenue, N.W.
Washington, DC 20036

Gerald P. Norton, Esq.
Harkins Cunningham
1300 19th Street, N.W.
Suite 600
Washington, DC 20036

Brenda Durham

Brenda Durham

STB FD . 33388 2-23-98 E . 185855

185855

LEBOEUF, LAMB, GREENE & MACRAE

L.L.P.

A LIMITED LIABILITY PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

NEW YORK
WASHINGTON
ALBANY
BOSTON
DENVER
HARRISBURG
HARTFORD
JACKSONVILLE

1875 CONNECTICUT AVENUE, N.W.
WASHINGTON, DC 20009-5728
(202) 986-8000
TELEX: 440274 FACSIMILE: (202) 986-8102

WRITER'S DIRECT DIAL:
(202) 986-8050

LOS ANGELES
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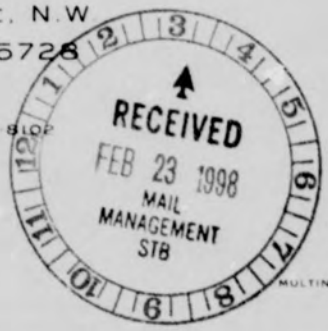
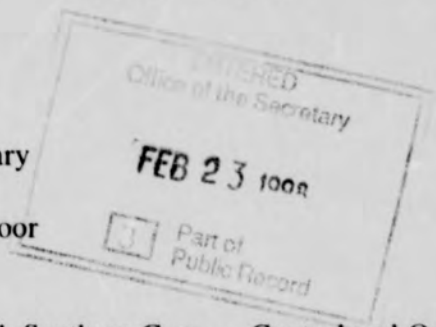


February 23, 1998



VIA HAND DELIVERY

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

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

Dear Secretary Williams:

Enclosed are the original and 25 copies of the "Supplemental Brief of The Fertilizer Institute in Support of Request for Conditions" (TFI-5) for filing in the above-referenced proceeding. TFI-5 does not contain any confidential or highly confidential information. Therefore, we are filing only one, public version of TFI's Brief. Also enclosed is a 3.5" diskette containing the Brief in WordPerfect format.

Please date stamp and return the enclosed three additional copies via our messenger.

Very truly yours,

Michael F. McBride

Michael F. McBride
Brenda Durham

Attorneys for The Fertilizer Institute

Enclosures

cc (w/encl): All Parties of Record

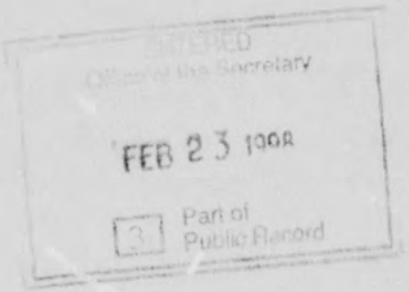
185855

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

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

SUPPLEMENTAL BRIEF OF THE FERTILIZER INSTITUTE IN SUPPORT OF REQUEST FOR CONDITIONS



Michael F. McBride
Brenda Durham
LeBoeuf, Lamb, Greene
& MacRae, L.L.P.
1875 Connecticut Ave., N.W.
Suite 1200
Washington, D.C. 20009-5728
(202) 986-8000 (Telephone)
(202) 986-8102 (Facsimile)

Attorneys for The Fertilizer Institute

Due Date: February 23, 1998
Dated: February 23, 1998

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

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

SUPPLEMENTAL BRIEF OF THE FERTILIZER INSTITUTE IN SUPPORT OF REQUEST FOR CONDITIONS

Introduction and Summary

The Fertilizer Institute ("TFI") hereby submits its Supplemental[1] Brief concerning the Application of CSX Corporation and CSX Transportation, Inc. (collectively "CSX") and Norfolk Southern Inc. and Norfolk Southern Railway Inc. (collectively "NS") to acquire and divide among themselves the assets of Conrail Inc. and Consolidated Rail Corporation (collectively "Conrail").[2]

The Board should order that any use by Applicants or the Board of the RCAF include a productivity adjustment, as TFI urged in TFI-2, filed October 21, 1997. Otherwise, every charge or rate, even if reasonable when set, will be adjusted by an

[1]TFI is a party to the Brief of the National Industrial Transportation League, et al. (NITL-12) being filed contemporaneously with this Brief. This Supplemental Brief addresses the one issue on which it and NITL differ.

[2]We use the terms "merger," or "acquisition," or "control" synonymously, unless the context requires otherwise.

index that, by definition, exceeds the level of the railroads' cost changes, which is not the purpose for such adjustments. Such changes should only be made to adjust for changes in the railroads' costs, which by definition requires that changes in railroad productivity be included in the adjustment mechanism.

Argument

To avoid repetition, we hereby incorporate by reference the Joint Brief of NITL, et al. filed contemporaneously with this Supplemental Brief. In addition, TFI submits the following argument:

The Rail Cost Adjustment Factor ("RCAF") must be adjusted for productivity. The law on this point is crystal clear. The RCAF, by statute, is adjusted for productivity. 49 U.S.C. 10708(b) (first sentence). The fact that the STB is to publish "another index", unadjusted for productivity, is immaterial (and done for the convenience of parties with the RCAF (Unadjusted) in their contracts). The ICC adopted the productivity adjustment to the RCAF in 1989, and its adoption was affirmed by the D.C. Circuit. Edison Electric Institute v. ICC, 969 F.2d 1221 (D.C. Cir. 1992).

Accordingly, any use of the "RCAF" by the STB must include a productivity adjustment. Doctors Alfred E. Kahn and Frederick C. Dunbar also endorse this view. See ACE, et al.-18 (filed October 21, 1997), Kahn/Dunbar V.S. at 22-23. That would include rate provisions, as well as adjustments to such things as switching charges and tracking rights fees. The Board is simply not permitted to use any other measure as an adjustment mechanism for railroad rates or other charges.

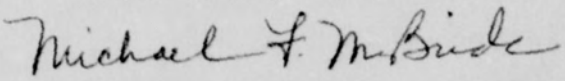
Wholly apart from legal or economic grounds, there is simply no conceivable policy ground for not using a productivity-adjusted RCAF as an adjustment mechanism. After all, the productivity adjustment was adopted so that the RCAF would track the railroads' costs. Railroad Cost Recovery Procedures -- Productivity Adjustment, 5 I.C.C. 2d 434 (1989), aff'd sub nom. Edison Electric Institute v. ICC, 969 F.2d 1221 (D.C. Cir. 1992). It follows that failing to use the productivity-adjusted RCAF would permit rates and charges to be adjusted by values that are higher than the railroads' costs, which is not the purpose of such adjustments.

Conclusion

The Board should not approve the proposed transaction unless it uses the RCAF (Adjusted), rather than the unadjusted "index" (which is **not** the RCAF) referred to in 49 U.S.C. § 10708, as the adjustment mechanism for any mechanism used to adjust rates, fees, or other charges for which adjustment for cost

changes is appropriate, because the statute requires the Board to adjust "**the**" RCAF for productivity.

Respectfully submitted,



Michael F. McBride
Brenda Durham
LeBoeuf, Lamb, Greene & MacRae,
L.L.P.
1875 Connecticut Avenue, N.W.
Suite 1200
Washington, D.C. 20009-5728

Attorneys for The Fertilizer Institute

Due Date: February 23, 1998
Dated: February 23, 1998

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33388

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

CERTIFICATE OF SERVICE

I hereby certify that I have served, this 23rd day of February, 1998, a copy of the foregoing "Supplemental Brief of The Fertilizer Institute in Support of Request for Conditions" (TFI-5), by first-class mail, postage prepaid, or by more expeditious means, upon all parties of record. The following persons were served by hand delivery:

Office of the Secretary
Case Control Unit
ATTN: STB Finance Dkt. 33388
Surface Transportation Board
Mercury Building
1925 K Street, N.W.
Washington, DC 20423-0001

Mr. Vernon Williams, Secretary
Surface Transportation Board
Mercury Building
1925 K Street, N.W.
Washington, DC 20423-0001

David M. Konschnik, Director
Office of Proceedings
Surface Transportation Board
Mercury Building
1925 K Street, N.W.
Washington, DC 20423

Honorable Jacob Leventhal
Administrative Law Judge
Federal Energy Regulatory
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888 First Street, N.E.
Washington, DC 20426

John V. Edwards, Esq.
Patricia Bruce, Esq.
Zuckert, Scoutt
& Rasenberger, L.L.P.
Brawner Building
888 17th Street, N.W.
Washington, DC 20006-3939

Drew A. Harker, Esq.
Chris Datz, Esq.
Susan Cassidy, Esq.
Arnold & Porter
555 12th Street, N.W.
Washington, DC 20004-1202

David A. Coburn, Esq.
Steptoe & Johnson
1330 Connecticut Avenue, N.W.
Washington, DC 20036

Gerald P. Norton, Esq.
Harkins Cunningham
1300 19th Street, N.W.
Suite 600
Washington, DC 20036

Brenda Durham

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SDB-11

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33388 (SUB-NO. [redacted])

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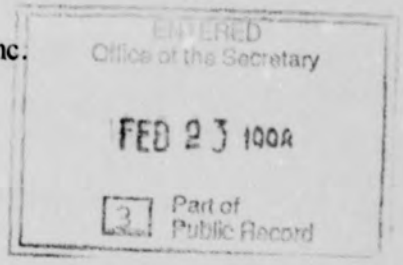
-CONTROL AND OPERATING LEASES/AGREEMENTS-
CONRAIL, INC., AND CONSOLIDATED RAIL CORPORATION

TRIAL BRIEF OF STARK DEVELOPMENT BOARD, INC.

Keith G. O'Brien
REA, CROSS & AUCHINCLOSS
1920 N Street, N.W., Suite 420
Washington, D.C. 20036
Tel: (202) 785-3700
Fax: (202) 659-4934

Randall C. Hunt, Esq.
KRUGLIAK, WILKINS, GRIFFITHS
& DOUGHERTY CO., L.P.A.
4775 Munson Street, N.W.
P.O. Box 36963
Canton, OH 44735-6963
Tel: (330) 497-0700
Fax: (330) 497-4020

Counsel for Stark Development Board, Inc.



February 23, 1998

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ORIGINAL

TABLE OF CONTENTS

SUMMARY OF LAW AND ARGUMENTS

A. SUMMARY OF LAW.

Due to the unique, multifaceted nature of the arguments of the Stark Development Board, Inc. ("SDB"), counsel believes it will be informative and helpful to the Surface Transportation Board ("STB") to outline SDB's arguments at the outset.

SDB, in conjunction with the Wheeling and Lake Erie Railway Company ("W&LE"), the Ohio Rail Development Commission ("ORDC"), the Ohio Attorney General ("OAG"), and the Ohio Department of Transportation ("ODOT"), hereby respectfully requests that the STB place certain conditions on Norfolk Southern Companies and Norfolk Southern Railway Company (collectively "NS") and CSX Corporation and CSX Transportation, Inc. (collectively "CSX") in their proposed merger/divestiture ("breakup") of Conrail, Inc. and Consolidated Rail Corporation (collectively "Conrail"). The protective conditions requested are mandated by 49 U.S.C. § § 11321 - 11325; the public's best interest; and the various judicial and legislative factors which the STB should consider in this proceeding.

The STB must consider the factors set forth in 49 U.S.C. § 11324 in its review and oversight of this breakup 49 U.S.C. § 11324, states, in pertinent part:

> 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 should 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.

Through this statute, the United States Congress has provided the STB with a "public interest" standard to guide its review and findings in railroad mergers and consolidations. The definition of "public interest" has been further defined by the Supreme Court of the United States in the case of United States v. Lowden, 308 U. S. 225. There, the Supreme Court determined that a "public interest" is one which has a "direct relation to the adequacy of transportation services, to its essential conditions of economy and efficiency, and to the appropriate provision and best use of transportation facilities" Lowden, *Supra* at 230 (*citing* Texas v. United States, 292 U. S. 522, 531, 545, Ct. 819, 824).

The recent cases citing Lowden, supra, do not alter the Supreme Court's definition of "public interest." However, the United States Congress has added some insight to the term. Pursuant to 49 U.S.C. § 10101, some of the United States Government's public policy guidelines in regulating the railroad industry are:

> To promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Board;
>
> To ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;

> To foster sound economic conditions and transportation and to ensure effective competition and coordination between rail carriers and other modes; and
>
> To operate transportation facilities and equipment without detriment to public health and safety.

49 U.S.C. § 10101(3)-(5) & (8)(citing only the sections applicable to the SDB's arguments).

In addition to the aforerecited statutory criteria, the STB will also consider the following factors:

> (1) Whether essentia' rail services will continue to be provided, either by the consolidating companies or by other railroads which may be affected by the consolidation ("essential services" include, but are not limited, those required by the national defense and those shown necessary to achieve other established national goals, such as energy conservation and rural and community development);
>
> (2) Whether opportunities to achieve operating efficiencies will be increased;
>
> (3) Whether redundant facilities will be eliminated;
>
> (4) Whether the ability of the consolidated system to attract new businesses will be enhanced;
>
> (5) Whether the consolidated company will be financially viable;
>
> (6) Whether effective inter- and intramodal competition will be maintained wherever economic realities make it possible; and
>
> (7) Whether there will be any adverse impact on the environment of the region served.

49 C.F.R. § 1180.1; Railroad Consolidation Procedures, 359 I.C.C. 195 (1978).

In deciding whether a merger is "in the public interest," the STB performs a balancing test by weighing the potential benefits to the applicants and the public against the potential harm to the public. 49 C.F.R. § 1180.1; Railroad Consolidation Procedures, 359 I.C.C. 195 (1978). In weighing the potential harm to the public, the STB considers two principal factors: (1) the degree of reduction of competition; and (2) the harm, if any, to "essential services" provided by the parties affected by the merger. Id. In determining whether competition will be significantly reduced, the STB considers both competition among rail carriers and intermodal competition between rail carriers and motor and non-motor vehicles. 49 C.F.R. § 1180.1. A transportation provider's services are "essential" if "there is a sufficient public need for the service and adequate alternative transportation is not available." 49 C.F.R. § 1180.1.

If, after weighing the potential benefits to both the applicants and the public interest against the potential harm to the public, the STB determines that the merger would be a benefit to the public interest, but a great detriment to one or more of the parties involved, the STB may approve the merger with certain conditions designed to protect the public interest.

The STB treats the existence of harm to competition and/or essential services as a threshold test for when conditions may be needed to reduce the adverse effects of a breakup. In general, the STB defines an "essential service" as one for which an adequate alternative is not available. Lamoille Valley RR Co. at 309. However, the term "adequate" is a relative expression. See Atlantic Coastline Railroad v. Wharton, 207 U.S. 328, 335 (1907). For a shipper, loss of a service that it currently uses may create some decrease in profit, which could be minor or devastating. Lamoille Valley RR Co. at 309. If the additional cost involved in

using an alternative service is small, the STB should not be concerned; and the alternative service would be deemed adequate. Id. However, if the alternative service is very costly, so, for example, as to force bankruptcy, the alternative service is clearly inadequate (at least for that shipper). Lamoille Valley, *supra* at 311. Still, the STB has discretion to draw the dividing line between minimum and extreme cost. Id.

The arguments set forth hereinafter shall demonstrate that the breakup of Conrail by NS and CSX, without protective conditions, will:

(1) Have a negative effect on the adequacy of transportation to the public in Northeast Ohio;

(2) Not promote a safe and efficient rail transportation system in Northeast Ohio;

(3) Eliminate effective rail competition in Northeast Ohio, by eliminating W & L E and the intermodal terminal known as Neomodal, as owned by SDB;

(4) Not foster or promote sound economic conditions in Northeast Ohio;

(5) Not ensure effective competition and coordination between all rail carriers in Northeast Ohio; and

(6) Create redundant transportation facilities which shall be a detriment to public health and safety.

The protective conditions set forth in the conclusion of this brief shall ensure that the breakup of Conrail by NS and CSX will comply with the statutory and judicial guidelines which the STB must review in this proceeding.

B. SUMMARY OF ARGUMENTS

I. WITHOUT PROTECTIVE CONDITIONS, THE CONRAIL BREAKUP WILL HAVE A NEGATIVE EFFECT ON THE ADEQUACY OF TRANSPORTATION IN NORTHEAST OHIO.

II. WITHOUT PROTECTIVE CONDITIONS, THE CONRAIL BREAKUP WILL NOT PROMOTE A SAFE AND EFFICIENT RAIL TRANSPORTATION SYSTEM IN NORTHEAST OHIO AND SHALL BE A DETRIMENT TO PUBLIC HEALTH AND SAFETY.

III. WITHOUT PROTECTIVE CONDITIONS, THE CONRAIL BREAKUP WILL ELIMINATE EFFECTIVE RAIL COMPETITION IN NORTHEAST OHIO, AND MORE SPECIFICALLY, ELIMINATE W & L E AND NEOMODAL.

IV. WITHOUT PROTECTIVE CONDITIONS, THE CONRAIL BREAKUP WILL NOT FOSTER OR PROMOTE SOUND ECONOMIC CONDITIONS IN NORTHEAST OHIO.

ARGUMENT

I. WITHOUT PROTECTIVE CONDITIONS, THE CONRAIL BREAKUP WILL HAVE A NEGATIVE EFFECT ON THE ADEQUACY OF TRANSPORTATION IN NORTHEAST OHIO.

In 1995, SDB strategically built an intermodal terminal ("Neomodal") on the W&LE, a regional railroad connected to three Class I carriers, Conrail, CSX, and NS. Neomodal was built to foster competitive access among said carriers and help create an efficient and economical rail system in Northeast Ohio ("NEO"). In fact, prior to building Neomodal, in early 1993, the W&LE consulted CSX on locating an intermodal terminal in Ohio (CSX Rutski 2B of 3, P 396). At that time, CSX did not have access to the NEO market and agreed that an intermodal terminal located on the W&LE would provide CSX access to intermodal business in NEO. At the same time, W&LE discussions were underway with ODOT regarding the need for such an intermodal terminal in NEO.

The chain of events leading up to the ODOT's November 1994 award of the funds to the SDB to build Neomodal have been recited in previous SDB filings. (SDB 4 and 7). Although NS states that it "first became aware of the project in the summer of '95." (NS Finkbinder, Vol. 2 of 3, 83), W&LE personnel discussed the Neomodal project with CSX and NS in January of 1995 at a conference in San Francisco, California. At that time, both CSX and NS expressed an interest in Neomodal, and neither company raised any concern about the lack of an intermodal rail market in NEO or the adverse effect of locating Neomodal on the W&LE, a regional carrier.

There were numerous other discussions between the W&LE, SDB, CSX, and NS regarding Neomodal, its design, its construction and the NEO market and service, all of which

occurred prior to the start of Neomodal's construction in July, 1995. Neither railroad, CSX nor NS, told the W&LE or SDB, to cease or delay construction prior to the July, 1995 construction start date. CSX and NS now contend that "they did not even know that the terminal was under construction until very late in the day" (CSX/NS Rebuttal, Vol. 1 of 3 72 and 475). However, the record shows that W&LE and SDB advised CSX and NS of the construction plans and schedule as early as January of 1995, well in advance of the July, 1995 construction commencement date. Specifically, in March of 1995, CSXI reviewed the conceptual design of Neomodal, at the request of W&LE and SDB, to insure the thoroughness of said design. As further proof of CSX's knowledge of this project, a CSXI letter dated March 13, 1995, clearly provided SDB's designers with a positive response from CSXI's review. (SDB4, Stadelman Exhibit 4). This CSXI letter also reflects favorably on CSXI's intentions and interests in using Neomodal and integrating Neomodal into the CSX system. (SDB4, Stadelman Exhibit 4). Again, for the record, when the CSXI letter was written, Neomodal was not yet under construction.

CSX also incorrectly states that "neither CSXI nor CSXT was consulted at the time construction began about whether such a facility made good economic sense." (CSX Rutski, Vol. 2B of 3, 395). To the contrary, as evidenced above, SDB, W&LE, CSXI and CSXT discussed these subjects at length six (6) months before the start of Neomodal construction. The SDB contract with ODOT was not executed until May 16, 1995, and there is no question that if SDB, ODOT, and W&LE would have been privy to CSX's apparent belief that Neomodal does not make "good economic sense," Neomodal would not have been constructed. For CSX or NS to now argue that Neomodal does not make economic sense is

inconsistent with their respective actions prior to July of 1995. Those actions induced W&LE, SDB and ODOT to proceed with Neomodal's construction; and now, CSX would have the project go to waste in the interest of what it claims to be "economic efficiency," when, in reality, CSX has simply changed its mind for internal reasons which do not benefit NEO's economic condition or the adequacy of transportation to its public.

Furthermore, in early 1995, before Neomodal's construction, neither NS nor CSX told SDB or W&LE that the "terminal is on the lines at a location that is not convenient for quick connection to CSX or NS" (CSX Rutski, Vol. 2 of 3, 400). Despite the fact that NS knew, in early 1995, that Neomodal would be located on the W&LE's lines, NS now states, "It (Neomodal) is not located on or near NS or CSX lines. Because of this lack of proximity to the NS or CSX lines, it is understandable why it was never served by NS or CSX." (NS Finkbinder, Vol. 2A of 3, 84). However, NS never stated, in its 1995 conversations with the W&LE or SDB, or at any time prior to the Conrail breakup, that locating Neomodal on the W&LE system would bring this state of the art terminal to its inevitable demise.

If these Class I railroads "require intermodal terminals to be located on or adjacent to their rail lines." (NS Finkbinder, Vol. 2A of 3, 86), and this is NS policy, then NS could have and should have shared this policy with the SDB and W&LE prior to the July 1995 construction of Neomodal. To the contrary, NS and CSX promoted the use of Neomodal prior to the Conrail breakup. (SDB 4 and 7). Still, CSX further states, "The terminal's biggest problem is that it is not on or near the main line of a Class I railroad." (CSX Rutski, Vol. 2B of 3, 400). Unfortunately, this self serving statement, as well as the other statements made by NS and CSX in this proceeding, were all made ***after*** the Conrail breakup. Prior to that event,

NS and CSX, entered into separate five (5) year service and marketing agreements ("Contracts") with the W&LE to market Neomodal. (SDB4, Stadelman Exhibit D). The Contracts expressly recite that CSX and NS shall provide competitive intermodal rail service to Neomodal. As a result of the Contracts, the SDB had every reason to believe that NS and CSX fully intended to provide reliable service designs, routes, schedules, and rates that would be competitive with trucking export and import cargoes into NEO.

Prior to the Conrail breakup, Neomodal was the only intermodal terminal of CSX and NS in NEO (NS has a small ramp in Cleveland, Ohio), and it provided CSX and NS with an intermodal terminal to compete with Conrail for NEO and Western Pennsylvania intermodal business. Prior to construction of Neomodal, CSX and NS did not have any access to the NEO intermodal market. Still, as a diversionary tactic, CSX and NS now argue that the SDB, in its due diligence prior to the construction of Neomodal, did not conduct a formal market study. However, CSX and NS overlook the fact that the SDB and its associated agencies in the surrounding counties are intimately aware of the industries and distribution centers located in the market area served by Neomodal. SDB was fully aware of the truck and rail traffic in NEO and Western Pennsylvania, and therefore, the SDB did not need to commission a formal market study.

However, in mid-1997, to substantiate its market knowledge and data, the SDB commissioned Reebie & Associates of Greenwich, Connecticut, to identify inbound and outbound cargo flow patterns in Stark County, Ohio and its contiguous counties and cities, including Cleveland, Ohio, and Western Pennsylvania. The Reebie data clearly demonstrated that in addition to the Cleveland, Ohio market, there is a substantial market south of Cleveland, Ohio,

that can and could be readily served by Neomodal. (SDB7, Exhibit J). The Reebie data was merely a confirmation of the intermodal market that existed in 1994 and 1995, prior to the construction of Neomodal, and was further proof that Neomodal would create an effective outlet for intermodal competition in NEO and Western Pennsylvania.

CSX and NS argue that the Neomodal's "core problem" is that it is not on CSX or NS main lines, and is "distant from major population and commercial centers." (CSX/NS Rebuttal, Vol. 1 of 3, 474). Surely CSX and NS must be aware that industrial facilities and distribution centers, not population and commercial centers, provide potential intermodal business. . The SDB is a non-profit corporation charged with the responsibility of retaining and creating jobs in Stark County, Ohio. To this end, the SDB is closely associated with other development organizations in NEO and Western Pennsylvania and industry and distribution leaders (SDB4). Through these associations, the SDB is keenly aware that industry and distribution is and has been moving their facilities south of Cleveland, Ohio due to the availability of competitive real estate, favorable environmental conditions, superior highway access, and the availability of a trained work force. This industrial relocation and other economic factors lead the SDB and ODOT to locate Neomodal south of Cleveland, Ohio. Unfortunately, the arguments of CSX and NS fail to recognize the economic growth in areas south of Cleveland, Ohio, and serve merely as a subterfuge to the fact that these arguments are self serving, and were never even mentioned by the applicants prior to the Conrail breakup, let alone before the July of 1995 Neomodal construction commencement date.

CSX's statement that the Neomodal's "market projection of 15,000 units per year" is "far short of the number of units typically needed to economically justify operation of such

a train." (CSX Rutski, Vol. 2 of 4, 398), is valid. However, CSX fails to recognize that Neomodal is a ***new***, state of the art facility ***in its start-up mode;*** and it generally takes three to four years to build up enough volume to support a sixty (60) car per day train in a new market. Moreover, Neomodal is designed for 150,000 lifts per year; and SDB/W&LE data demonstrates that the traffic volume of the Neomodal was increasing prior to the Conrail breakup. (SDB 4) Furthermore, during the start-up process, CSX/NS acknowledged that it would take time to convert NEO shippers from draying containers and trailers to Chicago, Illinois, and/or the East Coast to intermodal rail through Neomodal.

With the breakup of Conrail, CSX is now planning to build an intermodal terminal at the newly acquired Conrail Collingwood, Ohio Yard and NS is planning to build an intermodal terminal at its Bellview, Ohio Yard and at the newly acquired Conrail Pittsburgh, Pennsylvania Yard. With these new terminals, NS and CSX plan to service the same market that Neomodal was designed, located and constructed to serve, and which was Neomodal's exclusive market prior to the breakup of Conrail. However, the breakup of Conrail would create access for CSX and NS to now serve this market through the construction of additional terminals, which will duplicate service and cost, all at the expense of the federal, state, and local governments' investment in Neomodal.

CSX's position is in conflict within its own testimony, specifically, CSX stated that, "The proposed allocation of Conrail lines has no effect on CSXI's marketing of the terminal." (CSX Rutski, Vol. 2B of 3, 396). However, in the same testimony, CSX states, "Shippers interested in quick transit times to points on the CSX system may find (Conrail) Collingwood more attractive due to its advantages of its main line location." (CSX Rutski, Vol.

2B of 3, 399). The contradictory fact is that the CSX (Conrail) Collingwood, Ohio terminal does not now exist and did not exist before the Conrail breakup.

To deny SDB and W&LE their respective protective conditions would result in the creation of "redundant facilities," contrary to the factors to be considered by the STB pursuant to the Railroad Consolidation Procedures, 359 I.C.E. 195 (1978). Furthermore, the construction of the new terminals by CSX and NS will lead to predatory pricing and business practices which, in turn, would lead to an undue concentration of market power in the Northern Ohio corridor. Such a scenario would frustrate the specific intent of the United States Congress in regulating the railroad industry. 49 U.S.C. § 10101(12). Accordingly, it is imperative that the growing NEO industrial and distribution centers continue to have direct access to intermodal service on the W&LE, a reliable rail carrier, to avoid this concentration of market power and predatory practices. Consistent therewith, SDB's protective conditions set forth in the conclusion hereof must be granted by the STB, and the W&LE must be granted trackage rights to Chicago, Illinois and unrestricted trackage rights to Hagerstown, Maryland to keep the W&LE as a viable carrier and "to foster sound economic conditions in transportation and to insure effective competition and coordination between rail carriers and other modes." 49 U.S.C. § 10101(5). CSX and NS cannot, through predatory practices, inflict mortal financial harm on the W&LE and the Neomodal and also claim that SDB and W&LE do not have the financial strength to support the protective conditions set forth herein and/or the Chicago and Hagerstown trackage rights conditions. Only with the issuance of the SDB and W&LE protective conditions will this proposed Conrail breakup make for sound public policy, as dictated by the United States Congress.

The January 22, 1998 timing of CSX's Cleveland Economic Impact Report can truly be characterized as a proverbial Snow job. Pete Carpenter, CSX President, outlines a euphoric economic growth projection for Cleveland, Ohio aimed at offsetting the two or three-fold increase in rail traffic through Cleveland, Ohio suburbs. Mr. Carpenter also finds the elusive NEO intermodal market which CSX contends in its Conrail breakup filings does not exist. He projects that the 10 Million Dollar CSX Collingwood, Ohio ramp expansion will increase the volume of traffic to 150,000 lifts per year in the year 2003 (GPS Conrail ramp current average 30,000 lifts per year times the 500% increase of CSX equals 150,000 lifts per year). This ramp did not belong to CSX before the Conrail breakup. This market is predominately Neomodal's market that the SDB contends it takes three to four years to build up. Obviously, CSX is using Neomodal to do the missionary marketing for the future CSX Conrail Collingwood, Ohio ramp market. It is obvious that this marketing plan is predatory and can only be counteracted by the protective conditions sought by the SDB to insure fair competition.

In a vain attempt to mask the true flavor of this breakup and downplay the importance of an intermodal facility in NEO, CSX argues that, "intermodal transportation is generally most competitive with motor carriage at distances greater than 500 miles;" and, "Neomodal has a natural competitive disadvantage to the East Coast and Chicago because distances are less than 500 miles." (CSX Rutski, Vol. 2 of 3, 398). However, CSX and NS are planning to build intermodal terminals at Bellview, Ohio, Conrail Pittsburgh, Pennsylvania and Conrail Collingwood, Ohio. Surely, these locations will have the same, if not greater distance and competitive disadvantages as Neomodal. So why spend millions of dollars to build new terminals to service a market which CSX and NS claim is competitively disadvantaged,

unless, of course, the argument is merely meant to shadow the truth. The truth is that Neomodal services an important market in NEO, and without it, NEO would be left without an adequate system of transportation. Therefore, in order to offset these effects, NS and CSX propose to build redundant terminals and reduce Neomodal to an $11.2 Million Dollar political white elephant. In summary, CSX and NS seem to have one story that applies to their own actions and a second story that applies to Neomodal and W&LE.

II. WITHOUT PROTECTIVE CONDITIONS, THE CONRAIL BREAKUP WILL NOT PROMOTE A SAFE AND EFFICIENT RAIL TRANSPORTATION SYSTEM IN NORTHEAST OHIO AND WILL BE A DETRIMENT TO PUBLIC HEALTH AND SAFETY.

The long standing public policy interest of protecting the public health and safety, as set forth in 49 U.S.C. § 10101(8), will be severely compromised and adversely affected by the Conrail breakup. Neomodal was conceived, funded and constructed under the Intermodal Surface Transportation Efficiency Act of 1991 ("ISTEA"), through funding from Congestion Mitigation and Air Quality ("CMAQ") funds. One of the major purposes of Neomodal and its Federal funding was to reduce over-the-road traffic on the highway, thereby improving safety, lowering noxious emissions into the atmosphere, relieving truck congestion in NEO, and conserving diesel fuel. In fact, Neomodal, was and is predicated on the principle of creating an efficient transportation facility which promotes the public health and safety. Unfortunately, the public health and safety will be adversely affected by the Conrail breakup. 49 U.S.C. § 10101(8), for without Neomodal, NEO's shippers will be forced to use over the road shipping, a scenario which would conflict with the public policy purposes envisioned by the Neomodal's progenitors and governmental participants.

Prior to the construction of Neomodal, manufacturers and shippers were required to dray their trailers and containers to Chicago, Illinois and to the East Coast. With the construction of Neomodal, it is now possible to reduce these long distance hauls which, in turn, will remove truck traffic from the highways and onto the railways. Truck congestion creates passenger safety issues, including damage to property and/or injury/death to persons as a result of accidents.

In addition, reducing truck traffic on NEO highways is critical to obtaining and maintaining an EPA Attainment rating, and to that end, Neomodal is located in an Attainment zone. It is not necessary to prepare an in-depth fuel use and environmental impact analysis to recognize the benefits of reducing truck traffic on the highways of NEO. However, rudimentary projections demonstrate that the operation of Neomodal saves over one million five hundred thousand (1,500,000) gallons of diesel fuel a year; not to mention the concomitant reduction in truck emissions and associated air pollution. (SDB3). Obviously, this fuel savings significantly benefits the national defense, conserves the nation's limited natural resources, and improves the air quality in NEO. Moreover, it signifies a public/private project which was designed to improve both the economy and public transportation while preserving the public health and natural resources, consistent with Federal public policy statements.

On the other hand, even if the Conrail breakup would benefit transportation in NEO, the breakup would do more harm to the public health and safety than would be justified by any of the alleged benefits to the efficiency of transportation. As a result of the Conrail breakup, CSX and NS have doubled and tripled their train traffic on the northern routes through Cleveland, Ohio. (OAG4, 39). This increased rail traffic must have been carried on other rail

lines prior to the breakup of Conrail, because there has not been such an increase in the regional rail market to substantiate this increased volume. In other words, this increase came from rerouted traffic rather than new traffic. With this increased rail traffic comes the increased potential for rail accidents. Accordingly, Cleveland, Ohio is correct in identifying its many rail crossings as "potential disasters waiting to happen." (Denihan CLE, 12).

The number of rail crossing accidents in Ohio ranks among the highest in the nation. This statistic will only rise given the fact that communities north and south of the CSX/NS tracks will be divided by an almost continuous stream of rail traffic coming from either direction on the double track system of both NS and CSX. Associated with the division of these Ohio communities will be the safety problems and traffic delays for fire, police and emergency medical vehicles. However, if the STB issued the protective conditions sought by the SDB and the W&LE, there would be a diversion of some of this increased rail traffic on rail routes through the W&LE system would be an outlet for the overly congested CSX/NS West and East Cleveland rail routes. (OAG Wilson, 38; Denihan CLE, 12). In fact, in an effort to reduce the risks to public safety, the W&LE has offered trackage rights over its system to help alleviate the Cleveland, Ohio congestion. (Kucinich, 11).

The STB should grant the protective conditions sought by the SDB and the protective conditions sought by the W&LE, including but not limited to, the W&LE trackage rights to Chicago, Illinois and the unrestricted trackage rights to Hagerstown, Maryland, as a means of ameliorating the losses to the W&LE/SDB created by the breakup of Conrail; and relieving the heavy CSX/NS Cleveland, Ohio traffic which would significantly improve safety in Cleveland, Ohio. These protective conditions, including the aforerecited trackage rights, with

expressed guarantees and remedies, would also provide a competitive outlet for NEO shippers to reach western and eastern markets. (WLE, 7). Direct access to Neomodal, through these trackage rights, would encourage competition, help establish reasonable rail rates through the competitive process, and most importantly, divert rail traffic south of Cleveland, Ohio over the W&LE tracks, thereby relieving the overloaded CSX/NS corridor and its associated safety issues.

III. WITHOUT PROTECTIVE CONDITIONS, THE CONRAIL BREAKUP WILL ELIMINATE EFFECTIVE RAIL COMPETITION IN NORTHEAST OHIO, AND MORE SPECIFICALLY, WILL ELIMINATE W&LE AND NEOMODAL.

CSX and NS, who were partners of W&LE and Neomodal prior to the Conrail breakup, are now after the breakup, and even more so in the future, will become direct competitors of W&LE and Neomodal. As such, CSX and NS can utilize their trackage rights, their financial resources, and their marketing strength to bankrupt the W&LE and Neomodal. This anti-competitive posturing is precisely why CSX and NS have apparently changed their minds, and now are belatedly arguing that SDB should not have built Neomodal on a regional carrier's tracks. (CSX Rutski, Vol. 2B of 3, 400; NS Finkbinder, Vol. 2A of 3, 84). Unfortunately, NS and CSX did not share their strategic plan with the Federal, State and Local agencies, both private and public, who funded and constructed Neomodal. Moreover, NS's and CSX's anti-competition theory creates the undesirable conclusion that industry should not locate its manufacturing and distribution centers on regional railroad lines because Class I carriers will not provide competitive and reliable service to regional railroads and their local clientele. This result conflicts with the national public policy goal and one of Neomodal's priorities of developing the economic condition of a rural area.

A clear example of the anti-competitive actions of CSX is its grant to the W&LE of trackage rights from Connellsville, Pennsylvania to Hagerstown, Maryland, and its subsequent refusal to allow the trains to pass through this area on a timely, reliable, and competitive basis. The W&LE had been working with NS on this intermodal train route in the latter half of 1995, and all of 1996, with services which commenced in 1997. The actual transit time took four (4) hours longer than contemplated in the W&LE/NS five (5)-year contract. Interestingly, the source of the delay occurred at the NS Bellview Yard and a CSXT slow order on W&LE trackage rights from Connelsville, Pennsylvania to Hagerstown, Maryland. (Thompson WLE 7, 29). As a result, the CSX trackage rights are useless and NS has had to discontinue its intermodal service on that route. This is a clear example of the predatory practices which these Class I carriers will engage, which has unlawfully discriminated against W&LE and Neomodal in violation of 49 U.S.C. § 10101(12). Accordingly, approving this breakup without the protective conditions sought by SDB herein, which would assure the W&LE's and Neomodal's ability to compete, would fly in the face of the public policy goals set forth in 49 U.S.C. § 10101(12).

Another example of the anti-competitive nature of this merger is CSX's plan to move its intermodal train blocking from the CSX Willard, Ohio Yard to the CSX Conrail Collingwood, Ohio Yard. The W&LE has no direct access to CSX Conrail Collingwood, Ohio Yard, and as a result thereof, the W&LE and Neomodal would be effectively eliminated from the CSX intermodal train system. This action obviously does not foster "effective competition and coordination between rail carriers" as envisioned by 49 U.S.C. § 10101(5). The only argument for the proposed intermodal terminals of CSX and NS and the change in the CSX

blocking yard is that these Class I railroads do not want a regional railroad, like W&LE, to compete in the intermodal terminal business. NS and CSX obviously want exclusive control of Northern Ohio rail and its customers, thereby forcing W&LE and Neomodal out of business. However, the control envisioned by NS and CSX simply does not comport with the codifi public policy of fostering competition; eliminating redundant systems; reducing risk to the public health and safety; encouraging rural economic development; and providing an adequate and efficient transportation system to the public.

In this proceeding, CSX and NS have also stated that they have quoted competitive rates, competitive schedules, and provided reliable service to the customers of W&LE and Neomodal. This contention is, simply put, not true. CSX and NS state that "neither railroad provided any commitments to utilize the terminal or has since entered into any agreements obligating use of the terminal." (CSX/NS Rebuttal, Vol. 1 of 3, 473). However, this rhetorical statement is designed to mislead the STB. To the contrary, CSX and NS executed separate contracts, as defined heretofore, with the W&LE which expressly stated just the opposite. (SDB4 Stadelman, Exhibit D). What is even more egregious, is that both CSX and NS aggressively pursued the W&LE to secure the Contracts prior to the Conrail breakup, at a time when CSX and NS had no other available intermodal terminals in NEO.

Competitive rates, service and scheduling are offered by the railroads because the railroads have railroad competition. Wall Street Journal, February 6, 1998. As monopolistic providers, railroads can charge whatever the market will bear and become "profit maximizing sellers." Id. CSX/NS have argued in their rebuttal "that intermodal transportation is fundamentally competitive and should be exempt from regulatory controls." (Interstate

Commerce Commission's 1981 findings; CSX/NS Rebuttal, Vol. 1 of 3, 465). In opposition, the SDB would argue that the STB should be leery of those who seek, through the back door of the Conrail buyout, to ***create*** rather than ***protect*** "abuses of the market power." (CSX/NS Rebuttal, Vol. 1 of 3, 465). Clearly, the impact of the Conrail breakup, while competitively advantageous for CSX and NS, would practically destroy the W&LE and Neomodal, and would adversely affect the transportation system of NEO, contrary to sound public policy.

NS argues that it has provided and will continue to provide rates and scheduling options for Neomodal's intermodal traffic which will be "in all cases competitive with CSX rates, in many cases competitive with motor carrier rates." (NS Finkbinder, Vol. 2A of 3, 82). This is merely a self serving play on words and perhaps even an unkeepable promise. The fact is that shippers and intermodal marketing companies have not received competitive rates, competitive schedules, and/or reliable service from NS, due to delays at the NS Bellview, Ohio Yard and other service problems of NS. What is the truth, and not just a mere play on words, is the fact that the W&LE and Neomodal enjoyed business with Roadway Trucking and Schneider Trucking which was lost because of CSX's service failures. However, the W&LE can recapture the business of both Roadway Trucking and Schneider Trucking if the STB places the protective conditions outlined in the Conclusion hereof, on CSX and NS, to ensure that these Class I carriers will provide competitive and reliable services, scheduling, and rates.

One of the protective conditions sought by the SDB, as outlined in the Conclusion hereof, is the grant to the W&LE of trackage rights to Chicago, Illinois, and unrestricted trackage rights to Hagerstown, Maryland with expressed guarantees and remedies, which would provide NEO and Western Pennsylvania with competitive rates and schedules, as follows:

A. Neomodal/W&LE would be less affected by delays in switching at CSX Willard and NS Bellview Yards;

B. Neomodal and W&LE would not encounter the continual problem of the east/west Class I trains operating at full capacity which are unable to accept Neomodal and W&LE cars on a cost efficient, competitive, timely basis;

C. Neomodal and W&LE would not be at a disadvantage by accessing the CSX Conrail Collingwood, Ohio Yard by crossing four (4) main Class 1 railroad east/west tracks in East Cleveland, Ohio;

D. Neomodal and W&LE would be in control of their own destiny in reaching western railroads and would encourage honest and efficient management of the rail system in NEO. 49 U.S.C. § 10101(9); and

E. Neomodal and W&LE could competitively price services to western carriers and set their own competitive schedules, which would "allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail." 49 U.S.C. § 19191(1).

There is no question that Neomodal's customers are disillusioned about the unreliable intermodal service. This lack of trust is not necessarily based on the total transit time, but the uncertainty that the quoted scheduled time will be met. Fleming Foods, Inc., has made several test shipments of non-perishable products, only to find that the quoted schedule was missed by several days. Obviously, this is devastating to a "just-in-time" distribution warehouse operation, when it cannot make its on-time delivery to its customers. CSX has consistently left Neomodal/W&LE cars sitting for two (2) or three (3) days at its Willard, Ohio, yard awaiting space on CSX east/west trains. Despite these repetitive service problems, Mr. Pete Carpenter, President and CEO of CSXT, was quoted as saying "by integrating Conrail networks into those of CSX and NS, we (CSX) will bring faster, simpler, more efficient service to shippers" (CSX Press release dated July, 1997). Perhaps Mr. Carpenter is referring to the service CSX will provide its new intermodal terminal at Collingwood, Ohio after CSX forces Neomodal and

W&LE out of business. Such action is contrary to the public policy considerations recited in 49 U.S.C. § 10101, which seek to insure effective competition and coordination between rail and intermodal carriers. Accordingly, the Board should issue the protective conditions set forth herein and the protective conditions sought by the W&LE, including but not limited to the trackage rights, which will bring faster, simpler and more efficient service to the customers of Neomodal.

NS's acknowledged strategy is to shed all unprofitable tracks and NS applied that strategy in its original sale of the W&LE track. (W&LE6). If there are no protective conditions issued W&LE may be facing insolvency which may require it to seek inclusion, and as a result thereof, NS will shed all or substantially all of the W&LE system over time, and many, if not all, of the customers of W&LE will be forced to truck their products. This dilemma was best summed up by the office of the Ohio Attorney General, when it concluded, "The W&LE would not face impending bankruptcy if there were no Conrail sale." (OAG 8 O'Leary, 87). This predatory action, again, will not "foster sound economic conditions in transportation" nor will it insure "effective competition and coordination between rail carriers." 49 U.S.C. § 10101(5). Moreover, without protective conditions, the W&LE and Neomodal will face bankruptcy and insolvency and the businesses of NEO will be left with an inadequate transportation system that does not meet their needs and lacks effective coordination of service.

There is no question that if the SDB, ODOT and W&LE knew in 1994 that Conrail would be acquired by CSX/NS and as a result thereof become competitors, then Neomodal would never have been built, and over Eleven Million Two Hundred Thousand Dollars ($11,200,000) of federal, state, and local funds would not have been spent for its

construction. Prior to this proceeding, Neomodal provided a competitive intermodal terminal for CSX/NS. CSX and NS encouraged the SDB to build Neomodal on W&LE lines and did not dissuade the SDB construction because they planned to buy Conrail and build their own competing intermodal terminals.

CSX/NS's position, after the Conrail breakup, is that Neomodal can and should compete against the CSX Conrail Collingwood, Ohio terminal and the NS Bellview, Ohio and Conrail Pittsburgh, Pennsylvania terminals. However, fair and effective competition is only possible with the issuance of protective conditions by the STB, which are consistent with STB's public policy considerations under 49 U.S.C. § 10101. To fully "foster sound economic conditions in transportation and to insure effective competition and coordination between rail carriers" the SDB should be granted its protective conditions sought herein and the W&LE should be granted its protective conditions including but not limited to trackage rights to Chicago, Illinois, and unrestricted trackage rights to Hagerstown, Maryland which would insure the livelihood and continuity of Neomodal and protect the substantial investment of the United States Government and the State of Ohio.

It is easy for CSX and NS to now state that "the free market should judge whether Neomodal flourishes or fails" (CSX/NS Rebuttal, Vol. 1 of 3, 477). While it is true that the SDB, ODOT and W&LE accepted the risk of building Neomodal on W&LE lines; they accepted that risk before the Conrail breakup and they would agree that the "free market," as it existed before the Conrail breakup, should control Neomodal's destiny and prevail in this proceeding. Therefore, to maintain this "free market," the STB should issue the protective conditions sought by the SDB and the W&LE.

Unfortunately, the SDB proceeded in good faith to construct Neomodal and now CSX and NS have changed their position and want to change the "free market" of NEO to one controlled and dominated by NS and CSX. The SDB, ODOT and W&LE cannot make Neomodal disappear; nor can they recoup the over $11.2 Million Dollars invested by taxpayers to build the Neomodal. CSX and NS misstate the nature of their predatory action when they state that "Conrail in fact did not serve Neomodal and thus the allocation of its assets will not have any significant impact on the terminal." (CSX/NS Rebuttal, Vol. 1 of 3, 476). To the contrary, the reallocation of Conrail assets will put the W&LE and Neomodal out of business, because, as CSX has expressly stated, "CSX will utilize the Collingwood facility that is today operated by Conrail." (CSX/NS Rebuttal, Vol. 1 of 3, 476). By utilizing the CSX Conrail Collingwood, Ohio, terminal to the exclusion of W&LE and Neomodal, CSX, will, by CSX's own testimony, negatively impact Neomodal. Without protective conditions, there will be no coordination of service between CSX/NS and the W&LE, which may ultimately lead to the bankruptcy of the W&LE system and the closing of Neomodal. This surely is not what Congress envisioned when it enacted 49 U.S.C. § 11324 and 49 U.S.C. § 10101 to protect the public's interest in a safe, efficient and adequate system of transportation. Such a disastrous result is not in the best interest of NEO for it leaves this region of the State without adequate rail transportation and eliminates the only regional rail carrier in the area. For this merger to be consistent with the public interest of NEO, the STB must impose the aforerecited protective conditions of SDB and the W&LE to insure fair and effective competition for the W&LE and Neomodal.

IV. WITHOUT PROTECTIVE CONDITIONS, THE CONRAIL BREAKUP SHALL NOT FOSTER OR PROMOTE SOUND ECONOMIC CONDITIONS IN NORTHEAST OHIO.

The proposal to construct Neomodal was submitted under the auspices of TE-045 Federal Highway Administration's innovative financing initiative. This initiative was launched in April of 1994, and since its inception, twenty-five (25) states have submitted over sixty (60) innovative proposals, at a value of $4.5 Billion. Neomodal was a model public sector/private sector project and was one of the first projects under this initiative to be successfully completed in twelve (12) months and within budget. The public sector participants, the United States Department of Transportation ("USDOT") and ODOT heralded and marketed this project as an example of what can be done when the private sector and public sector join forces.

As a result of this successful private sector/public sector partnership and its shining example for the rest of the United States, the following elected officials have written letters of support for Neomodal and the W&LE, (SDB4 Paquette, "Exhibit A"):

1. Bill Clinton, President of the United States of America;
2. George Voinovich, Governor of the State of Ohio;
3. Ralph Regula, U.S. Congressman, Sixteenth District;
4. Scott Oeslager, State Senator, Ohio 29th District;

These elected officials and the public sector participants in this partnership are most anxious that SDB and the W&LE find a way to work with CSX and NS to assure that the W&LE and Neomodal survive after the Conrail breakup. This model project and the $11.2 Million Dollar investment of the United States Government and the State of Ohio are at risk if this breakup is approved without protective conditions for W&LE and the SDB. The position of the public

sector parallels that of the SDB in that these public officials were not aware that CSX and NS were going to buy out Conrail and thereby practically destroy Neomodal and the W&LE's position in the NEO transportation system.

Based upon the substantial economic and political liabilities associated with this proceeding, the protective conditions requested by the W&LE and SDB are extremely insignificant in the overall political and financial landscape of this breakup. In their respective filings, CSX and NS have projected savings of over $1 Billion per year, which, in light of the total financial loss envisioned by W&LE and SDB, make their protective conditions seem even more insignificant. Accordingly, the public sector and the aforerecited public officials request that the STB issue protective conditions to insure an adequate transportation system; to insure effective rail service and competition in NEO; to insure the long term economic development of NEO; and to protect the private and public sectors' investment in Neomodal.

Neomodal has helped attract companies to Stark County, Ohio and NEO and the potential loss of the W&LE and Neomodal would adversely impact economic and community development in this region. Specifically, there are approximately one thousand (1000) acres contiguous to Neomodal which are being developed by the SDB and other companies as Class A industrial parks to attract manufacturing and distribution facilities. To date, several companies have located in these parks to take advantage of Neomodal and its capacity to ship their products more efficiently, which enables said companies to be competitive in the global marketplace.

One example of this development is Sterilite Corporation, which has constructed a million square foot plastics manufacturing and distribution facility that ships part of its outbound finished products by intermodal rail. In addition, Peoples' Services, Inc. has located

a strip and stuff container operation immediately adjacent to Neomodal for the purpose of providing interim warehousing and the ability to take less than full truckloads and assemble truckloads to be shipped from Neomodal.

Unless protective conditions are issued by the STB, essential, reliable rail services will not be available to these industrial parks. The Railroad Consolidation Procedures, as set forth in 359 I.C.C. 195, require that "essential rail services will continue to be provided" and that "essential rail services" include those services required to achieve "community development" 359 I.C.C. 195(1). Furthermore, said Procedures require the STB to consider "whether the ability of the consolidated system to attract new business will be enhanced" 359 I.C.C.195(4). It is readily apparent that the NS/CSX breakup of Conrail and their associated intermodal plans do not include the W&LE or Neomodal, and therefore, Neomodal will not be able to attract new businesses. Consistent therewith, the contiguous industrial parks will not be able to market effective/efficient intermodal and general freight access and service and, eventually, the regional economic development plans will be severely damaged.

The protective conditions sought by the SDB and the W&LE would not impose unreasonable costs on NS and CSX nor would said conditions frustrate the attainment of the anticipated public benefits envisioned from this breakup. Lamoille Valley Railroad Company v. Interstate Commerce Commission 711 F.2d 295,302 (1983). The STB must treat the existence of harm to competition and/or essential services as its threshold test in issuing protective conditions to reduce the adverse effects of this breakup on NEO, and more specifically, on the W&LE and SDB. Lamoille Valley Railroad Company, at 309.

In general, the STB has defined an "essential service" as one "for which an adequate alternative is not available." Lamoille Valley Railroad Company, at 309. This definition closely parallels, if not restates, the statutory requirement that the STB must consider "adequacy of transportation to the public" 49 U.S.C. 11324. The issue of "adequacy" is a relative one and requires the STB to review the cost, both in terms of services and finances, of an alternative service. Atlantic Coastline Railroad v. Wharton 207 U.S. 328, 335 (1907) and Lamoille Valley Railroad Company, supra, at 311. As part of this inquiry, the STB should determine whether the loss of existing services will cause substantial harm to the local economy. Lamoille Valley Railroad Company, at 311. It is clear that unless protective conditions are issued by the STB, which enable Neomodal to effectively integrate into the CSX and/or NS systems, or effectively enable Neomodal and W&LE to independently compete as a regional railroad, then not only will the W&LE and Neomodal shut down, but the aforerecited industrial parks and the local economy will be devastated. The protective conditions sought by SDB and W&LE and their corresponding benefits to NEO do not "lessen the benefits" of the consolidation to CSX and NS or the public, but rather, provide essential services to NEO and create an adequate system of transportation for the public. 49 C.F.R. § 1180.1.

CONCLUSION

The fate of Neomodal and its regional carrier, W&LE, is now in the hands of the STB. As the STB reviews and rules upon the Conrail breakup, the STB must carefully weigh the critical role Neomodal and W&LE play in the adequacy of competitive transportation in NEO; in the future economic development/growth of NEO; and in the preservation/protection of public health and safety in NEO, particularly in Cleveland, Ohio.

As outlined in this brief, without the issuance of the protective conditions sought by the SDB and W&LE, NEO will arguably be left without adequate, competitive rail transportation. As a result of this void, economic growth and the economy, in general, in NEO will be severely affected, and there may be catastrophic safety issues in Cleveland, Ohio.

The arguments of SDB and the W&LE become even more persuasive, when one weighs the aforerecited economic, political and safety issues against the minimal cost the protective conditions sought by SDB & W&LE would have on CSX and NS in this breakup. In their respective pleadings, NS and CSX have projected savings of over $1 Billion per year as a result of the breakup; which, in light of the catastrophic costs to W&LE, SDB, and NEO, make the protective conditions sought by the SDB and W&LE even more insignificant. In addition, the protective conditions sought by the SDB and W&LE would not frustrate or negate the attainment of the anticipated public benefits envisioned by CSX and NS from this breakup; but would assure the adequacy of competitive, public rail transportation in NEO.

Furthermore, in light of the participation and support of CSX and NS which lead to the construction of Neomodal at its current site, the protective conditions sought by SDB and

W&LE would equitably reduce the adverse economic, political and safety effects of this breakup. CSX and NS should not be permitted to use Neomodal as its entrance into the NEO intermodal market, and then turn their backs on NEO by constructing their own terminals, which are arguably redundant facilities. When you couple this new terminal construction, with the lack of competitive and reliable service and scheduling from NS and CSX, it is inevitable that Neomodal and W&LE may be forced out of business and into bankruptcy.

In conclusion, the SDB opposes the breakup of Conrail, but if the breakup is approved by the STB, then the SDB requests that the STB issue the following protective conditions to ensure the future of Neomodal:

1) Mandate that CSX and NS provide competitive pricing/rates, competitive/reliable scheduling, reliable/timely service, and access to markets;

2) Mandate that CSX and NS work with W&LE to insure competitive pricing/rates, competitive/reliable scheduling, and reliable/timely service;

3) Mandate that CSX and NS integrate Neomodal into their respective rail systems and market Neomodal as if it was their own terminal;

4) Mandate that CSX and NS enter into long-term (minimum ten (10) years) take or pay lift contracts, at a minimum level of fifteen thousand (15,000) lifts per year; and

5) Grant to W&LE trackage rights to Chicago, Illinois and unrestricted trackage rights to Hagerstown, Maryland with expressed guarantees and remedies.

In the alternative, if the STB does not issue the aforerecited protective conditions, then SDB requests that CSX and/or NS be required to purchase Neomodal and its assets, at their

fair market value, as determined by appraisal; and integrate Neomodal into their respective rail systems.

Respectfully Submitted

Randall C. Hunt / WTN

Randall C. Hunt, Esq. (0016865), of
KRUGLIAK, WILKINS, GRIFFITHS
& DOUGHERTY CO., L.P.A.
4775 Munson Street, N.W.
P.O. Box 36963
Canton, OH 44735-6963
Tel: (330) 497-0700
Fax: (330) 497-4020

ATTORNEYS FOR
STARK DEVELOPMENT BOARD, INC.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent by ordinary U.S. mail this 20th day of February, 1998, to the counsel and/or parties of record on the restricted service list.

Randall C. Hunt / WTN

Randall C. Hunt (0016865), of
KRUGLIAK, WILKINS, GRIFFITHS
& DOUGHERTY CO., L.P.A.
ATTORNEYS FOR
STARK DEVELOPMENT BOARD, INC.

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STATE OF CONNECTICUT

DEPARTMENT OF TRANSPORTATION

2800 BERLIN TURNPIKE, P.O. BOX 317546
NEWINGTON, CONNECTICUT 06131-7546

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Office of the
Commissioner

An Equal Opportunity Employer

February 19, 1998

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

Dear Mr. Williams:

Subject: Finance Docket No. 33388

In accordance with Decision No. 6 dated May 30, 1997 for Finance Docket No. 33388, enclosed are an original and twenty-five copies of a Brief related to the Primary Application by CSX and Norfolk Southern Corporation.

Very truly yours,

James F. Sullivan

James F. Sullivan
Commissioner

Enclosures

185846

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

CONNECTICUT DEPARTMENT OF TRANSPORTATION

As a party of Record in the subject proceeding, the Connecticut Department of Transportation respectfully submits the following in accordance with the procedural schedule established in the Surface Transportation Board's Decision No. 6, dated May 30, 1997.

BRIEF

This is to certify that the State of Connecticut owns a portion of the Northeast Corridor in Connecticut known as the New Haven Rail Line. In Connecticut, the multiple-track New Haven Rail Line extends 46.7 miles from MP 26.1 at the Connecticut/New York state line to the division post at MP 72.8 in New Haven, Connecticut.

This serves also to reiterate and emphasize, in the strongest possible terms, that the State of Connecticut desires that the proposed North Jersey Shared Assets Area be extended easterly through New York City and Westchester County, New York, along the New Haven Rail Line to New Haven.

Clearly, truck-competitive, high speed intermodal rail service operating on the Northeast Corridor is perhaps the most effective means of mitigating, at least to some degree, intolerable levels of heavy truck traffic in the parallel I-95 corridor. If the North Jersey Shared Assets Area is not extended to New Haven, and the proposed CSX/NS operating plan is approved by the Surface Transportation Board in an unconditional form, maximum utilization of the New Haven Rail Line for rail freight service cannot be realized.

Far worse than failing to maximize the use of a resource like the New Haven Rail Line to mitigate existing environmental concerns, is the fact that failing to extend the North Jersey Shared Assets Area will likely exacerbate congestion and air quality problems in the I-95 corridor. If the significant new north-south intermodal services proposed, especially by NS, are terminated in the North Jersey Shared Assets Area as it is currently envisioned, then it must follow that a new and significant volume of containers bound for points east of the Hudson River will complete the trip by truck in the I-95 corridor.

Based upon assertions made publicly in Connecticut by NS, and demonstrations performed in Penn Station in the past, the State of Connecticut is persuaded that direct intermodal rail freight service on the Northeast Corridor through Penn Station to New Haven is viable using single containers on flatcars and RoadRailer-type equipment.

Dated at Newington, Connecticut this 19th day of February, 1998.

James F. Sullivan
Commissioner

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Connecticut Department of Transportation's Brief filed this date in STB Finance Docket 33388 will be served by first class US mail, postage prepaid, upon all Parties of Record and the following individuals:

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

Mr. Dennis G. Lyons, Esq.
Arnold and Porter
555 12th Street, N.W.
Washington, D.C. 20004-1202

Mr. Richard A. Allen, Esq.
Zuckert Scoutt & Rasenberger, L.L.P.
Suite 600
888 Seventeenth Street, N.W.
Washington, DC 20006-3939

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

Richard G. Slattery, Esq.
National Railroad Passenger Corp.
60 Massachusetts Avenue, N.E.
Washington, D.C. 20002

James C. Bishop, Jr. Esq.
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510-2191

John M. Nannes, Esq.
Scot B. Hutchins, Esq.
Skadden, Arps, Slate, Meagher & Flom, LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005-2111

Mark G. Aron, Esq.
Peter J. Schudtz, Esq.
Ellen M. Fitzsimmons, Esq.
CSX Corporation
One James Center
901 East Cary Street
Richmond, VA 23129

P. Michael Giftos, Esq.
CSX Transportation, Inc.
500 Water Street
Jacksonville, FL 32202

Samuel M. Sipe, Jr. Esq.
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington D.C. 20036-1795

Timothy O'Toole, Esq.
Constance L. Abrams, Esq.
Consolidated Rail Corporation
Two Commerce Square
2001 Market Street
Philadelphia, PA 19101

Dated at Newington, Connecticut, this 19th day of February, 1998.

State of Connecticut
Department of Transportation

James F. Sullivan
Commissioner

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185746

LAW OFFICES

BARBIN, LAUFFER & O'CONNELL

(PROFESSIONAL CORPORATION)

608 HUNTINGDON PIKE

ROCKLEDGE, PENNSYLVANIA 19046-4490

TELEPHONE (215) 576-1515

TELECOPIER (215) 663-8906

HARRY C. BARBIN
JOHN W. LAUFFER
GEORGE P. O'CONNELL
WILLIAM M. O'CONNELL, III

February 19, 1998

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

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

Dear Secretary Williams:

We have enclosed an original and 25 copies of Brief in Support of Comments, Protests and Requests for Conditions of Paul J. Engelhart, William J. McIlfatrick, H. C. Kohout, Thomas F. Meehan, Jr., Lawrence Cirillo, Charles D. Nester, Jacqueline A. Mace, Donald E. Kraft, and Robert E. Graham, Former Employees of Consolidated Rail Corporation ("Retirees"), with attached Certificate of Service.

Also enclosed is a 3.5-inch IBM compatible floppy disk containing the above document.

Very truly yours,

BARBIN, LAUFFER & O'CONNELL

Harry C. Barbin

HCB:lpet

Enclosures

cc: The Honorable Jacob Leventhal (with enclosure)
(Via First Class Mail)
All Parties of Record (per Service List)
(with enclosure) (Via First Class Mail)

VIA FEDERAL EXPRESS
AIRBILL NO. 803148061445

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RETR-9

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

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

BRIEF IN SUPPORT OF
COMMENTS, PROTESTS AND REQUESTS FOR CONDITIONS
OF
PAUL J. ENGELHART, WILLIAM J. McILFATRICK,
H. C. KOHOUT, THOMAS F. MEEHAN, JR.,
LAWRENCE CIRILLO, CHARLES D. NESTER,
JACQUELINE A. MACE, DONALD E. KRAFT
AND ROBERT E. GRAHAM, FORMER EMPLOYEES OF
CONSOLIDATED RAIL CORPORATION ("RETIREES")

On August 5, 1997, certain former employees of Consolidated Rail Corporation ("Conrail") and certain railroad companies that were merged into Conrail ("Retirees") filed their Notice of Intent to Participate in this proceeding as Parties of Record before the Surface Transportation Board ("Board"). On October 20, 1997, the Retirees filed their Comments, Protests and Requests for Conditions. The Applicants filed their Rebuttal to the Retirees'

Comments, Protests and Requests for Conditions.[1] The Retirees submit this Brief in support of their Comments, Protests and Requests for Conditions.

I. INTRODUCTION

The Retirees consist of five (5) former non-agreement employees (non-union employees), and four (4) former agreement employees (union employees) as follows:

(a) Paul J. Engelhart, 516 Meadowyck Lane, R.R. #4, Vincentown, New Jersey 08088, non-agreement (non-union employee;

(b) William J. McIlfatrick, 311 North Avenue, Secane, Pennsylvania 19018, non-agreement (non-union) employee;

(c) H. C. Kohout, 5341 Burning Tree Circle, Stuart, Florida 34997, non-agreement (non-union) employee;

(d) Thomas F. Meehan, Jr., 3616 Gradyville Road, P.O. Box 204, Newtown Square, Pennsylvania 19073, non-agreement (non-union) employee;

(e) Lawrence Cirillo, 3743 Brisban Street, Harrisburg, Pennsylvania 17111, agreement (union) employee;

(f) Charles D. Nester, 100 Bonsall Avenue, Aldan, Pennsylvania 19018, non-agreement (non-union) employee;

(g) Jacqueline A. Mace, Moorestowne Woods Apartments, 215 E. Camden Avenue, Apartment D-10, Moorestown, New Jersey 08057, agreement (union) employee;

(h) Donald E. Kraft, 560 Hopewell Road, Atco, New Jersey 08004, agreement (union) employee; and

(i) Robert E. Graham, 110 Oakwood Drive, Cinnaminson, New Jersey 08077, agreement (union) employee.

The Retirees are all participants in the Supplemental Pension Plan of Consolidated Rail Corporation ("Supp. Plan") which is an overfunded, contributory defined benefit pension plan.

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[1] Applicants' Rebuttal, Volume 1 of 3, p. 697.

The Retirees have an interest in the Supp. Plan with respect to maintaining the financial integrity of the Supp. Plan to secure the defined benefits payable to them under the Supp. Plan. The Retirees also have an interest in a pro rata share of the surplus assets of the Supp. Plan to the extent that the surplus is attributable to the employee contributions which they made to the Supp. Plan or certain predecessor plans. These predecessor plans were merged into the Supp. Plan after Conrail came into existence on April 1, 1976.

The Retirees represent themselves and a class consisting of all other similarly situated retirees who are participants or beneficiaries of participants of the Supp. Plan.

The Applicants' Rebuttal to the Retirees' Comments, Protests and Requests for Conditions was not responsive and was evasive. Applicants argue that the Retirees should rely exclusively upon the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. 1001 et seq., and the Federal Courts to protect their interests in the Supp. Plan.

Applicants further state that the Retirees are attempting to relitigate their pension case before the Surface Transportation Board which they lost in the Federal Courts. That contention completely misses the point and is made only to divert the Board's attention from the real issues.

The issues in the Federal Court litigation involved the pre-termination rights to the surplus assets in the Supp. Plan. The issues before the Board involved the rights of the Retirees in the

Supp. Plan if it is terminated or merged into the CSX or NS pension plans.

Applicants have failed to state what will happen to the Supp. Plan. The Retirees have a vital interest in whether the Supp. Plan will be terminated, partially terminated, split between CSX and NS, merged with pension plans administered by CSX and NS, or continued as a frozen plan administered by remnants of Conrail. The destiny of the Supp. Plan has an enormous effect upon the security of the Retirees' pensions and their interest in the surplus assets of the Pension Plan attributable to their contributions to the Plan.

II. PROCEDURE

The application in this proceeding is to obtain the approval and authorization under 49 U.S.C. §11321-25 for the acquisition by CSX Corporation ("CSX") and Norfolk Southern Corporation ("NSC") and related companies of control of Conrail and the division of the assets of Conrail by and between CSX and NSC ("Application"). This is a complex transaction which will have a major impact upon the interests of the employees and former employees of Conrail. According to the Application, the proposed transaction will result in the creation of 1,152 positions, the transfer of 2,306 positions, and the abolition of 3,807 positions in both the CSX and NSC expanded system. (See Railroad Control Application, Volume 1, p. 28).

The employees and former employees of Conrail have a vital interest in preserving the financial security of their pensions and the surplus assets of the Supp. Plan.

It is not stated on the Application how the interests of the employees and former employees in the Supp. Plan will be protected. The Application merely states that "standard labor protective conditions" will be applied and that no employee protective agreements have been reached as of the date of the Application. (See Application, Volume 1, pp. 28-29). The Applicants' Rebuttal to the Retirees' Comments, Protests and Requests for Conditions also did not address the issues relating to the Supp. Plan. Applicants continue to stonewall these matters. The Retirees can only conclude from these tactics of the Applicants that they will not disclose their plans for the Supp. Plan because such a disclosure would adversely affect the interests of the Retirees, all participants of the Supp. Plan, and also the Applicants' merger plans.

In a proceeding involving the merger or control of two Class 1 railroads, the Board shall consider at least among other matters the interests of the employees affected by the proposed transaction. See 49 U.S.C. ¶1134(b)(4). Also see 49 CFR 1180.1(b). 49 CFR 1180.1(f) provides as follows:

> "(f) *Labor protection.* The Commission is required to provide applicants' employees affected by a consolidation with adequate protection. Similarly situated employees on the applicants' system should be given equal protection. Therefore, absent a negotiated agreement, the Commission will provide for protection at the level mandated by law (49 U.S.C. 11347), unless it can be shown that because of unusual circumstances more stringent protection is necessary to provide employees with a fair and equitable treatment of affected employees."

In addition, the Board has broad authority to impose conditions governing the transaction. See 49 U.S.C. 11324(c) and 49 CFR 1180.1(d).

The interests of the Retirees and employees of Conrail in the Supp. Plan are set forth herein with their request to the Board to adequately protect such interests in approving the transactions involved in this Application.

III. FACTS

The evidence to support all of the facts in this case are included in the record of the case of Engelhart, et al v. Consolidated Rail Corporation, et al., in the United States District Court for the Eastern District of Pennsylvania,[2] which are not in dispute and which are incorporated herein by reference.

The following are the facts relevant to the Supp. Plan in these proceedings:

A. Background

Conrail came into existence on April 1, 1976 under the Regional Rail Reorganization Act of 1973 at 45 U.S.C.S. §701 et seq., to acquire the rail properties of several bankrupt railroads. The Penn Central Transportation Company ("Penn Central") was the largest of these railroads ("Merged Railroads") merged into Conrail on April 1, 1976. Virtually all of the Merged Railroads maintained contributory defined benefit pension plans ("Merged Plans"). The Supp. Plan was adopted by Conrail as a successor to the Merged Plans in order to provide Conrail employees, including those employees of the former Merged Railroads, with continuing pension

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[2] Engelhart, et al v. Consolidated Rail Corporation, et al., No. 92-7056, 1993 U.S. Dist. LEXIS 1171 (E.D.Pa., August 16, 1993).

benefits. Conrail employees were classified as either non-agreement (management) employees, or agreement (union) employees. Benefits under the Supp. Plan were funded from the assets of the Merged Plans, and from both Conrail and agreement employee contributions. The Penn Central Transportation Company Supplemental Pension Plan ("Penn Central Plan") was the largest of the Merged Plans in terms of the number of participants and asset values. The Penn Central Plan had been funded by both employer and employee contributions, as well as by the transfer of assets from the supplemental pension plans of the Pennsylvania Railroad Company ("PRR") and the New York Central Railroad Company ("New York Central"). Both the PRR and the New York Central maintained contributory defined benefit pension plans. The Retirees were participants in one or more of the Merged Plans as well as either the PRR or New York Central pension plans.[3]

Between 1976 and 1984, the Supp. Plan was funded by both Conrail and agreement employee contributions. Due to the large surplus which was accumulating in the Supp. Plan, Conrail made no contributions in the period from 1985 to the present time. By January 1, 1994, the Supp. Plan had accumulated a surplus of $538,000,000.00. The growth of this surplus paralleled the evolution of Conrail from a federally subsidized corporation into a publicly held corporation on March 26, 1987 under the Conrail Privatization Act at 45 U.S.C.S. §1301 et seq.

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[3] Mandatory contributions by management employees to the PRR plan were discontinued by the PRR in 1965.

B. The Supp. Plan Surplus

Paul J. Engelhart ("Engelhart") was born September 2, 1928 and, like the other named class representatives, was a long-term railroad employee, having first been hired by the PRR on September 16, 1948. He worked through its transition into Penn Central and ultimately into Conrail, from which he retired on August 31, 1988. Engelhart was a participant in the relevant supplemental pension plan of each of his railroad employers. The Retirees named in these proceedings are all in substantially similar circumstances as Paul J. Engelhart, and should be considered as named class representatives of all other employees and former employees who are participants in the Supp. Plan ("Engelhart Class").

On December 9, 1992, the Engelhart Class commenced an action in the United States District Court for the Eastern District of Pennsylvania, (Engelhart, et al v. Consolidated Rail Corporation, et al.[4]). In that action, the Retirees claimed that they had an interest in the Supp. Plan surplus attributable to their employee contributions during their railroad careers ("the Surplus Claims"). The District Court dismissed the Surplus Claims pursuant to Federal Rule of Civil Procedure 12(b)(6). The District Court Decisions were affirmed by the United States Court of Appeals for the Third Circuit on August 5, 1997 without opinion.[5] The Engelhart Class

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[4] Infra. 2, p.6

[5] Engelhart et al. v. Consolidated Rail Corporation, et al., No. 96-1920, U.S. App. LEXIS 26153, August 5, 1997.

filed a Petition for Writ of Certiorari with the United States Supreme Court to seek a review of the Decision by the Third Circuit, which is still pending.[6]

In the District Court, the Engelhart Class did not seek an increase in the benefits from the Supp. Plan. Instead, the Engelhart Class sought (1) a determination of their interest in the Supp. Plan surplus under the Employee Retirement Income Security Act (ERISA), 29 U.S.C.S. §1132(a)(1)(B), and (2) a determination under 29 U.S.C.S. §1132(a)(3) that the defendants have breached their fiduciary duties to the Engelhart Class by using surplus assets attributable to employee contributions to fund an early retirement program and certain retiree health care accounts in violation of their rights under the Supp. Plan and the fiduciary standards of ERISA.[7] On August 13, 1993, the District Court, in dismissing the Engelhart Class Action, held that Conrail's action in amending the Supp. Plan to provide for these special benefits for certain employees was not actionable pursuant to ERISA's fiduciary duty provisions.

The Supp. Plan is an overfunded pension plan in that the current value of Supp. Plan assets exceeds the value of anticipated benefit liabilities. This surplus in the Supp. Plan was attributable to contributions and forfeitures by Merged Railroads

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[6] Paul J. Engelhart, et al. v. Consolidated Rail Corporation, Supreme Court of the United States, October Term, 1997, No. 97-885

[7] These claims are described in more detail on pages 8-9 hereof.

and Conrail employees, contributions from the Merged Railroads, earnings and appreciation of assets held in trust under the Merged Plans and the Supp. Plan, and contributions by Conrail during the period that it was wholly owned and subsidized by the United States Government. Since its emergence as a publicly held corporation, Conrail has not made any contributions to the Supp. Plan. In the period between December 31, 1984 and December 31, 1993, the Supp. Plan surplus increased from $197 million to $538 million.[8] The surplus is undoubtedly much higher now because of the substantial appreciation in marketable securities which are held in the Supp. Plan.

The nine Engelhart Class representatives are all receiving retirement benefits as participants of the Supp. Plan. The Supp. Plan is the successor to the Merged Plans which, including the Penn Central Plan, were transferred to Conrail under the Regional Rail Act. Prior to February 1, 1965, all PRR employees were required, as a pre-condition to participation, to make contributions to the PRR Plan, and the PRR made matching contributions to fund their pensions. In 1965, the non-agreement PRR employees were advised by management that in lieu of further salary increases, they would not be required to make matching contributions to the PRR Plan. Agreement employees were still required to make contributions to the PRR Plan until retirement. That practice has continued through the gradual evolution into the Supp. Plan.

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[8] This surplus was determined by examining Schedule B, Actuarial Information, attached to the Forms 5500 for each of the relevant years.

In the District Court proceeding, the Engelhart Class challenged the use by the defendants of the surplus assets of the Supp. Plan to fund (a) the special voluntary pension program; and (b) the cost of certain retiree health care benefits claims ("Retiree Health Care") previously paid by Conrail. Conrail had also announced its intention to make annual transfers to pay for Retiree Health Care in the future. The Engelhart Class challenged these uses of the Supp. Plan surplus as an impairment of the fiscal integrity of the Supp. Plan, and as impermissible reversions of the assets of the Supp. Plan to Conrail. The class representatives alleged that the Engelhart Class members have a proprietary interest in the Supp. Plan surplus based upon their contributions, forfeitures and the earnings. As participants in and beneficiaries of the Supp. Plan, the Engelhart Class has a direct interest in preserving the fiscal integrity of that fund, which pays their pension benefits, and in maintaining adequate safeguards with respect to the administration of the Supp. Plan. Further, the class representatives alleged that the rights of class members as predicated upon ERISA at 29 U.S.C. §1344(d) represent contingent liabilities that must be satisfied before any reversion of the surplus to Conrail may occur. The Engelhart Class representatives, on behalf of themselves and all other subclass members, alleged that Conrail violated the fiduciary duties imposed upon it by ERISA, the Supp. Plan and the common law. They also alleged that Conrail failed to discharge its fiduciary duties under ERISA as set forth in ERISA at 29 U.S.C. §1104(a)(1), and 29 U.S.C. §1103(c)(1), and under the

common law of trusts, by converting a portion of the Supp. Plan surplus attributable to employee contributions to the use and benefit of Conrail. The Retirees alleged that Conrail impaired the fiscal integrity of the fund and failed to take the appropriate steps to cure the breaches of their fiduciary duties.

IV. LAW WITH RESPECT TO THE SUPP. PLAN

In a non-contributory defined benefit pension plan, the employer promises plan participants that the employer will provide a benefit as defined by the plan's benefit accrual formula upon retirement, termination or disability. Typically, the employer must satisfy any shortfalls from its general assets if the actuarial assumptions used in calculating the employer's annual contribution are determined to be incorrect. Malia v. General Electric Company, 23 F.3d 828, 831 (3rd Cir. 1994). Therefore, the financial risk of plan underfunding falls solely upon the employer.

The Supp. Plan, however, is an overfunded contributory defined pension plan to which both Conrail and its agreement employees theoretically contribute. Historically, the Merged Plans, which were the contributory defined benefit plans maintained by the Merged Railroads, required both employees and the employers to make matching contributions. Conrail's operations were subsidized by the United States Government until 1987 when Conrail ceased being a ward of the Federal government and became a publicly held corporation. Conrail has not made any employer contributions to the Supp. Plan since it became a publicly held corporation,

although Conrail agreement employees, i.e. union employees, have continued to make employee contributions as required by the Supp. Plan.

An actuarial surplus exists in a pension plan such as the Supp. Plan when its assets increase in value more rapidly than the value of expected benefit liabilities. See Johnson v. Georgia-Pacific Corporation, 19 F.3d 1184, 1189 (7th Cir. 194). In the period between December 31, 1984 and December 31, 1993, the Supp. Plan was the direct beneficiary of favorable investment experience as its surplus doubled from $197 million to $538 million, and that favorable investment experience has continued with the tremendous growth in the stock market over the last several years.

What financial risk has Conrail assumed relating to pension costs since its emergence as a publicly held corporation? The answer, quite simply, is none! Rather, Conrail has sought to use the Supp. Plan surplus to fund both special early retirement programs and to provide retiree health care benefits for those Conrail employees fortunate to participate in these programs. Conrail has reaped the benefit of the Supp. Plan surplus, the existence of which is primarily attributable to plan assets representing the matching contributions of the Merged Railroads and their employees and Federal subsidies which supported Conrail from 1976 to 1987.

In the current leading case decided by the United States Court of Appeals for the Ninth Circuit of Jacobson v. Hughes Aircraft

Company[9], the Court stated:

> "If employees contribute to the plan, the employer has a fiduciary duty to the employees when it amends the plan to use an asset surplus. In essence, when a plan is funded by both employer and employee contributions, both the employer and the employees are co-settlors of the plan." (105 F.3d at 1296)

This concept is reflected in both the common law of trusts and the Employee Retirement Income Security Act ("ERISA") at 29 USCS §1344. The resulting trust doctrine under common law provides that any residual assets remaining after a trust's purposes have been fulfilled become a resulting trust for the benefit of the original settlors of the trust. See Jacobson, 105 F.3d at 1295. ERISA 29 USCS §1344 governs the allocation of the residual assets of a pension plan upon its termination and mandates that any residual assets of the plan attributable to employee contributions must be equitably distributed to the contributing participants or their beneficiaries before any reversion to the employer may occur. Thus, ERISA at 29 USCS §1344 provides a statutory corollary to the common law resulting trust doctrine, and, indeed, goes even further in granting priority to the contributing plan participants in the distribution of the residual assets of a terminating pension plan.

The Retirees have sought to prevent Conrail from dissipating that portion of the Supp. Plan surplus attributable to their contributions and those of other members of the Engelhart Class. Their principal concern is to preserve the fiscal integrity of the Supp. Plan and to preserve that portion of the surplus attributable

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[9] 105 F.3d 1288 (9th Cir; 1997)

to their contributions and those of other Engelhart Class members.

The Retirees contend that the Applicants in these proceedings will violate ERISA's anti-inurement provision at 29 USCS §1103(c)(1) if they use the Supp. Plan surplus for purposes that do not take into account their interest and that of the other Engelhart Class members in the surplus. This precise issue was presented in Jacobson where the court at 105 F.3d 1294 stated:

> "We therefore, hold that when both the employer and employees contribute to a pension plan, the employer does not have sole discretion to use that part of a plan's asset surplus attributable to employee contributions."

The Retirees wish to preserve their interest in the surplus assets of the Supp. Plan, and to maintain the financial security provided by the overfunded contributory plan. In Jacobson, the Court explicitly recognized that the participants in an overfunded contributory defined benefit plan have a legally protectible interest in preserving the fiscal integrity of their pension fund. See Jacobson, 105 F.3d at 1296, n.4.

V. COMMENTS AND PROTESTS BY RETIREES WITH RESPECT TO CSX'S AND NSC'S INTENTIONS REGARDING THE SUPP. PLAN

The documents submitted by the Applicants and their Rebuttal fail to explain what their intentions are with respect to the Supp. Plan. There appear to be three viable alternatives for the future of the Supp. Plan:

1. It could be terminated;

2. It could be merged with the pension plans of CSX and NSC, or either of them; or

3. It could survive in its present form and continue to be administered by Conrail.

Each of these possibilities raises unique subsets of legal and practical issues and requires careful analysis so that their impact upon retired plan participants and others may be evaluated.

If the Supp. Plan is formally terminated, then ERISA's scheme of asset allocation under 29 U.S.C. §1344(a) is implicated. Section 1344(a) provides for the allocation of assets among the participants and beneficiaries upon the termination of a single employer pension plan, and directs the plan administrator to allocate assets in accordance with the following priorities:

1. To that portion of each individual's accrued benefit attributable to voluntary employee contributions;

2. To that part of a participant's accrued benefit attributable to mandatory employee contributions;

3. To the benefits of retirees who have been in pay status or deferred vested status for at least three years prior to the date of plan termination;

4. To all benefits guaranteed by the Pension Benefit Guaranty Corporation under Title IV of ERISA;

5. To all other nonforfeitable benefits under the plan; and

6. To all other benefits under the plan.

The Supp. Plan is substantially overfunded in that the value of plan assets exceeds the estimated plan liabilities. If the plan is terminated, there will be a substantial pool of residual, or

surplus, assets. ERISA provides for the allocation and distribution of these residual assets at 29 U.S.C. §1344(d)(1) through (4).[10] Subsection 1344(d)(1) permits the reversion of these residual assets to Conrail if:

1. All plan liabilities to participants and their beneficiaries have been satisfied;

2. The distribution does not contravene any provision of law; and

3. The plan provides for a reversion of surplus to the employer.

Employer compliance with these requirements is mandatory. Parrett v. American Ship Building Co., 990 F.2d 854 (6th Cir. 1994). However, before an employer reversion can occur under subsection 1344(d)(1)(A), the requirements of 29 U.S.C. §1344(d)(3) must be met as well. That subsection permits an employer reversion only if the residual assets attributable to employee contributions are first equitably distributed to the participants who made such contributions or their beneficiaries.

If the Supp. Plan is merged with another plan, e.g. a plan sponsored by CSX or NSC, then attention must shift to ERISA, Section 208 at 29 U.S.C. §1058.[11] That section provides:

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[10] 29 U.S.C. §1344(a)-(d) is attached as Exhibit "1".

[11] That section is a mirror image of the Internal Revenue Code, 26 U.S.C. §414(1). A district court has noted this parallelism and stated that sources useful in interpreting 26 U.S.C. §414(1) can also be used to interpret ERISA Section 208. See Gillis v. Hoechst Celanese Corp., 889 F.Supp. 202 (E.D. Pa. 1995).

> "A pension plan may not merge or consolidate with, or transfer its assets or liabilities to, any other plan .... unless each participant in the plan would (if the plan then terminated) receive a benefit immediately after the merger, consolidation, or transfer which is equal to or greater than the benefit he would have been entitled to receive immediately before the merger, consolidation or transfer (if the plan had then terminated).

In short, ERISA provides that the participant's accrued benefit after a plan merger must be at least equal to what that benefit was prior to the merger. Such an analysis is particularly relevant here because of the concerns of the Retirees about the financial security underlying those benefits which they will receive in the future. As one commentator has observed:

> "Plan amendments transferring assets and benefit liabilities of some participants from one plan to another or merging two plans, can dilute the security of participants' benefits as measured by the difference in the amount of benefits that would be paid them if the plan terminated immediately before or immediately after the asset or liability transfer or plan merger."

See Stephen Bruce, Pension Claims: Rights and Obligations, 2nd Ed., Bureau of National Affairs, Wash. D.C. (1993), p. 509.

Once again, given the current lack of direction with respect to the Supp. Plan, the retiree participants cannot assess the applicability of either 29 U.S.C. §1344 or 29 U.S.C. §1058 to their benefits.

Superficially, the continued survival of Conrail and the maintenance of the Supp. Plan would appear to be the most straightforward scenario. Questions remain as to what form, if any, Conrail might exist in if the proposed merger is successfully completed. Assuming that Conrail survives in one form or another

as a viable entity, and continues to maintain the Supp. Plan, then a partial termination of the Supp. Plan will have occurred by virtue of the proposed mass layoffs of Conrail personnel.[12] In Gluck v. Unisys Corp., 960 F.2d. 1168, 1992 U.S. App. LEXIS 5647, *41 (3rd Cir. 1992), the Court stated:

> "Partial termination thus involves a significant reduction in plan liability by means of a corresponding reduction in employee benefits. That reduction may be achieved by excluding a segment of employees, or by reducing benefits generally. The former reduction, the exclusion of participants, is referred to as a "vertical reduction" ... and may result in a "vertical partial termination"... A vertical partial termination may result from events such as mass firing or lay-offs due to closing divisions or moving plants ....."

If a partial termination does occur, then the distribution of residual assets under 29 U.S.C. §1344(d) is again implicated. Article 6.4 of the Supp. Plan explicitly recognizes the application of Title IV of ERISA, including 29 U.S.C. §1344(d), and states:

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[12] A partial termination is not specifically defined by ERISA, however, the Internal Revenue Code attempts to fill the gaps at 26 U.S.C. §411(d)(3), which states:

> "Notwithstanding the provisions of subsection (a) [the minimum vesting standards], a trust shall not constitute a qualified trust under section 401(a) unless the plan provides that upon its termination or partial termination the rights of all affected employees to benefits accrued to the date of such termination, partial termination or discontinuance, to the extent funded as of such date, as nonforfeitable."

The Treasury Regulations at §1.411(d)-2(b)(1) attempt to define when a partial termination has occurred, but this Regulation merely allows the Internal Revenue Service to apply a facts and circumstances test to a given situation. Courts may consider these Treasury Regulations as well to determine whether a partial termination has occurred in a particular factual context. See Gluck v. Unisys Corp., 960 F.2d 1168, 1992 U.S. App. LEXIS 5647, *44 (3rd Cir. 1992).

"6.4 Allocations on Termination. In the event that the Plan is completely or partially terminated, the rights of all affected Participants to accrued benefits under the Plan to the date of such termination shall become fully vested and nonforfeitable to the extent funded; and the assets of the Plan available to provide benefits shall be allocated to the persons who are entitled or who may become entitled to benefits under the Plan, subject to and in the manner prescribed by the applicable provisions of Title IV of ERISA. Any other provision of the Plan to the contrary notwithstanding, if there remain any assets of the Plan after all liabilities of the Plan to Participants, Terminated Participants and their beneficiaries have been satisfied or provided for, such residual assets shall be distributed to the Company subject to and in accordance with Title IV or ERISA." (Emphasis supplied).

Clarification of the Applicants' intentions vis-a-vis the Supp. Plan is essential.

It is interesting to observe that Conrail's position is that any Supp. Plan assets in excess of benefit obligations may be used by Conrail to provide benefits to Supp. Plan participants. (See letter from Debbie Melnyk, Administrator, Pension Plan Administration Committee, to Thomas Robinson dated June 9, 1997 - highlighted sentence in second paragraph (Exhibit "2" attached). This position has many legal ramifications such as whether the plan surplus assets are going to be used to pay severance allowance to Conrail employees, or CSX or NSC will use plan surplus assets to fund their employees' pension obligations. In addition, Ms. Melnyk's letter states that if the Supp. Plan terminates, any residual assets after all Plan obligations are satisfied, will be paid to Conrail. This statement is directly contrary to the law of ERISA as cited above that residual assets can be distributed to the employer only if the residual assets attributable to employee contributions are first

equitably distributed to the participants who made such contributions. (ERISA at 29 U.S.C. 1344(d)(3).

It appears that the Applicants do not intend to disclose voluntarily their plans with respect to the Supp. Plan until some time in the future, after the merger is completed. Attached as Exhibit "3" is a September 22, 1997 letter from Anthony P. Santoro, Jr., General Chairman of the TCU Board of Adjustments, to Dennis A. Arouca, Vice President - Labor Relations for Consolidated Rail Corporation, in which Mr. Santoro inquired about the disposition of the assets of the Supplementary Plan and the effect of that disposition upon Plan participants. Attached as Exhibit "4" is the January 19, 1998 reply from Mr. Arouca to Mr. Santoro, wherein Mr. Arouca states that "we" do not have any information concerning the impact that the sale of Conrail will have on the Supp. Plan. That response appears disingenuous in light of the comments by Mr. Levan during a March 5, 1997 video conference with Conrail employees. It is quite clear that there have been ongoing discussions among Conrail, CSX and NSC regarding the disposition of the Supplemental Plan and it is equally clear that they will not disclose their intentions unless directed to do so by this Board. It is unbelievable and unconscionable for the Applicants to take the position that they do not have to disclose their plans for the future of the Supp. Plan and how it will affect the employees and retirees of Conrail.

V. RETIREES' REQUESTS FOR CONDITIONS

The Retirees request the Board to impose appropriate conditions governing the contemplated transaction, pursuant to the provisions of 49 U.S.C. 11324(c) and 49 CFR 1180.1(d), to protect the interests of all of the participants of the Supp. Plan in the Supp. Plan and its assets.

In addition, the Retirees request the Board to impose the following specific conditions governing this transaction:

1. Require that the Applicants make legally binding agreements and commitments that specify the disposition of the Supp. Plan and its assets after the proposed merger.

2. If the Supp. Plan will be amended, terminated or merged into another plan, the Applicants must specify how the interests of the participants of the Supp. Plan in the security of their pension rights and in the surplus assets of the Supp. Plan are to be protected.

3. Require the applicants to specify how the Supp. Plan and its assets will be administered after the merger.

4. Require the Applicants to specify if the assets of the Supp. Plan will be used to provide any kind of severence benefits to employees of any of the Applicants.

5. Require the Applicants to amend the Supp. Plan to provide adequate security for the pension benefits of the participants of the Supp. Plan.

6. Require the Applicants to amend the Supp. Plan to determine the interests of the participants in the surplus assets, which may not be used for any purpose except the payment of benefits to the Retirees and all of the present participants of the Supp Plan.

7. If the Supp. Plan is to be terminated or partially terminated, require that the Applicants allocate and pay to the Retirees and all of the present participants of the Supp. Plan their equitable share of the surplus assets of the Supp. Plan.

8. Require that the Applicants amend the Supp. Plan to provide for adequate independent representation of the participants in the Supp. Plan Administration Committee, with appropriate arrangements for the selection, compensation and reimbursement of expenses for such participants' representation.

9. Require that all commitments and agreements which are made by the Applicants shall be legally binding upon the Applicants, their successors and assigns, and shall be for the benefit of the Retirees and all of the participants and their beneficiaries.

10. Permit the Retirees to conduct all necessary discovery of the Applicants relating to the disposition of the Supp. Plan.

11. Require the Applicants to pay all legal costs and expenses, including reasonable counsel fees and expenses for the Retirees' counsel.

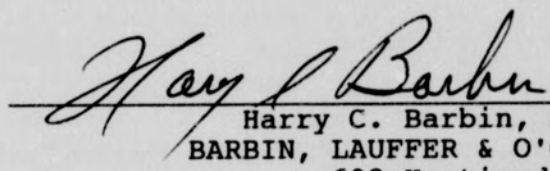
12. The Retirees reserve the right to request further conditions, depending upon the Applicants' response to this Brief and other pleadings in these proceedings.

VI. CONCLUSION

The Retirees request the Board to render an appropriate decision to protect the interests of all participants of the Supp. Plan for the reasons set forth above.

The Retirees reserve the right to submit supplemental replies, pleadings and other documents relating to the transaction in these proceedings related to the Supp. Plan.

Respectfully submitted,



Harry C. Barbin, Esquire
BARBIN, LAUFFER & O'CONNELL
608 Huntingdon Pike
Rockledge, PA 19046
(215)379-3015

Counsel for Paul J. Engelhart, et al.

Exhibit 1

§ 1344. Allocation of assets

(a) Order of priority of participants and beneficiaries. In the case of the termination of a single-employer plan, the plan administrator shall allocate the assets of the plan (available to provide benefits) among the participants and beneficiaries of the plan in the following order:

(1) First, to that portion of each individual's accrued benefit which is derived from the participant's contributions to the plan which were not mandatory contributions.

(2) Second, to that portion of each individual's accrued benefit which is derived from the participant's mandatory contributions.

(3) Third, in the case of benefits payable as an annuity—

(A) in the case of the benefit of a participant or beneficiary which was in pay status as of the beginning of the 3-year period ending on the termination date of the plan, to each such benefit, based on the provisions of the plan (as in effect during the 5-year period ending on such date) under which such benefit would be the least,

(B) in the case of a participant's or beneficiary's benefit (other than a benefit described in subparagraph (A)) which would have been in pay status as of the beginning of such 3-year period if the participant had retired prior to the beginning of the 3-year period and if his benefits had commenced (in the normal form of annuity under the plan) as of the beginning of such period, to each such benefit based on the provisions of the plan (as in effect during the 5-year period ending on such date) under which such benefit would be the least.

For purposes of subparagraph (A), the lowest benefit in pay status during a 3-year period shall be considered the benefit in pay status for such period.

(4) Fourth—

(A) to all other benefits (if any) of individuals under the plan guaranteed under this title (determined without regard to section 4022B(a) [29 USCS § 1322b(a)]), and

(B) to the additional benefits (if any) which would be determined under subparagraph (A) if section 4022(b)(5) [29 USCS § 1322(b)(5)] did not apply.

For purposes of this paragraph, section 4021 [29 USCS § 1321] shall be applied without regard to subsection (c) thereof.

(5) Fifth, to all other nonforfeitable benefits under the plan.

(6) Sixth, to all other benefits under the plan.

(b) Adjustment of allocations; reallocations; mandatory contributions; establishment of subclasses and categories. For purposes of subsection (a)—

(1) The amount allocated under any paragraph of subsection (a) with respect to any benefit shall be properly adjusted for any allocation of assets with respect to that benefit under a prior paragraph of subsection (a).

(2) If the assets available for allocation under any paragraph of subsection (a) (other than paragraphs (5) and (6)) are insufficient to satisfy in full the benefits of all individuals which are described in that paragraph, the assets shall be allocated pro rata among such individuals on the basis of the present value (as of the termination date) of their respective benefits described in that paragraph.

EXHIBIT "1"

(3) This paragraph applies if the assets available for allocation under paragraph (5) of subsection (a) are not sufficient to satisfy in full the benefits of individuals described in that paragraph.

(A) If this paragraph applies, except as provided in subparagraph (B), the assets shall be allocated to the benefits of individuals described in such paragraph (5) on the basis of the benefits of individuals which would have been described in such paragraph (5) under the plan as in effect at the beginning of the 5-year period ending on the date of plan termination.

(B) If the assets available for allocation under subparagraph (A) are sufficient to satisfy in full the benefits described in such subparagraph (without regard to this subparagraph), then for purposes of subparagraph (A), benefits of individuals described in such subparagraph shall be determined on the basis of the plan as amended by the most recent plan amendment effective during such 5-year period under which the assets available for allocation are sufficient to satisfy in full the benefits of individuals described in subparagraph (A) and any assets remaining to be allocated under such subparagraph shall be allocated under subparagraph (A) on the basis of the plan as amended by the next succeeding plan amendment effective during such period.

(4) If the Secretary of the Treasury determines that the allocation made pursuant to this section (without regard to this paragraph) results in discrimination prohibited by section 401(a)(4) of the Internal Revenue Code of 1986 [26 USCS § 401(a)(4)] then, if required to prevent the disqualification of the plan (or any trust under the plan) under section 401(a) or 403(a) of such Code [26 USCS § 401(a) or 403(a)], the assets allocated under subsections (a)(4)(B), (a)(5), and (a)(6) shall be reallocated to the extent necessary to avoid such discrimination.

(5) The term "mandatory contributions" means amounts contributed to the plan by a participant which are required as a condition of employment, as a condition of participation in such plan, or as a condition of obtaining benefits under the plan attributable to employer contributions. For this purpose, the total amount of mandatory contributions of a participant is the amount of such contributions reduced (but not below zero) by the sum of the amounts paid or distributed to him under the plan before its termination.

(6) A plan may establish subclasses and categories within the classes described in paragraphs (1) through (6) of subsection (a) in accordance with regulations prescribed by the corporation.

(c) **Increase or decrease in value of assets.** Any increase or decrease in the value of the assets of a single-employer plan occurring during the period beginning on the later of (1) the date a trustee is appointed under section 4042(b) [29 USCS § 1342(b)] or (2) the date on which the plan is terminated is to be allocated between the plan and the corporation in the manner determined by the court (in the case of a court-appointed trustee) or as agreed upon by the corporation and the plan administrator in any

other case. Any increase or decrease in the value of the assets of a single-employer plan occurring after the date on which the plan is terminated shall be credited to, or suffered by, the corporation.

(d) **Distribution of residual assets; restrictions on reversions pursuant to recently amended plans; assets attributable to employee contributions; calculation of remaining assets.** (1) Subject to paragraph (3), any residual assets of a single-employer plan may be distributed to the employer if—

(A) all liabilities of the plan to participants and their beneficiaries have been satisfied,

(B) the distribution does not contravene any provision of law, and

(C) the plan provides for such a distribution in these circumstances.

(2)(A) In determining the extent to which a plan provides for the distribution of plan assets to the employer for purposes of paragraph (1)(C), any such provision, and any amendment increasing the amount which may be distributed to the employer, shall not be treated as effective before the end of the fifth calendar year following the date of the adoption of such provision or amendment.

(B) A distribution to the employer from a plan shall not be treated as failing to satisfy the requirements of this paragraph if the plan has been in effect for fewer than 5 years and the plan has provided for such a distribution since the effective date of the plan.

(C) Except as otherwise provided in regulations of the Secretary of the Treasury, in any case in which a transaction described in section 208 [29 USCS § 1058] occurs, subparagraph (A) shall continue to apply separately with respect to the amount of any assets transferred in such transaction.

(D) For purposes of this subsection, the term "employer" includes any member of the controlled group of which the employer is a member. For purposes of the preceding sentence, the term "controlled group" means any group treated as a single employer under subsection (b), (c), (m) or (o) of section 414 of the Internal Revenue Code of 1986 [26 USCS § 414(b), (c), (m) or *(o)]*.

(3)(A) Before any distribution from a plan pursuant to paragraph (1), if any assets of the plan attributable to employee contributions remain after satisfaction of all liabilities described in subsection (a), such remaining assets shall be equitably distributed to the participants who made such contributions or their beneficiaries (including alternate payees, within the meaning of section 206(d)(3)(K) [29 USCS § 1056(d)(3)(K)]).

(B) For purposes of subparagraph (A), the portion of the remaining assets which are attributable to employee contributions shall be an amount equal to the product derived by multiplying—

(i) the market value of the total remaining assets, by

(ii) a fraction—

(I) the numerator of which is the present value of all portions of the accrued benefits with respect to participants which are derived from participants' mandatory contributions (referred to in subsection (a)(2)), and

(II) the denominator of which is the present value of all benefits with respect to which assets are allocated under paragraphs (2) through (6) of subsection (a).

(C) For purposes of this paragraph, each person who is, as of the termination date—

(i) a participant under the plan, or

(ii) an individual who has received, during the 3-year period ending with the termination date, a distribution from the plan of such individual's entire nonforfeitable benefit in the form of a single sum distribution in accordance with section 203(e) [29 USCS § 1053(e)] or in the form of irrevocable commitments purchased by the plan from an insurer to provide such nonforfeitable benefit,

shall be treated as a participant with respect to the termination, if all or part of the nonforfeitable benefit with respect to such person is or was attributable to participants' mandatory contributions (referred to in subsection (a)(2)).

(Sept. 2, 1974, P. L. 93-406, Title IV, Subtitle C, § 4044, 88 Stat. 1025.; Sept. 26, 1980, P. L. 96-364, Title IV, § 402(a)(7), 94 Stat. 1299; Apr. 7, 1986, P. L. 99-272, Title XI, § 11016(c)(12), (13), 100 Stat. 274; Dec. 22, 1987, P. L. 100-203, Title IX, Subtitle D, Part II, Subpart B, § 9311(a)(1), (b), (c), 101 Stat. 1330-359, 1330-360; Dec. 19, 1989, P. L. 101-239, Title VII, Subtitle G, Part V, Subpart C, § 7881(e)(3), Subpart D, §§ 7891(a)(1), 7894(g)(2), 103 Stat. 2440, 2445, 2451.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

"This title", referred to in this section, is Title IV of Act Sept 2, 1974, P. L. 93-406, 88 Stat. 1003, popularly known as the Employee Retirement Income Security Act of 1974, which appears generally as 29 USCS §§ 1301 et seq. For full classification of this Title, consult USCS Tables volumes.

Effective date of section:

For effective date of this section, see 29 USCS § 1461.

Amendments:

1980. Act Sept. 26, 1980 (effective upon enactment on 9/26/80, as provided by 29 USCS § 1461(e)), in subsecs. (a), (c), and (d) inserted "single-employer".

1986. Act Apr. 7, 1986 (effective 1/1/86, as provided by § 11019(a) in part of such Act, which appears as 29 USCS § 1341 note), in subsec. (a), in the introductory matter, deleted "defined benefit" following "single-employer", in para. (4), in subpara. (A), substituted "section

§ 1344. Allocation of assets

(a)-(c) [Unchanged]

(d) Distribution of residual assets; restrictions on reversions pursuant to recently amended plans; assets attributable to employee contributions; calculation of remaining assets. (1)-(3) [Unchanged]

(4) Nothing in this subsection shall be construed to limit the requirements of section 4980(d) of the Internal Revenue Code of 1986 [26 USCS § 4980(d)] (as in effect immediately after the enactment of the Omnibus Budget Reconciliation Act of 1990 [enacted Nov. 5, 1990]) or section 404(d) of this Act [29 USCS 1104(d)] with respect to any distribution of residual assets of a single-employer plan to the employer.

(As amended Nov. 5, 1990, P. L. 101-508, Title XII, Subtitle A, § 12002(b)(2)(B), 104 Stat. 1388-566.)

Exhibit 2

CONRAIL

June 9, 1997

Mr. Thomas F. Robinson
6653 Malvern Ave.
Philadelphia, PA 19151-2346

Dear Mr. Robinson:

I am writing in response to your letter dated May 6, 1997 regarding the future of Conrail's Supplemental Pension Plan (the "Conrail Plan"). I understand your concern but I am afraid that your information is not entirely accurate. The purpose of my May 1 letter was to address the concerns of some retirees who questioned what would happen to their monthly pension payments after the merger. The Conrail Plan is subject to the provisions of the Employee Retirement Income Security Act of 1974 ("ERISA") and to the extent that a participant's retirement benefit is vested or nonforfeitable it cannot be taken away.

As you know under the Amended Merger Agreement, CSX Corporation and Norfolk Southern Corporation have agreed to purchase the shares of Conrail. Included as part of this purchase are the assets of Conrail, including the Conrail Plan which Conrail has sponsored. As the Plan's sponsor under ERISA, Conrail has the obligation to fund, through contributions if necessary, the retirement benefits of the Plan participants. Contributions by Conrail have not been required in the past several years because of the Plan's overfunded status. To the extent there are Plan assets in excess of the benefit obligations owed to participants and beneficiaries, these are assets which Conrail may use to provide benefits to Plan participants. However, if the Conrail Plan were to terminate, any assets which remain after all liabilities and benefit obligations of the Conrail Plan to participants and their beneficiaries have been satisfied are returned to the plan sponsor, Conrail or its successors. If the Conrail Plan is merged with the CSX Plan, such action is permitted under the provisions of ERISA as long as the vested or nonforfeitable retirement benefits of participants are protected. The fiduciaries of the Conrail Plan consider the interests of the plan participants and beneficiaries in the discharge of their duties with respect to their actions which will affect the Conrail Plan. The provisions of the current Amended Merger Agreement are completely within the laws that protect plan participants.

If you have any other questions, please contact me at the address below.

Sincerely,

Debbie Melnyk
Administrator-Pension Plan Administration Committee

EXHIBIT "2"

Exhibit 3

TRANSPORTATION • COMMUNICATIONS INTERNATIONAL UNION
AFL-CIO CLC

TCU System
Board of Adjustment No. 86
1522 Locust Street
Philadelphia, PA 19102
(215) 732-7410

Anthony P. Santoro, Jr.
General Chairman

Russell C. Oathout
General Secretary-Treasurer

File: 71.92

Subject: Conrail Supplemental Pension Plan

September 22, 1997

Mr. Dennis A. Arouca
Vice President-Labor Relations
Consolidated Rail Corporation
Two Commerce Square - 15A
2001 Market Street
P.O. Box 41415
Philadelphia, PA 19101-1415

Dear Mr. Arouca:

Attached you will find a letter dated September 14, 1997, from Mr. Richard Sklenar, President/FST, TCU District #735, who is also a current Conrail employee. This letter involves some concerns that Mr. Sklenar and other TCU Members have raised concerning the Conrail Supplemental Pension Plan. In particular, what impact will the pending sale of Conrail, if approved, have on the benefits Mr. Sklenar and others are entitled.

Also, who will administer this plan after change of control or, if the proceeds of the plan are divided, how will this be accomplished? In either case, what will the rights of the plan participants be both now and in the future?

I'm confident that the parties (CR/CSX and N/S) have concluded discussions involving this issue, particularly after reviewing the comments made during Mr. Levan's March 5, 1997 video conference, which are also attached. Therefore, I request that you provide details of those discussions and any decisions made thus far or in the future, so that I can respond to the inquiries/concerns expressed by Mr. Sklenar and others.

Thanking you in advance for your anticipated cooperation in responding to this matter.

Very truly yours,

Anthony P. Santoro, Jr.
General Chairman

APS/ss

EXHIBIT "3"

TRANSPORTATION •
COMMUNICATIONS
INTERNATIONAL
UNION

Attachment

cc: Mr. R. A. Scardelletti, IP
Mr. R. C. Oathout, GST/VGC
Mr. J. A. Ponigar, VGC
Mr. R. Sklenar, ADC #735
All Conrail District Chairpersons

TRANSPORTATION•
COMMUNICATIONS
INTERNATIONAL
UNION
AFL-CIO

TCU System
Board of Adjustment No. 86
837 Jeannette Avenue
Steubenville, OH 43952
(614) 282-7071

Richard F. Sklenar
Assistant District Chairman
District No. 735

September 14, 1997

R. C. Oathout
VGC - GST
System Board No. 86
1522 Locust Street
Philadelphia, Pa. 19102

Dear Sir and Brother:

As you are well aware, Conrail has an OVERFUNDED private pension plan in excess of $1 billion. As a participant in this plan, I receive, on request, the amount paid in and what I should be receiving upon my retirement . This is, of course, estimated at the present time, based on age sixty two (62) or sixty five (65).

I have serious reservations as to what will happen to these monies in 1998 , when the CSXT-NS acquisition occurs, and how it will be disbursed to the plan members and what legal ramifications, there will be, if any. Or, will they be able to take these monies and run if they become the proprietor?

There has been a number of supervisor on Conrail who have received monies from the Supplemental Plan through their early retirements or buyouts who never made a contribution to this plan. Morally, I feel this is wrong; is it legal, I don't know.

I would appreciate any and all information you can gather in this matter, and if permissible, I will disseminate this information to the other plan members at the NCSC.

I sincerely appreciate your efforts in this matter.

Sincerely and fraternally,

R. F. Sklenar
President/FST 735

CONRAIL ELECTRONIC MAIL SYSTEM

PRINTED FOR: DEPT: INTERMODAL SVC GROUP
PAGE: 5

Levan.....When the process ends we will turn over our assets, until such time we will continue to pursue our goals and plans. We may have some boundaries put on us by the CSX and NS, but to what extant it is unknown at this time.

Ninth Question from Phila - Will the Supplemental Pension Plan be in jeopardy through this takeover?

Levan..... On going discussions with CSX on this are taking place right now. Final decisions on how things will be distributed or handled will be announced soon.

Tenth Question from Altoona - Is Conrail bound by provision of this deal?

Levan..... We must go with the agreement voted on by the board.

Eleventh Question from Dearborn - When will a conclusion be reached with the CSX?

Levan.....Soon, but we won't reach a conclusion until we get the protection we're seeking for our people.

Twelfth Question from Indy - We will have another proxy vote? Also, any chance the STB won't approve the NS/CSX deal?

Levan.....You will not receive another proxy, but will be asked to tender shares to CSX at $115.00 a share. On the STB not approving.....I don't think there's an expert alive on the STB workings.....so I really can't say what they are liable to do.

Thirteenth Question from Pittsburgh - There are currently labor contracts unsettled.....will we continue to attempt to settle these?

Levan.....Yes we will. Provisions of protection and stay bonuses will be announced as they become available....once the CSX approves them.

Fourteenth Question from Albany - How accurate has the press been in stating the division of assets between NS and CSX?

Levan.....Today's Journal of Commerce is fairly accurate. Lines from St. Louis to Cleveland will most likely go CSX. Water table lines Cleveland to North Jersey will most likely go CSX. Albany to Boston will most likely go CSX. Rest may go to the NS.

Exhibit 4

CONRAIL

Working safely requires continuous improvement.

DENNIS A. AROUCA
VICE PRESIDENT
LABOR RELATIONS

January 19, 1998

Mr. A. P. Santoro, Jr.
General Chairman, TCU
1522 Locust Street
Philadelphia, PA 19102

Dear Tony:

This refers to your letter concerning the Conrail Supplemental Pension Plan and what impact will the pending sale of Conrail have on pension benefits.

For the time being, Conrail will administer the Supplemental Pension Plan. Beyond that, there are obviously many complex merger details to be worked out, and we do not have the answers at this time. As we learn more, we'll use all the ways we have to get information to active and retired employees.

As required by law, the assets of the Supplemental Pension Plan are held in trust for the benefit of all participants and their beneficiaries. Under the terms of the Amended Merger Agreement, the CSX Corporation has agreed to honor all existing retirement plans and to cause all required Supplemental Pension payments to continue to be paid after Conrail is acquired. Further, the Supplemental Pension Plan is a qualified plan covered by the Employee Retirement Income Security Act of 1974 (ERISA) and as such, comes under the jurisdiction of the Internal Revenue Service (IRS) and the U.S. Department of Labor (DOL). In order to maintain its qualified status for tax purposes and ERISA, the plan must comply with the requirements of the IRS and DOL.

I trust this is of assistance to you in advising your constituents of their concerns.

Sincerely,

CONSOLIDATED RAIL CORPORATION 2001 MARKET STREET PHILADELPHIA, PA 19101-1417 (215) 209-4678 • FAX (215) 209-4068

EXHIBIT "4"

CERTIFICATE OF SERVICE

I hereby certify that, on this 19th day of February, 1998, I caused a true and correct copy of the Brief in Support of Comments, Protests and Requests for Conditions of Paul J. Engelhart, William J. McIlfatrick, H.C. Kohout, Thomas F. Meehan, Jr., Lawrence Cirillo, Charles D. Nester, Jacqueline A. Mace, Donald E. Kraft and Robert E. Graham, Former Employees of Consolidated Rail Corporation ("Retirees") (RETR-9) to be served by first class mail, postage prepaid, upon all Parties of Record in the above-captioned matter, and upon Administrative Law Judge Jacob Leventhal.

Harry C. Barbin, Esquire
BARBIN, LAUFFER & O'CONNELL
608 Huntingdon Pike
Rockledge, PA 19046
(215)379-3015

Counsel for Paul J. Engelhart, et al.

Dated: February 19, 1998

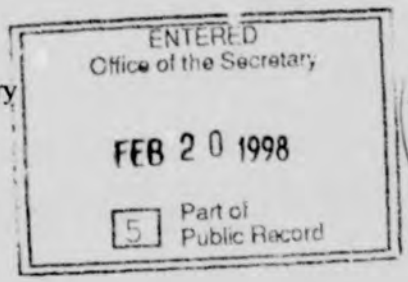
STB FD . 33388 2-20-98 E . 185738

185738

NEFCO

NORTHEAST OHIO FOUR COUNTY REGIONAL PLANNING & DEVELOPMENT ORGANIZATION
969 Copley Road, Akron, Ohio 44320-2992 (330) 836-5731 • Fax (330) 836-7703
Gayle Jackson, Chair *Joseph Hadley, Jr., Executive Director*

February 18, 1998



VIA HAND DELIVERY

Honorable Vernon A. Williams, Secretary
Surface Transportation Board
Office of the Secretary
Case Control Unit
ATTN: Finance Docket No. 33388
1925 K Street, N.W., Room 715
Washington, D.C. 20006

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

Dear Secretary Williams:

Please find enclosed for filing in the above-captioned docket the original and twenty-five (25) copies of a brief summarizing the Northeast Ohio Four County Regional Planning and Development Organization's (NEFCO) previous filings. Also enclosed are a 3.5-inch disk containing the text of this document in WordPerfect 6.1 format and a certificate of service.

NEFCO is filing as a participant of record on behalf of METRO Regional Transit Authority (METRO), which serves a large portion of NEFCO's four-county population. NEFCO is a regional council representing Portage, Stark, Summit, and Wayne counties and their local governments in northeast Ohio. NEFCO assists its members and local communities by serving as a forum for regional economic and environmental issues, such as the creation of a commuter rail system, that have extensive benefits to the four-county area.

Copies of MRTA-5 were served via first-class mail, postage prepaid, on the Honorable Jacob Leventhal and counsel for Applicants, the U.S. Secretary of Transportation, the U.S. Attorney General, and all parties of record. If you have any questions, please contact me at (330) 836-5731. Thank you.

Sincerely,

Sylvia R Chinn-Levy

Sylvia R. Chinn-Levy
Economic Development Planner

Enclosures
pc: Hon. Jacob Leventhal
Counsel for Applicants
All Parties of Record
U.S. Secretary of Transportation
U.S. Attorney General

MRTA-5

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 LEASE/AGREEMENTS--
CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION

NORTHEAST OHIO FOUR COUNTY REGIONAL PLANNING AND DEVELOPMENT ORGANIZATION

on behalf of

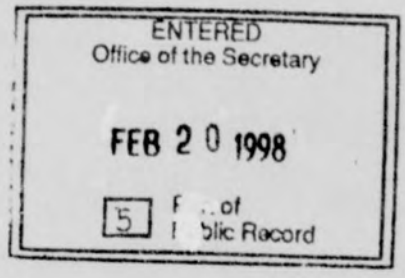
METRO REGIONAL TRANSIT AUTHORITY
--OPERATING RIGHTS--
LINES OF CONSOLIDATED RAIL CORPORATION

BRIEF

Sylvia Chinn-Levy
Economic Development Planner and Intergovernmental Review Coordinator
Northeast Ohio Four County Regional Planning and Development Organization
969 Copley Road
Akron, Ohio 44320-2992
(330) 836-5731
Filing on behalf of METRO Regional Transit Authority as a Participant of Record

Charles Zumkehr
Roetzel & Andress Co. LPA
75 East Market Street
Akron, Ohio 44308
(330) 376-2700
Counsel

Robert K. Pfaff
General Manager, Secretary-Treasurer
METRO Regional Transit Authority
416 Kenmore Blvd.
Akron, Ohio 44310
(330) 762-7267



Dated: February 23, 1998

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33388

NORTHEAST OHIO FOUR COUNTY REGIONAL PLANNING AND DEVELOPMENT ORGANIZATION

on behalf of

METRO REGIONAL TRANSIT AUTHORITY

BRIEF

The Northeast Ohio Four County Regional Planning and Development Organization ("NEFCO") hereby submits its final Brief in the Conrail merger-acquisition before the Surface Transportation Board. This brief will outline the submissions NEFCO presented as a participant of record on behalf of METRO Regional Transit Authority ("METRO"). METRO submitted, chronologically: (1) a Request for Conditional Operating Rights; (2) a Response to the Responsive Application of Wheeling and Lake Erie Railway Company; AND (3) a Petition to File Supplemental Comments and Supplemental Comments. The Petition to File Supplemental Comments was denied by the Board in Decision No. 66.

I. Request for Conditional Operating Rights

NEFCO filed a Request for Condition on October 21, 1997 on behalf of METRO. METRO believes the proposed control and realignment of trackage operations in Northeast Ohio between CSX Corporation and CSX Transportation, Inc. (collectively, "CSX") and Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively, "NS") will have

serious impacts on future rail operations in Ohio which may result in irreparable harm. METRO opposes the merger-acquisition of the Consolidated Railway Corporation ("Conrail") by CSX and NS without conditions for commuter rail operating rights on what is currently the Conrail mainline connecting Cleveland and Hudson, Ohio.

METRO's request is anything but a shortsighted attempt to gain some type of windfall; rather it is a response to the potential harm to a joint-community project started over four years ago. Numerous public and private entities have invested significant resources over the past four years for the purpose of developing a rail transportation system to link the cities of Canton, Akron, and Cleveland ("CAC corridor") in Ohio.

To date, cooperating agencies have spent or appropriated upwards of $12.7 million for the development of commuter rail service in the CAC corridor.[1] The Freedom Secondary and the Akron Secondary lines were purchased by METRO from Conrail in 1994. The Akron Secondary connects with the Conrail mainline in Hudson. A contract for purchase has been drafted by METRO and is expected to be executed by CSX before April 30, 1998 for the Sandyville Local line connecting Akron and Canton. Once this transaction is finalized, 60% of the track necessary to connect passengers from Canton to Cleveland will have been purchased for the CAC project. The only segment of track which remains is the leg from Hudson into downtown Cleveland.

The Hudson to Cleveland trackage was identified as a necessary link in a Northeast Ohio commuter rail system prior to the announcement of this acquisition-merger. The Hudson to Cleveland mainline was identified as a key component to completing the commuter rail project,

---

[1] *See* MRTA-1, Request for Conditional Operating Rights at page 3, footnote 6. In addition to these figures, the proposed appropriation of $2 million for an MIS of the CAC corridor referenced at footnote 9 of the same page is now law. *See*, The Department of Transportation and Related Agencies Appropriations Act, 1998 (Pub.L. 105-66), signed by President Clinton on October 27, 1997.

not simply "one option" as Applicants claim. The Ohio Department of Transportation ("ODOT") initially recognized the potential for economic growth and business development through the construction of a commuter rail system in the CAC corridor.[2] Furthermore, even with the addition of one more lane to Interstate 77, ODOT determined the highway will be at an unacceptable "level of service" necessary to accommodate vehicular movements by the year 2020.[3] The study was on an I-77 segment between Akron and Canton.

URS, an independent transportation consulting firm, was hired to study potential rail lines connecting the three major cities. The study found that a comparison of options "favor[s] the selection of the [Conrail] route..." as the final leg of the rail commute from Canton to Cleveland.[4] This report recognizes that the double track line connecting Hudson and Cleveland currently possesses the operational and technical characteristics necessary to support speeds required for the efficient operation of passenger rail service.[5] In addition, the study recognizes that this track services the highest potential ridership in the CAC corridor.[6]

METRO, relying on the recommendations of independent consultants, ODOT's assessment of traffic congestion, and regional transit data, asserts that operating rights on the Conrail mainline are essential for the successful implementation of commuter rail service in the CAC corridor. The lost financial investment expended to date, the foregone opportunity for

---

[2]State Policy Statement on Commuter Rail, Excerpt from: ACCESS OHIO MULTI-MODAL STATE TRANSPORTATION PLAN TO THE YEAR 2000, Ohio Department of Transportation, Ohio 1993, p. 21.

[3]See, "Interstate 77 Corridor Major Investment Study: Stark/Summit Counties," Ohio Department of Transportation, Office of Planning, prepared February 6, 1997, p. 39 (ODOT had to apply for an exemption for the FHWA Division).

[4]SCATS/METRO RTA-Akron/Greater Cleveland RTA; Alternative Implementation Report Canton-Akron-Cleveland via Kent/W&!.E. conducted by URS Consultants, October 1995, p. 3-28.

[5]Greater Cleveland Regional Transit Authority/METRO RTA-Akron: Implementation Report Canton-Akron-Cleveland via Hudson, conducted by URS Consultants, October 1995, p.4-1 (discussing the trackage classification and curvature, advantages of double tracks, signaling systems, track elevation, crossings, etc.).

[6]Id. at Table 3, p. 5-9.

economic development, compounded by crippling traffic congestion in the region pose significant irreparable harms to the citizens of Northeast Ohio.

With this background, good faith negotiations and reasonableness on the part of the railroads is essential for METRO to protect the communities interests. METRO had what it considered to be a working relationship with Conrail. However, the proposed merger and statements made in Applicants' Rebuttal, set forth a different scenario. In particular the verified statement of Paul Carey states, "Conrail has declined to even entertain granting such rights."[7] Such a statement not only evidences a different position on the previous "working relationship", but also an attitude which causes METRO concern for the successful implementation and operation of commuter rail in Ohio.

A patterned history of fruitless negotiations concerning this track coupled with this *party admission*, gives METRO concern that Applicants have no intention of granting operating rights to METRO. The testimony, albeit by a Conrail executive, evidences a shared sentiment among the Applicants. The harm is no longer "potential"; this position presents imminent harm to the region. This, in conjunction with the economic and environmental impact, should be reason enough for the Board to grant METRO's request.

If the Board does not find it necessary to grant operating rights, it may consider the suggestion of Philip G. Pasterak, P.E.:[8] "As a condition to the approval of the Transaction...the Board should require that the proposed operator of the line and MRTA negotiate a mutually binding agreement to mitigate the impacts of the Transaction on planned commuter rail service."

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[7]Rebuttal Verified Statement of R. Paul Carey at 11, initially submitted by Applicant on December 12, 1997.

[8]Verified Statement of Philip G. Pasterak, Vice President of Parsons Brinkerhoff, Ohio, Inc. attached hereto, initially accompanying MRTA-4.

II. Response to Responsive Application of The Wheeling and Lake Erie Railway

On December 12, 1997 METRO, in conjunction with the Summit County Port Authority, filed a brief clarifying the ownership interests of the "Freedom Secondary" between mile post 192.15 in Kent, Ohio and 201.84 in Akron, Ohio, and the "Akron Secondary" between mile post 1.45 in Hudson, Ohio and mile post 8.00 in Cuyahoga Falls, Ohio. These lines were purchased by METRO with a grant from the Federal Transit Administration who then transferred ownership to the Summit County Port Authority to be held for future use.

Wheeling and Lake Erie's Responsive Application (Sub. No. 80)("W&LE Application") requests operational rights over the Akron Secondary and the Freedom Secondary. METRO filed a response for the sole purpose of clarifying the record and making the Board aware that the rail lines mentioned in W&LE Application are not owned by Conrail, CSX or NS. These rail lines and thus W&LE's requests are not within the scope of the Conrail merger. Any interests in these lines should not be altered or even addressed in the present action.

III. Conclusion

NEFCO, as a participant of record, has followed this proceeding to apprise its members of potential impacts of STB decisions on the four counties NEFCO represents in Northeast Ohio. METRO, through NEFCO, participated in this proceeding to protect citizen interest within the Canton-Akron-Cleveland corridor from being harmed by the Conrail acquisition-merger.

The Request for Condition is not simply a request of a shortsighted opportunist, but rather a request from numerous entities attempting to protect a long term project identified as essential to economic development in northeast Ohio. A commuter rail system has been contemplated in Northeast Ohio for years. Interested parties gained support at the local, state and national level to study this project. The process has been slow, but deliberate; President

Clinton's recent approval of funding is representative of the momentum of this project. Commuter rail is on the threshold of becoming a reality for Ohio citizens. It will be regretful if this project is spurned as a result of a freight traffic realignment that took place without consideration of the impacts on passenger rail efforts.

WHEREFORE, NEFCO, representing its members' interests, on behalf of METRO Regional Transit Authority respectfully submits this Brief as a summary of its request for conditional operating rights or any other relief the Board deems appropriate as a condition precedent to the acquisition's approval in this proceeding.

Respectfully Submitted,

Charles Zumkehr
Roetzel & Andress Co. LPA
75 East Market Street
Akron, Ohio 44308
(330) 376-2700
Counsel

Sylvia Chinn-Levy
Economic Planner and Intergovernmental
Review Coordinator
Northeast Ohio Four County Regional Planning
and Development Organization
969 Copley Road
Akron, Ohio 44320-2992
(330) 836-5731
Filing on behalf of METRO Regional Transit Authority
as a Participant of Record

Robert K. Pfaff
General Manager, Secretary-Treasurer
METRO Regional Transit Authority
416 Kenmore Blvd.
Akron, Ohio 44310
(330) 762-7267

Dated: February 23, 1998

VERIFIED STATEMENT OF
PHILIP G. PASTERAK, P.E.
JANUARY 9, 1998

I am Philip G. Pasterak, P.E., Vice President of Parsons Brinckerhoff Ohio, Inc., in its Cleveland, Ohio office. I have provided professional services in rail planning, engineering, and operations for more than 16 years in Ohio, Michigan, New York, Virginia, and numerous other locations.

I am submitting this statement in support of the position of the Northeast Ohio Regional Planning and Development Organization on behalf of Metro Regional Transit Authority (MRTA) of Akron, Ohio, in response to the Applicants' Rebuttal of December 1997. Specifically, this pertains to Applicants' Rebuttal Section XII "The Requests for Conditions Filed by Passenger Agencies Should Be Denied".

As the author of a series of implementation and feasibility studies regarding this corridor, performed in 1995 and referenced by MRTA-1@2, I note that a relatively comprehensive public planning process was undertaken at that time regarding the Canton-Akron-Cleveland corridor. The studies were sponsored by the Greater Cleveland Regional Transit Authority, Metro Regional Transit Authority (Akron), Stark County Area Transit Study (Canton), and the Ohio Rail Development Commission. An active Policy Committee including these and other public stakeholders (including the Metropolitan Planning Organizations and transit authorities from all three cities) considered the available data and selected the corridor via Hudson and the Conrail Cleveland Line as the preferred corridor for the service. This matched the studies' recommendation based on my technical evaluation.

The Applicants cite two reasons why the MRTA request for commuter rail operating rights over what is now the Conrail Cleveland Line connecting Cleveland and Hudson (the "Subject Line") should be denied.

The first stated reason is that "...MRTA has not shown that proposed commuter operations in the geographical area encompassing the cities of Canton, Akron, and Cleveland will suffer any harm as a result of the proposed Transaction." The second stated reason is that "... future development of a proposed commuter rail system should be the subject of negotiation between interested parties, not Board imposed conditions."

In fact, the proposed Transaction will increase traffic volumes on the Subject Line, causing harm to the ability to operate the commuter service under consideration. According to the Applicants' Operating Plan, traffic on the segment between Cleveland Drawbridge and CP White (line N-061) will increase from 12.5 to 29.7 daily trains. The segment between CP White and Alliance (line N-064) will increase from 26.4 to 30.1 daily

trains. During consideration of the proposed commuter services, Conrail emphatically made the case that capacity on the Subject Line was sufficiently restricted so as to make the operation of any commuter trains practically impossible.

Clearly, the increase in traffic proposed by the Transaction will have harmful impacts on the ability to operate this commuter service, making the issue appropriate for Board consideration. The effects of this impact are not dependent on the existence, or non-existence, of a current agreement between MRTA and Conrail.

It is not argued that Board action be the replacement in total for an appropriate agreement between MRTA or others and Norfolk Southern, the proposed operator of the Subject Line, regarding the terms of commuter rail operation. As a condition to the approval of the Transaction, however, the Board should require that the proposed operator of the line and MRTA negotiate a mutually acceptable binding agreement to mitigate the impacts of the Transaction on the planned commuter rail service.

VERIFICATION

STATE OF OHIO)
) ss:
COUNTY OF CUYAHOGA)

Philip G. Pasterak, being duly sworn, deposes and says that he has read foregoing statement, knows the facts asserted therein are true and that the same are true as stated.

Philip G. Pasterak

Subscribed and sworn to before me this 12th day of January, ~~1997.~~ 1998

Notary Public of Cuyahoga County

My Commission expires:

Raluca Uleia
Notary Public
Commission Expires Jan. 31, 2000

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of February, 1998, I served a copy of the Brief (MRTA-5) on behalf of METRO Regional Transit Authority and the Summit County Port Authority by first class mail, postage prepaid, upon:

Richard A. Allen, Esq.
Zuckert, Scoutt & Rasenberger, LLP
888 Seventeenth Street, N.W. Suite 600
Washington, D.C. 20006-3939

Administrative Law Judge Jacob Leventhal
Federal Energy Regulatory Commission
888 First Street, NE, Suite 11F
Washington, D.C. 20004-1202

Paul A. Cunningham, Esq.
Harkins Cunningham
1300 19th Street, N.W., Suite 600
Washington, D.C. 20002

Dennis G. Lyons
Arnold & Porter
555 12th St. NW
Washington, D.C. 20004-1202

Janet Reno
U.S. Attorney General
U.S. Dept. of Justice
Tenth St. and Constitution Ave. NW
Washington, D.C. 20530

Rodney Slater
Secretary of Transportation
U.S. Dept. of Transportation
400 Seventh St. SW
Washington, D.C. 20590

Samuel M. Sipe, Jr., Esq.
Steptoe and Johnson LLP
1330 Connecticut Avenue, NW
Washington, D.C. 20036-1795

and upon all other Parties of Record in this proceeding.

Sylvia R Chinn-Levy

Sylvia R. Chinn-Levy
Northeast Ohio Four County Regional Planning
and Development Organization
969 Copley Road
Akron, OH 44320-2992