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BEFORE THE
SURFACE TRANSPORTATION BOARD

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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

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BRIEF ON BEHALF OF

AK STEEL CORPORATION

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DATE: FEBRUARY 23, 1998

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

CSX CORPORATION AND CSX TRANSPORTATION, INC.,
NORFOLK SOUTHERN CORPORATION
AND NORFOLK SOUTHERN RAILWAY COMPANY

—CONTROL AND OPERATING LEASES/AGREEMENTS—

CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION

BRIEF ON BEHALF OF

AK STEEL CORPORATION

In accordance with the provisions of the Board's procedural orders in this proceeding, Decision No. 6 (served May 30, 1997) and Decision No. 12 (served on July 23, 1997), AK Steel Corporation ("AK Steel") submits this brief in support of its request for conditions and other relief. This transaction involves the joint application of CSX Corporation ("CSX") and its principal railroad subsidiary, CSX Transportation, Inc. ("CSXT") and Norfolk Southern Corporation ("NS"), and its principal railroad subsidiary Norfolk Southern Railway Company ("NSR"), to acquire control of Conrail, Inc. ("Conrail") and its principal railroad subsidiary, Consolidated Rail Corporation ("CR").[1] In addition to applying for joint control of Conrail, CSX and NS are also proposing to divide the properties, rights and other assets of CR between them for separate operation in connection with CSXT and NSR. They are also proposing a considerable number of modifications in existing arrangements between and among the

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[1] All of these parties are referred to collectively as "Applicants."

various Applicants. It is the Applicants' request for approval by the Surface Transportation Board ("Board or STB") of the proposed modification of one part of those existing arrangements that is of concern to AK Steel.

I. INTRODUCTION AND SUMMARY OF POSITION

The transaction presented by the Applicants for approval is extensive and complex. Much of the complexity arises from the need to overlay this transaction onto the often Byzantine relationships between the Applicants and other carriers that have evolved over decades. AK Steel's objection to this transaction relates to a very narrow but very significant part of the entire transaction, which were addressed in detail in AK Steel's Comments filed on October 21, 1997.[2] After careful analysis of the convoluted documentation presented to the Board for approval, as well as discovery materials and other matter then available to AK Steel, it appeared that a significant anti-competitive effect would occur as a result of the proposed transaction.

Specifically, it appeared that CSXT would obtain the exclusive right to provide rail transportation service to and from the Toledo Docks on Lake Erie in Ohio, even though both Conrail and CSXT today have the right to serve the Toledo Docks. This understanding of the effect of the transaction was confirmed by NS, although CSX apparently disagreed. AK Steel therefore requested certain conditions and other relief to ensure that NSR would be able to replace Conrail in all aspects of the Toledo Docks operation so that there would be no loss of competitive alternatives for shippers using the Toledo Docks.[3]

The Applicants have responded by taking the position that "NS will obtain all trackage rights and operating rights currently held by Conrail on CSX that provide

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[2] The AK Steel Comments were filed in two versions, AKSC-6 (Highly Confidential) and AKSC-7 (Public/Redacted).

[3] The relief included denial of the relief requested in a related application (Finance Docket No. 33388 (Sub-No. 26)), requesting approval of the transfer of Conrail's 50% ownership interest in the Lakefront Dock and Railroad Terminal Company ("LDRT"). CSXT already owns the other 50% interest in LDRT.

access to the Toledo Dock facilities." Applicants represent that they will enter into further agreements and actions necessary to provide for this access. However, Applicants still seek approval of the related application for transfer of Conrail's 50% interest in LDRT to CSX, instead of transferring it to NS.

AK Steel acknowledges the representations by the applicants regarding their intentions to transfer all of Conrail's trackage and operating rights at the Toledo Docks to NS. However, there is still an ambiguity created by the apparent effect of the definitive documentation applicable to this transaction, an ambiguity that initially led to a disagreement between NS and CSX regarding its effect on the disposition of Conrail's rights at the Toledo Docks. AK Steel therefore requests the imposition of a condition that requires Applicants to honor all amendments, clarifications, and modifications of the definitive documentation made on the record of this proceeding. A similar condition was imposed by the Board in the recent UP/SP proceeding.

AK Steel again requests denial of approval of the related application. The operating agreements that give Conrail rights to access and use the Toledo Docks facilities expire in the near future. The history of the Toledo docks over the last two decades shows that it has clearly been Conrail's 50% ownership interest in LDRT that has given it both the economic motivation and the legal leverage to obtain the equal right of access with CSX to those facilities. Unless NS also has the 50% ownership interest in LDRT, it will have little if any interest in continuing to provide a competitive alternative to CSX at the Toledo Docks.

II. IDENTITY AND INTEREST OF AK STEEL CORPORATION

AK Steel Corporation is an integrated producer of iron and steel with headquarters in Middletown, Ohio. AK Steel operates two facilities for the production of iron and steel that require the use and availability of iron ore; one at Middletown, Ohio, and the other at Ashland, Kentucky. The facility at Middletown is served today by rail lines operated by CSX and CR. The CR line, which is part of the line from

Columbus to Cincinnati, Ohio, is proposed to be assigned to NSR for operation and control. App. Vol. 8B at 100. This means that the Middletown plant will continue to have two-carrier competition. However, AK Steel is heavily reliant for its operations on the use of iron ore obtained from the region around the upper Great Lakes and similar areas. Much of that iron ore can be and is transported via lake vessel to lower lake ports for further movement beyond by rail to Middletown and Ashland. At the present time, all of AK Steel's iron ore moving by lake vessel moves over dock facilities at Toledo, Ohio. Iron ore moving through Toledo is presently transported by CSX to both Middletown and Ashland.

III. CONRAIL CLEARLY HAS A RIGHT TO ACCESS AND USE THE TOLEDO DOCKS

At the present time, there are two major dock facilities near Toledo, Ohio, that will be affected by the proposed transaction, the Presque Isle dock, used to handle coal shipments, and the Lakefront Dock, now used to handle iron ore. As described in detail in AK Steel's Comments, at 3-6 and in the Applicants' Rebuttal Narrative, CSX/NS-176, at 68-70, there are a series of related agreements and arrangements, and ownership interests, that allow Conrail both full access to and use of both docks. Because Applicants agree that Conrail has such rights today, this detailed description will not be repeated here. However, it is important for the Board to have in mind that two of the more important agreements that grant Conrail its access rights expire in the near future.

.[4] As stated in AK Steel's Comments at 6, and as acknowledged by Applicants, Rebuttal Narrative at 71-72, CSX is also under a contractual obligation to AK Steel to maintain equal access to the TORCO facility for Conrail.

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4 Applicants' Rebuttal Appendix, CSX/NS-178, Vol. 3B at 199, 224, and 250, 280, respectively.

IV. APPLICANTS NOW CONCEDE THAT THE PROPOSED TRANSACTION SHOULD AND WILL ALLOW NORFOLK SOUTHERN TO ACCESS AND USE THE TOLEDO DOCKS

In its Comments, AK Steel detailed the apparent effect of the transaction in depriving NSR of the right to inherit Conrail's rights of access and use of the Toledo Docks. Comments at 6-10. The principal negotiators of the division of Conrail's assets for CSX and NS disagreed on the effect of the transaction on those rights. *Id.*

However, Applicants have now agreed that the transaction, if approved by the Board, will be implemented in such a manner "that NS will obtain all trackage rights and operating rights currently held by Conrail on CSX that provide access to the Toledo Docks facilities." Rebuttal Narrative at 70. However, such implementation will, according to Applicants, require them to "enter into further agreements" or make other arrangements to fulfill their expressed intentions. *Id.* at 71. Those agreements or arrangements have not been presented on the record of this proceeding for review by affected parties, such as AK Steel, and for approval by the Board.

The ambiguity and incomplete state of the arrangements for protecting NS' access to the Toledo Docks, notwithstanding the concessions made by Applicants, requires action by the Board to ensure that those arrangements are completed as required. In a similar situation, the Board explicitly required the Applicants in *Union Pacific Corp., et al. — Control and Merger — Southern Pacific Rail Corp., et al,* (Finance docket No. 32760) ("*UP/SP*") to honor all amendments, clarifications, modifications and extensions of their various agreements that had been made on the record. *UP/SP,* Decision 44 at 145, n.177 and 226, n.277. Similar action is required here.

V. APPLICANTS STILL SEEK APPROVAL OF THE TRANSFER OF CONRAIL'S OWNERSHIP INTERESTS IN THE TOLEDO DOCKS TO CSX INSTEAD OF NORFOLK SOUTHERN

Notwithstanding the concession that NS will have the right, upon implementation of the transaction to access and use the Toledo Docks, Applicants are still seeking approval of a related application included with the principal application that involves the Toledo Docks situation. Applicants are seeking approval of their agreement to transfer CR's 50% ownership of the LDRT to be transferred to CSXT (which already owns the other 50%) and for CSXT to exercise complete control of LDRT. Finance Docket No. 33388 (Sub-No. 26) *CSX Corp. et al. — Control — The Lakefront Dock and Railroad Terminal Company.* App. Vol. 5, at 464-486.

It should be clear, from referring to the two operating agreements, that Conrail's ability to obtain

arose directly from its 50% ownership interest in LDRT. Conrail obviously had a strong interest in protecting its right to access and use its own investment in part of the Toledo Docks by negotiating and entering into an agreement with CSX that protected that interest. Those agreements, as Applicants now acknowledge, are the primary basis for ensuring that shippers, such as AK Steel, have the benefits of competitive rail services to and from those facilities.

However, when the two operating agreements expire, and if NS no longer has an ownership interest in the Toledo Docks facilities (assuming the related application is approved), then it will have no motivation to protect the rights of access that guarantee competitive rail service at the Toledo Docks. This is another example of the fact that,

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5 Applicants' Rebuttal Appendix, CSX/NS-178, Vol. 3B at 199, 202, and 250, 258-59, respectively.

when considering whether to approve this transaction (including any related applications) the Board must not only consider current circumstances, but it must also consider the effect of its approval on the future availability of competitive rail service. therefore, in order to preserve the availability of competitive rail service at the Toledo Docks in the future, NS should obtain not only Conrail's present access and use rights, but Conrail's ownership interest. NS will thereby have both the ability and the motivation to ensure the continuation of competitive rail service at the Toledo Docks.

VI. STANDARDS FOR RELIEF

As the Board's policy statement on rail consolidation applications explicitly acknowledges, any elimination of the only remaining rail competitor by a proposed transaction is a significant element of competitive harm that must be addressed. 49 C.F.R. §1180.1(c)(2)(i). Specifically, the Board has come to focus in many recent cases on the so-called "2-to-1" shippers. In *UP/SP,* the Board focused primarily on the need to prevent loss of competition at points where the available rail competitive alternatives would be reduced from two to one. *See UP/SP* at 98-103. The Board was concerned, in the general context of preserving existing competition, with protecting future competitive alternatives, such as new facilities, build-ins and build-outs and new transloading facilities. *Id.* at 122. In that proceeding the Board modified certain proposed agreements to ensure that such future competitive alternatives were protected. *Id.* at 145-46. Similar action is required here.

In summary, the Toledo Docks is clearly a 2-to-1 point used by shippers such as AK Steel that still could lose a competitive alternative in the future as a result of the proposed transaction. For this reason, it is necessary for the Board to provide appropriate relief to prevent this competitive harm.

VII. REQUESTED RELIEF

In order to remove the competitive harm caused by this transaction, specifically, the elimination of potential future competitive alternatives available to AK Steel for the movement of iron ore from the Toledo Docks, the following specific relief should be granted:

1. A condition directing Applicants to implement promptly their commitments to enter into all necessary ancillary agreements under the provisions of the agreement in Exhibit PP to the Transaction Agreement, so that all of the various rights granted to CR relating to the Toledo Docks, will be vested in and assigned to NSR, including, without limitation, the 1932 Puller Service Agreement (as amended), the 1946 trackage rights agreement with LDRT approved by the ICC, the 1980 Toledo Docks Operating Agreement and the 1984 TORCO Operating Agreement, and any other disclosed and undisclosed agreements relating to the ownership, use, access, management or any other aspect of the Toledo Docks.

2. An order disapproving the related application in Finance Docket No. 33388 (Sub-No. 26), and directing that this related application be amended to provide for the transfer of CR's 50% ownership to NS or NSR.

VIII. CONCLUSION

In view of all of the foregoing considerations, the proposed transaction in this proceeding should not be approved by the Surface Transportation Board, unless it is subject to the conditions and other relief described above.

Respectfully submitted,

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Date: February 23, 1998

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing BRIEF ON BEHALF OF AK STEEL CORPORATION has been caused to be served by first class mail, postage prepaid, on all parties of record in this proceeding this 23rd day of February, 1998.

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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

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BRIEF OF

NIAGARA MOHAWK POWER CORPORATION

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CSX CORPORATION AND CSX TRANSPORTATION, INC.,
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—CONTROL AND OPERATING LEASES/AGREEMENTS—

CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION

**BRIEF OF
NIAGARA MOHAWK POWER CORPORATION**

Niagara Mohawk Power Corporation ("NIMO") hereby files its Brief in support of its Comments, Evidence and Request for Conditions (NIMO-6)[1] ("Comments") filed in this proceeding on October 21, 1997. The evidence filed by NIMO established that the proposed acquisition of Conrail, Inc. and Consolidated Rail Corporation ("Conrail") by CSX Corporation and CSX Transportation, Inc. ("CSX") and Norfolk Southern Corporation and Norfolk Southern Railway Company ("NS") will cause serious competitive harm to occur to two of NIMO's coal-fired electricity generating facilities, the C.R. Huntley Station ("Huntley Station") and the Dunkirk Steam Station ("Dunkirk Station"). The conditions requested by NIMO in its October filing would prevent the occurrence of such harm and must be imposed by the Surface Transportation Board ("STB" or "Board").[2]

1 NIMO-6 represents the highly confidential version of NIMO's Comments, Evidence and Request for Conditions. The designation of NIMO-7 was used for NIMO's public version of the same.

2 NIMO is also a member of the Erie-Niagara Rail Steering Committee and supports each aspect of the relief requested by that organization in this proceeding because such relief would alleviate the anticompetitive effects of the proposed transaction with respect to NIMO.

I. INTRODUCTION

NIMO is an investor owned electric utility that is engaged in the generation, transmission and distribution of electricity. NIMO is a retail seller of electricity to communities in upstate New York and also participates in the wholesale power market as a participant in the New York Power Pool.[3] NIMO's Huntley Station is located in Tonawanda, New York which is several miles north of the City of Buffalo. Its Dunkirk Station is located in Dunkirk, New York, which is southwest of Buffalo. A detailed description of the operations at NIMO's Huntley and Dunkirk Stations as well as the current transportation service and competitive options available at the stations was set forth in NIMO's October 21 Comments and will not be repeated here.

The Applicants have failed to rebut the substantial evidence submitted by NIMO that shows that the proposed acquisition and division of Conrail by CSX and NS will have a seriously adverse impact on NIMO's Huntley and Dunkirk Stations. They have not disproved (because they cannot) the compelling testimony provided by NIMO's witnesses that shows that NIMO's facilities, which will be captive to CSX under the proposed transaction, will be competitively disadvantaged *vis-a-vis* plants of competing utilities located in the proposed Shared Assets Areas of Detroit and Southern New Jersey/Philadelphia, as a direct result of the transaction.

The Applicants have attempted, without success, to respond to NIMO's case by mischaracterizing the degree and effect of vessel and truck transportation of coal that is available to NIMO under limited circumstances. They have also tried to discredit NIMO's case by overstating the potential benefits that may (or may not) accrue to NIMO under their proposal to acquire Conrail. Finally, the Applicants submit rebuttal testimony from a prior supporting witness in their case to respond to NIMO's valid claims of competitive harm; however, such rebuttal testimony is comprised of inconsistencies, contradictions, and speculation.

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3 The NYPP operates within the Northeast Power Coordinating Council power pool ("NPCC").

Accordingly, NIMO respectfully reasserts its requests to the Board to exercise its authority under 49 U.S.C. § 11324, to impose conditions governing the transaction that will ameliorate the competitive harm that will occur to NIMO, as discussed herein and described more fully in NIMO's Comments submitted on October 21.

II. THE APPLICANTS HAVE FAILED TO REFUTE NIMO'S EVIDENCE THAT SHOWS THAT NIMO WILL SUFFER SUBSTANTIAL COMPETITIVE HARM AS A RESULT OF THE PROPOSED TRANSACTION

A. NIMO Will Be Harmed Vis-A-Vis Other Utilities That Will Receive Head-to-Head Rail Competition

NIMO submitted substantial evidence to the Board that shows that the proposed transaction will cause NIMO competitive harm. NIMO's two coal-fired stations receive the vast majority of their coal shipments by rail.[4] Under the proposed transaction, both of NIMO's coal fired stations will be captive to CSX for rail deliveries of coal. CSX will in essence step into Conrail's shoes as the sole provider of rail service. As explained by NIMO's witness G.W. Fauth III, a transportation consultant with more than twenty-five years experience, under the transaction NIMO can expect to incur rate increases for the substantial amount of coal deliveries it receives by rail. NIMO-6, Fauth V.S. at 6-7, 33, 48-49. An increase in NIMO's rates will result from NIMO's captive status coupled with the Applicants' natural desire and motivation to off-set the unprecedented acquisition premium that has been paid by CSX and NS for Conrail. *Id.* At the same time, NIMO's competitors located in the regions of Detroit and South Jersey/Philadelphia, which have been designated as "Shared Assets Areas" by the Applicants, will receive head-to-head

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[4] While both the Huntley and Dunkirk Stations can receive limited amounts of coal by vessel, this alternative is severely restricted due to weather, vessel availability, and a variety of other factors. NIMO-6, Bonnie V.S. at 8-10. Thus, vessel transportation is not and has never served as a viable competitive coal transportation alternative for NIMO. *Id.*; Fauth V.S. at 29-30. The evidence submitted by NIMO supports this fact. An analysis performed by NIMO's witness Mr. Fauth showed that vessel transportation of coal to NIMO's stations has not served to discipline Conrail's rail rates. Mr. Fauth's analysis demonstrated that, in 1995, Conrail moved of NIMO's coal requirements, which movements generated an average revenue-to-variable cost ratio that was well in excess of the existing market dominance statutory threshold of 180% R/VC. Fauth V.S. at 29-30.

rail competition. The increased competition in these areas can be expected to result in rate decreases for utilities receiving coal deliveries by rail. Fauth V.S. at 38, 49.

NIMO's ability to compete effectively with utilities located in the Shared Assets Areas will be hampered seriously by the proposed transaction, not only because its competitors delivered fuel costs will decrease (while NIMO's will increase), but also because the decrease in rail revenues to CSX that will result from the increase in competition in the Shared Assets Areas will create an even greater incentive for CSX to increase the rates of captive shippers, such as NIMO. As transportation costs comprise as much as one-third of NIMO's delivered coal costs, rail rates have a significant impact on the competitiveness of the Huntley and Dunkirk Stations relative to other northeastern and midwestern power plants. NIMO-6, Leuthauser/Mathis V.S. at 4.

Moreover, NIMO has demonstrated that the harm it will suffer can be expected to worsen over time. This is because ongoing federal and state restructuring of the electric utility industry is expected to further increase competition between electric utilities located in different regions, particularly with respect to wholesale power transactions. Leuthauser/Mathis V.S. at 9-12. By vastly improving the competitive position of electric utilities located in the Shared Assets Areas, by affording such companies direct rail service by two Class I carriers, NIMO's coal plants that will remain captive to CSX will be competitively disadvantaged.

The Applicants have asserted that the competitive harm raised by NIMO is not the kind of harm that the Board may remedy under its conditioning power because it is "preexisting." Rebuttal Vol. 1, at 445. As support for their assertion, the Applicants rely on a prior decision of the agency which addressed a merger between only tv Class I rail carriers, and which set forth the general statement that "A condition must ddress an effect of the transaction. We will not impose conditions 'to ameliorate longstanding problems which were not created by the merger,' nor will we impose conditions that 'are in no way related either directly or indirectly to the involved merger.'" Rebuttal Vol. 1, at 119, citing, *UP/SP* at 145.[5]

However, the harm described by NIMO <u>would</u> be caused directly by the transaction. NIMO is seeking to redress the harm that it would suffer solely because of the Applicants' proposal to create Shared Assets Areas in three major areas within the northeastern and midwestern United States. It is specific action by the Applicants that will significantly worsen NIMO's competitive standing vis-a-vis its competitors located in those areas. Moreover, the anticipated rate increases that NIMO seeks to avoid would result from the unprecedented acquisition premium paid by the Applicants and from the carriers' incentive to recoup from the remaining captive shippers revenue which will be lost due to the increased head-to-head competition established elsewhere by the Applicants.[6] In other words, "but-for" the Applicants' acquisition proposal, NIMO's ability to compete with utilities located in other major markets in the northeast and midwest would not be substantially altered to NIMO's detriment.

The statutory provisions that set forth the standards and authority of the Board related to the approval of rail consolidations do not, on their face, restrict the Board from remedying the harm that NIMO will suffer. 49 U.S.C. § 11324. The Board maintains the discretion to apply its broad conditioning power to mitigate competitive harm in a manner that the Board determines is justified to serve the public interest. Moreover, the Board is not constrained in this case by prior agency decisions that arguably do not apply, because they address a different set of circumstances where one Class I rail carrier mergers with only one other Class I rail carrier.[7] By the Applicants

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5 *UP/SP* refers to *Union Pacific Corporation, et al. -- Control and Merger -- Southern Pacific Transportation Company, et al.* Finance Docket No. 32760, Decision No. 44 (1996).

6 As its response to the Applicants' rebuttal concerning the impact of the acquisition premium paid by CSX and NS for Conrail, NIMO hereby adopts and incorporates the arguments set forth in the Brief of the Erie-Niagara Rail Steering Committee (ENRS-19).

7 Neither is the Board constrained by prior statements of policy because "A general statement of policy . . . does not establish a 'binding norm.'" *American Bus Ass'n v. United States,* 627 F.2d 525, 529 (D.C. Cir. 1980).

own admission, this transaction presents a unique situation where two Class I railroads have proposed to acquire and divide the assets of a third rail carrier. The effect of the proposal will be to re-define substantially the scope of rail transportation for the entire northeastern and midwestern United States. Undoubtedly, the instant sweeping proposal justifies non-traditional action by the Board in evaluating and deciding whether the proposal serves the public interest. The bottom line is that the instant proposal differs substantially from the recent merger cases decided by the Board, and those prior cases should not be used to deny appropriate relief to NIMO. The Board clearly maintains the authority to grant the relief requested by NIMO and it should do so.

B. The Applicants Mischaracterize the Level and Effect of Intermodal Competition Available to NIMO

The Applicants contend that NIMO is not entitled to the relief it requests because its Dunkirk and Huntley Stations may receive coal via intermodal rail-lake deliveries and have received coal by truck in the past. To support their assertion, the Applicants grossly distort the impact that the availability of intermodal coal deliveries has had on NIMO's delivered coal prices; they fail to provide the Board with complete information concerning the effect of intermodal deliveries to NIMO's stations; and they present inaccurate and misleading information with respect to NIMO's relationship with Conrail.

In its October filing, NIMO described its current coal transportation service and options, including its limited access to vessel deliveries of coal at its Dunkirk and Huntley Stations. NIMO-6 at 8-10; Bonnie V.S. at 8-11; Fauth V.S. at 29-30. NIMO explained that while in the past it has received limited amounts of coal by rail-water movements at its stations, its use of terminal facilities on Lake Erie and the Niagara River is limited "by the weather, vessel availability, ice conditions on the Niagara River, unpredictability of the shipping season (start/close) and, in connection the rail-water movements to Huntley, constraints and costs associated with the Black Rock Lock (traffic delays, opening/closing dates, and vessel size restrictions) . . ." Bonnie V.S. at 8. NIMO also presented evidence by Mr. Fauth whose analysis of Conrail's rail service to NIMO's stations showed that:

> There are effectively no alternatives to rail transportation at Huntley. Dunkirk has a viable rail-water option, however, this option is limited and has resulted in little, if any competitive pressure on Conrail. In fact, Conrail's rates on a per-ton mile basis are higher to Dunkirk than to Huntley ( ) and Conrail's profits are higher on movements to Dunkirk ( ).

Fauth V.S. at 29-30.[8] These rate levels are particularly revealing given that NIMO's Huntley Station is located further away from the MGA mines than the Dunkirk Station, and vessel deliveries of coal to the Huntley Station are even more limited than to Dunkirk. In responding to NIMO, the Applicants chose to ignore the facts which show that Conrail's 1995 rates to the Huntley and Dunkirk Stations do not support their claim that "NIMO has employed intermodal competition to achieve competitive rail rates." Rebuttal Vol. 2B, Sansom R.V.S. at 42.

1. <u>The Applicants Present Misleading Evidence</u>

The Applicants' witness, Mr. Sansom, presented incomplete and misleading data in an effort to embellish the Applicants' point regarding intermodal transportation service to NIMO's stations. Mr. Sansom included a chart in his rebuttal testimony that depicts NIMO's Dunkirk and Huntley plants as the lowest and fourth lowest cost plants "in the Northeast." He seemingly attributed NIMO's low cost plants as being the product of "the benefits of intermodal options at Huntley and Dunkirk." Sansom Rebuttal R.V.S. at 43. Mr. Sansom's testimony on this issue, which is limited to the year 1996, disregarded a host of other factors and market conditions that more likely are the reasons for the low cost status of NIMO's plants in that year, rather than the availability of limited vessel deliveries of coal. For example, in 1996 NIMO executed a new coal

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8 *See also* NIMO-11, Supplemental Errata to NIMO-6, filed on December 1, 1997.

contract with its major supplier, Consolidation Coal Company ("Consol"), to obtain coal on a delivered price basis. Sansom R.V.S. at 42. Not only did NIMO not have a separate transportation contract with Conrail in that year (that would have enabled the Applicants' witness to analyze Conrail's transportation rates to NIMO's stations) but neither was Conrail (or any other Applicant) involved in NIMO's contract negotiations with Consol. Thus, the Applicants had no basis to conclude that NIMO's limited intermodal transportation options served to discipline Conrail's rates during that time frame.[9]

Mr. Sansom's testimony on NIMO's delivered coal prices is also inaccurate because he presented an incomplete comparison: he focused only on a single year (1996); he limited his comparison to only two (2) power pools and fourteen (14) other power plants; and he ignored the geographic proximity between MGA coal mines and the various power plants, among other factors, that could impact the data presented.

Factors that impact a utility's delivered coal prices can fluctuate substantially from year to year. For example, a fluctuation in the market price of coal and/or the expiration of coal supply or coal transportation contracts in any given year could severely alter the conclusions presented by Mr. Sansom. By relying solely on data for the year 1996, Mr. Sansom presented a deficient picture to the Board.

In addition, in his initial verified statement to the Board provided in support of the primary application, Mr. Sansom defined the electric utility market in the "northeast" that is served by Conrail in terms of the three major power pools. Mr. Sansom specifically referred to power plants located in the PJM Pool, ECAR, and the NPCC (which includes the New York Power Pool "NYPOOL"). CSX/NS 19, Vol. 2A, at 316-318, 342 (Exhibit 3). Yet, when comparing NIMO's delivered coal prices with other various utilities, Mr. Sansom concentrated his analysis only on the NYPOOL and

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[9] Moreover, the Applicants' premise is further tarnished by the fact that Conrail's transportation rates to NIMO's stations in 1995 were high enough to generate an average revenue to variable cost of at least Fauth V.S. at 27; NIMO-11, Supplemental Errata to NIMO-6, filed on December 1, 1997.

NEPOOL (two power pools within NPCC) and concluded that NIMO's costs are the lowest and fourth lowest "in the northeast." By further restricting his analysis in this manner Mr. Sansom failed to present an accurate picture of delivered coal prices to utilities located "in the Northeast," based upon his own definition of that region.

Mr. Sansom ignored a variety of other factors which could contribute to NIMO's plants being lower in cost. He failed to mention that NIMO's Dunkirk Station is closer in proximity to MGA mines than most other power plants, particularly those located in NEPOOL. This closer geographic location shortens the transportation haul, which can lead to lower transportation costs and, ultimately, lower delivered prices. His comparison also assumed that all plants are equal in size and in coal requirements but, of course, they are not. He compared NIMO's Huntley and Dunkirk plants, which have capacities of 740 MW and 593 MW respectively, with plants that have much smaller capacities and coal requirements. For example, Rochester Gas & Electric's Russell plant has only 260 MW capacity and receives approximately only 650,000 tons of coal annually. RG&E-1, at 1; NIMO-6, Leuthauser/Mathis V.S. (Table 1).[10]

Mr. Sansom set forth another chart in his rebuttal testimony that purported to show "NIMO's Delivered Coal Prices and Sulfur Coal Quality" for the years 1990 through 1996 and for the period January through August 1997. Sansom R.V.S. at 48. Based upon this chart derived form FERC From 423 data, Mr. Sansom postulated that NIMO's delivered coal costs have decreased while its coal quality has increased, again inferring that this change is the effect of intermodal competition. But based upon Mr. Sansom's own chart, the data shown for the most recent period of January through August 1997, show a reversal in this trend, with an increase in the delivered coal price (from 129.06 to 130.80 cents/MMBtu). And again, Mr. Sansom neglected to consider other geographic and market factors that could influence these data. The fact is that Mr.

10 Moreover, a utility by utility comparison, rather than a plant by plant comparison, can lead to different results. Dunkirk's costs are shown by Mr. Sansom as being lower than NYSEG's Kintigh station in the chart (123 versus 126 cents/MMBtu Delivered) but NYSEG's total average cost is lower than NIMO's total (127 versus 128 cents/MMBtu Delivered). Sansom R.V.S. at 43.

Sansom's insinuation that NIMO's plants are lower in cost because of intermodal competition is at best misleading.

Finally, the Applicants' statement that "the principal reason that Huntley has stopped receiving coal by lake vessel and by truck is that their intermodal competition has induced Conrail to enter into more favorable contracts with NIMO" is wrong. Rebuttal Vol. 1, at 446. As noted above, since 1996, NIMO has not entered into a separate long-term transportation contract with Conrail but has undertaken to obtain coal from its primary suppliers on a delivered cost basis.

2. The Applicants Have Withheld Relevant Information

As further support for their claim that vessel deliveries of coal have disciplined Conrail's transportation rates, the Applicants' referred to a February 25, 1993 Project, Report which was produced to the Applicants by NIMO in response to Applicants' discovery requests, and which addressed a proposal by NIMO to construct a coal boat docking facility at the Dunkirk Station ("Dock Report"). Sansom R.V.S. at 42; Vol. 1 Rebuttal at 446. The Applicants relied on certain assumptions and statements included in the Dock Report that related to reported costs savings at NIMO's Huntley Station due to vessel deliveries of coal and projected additional cost savings that could potentially be achieved at Dunkirk by introducing vessel deliveries.

However, in presenting this information in their rebuttal evidence, the Applicants failed to include other information that was provided to them by NIMO simultaneously with the production of the Dock Report. This information showed that the Dock Report was prepared for the limited purpose of justifying the subject capital improvements and related expenditures at the Dunkirk Station and was based upon certain assumptions and information that were later found to be inaccurate.[11] As

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[11] NIMO presented this additional information in its Response to the Applicants' Interrogatory Number 14 as set forth in NIMO's Highly Confidential Responses to the First Set of Interrogatories and Requests for Production of Documents of CSX Corporation and CSX Transportation, Inc. (NIMO-9). In order to provide the Board with full and complete information concerning the Dock Report, and to ensure an accurate record is maintained in this proceeding, a copy of this Interrogatory Response is attached hereto as Exhibit 1.

detailed in NIMO's discovery response to the Applicants, the projected "savings" set forth in the Dock Report associated with coal deliveries to the Dunkirk Station were based upon faulty assumptions and unique circumstances that existed at the time of preparation of the report, and such savings did not materialize as predicted with respect to rail deliveries of coal to the Dunkirk Station. NIMO further informed the Applicants that:

See Exhibit 1. The Applicants were also apprised by NIMO that the limited cost savings that may have accrued at NIMO's Huntley Station during the early 1990s and the projected costs savings for the Dunkirk Station were largely based upon spot market prices of coal that existed at that time, and unique contracts with certain coal suppliers. *Id.* The Applicants' failure to present this highly relevant information to the Board casts serious doubt on their credibility.

3. <u>Other Evidence Presented By the Applicants is Not Credible</u>

The Applicants' witness, Mr. Sansom, has alleged in his rebuttal statement that NIMO's witness, Mr. James Bonnie, has mischaracterized certain facts related to seasonal burns at its Huntley Station, the winter lake shipping season, and NIMO's inventory needs. Sansom R.V.S. at 45-46. But a review of Mr. Sansom's own data reveals that it is he who lacks credibility. At page 46 of his rebuttal testimony, Mr. Sansom sets forth a chart of "Huntley Coal Burns (Tons)" that includes data from FERC Form 759 for the years 1996 and 1997. Mr. Sansom asserted that the data in this chart contradict NIMO's testimony that "burn requirements are higher in the winter months . . . because of the winter energy peak demand." Bonnie V.S. at 9. However, Mr. Sansom defines the "Winter Period" in his chart as "Jan-Mar." NIMO's plants, however, service communities in upstate New York, where the winter peak period clearly commences prior to January. Mr. Sansom's own work papers (attached hereto as Exhibit 2)[12] appear to confirm this fact, as they show a strong coal burn at NIMO's Huntley Station for December 1996.[13] Furthermore, because several other factors, such as the shutting down of generating units due to mechanical breakdowns or unusual weather patters, could influence the level of coal burn at NIMO's Huntley Station in any given year, the "snap-shot" approach employed by the Applicants to show coal burns for only 1996 and 1997 is likewise misleading.

The Applicants also attempt to disparage Mr. Bonnie by disputing his testimony as to the open and close dates of Black Rock Lock in the winter.[14] Putting aside the pettiness of the Applicants' assertions, the Applicants overlook the primary point being made by Mr. Bonnie, which was that there are a variety of factors that limit the availability of vessel coal deliveries to the Huntley Station. With respect to Black Rock Lock itself, Mr. Bonnie testified that factors such as traffic delays, weather, and vessel availability and size restrictions in the Black Rock Channel, can restrict NIMO's use of vessel coal deliveries to its Huntley Station. Bonnie V.S. at 8-9. The effect of any one of these factors can vary from year to year. Consequently, because NIMO cannot predict which of any one of these factors may adversely impact vessel deliveries to its Huntley Station, NIMO is always required to "plan for the worst" to ensure that it will receive and store a sufficient amount of coal that will be needed during the peak winter season. Thus, Mr. Bonnie's statements that "[f]or practical purposes, rail-vessel movements to Huntley are foreclosed to NIMO after early December each year . . ." and that "NIMO

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12 CSX 86 P 000104.

13 December 1997 data are not included in Mr. Sansom's chart or work papers obviously because such data were not available at the time he prepared his rebuttal statement.

14 Black Lock Rock is located where Lake Erie drains into the Niagara River. It serves to provide a protected waterway for vessels around the fast current and rapids that exist near the mouth of the Niagara River. Fauth V.S. at 13.

can schedule rail-water movements of coal to Huntley only seven to eight months out of the year" are correct. Bonnie V.S. at 9.

4. <u>The Applicants' Assertions Regarding Truck Competition Are Also Misleading</u>

Finally, the Applicants' claim that NIMO relies upon truck shipments to discipline Conrail's rates is erroneous. Truck shipments to the Dunkirk Station in 1996 were nominal (only 29,301 tons) and there were no truck shipments to the Huntley Station in 1995, 1996, or 1997. Bonnie V.S. at 6-7. Also, the Applicants themselves admit that the economics of trucked coal make this a less viable option for NIMO. Sansom R.V.S. at 47. Thus, trucking coal to NIMO's stations is hardly the "vibrant" delivery option espoused by the Applicants.

C. <u>The Applicants' Claim that NIMO Will Benefit from the Transaction Is Faulty</u>

Another reason provided by the Applicants for denying the relief sought by NIMO is that NIMO's situation will be improved by the transaction. The benefits that the Applicants allege will accrue to NIMO are increased competition between NS and CSX in the transport of Pittsburgh seam coal to the lake at Ashtabula, Ohio and access to single line CSX coal deliveries of Northern (B&O) and Central Appalachia coal. Sansom R.V.S. at 44-45. As NIMO has already established, these supposed benefits will never be realized or are too speculative to warrant a denial of NIMO's requested relief.

In its Comments, NIMO's witnesses, Mr. Fauth and Mr. Bonnie, set forth a number of reasons as to why NIMO would not be able to take advantage of any increased competition between CSX and NS at Ashtabula. Fauth V.S. at 17, 35; Bonnie V.S. at 15-16. One reason is that CSX controls the destination at both the Dunkirk and Huntley Stations and will be motivated to protect its long haul movements to the stations. Thus, it can be expected that CSX would not be willing to compete aggressively against itself by quoting competitive rates to Ashtabula. Fauth V.S. at 35.

It is also pure speculation on the Applicants' part that NS will price its movements to Ashtabula at a level that will be competitive with CSX's long haul rates.

In addition, Mr. Fauth explained that the coal storage capacity at Ashtabula is severely limited; that its coal storage area appears to be landlocked, which would make expansion difficult, if not impossible; and that Ashtabula is already operating near its capacity. Fauth V.S. at 17. Other participants in this case have presented similar evidence on the capacity constraints at Ashtabula. BLE-8, Huston V.S. at 5-7 and Rieland V.S. at 4-6. As further noted by Mr. Bonnie, the capacity constraints at Ashtabula will be heightened by the fact that two Class I railroads will gain access to the Ashtabula harbor, whereas only one major rail carrier serves Ashtabula today. Bonnie V.S. at 15. The Applicants failed to address these important points in responding to NIMO.

Instead, the Applicants sought to challenge NIMO's contention that the above described constraints at Ashtabula will be exacerbated by the anticipated increase in coal shipments through Ashtabula by Ontario Hydro, which intends to increase production at its two coal-fired stations in order to replace capacity lost by the laying up of its seven nuclear facilities. Fauth V.S. at 33. Their specific challenge is to NIMO's claim that CSX and NS can be expected to compete aggressively for Ontario Hydro's increased coal business through Ashtabula. Sansom R.V.S. at 44. The Applicants apparently viewed this claim as inconsistent with NIMO's assertion that it will not receive the benefit of such competition at Ashtabula. The Applicants, however, conveniently overlook a critical distinction between coal deliveries at NIMO's and Ontario Hydro's plants that supports NIMO's contention. The distinction is that neither CSX or NS controls the destination with respect to coal deliveries at Ontario Hydro's plants, whereas CSX solely controls coal deliveries by rail to NIMO's plants. Consequently, CSX will have no incentive to compete aggressively with NS for NIMO's coal shipments through Ashtabula, while CSX will have every incentive to compete vigorously with NS for Ontario Hydro's coal shipments.

As to the purported benefits that the Applicants' allege NIMO will receive from CSX single line service of Northern (B&O) or Central Appalachia coal, they are purely hypothetical in nature and are not a basis for denying NIMO's requested relief. For example, without additional information concerning the commodity price for such coal, the transportation charges related to delivery of the coal, and routing to be selected by CSX there is absolutely no basis by which NIMO can judge the benefits of such CSX service. Compared to NIMO's current coal sources in the MGA region, movements of Northern (B&O) or Central Appalachia coal to NIMO's stations would involve longer transportation movements, with correspondingly higher transportation costs. Thus, if either the coal or transportation price is non-competitive or if the routing selected by CSX is not efficient, the benefit to NIMO, if any, would be minimal.

D. The Applicants Have Failed to Rebut NIMO's Evidence That Shows NIMO's Plants Will Suffer Competitive Harm Under the Transaction

In NIMO's October 21 filing, Scott D. Leuthauser and Michael J. Mathis, two knowledgeable and experienced NIMO managers that concentrate in energy supply and fuel analysis, explained NIMO's generation system, wholesale market activities, and analyzed the competitive impact of the proposed transaction upon NIMO's coal-fired generating stations, under existing conditions in the electric utility industry and under the further anticipated state and federal deregulation of the industry. As recognized by the Applicants' own witness, Mr. Sansom, who was charged to respond to NIMO's evidence, "NIMO Witnesses Leuthauser and Mathis are obviously very knowledgeable on NYPOOL . . . and are aware of the fast-evolving developments toward utility deregulation." Sansom R.V.S. at 51.

Mssrs. Leuthauser and Mathis established that NIMO's Huntley and Dunkirk Stations compete with other power plants on two main fronts— "through NIMO's participation as a member of the New York Power Pool, and through bilateral wholesale power-sales and power-purchase agreements that NIMO negotiates with other utilities." Leuthauser/Mathis V.S. at 2. They further explained that pending federal and state restructuring of the electric industry will very likely increase "the intensity and geographic breadth of competition among individual power plants . . ." *Id.* at 3, 9-11.

Against this backdrop, Mssrs. Leuthauser and Mathis discussed the competitive relationship that exists between NIMO's coal-fired plants and plants located in the Shared Assets Areas, such as Detroit Edison's River Rouge and Trenton plants in Michigan, Philadelphia Electric's Eddystone plant in Pennsylvania, Atlantic City Electric's Deepwater and England plants, and Vineland's H.M. Down plant in New Jersey. *Id.* at 4-6. They explained that competition among power plants is largely based upon short-term variable costs, such as delivered fuel costs. *Id.* They further testified that "rail rates are a significant component in the determination of the level of competitiveness of [NIMO's] Stations relative to other northeastern U.S. power plants." *Id.* at 4. In analyzing the Applicants' proposal to create the Shared Assets Areas, they determined that NIMO's power plants which lack rail competition would suffer competitive harm, due to the fact that plants in the Shared Assets Areas will most likely obtain a reduction in their short-term variable costs by gaining head-to-head rail competition between CSX and NS. *Id.* at 5-6.

Mssrs. Leuthauser and Mathis also explained that "NIMO has historically carried on a significant amount of wholesale energy transactions, both with other utilities who are members of NYPP, and with utilities in surrounding states and in Canada." *Id.* at 6 (emphasis added). They emphasized that wholesale sales of power are directly tied to the utility's costs, with the lowest cost utilities being able to maximize such sales. *Id.* at 7. These witnesses also established that NIMO engages in bilateral sales agreements with other utilities in which NIMO acts as a buyer or a seller (*Id.* at 8) and that such sales covered a region "south to Virginia, north to Ontario and Quebec, east to the Atlantic coastline, and west to Ohio." *Id.* Finally, they clarified that NIMO's potential market area within which NIMO may compete for bilateral energy sales extends well beyond that region because of NIMO's interconnections with other utilities by means of an extensive electrical grid." *Id.*

After acknowledging the knowledge and experience of NIMO's witnesses, Mr. Sansom attempts to discredit their testimony by calling it "incomplete" and disputing whether NIMO's plants actually compete with other plants that are located in the designated Shared Assets Areas of Detroit and Philadelphia/South Jersey. But it is Mr. Sansom's rebuttal statement with respect to NIMO that is contradictory and misleading.

Mr. Sansom's primary argument appears to be that NIMO's plants do not compete with the plants located in the Shared Assets Areas. Sansom R.V.S. at 54. With respect to Detroit Edison's power plants, Mr. Sansom admits that these plants share similar variable costs as NIMO's plants (as Mssrs. Leuthauser and Mathis testified), but he then alleged that they cannot compete because they are in different power pools. *Id.* However, earlier in his testimony Mr. Sansom contradicted this very point by recognizing the large magnitude of energy transfers that can and do exist between plants located in neighboring power pools. Sansom R.V.S. at 41, 53. As testified to by Mssrs. Leuthauser and Mathis, the operational separation of power pools clearly does not prevent large bilateral energy transfers from crossing neighboring power pool transmission systems via bilateral agreements. Leuthauser/Mathis V.S. at 8. The reality is that NIMO's plants do compete with generating plants in neighboring power pools precisely in this manner.

Mr. Sansom also challenged NIMO's argument that NIMO and Detroit Edison may be in competition for potential wholesale sales of power to Ontario Hydro, and that the transaction will elevate Detroit Edison's competitive stance vis-a-vis NIMO's plants. Leuthauser/Mathis V.S. at 9. Mr. Sansom asserted that NIMO is normally not a power seller to Ontario Hydro but a power buyer, that "it is unlikely Dunkirk and Huntley can find a power market to the west in Canada that has a higher value . . .", and that "Canadian consumers will be better served to buy ECAR power and wheel it into NYPOOL (NIMO)." Sansom R.V.S. at 41. The facts are, however, that NIMO is connected to Ontario Hydro's grid (as Mr. Sansom readily admits on page 54 of his R.V.S.), as is Detroit Edison; that both NIMO and Detroit Edison may transfer approximately 2,000 MW of power with Ontario Hydro; and that NIMO has engaged routinely in wholesale energy transactions with Ontario Hydro as a seller in the past.[15] Leuthauser/Mathis V.S. at 8-9; Exhibit 3. Thus, a careful review of Mr. Sansom's statements demonstrate that such statements actually support NIMO's position that a further lowering of the variable costs of Detroit Edison's plants (which participate in ECAR) will only ensure that NIMO's plants are non-competitive in power sales to Ontario Hydro.

As to competition between NIMO and other power plants located in the PJM power pool (which covers Pennsylvania, New Jersey, and Maryland), Mr. Sansom pointed to the fact that the PJM plants currently have higher variable generation costs than NIMO's plants, which would make NIMO's plants more competitive. Sansom R.V.S. at 52. This fact, however, was readily admitted by Mssrs. Leuthauser and Mathis. Leuthauser/Mathis V.S. at 6. Mr. Sansom, however, fails to respond to their main point to the Board which was that "head-to-head competition between CSX and NS at [PJM] plants is likely to exert downward pressure on the railroads' margins to gain or retain business at [these plants]" which, in turn, will "have the effect of lowering delivered coal costs, thereby making these plants more competitive vis-a-vis . . . NIMO's Dunkirk and Huntley plants, which will not enjoy similar direct rail competition." *Id.*

Finally, Mr. Sansom claimed that NIMO's plants do not compete with PJM plants because even though NYPOOL and PJM are connected "power moves from PJM to NYPOOL . . ." Sansom R.V.S. at 53. His testimony included a chart that shows scheduled power moves between PJM and NYPOOL for the years 1994 through 1996 that were apparently accumulated from FERC Form 714 data. Mr. Sansom made the

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15 NIMO produced documents to the Applicants in response to their discovery requests that expressly showed NIMO power "sales for resale" for the years 1995, 1996, and part of 1997. NIMO's data—which were in Applicants' possession prior to the filing of their rebuttal evidence—plainly show sales of wholesale power by NIMO to Ontario Hydro on a number of occasions. NIMO is attaching the data produced to the Applicants as Exhibit 3 (NIMO HC 000536-540).

further point that his chart shows that there were "0" scheduled power interchanges from NYPOOL to PJM in 1996. Sansom R.V.S. at 53. However, these data are wholly misleading, as NIMO produced information to the Applicants in response to their discovery that expressly revealed that in 1996, NIMO (a member of NYPOOL) sold wholesale power to a number of utilities that are members of PJM. Exhibit 3. In fact, these data show that such sales by NIMO were commonplace since, in some cases, power sales were made by NIMO to the same entity in every single month of 1996.

E. The Applicants' Arguments Regarding Mine 84 Are Baseless

In its Comments, NIMO expressed its concern that the proposed transaction would cause harm to Mine 84, which is and has been a supplier of low-sulfur coal to NIMO's Huntley plant. Bonnie V.S. at 16. NIMO's concern relates to the loss of single-line service rail from Mine 84 to NIMO's Huntley and Dunkirk Stations that will occur as a result of the transaction. Under the transaction, Mine 84 will be sole served by NS; thus, movements to NIMO's stations, which will be sole served by CSX, will require a switch from NS to CSX. In order for CSX to protect its long haul movements of coal to NIMO's stations, it can be expected that CSX will impose a high switching charge on Mine 84 coal movements as a means of encouraging NIMO to take coal from mines that are served directly by CSX.

The Applicants attempt to discredit NIMO's contention that Mine 84 is an important coal supplier by presenting data that reveal that NIMO has taken only limited amounts of coal from Mine 84 in the recent past and no coal from that source in 1996. However, the fact that no coal from Mine 84 was shipped to NIMO in 1996 does not mean that Mine 84 is not a viable source option for NIMO. In fact, NIMO has taken coal from Mine 84 prior to 1996 and contracted for Mine 84 coal in 1997, as the Applicants themselves acknowledge. Sansom R.V.S. at 50. NIMO's concern that the transaction will threaten its ability to continue to obtain Mine 84 coal cost-effectively and efficiently is legitimate. The Applicants' insignificant assertions have obviously been raised to divert the Board's attention from the real harm that will occur to NIMO and to Mine 84.[16]

F. <u>The Board Should Condition the Proposed Transaction to Prevent Competitive Harm to the Bessemer & Lake Erie Railroad and Conneaut Dock</u>

In its Comments, NIMO also expressed its concern that the proposed transaction could have serious anticompetitive effects on the Bessemer & Lake Erie Railroad Company ("BLE") and its operations at Conneaut Dock. Fauth V.S. at 19; Bonnie V.S. at 14. The central concern expressed by NIMO is that the proposed transaction will foreclose the BLE from participating in the movement of significant amounts of MGA coal, since the Applicants will seek to move such coal themselves to Ashtabula. Fauth V.S. at 19. NIMO is concerned about the impact of the transaction upon the BLE and Conneaut Dock because NIMO has used the BLE and Conneaut facility to move a limited amount of MGA coal to its stations by vessel, rather than through the Ashtabula harbor facility. *Id.*

The Applicants have not been able to show that such harm will not occur to the BLE. Their primary response to the valid concerns of NIMO and the BLE is that "market forces will dictate the capacity and level of service demanded by customers, whether through Ashtabula, P&C Dock or otherwise." Rebuttal Vol. 1, at 146. However, the transaction clearly places CSX and NS in the position to influence, if not control, the routing of MGA coal to be carried and delivered via rail-vessel movements regardless of customer demand or preferences. Accordingly, NIMO reasserts its support for the conditions being sought by the BLE in this proceeding.

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16 The Applicants also alleged that the NITL settlement "specifically and fully" addresses any concerns arising from losses of single-line service." Rebuttal Vol. 1, at 419. However, the Board should not deny meaningful relief to individual parties based on the NITL settlement where specific and individualized harm has been shown to exist and which may not be adequately addressed by the Agreement. The NITL Settlement Agreement itself appears to contemplate as much in providing that "This agreement by Organization is not to be construed as expressing opposition to any condition or responsive or inconsistent application requested by any other party to this proceeding." NITL Settlement Agreement, Paragraph 1.

III. THE CONDITIONS REQUESTED BY NIMO ARE SUPPORTED BY THE EVIDENCE

The Applicants have not rebutted NIMO's compelling case that shows that it will be competitively harmed by the proposed transaction. To prevent the adverse competitive impacts of the proposed transaction, NIMO has requested the following relief from the Board:

A. Relief Requested by the Erie-Niagara Rail Steering Committee

NIMO is a member of the Erie-Niagara Rail Steering Committee ("ENRS") and supports each aspect of the relief requested by that organization in this proceeding because such relief would alleviate the anticompetitive effects of the proposed transaction with respect to NIMO. These conditions are:

1. (a) Creation by the Applicants of another Shared Assets Area, i.e., the "Niagara Frontier Shared Assets Area" which would permit equal access to both CSX and NS by Conrail customers, including NIMO's Huntley and Dunkirk Stations, and (b) in addition, establishment within the Niagara Frontier Shared Assets Area of reciprocal switching arrangements for all current Conrail customers (including NIMO's Huntley and Dunkirk Stations) that would allow other rail carriers serving the area, such as CN, CP and existing shortline operators, also to provide competitive service and at a reasonable level of charges, i.e. $156.00 per car.

2. Alternatively, if a Niagara Frontier Shared Assets Area is not created, approval of the joint acquisition of Conrail should be conditioned on the reciprocal grant of terminal trackage rights to each other by CSX and NS for operations over the Conrail lines in the same geographical area covered by the proposed Niagara Frontier Shared Assets Area; ownership and operation of the Conrail assets in that area would be divided as proposed by the applicants, but all current Conrail customers, such as NIMO's Huntley and Dunkirk Stations, would receive rail service directly from both

CSX and NS; and a reasonable level of charges for the reciprocal terminal trackage rights would be established, i.e., a rate of $0.29 per car mile.

3. If neither of the above alternatives is established, approval of the proposed transaction should be conditioned on the establishment by CSX and NS of reciprocal switching to all current and future customers that are or will be served by the Conrail lines located within the Niagara Frontier Shared Assets Area, such as NIMO's Huntley and Dunkirk Stations, and a reasonable reciprocal switching charge should be established, i.e. $156.00.

B. Trackage Rights

If none of the above conditions proposed by ENRS are adopted by the Board, then the Board should condition approval of the transaction on the granting of trackage rights by CSX to NS that would permit NS to serve the Huntley and Dunkirk Stations directly as follows:

1. Huntley Station—Under the proposed transaction, NS would obtain overhead trackage rights on Conrail's Belt Line Branch and Niagara Branch (which lines are proposed to be allocated to CSX), from which lines NIMO's Huntley Station is accessed. The Board should order that these overhead trackage rights be modified to allow NS the right to operate over such tracks and any necessary connecting tracks in order to access and serve NIMO's Huntley Station, including delivery of coal to the Huntley Station.

2. Dunkirk Station—Trackage rights in favor of NS should also be established over Conrail's Chicago Line between Control Point 58 (CP 58) near Westfield, New York, to NIMO's Dunkirk Station which is located near CP 42 in Dunkirk, New York in order to allow NS to access and serve NIMO's Dunkirk Station, including the delivery of coal to that station.

The trackage rights to both Huntley and Dunkirk Stations would permit NS to provide direct service to these NIMO facilities, in addition to direct service by CSX, thereby alleviating the competitive harm that would otherwise occur to NIMO as result of the proposed transaction.

Respectfully submitted,

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Attorneys for
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DATE: February 23, 1998

CERTIFICATE OF SERVICE

I hereby certify that I have caused copies of the foregoing BRIEF OF NIAGARA MOHAWK POWER CORPORATION to be served by hand delivery or first class mail, postage prepaid, on all parties of record in this proceeding this 23rd day of February, 1998.

Patrice A. Coachman

EXHIBIT 1

HIGHLY CONFIDENTIAL
INFORMATION REMOVED

EXHIBIT 2

Table 3
HUNTLEY'S COAL BURN HISTORY

Month	Monthly Coal Use (Tons)	Comments
Jan 1996	137,453	392,767
Feb 1996	144,391	~~336,028~~ tons
Mar 1996	110,923	
Apr 1996	108,416	
May 1996	91,715	
Jun 1996	122,675	408,148 tons
Jul 1996	138,332	Summer peak is more than winter
Aug 1996	147,141	peak months.
Sep 1996	97,804	
Oct 1996	110,282	
Nov 1996	123,850	
Dec 1996	122,499	
Jan 1997	133,237	
Feb 1997	99,891	345,541 tons
Mar 1997	112,413	
Apr 1997	120,080	
May 1997	123,183	
Jun 1997	146,970	439,707 tons
Jul 1997	150,556	Summer peak is more than winter
Aug 1997	142,181	peak months.

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EXHIBIT 3

HIGHLY CONFIDENTIAL
INFORMATION REMOVED

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February 23, 1998

VIA HAND DELIVERY

Hon. Vernon A. Williams
Secretary
Surface Transportation Board
Washington, DC 20423

E

Dear Secretary Williams:

Enclosed for filing in STB Finance Docket No. 33388, CSX Corp., et al.--Control and Operating Leases/Agreements--Conrail, Inc., et al., are the original and twenty-five copies of the Brief of Martin Marietta Materials, Inc.

A diskette containing the text of the Brief in WordPerfect 5.0 format also is enclosed.

Extra copies of the Brief and of this letter are enclosed for you to stamp to acknowledge your receipt of them and to return to me in the enclosed self-addressed, stamped envelope.

By copy of this letter, service is being effected upon counsel for each of the parties.

If you have any question concerning this filing or if I otherwise can be of assistance, please let me know.

Sincerely yours,

Fritz R. Kahn

enc.
cc: Counsel for all parties
Bruce A. Deerson, Esq.

185923

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.

STB Finance Docket No. 33388

CSX CORPORATION, et al.,
-- CONTROL AND OPERATING LEASES/AGREEMENTS --
CONRAIL, INC., et al.

BRIEF
OF
MARTIN MARIETTA MATERIALS, INC.

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Dated: February 23, 1998

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CSX CORPORATION, et al.,
-- CONTROL AND OPERATING LEASES/AGREEMENTS --
CONRAIL, INC., et al.

BRIEF
OF
MARTIN MARIETTA MATERIALS, INC.

Protestant, Martin Marietta Materials, Inc., of Raleigh, North Carolina ("MMM"), pursuant to 49 C.F.R. 1113.18 and the Board's decision, Decision No. 12, served July 23, 1997, submits the following as its Brief herein.

I.

INTRODUCTION

The proposed transaction before the Board is unlike any other. Never before has the Board or its predecessor, the Interstate Commerce Commission ("ICC"), been asked to pass on the dismemberment of a major railroad and the apportionment of its lines among its largest connections. As the result of the proposed transaction certain shippers, which heretofore have been able to ship their products via the single-line service of Consolidated Rail Corporation ("Conrail"), will need to contend with the applicants' two-railroad, interline operations. Following the proposed break-up of Conrail, the freight of affected shippers will originate on a line of CSX Transportation ("CSXT") and terminate on a line of Norfolk Souther Railway Company ("NS"), or visa versa

Applicants acknowledge that the interlining of freight shipments that formerly had moved in single-line service will result in impaired service, greater costs and increased rates. The testimony of applicants' own witnesses is to the effect that going from Conrail's single-line service to the two-railroad, interlining of freight shipments from CSXT to NS will result in poorer and more cumbersome service. The interchange of cars from one rail carrier to the other is less efficient, more time consuming, less consistent, less reliable and be more likely to occasion freight loss and damage. Applicants, moreover, are on record as admitting that the two-railroad, interlining of freight shipments from CSXT to NS will be more costly than Conrail's single-line service has been and that the affected shippers, accordingly, must anticipate having to pay higher freight rates and charges. Applicants seek to belittle the adverse consequences of the proposed transaction upon the affected shippers by minimizing their numbers; applicants, however, do not dispute that there are shippers who, as a result of the break-up of Conrail, will face impaired service and increased rates.

MMM is such a shipper. A producer of aggregates and lime, it will be adversely affected by the proposed transaction and rendered noncompetitive in the marketing its products from its Woodville, Ohio, plant, now served by Conrail but slated to be served by CSXT. Among its principal rail served aggregates customers are Whitestone at Twinsburg, Ohio, and Honker Sand at Hugo, Ohio, currently served by Conrail but assigned to be served by NS. Similarly, among MMM's most important lime customers are Weirton Steel at Weirton, West Virginia, and Wheeling-Pittsburgh Steel at Mingo Junction, Ohio, again, now Conrail served but designated to be served by NS. Thus, what heretofore had been Conrail single-line movements of MMM's products will become two-railroad, interlined freight shipments handed off from CSXT to NS, with the attendant impaired service, greater costs and increased rates that applicants acknowledge will follow.

MMM, therefore, asks that, if the Board otherwise were to find the proposed transaction to be consistent with the public interest, the Board condition its approval in a way that would reduce the impact upon MMM of the poorer, costlier service it otherwise would experience and the higher rates it would need to pay. Admittedly, the proposed transaction will not lessen rail competition; it will not eliminate essential rail service. The Board's conditioning power, however, is not so narrowly circumscribed as to be able respond only to such threatened results of a railroad merger or acquisition; the Board can condition its approval of a proposed transaction so as to safeguard that affected shippers will continue to receive adequate service, and that is what MMM asks. MMM seeks the imposition of conditions requiring the applicants to provide unit-train-like, run-through trains in response to its tenders of

60 cars or more of aggregates or lime shipments, to handle in blocks tenders of ten or more but fewer than 60 cars and to maintain for five years the existing level of rates applicable on the considered aggregates and lime shipments. The conditions MMM seeks do not call for the redrawing of the map agreed upon by CSXT and NS for the division of Conrail's lines; the conditions MMM seeks do not call for the transfer of a line from the one rail carrier to the other or for the grant of trackage rights for one to operate over the lines of the other. MMM's proposed conditions are altogether consistent with the applicants' proposal for the break-up of Conrail and will deny them none of the benefits of the transaction.

The relief that MMM seeks is modest and yet is essential if MMM is to be able to adjust in an orderly fashion to having to market its products by using the two-railroad, interline service of CSXT and NS in lieu of the single-line service which Conrail heretofore has rendered.

II.

STATEMENT OF FACTS

A.

The aggregates produced by Martin Marietta at Woodville <u>are service and price sensitive.</u>

MMM is the Nation's second largest producer of aggregates, used for the construction of highways and other infrastructure projects and for commercial and residential construction. Formerly a subsidiary of Lockheed Martin Corporation, MMM is an independent company, the stock of which is publicly traded.

Involved in this proceeding is the shipments by rail of certain of MMM's products from its Woodville, Ohio, facility, the largest dolomitic lime plant in the United States. The plant ships by rail in excess of half a million tons of aggregates annually consigned to its customers. The principal customers for MMM's rail-shipped aggregates are Whitestone at Twinsburg, Ohio, and Honker Sand at Hugo, Ohio, which together receive approximately 465,000 tons annually.

Aggregates are about the lowest rated of the commodities handled by the railroads, traditionally carried in carload lots at 17½ percent of the railroads' first class rates. At the same time, however, the railroads' rates on aggregates are extraordinarily high, given the intrinsic low value of the commodity. In the case of MMM's Woodville-to-Twinsburg and Woodville-to-Hugo aggregates shipments, the railroad transportation charges actually have exceeded the price of the commodity itself. In other words, at the time of their delivery to MMM's customers, more than half of the commodity's price represents the transportation charges applicable on the aggregates shipments. Even a half a cent per hundredweight increase in the railroad transportation charges would result in a greater than 12.5 percent increase in the delivered price of the rock. Accordingly, aggregates sales are extremely sensitive to slight changes in the railroads' service patterns and freight rates. As MMM advised the applicants, "the present rate/service structure is very sensitive to competitive alternatives and with only minor changes is susceptible of loss." Seale Deposition, pp. 30-31. See, Union Pacific Corp. et al.--Cont.--MO-KS-TX Co., et al., 4 I.C.C. 409, 464 (1988)("[C]rushed stone is a high-bulk, heavy loading commodity, for which motor carriers are effective only for distances of less than 75 to 100 miles.").

B.

Martin Marietta at Woodville
will cease having single-line service
and will become a 1-to-2 shipper.

MMM's Woodville plant currently is served by Conrail, as are MMM's largest rail-served aggregates customers, Whitestone at Twinsburg and Honker Sand at Hugo, as well as its lime customers, Weirton Steel at Weirton and Wheeling-Pittsburgh Steel at Mingo Junction. Following consummation of the proposed transaction, however, that will change. Woodville will become a station on a line assigned to CSXT, while Twinsburg, Hugo, Weirton and Mingo Junction will become stations on lines slated to go to NS. The proposed break-up of Conrail, in other words, will result in what heretofore had been single-line Conrail movements of MMM's aggregates and lime shipments becoming two-railroad, interlined CSXT/NS movements. CSXT will handle the cars from MMM's Woodville facility to Toledo, where they will be interchanged to NS for their subsequent line-haul transportation to MMM's customers on NS' lines.

The applicants' most senior official offering rebuttal testimony in response to MMM's Comments and Request for Conditions, MMM-2, was Mr. Donald W. Seale, Vice President - Merchandise Marketing of Norfolk Southern Corporation. See, p. P-491, et seq., of vol. 2B, CSX/NS-177. At pages 16-17 of his deposition, the pertinent portions of the transcript of which are appended, Mr. Seale acknowledged the effect that the break-up of Conrail would have on railroad service from MMM's Woodville plant:

> Q. As a result of the breakup of Conrail which the applicants have proposed, we've already said, I believe, that Woodville is slated to become a CSXT station, is that correct?
>
> A. That is correct.
>
> Q. And Twinsburg and Hugo are slated to become Norfolk Southern stations?
>
> A. That is correct.
>
> Q. Similarly, Weirton and Mingo Junction are slated to become Norfolk Southern stations?
>
> A. That is correct.
>
> Q. And, accordingly, the single-line Conrail movement of aggregates from Woodville to Twinsburg and Hugo will become a two-line CSXT/NS movement, isn't that correct, Mr. Seale.
>
> A. Yes.
>
> Q. And the single-line Conrail movement of lime from Woodville to Weirton and Mingo Junction will become a two-line CSXT/Norfolk Southern movement; is that correct?
>
> A. Correct.

The change in the handling of MMM's shipments from single-line Conrail service to the two-railroad, interlining of its freight shipments from CSXT to NS is not without its consequences; indeed, as we next shall discuss, the applicants are on record as acknowledging that handing off carloads of freight from one railroad to another almost invariably is less efficient and more costly than when just one railroad is involved in the transportation.

C.

The interlining of Martin Marietta's shipments will result <u>in poorer service and greater costs.</u>

"One of the major benefits of this transaction," said Mr. John W. Snow, Chairman, President and Chief Executive Officer of CSX Corporation, at page 311 of vol. 1 of the Application, CSX/NS-18, "will be the dramatic increase in the single-line routes available to shippers throughout the East." Mr. Snow continued:

> The inherent superiority of single-line service over interline service has long been recognized in the railroad industry. It translates into enhanced operating efficiencies, reduced costs, reduced transit time and less handling of freight.

Mr. Snow had the candor to acknowledge that the converse is no less true, that going from single-line service to two-railroad, interlined freight transportation is less efficient and more costly. At pages 169-170 of his deposition, the pertinent portions of the transcript of which are appended, Mr. Snow testified

> Q. Would not going from single line service to two-railroad or joint line service be correspondingly disadvantageous. Would there not be greater handling of freight?
>
> * * *
>
> A. I think it would.
>
> Q. And would it not result in extended transit time?
>
> A. Normally it would.
>
> Q. And would it not result in diminished operating

efficiencies?

A. Certainly that is potential consequence, yes.

Q. And would it not result in increased operating costs?

A. Insofar as there is additional handling which would be contemplated as a result, yes, there would be additional costs.

Q. And greater risk of loss and damage?

A. Yes, its's inherently more complicated when you have two people in the joint route or in the route.

Q. And diminished market reach?

A. Could well have that effect, yes.

Q. And fewer sales opportunities for sellers?

A. Yes, for the very reason that the single line service expands the opportunities, correct.

Mr. Snow's acknowledgement of the impaired service and increased cost of two-railroad, interlining of freight shipments, in contrast with the inherent benefits of single-line service, was echoed by Mr. Darius W. Gaskins, former President and Executive Officer of Burlington Northern Railroad Company, one of the foremost witnesses offered by the applicants in support of their proposed transaction. At pages 15-16 of his deposition, the pertinent portions of the transcript of which are appended, Mr. Gaskins testified:

Q. Now, Mr. Gaskins, would not going from single-line service to two-railroad service be correspondingly disadvantageous.

A. Most likely it would be.

Q. Would there not be greater handling of freight?

A. Yes.

Q. Would there not be extended transit times?

A. There probably would be.

Q. Would there not be increased operating costs?

A. Yes, there would be.

Q. Would there not be less efficient utilization of equipment?

A. Probably.

Q. Would there not be greater risk of loss and damage?

A. Yes.

Q. Would there not be fewer sales opportunities for sellers?

A. Yes.

* * *

Q. Mr. Gaskins, would there be fewer options for buyers, again using the term buyers as the customers of the shippers?

A. Probably, probably.

Significantly, neither Mr. Snow nor Mr. Gaskins introduced rebuttal testimony; neither Mr. Snow nor Mr. Gaskins was offered by the applicants to respond to MMM's Comments and Request for Conditions, MMM-2, although MMM had quoted extensively from, and placed great reliance upon, their deposition testimony. Accordingly, the acknowledgement by Mr. Snow and Mr. Gaskins that two-railroad, interlined freight transportation is less efficient and more costly than single-line service stands unchallenged.

D.

The CSXT/NS rates on Martin Marietta's shipments will increase, <u>but applicants won't say by how much.</u>

Faced by the loss of Conrail's single-line service on aggregates shipments to its customers at Twinsburg and Hugo and on lime shipments to its customers at Weirton and Mingo Junction, MMM sought to learn just how much of a rate increase would apply as a result of the less efficient and more costly manner in which CSXT and NS proposed to handle its shipments. Applicants offered only two rebuttal witnesses responding to MMM's Comments and Request for Conditions, MMM-2, Mr. Seale, as already noted, and Mr. John T. Moon, II, Manager - Strategic Planning for Norfolk Southern Railway Company. See, p. P-446, et seq., of vol. 2A, CSX/NS-177. Neither witness had any idea what the rates applicable on MMM's shipments would be following consummation of the proposed transaction.

At pages 24-25 of his deposition, pertinent portions of the transcript of which are appended, Mr. Moon testified:

> Q. And do you have any idea, Mr. Moon, what the common carrier rate will be that CSXT and Norfolk Southern will charge for the movement of rock from Woodville to Twinsburg?
>
> A. I have no earthly idea.
>
> Q. And the same with respect to the contract rate?
>
> A. That's the same. I have no earthly idea. I don't do rates.

At pages 36-37 of his deposition, Mr. Moon testified:

> Q. And do you know what CSXT expects to assess as their common carrier rate from Woodville to Hugo?
>
> A. No.
>
> Q. Do you know what they are likely to assess as their contract rate?
>
> A. No.

Finally, at pages 16-17 of his deposition, Mr. Moon testified:

Q. Can you tell us, Mr. Moon what the common carrier joint-line CSXT-Norfolk Southern rate on lime shipments from Woodville to Weirton, Ohio following the consummation of this transaction?

A. It would be whatever the two carriers negotiate along with the shipper. In terms of an exact dollar amount, I have no earthly idea.

Q. And to Mingo Junction?

A. Same. I have no idea.

Q. After any existing Conrail contract has expired and after the three years provided by the NIT League settlement agreement has expired, do you know, Mr. Moon, what the CSXT Norfolk Southern joint-line contract rate will be on lime shipments from Woodville to Weirton?

A. I have no idea on rates.

Q. And to Mingo Junction?

A. No idea.

Astonishingly, Mr. Seale, who, it will be recalled, is the Vice President - Merchandise Marketing of Norfolk Southern Corporation, was no better informed about the increased rates that would apply on the shipments of MMM's products from its Woodville facility than was Mr. Moon. At pages 17-18 of his deposition, Mr. Seale testified:

Q. And do you know, Mr. Seale, what the common carrier rate will be that CSXT and Norfolk Southern will assess on shipments of aggregates from Woodville to Twinsburg?

A. No, I do not.

Q. To Hugo?

A. No.

Q. After the expiration of the existing contract and the three years provided by the NIT League settlement agreement, do you know what CSXT's and NS joint line contract rate will be for shipments of aggregates from

Twinsburg to Hugo.

A. No.

Q. Do you know what the common carrier rate will be that CSXT and NS will assess on shipments of lime from Woodville to Weirton?

A. No.

Q. To Mingo Junction?

A. No.

Q. And after the expiration of the existing Conrail contract and the three years provided by the NIT League settlement agreement, do you know what the joint line CSXT/Norfolk Southern contract rate will be on shipments of lime from Woodville to Weirton?

A. No.

Q. To Mingo Junction?

A. No.

That, in the absence of Board imposed conditions, the rates applicable on the shipments from MMM's Woodville plant will be increased following the consummation of the proposed transaction is a certainty. Indeed, applicants, at page 26 of CSX/NS-190, candidly acknowledge, "Charging a single-line rate for a joint-line service, where obviously extra handling (to effect the interchange) is involved, is clearly apt to be uneconomic for the participating railroads." In short, rate increases inevitably will be imposed by CSXT and NS for their two-railroad, interlining of MMM's freight shipments, but MMM is to remain in the dark just how large the rate increases will be.

As we already have noted, however, MMM's freight shipments, especially, its aggregates shipments, are highly service and rate sensitive. Even as small a railroad rate increase of half a cent a hundredweight will result in a greater than 12.5 percent increase in the delivered price of rock. It is for that very reason that aggregates rarely, if ever, move in two-railroad, joint-line service. Indeed, Mr. Snow and Mr. Gaskins were asked whether based on their long and varied railroading experiences they were aware of any instances in which aggregates shipments were interlined between two participating Class I railroads, and they both responded that they were not. Snow deposition, pp. 171-72; Gaskins deposition, p. 19.

It is evident, therefore, that only the imposition of conditions will safeguard the adequacy of service required to permit MMM's products to continue to move by rail to its customers and maintain for a brief period of time the current level of rates, so as to permit MMM to adjust to the two-railroad, interchange operations that CSXT and NS will offer in lieu of Conrail's single-line service.

III.

ARGUMENT

A.

Applicants view all too narrowly <u>the Board's conditioning power.</u>

Applicants dismiss MMM's plea for partial relief from the impact of the poorer service and higher rates that will result from the loss of Conrail's single-line service, suggesting that the Board is powerless to condition its approval of the proposed transaction so as to safeguard the adequacy of the rail transportation that CSXT and NS will render following consummation of their proposed transaction. Thus, at page P-498 of vol. 1, CSX/NS-176, applicants allege, "MMM fails to demonstrate . . . that the Transaction will result in the loss of competition to the particular facilities in issue, or that the Transaction will result in the loss of essential services." Again, at pages P-499-500, applicants contend, "The imposition of protective conditions where a shipper will not suffer from a loss of rail competition is wholly inappropriate. Additionally, the Transaction will not result in the loss of essential services to these movements." Finally, at page P-502, applicants maintain, "MMM will suffer no loss of competitive service at Woodville quarry or at the Hugo and Twinsburg destinations."

Applicants' argument is nothing more than a strawman. MMM at no time has complained that it will suffer a loss of rail competition. To the contrary, MMM recognizes full well that the extension of CSXT and NS into areas of the northeast heretofore served only by Conrail in many instances will provide for rail competition where none has existed for decades. MMM, moreover, at no time has complained that it will be left without essential rail service, whether at the Woodville origin or the Twinsburg, Hugo, Weirton or Mingo Junction destinations. MMM has a high regard for the competence and dedication of both CSXT and NS and entertains no doubt that CSXT will be proficient in rendering service at Woodville, as NS will be capable in providing service at Twinsburg, Hugo, Weirton or Mingo Junction.

Nevertheless, CSXT and NS cannot render two-railroad, interchanged freight operations so as to equal in efficiency and economy the single-line service heretofore rendered by Conrail. Indeed, applicants on the record have acknowledged that their interlining of shipments will be less efficient and more costly than Conrail's single-line service has been; applicants on the record have acknowledged that they cannot perform two-railroad, interline operations at single-line rates and that rate increases are certain to assessed on the affected shipments.

Applicants suggest that the Board is powerless to impose conditions that will safeguard the adequacy of the rail transportation service that CSXT and NS will render following consummation of their proposed transaction. To be sure, in its prior decisions approving railroad acquisitions, as, for example, Finance Docket No. 32760, Union Pacific Corp., et al.--Control and Merger--Southern Pacific Rail Corp., et al., served August 12, 1996, and Finance Docket No. 32549, Burlington Northern Inc., et al.--Control and Merger--Santa Fe Pacific Corp., et al, served August 23, 1995, as in its merger guidelines based thereon, 49 C.F.R. 1180.1(d), the Board has focused on conditions designed to ameliorate the anticompetitive effects of the proposed transaction and the loss of essential services resulting from its implementation. But the holdings in those cases and the regulation to which they gave rise are inapposite. None of the prior railroad merger or acquisition decisions involved the break-up of a major railroad and the apportionment of its lines between its largest connections; in none of the decisions did the Board or the ICC need to address the adequacy of transportation afforded shippers losing single-line service and compelled to contend with less efficient and more costly two-railroad, interlined freight operations and the higher rates they will bring about.

The statue is explicit. In determining whether applicants' proposed break-up of Conrail is in the public interest, the Board, pursuant to 49 U.S.C. 11324(b)(1), needs to consider, among other things, "the effect of the proposed transaction on the adequacy of transportation to the public." Moreover, to safeguard that the statutory standard is met, under 49 U.S.C. 11324(c), the Board "may impose conditions."

"The expression [adequacy of transportation]" said the Supreme Court in Pennsylvania R. Co. v. United States, 323 U.S. 588, 592-93 (1945), "would seem to apply only to the interest of the shipping public." Accord, Denver & G. W. R. Co. v. Union Pacific R. Co., 287 I.C.C. 611, 655 (1953), aff'd, Union Pacific R. Co. v. U.S., 132 F. Supp. 72, 78 (1954).

Of aid in construing the adequacy of transportation service standard as it relates to shippers claiming to be adversely affected by a railroad merger or acquisition proposal and the authority of the Board to condition its approval of the transaction so as to safeguard that such shippers are afforded adequate service by the surviving railroad or railroads is Lamoille Valley R. Co. v. I.C.C., 711 F.2d 295 (D.C. Cir. 1988), reversing, in part, Guilford

Transportation--Control--B&M, et al., 5 I.C.C. 2d 202 (1988). In that proceeding a shipper, Eastern Magnesia Talc Co., expressed concern about the loss of effective rail transportation, deemed by it to be necessary to market its products to distant locations, for which truck transportation was prohibitively expensive. The court, 711 F.2d at 311, observed:

> A refusal to consider protective conditions unless alternative service is so expensive that shippers will be forced out of business does not comport with the statutory directive to take into account "adequacy" of transportation. The term "adequate," as the Supreme Court noted long ago in a similar context, is "a relative expression." Atlantic Coast Line Railroad v. Wharton, 207 U.S. 328, 335 (1907). For a shipper, loss of service that it currently uses generally portends some decrease in profit, which can be any where from minor to devastating. If the additional cost involved in using alternative service is small, the ICC need not be concerned. At the other extreme, if the added cost is so grave as to force bankruptcy, the alternative service is clearly inadequate, at lest for that shipper. Somewhere between these two extremes, we pass from adequate to inadequate service. Within reason, the Commission has discretion to draw the dividing line as it sees fit. The business termination test, however, is too far to one extreme to be a reasonable definition of "adequacy."

The Board is vested with the discretion to impose such conditions upon its approval of the proposed transaction as in its judgment are required to safeguard the adequacy of transportation service to affected shippers, such as MMM. Affected shippers, such as MMM, need not incur the risk that the poorer service and higher rates that they will suffer as a result of the loss of Conrail's single line service are so overwhelming as to occasion the loss of business they previously were able to transact. They may invoke the assistance of the Board without being driven out of business. The need for conditions may have nothing to do with the loss of rail competition; it may have nothing to do with the loss of essential rail services, and applicants err in suggesting that these are the only bases upon which the Board's conditioning authority can be exercised. Here, the modest relief that MMM seeks lies well within the Board's discretionary authority to grant; MMM asks for nothing more.

B.

Martin Marietta has established that the loss of Conrail's single-line service <u>will be harmful to it in terms of service and rates.</u>

Appellants, at pages P-500 and P-502 of CSX/NS-176, make the throw-away, <u>pro</u> <u>forma</u> argument that MMM's allegations of harm flowing from the loss of Conrail's single-line service are speculative and unsupported by the fact. Of course, nothing could be further from the truth.

It was none other than the Chairman, President and Chief Executive Officer of CSX Corporation, Mr. John W. Snow, who in his deposition testimony detailed the impairment in service which a shipper, such as MMM, would suffer as the result of the loss of single-line railroad service and its replacement by two-railroad, interline transportation. At pages 169-170 of his deposition, Mr. Snow was asked:

> Q. Would not going from single line service to two-railroad or joint line service be correspondingly disadvantageous. Would there not be greater handling of freight?
>
> * * *
>
> A. I think it would.
>
> Q. And would it not result in extended transit time?

A. Normally it would.

Q. And would it not result in diminished operating efficiencies?

A. Certainly that is potential consequence, yes.

Q. And would it not result in increased operating costs?

A. Insofar as there is additional handling which would be contemplated as a result, yes, there would be additional costs.

Q. And greater risk of loss and damage?

A. Yes, it's inherently more complicated when you have two people in the joint route or in the route.

Q. And diminished market reach?

A. Could well have that effect, yes.

Q. And fewer sales opportunities for sellers?

A. Yes, for the very reason that the single line service expands the opportunities, correct.

Former President and Chief Executive Officer of the Burlington Northern Railroad Company, Mr. Darius W. Gaskins, testifying on behalf of the applicants, agreed with the testimony that had been offered by Mr. Snow that going from single-line service to two-railroad, interline freight operations is less efficient and more costly. At pages 15-16 of his deposition, Mr. Gaskins testified:

Q. Now, Mr. Gaskins, would not going from single-line service to two-railroad service be correspondingly disadvantageous?

A. Most likely it would be

Q. Would there not be extended transit times?

A. There probably would be.

Q. Would there not be increased operating costs?

A. Yes, there would be.

Q. Would there not be less efficient utilization of equipment?

A. Probably.

Q. Would there not be greater risk of loss and damage?

A. Yes.

Q. Would there not be fewer sales opportunities for sellers?

A. Yes.

* * *

Q. Mr. Gaskins, would there be fewer options for buyers, again using the term buyers as the customers of the shippers?

A. Probably, probably.

It was none other than the applicants themselves who acknowledged that the less efficient and more costly interchange freight operations, of which Mr. Snow and Mr. Gaskins testified, invariably will result in increased rates. At page 26 of CSX/NS-190, applicants declared unequivocally that "[c]harging a single-line rate for a joint-line service, where obvious extra handling (to effect the interchange) is involved, is clearly apt to be uneconomic for the participating railroads." CSXT and NS necessarily will be charging more for their two-railroad, interline operations than Conrail was able to assess for its single-line service.

This is the very thing that alarms MMM. Its very ability to market its products, particularly aggregates, is jeopardized by the poorer service and greater costs of interchanging its freight shipments from CSXT to NS that the break-up of Conrail will occasion and the higher rates it will need to pay as a result. MMM had made this clear to the applicants; the applicants understood MMM's position and offered nothing to refute it. As Mr. Seale, who in his rebuttal statement, at page P-496 of CSX/NS-177, had talked about the settlement discussions between the applicants and MMM, testified, at pages 30-31 of his deposition transcript:

> Q. And then in Mr. Grant Godwin's response of October 9, in Exhibit 2, Mr. Godwin states, "As we have stated on a number of occasions, the continuance and growth of aggregate and lime shipments from Woodville on a competitive basis is absolutely critical to the continued profitability of that plant. The present rate/service structure is very sensitive to competitive alternatives and with only minor changes is susceptible of loss. The pending shift from single line to two-line movements of a major portion of that traffic is of major concern. This concern is based on prior experience and knowledge of two-line service invariably involving higher costs and/or degraded service."
>
> To your knowledge, Mr. Seale, did the applicants dispute Mr. Godwin's statement during the course of the settlement discussions.
>
> * * *
>
> A. I don't see anything in the exhibits that addresses that after the October 9th letter.

Indeed, both Mr. Seale and Mr. Moon in their deposition testimony acknowledged the vigorous competition that MMM faces in marketing its aggregates at Twinsburg and Hugo and lime at Wheeling and Mingo Junction. Seale Deposition, pp. 13, 18-20; Moon Deposition, pp. 15, 23, 36. As Mr. Moon testified, at page 23 of his deposition:

> Q. . . . You are not suggesting that Martin Marietta is the sole source of the rock purchased by Whitestone at Twinsburg, are you?
>
> A. No. To my knowledge, the multitude of stone producers and stone receivers in northeast Ohio -- that there is multiple origins and multiple destinations for

all of them. I don't think any one is a single point.

Similarly, Mr. Seale testified, at page 13 of his deposition:

> Q. Getting back to the movements of lime from Woodville to Weirton Steel in Weirton and to Wheeling-Pittsburgh Steel at Mingo Junction, do you know whether Martin Marietta was the sole supplier of lime to Weirton Steel at Weirton?
>
> A. No.
>
> Q. Would you expect that there would be competition for that business
>
> A. I would think so.

In short, applicants have no basis for arguing, as they do at pages P-500 and P-502 of CSX/NS-176, that MMM's assertion of harm owing to the loss of Conrail's single-line service was speculative and unsupported. Applicants themselves have acknowledged that the two-railroad, interline service that CSXT and NS will be offering will be less efficient and more costly. Applicants themselves have acknowledged that they will need to increase the applicable rates to reflect the additional services related to the interchange of freight from CSXT to NS. Applicants full well understood that this was -- and remains -- a matter of grave concern to MMM, facing the intense competition of other aggregates and lime producers -- and they have presented nothing to allay MMM's fears.

C.

Applicants' contention that
Martin Marietta will be able to
exploit its ability to ship via CSXT
<u>single-line is illusory and unrealistic.</u>

The most senior executive to offer testimony in response to MMM's Comments and Request for Conditions, MMM-2, Mr. Donald W.

Seale, was asked during the course of his deposition to amplify upon his contention, at page P-497 of CSX/NS-177, that "aggregates shippers on new CSX likely will, in the long run, readjust their market focus to customers on CSX." It turns out, that Mr. Seale's statement, at best, was a hypothetical abstraction; he really had no knowledge about MMM's marketing of its aggregates products; At pages 48-49 of his deposition transcript, Mr. Seale was asked:

> Q. At page 497 of your rebuttal testimony, Mr. Seale, you state that aggregate shippers such as Martin Marietta whose plants are on the new CSX likely will, in the long run, readjust their market focus to customers located on CSX. Now, do you remain of that view?
>
> A. Yes.
>
> Q. So if Martin Marietta were to look to the west in the sale of its aggregates, and you're pretty knowledgeable about marketing of aggregates, don't you think Martin Marietta would run into the competition of Indiana stone and the very cheap slag that's available in the Gary area?
>
> A. I am not aware of that.
>
> Q. And if Martin Marietta were to focus to the south, would its aggregates not run into the vigorous competition of National Lime and the other rock producers of central Ohio?
>
> A. I can't judge that.
>
> Q. And if Martin Marietta were to focus to the north, would its aggregates not encounter the competition of rock coming off the Great Lakes and the very cheap slag that is available in the Detroit area?
>
> A. I cannot judge that.

In fact, MMM has found its rail-served aggregates customers to be situated toward the east, namely, Whitestone at Twinsburg and Honker Sand at Hugo. Applicants' rebuttal witness, Mr. John T. Moon, II, acknowledged that, as a result of the break up of

Conrail, MMM no longer will be able to reach those customers in single-line railroad service. Mr. Moon, at p. P-452 of CSX/NS-177, said

> In the case of MMM, it will lose the ability to ship directly from the Woodville quarry to Hugo and Twinsburg via single line service, which it now has over Conrail tracks. After the transaction, Woodville will be on track operated by CSX, and Hugo and Twinsburg will be on track operated by NS.

While Mr. Moon in his rebuttal statement implied -- and the applicants in their narrative argued, at page P-501 of CSX/NS-176 -- that MMM would be able to reach its customers through a combination of moving the rock part way by rail, single-line via CSXT, and then by truck, Mr. Moon acknowledged during the course of his deposition testimony that such rail/motor movement of aggregates simply was not practicable. At page 31 of his deposition, Mr. Moon testified:

> Q. But then if I understood your statement just a moment ago, Mr. Moon, so long as Whitestone proposes to continue to operate its ready-mix concrete plant and its ready-mix asphalt plant at the Twinsburg site, it cannot avail itself of CSXT single-line service, is that correct?
>
> A. That's correct. CSXT will not go to Twinsburg.
>
> Q. And you are stating that -- you are not suggesting that the rock be offloaded from a CSXT train somewhere in the Cleveland area and trucked to Twinsburg for processing at Twinsburg?
>
> A. That's not my suggestion. That's physically possible. But that's not what I was suggesting.

And, again, at pages 37-38, Mr. Moon testified:

> Q. Assuming that Honecker [sic] will want to keep its ready-mix concrete plant and asphalt plant, if indeed there is an asphalt plant at Hugo, how would that single-line service to Akron work?

A. You are talking about an identical situation as we previously discussed at Twinsburg.

Q. And correct me if I mischaracterize your testimony, but I believe Mr. Moon finally concluded that if the ready-mix concrete plant and the asphalt plant was intended to remain at Hugo, then single-line service to Akron wouldn't work?

* * *

A. I said it would probably not happen. It is physically impossible.

Q. And physically that would entail a truck movement from Akron to Hugo?

A. Yes. That's correct.

Q. And that truck movement would entail an additional transloading, is that correct?

A. If the stone was going to move single-line from Woodville to Akron, then it would be transloaded to truck, assuming that the production facilities at Hugo remained at their present location and intact and functioning, that is correct. Like I said with Twinsburg, if its going to go from Woodville to Hugo, it's going to go joint-line rail or it probably won't move rail.

In short, Mr. Moon acknowledged that, so long as MMM hopes to be able to continue selling its aggregates products to Whitestone at Twinsburg and Honker Sand at Hugo, it will be dependent upon the two-railroad, interline freight operations of CSXT and NS; the fact that CSXT single-line service is available to Cleveland and Akron is altogether irrelevant. As Mr. Moon conceded, rock simply cannot be moved by rail to Cleveland or Akron, even in CSXT single-line service, and then be trucked to Twinsburg and Hugo for processing at the ready-mix concrete and asphalt plants situated there. Thus, CSXT single-line service offers no practicable and realistic alternative to be exploited by MMM in trying to continue to sell its aggregates products to its customers.

D.

The conditions which Martin Marietta seeks are consistent with applicants' proposal.

In its Comments and Request for Conditions, MMM-2, MMM asked that, if the Board otherwise were to find the transaction to be consistent with the public interest, its approval of the proposal be subject to three conditions:

- that CSXT cooperate with NS in the operation of run-through trains from Woodville to stations on NS, provided, however, that there be a tender at any one time of no fewer than sixty 100-ton hopper cars.

- that, if fewer than sixty, but not less than ten, 100-ton hopper cars be tendered at any one time for transportation to stations on NS, that they be pre-blocked and handed off as a block of cars by CSXT and NS so as to pass through the Toledo gateway without the need for classification.

- that applicants enter into five-year rate agreements with MMM, effective the date the Board's decision becomes effective, at the existing level of aggregates and lime rates, whether tariff, exempt circular or contract rates, provided, however, that such rates shall be subject to eighty-five percent of the unadjusted RCAF increases.

In their dogmatic opposition to the Board's grant of any relief to affected shippers, applicants mischaracterize the conditions requested by MMM as intended to preserve single-line service for MMM. That might have been an accurate description of the relief sought by MMM if MMM had asked for the conveyance of the Woodville-to-Toledo line from CSXT to NS (Cf., W&LE-4) or for the grant by CSXT of trackage rights to NS so as to enable NS to operate on the Woodville-to-Toledo line. Cf., NLS-2; Wyandot-3. That, however, was not what MMM requested, and it is absolutely mystifying how applicants arrived at their characterization of MMM's request for conditions. Significantly, Mr. Seale was unable to offer any explanation as to why applicants claimed that the conditions which MMM seeks were described as retaining single-line movements for MMM. At page 44 of his deposition testimony, Mr. Seale testified:

> Q. Let's go back to my question, Mr. Seale. The question is: Can you as the senior Norfolk Southern official responding to the comments and request for conditions of Martin Marietta please explain why our three conditions, requested conditions, have been characterized as an effort to retain single line service?
>
> A. I -- I am not aware of why that characterization has been made . . .

And, again, at page 46 of his deposition testimony, Mr. Seale said:

> Q. . . . And the question is how do you derive from that filing a statement which says that what Martin Marietta seeks [is] the retention of single line service for these movements.
>
> MR. ALLEN; I think that's been asked and answered. He said he didn't know how.
>
> BY MR. KAHN:
>
> Q. That's your answer, Mr. Seale?
>
> A. That's correct.

As a matter of fact, the applicants had offered run-through operations and the handling of blocked cars during the course of their settlement discussions with MMM. They offered to be bound by the existing rate agreements covering the movement of aggregates to Twinsburg and Hugo and lime to Weirton and Mingo Junction, albeit for only one year's time. In other words, the relief which MMM now seeks from the Board is not unlike what the applicants had offered when they were endeavoring to win MMM's support for their proposed transaction. Mr. Seale, at pages 32-33 of his deposition testimony, was asked:

> Q. Mr. Seale, is there anything within your experience that the applicants might have offered to have allayed Martin Marietta's concerns about the loss of single line service? In other words, short of conveying the Toledo to Woodville line to Norfolk Southern, or granting Norfolk Southern trackage rights to operate over the Toledo-Woodville line, is there anything the applicants might have done to minimize the effects of two-line service that the breakup of Conrail would occasion?
>
> A. Yes, we offered to honor the existing rates that are under contract with Conrail. We [now] also have a NIT League agreement which will continue such rate for a three-year period after a closing time which extends the single line contract rate that Conrail holds with those receivers.
>
> We also proposed an operational arrangement under which run-through power would be used from Woodville and that Hugo and Twinsburg business could be combined into a unit and run through Toledo on a unit train operation with regular service beyond the two destinations.
>
> Q. Can you show me anywhere in CSXT's letters. Exhibits 2 or 5, where that was offered. I think that should be Exhibits 1 and 5.
>
> * * *
>
> A. On page 4 of the October 7th letter to Mr. Sipling, under "Service," and I quote: "Utilizing NS

run-through power, shipments will move to Toledo, Ohio. Regular train service will exist for movement beyond Toledo, Ohio. To support the most efficient service, shipper should local, bill, and preblock movements to both Hugo and Twinsburg on the same day."

Even before MMM, in its Comments and Request for Conditions, MMM-2, asked for Board imposition of conditions obligating the applicants to cooperate in the offering of unit-train-like run-though train service and in the handling of cars in blocks, Mr. Snow was asked to opine about such relief. Specifically, Mr. Snow was questioned as to whether the applicants' handling of blocked cars and operation of run-though trains would be means of allaying MMM's concerns about the poorer service and increased costs that the loss of Conrail's single-line service would occasion and whether he perceived such relief to be inconsistent with, or offensive to, applicants' proposed transaction. He responded that there is nothing inconsistent between the relief MMM is seeking and the proposal applicants are advancing. At pages 173-174 of his deposition transcript, Mr. Snow was asked:

> Q. Would the operation or the handling of block cars as a unit, which would certainly be a means of facilitating an interchange, would that offend the agreement?
>
> A. No, not to my knowledge.
>
> Q. Would the operation of run-through trains be another way of addressing the problem of interchange?
>
> A. I think blocking, run-through arrangements -- there are various arrangements that could mitigate the problem.
>
> Q. Would you consider your Tropicana train be a run-through train, the arrangement between CSXT and Conrail?

A. Surely, that's a run-through.

Q. And would such a run-through train arrangement be offensive to the agreement, Mr. Snow, the agreement between Norfolk Southern and CSXT?

A. No. if NS and CSXT can come to agreement on a run-through train, I don't see anything inherently offensive

As for the third condition which MMM asks be imposed, namely, a five-year rate freeze of the rates applicable on its shipments, applicants already have agreed to a three-year rate freeze. The agreement applicants negotiated with the National Industrial Transportation League provides that "[f]or a period of three years after the Closing Date, the carriers will, as a joint-line rate, maintain the Conrail single-line rate, subject to escalation based on the RCAF-U index, for shippers who request this and have a history of use of rail transportation on the route in question [p. 25 of CSX/NS-190]." Considering that the NIT League agreement covers the full range of commodities transported by rail, the five year rate freeze that MMM seeks for application to its low-value, rate sensitive traffic is compelling. Indeed, a five-year rate freeze is critical so as to permit MMM to adjust in an orderly fashion to the loss of Conrail's single-line service and the less efficient and more costly two-railroad, interlined freight operations that CSXT and NS will be rendering. See, Guilford Transportation--Control--B&M, et al., 5 I.C.C.2d 202, 229, 233 (1988); Union Pacific--Control--Missouri Pacific; Western Pacific, 366 I.C.C. 462, 603-609 (1982), aff'd, Southern Pacific v. I.CC., 736 F.2d 708 (D.C. Cir. 1984), cert. den., 469 U.S. 1208 (1985).

As MMM's Chairman and Chief Executive Officer, Mr. Stephen P. Zelnak, Jr., explained, at page 2 of his Verified Statement, attached to MMM's Comments and Request for Conditions, MMM-2:

> If Woodville rates and service were to remain comparable to present levels, we believe the tonnage could remain at current volumes in spite of competition from lime and aggregate delivered by single-line service and/or by water. However, Martin Marietta knows of no two-line haul situations that involve rates or service equal or comparable to single-line hauls. From our experience, two-line hauls always involve higher rates, with the revenues divided between the railroads, less efficient service because of transit times between rail yards, and consequently a negative impact on shipping cost.

The modest, interim rate relief which MMM seeks ties in with the other conditions it asks the Board to impose. If, as MMM asks, the Board were to condition its approval of the proposed transaction upon the applicants' operation of run-through trains and the handling of blocked cars, the interchange of cars at the Toledo junction would be simplified greatly and the terminal costs that otherwise would be borne by CSXT and NS would be reduced significantly. MMM, in effect, simply asks that at least some of those savings to be realized by CSXT and NS in operating run-through trains and handling of blocked cars be used to ameliorate in part MMM's difficult position and be shared with MMM by way of a five-year freeze of the rates applicable on its interlined traffic.

Applicants project that their proposed acquisition of Conrail will yield them benefits approaching $1.5 billion annually, most of which will have been realized in the third year following consummation of the transaction. CSX/NS-18, pp. 124, 126. The dramatic revenue gains and operating savings projected by the applicants renders the rate relief which MMM seeks almost insignificant. The rate relief certainly is well within the means of the applicants to bear for the requested five year period MMM seeks without leaving even a noticeable dent in the benefits that applicants expect to achieve.

WHEREFORE, Protestant, Martin Marietta Materials, Inc., asks that, if the applicants' proposed transaction otherwise were found by the Board to be consistent with the public interest, its approval be conditioned upon the railroads' operation of run-through trains, handling of blocked cars and maintenance of rates, as requested.

Respectfully submitted,

MARTIN MARIETTA MATERIALS, INC

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Dated: February 23, 1998

APPENDIX A

Excerpts from the deposition of

DARIUS W. GASKINS, JR

August 20, 1997

MR. SIPE: And, subject to Mr. Reeves' representation that he's going to sign those today, and I believe we're going to get some copies here for you --

MR. REEVES: Great.

MR. SIPE: -- we'll proceed on that basis.

MS. TANENHAUS: I'm Marta Tanenhaus and I'm representing Canadian Pacific Railway, and I have signed both of the protective orders.

MR. KAHN: Fritz R. Kahn, representing Martin Marietta Materials, Inc., and I have signed both the confidential and highly confidential undertakings.

Whereupon,

DARIUS W. GASKINS, JR.,

was called as a witness by counsel for the Parties, and having been duly sworn by the Notary Public, was examined and testified as follows:

EXAMINATION BY COUNSEL FOR
MARTIN MARIETTA MATERIALS, INC.

BY MR. KAHN:

Q. Mr. Gaskins, I'm Fritz R. Kahn, I represent Martin Marietta Materials, Inc., of Raleigh, North Carolina, and I just have a few questions of you based on your verified statement beginning at page 88 of volume 2A of the railroad control application.

Mr. Gaskins, you're the former chairman of the Interstate Commerce Commission. Do you recall when you were at the ICC?

A. Yes, I was confirmed in July of 1979 as a commissioner and appointed chairman on January 1 of 1980. And I resigned from the commission on the 1st of February, 1981.

Q. And, while you were at the ICC, were there any major mergers, railroad mergers pending, do you recall?

A. Yes, there were.

Q. And which ones were they?

A. There was a merger between the Frisco Railroad and Burlington Northern at that time, there was a merger between the Chessie system and Seaboard Coastline, there was an acquisition of the -- that's a small merger. Those two I remember very clearly.

Q. Had Norfolk Southern/N&W been filed before you left?

A. It had been filed.

Q. And my recollection, Mr. Gaskins, is

that upon leaving the ICC you joined BN, Burlington Northern?

A. No, that's not strictly correct. I went to work for a company in Texas called Natomas North American which was an oil and gas company. And I worked for them from February of 1981 until August of 1982, a period of a year and a half.

Q. And you were at BN from August of '82 until when?

A. Until April of 1989.

Q. And, during that period of time, was BN involved in any major railroad mergers, either as an applicant or protestant?

A. We were a party I believe in the SP/Santa Fe case, but I'm not sure that we -- I don't remember what stance we took because that involved -- I think in the end we stood aside, even though we signed the papers and were part of the process.

Q. And do you recall whether BN at that time may have been involved in the UP and MP/WP, Union Pacific's acquisition of the Missouri Pacific and Western Pacific?

A. I think that that was being concluded when I joined the railroad. I was involved in marketing and sales and didn't have anything to do with that matter. I don't remember when it was concluded, whether it was just after I joined BN or shortly after. But I had no involvement, I don't remember the company being involved in it, I don't know what their posture was.

Q. In advance of preparing this verified statement, Mr. Gaskins, did you meet with CSXT or NS?

A. Yes.

Q. And did either CSXT or NS provide you with some data, some information relating to the proposed transaction?

A. Yes, as part of this analysis, we relied directly on estimates made by some people from Reebie and also some representatives of the railroad as to what they thought the short-term diversions from truck to the newly acquired property would be, combined property.

Q. Mr. Gaskins, at page 15 of your statement which is page 103 of volume 2A, you make the statement, in my opinion a central advantage of the proposed transaction is the expansion of single-line services. Do you remain of that view?

A. Yes.

Q. At page 14 you state, the advantages of single-line service to customers have long been recognized. Do you remain of that view?

A. Yes.

Q. Would you please enumerate what some of those advantages of single-line service might be?

A. Well, I think they're enumerated in my statement. But sort of the bottom line concluding advantage is that, when single-line service is offered to the customer, because it's under the control, total control of a single entity supplying the service, the quality of the service as perceived by the customer is superior to a situation where there are multiple parties involved in a transportation option.

Q. Is there less handling of freight, Mr. Gaskins?

A. Well, there may be substantially less switching of the cars involved, there are clearly less negotiation about rates, there's less discussion about who is responsible for what happens when there's only one party that holds themselves out as the responsible freight carrier.

Q. Is there reduced transit time?

A. Almost always, there would be reduced transit time because the transportation is planned by a single entity and there is not the potential delay when traffic is handed off from one to another.

Q. Are there reduced operating costs?

A. There's certainly the possibility of reduced operating costs and I would suggest in most instances there is an actual reduction, though in some instances the parties before the transaction could operate effectively and efficiently.

Q. Is there more efficient utilization of equipment?

A. Yes.

MR. SIPE: Fritz, just so we're clear, these questions are all sort of asking for generalizations at this point as I understand it.

MR. KAHN: Yes.

THE WITNESS: Yes, I would agree with that.

BY MR. KAHN:

Q. And reduced risk of loss and damage?

A. Yes.

Q. More sales opportunities for sellers?

MR. SIPE: I object to that question as unclear.

THE WITNESS: That was not -- I mean I don't follow that question exactly. I can answer it, but -- let me see.

BY MR. KAHN:

Q. It happens to be a direct quote from the testimony of the chairman, Mr. John Snow. And I was just trying to explore whether you agreed with Mr. Snow's statement?

A. Well, let me respond in the following sense, if you look at the actual transaction that we have in place, because those shippers in the former Conrail territory will have single-line service to points they didn't have it before, then -- but it isn't single-line service that provides different regions, it's the fact that you've created single-line service to a point that's outside the range of the Conrail franchise.

Q. More options for buyers?

A. Which buyers are we talking about?

Q. I assume that would refer to customers of shippers?

A. Yes.

Q. Now, Mr. Gaskins, would not going from single-line service to two-railroad service be correspondingly disadvantageous?

A. Most likely it would be.

Q. Would there not be greater handling of freight?

A. Yes.

Q. Would there not be extended transit times?

A. There probably would be.

Q. Would there not be increased operating costs?

A. Yes, there would be.

Q. Would there not be less efficient utilization of equipment?

A. Probably.

Q. Would there not be greater risk of loss and damage?

A. Yes.

Q. Would there not be fewer sales opportunities for sellers?

A. Yes.

MR. SIPE: I'm going to object -- well,

let me just make a comment on that question.

You're asking generally in the abstract and not with reference to this transaction I take it? If you want to ask him with reference to this proposed transaction, that's fine. But I'm just going to state for the record my understanding of the scope of these questions.

MR. KAHN: Thank you, Mr. Sipe.

BY MR. KAHN:

Q. Mr. Gaskins, would there be fewer options for buyers, again using the term buyers as the customers of the shippers?

A. Probably, probably.

Q. Mr. Gaskins, will not the breakup of Conrail with regard to certain shippers which today have Conrail single-line service result in their being subject to two-railroad service on CSXT and NS?

A. In a very small percentage of the time. We have analyzed that question and discovered that there are, in fact, nine lanes between one BEA and another where single-line service would be removed. And those nine lanes represent a de minimis portion of the rail freight that's involved in this transaction.

Q. Where in your statement will I find evidence of your consideration of that?

A. It's not in my statement.

Q. On page 13 and 14 of your statement, you do make the statement, at the bottom of page 13, carrying over to the top of 14, the increased cost associated with the need for each carrier to, in effect, originate a move can price the rail mode out of that market. Do you remain of that view?

A. Yes.

Q. And what did you mean by that statement, would you amplify on it, please?

A. Well, to the extent that you have two parties that have to negotiate, negotiate rates, that have to coordinate service, they both will bear some costs associated with it. And it seems likely that the total cost of the move and the costs to the two parties will be somewhat higher than it would in the case of single line.

And, if, in fact, the truck competition is so severe that there's very little margin even for a single-line carrier, there's a possibility that the interline carriers will not be able to compete in the market. So they will lose traffic because of that.

Q. On page 13 you have the statement, furthermore, interline service can be difficult for the railroads to market in relatively short and medium haul lanes, particularly for low-margin commodities. Do you remain of that view?

A. Yes.

Q. Do you consider aggregates to be low-margin commodities, sand?

A. No. In fact, if the rail service is properly designed, aggregates can be quite profitable for railroads. In fact, railroads are observed to haul aggregates relatively short distances.

Q. Short distances?

A. Yes, like 200 miles.

Q. If you do not consider aggregates, sand, gravel, crushed rock, to be low-margin commodities, would you give me an example of what you deem to be low-margin commodities as you use that term in your statement?

A. Well, in the case of a short distance, like 200 miles, anytime a railroad attempts to compete directly with trucks for intermodal type shipments, those are low-margin commodities for the railroad. And, in fact, you observe that, using existing technology, railroads are generally unable to attract intermodal traffic for a distance of 200 miles. But, in contrast to that, aggregates they can handle in the 200-mile range.

Q. With reference to aggregates, Mr. Gaskins, do you know any instance when there are interlined movements, two-line movements, not including short line but Class I railroads?

MR. SIPE: And this question time frame applies to any time in his experience, past or present?

BY MR. KAHN:

Q. That would be great, if he can recall any instance. Thank you, Mr. Sipe.

A. I'm sure there were some -- there's examples of gravel that moved on short lines.

Q. Excluding short lines, Mr. Gaskins. I asked whether you were aware of any two Class I interlined movements.

A. Class 1's. I'm not aware. There may well be, but I'm not aware of them.

Q. Mr. Gaskins, are there steps that

cooperating railroads might take to minimize the difficulties of two-railroad interchange service?

A. Yes, there are steps obviously that can be taken.

Q. Could you identify what they might be?

A. Well, historically railroads have agreed to long-term contractual arrangements that tend to bridge the gap where the contracts spell out specific operating responsibilities. I know at the Burlington Northern we had an arrangement with a terminal in the Memphis area in which we alternated operation of the property from year to year in order to maintain appropriate coordination of traffic.

Q. Would trackage rights be something that might be included in an agreement?

A. Trackage rights have been included historically. And one of the purposes is to help solve these problems. Run-through trains, where you power run through, is another institutional arrangement that has occurred in the case of coal movements in particular to help coordinate interline movements. So there are lots of things that railroads have turned to.

Q. Haulage rights, for example?

A. Yes, haulage rights have been used.

Q. Blocking of cars?

A. Yes. There's a myriad of small things that are done at an operating level that attempt to solve these problems.

Q. Enlarged reciprocal switching districts?

A. That's been used, yes.

Q. How about line sales?

A. Well, there's always the possibility that railroads can rationalize their systems by selling lines to one another. I don't know of an example, though, where that's been -- I'm just not familiar with a situation where that's been used to solve these kinds of problems.

Q. The foregoing which are arrangements that cooperating railroads have worked out among themselves, do you think that those might be imposed as conditions by the Surface Transportation Board if it deemed the imposition of such conditions were required to assure the adequacy of transportation services?

MR. SIPE: I object to that question. First of all it calls for the witness to speculate. Second, it asks him to speculate about legal matters.

BY MR. KAHN:

Q. You may answer the question.

MR. SIPE: But don't speculate.

THE WITNESS: I know historically that the predecessor to the Surface Transportation Board has imposed certain conditions on mergers. And over time the imposition of those conditions has changed with their perception of what the competitive realities are.

When I first joined the commission, the policy was that DT&I, the famous DT&I conditions were imposed on all mergers under the guise at that point that that was protecting competition. With the benefit of additional thought, the commission has stepped back from the imposition of those conditions beginning in the early 1980s. So yes, the commission and its successor can impose conditions and has in the past.

Q. Such as trackage rights, for example?

A. Yes.

Q. Such as independent pricing authority, for example?

A. Yes.

Q. Mr. Gaskins, are you personally familiar with the Woodville lime plant of Martin

Marietta Materials, Inc.?

A. No, I'm not.

MR. SIPE: Just for the record, Mr. Kahn, when you say Woodville, I assume that's a city or a town. Could you associate that with a particular state so the record is clear.

MR. KAHN: Mr. Sipe, I'm surprised, you haven't done your homework in preparation for this. Woodville is about 15 miles south of Toledo, Ohio. It is a Conrail station which will be served by your client, CSXT. And the reason I'm here is that several of its customers will be on Norfolk Southern's lines.

BY MR. KAHN:

Q. Mr. Gaskins, can you state from your personal knowledge whether the Woodville lime plant of Martin Marietta Materials, Inc., will be able to move its aggregates to customers?

A. I have no idea.

Q. Can you state from your personal knowledge whether, in the situation of the Woodville lime plant, it requires the imposition of protective conditions?

A. I have no idea.

MR. KAHN: That concludes the questions

I have. Thank you very much, Mr. Gaskins.

MR. SIPE: Do we want to identify the gentleman who walked in during the course of Mr. Kahn's examination.

MR. DONOVAN: I apologize for being late, Mr. Sipe.

Paul Donovan with LaRoe, Winn, Moerman & Donovan representing The Port Authority of New York and New Jersey, and I have signed both protective orders.

EXAMINATION BY COUNSEL FOR
CANADIAN PACIFIC RAILWAY COMPANY
BY MS. TANENHAUS:

Q. Dr. Gaskins, my name again is Marta Tanenhaus, I'm from the law firm of Hogan & Hartson, and I represent Canadian Pacific Railway.

In your verified statement, at the bottom of page 90, and let me say for the record that I will be referring to the lower page numbers?

A. I have to do a little cross-reference because I have the upper ones. But that's fine.

Q. You say that the CSX/NS/Conrail transaction, quote, is the most procompetitive

APPENDIX B

Excerpts from the deposition of

JOHN T. MOON, II

January 8, 1998

PROCEEDINGS

MR. ALLEN: This is the deposition of Mr. John Moon in Surface Transportation Board Docket Number 33388. And I'm Richard Allen representing Norfolk Southern Corporation and with me is my colleague, Craig Cibak. Mr. Kahn, I guess you can go ahead.

Whereupon,

JOHN T. MOON, II,

business address at Three Commercial Place, Norfolk, Virginia 23510, was called as a witness by counsel for Martin Marietta Materials, Inc., and having been duly sworn by the Notary Public, was examined and testified as follows:

EXAMINATION BY COUNSEL FOR
MARTIN MARIETTA MATERIALS, INC.

BY MR. KAHN:

Q. Mr. Moon, my name is Fritz Kahn and I represent Martin Marietta Materials, Inc. Just for the record, although I don't anticipate covering any confidential matter, I have signed the confidential and highly confidential documents. Would you please state your name and address for the record.

A. My name is John T. Moon, II. My home

address is 2116 Cutler Ridge, Virginia Beach, Virginia, 23454. Employee of Norfolk Southern Corporation.

Q. You are stationed at Norfolk Southern's headquarters in Norfolk?

A. Norfolk, Virginia. Three Commercial Place, Norfolk, Virginia.

Q. And I believe the statement identifies you as a manager, strategic planning for Norfolk Southern?

A. That is correct.

Q. What are your responsibilities as manager in strategic planning for Norfolk Southern?

A. Predominantly various projects that deal with line sales, line acquisitions, abandonments, operational studies, overall projects to better the corporation, coordination projects with foreign railroads, joint facilities.

Q. Is there a distinction, Mr. Moon, between a manager and a director of strategic planning?

A. No, there is not. All of the -- regardless of title, everybody in the strategic planning department works directly for the vice president.

Q. And who is that, please?

A. That's Mr. James W. McClellan.

Q. And you report to him directly?

A. That is correct.

Q. In this proceeding, the Conrail proceeding, have you previously appeared?

A. No. I furnished a verified statement to response of applicants, but I was not involved in the early application phase.

Q. Before this, have you testified in depositions?

A. Yes.

Q. And how did you prepare for today's deposition, Mr. Moon?

A. Did very little preparation. Talked some generalities with my counsel of my experiences, the physical layout of trackage in Northern Ohio and just some general things relating to my experience or my experiences in the railroad industry over the last 25 years.

Q. When you say your counsel, you are referring to Mr. Richard Allen of the Zuckert, Scoutt firm?

A. That is correct.

Q. And did you discuss your deposition with Jim McClellan?

A. All of about one minute; I told him I was coming in here to be deposed, and he was on the way to his father's funeral, and that was the extent of the communication, and that was the day before yesterday when I was notified to be here.

Q. And did you review any documents in preparation for today's deposition?

A. The only document I reviewed was my -- I reviewed my verified statement. I reviewed the verified statement of a couple of other people in the same volume. I read about them on a train coming up here yesterday.

Q. How was it decided that you would be offering rebuttal testimony, Mr. Moon?

A. As the multitude -- 160, 180, whatever it is -- responsive applications and comments came in, the responsibilities were divided up, and the ones that were assigned to me either somewhat matched my previous railroad experience or in a couple of cases actually matched territories that I had had as a train master in my previous life in the operating department.

Q. And that with respect, to your thinking, of the operation in Indiana and the PSI Gibson plant?

A. That's one of them.

Q. Is there another one that I missed?

A. I did five of them. My work experiences have taken me to several of the five.

Q. Like Calumet Harbor, for example?

A. I have done a lot of projects in the Chicago area.

Q. Mr. Moon, who was it that made the decision that you would be rebuttal witness and that you would be handling these four or five protestants' testimony?

A. There was a -- well, basically when they came in, we and the strategic planning department basically knew that each of the 160 or 180 required input from our department and we sat around the table and divided them up and then each provided the input to our various counsel.

Q. And Jim McClellan was part of that discussion?

A. As a matter of fact, he was not a part of that discussion on that day. He approved the process after he had been on vacation. He returned, and we had put together a spreadsheet of these 160 or 180 things showing the -- sort of an inventory of the SEB number and who was going to handle it, which attorney was going to handle it, and whether it was something that went to our partners in this application, CSX, or whether it was done by Norfolk Southern. McClellan approved the spreadsheet.

Q. In lumping Martin Marietta Materials with Indiana and Ohio Railway Company or Four Cities Consortium, Department of Justice and Illinois International Port District, you are not suggesting, Mr. Moon, that we have common concerns about the breakup of Conrail?

A. Absolutely none at all. Five totally separate filings and five totally separate answers.

Q. And you are not suggesting that we are seeking similar relief or similar conditions?

A. I don't know of any similarities.

Q. Mr. Moon, in the roughly 18 years, I'd say, that you have been with Norfolk Southern, did you ever work in one of Norfolk Southern's sales offices?

A. No, I did not.

Q. Were you ever employed in the marketing division?

A. No. I never have been.

Q. Have you been responsible for selling Norfolk Southern services to shippers of aggregates?

A. No, I have not.

Q. So shippers of lime?

A. No, I have not.

Q. Have you ever worked for shipper of aggregates?

A. Only minimal summer working when I was a teenager with a construction company.

Q. What was the name of that company?

A. Let me think. I think it was John Young Construction Company if I recall right. It's been 25 years, plus or minus, 27.

Q. And it was a producer of rock?

A. No. It was a consumer.

Q. Was it a producer of lime?

A. No.

Q. Can you identify the principal shippers of aggregates and lime in Ohio?

A. I don't know that I could identify all of them. As in other parts of this record, most of them are identified; if you read the responsive application of the Wheeling and Lake Erie Railway, it lists a whole bunch of them. There is a Wyandot Dolomite filed. There is a National Limestone or something filed. Your client filed. I think maybe the State of Ohio mentioned some in their filings. And I'm probably missing some, but there is a lot of overlap in those filings.

Q. And apart from their filings, do you have any personal knowledge of the shippers of aggregates or lime in Ohio?

A. I have the knowledge of field inspection of a multitude of these facilities.

Q. Can you tell me, Mr. Moon, where the principal mines on Conrail lines are, from which National Lime ships its rock and lime?

A. I'd have to refer to their filings to do that. There are so many places up there that there were quite a few places that produced and quite a few places that received.

Q. Can you tell me the Conrail station from which Wyandot Dolomite ships?

A. I'd have to look that up. I don't know.

Q. Can you tell me the station from which Redland, Ohio ships?

A. The station?

Q. Conrail station.

A. No. I'd have to look that up, too. I know where it is but I don't know the exact freight station.

Q. Mr. Moon, do you know Mr. Ronald W. Kruse?

A. No. Never heard that name.

Q. And do you Mr. Timothy A. Wolfe?

A. Not to my knowledge.

Q. And do you know Mr. David Chapman?

A. No. Not to my knowledge.

Q. And do you know Mr. Grant Goodwin?

A. No.

Q. Mr. Moon, would you consider yourself an expert witness on the subject of the marketing of aggregates and lime?

A. On marketing, no.

Q. At page 451 of your rebuttal testimony, Mr. Moon, you say Martin Marietta is complaining only about "two particular movements from its Woodville, Ohio plant, one to Hugo, Ohio, and one to Twinsburg, Ohio."

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MR. ALLEN: Where are you reading from?

MR. KAHN: Top of page P 451. First sentence.

THE WITNESS: All right. I see that.

BY MR. KAHN:

Q. Do you remain of that view, Mr. Moon?

MR. ALLEN: What was that view, again?

MR. KAHN: Just asking whether he continued to agree with that statement that Martin Marietta is complaining only about two particular movements from its Woodville, Ohio plant, one to Hugo, Ohio, and one to Twinsburg, Ohio.

THE WITNESS: I don't see the word "only" in there.

BY MR. KAHN:

Q. Were there additional parts about which Martin Marietta complained?

A. To a lesser extent.

Q. And what points were those, please?

A. Let me freshen my memory. There was some lime movements to a couple of steel places in Pennsylvania. Maybe a movement to Michigan. Most of the comments were about these two movements, but I did not use the word "only".

Q. Turning to page 453, what destinations for Martin Marietta's lime movements from Woodville were you thinking of when you said that they are better able to sustain a move over a joint-line route?

A. Those were the movements that were identified in Martin Marietta's filings from which I was working from.

Q. You have no current recollection of what those destinations were?

A. No. Not without looking it up.

Q. If I were to say that they were in West Virginia and Mingo Junction, Ohio, would you accept my characterization?

A. Yes. I believe that's correct.

Q. And do you know the identity and the purchaser of Martin Marietta's line at Weirton, West Virginia?

A. I think I did but I can't say 100 percent sure.

Q. If I represented that it was Weirton Steel, would you accept that characterization?

A. Yes, I would.

Q. And would you know who the purchaser of Martin Marietta's lime at Mingo Junction was?

A. I think I do but I'm not 100 percent sure.

Q. If I was to represent that it was Wheeling Pittsburgh Steel, would you accept that characterization?

A. Yes, I would.

Q. Mr. Moon, is Martin Marietta Materials the sole source for and the quick lime consumed by Weirton Steel at Weirton, West Virginia?

A. I have no earthly idea.

Q. Is Martin Marietta Materials the sole source for the quick lime consumed by Wheeling Pittsburgh Steel at Mingo Junction?

A. I have no earthly idea.

Q. Would you agree that there are other lime producers competing for that business?

A. I think that would be a logical assumption.

Q. But you don't know offhand who they might be?

A. No. That's correct.

Q. Mr. Moon, what is the current Conrail single-line common carrier rate on lime shipments from Woodville to Weirton, West Virginia?

A. I have no earthly idea.

Q. To Mingo Junction?

A. Again, no idea. I don't do rates.

Q. Mr. Moon, do you know what the current Conrail contract rate is on lime shipments from Woodville to Weirton, West Virginia?

A. Again, I have no earthly idea. I don't do rates or rate contracts.

Q. And Mingo Junction?

A. Same.

Q. You do know, however, that Woodville is slated to become a station on the lines of CSXT?

A. That is correct.

Q. And that Weirton and Mingo Junctions are slated to become stations on the lines of Norfolk Southern?

A. That is correct.

Q. So that instead of a single-line Conrail movement of lime from Woodville to Weirton or Mingo Junction, and the transportation would become a two-line CSXT Norfolk Southern line movement?

A. That is correct.

Q. Can you tell us, Mr. Moon, what the common carrier joint-line CSXT-Norfolk Southern rate on lime shipments from Woodville to Weirton, Ohio following the consummation of this transaction?

A. It would be whatever the two carriers negotiate along with the shipper. In terms of an exact dollar amount, I have no earthly idea.

Q. And to Mingo Junction?

A. Same. I have no idea.

Q. After any existing Conrail contract has expired and after the three years provided by the Methely settlement agreement has expired, do you know, Mr. Moon, what the CSXT Norfolk Southern joint-line contract rate will be on lime shipments from Woodville to Weirton?

A. I have no idea on rates.

Q. And to Mingo Junction?

A. No idea.

Q. Now, turning to the rock movements to which you refer on page 451 of your rebuttal verified statement, at the third paragraph on that page, you state: "Shipments of aggregates are invariably handled via rail from the quarry to a fixed rail location and where they are transloaded to trucks for shipment to the final destination." Do you remain of that view?

A. Yes, I do.

Q. Does that statement apply to the shipments of Martin Marietta's rock from Woodville to Twinsburg?

A. The Woodville to Twinsburg segment is only a portion of the shipment from where the rock is produced to where it's consumed.

Q. Do you know that for a fact?

A. I know that from my physical inspection of the facility.

Q. And how about the movement from Woodville to Hugo?

A. Same.

Q. And do you know that for a fact?

A. Yes. Same.

Q. Who was the purchaser of the rock at Twinsburg, Ohio?

A. It's in this filing someplace, Martin Marietta's purchaser. It's in Don Seal's verified statement someplace. I think it's in the Wheeling and Lake Erie's also. This is the one that's showing Hugo. Didn't you ask Twinsburg?

Q. Yes, sir. I was inquiring whether you know from your personal knowledge?

A. No. It's on the tip of my tongue. I

looked at the place, and it's in the -- in several of these filings. It's in Martin Marietta's, it's in Wheelings' and several others.

Q. I'm asking if you know it of your personal knowledge.

A. I don't know it without looking it up.

Q. Do you have any idea how much rock moves annually from Martin Marietta's facility at Woodville. And let me put your mind at ease. It happens to be Whitestone at Twinsburg.

A. I only know that from Martin Marietta's filings. It was stated in there someplace.

Q. Again, you have no personal knowledge, Mr. Moon?

A. Other than what I have read from Martin Marietta, no.

Q. What does Whitestone do with the rock at its Twinsburg facility?

A. Whitestone, other folks like them, they basically sell to contractors or work with contractors for construction projects. The final source of the rock that comes out of the quarry is some sort of construction project either a building or a road or a bridge.

Q. Let's be clear about this. Whitestone at Twinsburg, Ohio, you say, offloads the rock and then --

A. Puts it in a pile.

Q. -- puts it in a pile from there.

A. The rock is then transported from the pile into a truck to wherever it's going for its final destination.

Q. Are you stating as a matter of fact that White Rock at Twinsburg has no ready-mix concrete plant?

A. I didn't say that. I said I saw trucks getting loaded with rock out of the pile.

Q. Are you saying that White Rock at Twinsburg does not have an asphalt plant?

A. I didn't say that either. It doesn't matter whether it's in concrete form, rock form, asphalt form. It still has to go from there to where it's finally used.

Q. That's not what your statement says at 451. Do you want to read that again, Mr. Moon?

A. I can see it.

Q. This very specifically says, Mr. Moon, that the rock is transloaded to trucks for shipment to final destination. It doesn't say concrete is moved to final destination. It doesn't say asphalt is moved to final destination.

A. Each job is different. In my experience, I have seen -- depending on the construction job, a contractor may move a portable asphalt plant in near sight or may move a portable concrete ready-mix facility towards site. Each is the customer's own logistics based upon the individual project at hand.

If the job is small enough to not warrant setting up production facilities at the job, then it will truck it from somewhere else or it will truck it from the train to the plant, or the plant may be adjacent to the train. The key is that from the quarry to the final consumption point of the aggregate, that the aggregate by nature moves by rail and truck.

Q. That's what I want to explore with you, Mr. Moon. Let's limit ourselves to Whitestone at Twinsburg. Are you saying that the roughly 340,000 tons of rock that were shipped by rail, single line, from Conrail, from Woodville to Twinsburg were transloaded at Twinsburg for ultimate delivery by truck to other sites?

MR. ALLEN: Just to make sure the record is clear, I don't believe that Mr. Moon quantified the amount of rock that came into the facility.

MR. KAHN: Let's get at that, Dick.

BY MR. KAHN:

Q. How much, Mr. Moon, of that 340,000 tons that moved in 1996 by rail, Conrail single line, from Woodville, Ohio to Whitestone at Twinsburg, Ohio, moved by truck as an aggregate, as a rock, beyond Twinsburg?

A. I have no earthly idea. I have seen trucks at that facility being loaded with rock and departing that facility. Whether it's 2 percent, 5 percent, 50 percent, 100 percent, I couldn't tell you.

Q. Mr. --

A. And I can't tell you whether or not the rock that went out the front gate that I saw came from Woodville or whether it came from Parker Town or other places that shipped to Twinsburg. Twinsburg is multiple origins. I can't tell you whether this pile of rock came from one quarry or another quarry.

Q. That leads exactly to the next question

I was planning to ask you, Mr. Moon. Are you not suggesting that the Martin Marietta is the sole source of the rock purchased by Whitestone at Twinsburg, are you?

A. No. To my knowledge, the multitude of stone producers and stone receivers in northeast Ohio -- that there is multiple origins and multiple destinations for all of them. I don't think any one is a single point.

Q. And again, I take it you wouldn't be able to identify who the folks are with whom Martin Marietta competes in selling rock to Whitestone at Twinsburg?

A. I think the answer I gave previously on that with the cross-reference to the other filings is much more comprehensive than anything I have.

Q. Offhand you can't name anyone?

A. No. Not offhand to isolate one versus another.

Q. Mr. Moon, do you know the current Conrail common carrier rate on shipments of rock from Woodville to Twinsburg?

A. I have no earthly idea.

Q. Do you have what the current Conrail

contract rate is on rock shipments from Woodville to Twinsburg?

A. I have no earthly idea.

Q. Again, you do recognize that Twinsburg is slated to become a CSXT station?

A. That is incorrect.

Q. I beg your pardon. You are correct. Thank you for correcting me. Woodville is slated to become a Norfolk Southern station?

A. That is correct. I think we stated that --

MR. ALLEN: I think you have it wrong. Twinsburg.

BY MR. KAHN:

Q. Twinsburg is going to be Norfolk Southern. Woodville is going to be CSXT. What had been a single rail Conrail movement from Woodville to Twinsburg is now going to become a two-line CSXT Norfolk Southern movement, right?

A. That is correct.

Q. And do you have any idea, Mr. Moon, what the common carrier rate will be that CSXT and Norfolk Southern will charge for the movement of rock from Woodville to Twinsburg?

A. I have no earthly idea.

Q. And the same with respect to the contract rate?

A. That's the same. I have no earthly idea. I don't do rates.

Q. The substance of your testimony, if I read it correctly, Mr. Moon, is that the stone that now moves from Woodville to Twinsburg can continue to move single line via CSXT to Cleveland, right?

A. My statement is first saying that, as in line with your previous questions, the stone can move joint line Woodville to Twinsburg, CSX to Norfolk Southern. Or, if Martin Marietta desires to go to the same geographical part of the world, it can go single line on CSX to the various places that are near Twinsburg that are served by CSX.

Q. Do you know what CSXT's single-line rate will be on movements from Woodville to Cleveland?

A. I have no earthly idea.

Q. Do you have any idea what CSXT's contract rate will be?

A. I can't speak for CSX. I don't have any idea.

Q. Thank you for correcting me. That should be Norfolk Southern's rate.

MR. ALLEN: From where to where?

MR. KAHN: No. It's CSXT.

BY MR. KAHN:

Q. You did indicate that there would be a single-line capability between Woodville and Cleveland by a CSX team, is that right?

A. That is correct.

Q. I'm asking you do you know what the contract rate is likely to be?

A. No. I can't speak for CSX.

Q. Assuming that Whitestone does have a gradient mix concrete plant at Twinsburg, and assuming that Whitestone has an asphalt plant at Twinsburg, and that will want to continue utilizing those following the breakup of Conrail, in order to avail itself of this capability of moving rock single line from Woodville to Cleveland, where would the rock be delivered in Cleveland?

A. What you have said wouldn't work because you said single line. If you are going to -- if the rock at Woodville is going to go to the facility at Twinsburg, it's either going to go in a joint-line service or it won't move by rail.

Q. You said in your testimony, and I think it's the substance of your testimony, that -- just so I don't misquote you, Martin Marietta -- I'm on page 451: Martin Marietta does not address the fact, and that after the transaction CSX will operate on lines that are in a close proximity to Hugo and Twinsburg.

I read that to mean, and correct me if I'm wrong, that rock will be able to move single-line CSXT from Woodville to points in close proximity to Hugo and Twinsburg?

A. That's correct. Close proximity is not to. Close proximity is near.

Q. All right. And the near point for Twinsburg is, in your testimony, is Cleveland, right?

A. Cleveland or maybe a point along CSX's line entering Cleveland. If you got out a compass and figured out exactly what was closest to Twinsburg, it would be in that area. It's a geographic proximity but it's not the exact location.

Q. So you have a rail movement, let's say, from Woodville to Cleveland, right.

A. That's a possibility.

Q. What other movement are you talking about in your testimony?

A. Movement could go from Woodville. It doesn't have to go to Cleveland. It could be somewhere along the line going to Cleveland. It could go to Akron or somewhere along the line going to Akron. If you sort of pick Twinsburg and say what's within a 20-mile radius, you'll hit CSX several different places.

Q. Bear with me. Is it your testimony that there is single-line CSXT rail service available following the breakup of Conrail from Woodville this ill-defined point in the greater Cleveland area?

A. Yes. That is true.

Q. That's what I was referring to as single-line service, single-line rail service.

A. Yes. CSX all the way.

Q. Yes, sir. Let's get back. Where would that rock be unloaded?

A. Wherever the customer chose to unload it and the railroad could handle to unload it.

Q. The customer is Whitestone in

Twinsburg.

A. Like I said before, if it's going directly to Whitestone at Twinsburg, it's going joint-line rail transportation or it's not going rail. If it's going near to, then there is a multitude of places along CSX's lines that are near to Twinsburg.

Q. But then you are changing the substance of your testimony, if I understand, Mr. Moon, in that --

A. No. That's exactly what my testimony is saying.

Q. Please explain to me, if you will, how CSXT's single-line service to the greater Cleveland area is available on rock that needs to be processed by Whitestone at Twinsburg?

A. It's not, but if the final destination of the process in transit -- if you will, rock -- at Twinsburg, the final destination is not Twinsburg. The final destination is the various construction sites within a radius around Twinsburg of which the same radius, CSX's lines also are within the radius.

Q. Mr. Moon, if the construction site takes concrete and the concrete is made at the

Whitestone facility at Twinsburg, please explain to me how CSXT's single-line service will meet the needs of Martin Marietta and its customer Whitestone at Twinsburg.

A. If your question is saying that you are going to have single-line rail service and that the concrete processing will occur at Twinsburg and nowhere else than Twinsburg, it won't work. That will be a joint-line rail move, not a single-line rail move.

However, if the individual construction project justified either a temporary or a permanent concrete processing plant portable or otherwise, moved someplace other than Twinsburg, then that particular Woodville to whatever the other new location would be would be single-line rail service.

Q. Single-line rail service.

A. If they so chose it.

Q. Plus a truck operation?

A. That all depends. You are going to have a truck operation regardless to get to the final construction site. There could be a truck operation between the rail and the concrete plant if it's elected to stay put, or if temporary one or a different one moves to the rail head, it could move on CSX's line someplace. It's a dynamic either/or, but not both.

Q. But then if I understood your statement just a moment ago, Mr. Moon, so long as Whitestone proposed to continue to operate its ready-mix concrete plant and it's ready-mix asphalt plant at the Twinsburg site, it cannot avail itself of CSXT single-line service, is that correct?

A. That's correct. CSXT will not go to Twinsburg.

Q. And you are stating that -- you are not suggesting that the rock be offloaded from a CSXT train somewhere in the Cleveland area and trucked to Twinsburg for processing at Twinsburg?

A. That's not my suggestion. That's physically possible. But that's not what I was suggesting.

Q. So it is only with respect to that rock which is trucked from the rail head to a ready-mix plant at the construction site or the paving plant at a paving plant at a paving site, that your testimony suggests CSXT single-line service would be of benefit to Martin Marietta, is that correct?

A. That's one of the applications. Each move from quarry to final construction project is different, depending on the location, the size and scope of the project. Some projects would be beneficial for Whitestone to continue to process out of its production facilities at Twinsburg. Some jobs may be economical for Whitestone to locate either a temporary or permanent facility near the job site which could be on a CSX line or a line owned by another rail carrier, could source the rock from Woodville or some other place. Each case is different.

But if you get in the general radius around Woodville, or the general radius around Hugo, or around Twinsburg, any of these points that are mentioned within a relatively small radius, there are rail lines of CSX, Conrail, Norfolk Southern and other carriers today and will be again after this transaction is completed.

Q. In order to avail itself of CSXT's single-line service from Woodville to a point in the greater Cleveland area, wouldn't the ready-mix concrete plant and the asphalt plant of

Whitestone be -- need to be situated on the CSXT line?

A. If it's going to be -- if it's going to move in single-line CSXT service, your answer is correct.

Q. Do you know of any industrial sites in the greater Cleveland area, and that would be available for the location of a ready-mix concrete plant and an asphalt plant that's been zoned accordingly?

A. I'm not familiar with the sites that are located along CSX's lines.

Q. Do you have any idea what the costs might be to Whitestone if it were to acquire such a site and equip it to be a ready-mix concrete plant and then asphalt plant?

A. There is no definite answer to that. It would vary to whether it was a temporary, portable facility that is being located or a permanent facility or relocation. Each would stand on its own.

Q. Suppose they set up a permanent plant. What would the cost be?

A. I have no earthly idea.

Q. If it were a temporary plant, what

would the cost be?

A. Same. Don't have any idea.

Q. Let's turn to Hugo. Mr. Moon, who is the customer that buys Martin Marietta's rock at Hugo?

A. The customer I believe, I think I recall it to be Honecker Sand.

Q. Yes, sir. Do you know how much rock Honecker Sand purchased from Martin Marietta? How much it buys annually?

A. I believe that figure is in Martin Marietta's response of application. I'd have to look it up.

Q. Offhand you don't know?

A. No.

Q. And what does Honecker Sand do with the rock it purchases from Martin Marietta at its Hugo facility?

A. The end use of the product is similar to that of Twinsburg.

Q. Are you saying the preponderance of the rock moves out by truck?

A. There is some that moves out by truck. Again, it ends up in the -- as we have been discussing previously, either in asphalt or in concrete or in filler in construction projects.

Q. You don't know what portion?

A. I have no idea what portion or percentage goes to which use.

Q. And does Honecker Sand have a ready-mix concrete plant and an asphalt plant at its Hugo site?

A. I'm trying to recall. I don't believe that I saw an asphalt production facility there. There was a -- it looked like old and worn-out concrete producing facility there and I don't know if it was in functioning condition.

Q. Does Honecker Sand have a more modern ready-mix concrete plant and asphalt plant nearby?

A. I don't recall seeing one.

Q. So you don't know how much the prepared rock that is delivered now by Conrail to the Honecker Sand site at Hugo is actually consumed at Hugo in the production?

A. I have no earthly idea.

Q. Again, Mr. Moon, do you think Martin Marietta is the sole source of the rock that Honecker Sand buys and consumes at Hugo?

A. I don't think they are.

Q. And can you identify who the other suppliers might be?

A. The same potential group referred to previously in the other filings in this case. Quite a few of them have mentioned this location as a potential destination for some shipments produced by people other than Martin Marietta.

Q. But you don't know, for example, whether Wyandot actually sells to Honecker?

A. Not off the top of my head, no.

Q. And again, Mr. Moon, do you know what Conrail's current common carrier rate is on rock shipped to Woodville?

A. No.

Q. And Conrail's current contract rate?

A. No.

Q. And Hugo, as Twinsburg, is slated to become a Norfolk Southern station?

A. That is correct.

Q. And shipments of rock from Woodville to Hugo will become a two-line CSXT Norfolk Southern movement, is that correct?

A. That is correct.

Q. And do you know what CSXT expects to assess at their common carrier rate from

Woodville to Hugo?

A. No.

Q. Do you know what they are likely to assess as their contract rate?

A. No.

Q. Again, the substance of your belief, I believe, is that CSX will be able to handle Woodville aggregates via single-line rail service to Akron which is approximately 20 miles from Hugo.

A. That is correct.

Q. Assuming that Honecker will want to keep its ready-mix concrete plant and asphalt plant, if indeed there is an asphalt plant at Hugo, how would that single-line service to Akron work?

A. You are talking about an identical situation as we have previously discussed at Twinsburg.

Q. And correct me if I mischaracterize your testimony, but I believe Mr. Moon finally concluded that if the ready-mix concrete plant and the asphalt plant was intended to remain at Hugo, then the single-line service to Akron would not work?

MR. ALLEN: You can confirm or correct that.

THE WITNESS: I said it would probably not happen. It is physically impossible.

BY MR. KAHN:

Q. And physically that would entail a truck movement from Akron to Hugo?

A. Yes. That's correct.

Q. And that truck movement would entail an additional transloading, is that correct?

A. If the stone was going to move single-line rail from Woodville to Akron, then it would be transloaded to truck, assuming that the production facilities at Hugo remained at their present location and intact and functioning, that is correct. Like I said with Twinsburg, if it's going to go from Woodville to Hugo, it's going to go joint-line rail or it probably won't move rail.

Q. But exploring the theoretical possibility that it might move to Akron and then be transloaded and loaded for truck transportation to Hugo, I believe you just said there would be an additional transloading cost and there would also be an additional trucking cost, would there not?

A. If the production of this individual piece of aggregates remain to Hugo, that's correct. Again, if you are looking at the radius around Hugo, there are places within the reasonable radius around Hugo that CSX has rail lines, Norfolk Southern has rail lines, Conrail has rail lines.

Q. But assuming tha the production remains at Hugo, do you have any idea how much in the transloading and trucking costs would come to?

A. I have no idea.

Q. And if I were to say that Martin Marietta estimates the increased transloading and trucking costs from Akron to Hugo as from Cleveland to Twinsburg would come to about two and a half dollars a ton, would you have any reason to dispute that?

MR. ALLEN: I object to that question. There is no basis in the record for that assertion. It's simply coming from counsel, with all respect.

MR. KAHN: You may answer the question.

MR. ALLEN: His question was do you

have any basis to dispute that hypothetical assertion?

THE WITNESS: If that's what Martin Marietta says their costs are, I'm not going to challenge Martin Marietta's costs when another producer or consumer may come up with significantly different costs that may apply to them.

BY MR. KAHN:

Q. In connection with the single-line railroad service from Woodville to Akron, which you say is a possibility, do you have any idea what CSXT proposed to assess as its common carrier rate?

A. I have no idea. I don't work for CSX.

Q. Do you have any idea what CSXT proposes as its contract rate?

A. Same.

Q. You say that Honecker Sand might be able to set up a facility on a CSXT line in the greater Akron area in lieu of the operation currently rendered at Hugo. Do you know of a site, an industrial site in the Akron area on CSXT, that has been zoned for a ready-mix concrete plant and an asphalt plant?

A. I have no idea. I don't work for CSX.

Q. Do you have any idea what such a site might cost Honecker Sand?

A. I have no earthly idea.

Q. Mr. Moon, I just have a couple of concluding questions. On page 451 of your statement, you say: "The final destinations for most aggregate shipments are road and building construction sites." Do you remain of that view?

A. That is correct. That's where the final product that comes from the quarry -- where it's ultimately consumed and moves no further.

Q. We are talking about the rock now; not the asphalt and not the concrete, we are talking about the rock.

A. No. I'm implying the rock included as part of the concrete or the asphalt. The point of final construction.

Q. So --

A. I said the final destinations, plural. I did not say singular.

Q. And then am I correct if I were to read the statement, the final destinations for most aggregate shipments, whether in the form of rock, concrete, or asphalt, are road and building construction sites?

A. Yes. That is correct.

Q. And then finally, Mr. Moon, at the bottom of page 451 going over to the top of 452, you have the statement: "One reason that aggregate shipments are such low revenue moves is that there is constant competition from struck carriers and rail rates are thus severely depressed." Do you remain of that view?

A. Yes, the trucks are very viable competitors.

Q. Mr. Moon, what is the distance between Woodville and Cleveland?

A. I would have to approximate plus or minus 100 miles. I couldn't tell you exactly.

Q. Do you know of any rock that's shipped for consumption in ready-mix concrete plants and for asphalt plants that is trucked for 100 miles?

A. I don't know about today but in my previous experiences, I have saw truck movements well over 100 miles from a Martin Marietta quarry in Georgia.

Q. So you are saying that in your view, Martin Marietta has an alternative to truck rock from Woodville to the greater Cleveland Akron areas and remain competitive in those markets?

A. Martin Marietta can choose to ship rail or to ship truck. That's their choice, and what they do vis-a-vis their competitors is another railroad's business.

Q. Let's explore that just a little bit further, Mr. Moon. Are you suggesting that the cost of trucking rock 100 miles is comparable to the cost of the single-line Conrail movement for 100 miles?

A. I can't speak to the specific truck costs in a specific area, just like I can't speak to the rail rates on something. I don't do rates.

Q. Generally, will you assume the cost of trucking rock 100 miles to be no less costly than moving it single-line rail 100 miles?

A. Again, depends on the individual railroad, the individual truck. As sort of a general rule, as distance increases, you deliver price per ton, rail gains an advantage over truck. But the break point or the distance, if you will, varies rate by rate, commodity by commodity, and truck line by truck line.

Q. I wasn't focusing on any commodity other than rock.

MR. ALLEN: What was your question?

MR. KAHN: The question was whether in Mr. Moon's general experience the truck transportation of rock destined for concrete ready-mix plant or an asphalt plant, a distance of 100 miles is no more costly than moving it single-line rail?

THE WITNESS: Again, it depends upon the specific destination, the specific job. In lots of instances, single-line rail is the most economical way to go. I have seen, like I referred to from Martin Marietta facilities in Georgia, that a job that was big enough actually trucked well over 100 miles because it was more desirable for Martin Marietta to participate in this job vis-a-vis one of its competitors, even though it had no single-rail-line alternative, and when the joint-rail-line combinations were explored, the railroads and the shipper were unable to make a deal, but for the shipper to stay in the game, it's trucked.

MR. KAHN: Thank you, Mr. Moon. I have no further questions. I appreciate your coming in for this deposition.

MR. SIPE: I have no questions.

MR. ALLEN: Why don't we take a couple-minute break.

(Recess.)

MR. ALLEN: I have no questions and I thank Mr. Kahn for his speedy and courteous deposition.

(Whereupon, at 4:10 p.m., the taking of the instant deposition ceased.)

____

Signature of the Witness

SUBSCRIBED AND SWORN to before me this _________ day of ______________________, 19__.

____

NOTARY PUBLIC

My Commission expires: ________________________

CERTIFICATE OF REPORTER

UNITED STATES OF AMERICA) *ss.:*

DISTRICT OF COLUMBIA)

I, **SUSAN L. CIMINELLI, RPR, CRR,** the officer before whom the foregoing deposition was taken, do hereby certify that the witness whose testimony appears in the foregoing deposition was duly sworn by me; that the testimony of said witness was taken by me to the best of my ability and thereafter reduced to typewriting under my direction; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this deposition was taken, and further that I am not a relative or employee of any attorney or counsel employed by the parties thereto, nor financially or otherwise interested in the outcome of the action.

Susan L. Ciminelli

Notary Public in and for

the District of Columbia

My commission expires: 10/15/2001

APPENDIX C

Excerpts from the deposition of

DONALD W. SEALE

January 14, 1998

P R O C E E D I N G S

Whereupon,

DONALD WAYNE SEALE,

a witness, was called for examination by counsel for Martin Marietta Materials, Inc., and, having been first duly sworn, was examined and testified as follows:

EXAMINATION BY COUNSEL FOR MARTIN MARIETTA

BY MR. KAHN:

Q. Good morning, Mr. Seale. My name is Fritz R. Kahn and I represent Martin Marietta Materials, Inc., specifically with reference to its Woodville, Ohio, plant.

For the record, will you state your full name and address, please.

A. Donald Wayne Seale, and I reside at 1333 Baffy Loop -- B-a-f-f-y -- Loop, L-o-o-p -- Chesapeake, Virginia 23320.

Q. And are you stationed at Norfolk Southern's headquarters in Norfolk?

A. Yes.

Q. As vice president merchandise marketing, are you the most senior officer of Norfolk Southern offering rebuttal testimony in response to the comments and requests for conditions of Martin Marietta Materials, Inc.?

A. Yes.

Q. And does your testimony represent the position of Norfolk Southern?

A. Yes.

Q. Does your testimony represent the position of the applicants? In other words, are you testifying on behalf of the applicants?

MR. SIPE: Well, I object to that from CSX's perspective, or will state as a matter of clarification that Mr. Seale is not an employee of CSX and was not authorized in his verified statement to speak on behalf of CSX, to my knowledge.

BY MR. KAHN:

Q. Again, I ask, Mr. Seale, whether your rebuttal testimony which appears in volume 2B of CSX/NS 19 purports to be the position of the applicants?

MR. ALLEN: I would echo Mr. Sipe's objection to the question. The rebuttal verified statement speaks for itself and -- speaks for itself.

BY MR. KAHN:

Q. Would you to answer the question, Mr. Seale?

A. I defer to counsel on the question.

Q. Notwithstanding their objections, you may answer the question.

A. I represent Norfolk Southern Corporation. I'm an employee of Norfolk Southern.

Q. And do you know of any CSX representative of CSX Corporation or CSX Transportation who has offered rebuttal testimony in this proceeding?

A. No, I do not.

MR. ALLEN: In connection with Martin Marietta, or in general?

BY MR. KAHN:

Q. In connection with Martin Marietta.

A. No, I do not.

Q. Have you reviewed the narrative which was part of the opposition or the rebuttal filing by the applicants?

MR. ALLEN: In connection with Martin Marietta?

BY MR. KAHN:

Q. In connection with Martin Marietta?

A. Yes.

Q. Does the narrative insofar it discusses the comments and the requests for conditions by Martin Marietta, specifically at pages 498 to 502, identify anyone other than yourself and Mr. John T. Moon, also of Norfolk Southern, as a rebuttal witness?

MR. ALLEN: Well, again I would object on the grounds that the narrative speaks for itself, but I'll permit the witness to read the discussion.

BY MR. KAHN:

Q. Well, in the interest of moving things along, Don, would you accept my characterization that not another rebuttal witness, other than you and Mr. Moon, are mentioned on pages 498 to 502 with respect to Martin Marietta?

A. I'm looking for that that you're referring to. Could you restate the question, since we've been reading through this, so I can know exactly what you're asking.

Q. Does the narrative response to the comments and requests for conditions of Martin Marietta, specifically at pages 498 through 502 of volume 1 of CSX/NS 176, identify anyone other than you and Mr. Moon as rebuttal witnesses?

A. Not that I can -- not that I can ascertain through this quick glance though the pages.

Q. And do you have any idea how it came about, in view of the fact that Martin Marietta in its comments and requests for conditions relied almost exclusively on its deposition of CSXT witnesses, that you and Mr. Moon turned out to be the persons who would offer rebuttal evidence in this preceding?

A. I'm not aware of any specific information relative to that selection.

Q. And did you and CSX and Norfolk Southern get together to divide who among the two parties would respond to the comments of shippers?

A. I'm not aware of that.

Q. So there was no agreement between Norfolk Southern and CSXT as to who would respond to what?

A. I'm not aware of that agreement. It could be, but I'm not aware of it.

Q. Mr. Seale, your rebuttal testimony as it relates to Martin Marietta -- I'm referring to specifically pages P-496, P-497 of volume 2B, focuses largely on the settlement offer made by the applicants to Martin Marietta and rejected by it; is that correct, Mr. Seale?

A. Yes.

Q. Whose idea was it publicly to disclose the content of settlement discussions between the applicants and Martin Marietta?

A. Restate the question.

Q. Whose idea was it to publicly disclose the contents of settlement discussions between applicants and Martin Marietta?

A. I'm not aware who made that decision.

Q. And did you?

A. It's in my statement.
Q. And did you decide to put it in the statement or did someone else suggest it to you?
A. I can't recall that.
Q. Was the disclosure of settlement discussions reviewed by counsel?
A. Yes, as far as I know.
Q. In the course of the settlement discussions, I believe you understood that Martin Marietta was concerned about shipments of aggregates and lime from its Woodville, Ohio, plant; is that correct?
A. Correct.
Q. And Woodville currently is a station served by Conrail; is that correct?
A. Yes.
Q. You understood, did you not, that Martin Marietta was concerned about aggregate shipments to Whitestone at Twinsburg, Ohio, and Honker at Hugo, Ohio; is that correct?
A. Yes.
Q. Do you know whether Martin Marietta is the

sole supplier of aggregates to Whitestone at Twinsburg?

A. I do not know whether they're the sole supplier.

Q. Would you expect that there might be competitors for that business?

A. Yes.

Q. And do you know whether Martin Marietta is the sole supplier of aggregates to Honker at Hugo?

A. I do not.

Q. And would you expect that there would be competition for that business?

A. I would think so.

Q. Mr. Seale, you further understood that during the course of the settlement discussions that Martin Marietta was concerned about lime shipments to Weirton Steel at Weirton, West Virginia, and to Wheeling-Pittsburgh Steel at Mingo Junction, Ohio, did you not?

MR. ALLEN: I'm going to object to your characterization of these discussions as "settlement discussions." I don't think there is any foundation that they were settlement discussions.

MR. KAHN: Dick, if you will look at the heading of Mr. Seale's testimony on page 496, it says "settlement offers."

MR. ALLEN: It does use the word "settlement," I see that.

MR. KAHN: Thank you.

BY MR. KAHN:

Q. Getting back to the movements of lime from Woodville to Weirton Steel in Weirton and to Wheeling-Pittsburgh Steel at Mingo Junction, do you know whether Martin Marietta was the sole supplier of lime to Weirton Steel at Weirton?

A. No.

Q. To Wheeling-Pittsburgh Steel at Mingo Junction?

A. No, I do not know.

Q. Would you expect that there would be competition for that business?

A. I would think so.

Q. And Twinsburg and Hugo are currently

stations on Conrail lines; is that correct?
A. Correct.
Q. And Weirton and Mingo Junction are currently served by Conrail as well; is that correct?
A. That's correct.
Q. Do you know, Mr. Seale, Conrail's common carrier rate on the shipments of aggregates from Woodville to Twinsburg?
A. Restate that, please.
Q. Do you know Conrail's common carrier rates on shipments of aggregates from Woodville to Twinsburg?
A. No, I do not.
Q. To Hugo?
A. No, I do not.
Q. Do you know the contract rate that Conrail currently assesses on shipments of aggregates from Woodville to Twinsburg?
A. No, I do not.
Q. To Hugo?
A. No.

Q. Do you know the expiration date of the existing contract covering the movement of aggregates from Woodville to Twinsburg?

A. We understand that those are receiver contracts, so therefore we don't have that information. These are Conrail contracts and Norfolk Southern is not a party to those contracts, so we do not have the information.

Q. So you do not know the expiration date?

A. That's correct.

Q. And that applies as well on the movement from Woodville of aggregates moving to Hugo?

A. That is correct.

Q. And do you know the contract rate that Conrail currently assesses on shipments of lime from Woodville to Weirton?

A. No.

Q. To Mingo Junction?

A. No.

Q. Do you know the expiration date of the Weirton contract?

A. No.

Q. Or the Mingo Junction contract?

A. No.

Q. As a result of the breakup of Conrail which the applicants have proposed, we've already said, I believe, that Woodville is slated to become a CSXT station; is that correct?

A. That is correct.

Q. And Twinsburg and Hugo are slated to become Norfolk Southern stations?

A. That is correct.

Q. Similarly, Weirton and Mingo Junction are slated to become Norfolk Southern stations?

A. That is correct.

Q. And, accordingly, the single-line Conrail movement of aggregates from Woodville to Twinsburg and Hugo will become a two-line CSXT/NS movement; isn't that correct, Mr. Seale?

A. Yes.

Q. And the single-line Conrail movement of lime from Woodville to Weirton and Mingo Junction will become a two-line CSXT/Norfolk Southern movement; is that not correct?

A. Correct.

Q. And do you know, Mr. Seale, what the common carrier rate will be that CSXT and Norfolk Southern will assess on shipments of aggregates from Woodville to Twinsburg?

A. No, I do not.

Q. To Hugo?

A. No.

Q. After the expiration of the existing contract and the three years provided by the NIT League settlement agreement, do you know what CSXT's and NS joint line contract rate will be for shipments of aggregates from Twinsburg to Hugo?

A. No.

Q. Do you know what the common carrier rate will be that CSXT and NS will assess on shipments of lime from Woodville to Weirton?

A. No.

Q. To Mingo Junction?

A. No.

Q. And after the expiration of the existing Conrail contract and the three years provided by the NIT League's settlement agreement, do you know what the joint line CSXT/Norfolk Southern contract rate will be on shipments of lime from Woodville to Weirton?

A. No.

Q. To Mingo Junction?

A. No.

Q. Now, even before the breakup -- the proposed breakup of Conrail, Mr. Seale, Norfolk Southern served a number of shippers of aggregates and lime; is that not correct?

A. That is correct.

Q. And some of those are in the not too distant area away from the markets of Cleveland and Akron and mines in Ohio and Pennsylvania; is that correct?

A. Not defining what is "not too distant," with that -- that qualifier, yes.

Q. And would you agree that among the shippers of aggregates that Norfolk Southern serves that there are competitors or potential competitors of Martin Marietta at Twinsburg and Hugo?

A. There are potential competitors in every market.

Q. Specifically, Mr. Seale, wouldn't Sandusky Crushed Stone in Parkertown, Ohio, be one?

A. Yes, that is an example of a joint line move today, Norfolk Southern/Conrail to Twinsburg and that is --

Q. And will become single line movement; correct?

A. Correct, but they're competing today on a joint line basis.

Q. Yes, but after the consummation of the transaction, it will become a single line Norfolk Southern movement?

A. It will.

Q. And would you agree that among the shippers of lime that Norfolk Southern currently serves that either are or will be competitors of Martin Marietta in Weirton and Mingo Junction, that that would include Carmoose at Maple Grove?

A. I would not know whether it would include that particular supplier, but all markets are competitive and I would feel that those two receivers would be seeking the most competitive delivered price for lime that they could find in the market.

Q. Well, isn't Redland at Maple Grove a facility that you currently serve?

A. I believe we access that facility through a shortline railroad that connects with Norfolk Southern.

Q. So following the consummation of this proposed transaction, Norfolk Southern would be able to offer Redland or Carmoose at Maple Grove single line service to Weirton and Mingo Junction; is that not correct?

A. I'm not sure about the single line service aspect of that question, but if the two receivers Weirton and Wheeling-Pit were buying -- which they do -- were purchasing their lime, we would work in conjunction with them to source that lime where they directed their attention.

Q. Mr. Seale, would you not say that all things being equal, a shipper receiving single line service is better served than a shipper having to rely on two-line railroad service?

A. Single line service is generally more efficient and more expedient than joint line service.

Q. And wasn't that one of the foremost benefits of this proposed transaction that you cited in your opening testimony?

A. Yes.

Q. And you spelled out in great detail -- we needn't read it all together, page 287 of your testimony you indicate single line service is generally more efficient, it eliminates the waste of interchange, provides faster more reliable transit time, and it reduces service variability and so on. You're still of that view are you not, Mr. Seale?

A. Yes.

Q. And you continue on the following page, as I recall, to the same effect. And you remain of that view?

A. Yes.

Q. The benefits of single line service?

A. Yes.

Q. In view of your own testimony, Mr. Seale, would you deem it unreasonable for Martin Marietta to have been concerned about losing single line service on shipments from Twinsburg -- I mean from Woodville to Twinsburg and Hugo? Would you consider that concern to have been unreasonable?

A. Define "unreasonable" for me.

Q. That they would have been apprehensive that the benefits of single line service would be lost; that with an interchange between Norfolk Southern -- between CSXT and Norfolk Southern at Toledo there it would be less efficient than single line service; that it would generate a cost of interchange, it would be slower, transit times would not be quite as reliable, the utilization of cars and locomotives would not be as great. All those benefits which you touted in your opening testimony as being the benefits of single line service, Martin Marietta felt would be lost.

MR. ALLEN: What's your question?

BY MR. KAHN:

Q. Was that not a reasonable assumption for Martin Marietta to have made?

A. Martin Marietta has access -- will have access to a new -- two new carriers with respect to expanded single line service. CSX out of Woodville will serve all the markets east of the Mississippi on a single line basis and throughout Ohio. The opportunities for them to have single line service is, in my mind, equivalent to or greater than any concern that might exist of converting a single line move to a joint line move to Hugo or to Twinsburg.

Q. We'll get to that, but let's concentrate for the time being, if you would please, Mr. Seale, on the existing customers of Martin Marietta. I'm referring to Whitestone at Twinsburg, I'm referring to Honker at Hugo, I'm referring to Weirton Steel at Weirton, and Wheeling-Pittsburgh at Mingo Junction.

Now, do you feel that the concerns that were expressed in the settlement discussions by

Martin Marietta were unreasonable?

MR. ALLEN: I think he answered your question.

MR. KAHN: I don't believe he did but if he did, may I have it again?

THE WITNESS: There are opportunities for Martin Marietta to seek new single line markets, plus serve the existing markets at Weirton, Mingo Junction, Hugo and Twinsburg. We, in our industry today, we have a lot of joint line traffic that moves successfully and with dedicated power, run-through service, unit trains, which Martin Marietta has the opportunity to ship combined volumes to Hugo and Twinsburg to generate a unit train, they will have the access to service that is competitive.

BY MR. KAHN:

Q. Well, that leads me exactly, Mr. Seale, into what I was going to get into next. Whether counsel characterizes it as settlement discussions or not, there were exchanges in between Martin Marietta and the applicants before we finally --

before Martin Marietta finally felt it had to participate in this proceeding. And I would like to have identified first a letter from Mr. Derrick W. Smith to Mr. Philip J. Sipling dated October 7, as Exhibit Number 1.

(Seale Exhibit No. 1 was marked for identification.)

MR. KAHN: As Exhibit Number 2, a letter from Mr. Grant Godwin to Mr. Smith dated October 9.

(Seale Exhibit No. 2 was marked for identification.)

MR. KAHN: As Exhibit Number 3, a letter from Mr. Grant Godwin to Mr. Gary Wendorf dated October 9.

(Seale Exhibit No. 3 was marked for identification.)

MR. KAHN: As Exhibit Number 4, a letter from Mr. Wendorf to Mr. Grant Godwin dated October

14.

(Seale Exhibit No. 4 was marked for identification.)

MR. KAHN: As Exhibit Number 5, a letter from Derrick W. Smith to Philip Sipling dated October 16.

(Seale Exhibit No. 5 was marked for identification.)

MR. KAHN: And finally Exhibit 6, a letter from Mr. Grant Godwin to Mr. Derrick W. Smith dated October 16.

(Seale Exhibit No. 6 was marked for identification.)

MR. SIPE: Fritz, could I ask a question of clarification? These letters don't have Bates stamps on them. Do you know whether they were produced in discovery or whether they came from Martin Marietta's files or what their source is?

MR. KAHN: They were withheld. They were

identified as withheld documents because I felt that the disclosure of confidential settlement negotiations would be improper. But since we are now discussing settlement negotiations, I felt obliged that we needed to produce at least this correspondence.

MR. SIPE: Well, was there -- did you file something in discovery indicating the documents existed but were being withheld?

MR. KAHN: Yes, I produced a schedule of withheld documents.

BY MR. KAHN:

Q. Mr. Seale, before today, did you see any of these letters?

A. I saw these letters yesterday.

Q. Before yesterday, Mr. Seale, did you see the letters?

A. No.

Q. The letters suggest, Mr. Seale, that you personally were not directly involved in the settlement discussions; is that correct?

A. That is correct.

Q. And the settlement discussions these letters suggest were primarily between Mr. Derrick W. Smith, assistant vice president minerals marketing of CSXT and Mr. Philip J. Sipling, senior vice president or Mr. Grant Godwin, vice president marketing of Martin Marietta, were they not?

A. These letters show that.

Q. And Norfolk Southern essentially was kept informed of those settlement discussions by copies of the proposals and counterproposals being provided to Mr. Gary G. Wendorf, director of metals and construction marketing of Norfolk Southern; is that not correct?

A. Yes.

Q. And in the ordinary course of business, does Mr. Wendorf report to you?

A. Yes.

Q. And did Mr. Wendorf keep you apprised of the course of the settlement discussions between the applicants and Martin Marietta?

A. Mr. Wendorf reports to one of my assistant vice presidents who was in communication with me on the larger parts of the discussion, but not details.

Q. And did you at any time have occasion to discuss with Mr. Wendorf the progress of the settlement discussions?

A. No.

Q. And did you offer any suggestions either to your assistant vice president or to Mr. Wendorf as to how the settlement might be achieved?

A. No.

Q. In the first paragraph of Mr. Derrick's letter to Mr. Sipling of October 7, Exhibit 1, on page 2, first paragraph of page 2, Mr. Derrick says, "CSXT and NS understand that the principal concern of Martin Marietta is that some movements of lime and aggregates from your Woodville facility that currently move in Conrail single line service will move in CSXT/NS joint line service if the application is approved. We further understand that you are concerned that the current level of Conrail single line service will deteriorate if CSXT/NS joint line service is substituted for

Conrail's existing service on certain shipments."

Do you agree, Mr. Seale, that for purposes of the settlement discussion the applicants understood the foregoing, the paragraph that I have just read, to be Martin Marietta's primary concerns?

A. Yes.

MR. SIPE: Just for the record, you referred a couple of time to the author of this letter as "Mr. Derrick." It's actually Mr. Smith. His first name is Derrick.

MR. KAHN: I beg your pardon. Thank you, Sam.

BY MR. KAHN:

Q. And then in Mr. Grant Godwin's response of October 9, in Exhibit 2, Mr. Godwin states, "As we have stated on a number of occasions, the continuance and growth of aggregate and lime shipments from Woodville on a competitive basis is absolutely critical to the continued profitability of that plant. The present rate/service structure is very sensitive to competitive alternatives and with only minor changes is susceptible of loss. The pending shift from single line to two-line movements of a major proportion of that traffic is of major concern. This concern is based on prior experience and knowledge of two-line service invariably involving higher costs and/or degraded service."

To your knowledge, Mr. Seale, did the applicants dispute Mr. Godwin's statement during the course of the settlement discussions?

A. Yes.

Q. Can you indicate when and where?

A. In Exhibit 1, the letter from Mr. Smith indicated our joint belief that we could provide the joint line service that was both competitive economically and expediently with respect to transit time. It appears to me that Exhibit 1 and Exhibit 2 are two different views of two parties that are both expressing their beliefs.

Q. But nothing followed Mr. Godwin's letter to suggest that? In other words, Mr. Godwin was taking issue with Mr. Smith's characterization.

A. I don't see anything in the exhibits that addresses that after the October 9th letter.

Q. Mr. Seale, is there anything within your experience that the applicants might have offered to have allayed Martin Marietta's concerns about the loss of single line service? In other words, short of conveying the Toledo to Woodville line to Norfolk Southern, or granting Norfolk Southern traffic rights to operate over the Toledo-Woodville line, is there anything the applicants might have done to minimize the effects of two-line service that the breakup of Conrail will occasion?

A. Yes, we offered to honor the existing rates that are under contract with Conrail. We also have a NIT League agreement which will continue such rate for a three-year period after our closing time which extends the single line contract rate that Conrail holds with those receivers.

We also proposed an operational arrangement under which run-through power would be used from Woodville and that Hugo and Twinsburg business could be combined into a unit and run through

Toledo on a unit train operation with regular service on beyond the two destinations.

Q. Can you show me anywhere in CSXT's letters, Exhibits 2 or 5, where that was offered? I think that should be Exhibits 1 and 5.

MR. ALLEN: You meant to say Exhibit 1 and 5?

MR. KAHN: 1 and 5, yes. CSXT's letters.

THE WITNESS: On page 4 of the October 7th letter to Mr. Sipling, under "Service," and I quote: "Utilizing NS run-through power, shipments will move to Toledo, Ohio. Regular train service will exist for movement beyond Toledo, Ohio. To support the most efficient service, shipper should local, bill, and preblock movements to both Hugo and Twinsburg on the same day."

BY MR. KAHN:

Q. Does that state that the applicants are prepared to offer run-through train service from Woodville to Twinsburg?

A. It states exactly what it says, which is run-through power to Toledo and regular train service for movement beyond Toledo, Ohio.

Q. That's not how unit trains are handled, is it, Mr. Seale?

A. It depends on how you define unit trains. This gets it to a single line carrier, Norfolk Southern, for expedient movement beyond Toledo to the two destinations.

Q. And it's regular trains.

A. Regular train service can be good train service.

Q. But that's not run-through train service, is it?

A. In the definition of train service, I would not want to categorize regular train service as being inferior to run-through train service.

Q. I didn't ask you whether it was inferior. I simply asked you where in these negotiations in your judgment that the applicants propose to offer Martin Marietta the equivalent of unit train service from its mine at Twinsburg [sic.] to its customers in Hugo or Twinsburg?

MR. ALLEN: For the record, I don't believe

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that was your previous question, but now that it's your question, go ahead and answer it.

THE WITNESS: As I previously stated, we proposed in this letter of October 7th to Mr. Sipling that we would use run-through power, which is a power exchange, on the units that would be loaded at Woodville through Toledo, Norfolk Southern to Twinsburg and Hugo.

BY MR. KAHN:

Q. Run-through trains?

A. Run-through power.

Q. With no change of power from Woodville to Twinsburg?

A. That is -- that is what we offered.

Q. With a 60-car train running straight through?

A. I don't have the schedule in front of me.

Q. Why are we here today if that's what you think the applicants offered?

MR. ALLEN: I object to that question. We're here today because you have sought to depose him.

BY MR. KAHN:

Q. All right.

MR. ALLEN: Although it seems to me a pertinent question.

MR. SIPE: Kind of metaphysical, though.

BY MR. KAHN:

Q. With respect to your statement at page 497 that both Martin Marietta and National Lime requested 10- to 20-year commitments, to which neither Norfolk Southern nor CSX was willing to agree without access to Conrail cost data, are you suggesting, Mr. Seale, that Martin Marietta would not have settled for a five-year commitment?

A. I don't know.

Q. Would you take a look at Exhibit 6, which I believe is Grant Godwin's letter to Mr. Smith dated October 16. And the paragraph that starts, "We, of course, would like a long-term perspective of 20 years. However, realistically, depending on the service proposal, we recognized a period of five to ten plus years might have to be considered."

Do you know whether the applicants ever

offered to settle based on a five-year commitment?

A. I'm not aware of that personally. The way I read this is that this is a response to a -- to the applicant's response that 20 years was not acceptable and that the statement that five to ten might be is after the fact.

Q. Well, are you familiar with Martin Marietta's comments and requests for conditions?

A. With respect to what part of it?

Q. The relief that Martin Marietta is seeking.

MR. ALLEN: Your question is whether he's familiar with the relief Martin Marietta is seeking?

MR. KAHN: Yes, sir.

THE WITNESS: Yes, in a general sense.

BY MR. KAHN:

Q. Are you aware, Mr. Seale, that on page 20 Martin Marietta asks that if the Board otherwise were to find the transaction to be consistent with the public interest, it be conditioned so as to require CSXT to cooperate with Norfolk Southern in the operation of run-through trains from Woodville to stations on Norfolk Southern, provided, however, that there be a tender any one time of no fewer than 60 100-ton hopper cars? If I understood your testimony, you would be willing to agree to that.

A. Again, I will quote directly from what we have proposed. Run-through power, shipments will move to Toledo, Ohio, regular train service will exist for movement from Toledo, Ohio.

Q. Then explain to me what is the difference between what you read and what I read.

A. This is a more specific, narrow definition of run-through trains. That the run-through train would be run as a unit train directly from Woodville to Hugo and Twinsburg, and that the Board would impose that operating requirement.

Q. Let's take away the Board imposing the requirement. Would you find this an acceptable basis for reaching an agreement?

A. I would certainly want to review that with our operations people before I made that commitment.

Q. Are you aware, Mr. Seale, that on page 21 Martin Marietta further asks that if fewer than 60, but not less than 10, 100-ton hopper cars be tendered at any one time for transportation to stations on Norfolk Southern, that they preblock and be handed off as a block of cars by CSXT to Norfolk Southern so as to pass through the Toledo gateway without the need for their classification. Would you agreeable to that?

A. Again, I would defer to my operating people to make that decision in conjunction with the market data.

Q. How does what I just have read, Mr. Seale, differ from what you are reading, the excerpt from Mr. Smith's letter to Mr. Sipling of October 7: To support the most efficient service shippers should load, bill, and preblock movements to both Hugo and Twinsburg on the same way?

MR. SIPE: I am going to interject an objection on behalf of CSX. If you will refer to the final page of Exhibit 1, that's page 9 -- this is Mr. Smith's letter that you have been focusing on -- the last sentence of the later states, "If we have not reached an agreement by October 21, 1997, however, this proposal is withdrawn."

So to the extent that this deposition seems to be contemplating a negotiation or an attempt to supplement the previous discussions, from the terms of Mr. Smith's letter, it's not on the table. I mean, maybe there was a window of opportunity that has closed. And I don't think any answers this witness is going to give, A, are going to bind CSX to anything now; and B, you know, it's not -- it doesn't strike me as a fruitful way of conducting a discussion.

If your client wants to talk to my client or Norfolk Southern, maybe they should talk to them directly as businesspeople.

MR. KAHN: Thank you, Mr. Sipe.

MR. ALLEN: I echo the same objection on behalf of Norfolk Southern.

MR. KAHN: Thank you, Mr. Allen.

BY MR. KAHN:

Q. Are you aware, Mr. Seale, that Martin

Marietta finally asked that the Board condition its approval of the proposed transaction by requiring that the applicant enter into a five-year joint rate agreement or agreements with Martin Marietta effective the date of the Board's decision at the existing level of aggregates and lime rates, whether tariff exempt, circular, or contract rates, provided however that such rates shall be shall be subject to 85 percent of an unadjusted RCF increase? Were you aware of that?

A. I didn't recall that in your earlier question, no.

Q. Now, in the light of the conditions that Martin Marietta has asked the surface transportation to impose, can you explain the statement in the narrative at page 499 at the conclusion of the carryover of the paragraph at the top of the page, "Martin Marietta seeks the imposition of conditions that would retain single line service for these movements." How do you explain that statement?

MR. ALLEN: Where is this statement?

MR. KAHN: The last sentence of the carryover paragraph on P-499.

THE WITNESS: That's a very straightforward statement. What aspect of it do you want me to explain?

BY MR. KAHN:

Q. Do you equate run-through trains as being single line service?

A. No, there's no direct correlation between a run-through train and single line service.

Q. But we just read that Martin Marietta's request for conditions is for run-through trains. Why would the applicant say that we were asking for conditions that would retain single line service?

A. I -- I do not know why that difference exists, unless there's been conversations between Martin Marietta and the parties that I'm not aware of.

Q. This makes reference to the pleading Martin Marietta 2, from which I just read. And there are three conditions that Martin Marietta seeks: Run-through trains, handling of cars in blocks, and a five-year rate freeze. That's all Martin Marietta asks for.

Now, I'd like you to explain, if you can, Mr. Seale, why it is that the applicants say Martin Marietta asks that single line service be retained.

MR. ALLEN: I object to the question. Mr. Seale didn't write this statement. And if you want to argue that we have incorrectly characterized Martin Marietta's request for conditions, you are free to do so. But I see no point in arguing this point with Mr. Seale who did not draft the narrative portion of the testimony.

MR. KAHN: Thank you, Mr. Allen. I will ask it of Mr. Seale as the senior official from Norfolk Southern offering rebuttal testimony.

THE WITNESS: I will respond to the question with a question of my own. And I'm looking at Exhibit 6. I'm looking at Martin Marietta's filing which indicates a five-year term, but in Mr. Godwin's letter of October 16th he's talking about a 20-year term.

BY MR. KAHN:

Q. Let's get back to my question, Mr. Seale. The question is: Can you as the senior Norfolk Southern official responding to the comments and request for conditions of Martin Marietta please explain why our three conditions, requested conditions, have been characterized as an effort to retain single line service?

A. I -- I am not aware of why that characterization has been made, but it does appear to me, looking at the documents, that there have been discussions from Martin Marietta over and above what was in their filing. And I refer to that third component of their filing which is the term which states five years, and I'm looking at 20 years in Mr. Godwin's letter of October 16th.

Q. The rate request, Mr. Seale, as submitted to the Surface Transportation Board, let me read it to you once more so there is no misunderstanding.

"Martin Marietta finally asks that its approval," meaning the Board's approval of the proposed transaction "be conditioned by requiring that the applicants enter into five-year joint rate agreements with Martin Marietta effective the date of the Board's decision becoming effective at the existing level of aggregates and lime rates, whether tariff exempt, circular, or contract rates, provided however that such rates shall be subject to 85 percent of the unadjusted RCF increases.

Now, what is it about that condition that suggests that Martin Marietta wishes to retain single line service?

A. What I'm saying is that -- and I have no way of confirming this since I have not had direct discussions with Martin Marietta -- however, it appears to me that there has been discussion of single line service that would be outside their filing, just as there has been discussion, apparently, of a 20-year term with respect to the application of rates as opposed to the five that are mentioned in their filing on page 21.

Q. I agree with you, Mr. Seale. We started off, Mr. Seale, hoping for conveyance of the line between Toledo and Woodville to Norfolk Southern. We started off hoping that CSXT would grant Norfolk

Southern trackage rights. But we're long beyond that. We're long beyond 20-year rate commitment. We're now talking about the position of Martin Marietta in this proceeding as articulated in the filing. And the question is how do you derive from that filing a statement which says that what Martin Marietta seeks the retention of single line service for these movements?

MR. ALLEN: I think that's been asked and answered. He said he didn't know how.

BY MR. KAHN:

Q. That's your answer, Mr. Seale?

A. That is correct.

Q. Thank you. During the course of the discussions, settlement discussions, Mr. Seale, in addition to the 10- to 20-year rate commitment that you say it sought, what did National Lime want?

A. I do nct know.

Q. And what does National Lime seek as conditions in the STB proceeding?

A. I'm not aware of their concern.

Q. Would your answers be the same with respect

to Weingott Dolomite?
A. Yes.
Q. And with respect to Redland Ohio?
A. Yes.
Q. And do you know of any aggregate shipper who would be satisfied if the Board did nothing more than ask the applicants to agree to handle their shipments in through trains, unit trains, to handle its cars in blocks, and to agree to a five-year rate freeze?
A. Restate the question.
Q. Do you know of any aggregate shipper that would be satisfied with such relief?
MR. ALLEN: With the relief that Martin Marietta seeks?
BY MR. KAHN:
Q. Comparable. The operation of 60-car run-through or unit trains, the blocking of 10 cars or more, and a five-year rate freeze.
A. I cannot respond to that because I don't have any facts to substantiate the opinion.
Q. In your review of the opposition testimony

in this case, did you find any shipper who asked for no greater relief from the Surface Transportation Board than that the applicants cooperate to run unit trains, a through train of 60 cars or more, that they handle as block movements 10 cars or more, and that they agree -- that the applicants agree to a modest five-year rate freeze?

MR. SIPE: I object to the characterization of "modest" in particular.

MR. ALLEN: And I object to the question as vague and ambiguous.

BY MR. KAHN:

Q. You may answer it, Mr. Seale.

A. There potentially could be. I don't know. I'm not aware of any. It's a question that I can't address for fact.

Q. At page 497 of your rebuttal testimony, Mr. Seale, you state that aggregate shippers such as Martin Marietta whose plants are on new the CSX likely will, in the long run, readjust their market focus to customers located on CSX. Now, do you remain of that view?

A. Yes.

Q. So if Martin Marietta were to look to the west in the sale of its aggregates, and you're pretty knowledgeable about marketing of aggregates, don't you think Martin Marietta would run into the competition of Indiana Stone and the very cheap slag that's available in the Gary area?

A. I'm not aware of that.

Q. And if Martin Marietta were to focus to the south, would its aggregates not run into the vigorous competition of National Lime and the other rock producers of central Ohio?

A. I can't judge that.

Q. And if Martin Marietta were to focus to the north, would its aggregates not encounter the competition of rock coming off the Great Lakes and the very cheap slag that's available in the Detroit area?

A. I cannot judge that.

Q. And if Martin Marietta, in assessing the economics of marketing rock, determined, as it has, that it must go east to the greater Cleveland and Akron area, isn't it faced with two-line CSXT/Norfolk Southern service to many of the potential customers there?

MR. ALLEN: I object to the question which assumes something that has no foundation, namely that Martin Marietta has said that it must look east. I see no foundation in any of the documents for that characterization.

BY MR. KAHN:

Q. You may answer the question, Mr. Seale.

A. Mr. Kahn, I would remind you that at Twinsburg, Sandusky Crushed Stone competes joint line today with Martin Marietta and they're coming out of that Cleveland area between Sandusky and Cleveland. So it tells me that, yes, there is competition, but there's a way addressing that competition. Joint line and single line.

Q. Notwithstanding Mr. Sipe's objections and Mr. Allen's, let me ask you, Mr. Seale, are you an authority to perhaps explore a settlement even at this late date?

MR. SIPE: On behalf of Norfolk Southern?

BY MR. KAHN:

Q. On behalf of Norfolk Southern.

MR. ALLEN: Are you asking him whether he would consider settlement discussions with Martin Marietta at this late date? Is that your question?

BY MR. KAHN:

Q. That's the question.

A. In the entire proceeding on behalf of Norfolk Southern, again I'm speaking strictly as my entire testimony has been on behalf of Norfolk Southern.

Q. Yes.

A. If there is any way that we can settle or reach an agreement that with a good customer like Martin Marietta or National Lime and Stone, obviously we would be very, very pleased to do so.

Q. And based on our discussions this morning, Mr. Seale, would you take that back and perhaps explore it?

A. I would be glad to do that.

Q. Thank you, that's all I have.

EXAMINATION BY COUNSEL FOR NATIONAL LIME AND STONE

BY MR. DRIVER:

Q. Good morning, Mr. Seale. My name is Ken Driver. I'm here as counsel on behalf of National Lime and Stone Company.

Just to verify things, you are the same Don Seale that had a verified statement included in the applicant's rebuttal submission that addressed the claims of National Lime and Stone; is that correct?

A. Yes.

Q. Are you aware of any other witness on behalf of Norfolk Southern or either of the two applicants that addressed the facts raised by National Lime and Stone Company in its October 21st protest?

A. I am not aware of any others.

Q. Mr. Seale, are you aware of any studies or analyses that the applicants performed, or have had performed, in connection with your response to National's claims?

A. I'm am not personally aware, no.

Q. I want to refer you to a specific page of the applicant's narrative filing. The page reference I have is actually designated as HC-505. I could also get you a public page reference if you want that.

MR. SIPE: I will state for the record that Mr. Seale is not authorized to see Highly Confidential information and my recollection is that the discussion of National Lime and Stone does involve certain Highly Confidential information. So I would just ask to you make sure that you don't disclose any of that to him.

BY MR. DRIVER:

Q. I appreciate that and the portions that I'm actually going to ask you about, Mr. Seale, are actually portions that are contained in both versions. In fact, just to simplify things why don't I turn to that so that we can avoid any inadvertent -- let me cross reference this briefly.

What I want to refer you to is at P-505, and it is midway through the page and it's a sentence that starts "in fact." The statement

APPENDIX D

Excerpts from the deposition of

JOHN W. SNOW

September 18, 1997

time together.

A. Thank you.

Q. I have no further questions at this time.

MR. LYONS: We've been in session for about an hour and 40 minutes. Would a five-minute break be in order prior to the next party?

(Recess.)

EXAMINATION BY COUNSEL FOR

MARTIN MARIETTA MATERIALS, INC.

BY MR. KAHN:

Q. Mr. Snow, my name is Fritz R. Kahn and I represent Martin Marietta Materials, Inc. of Raleigh, North Carolina. I have very few questions and the initial one, it will be a follow-up to a question or two that you were asked by Mr. McBride.

As I recall, you practiced law with the law firm of Wheeler & Wheeler?

A. Yes, I did.

Q. And do you recall what years that may have been?

A. That was late '60s, maybe '67, '66 through 1972, I think.

Q. And Wheeler & Wheeler was known as a transportation law firm, was it not?

A. Yes, it was.

Q. And Wheeler & Wheeler represented one or more railroads?

A. Yes, it did.

Q. And in practicing with Wheeler & Wheeler, you were admitted to practice before the Interstate Commerce Commission?

A. I must have been, Mr. Kahn, because I did appear over there a few times.

Q. So I think it's safe to say, would it not be, Mr. Snow, that you have more than simply a layman's knowledge of the regulatory scheme to which the railroads of this nation are subject?

A. Yes, I think that's fair, recognizing laymen don't know very much.

Q. And then let me turn to the subject that was introduced by Mr. Stone. I thought Mr. McBride would follow up on it but he did not to the extent that I would like to. And I would like to ask you a couple of questions with respect to your statement, particularly on page 9 of your statement, which is page 311 in volume 1. In the middle of the top paragraph, you say:

These public benefits can be broadly characterized as the benefits resulting from more efficient single line service than the other ones.

Do you continue to be of the view that the availability of single line service will be one of the benefits flowing from the proposed transaction?

A. Yes, I do.

Q. Further down on the page, you state, quote: The inherent superiority of single line service over interline service has long been recognized in the railroad industry. I assume you continue to be of that view, Mr. Snow?

A. Yes, I stand by that statement.

Q. And then over the next few pages, you indicate just what, in your view, those advantages of single line service are: Less handling of freight, reduced transit time, enhanced operating efficiencies, reduced operating costs and more efficient utilization of equipment, reduced risk of loss and damage, expanded market reach, more sales opportunities for sellers, more options for buyers.

Do you continue to be of that view?

A. Yes, I do.

Q. Would not going from single line service to two-railroad or joint line service be correspondingly disadvantageous? Would there not be greater handling of freight?

A. Conceivably, yes.

Q. Can you conceive of a situation where that would not be the case?

A. Depending on what sort of arrangement was worked out between the joint line carriers, they might be able to minimize some of the negatives that come from the substitution of the joint line service for the single line service. But I'm prepared to say that in situations where we have, as a result of the merger, present a shipper with joint line haul in lieu of a former single line haul, we're prepared to work with the shipper to try and tailor a solution that addresses those concerns.

Q. If I may, Mr. Snow, I would like to defer for a while the discussion of solutions but I just wondered whether, in the absence of an agreement in between the connecting railroads, if the performance in two-railroad or joint line service would not result in the greater handling of freight?

A. I think it would.

Q. And would it not result in extended transit time?

A. Normally it would.

Q. And would it not result in diminished operating efficiencies?

A. Certainly that is a potential consequence, yes.

Q. And would it not result in increased operating costs?

A. Insofar as there is additional handling which would be contemplated as a result, yes, there would be additional costs.

Q. And greater risk of loss and damage?

A. Yes, it's inherently more complicated when you have two people in the joint route or in the route.

Q. And diminished market reach?

A. Could well have that effect, yes.

Q. And fewer sales opportunities for sellers?

A. Yes, for the very reason the single line service expands the opportunities, correct.

Q. And Mr. Snow, will not the breakup of

Conrail as proposed in the application that's pending before the Surface Transportation Board result in certain shippers which heretofore have had single line service on Conrail being subject to joint line or interline service involving movements over NS and CSXT?

A. Yes, there are some instances like that.

Q. Did you give consideration to that in your statement, Mr. Snow?

A. No, I don't talk in my statement, that I'm aware of, of the so-called two-to-one -- I'm sorry, the so-called one-to-two problem.

Q. Within your experience, Mr. Snow, are there any categories of commodities that would be particularly adversely affected in a change from single line service to joint line service?

A. Not that I'm aware of.

Q. Within your knowledge, are there any joint line movements, where the two carriers are class 1 railroads, of sand?

A. Sand normally travels a fairly short distance. I'm searching my memory of any interchange arrangements we have on sand. I'm not aware of any off the top of my head.

Q. And gravel?

A. The same.

Q. Aggregate?

A. The same. Not aware of any in those cases.

Q. You started to explain, Mr. Snow, that in cooperating railroads can overcome some of the problems that inhere in interline and joint line service. Can you outline what some of those steps of the cooperating railroads might be?

A. The steps that would address directly the problems that you referenced in your questions to me, a special attention, for instance, to the joint line move that's created so that it does not place the shipment or the lading, burden the shipment of the lading with excess time in the yard, would be one that comes to mind. Attention to expeditious handling to give that lading, that shipment, a time profile consistent with single line service.

Perhaps treating it contractually between the carriers in some way that deals with the tracing and tracking and liability issues conceivably. But I think, as I suggested earlier in response to Mr. Stone's questions, that the answer is going to be very much an outgrowth of a detailed understanding on the part of the carriers of the precise service requirements and lading characteristics, flow characteristics, so that a well-thought-through and specific, tailored sort of response can be made to the individual shipping characteristics.

Q. The three subjects that you mentioned, and I'm paraphrasing, devoting special attention to the shippers' needs to get through the interchange, some sort of arrangement for expeditious handling of the cars, some sort of contractual arrangement between the carriers relating to tracing and liability, these would not in any way offend the agreement between CSXT and Norfolk Southern, as you understand it, would they?

A. I don't think they would.

Q. Would the operation or the handling of block cars as a unit, which would certainly be a means of facilitating an interchange, would that offend the agreement?

A. No, not to my knowledge.

Q. Would the operation of run-through trains be another way of addressing the problems of interchange?

A. I think blocking, run-through arrangements -- there are various arrangements that could mitigate the problems.

Q. Would you consider your Tropicana train to be a run-through train, the arrangement between CSXT and Conrail?

A. Surely, that's a run-through.

Q. And would such a run-through train arrangement be offensive to the agreement, Mr. Snow, the agreement between Norfolk Southern and CSXT?

A. No. If NS and CSXT can come to agreement on a run-through train, I don't see anything inherently offensive about that.

Q. Would haulage rights be another means of overcoming the inherent problems of effecting an interchange?

A. I think haulage rights could in certain cases be an appropriate response to the problem.

Q. And would an agreement among CSXT and Norfolk Southern for haulage rights be offensive to the agreement, do you believe?

A. Not inherently offensive, no.

Q. How about trackage rights, Mr. Snow?

A. Conceivably trackage rights could be a way to address the problem.

Q. Would line sales be yet a further means of overcoming an interchange problem?

A. Conceivably, under a given set of circumstances.

Q. Finally, how about enlarged switching districts?

A. I don't want to rule out any conceivable solutions here that might be workable in a given circumstance. If the question is expanding SAAs or shared areas, I think those were so hard bargained and fought out that they would be very difficult to get NS and CSX to come to closure on, having been a party at the 40,000-foot level to producing those agreements.

But certainly I think we're prepared to look at what will work to address these problems and we've taken note of those problems. And we're intent on trying to find answers to those problems.

Q. Granted that you would much rather work these things out amicably with the participation of Norfolk Southern and the shipper, failing that, would you have any views as to whether the

Surface Transportation Board, as a condition of its approval of the transaction, might impose one or another of these requirements?

A. Well, it's my hope that we will have addressed the shipper concerns jointly with NS and that prescriptions won't -- conditions, prescriptions won't be required. And I'm confident that we will be able to do that in most cases. And you're asking me if we aren't, would we be opposed to prescription and the answer would be, I would have to know what the nature of the prescription would be.

Q. Certainly. Let me just wind up by asking you, Mr. Snow, whether you personally are familiar with Martin Marietta Materials' Woodville lime plant in Woodville, Ohio.

A. No, I'm not but I'm very familiar with the company generally.

Q. Are you aware to which one of the railroads, CSXT or Norfolk Southern, the railroad line extending from Toledo to the Woodville lime plant will be assigned?

A. I'm not.

Q. And I assume as well, Mr. Snow, that you would not know whether the railroad lines reaching Martin Marietta's customers at Hugo, Ohio or Twinsburg, Ohio are going to Norfolk Southern or CSXT?

A. No, I don't.

Q. And the same with West Virginia and Mingo Junction, Ohio?

A. I don't.

MR. KAHN: That's all I have, Mr. Snow. Thank you very much.

THE WITNESS: Mr. Kahn, thank you very much.

EXAMINATION BY COUNSEL FOR THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY

BY MR. DONOVAN:

Q. Mr. Snow, Paul Donovan representing the Port Authority of New York and New Jersey. Preliminarily, let me start out by saying, sir, that the Port Authority of New York and New Jersey wants this transaction to succeed. We desperately want this transaction to succeed. We want your operations in the shared asset area of Northern New Jersey to be completely successful and we want you to earn your cost of capital. We want you to make lots of money moving lots of freight through the Port of New York and New

CERTIFICATE OF SERVICE

Copies of the foregoing Brief this day were served by me by mailing copies thereof, with first-class postage prepaid, to counsel for each of the parties.

Dated at Washington, DC, this23rd day of February 1998.

Fritz R. Kahn

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February 23, 1998

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STB

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

E

Re: STB Finance Docket No. 33388, *CSX Corporation, et al, Norfolk Southern Corporation, et al. -- Control And Operating Leases/Agreements --Conrail Inc., et al.*

Dear Secretary Williams:

Please find enclosed for filing in the above-referenced proceeding an original and twenty-five (25) copies of the Brief on behalf of Institute of Scrap Recycling Industries, Inc., which has been designated as ISRI-11.

A copy of this filing is also enclosed on a 3.5-inch diskette in WordPerfect 7.0 format.

Respectfully submitted,

Jeffrey O. Moreno
Attorneys for Institute of Scrap Recycling Industries, Inc.

ENCLOSURES
3310-070

cc: All Parties of Record

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ISRI - 11

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

submitted on behalf of

INSTITUTE OF SCRAP RECYCLING INDUSTRIES, INC.

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February 23, 1998

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

CSX CORPORATION AND CSX TRANSPORTATION, INC.,
NORFOLK SOUTHERN CORPORATION AND
NORFOLK SOUTHERN RAILWAY COMPANY

— CONTROL AND OPERATING LEASES/AGREEMENTS —

CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION

BRIEF

submitted on behalf of

INSTITUTE OF SCRAP RECYCLING INDUSTRIES, INC.

The Institute of Scrap Recycling Industries, Inc. ("ISRI") hereby submits this Brief, on behalf of itself and several of its individual members, in support of its Comments and Request for Conditions, submitted on October 21, 1997 (ISRI-6). In this proceeding, the Surface Transportation Board ("Board") is considering the application of CSX Corporation and CSX Transportation, Inc. ("CSX"), Norfolk Southern Corporation and Norfolk Southern Railway Company ("Norfolk Southern"), and Conrail, Inc. and Consolidated Rail Corporation ("Conrail") (collectively referred to as "Applicants") to allow CSX and Norfolk Southern to acquire control of Conrail and to divide the ownership, use and operation of Conrail's assets between them.

In its Comments and Request for Conditions, ISRI supported the comments of The National Industrial Transportation League ("the League") and asked the

Board to impose many of the same conditions. Since the submission of comments, the League has entered into a settlement agreement with the Applicants that addresses most of its original concerns. ISRI's Transportation Committee has recommended that ISRI join the settlement and this recommendation is awaiting action by ISRI's Board of Directors in March.

Even if ISRI's membership approves the settlement, there are certain issues and conditions not covered by the settlement that ISRI continues to pursue. First, just as the League has not reached a settlement with Applicants with regard to "Post-Implementation Rate Conditions," ISRI also continues to pursue those same conditions. Second, ISRI also has requested certain conditions that have not been raised by the League. These conditions would address adverse competitive effects that some ISRI members will experience as a consequence of the Shared Asset Areas. This Brief focuses upon those shared asset area conditions.

Statement of Facts

Three ISRI members have presented specific facts to demonstrate the serious competitive harm that the shared asset areas will inflict upon them. These members are Louis Padnos Iron & Metal Company ("Padnos"); William Reisner Corporation ("WRC"); and Royal Green Corporation ("Royal Green"). All three members operate large-scale scrap metal processing facilities that compete with other scrap processing facilities located in the shared asset areas. Each will be adversely affected by the transaction in similar ways vis-a-vis their shared asset area competitors.

Padnos operates two scrap processing facilities near the Detroit shared asset area. The Lansing, Michigan facility is located approximately 80 miles west of Detroit and the Grand Rapids, Michigan facility is located 150 miles west of Detroit. (ISRI-6, Padnos V.S. at 4) Currently, the Lansing facility is rail-served exclusively by Conrail and the Grand Rapids facility by CSX. (*Id.* at 2) Norfolk Southern will replace Conrail as the sole rail carrier at the Lansing facility after the transaction. Padnos' primary competitors in the scrap business are nine other scrap processors who operate facilities that will be located in the Detroit shared asset area. (*Id.* at 5-6) Because Padnos must ship 90% of its outbound traffic by rail, it is highly dependent upon the rail carriers that serve it. (*Id.* at 2)

WRC operates a single scrap processing facility in Clinton, Massachusetts. (ISRI-6, Kramer V.S. at 2) Its primary competitors are other scrap processors located in the North Jersey and the South Jersey/Philadelphia shared asset areas who sell to the same customers in Delaware, New Jersey, Ohio, and Pennsylvania. (*Id.* at 3) The Clinton facility is rail-served exclusively by Conrail today and will be served exclusively by CSX after the transaction. WRC is highly dependent upon rail for 65-70% of its outbound traffic. (*Id.* at 2)

Royal Green operates a single scrap processing facility in Temple (Reading), Pennsylvania that is only 40 miles beyond the South Jersey/ Philadelphia shared asset area and approximately 120 miles from the North Jersey shared asset area. (ISRI-6, Simon V.S. at 2) Royal Green's principal competitors in the scrap processing market will be located inside these two shared asset areas. (*Id.*) The Temple facility currently is rail-served only by Conrail as are its shared asset area competitors. After the transaction, the facility will be served exclusively by Norfolk Southern while its shared asset area competitors will gain access to Norfolk Southern and CSX. Royal Green is dependent upon rail for 65% of its outbound traffic. (*Id.*)

Argument

I. SHARED ASSET AREA CONDITIONS

The Board's mandate is to approve rail consolidations that are in the public interest. 49 U.S.C. §11324(c). The public interest is not defined in any way that limits the Board's evaluation to rail competition alone. The Board is permitted to, and should, consider the broad public interest, particularly when it is impacted so significantly as in this transaction. The Board has always held that the anticompetitive effects to be rectified must simply be a consequence of the transaction, and not a preexisting condition. *Burlington Northern, Inc. -- Control & Merger -- St. L.*, 360 I.C.C. 788, 952 (1980). This is not inconsistent with the relief sought for ISRI's members. The potential harm to ISRI members is clearly an effect of the transaction since, but for the creation of the shared asset areas, these shippers would not be adversely affected.

Although the Applicants have cited to recent *precedent* holding that conditions should not be imposed just because one group of shippers obtains pro-competitive merger benefits that other shippers do not enjoy (CSX/NS-176 at 121), this transaction is *unprecedented* and, therefore, warrants unique consideration. Never before have the pro-competitive effects of a consolidation or merger created so many "1-to-2" shippers and been so concentrated that they improve the competitive position of every shipper in a designated geographic area to the detriment of shippers outside that area. Some shippers, in past mergers, may have received benefits not received by other shippers, but those benefits have not reached the scale of offering entirely new rail competition to broad geographic areas encompassing hundreds of shippers, many of whom compete vigorously with other shippers just beyond the shared asset areas. Unfortunately, just as the scope of the benefits is magnified, so is the harm to many competing shippers located outside the shared asset areas. This unique circumstance calls for unique consideration by the Board.

The Applicants have attempted to address ISRI's shared asset area concerns by lumping them with every other commentor who has presented a view on the same generic issue. CSX/NS-176 at 113-24. This is inappropriate. The facts presented by each commentor vary significantly and, therefore, should be addressed individually by the Board. To lump them together would be to ignore obvious differences which may require different outcomes for different commentors.

The facts presented and the conditions sought by the three ISRI members are carefully focused. They do not seek to "gerrymander" the shared asset areas or to obtain a wide-spread expansion of them or to create new shared asset areas, as the Applicants suggest. Neither do they claim that they should be entitled to the benefits of a shared asset area for the sole reason that others obtain such benefits. Rather, each ISRI member shows with particularity how it will be competitively harmed in a significant way because it is highly dependent upon rail transportation; transportation is a sizable proportion of its final product value; and its principal competitors are located in shared asset areas, which will significantly lower the competitors' transportation costs and thereby grant them a significant economic and competitive advantage over non-shared asset area shippers. Thus, ISRI seeks to protect against particular and significant economic consequences of the arbitrary designation of shared asset areas, not the wholesale open access of the entire Conrail system, as Applicants would lead the Board to believe.

ISRI does not advocate that the shared asset areas be expanded freely to *any* shipper who is comparatively disadvantaged in any way. ISRI urges the Board to focus upon shippers with single-carrier service who compete in their business mostly against shippers who will go from single-carrier to two carrier competition in the shared asset areas. In addition, the Board should focus even more intently upon the adversely affected shipper who is highly dependent upon rail service and does not have effective competition from alternative modes of transportation. Moreover, transportation costs should account for a significant proportion of final value of the product produced by the affected shipper. The three ISRI members who have presented facts in this proceeding fall within these standards.

The scrap processing business is heavily dependent upon rail for its outbound transportation because it generally does not have economic and viable alternatives. The processing facilities tend to be located near the sources of scrap metal that make up their raw material. (ISRI-6, Padnos V.S. at 5) Therefore, much of the inbound scrap arrives in trucks since it comes from nearby areas and usually in small increments. In contrast, once the scrap is processed to specification-grade material it usually is transported by rail. This is due to a number of inter-related factors. The market for processed scrap principally is refineries, smelters, foundries and steel mills, which require large volumes of scrap and often are located significant distances from the processing facilities. (*Id.*; Kramer V.S. at 2) Since trucks become uneconomic at longer distances and many consumers prefer rail deliveries, in many instances, rail transport is the only viable and economic option, unless both the origin and destination points are on or near navigable waterways. (ISRI-6, Padnos V.S. at 3-4; Kramer V.S. at 2; Simon V.S. at 2) Trucks also are constrained by their smaller capacity, highway weight limits, and the fact that they must be loaded and unloaded quickly to address the presence of truck operators. (*Id.*, Kramer V.S. at 2) The importance of rail to scrap processors is illustrated by the fact that it accounts for approximately 65% of the outbound moves from WRC and Royal Green and 90% of the outbound moves from Padnos. (*Id.*, Padnos V.S. at 2; Kramer V.S. at 2; Simon V.S. at 2)

Transportation costs also account for a disproportionate share of the final value of processed scrap. For example, Padnos states that transportation costs can vary from 13% to over 21% of the final product value; WRC's transportation costs vary from 12% to 40% of product value; and Royal Green, while unable to give a number, states that transportation costs are a large portion of its final product value. (*Id.*, Padnos V.S. at 5; Kramer V.S. at 3; Simon V.S. at 3) Industry-wide, freight could be the single largest expense for scrap processors after the cost of raw material. (*Id.*, Simon V.S. at 3) At these high proportions, the difference in transportation costs can be a significant, if not determinate, factor in whether a non-shared asset area scrap producer with single-carrier rail service will be able to compete with shared asset area producers, all of whom will have competing rail service.

The two Padnos facilities at issue, in Lansing and Grand Rapids, Michigan, are only 80 and 150 miles west of the Detroit shared asset area, respectively. (*Id.*, Padnos V.S. at 4) As such, both compete quite vigorously with the facilities of nine competitors located in the Detroit shared asset area. These nine are among the largest scrap processors in Michigan. (*Id.* at 6) The unique scrap transportation situation in Michigan compounds the disadvantage to Padnos. Because Michigan is a peninsula and there are only three steel mills within the State, virtually all scrap processors in the State must ship their product South, out of the State, to other mills and foundries. (*Id.* at 5) As a consequence, Padnos does not even have a slight distance advantage serving potential customers to the West or North of Detroit. Padnos must compete with all of the Detroit shared asset area scrap processors for the same business. (*Id.*) Because freight alone can average over 21% of Padnos' final product value, the competitive freight rates that will be realized by Padnos' Detroit shared asset area competitors could render Padnos uncompetitive in the processed scrap market. (*Id.*)

WRC will be similarly affected, but as a result of its own unique circumstances. While WRC's scrap processing facility is located in Clinton, Massachusetts, its major markets are in Delaware, New Jersey, Ohio, and

Pennsylvania. (*Id.*, Kramer V.S. at 2) Many of its competitors for these markets are located in the North Jersey and the South Jersey/Philadelphia shared asset area. (*Id.* at 3) As a result, those competitors start off with a distance advantage over WRC in their transportation costs. But, as for base freight rates, WRC and its shared asset area competitors are on an equal footing because they all are single-served by Conrail. The creation of the shared asset areas, however, will give the shared asset area competitors the benefit of two-carrier competition on top of their existing distance advantage. Because it will have to pay substantially higher freight rates than its shared asset area competitors, WRC may be eliminated as a significant participant in the mid-Atlantic and mid-western scrap markets.

Royal Green is doubly aggrieved by its close proximity to two of the shared asset areas. Its Temple, Pennsylvania facility is only 40 miles from the South Jersey/ Philadelphia shared asset area and 120 miles from the North Jersey shared asset area. (*Id.*, Simon V.S. at 2) As a consequence, there is a greater potential that even more of its principal competitors will obtain a competitive advantage over it. The adverse affect upon Royal Green is best exemplified by one of its large customer destinations, the NorthStar steel mill located in Youngstown, Ohio. This mill will be accessible to CSX and Norfolk Southern after the transaction, thereby giving shared asset area scrap producers a single-line haul while Royal Green will be served only by Norfolk Southern. (*Id.* at 3)

An additional factor of concern to all three of these ISRI members is the supply of rail cars. (*Id.*, Kramer V.S. at 3; Simon V.S. at 4) After rates, this is probably their next greatest concern. Their shared asset area competitors will gain access to the car supply of two carriers while each of them will only have access to the supply of a single carrier. This may disadvantage them in gaining business because their shared asset area competitors will have greater success in obtaining cars to transport their processed scrap to customers.

Finally, the shared asset areas may compound the competitive harm to these three ISRI members simply because of the premium that CSX and Norfolk Southern are paying for Conrail. Because two carrier competition will prevent CSX and Norfolk Southern from recouping this premium from shared asset area shippers, single-served shippers, such as Padnos, WRC, and Royal Green, will be forced to pay for the competitive windfall that will be realized by their shared asset area competitors. This is a concern that has been expressed by the League and by ISRI and which is not addressed by the settlement agreement.

II. WHEELING AND LAKE ERIE RAILROAD CONDITIONS

ISRI also submitted comments and statements from members in support of the conditions sought by the Wheeling and Lake Erie Railroad ("WLE"). Despite Applicants' naked assertion that ISRI's concerns are unfounded, ISRI and, in particular, its affected members have not received sufficient assurances that they will not be competitively disadvantaged.

Shippers, such as Reserve Iron & Metal, L.P., have strong concerns about the viability of the WLE, after the transaction, as a competitive force in the Akron and Canton, Ohio area. In particular, WLE's current position as a competitive regional rail carrier is threatened because its essential services could be lost due to traffic diversions and loss of revenues. WLE's services also are essential to the protection of shippers who are going from 2-to-1 Class I rail carriers after the transaction. Any decline in the economic and competitive viability of WLE will be detrimental to the competitive position of ISRI members in WLE's service area.

Conclusion

In order to alleviate the anti-competitive conditions of the proposed transaction upon ISRI and its members, ISRI requests that the Board impose the following conditions:

I. Implementation conditions

A. The Board should permit implementation of the transaction only upon fulfillment of the following conditions:

1) Shared Asset Area Operations -- The submission by the Applicants jointly of a plan for operations within the Shared Asset Areas ("shared asset area"), including equipment allocations and assignment of dispatching functions, with a period for comment by shippers, followed by approval of the shared asset area operations plans by the Board.

2) Labor agreement conditions

a) The Board should, by specific order issued as soon as possible after the voting conference, authorize the Applicants to initiate formal negotiations with all labor unions regarding implementing labor agreements immediately.

b) Certification by the NS and CSX that all implementing labor agreements necessary to operate both the Shared Asset Areas and the acquired Conrail lines are in place.

3) Specification of Contract Movement Responsibilities -- Submission by NS and CSX jointly of a plan as to how revenues, costs and responsibilities for rail transportation contracts for movements to, from or within the current Conrail system are to be handled. For this purpose, NS and CSX should be able, by specific order of the Board, to obtain information as to CR contracts, and the costs, revenues and operations associated with them, as soon as possible and no later than immediately after the Board's voting conference. Shippers should be given an opportunity for comment, followed by approval of the plan by the Board.

II. Continuing oversight conditions

A. The Board should require continuing oversight of the implementation and effect of the transaction for a five year period.

B. As part of this continuing oversight, the Board should require quarterly reports from the NS and CSX, and should provide an opportunity for comment by shippers.

C. The Board should require specific quarterly and yearly information from NS and CSX, as set forth in more detail in this submission.

D. The Board should develop objective, measurable standards to determine if the transaction is resulting in benefits to the shipping public.

III. Post-Implementation Rate Conditions

A. The Board should approve the transaction only with a condition that would simplify the determination of market dominance for shippers served by the parties to the transaction, by stating that, for a period of five years after the transactions, if an NS or CSX shipper is served by only one railroad, market dominance will be presumed for that shipper if the rates to that shipper are increased by an amount greater than that set forth in paragraph (B) below.

B. The Board should approve the transaction only with a condition that would place on the carriers, for a period of five years after approval of the transaction, the burden of proving the lawfulness of any rate increase for market dominant shippers that exceeds the RCAF-U.

C. The Board should provide that the acquisition premium should not affect the determination of revenue adequacy for these carriers, or the determination of the jurisdictional threshold for rate reasonableness cases.

IV. Broad-Based Conditions

A. Transload, new facility and build-out conditions should be ordered as in the UP / SP merger.

B. All reciprocal switching points that would provide transportation options for shippers after the transaction is approved should continue to be kept open for reciprocal switching.

C. Reduction of reciprocal switching charges should be ordered to a maximum level of $130 per car, as the carriers adopted in the UP/SP merger.

D. The Board should require the carriers to propose, by no later than 30 days after the decision, a plan for each "single line to joint line" shipper for the protection of that shipper's current single line rates and service (including establishment of efficient means of interchange), for a period of at least five years after implementation of the transaction. Shippers dissatisfied with the proposal should be permitted to request the Board to adjudicate any dispute on an expedited basis.

V. ISRI Member Conditions

A. Grant a second rail carrier access to the Grand Rapids, Michigan and Lansing, Michigan facilities of Louis Padnos Iron & Metal Company.

1. At Grand Rapids, grant access to the Norfolk Southern over CSX track from the line that Norfolk Southern will acquire from Conrail.

2. At Lansing, grant access to CSX from its own track over the Norfolk Southern line, which will be acquired from Conrail.

B. Grant the Boston & Maine access to William Reisner Corporation's Clinton, Massachusetts via trackage rights over the CSX line, which will be acquired from Conrail.

C. Grant a second rail carrier trackage rights over Conrail's line between Royal Green's Temple (Reading), Pennsylvania facility and Philadelphia with the right to interchange traffic at Philadelphia.

1. If the carrier with trackage rights is any carrier other than CSX, require the carrier to absorb all switch charges on two line movements, or such other condition as will provide rate levels comparable to a single line movement.

2. The trackage rights must include access to Conrail's Reading Yard so that Royal Green may store its private fleet of railcars.

D. Impose conditions that will protect other ISRI members who are competitively injured by the shared asset areas.

E. Impose conditions, as requested by the Wheeling & Lake Erie Railroad, to protect the competitive position of Arnaco, Inc., Reserve Iron & Metal, L.P., and other ISRI members who may be similarly affected.

The conditions requested in Roman Numerals I, II, and IV are encompassed within the Applicants' settlement agreement with the League, which is before ISRI's Board of Directors for consideration in March. The remaining conditions have not been addressed and ISRI, therefore, urges the Board to impose those conditions upon the proposed transaction.

Respectfully submitted,

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February 23, 1998

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing BRIEF OF INSTITUTE OF SCRAP RECYCLING INDUSTRIES, INC. has been caused to be served by first class mail, postage prepaid, on all parties of record in this proceeding this 23rd day of February, 1998.

Aimee L. DePew