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February 23, 1998

BY HAND DELIVERY

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

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

Dear Secretary Williams:

Enclosed please find an original and 25 copies of the "Brief submitted on behalf of Rochester Gas And Electric Corporation" (RG&E-2). Also enclosed is an electronic version of this documents.

Kindly date stamp the enclosed additional copy at the time of filing and return it to our messenger.

Respectfully submitted,

Gerard G. Fullano, Esq
Counsel for Rochester Gas
and Electric Corporation

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RG&E-2

ORIGINAL

UNITED STATES OF AMERICA
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 33388

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

BRIEF
submitted on behalf of
ROCHESTER GAS AND ELECTRIC CORPORATION

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Dated: February 23, 1998

ORIGINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

ADMINISTRATIVE DECISIONS

STATUTES AND REGULATIONS

UNITED STATES OF AMERICA
SURFACE TRANSPORTATION BOARD

RG&E-2

STB Finance Docket No. 33388

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

BRIEF
submitted on behalf of
ROCHESTER GAS AND ELECTRIC CORPORATION

Rochester Gas and Electric Corporation ("RG&E" or "the Company") hereby submits its brief in this proceeding, in which CSX Corporation, CSX Transportation, Inc. (jointly, "CSX"), Norfolk Southern Corporation and Norfolk Southern Railway Company (jointly, "NS"), and Conrail Inc. and Consolidated Rail Corporation (jointly, "Conrail") (collectively, the "Applicants") seek from the Surface Transportation Board (the "Board") authorization under 49 U.S.C. §§ 11323-25 for the acquisition of control of Conrail by CSX and NS and the allocation of the use and operation of Conrail's assets between them.

I. STATEMENT OF THE FACTS

On June 23, 1997, CSX and NS, together with Conrail, submitted an application to the Board seeking authorization for the acquisition of control of Conrail by CSX and NS and the allocation of the use and operation of Conrail's assets between them (the "Transaction"). On August 6, 1997, RG&E timely submitted a Notice of Intent to Participate, thereby becoming a Party of Record in this proceeding.

RG&E is an investor-owned public utility serving roughly a quarter million electric and gas customers in a nine-county upstate New York service territory centered around the city of Rochester. RG&E competes now with other energy providers and will continue to do so in the increasingly competitive wholesale and retail power markets.

A major portion of the Company's retail electric customers are located in and around Rochester, as is Russell Station, the Company's principal coal-burning electric generating station. Russell Station receives an average of 650,000 tons of coal per year, principally from mines in the Monongahela Valley of northern West Virginia, over lines exclusively owned and operated by Conrail. Approximately the last 75 miles of rail line to Russell Station is in the exclusive control of one railroad at present, which, as planned, will continue to be the situation when CSX succeeds Conrail.

On October 20, 1997, RG&E submitted, pursuant to the procedural schedule established by the Board, its RG&E-1 "Protest and Request for Conditions" ("Protest") in response to the Transaction. In its Protest, RG&E demonstrated that notwithstanding the competitive potential in the Applicants' proposed allocation of origin rights on the former Monongahela Railroad, the Applicants' failure to make available to RG&E end-to-end competition from mine to boiler will harm RG&E's competitiveness for customers' energy requirements in both wholesale and retail power markets. In addition, RG&E demonstrated that the operation of a rail system, such as that proposed by the Applicants, with inter-carrier switching charges which bear no relation to the cost of such service represents a similar competitive harm. Accordingly, RG&E requested that the Board condition any order approving the Transaction with a series of conditions designed to ameliorate these competitive harms occasioned to RG&E as a result of the Transaction.

On December 15, 1997, the Applicants submitted their "Rebuttal" to the filings made by various Parties of Record, including RG&E, as well as to late filings accepted by the Board. The Rebuttal encompassed (a) Applicants' response to inconsistent and responsive applications, (b) Applicants' response to comments, protests, requested conditions, and other oppositions, and (c) Applicants' rebuttal in support of the primary

application and the related applications.[1/] In sum, the Applicants responded to the more than 160 responsive applications, comments, protests and requests for conditions which, as characterized by the Applicants, fall into two categories. These are: (1) requests for conditions that relate to the structure and terms of the Transaction as proposed by the Applicants, a category which includes RG&E's Protest, and (2) requests for conditions that relate to the efficient and safe implementation of the Transaction.

II. SUMMARY OF THE ARGUMENT

In order for the Transaction to be approved, the Board must determine that it is consistent with the public interest. The Board may, if it deems necessary, impose conditions on the Transaction to ensure that it comports with the public interest.

In its Protest, RG&E demonstrated that, if adopted as proposed, the Transaction will cause RG&E competitive harm. Thus, RG&E outlined conditions which would ameliorate the anticompetitive effects of the Transaction and, thereby, enable the Transaction to be consistent with the public interest.

In response, the Applicants contend that the conditions proposed by RG&E fail to meet the criteria established by the

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[1/] City of Georgetown, Illinois application for issuance of Certificate or Notice of Interim Trail Use with respect to a related abandonment authorization sought in STB No. AB-167 (Sub-No. 1181X) and STB No. AB-55 (Sub-No. 551X).

Board for the imposition of such conditions. However, the Applicants offer nothing to support there statements; their contentions are not supported by evidence or otherwise well taken. On the contrary, the evidence demonstrates that the conditions proposed by RG&E are warranted and appropriate.

III. ARGUMENT

A. The Board Has Authority To Impose Conditions Upon The Proposed Transaction In Order To Alleviate Its Anticompetitive Effects.

1. The Transaction Must Be Consistent With The Public Interest.

As the Applicants proclaim, the Transaction will reconfigure the railroad industry in the eastern United States. CSX/NS-176, HC-13. Accordingly, railroad shippers throughout the eastern United States will be impacted. Among such shippers are those utilities which depend on CSX, NS or Conrail, either in whole or in part to deliver steam coal, as the record in this proceeding so clearly demonstrates.[2/] As discussed infra, among these utilities, RG&E will be competitively harmed if the Transaction is approved as proposed.

There is no dispute, that in order to approve a merger or control application, the Board must find that the transaction under consideration is in the public interest. 49 U.S.C.

2/ Thirteen electric utilities filed comments and requests for conditions.

§ 11324(c). To determine whether a transaction is consistent with the public interest, the Board must, at a minimum, consider:

(1) the effect of the proposed transaction on the adequacy of transportation to the public;

(2) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction;

(3) the total fixed charges that result from the proposed transaction;

(4) the interest of rail carrier employees affected by the proposed transaction; and

(5) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region or in the national rail system.

49 U.S.C. § 11324(b).

In their Rebuttal, the Applicants summarily dismiss RG&E's Protest, as well as the protests and requests for conditions filed by other parties, by arguing that each of these five elements have been met and that through their filings the several commentors, RG&E included, simply "seek to deprive others of the substantial benefits of the Transaction or obtain for themselves an impermissible advantage in their position relative to the status quo ante." CSX/NS-176, HC-33. Implicit in this argument, which is echoed throughout their Rebuttal, is the contention that if the Transaction does not lessen competition, a showing which the Applicants strenuously argue has been made, it is in the public interest and therefore should be approved without condition.

However, in assessing whether a proposed transaction is consistent with the public interest, the five elements outlined above are not exhaustive. The Board is also guided by the rail transportation policy added to the Interstate Commerce Act (the "Act") by the Staggers Rail Act of 1980 (Pub. L.96-448, 94 Stat. 1931) and codified at 49 U.S.C. § 10101. 49 C.F.R. § 1180.1(b). This policy emphasizes that, where possible, competition among rail carriers rather than government regulation should govern the railroad industry. Accordingly, the Board in its administration of the Act should seek: "to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail" (49 U.S.C. § 10101(1)); "to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public . . ." (49 U.S.C. § 10101(4); ". . . to ensure effective competition and coordination among and between rail carriers . . ." (49 U.S.C. § 10101(5)); "to maintain reasonable rates where there is an absence of competition ..." (49 U.S.C. § 10101(6)); and, "to prohibit predatory pricing and practices, to avoid undue concentrations in market power, and to prohibit unlawful discrimination" (49 U.S.C. § 10101(12)).

The Board's Policy Statement regarding major railroad control transactions further defines the public interest standard by setting forth a balancing test to be performed by the Board.

See 49 C.F.R. § 1180.1. The Policy Statement provides that the Board "weighs the potential benefits to Applicants and the public against the potential harm to the public." 49 C.F.R. § 1180.1(c). Where potential harm to the public is identified by the Board, it "will consider whether the benefits claimed by applicants could be realized by means other than the proposed consolidation that will result in less potential harm to the public." Id. Thus, the Board is not constrained by the proposal presented to it by the applicants in a railroad control proceeding involving Class I rail carriers, but may consider and adopt an alternative proposal if by doing so the public interest would be better served.

Moreover, in evaluating whether a particular acquisition proposal is in the public interest, a primary concern of the Board is to determine whether competitive harm will result from the transaction. When evaluating such proposals, the Board and its predecessor, the Interstate Commerce Commission ("ICC"), have sought to identify "what competitive harm is directly and causally related to the merger" as distinguished from competitive disadvantages that existed prior to the proposed transaction. Union Pacific Corporation, et al.- Control and Merger - Southern Pacific Rail Corporation, et al., 1996 STB Lexis 220 *227. In addition, the Board recognizes a reduction or "lessening of competition" that would arise when two carriers consolidate as

the kind of harm that would be contrary to the public interest. 49 C.F.R. § 1180.1(c)(2)(i).

In sum, the scope of the Board's assessment in evaluating the public interest in the context of a railroad acquisition proceeding is much broader than the Applicants suggest. The Board should, at a minimum, consider whether there will be a lessening of competition, but it should also consider whether other kinds of competitive harm or disadvantages that would be harmful to the public interest would result from the Transaction.

2. The Board Has Authority To Impose Conditions To Ensure That The Transaction Is Consistent With The Public Interest.

The Board has the authority to impose on a transaction conditions, such as the divestiture of parallel tracks or requirement of trackage rights and access to other facilities, in order to ameliorate any potential anticompetitive effects and ensure that it is consistent with the public interest. 49 U.S.C. 11324(c). The Applicants concede this fact. CSX/NS-176, HC-31.

The Board's authority to impose such conditions is broad. 49 C.F.R. § 1180.1(d); Union Pacific Corporation, et al.- Control - Missouri Pacific Corporation, et al., 366 I.C.C. 462, 502 (1982). If a transaction is found to have anticompetitive consequences, the Board may invoke such power where certain

criteria are met. The Board has stated:

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

Id. at 563-64.

As discussed more fully below, contrary to the Applicants' contentions in their Rebuttal, each of the conditions proposed by RG&E satisfies these criteria.

B. The Evidence Establishes That RG&E Will Be Competitively Disadvantaged As A Result Of The Transaction As Proposed.

The Applicants make grandiose claims of the dramatic improvements in rail transportation alternatives afforded by the Transaction in support of their claim that it is within the public interest. CSX/NS-176, HC-13. However, RG&E has explained, that contrary to the Applicants' claims, the Transaction as proposed does not improve rail transportation alternatives for RG&E. On the contrary, the Transaction as proposed will cause RG&E competitive harm. Accordingly, the Transaction, absent the imposition of conditions which will ameliorate this harm, fails to satisfy the public interest standard as required for Board approval.

1. The Transaction As Proposed Precludes RG&E From The Benefits Of Mine-To-Boiler Rail Competition And Places RG&E At A Competitive Disadvantage.

As RG&E noted in its Protest, the proposed division of Conrail properties between the CSX system and the NS system, which contemplates among other things that both carriers -- as compared to Conrail alone, currently -- be able to originate coal on the former Monongahela Railroad System, may carry a potential benefit for RG&E and its customers. However, as RG&E demonstrated, although the introduction of competition at the origin point for much of the Northeast's bituminous steam coal may be helpful, the Applicants' efforts are incomplete and, accordingly, yield no real public benefit. On the contrary, as a result of the proposed Transaction's provision of competitive service to the benefit of RG&E's competitors, RG&E will be placed at a competitive disadvantage in the wholesale and retail power markets.

As RG&E explained, the delivered cost of fuel is a significant element in the production of electricity at Russell Station. The fuel component of the delivered fuel cost typically runs no more than 60%. The rest is consumed in transportation. Thus, RG&E incurs many millions of dollars a year in rail charges to move coal the 350 or so miles from mine to boiler. All of those dollars are in turn reflected in RG&E's cents-per-kilowatthour electricity price, the measure by which RG&E

competes with other sellers of electricity in the wholesale power market. Accordingly, RG&E must hold that price to a minimum consistent with its continuing obligation to provide reliable, high-quality service and in order to remain competitive in the increasingly competitive wholesale and retail power markets. Notwithstanding the Applicants' proposed restructuring of the competitive options available at the origin point, RG&E will be captive to a single carrier for the last 75 miles of service to the destination. So long as the destination leg of the transportation is locked up by a single carrier, RG&E's ability to minimize the delivered price of fuel and thus maintain a competitive price for electricity is substantially jeopardized.

This situation is compounded by the fact that, as the evidence clearly demonstrates, competitors of RG&E will obtain access to both CSX and NS under the Transaction.[3/] As a result, their competitive positions in wholesale and retail power markets will be substantially improved over the status quo ante and, accordingly, over RG&E as these utilities are able to minimize their delivered cost of fuel as a result of their access to competitive rail service.

In sum, RG&E will suffer a direct competitive harm as a result of the merger. Rather than provide RG&E rail

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[3/] These include, inter alia, Atlantic City Electric's Deepwater and England Plants, Vineland's H.M. Down Plant in New Jersey, Philadelphia Electric Company's Eddystone plant and Detroit Edison's River Rouge and Trenton plants.

transportation alternatives end-to-end from mine to boiler, which would enable RG&E to minimize its price for electricity and remain competitive in wholesale and retail power markets, the Applicants' proposal instead places RG&E at a competitive disadvantage vis-a-vis other utilities in the Northeast. Significantly, the Applicants have proffered no evidence to the contrary.

The obvious solution to this competitive harm is to make available to RG&E mine-to-boiler competition. As RG&E explained in its Protest, the joint operating rights established for the former Monongahela Railroad System contain a prospect for such competition. To convert that prospect into a truly competitive market for transportation of utility steam coal in the Northeast would require the opening of certain rail line segments planned to be controlled by just one of the two successors to Conrail. In RG&E's case, that would principally involve opening portions of the East-West Conrail lines in upstate New York (the old New York Central main line and the West Shore line) from Rochester westward to Buffalo and eastward to Lyons, N.Y., so that Norfolk-Southern and perhaps other carriers might use those lines now planned for exclusive CSX control.[4/] A second alternative to CSX for the Rochester metropolitan area could be established through an authorization to a short haul carrier (e.g., Buffalo &

4/ Currently Conrail's water level route, MilePost 437 (Buffalo, N.Y.) to MilePost 335 (Lyons, N.Y.).

Pittsburgh Railroad) to bridge the gap between Rochester in the north and the short haul carrier's southern connections with the Norfolk-Southern system in New York's Southern Tier area.[5/] To round out the real competition this route opening would achieve, it would be particularly helpful to RG&E if carriers in addition to CSX could be authorized to use the spur line within Rochester which transports the Company's coal from the main lines in the western part of the city through its northerly portions and into the Company's terminus at Russell Station in the adjoining suburb of Greece, a 10-mile distance [6/]

The opening of these portions of the Northeast rail system in the manner described would provide the opportunity for two separate carriers to move RG&E's coal from origin through to destination, plus the opportunity to combine segments on these carriers' lines with short haul lines in the area south of Rochester. Such an outcome would be consistent with that gained by RG&E's competitors if the Transaction were to be approved as proposed. In sum, if such steps were to be taken, the Transaction would, rather than harm RG&E, restore the competitive balance with respect to the transportation component of RG&E's cost of delivered fuel with that of its competitors in the

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[5/] Currently Conrail's Corning Secondary, MilePost 70 (Corning, N.Y.) to MilePost 0 (Lyons, N.Y.).

[6/] Currently Conrail's Charlotte Running Track at CP 373 to termination at RG&E's Russell Station.

wholesale and retail power markets, thereby ameliorating the anticompetitive effects of the Transaction as proposed.

In order to achieve this result, RG&E proposes that the Board condition approval of the Transaction on the two following conditions:

> (1) The availability to the Rochester, New York area of genuine competition between at least two long haul rail carriers as well as such competition between them and shorthaul carriers for traffic over suitable segments of transportation routes in and around Rochester. In particular, such competition should be created and fostered for the entire route between the former Monongahela Railroad System in northern West Virginia and RG&E's Russell Station in suburban Rochester.
>
> (2) The vigorous pursuit of competition between the applicant longhaul carriers for the business of shippers outside joint access areas. In particular origin carriers must be open to reaching reasonable contract provisions with shippers over route segments where another carrier is capable of providing origin-to-destination through service.

2. The Provision Of Fair Switching Fees Ameliorates The Competitive Harm Occasioned By The Transaction As Proposed.

Apart from the competitive harm the Transaction occasions on RG&E as a result of Applicants' failure to make available to RG&E end-to-end competition in coal transportation service, there remains a singular need to ensure that railroad charges exacted for essential services, such as those incurred in switching traffic from one carrier to another, be held to compensable -- not excessive -- levels.

As RG&E explained, in its experience with Conrail and predecessor carriers over many years, RG&E has been subjected to charges, or the threat of charges, for inter-carrier switching of its coal traffic that are plainly exorbitant, unfair and unrealistic. These charges, which bear no relation to the cost of the service requested, are clearly designed to discourage use of carriers other than the one controlling the switching point. The imposition of such charges impedes the use of short haul carriers for local movement of traffic and even short movements by long-haul carriers where economies in overall transportation can be achieved, thereby placing those subject to such charges at a competitive disadvantage.

Accordingly, as RG&E explained, making such charges part of a challengeable, reasonably-priced destination service would remove this competitive obstacle. To that end, RG&E proposed that the Board adopt the following two additional conditions:

> (1) The discontinuance of the railroad practice of charging exorbitant fees for essential services such as switching traffic from one carrier to the other, particularly in the routing of RG&E coal traffic in upstate New York. The Board should provide a simple, inexpensive procedure for determining a fair, non-discriminatory switching charge in those locations noted herein pertinent to coal delivery to Russell Station.
>
> (2) The destination carrier, as part of its challengeable, reasonably-priced offer of service over the destination haul of traffic for which a shipper has contracted with another carrier for origination, must include any switching charges necessitated by the inter-carrier connection and do so at a price reasonably related to the cost of such switching service.

C. The Imposition Of The Conditions Proposed By RG&E Is Wholly Consistent With The Board's Conditioning Power.

1. The Conditions Proposed By RG&E Meet The Necessary Criteria To Be Imposed Upon The Transaction By The Board.

Given the substantial competitive harm occasioned by the Transaction on RG&E as demonstrated by the evidence presented, RG&E proposes that the Board invoke its conditioning power and condition any grant of authorization on those reforms outlined above. As demonstrated supra, these conditions ameliorate the competitive harm which will be inflicted on RG&E if the Transaction is permitted to be implemented as proposed.

In their Rebuttal, the Applicants contend that the conditions proposed by RG&E should be rejected because "they do not meet the legal standards established by the Board, and they would dramatically restructure the Transaction in ways that would undermine many of its benefits." CSX/NS-176, HC-460. However, the Applicants have provided no evidence to support this contention. Clearly a rejection of the conditions cannot rest on this bald assertion. As the Board has noted, "Applicants' statements made on rebuttal here do not constitute new evidence." Decision No. 66, February 2, 1998.

The record demonstrates that RG&E's proposed conditions meet the necessary criteria to be imposed upon the transaction by the Board. First, the Transaction produces effects harmful to the

public interest. It is uncontroverted that RG&E will suffer competitive harm as a result of being a captive shipper for deliveries to Russell Station while, as a direct result of the Transaction, its competitors will gain a competitive advantage with respect to the cost of fuel delivered by rail.

Second, that the conditions proposed by RG&E will ameliorate the cited harms is unrefuted. The availability of mine-to-boiler competition for RG&E does not as the Applicants allege represent an attempt to "seek to deprive others of the substantial benefits of the Transaction or obtain for themselves an impermissible advantage in their position relative to the status quo ante." CSX/NS-176, HC-33. Rather, the availability of such competition will ensure that RG&E will have the opportunity to minimize its cost of fuel delivered by rail in the same manner which the Transaction affords its competitors in the significantly reconfigured railroad industry in the eastern United States, i.e., the status quo ante. The imposition of disciplined switching charges will go far to ensure that such competition is in fact realized.

Thirdly, aside from the conclusory statement that the imposition of the proposed conditions would "dramatically restructure the Transaction in ways that would undermine many of its benefits" (CSX/NS-176, HC-460), the Applicants have presented no evidence to support this claim or demonstrate in any way that the implementation of the proposed conditions is not

operationally feasible. Given the Applicants' ability to institute changes in origin rights on the former Monongahela Railroad and elsewhere which reflect potential gains in rail competition, and to do so in an economically efficient manner, the record demonstrates that the Applicants are not precluded from implementing such changes to achieve like results with respect to RG&E.

Finally, it is clear that implementation of the conditions proposed by RG&E will produce public benefits by ameliorating the competitive harm occasioned by the merger and do so without harming the Transaction. The Applicants have presented no evidence that implementation of the conditions proposed by RG&E would diminish in any way the efficiency gains which the Applicants so strenuously claim result from the Transaction.

In sum, it is uncontroverted that the conditions proposed by RG&E satisfy those criteria necessary for the Board to invoke its conditioning power. Accordingly, they should be adopted.

2. The Imposition Of The Proposed Conditions Is Warranted In Light Of The Benefits Afforded The Applicants By Approval Of the Merger.

In addition to the fact that, as demonstrated above, the conditions proposed by RG&E meet the necessary criteria to be imposed upon the Transaction by the Board, additional considerations warrant an exercise of the Board's conditioning power in this instance.

The Applicants seek Board approval of a transaction which will reconfigure the rail industry in the Northeast. Such approval will of course confer upon the Applicants significant economic benefit. Although the Applicants justify such benefit on the assertion that the Transaction is in the public interest because it increases rail competition in the Northeast, it is uncontroverted that, in the post-Transaction Northeast, one less railroad will remain and each surviving Applicant will be positioned to exercise monopoly power on certain routes. Deliveries of coal to RG&F, absent the imposition of the conditions proposed, will be but one such example.

The Applicants should not be permitted to reap such economic benefits from a Transaction which fails to foster the joint use of facilities and, accordingly, falls decidedly short of establishing true rail competition in the Northeast. The price to be exacted from applicants seeking to gain Board approval and reap the benefits of a merger is reflected in the policy guiding the Board in its evaluation of such mergers. That policy requires the Board inter alia "to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public . . ." (49 U.S.C. § 10101(4)); and ". . . to ensure effective competition and coordination among and between rail carriers . . ." (49 U.S.C. § 10101(5)).

Given the competitive half-step represented by the Transaction as proposed, the Applicants are clearly not entitled to reap the benefits of the Transaction. However, as explained supra, imposition of the conditions proposed achieves the gains in competition necessary to support approval of the Transaction.

IV. CONCLUSION

WHEREFORE, Rochester Gas and Electric Corporation respectfully requests that the Surface Transportation Board at a minimum condition any order granting such application with those four conditions set forth above.

Respectfully submitted,

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Date: February 23, 1998

CERTIFICATE OF SERVICE

I, Genaro Fullano, certify that on February 23, 1998, I have caused to be served by first-class mail, postage prepaid, or by more expeditious means, a true and correct copy of the foregoing Brief submitted on behalf of Rochester Gas and Electric Corporation (RG&E-2) on the official service list dated August 19, 1997, as corrected by STB Decision No. 43 and its appendices, and by hand delivery on the following:

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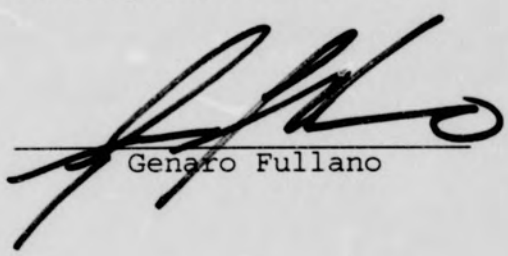

Genaro Fullano

Dated: February 23, 1998

STB FD . 33388 2-23-98 . E 185904

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Re: **CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company--Control and Operating Leases/ Agreements--Conrail, Inc. and Consolidated Rail Corporation**

Dear Secretary Williams:

I have enclosed an original and 25 copies of the Brief of Providence and Worcester Railway Company in the above-referenced proceeding. In addition, I have also enclosed an electronic copy of this document.

We would appreciate your date stamping the extra copy of this pleading, so that our files can properly reflect the filing. If you have any questions concerning this, please do not hesitate to contact me.

Very truly yours,

Edward D. Greenberg

Enclosures
cc: Heidi Eddins, Esquire

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BEFORE THE
SURFACE TRANSPORTATION BOARD
Washington, D.C.

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 THE PROVIDENCE AND WORCESTER RAILROAD COMPANY

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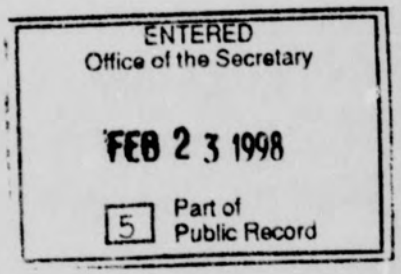
Dated: February 23, 1998



BEFORE THE
SURFACE TRANSPORTATION BOARD
Washington, D.C.

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 THE PROVIDENCE AND WORCESTER RAILROAD COMPANY

In accordance with the governing procedural order in this matter, the Providence and Worcester Railroad Company ("P&W") submits its brief with respect to the application pending before the Board that would transfer certain rail lines and other assets from Conrail, Inc. and Consolidated Rail Corporation ("CR") to the Norfolk Southern Corporation and Norfolk Southern Railway Company ("NS") and CSX Corporation and CSX Transportation, Inc. ("CSX"), respectively.

INTRODUCTION

P&W is a regional freight railroad operating in Massachusetts, Rhode Island, Connecticut and New York. P&W is the only interstate freight carrier serving the State of Rhode Island and possesses the exclusive and perpetual right to conduct freight operations over the Northeast Corridor ("NEC") between New Haven, Connecticut and the Massachusetts/Rhode Island border. Given its strategic location, P&W provides its customers with creative pricing and routing alternatives, coupled with fast,

reliable and efficient service that stems directly from the company's commitment to maintaining its track and equipment to high standards. (A copy of a map of P&W's operating area is attached as Exhibit A.)

The Board should be aware that there are a number of development projects underway in New England to improve the intermodal transportation and distribution infrastructure in the region. Of particular relevance here is the State of Rhode Island's Freight Rail Improvement Project ("FRIP"), in which the state and federal government are providing funds for the construction of an additional rail line on Amtrak's NEC with double-stack overhead clearances from P&W's main line to the Quonset/Davisville Industrial Park, and for the establishment of significant new industrial development at the Quonset/Davisville Industrial Park. P&W anticipates a substantial expansion of intermodal and automobile business to and from the Quonset/Davisville facility. This project is a cornerstone of Rhode Island's economic development plans and is of vital importance to P&W. P&W expects that the acquirers of Conrail will work with P&W to ensure that New England industries and port facilities will enjoy reliable, competitive and cost-effective rail service to and from points throughout the U.S.

I. P&W SUPPORTS THE TRANSACTION

In a letter dated August 28, 1997, P&W advised the STB that it supported the proposed acquisition and control of Conrail by CSX and NS (the "Transaction"). This support was predicated on the fact that P&W and CSX had entered into an agreement on August 6, 1997, by which P&W would be permitted to independently determine pricing for rail traffic moving between New England and New York based on a long term fixed revenue factor for CSX's movement of this traffic between New Haven, Connecticut and Fresh Pond Junction, New York. As this would enable P&W to provide more responsive and competitive service for traffic moving between New York City and New England, P&W determined that the Transaction would both enhance P&W's service and be in the public interest. As

a part of the August 6, 1997 agreement, P&W was required to advise the Board of its support for approval of the Application.

Separately, P&W requested Conrail, pursuant to a 1982 Order of the Special Court, to begin negotiations on the conveyance of New Haven Station to P&W. P&W did not--and does not--believe that the Application was intended to, or could, address New Haven Station or that this property can in any event be transferred in any manner inconsistent with the Order of the Special Court created by the Regional Rail Reorganization Act of 1973. Conrail declined to enter into the required negotiations. Thus, on October 17, 1997 P&W sent a further letter to the Board reiterating its continued support for the Application as filed, while pointing out several matters pertaining to New Haven Station.

First, the letter advised the Board that under an Order of the Special Court dated April 13, 1982, P&W had the right to acquire the terminal properties known as New Haven Station "if Conrail elects to withdraw from or abandon or discontinue freight service obligations" at that location. (A copy of the Order of the Special Court was attached to the October 17 letter as Exhibit 1.) P&W further advised the Board that it had initiated steps to effect the implementation of the Special Court's Order, as the Transaction would cause Conrail to withdraw from the continued performance of its freight service obligations in general and, specifically, at New Haven Station.

As indicated in the October 17, 1997 letter, P&W has sought an interpretation of the Order and declaration of its rights from the statutory successor to the Special Court---The United States District Court for the District of Columbia. The matter was put on a special "railroad" docket and assigned to Judge Charles R. Weiner, who is extremely familiar with the issues involved with, and the jurisprudence of, the Special Court--having served on the Special Court from 1982 until 1997. Conrail moved to dismiss P&W's complaint solely on the grounds of ripeness; Conrail did not challenge the exclusive

jurisdiction of the Special Court to interpret and implement its prior Order. (A copy of Conrail's motion to dismiss is attached hereto as Exhibit B.) Conrail argued that P&W's right to acquire New Haven Station was contingent on the consummation of the Transaction, which, in turn, was contingent on the Board's approval. Conrail contended that P&W's claims were premature because if the Board did not approve the Transaction, Conrail might continue to operate New Haven Station

Conrail urged the Court to require P&W to wait until the Board approved the Transaction before bringing its claim to the Court. Conrail assured the Court that deferring consideration of the case until after the Board approved the Transaction would not cause P&W to lose any rights it might possess. Indeed, Conrail stated "[e]ven if the Transaction is approved and consummated, these rights will not be affected. P&W's rights are secure and dismissal would permit P&W to assert its claim when it becomes ripe." (See Exhibit B at 10.)

The Court thereupon granted Conrail's request to defer consideration of P&W's rights until after the Transaction received the Board's approval. The Court's Order clearly contemplates, however, that P&W will refile its Complaint if the Transaction is approved by the Board, and expressly grants leave to do so. P&W fully intends to proceed in the Court if the Transaction is approved. (A copy of the Court's order dated January 22, 1998 is attached hereto as Exhibit C.)

Notwithstanding the actions it is taking to implement its right to acquire New Haven Station, P&W continues to support the Transaction. As the Special Court's Order specifically provides for the transfer of New Haven Station to P&W, and not to anyone else, and New Haven Station therefore cannot be encompassed within the proposed Transaction, and as this property is not in any way essential to the success of the proposed Transaction, P&W's position on this issue does not in any way diminish its support for the Application.

In addition, on December 9, 1997, P&W responded to Comments contained in an Intervention Petition filed by U.S. Representatives Jerrold Nadler, *et al.* ("Intervenors"; see P&W-3). In that response, P&W corrected a misunderstanding Intervenors had concerning the nature of P&W's trackage rights between New Haven and Fresh Pond. P&W then noted that the P&W Overhead Rights Area was already heavily used by P&W, Amtrak, Metro North and Conrail, so that introducing another carrier on these tracks would raise serious operating concerns. Accordingly, in light of capacity limitations, while fully supporting the Application as filed, P&W is willing to serve as the designated operator on that portion of the P&W Overhead Rights Area which is the subject of Intervenors' request, if the Board should decide to designate an additional carrier.

II. THE DISPUTE INVOLVING THE ORDER OF THE SPECIAL COURT NEED NOT, AND SHOULD NOT, BE RESOLVED BY THE BOARD IN THIS PROCEEDING

In their rebuttal filed on December 15, 1997, the Applicants request that the Board issue a declaration regarding P&W's right to acquire New Haven Station under the Order of the Special Court. In support of this request, and contrary to Conrail's position before the Court, Applicants argue that the Board should interpret the Order of the Special Court and find that it does not apply to the Transaction and/or find that P&W is estopped, due to its agreement to support the Application, from preventing the transfer of New Haven Station to CSX. Applicants apparently contend that CSX should be allowed to step into the shoes of Conrail without triggering the Order of the Special Court, and that P&W's rights would not be triggered absent some future transaction or event.

P&W respectfully submits that the dispute regarding New Haven Station is neither an integral nor necessary part of the Application and should be resolved by the designated successor to the Special Court--not the Board. The Special Court expressly reserved exclusive jurisdiction over the Order and

its implementation. *See* ¶ 25 of the Order. Clearly, Judge Weiner is best positioned to interpret and implement the Special Court Order.

Moreover, the dispute over New Haven Station involves the interpretation and implementation of a supplemental transaction over which Congress granted the Special Court original and exclusive jurisdiction. *See* 45 U.S.C. §§ 719 and 745(f). Indeed, Congress granted the ICC no role in the supplemental transaction underlying the Order, instead delegating to the Special Court the responsibility to implement congressional policy and to determine whether the supplemental transactions were in the public interest. The Order is not tantamount to an anti-assignment clause in a private contract which the acquirers argue should be abrogated--it is the embodiment of a specific congressional policy mandating transfer of certain Conrail assets in New England to regional carriers. Thus, the Applicants' unsupported assertion that the Board's exclusive and plenary authority over rail combinations extends to the § 745 supplemental transactions underlying the Order is simply incorrect.

Even if the Board had authority over the supplemental transactions covered by the Order, the declaration sought by the Applicants pursuant to 49 U.S.C. § 11321(a) would not be appropriate. The Board's power under § 11321(a) to exempt a transaction from inconsistent laws arises only when necessary to carry out the fundamental purposes of the transaction. *See Norfolk and Western v. Train Dispatchers*, 111 Sup. Ct. 1156 (1991); *City of Palestine v. United States*, 559 F. 2d 408 (5th Cir. 1977). New Haven Station and P&W's rights under the Order are not even mentioned in the Application, and a declaration relating to P&W's rights is clearly not necessary to the success of the Transaction. New Haven Station is presently an isolated marginal appendage to Conrail's system, disconnected from Conrail's main operations. Indeed, Conrail has, through a series of transactions, over the last several years shed many of its assets in Connecticut, (and even entered into an aborted sale of New Haven

Station to P&W), leaving New Haven Station as an island operation. In any event, if P&W acquires New Haven Station, there will remain adequate interchange facilities to meet CSX's requirements. The Board should decline the Applicants' invitation to reach out to resolve the dispute arising in connection with the Special Court's Order.[1]

Similarly, P&W's support for the Application is not inconsistent with its position regarding its rights under the Order, and P&W is not estopped from asserting those rights by its agreement to support the Application. The Application which P&W fully supports does not even mention New Haven Station, the Order of the Special Court, or P&W's rights under the Order. Nor do the Applicants contend that the agreement between P&W and CSX mentions New Haven Station or expressly contemplates that P&W would waive any rights under the Order of the Special Court. P&W cannot fairly be held to have waived its rights under the Order of the Special Court under the circumstances presented here.

The dispute regarding New Haven Station under the Order of the Special Court need not be addressed in connection with the proposed Transaction. Either P&W's rights under Paragraph 21 of the Order are triggered, and Conrail must sell New Haven Station to P&W, or P&W's rights are not triggered by the Transaction and must await some future triggering event. In either case, the proper interpretation

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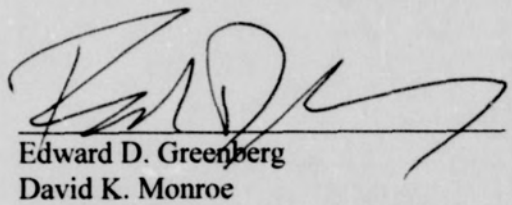
[1] Applicants' suggestion that the FRA supports its interpretation of the Order does not support their position. The FRA has itself acknowledged it has no authority to interpret the Order. In a 1982 letter requested by Conrail, Robert W. Blanchette, the then FRA Administrator, specifically stated that once the Order was entered, it would be construed and applied by the Special Court, not the FRA.

and implementation of the Order of the Special Court should be determined by the Court.



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Attorneys for
Providence and Worcester Railroad Company

Dated: February 23, 1998

CERTIFICATE OF SERVICE

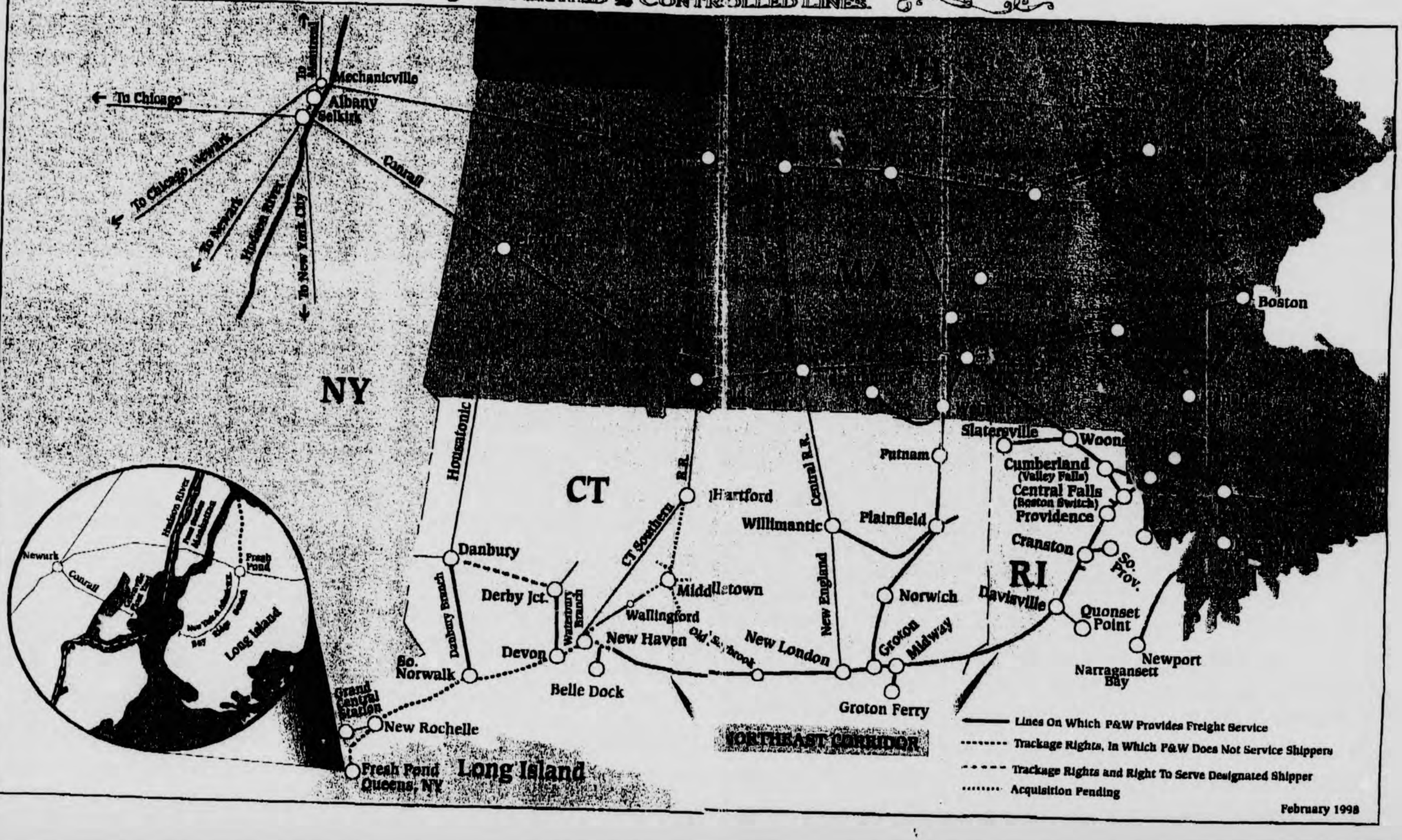
I certify that on this 23rd day of February, 1998, I caused a copy of the foregoing Brief of Providence And Worcester Railroad Company to be served by first-class mail, postage prepaid on all parties that have submitted to the Applicants a Request to be placed on the Public Service List in STB Finance Docket No. 33388.

David K. Monroe

EXHIBIT A

The Providence & Worcester Railroad Co.

Operated & Controlled Lines.



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PROVIDENCE AND WORCESTER RAILROAD COMPANY,	:	
Plaintiff,	:	
	:	**CIV. NO. 1:97RR00002**
v.	:	
CONSOLIDATED RAIL CORPORATION,	:	
Two Commerce Square	:	
2001 Market Street	:	
Philadelphia, PA 19101,	:	
Defendant.	:	

MOTION TO DISMISS COMPLAINT

Pursuant to Fed. R Civ. P. 12(b) (6), defendant, Consolidated Rail Corporation, moves the Court to dismiss the Complaint and, in support thereof, incorporates the attached Statement of Points and Authorities in Support of Motion to Dismiss..

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Dated: December 19, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PROVIDENCE AND WORCESTER RAILROAD COMPANY,	:	
Plaintiff,	:	**CIV. NO. 1:97RR00002**
v.	:	
CONSOLIDATED RAIL CORPORATION,	:	
Two Commerce Square	:	
2001 Market Street	:	
Philadelphia, Pennsylvania 19101,	:	
Defendant.	:	

STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS

Defendant, Consolidated Rail Corporation ("Conrail"), pursuant to Federal Rule of Civil Procedure 12(b)(6) and Local Rule 108(a), hereby submits this Statement of Points and Authorities Support of its Motion to Dismiss. As more fully discussed below, Providence and Worcester Railroad Company's ("P&W") complaint must be dismissed because its claims do not present a ripened case or controversy appropriate for judicial intervention at this time. In order for P&W's claims to become justiciable, the Surface Transportation Board ("STB") must first approve the acquisition of Conrail by CSX and Norfolk Southern, an event which, if it occurs at all, will not be determined until the summer of 1998. Accordingly, quite apart from the fact that P&W's claims completely lack merit, those claims may never arise either in their current state or in any form at all. Accordingly, P&W's complaint should be dismissed.

I. INTRODUCTION

A. Background

This action arises out of an Order Approving and Directing the Consummation of Expedited Supplemental Transactions ("the Order") issued by the Special Court, Misc. No. 81-1, filed April 13, 1982. A copy of the April 13, 1982 Order issued by Special Court is attached hereto as Defendant's Exhibit "A". Pursuant to Section 305(f) of the Regional Rail Reorganization Act, 45 U.S.C. § 701 et seq. ("the Rail Act"), the Order grants plaintiff Providence & Worcester Railroad Company ("P&W") a conditional right to acquire certain railway properties in and around the city of New Haven, Connecticut, upon Conrail's election "to withdraw from or abandon or discontinue freight service" with respect to the properties defined by the Order, including the New Haven Station terminal properties, and upon satisfaction of specific conditions. See Defendant's Exhibit "A" at ¶ 21. Specifically, Paragraph 21 of the Order states as follows:

> If Conrail elects to withdraw from or abandon or discontinue freight service obligation on the "Shore Line" between Westbrook, Connecticut (MP 101.2) and New Haven, Connecticut (MP 70.2) or on the terminal properties known as "New Haven Station" . . . Conrail shall sell said rail properties at a reasonable price and on reasonable terms and conditions to be agreed upon by Conrail and P&W or, in the absence of agreement, in accordance with the procedures of the American Arbitration Association, and P&W shall succeed to Conrail's service obligations . . . .

Defendant's Exhibit "A" at ¶ 21.

The language cited above was originally drafted by the Federal Railroad Administration ("FRA") in 1981 as part of FRA's mandate under the Northeast Rail Service Act of 1981, see 45 U.S.C. § 1101 et seq., to eliminate federal government subsidization of Conrail's freight operations in the Northeast region of the United States. See 45 U.S.C. § 1102(1). Congress, pursuant to section 745 of the Rail Act, granted the FRA authority to develop, analyze, and/or approve proposals to advance the supplemental transactions necessary to effectuate the evolution of a nationwide, self-sustaining rail freight service system. See 45 U.S.C. § 745.

The Order was the result of a detailed proposal designed by FRA to facilitate the privatization of Conrail and to meet the Northeast region's rail freight needs. See 45 U.S.C. § 745(a). Paragraph 21 of the Order, as drafted by the FRA and expressly approved by the Special Court, was designed to ensure, inter alia, that Conrail would be permitted to maintain the exclusive rights to operate rail freight service at New Haven Station so long as it desired to do so. See Defendant's Exhibit "A". From 1982 until the present day, Conrail has operated rail freight service at New Haven Station.

On June 23, 1997, the STB (successor to the Interstate Commerce Commission) announced that CSX Corporation ("CSX") and Norfolk Southern Corporation ("NS"), and certain subsidiaries, together with Conrail, had filed an Application with the STB seeking approval of CSX's and NS's control of Conrail ("the Transaction"). A copy of the June 23, 1997 Surface Transportation Board "Public & Media Advisory", No. 97-47, is attached hereto as Defendant's Exhibit "B." The Application remains pending before the STB. The STB will not finally act on the Transaction until interested parties have had ample opportunity to participate fully in the STB's processes. See id. at 3. Under the present schedule, the STB will not issue its

decision until July 1998. See id. at 6. The Interstate Commerce Commission Termination Act authorizes the STB to deny, grant, modify or otherwise condition the Application as presented by Conrail, CSX and NS. See 49 U.S.C. §§ 11321-11324 (1997).

Approximately two months following the filing of the Transaction Application with the STB, P&W sent a letter to Conrail demanding that Conrail offer the New Haven Station properties to P&W at "a reasonable price and on reasonable terms and conditions." A copy of the September 9, 1997 P&W demand letter is attached hereto as Defendant's Exhibit "C." Citing Paragraph 21 of the Order, P&W asserted that its right to purchase the New Haven Station properties had matured. See id. P&W further stated that, in its opinion, the proposed Transaction, without more, triggered P&W's rights under Paragraph 21 of the Order. See id. Conrail, however, objected to P &W's interpretation of the Order, particularly its assertion that the proposed Transaction had "triggered" any rights of P&W to purchase the New Haven Station properties and, consequently, refused to entertain P&W's request for sale negotiations.

Thereafter, on October 2, 1997, P&W petitioned the FRA to certify, inter alia, that Conrail had relinquished its exclusive freight rights to the New Haven Station properties sufficient to warrant a forced sale. A copy of the October 2, 1997 letter from P&W to The Hon. Jolene Molitoris, FRA Administrator, is attached hereto as Defendant's Exhibit "D." Conrail promptly responded to P&W's request, stating, among other things:

> [t]he Conrail-CSX-Norfolk Southern transaction pending before the Surface Transportation Board does not constitute an election by Conrail to withdraw from or abandon or discontinue freight service with respect to the properties known, for purposes of the Supplemental Transactions authority, as New Haven Station.

A copy of that October 10, 1997 letter is attached hereto as Defendant's Exhibit "E."

By letter dated October 30, 1997, FRA explicitly denied P&W's request to certify its present right to acquire New Haven Station from Conrail. A copy of its opinion letter is attached hereto as Defendant's Exhibit "F." Unsatisfied, P&W elected to bring the present action against Conrail.

Conrail continues to operate railway freight service over the New Haven Station Properties. Indeed, at no time since the issuance of the Order has Conrail withdrawn from, abandoned, or discontinued operations over the New Haven Stations properties.

B. Plaintiff's Complaint

Despite the conclusion reached by the FRA and despite the fact that Conrail trains continue to service New Haven Station, on November 10, 1997, P&W filed the present action against Conrail. The Complaint alleges, inter alia, that Conrail has, in effect, ceased freight service operations on the terminal properties in question. See Complaint ¶¶ 13-14. P&W apparently believes that the proposed, yet currently unapproved, acquisition of control of Conrail constitutes an event that triggers immediately the application of Paragraph 21 of the Order. Conrail denies that it has withdrawn from, abandoned or discontinued freight service at the New Haven Station properties or that the proposed Transaction would constitute such a withdrawal, abandonment or discontinuance, and, therefore, vigorously disputes the merits of P&W's claims.

II. ARGUMENT

A. Plaintiff's Claims Are Not Ripe For Review By This Court.

P&W's Complaint must be dismissed because the claims asserted fail to demonstrate ripeness sufficient to establish a justiciable case or controversy. According to the strictures imposed by Paragraph 21 of the Order, sale of the New Haven Station properties to P&W by Conrail is not to occur until Conrail "withdraw[s] from or abandon[s] or discontinue[s] freight service obligations" on the designated property. See Defendant's Exhibit "A" at ¶ 21. As confirmed by FRA, none of these triggering events has occurred. See Defendant's Exhibit "F." Consequently, the claims outlined in P&W's complaint are premature.

A case may not be ripe for decision, and therefore may not be justiciable, if the viability of the claims asserted depends, in whole or in part, on the occurrence of uncertain events. See Halleck v. Berliner, 427 F.Supp. 1225, 1250 (D.D.C. 1977). According to the ripeness doctrine, federal courts will not decide a case where the claim involves "contingent future events that may not occur as anticipated, or indeed may not occur at all." Thomas v. Union Carbide Agricultural Products, Co., 473 U.S. 568, 580-81 (1985) (citations omitted). The ripeness doctrine is designed to "prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements." Abbott Laboratories v. Gardner, 387 U.S. 136, 148 (1967). A determination of ripeness "requires the court to balance its interest in deciding the issue in a more concrete setting against the hardship to the parties caused by delaying review." Webb v. Department of Health and Human Services, 696 F.2d 101, 106 (D.C. Cir. 1982).

When the cause of action involves a purely legal question and no further factual clarification is required, courts may elect to decide the claim when initially presented.[1] Conversely, courts will not entertain claims requiring further factual development based on the occurrence of contingent events.[2] Numerous courts have recognized that unconsummated business transactions subject to regulatory approval are fraught with uncertainty and contingent upon a variety of factors that militate against present adjudication. For example, in Chicago & North Western Transportation v. Soo Line Railroad Company, 739 F.Supp. 447 (N.D. Ill. 1990), a federal district court considered one railroad's attempt to thwart another railroad's breach of an agreement between the two governing the use of railroad lines. See 739 F.Supp. at 448. The court held that the complaint challenging a potential transfer of rights under the controlling agreement failed to present a justiciable claim or controversy where it remained unclear that the proposed transfer of rights would ever occur. See id. In Soo Line, as in the instant case, the destiny of the parties' agreement was controlled by government agency approval which, at the time of the litigation, had yet to occur. See id. Due to the pendency and uncertainty of the government agency's approval of the proposed agreement, the district court dismissed the complaint. In so deciding, the Soo Line court emphasized that "although the . . . agreements have

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[1] See Union Carbide, 473 U.S. at 568 (deciding to address legality of arbitration scheme imposed by Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 et seq., prior to parties' use of arbitration process); but see Mid-Ohio Food Bank v. Lyng, 670 F.Supp. 403, 409 (D.D.C. 1987) (dismissing purely legal claim based on fact that there was "no immediate and compelling need for a ruling on the merits" at time claim presented).

[2] See Solo Cup Co. v. Federal Insurance Co., 619 F.2d 1178, 1189 (7th Cir.), cert. denied, 449 U.S. 1033 (1980) ("The mere possibility that proceedings might be commenced against an insured regarding an act of the insured's as to which the insurer might contest coverage, is not sufficient to create a justiciable controversy.").

been fully executed, the agreements may never go into effect if they do not receive [Interstate Commerce Commission] approval. In the absence of ICC approval, [plaintiff] will not suffer the injury on which its compla nt its based." Soo Line, 739 F.Supp. at 449.

Likewise, in Railway Labor Executives' Ass'n v. Grand Trunk Western Railroad Company, 737 F.Supp. 1027 (N.D. Ill. 1990), a federal district court granted the defendant railroad's motion to dismiss a complaint for declaratory and injunctive relief filed by members of a railway workers' union where the ICC had yet to approve the lease of a facility that, if approved, would have affected the employment rights of various railroad employees. See 737 F.Supp. at 1029. The Grand Trunk court concluded that the rail workers could not overcome the obstacle posed by the outstanding contingencies created by the unresolved agency action. See id. ("The ICC could decide to deny GTW's proposal. Plaintiffs will have lost nothing in that case. The ICC could also decide to allow the proposed transaction, but hold the parties subject to the RLA. Again, plaintiffs would emerge unscathed."). Recognizing that it "could postulate factual variations pursuant to which it would have jurisdiction" over the matter at hand, the Grand Trunk court nevertheless chose to dismiss the rail workers' complaint based on its refusal to postulate the outcome of the ICC's approval process. See id. ("[T]he ICC has, so far, done nothing. It does not expect to rule until July of this year. Until that time, plaintiffs have suffered no harm.").[3]

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[3]Even in the absence of the need for agency approval, courts still will not hesitate to dismiss an action when the proposed business transaction giving rise to the claims at issue remains pending. See, e.g., A.I.C. Ltd. v. Mapco Petroleum Inc., 711 F.Supp. 1230, 1241 (D.Del. 1988), aff'd, 888 F.2d 1378 (3d Cir. 1989) (declaratory judgment claim requesting court to declare that if petroleum company should conclude, in the future, an asset sale transaction as contemplated by consulting agreement with broker, then broker would be entitled to receive commissions as if consulting agreement had not been terminated, was not ripe for review); accord Halder v.

(continued...)

Dismissal of the present action finds support in the Soo Line and Grand Trunk precedents. The claims tendered by P&W in the current litigation are subject to a host of uncertain and contingent future events that may not occur as anticipated, or indeed may not occur at all. See Union Carbide, 473 U.S. at 568. The Transaction allegedly giving rise to P&W's claims in this action is many months shy of completion and has not been guaranteed approval by the STB. See generally Defendant's Exhibit "B." An STB Board decision is not scheduled for release until July 1998. See id. at 6. Interim factors could influence or delay the consummation or shape of the Transaction. If, for some reason, the Transaction fails or is modified, the entire platform upon which P&W's claim is based will fall. In addition, P&W has raised the issue of its rights to the New Haven Station properties in the STB proceedings and the STB's decision may touch upon this issue. These unknown elements demonstrate that present adjudication would force both this Court and the parties "to grapple with hypothetical possibilities rather than immediate facts." 13A Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice and Procedure § 3532, at 115 (1984).[4]

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[3](...continued)
Standard Oil Co., 642 F.2d 107, 110-11 (5th Cir. 1981) (declaratory judgment action based on service station franchisee's concern that franchisor would not provide the franchisee with condemnation proceeds pursuant to the franchise agreement should in the event the state elected to condemn the franchisee's leased property as predicted was not ripe for review where state had yet to condemn the property).

[4]"Even when . . . the governmental interest in withholding adjudication is relatively slight, an issue may nevertheless be unripe if the petitioner's interest in immediate resolution is insignificant." Friends of Keeseville, Inc. v. FERC, 859 F.2d 230, 236 (D.C.Cir. 1988). The party seeking adjudication must prove an "immediate and compelling need" to rule on merits at present time. Mid-Ohio Food Bank v. Lyng, 670 F.Supp. 403, 409 (D.D.C. 1987). Thus, this Court must evaluate whether any injury to P&W arising from Conrail's refusal to sell the New Haven Station (continued...)

In this instance, the risk of a premature decision clearly outweighs the need for an immediate decision. See Wright, Miller & Cooper, Federal Practice § 3532.1, at 114. P&W will suffer no direct or immediate harm as a consequence of this Court's refusal to entertain the present action for lack of a justiciable case or controversy. Dismissal of this litigation will not force P&W to reduce its current service, impair its current operations, or lose any right it now possesses. Even if the Transaction is approved and consummated, these rights will not be affected. P & W's rights are secure and dismissal would permit P&W to assert its claim when it becomes ripe.

B. The FRA Has Opined That P&W's Claim Is Not Yet Ripe For Review.

The foregoing rationale for dismissal is further supported by the recent opinion of the Federal Railroad Administrator ("FRA"), which made clear that P&W's desire to acquire immediately the New Haven Station properties is premature. See Defendant's Exhibit "F." The interpretation and opinion of FRA is significant because FRA drafted Paragraph 21 of the Order, the language upon which P&W now relies to establish its alleged right to instantaneous procurement of the New Haven Station properties.

Generally, courts will suspend judicial activity and defer to agency action when the issues presented by a particular claim "have been placed within the competence of an administrative body." United States v. Western Pacific Railway Co., 352 U.S. 59, 64, 77 S.Ct. 161, 165, 1 L.Ed.2d 126 (1956). In the present case, FRA analyzed the railway freight activity

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[4](...continued)
properties is "'sufficiently direct and immediate as to render the issue appropriate for judicial determination at this stage.'" Alascom, Inc. v. FCC, 727 F.2d 1212, 1217 (D.C.Cir. 1984) (quoting Abbott Laboratories, 387 U.S. at 152, 87 S.Ct. at 1517).

occurring in the Northeast, drafted the language contained in the controlling Order, including Paragraph 21, and, in 1982, petitioned the Special Court for approval of the Order's terms and conditions. See 45 U.S.C. § 745. Consequently, FRA's opinion should be accorded great weight by this Court. See, e.g., Miller v. Chicago and Northwestern Transportation Co., 925 F.Supp. 583 (N.D.Ill. 1996) (deferring to FRA policy statement with respect to railroad repair facilities); Dixson v. Burlington Northern Railway Co., 795 F.Supp. 939 (D.Neb. 1992) (where FRA regulation is ambiguous, court would defer to FRA's interpretation of that regulation); Association of American Railroads v. Adams, 485 F.Supp. 1077 (D.D.C. 1978) ("The Federal Railroad Administration possessed expertise in the area of railroad operations . . . and thus great deference had to be accorded to the exercise of its jurisdiction").

Because Congress, pursuant to the Rail Act, granted FRA the responsibility to make certain determinations as to whether P & W's rights could be triggered, this Court should give weight to the October 30, 1997 Opinion Letter in which the FRA concluded that "we do not believe that the pendency of that transaction [, the pending acquisition of control of Conrail,] in and of itself constitutes an election by Conrail to withdraw from, abandon, or discontinue service at New Haven Station." See Defendant's Exhibit "F."

III. CONCLUSION

"[C]ourts should not render decisions absent a genuine need to resolve a real dispute." Wright, Miller, & Cooper, Federal Practice and Procedure § 3532, at 114. In the present case, Conrail's current refusal to negotiate the purchase of the New Haven Station properties amounts to a non-justiciable issue because none of the contingencies required to launch the purchase process has occurred, nor is there any certainty that any one or more of these

contingencies will occur. Furthermore, P&W will not be injured by this Court's dismissal of the current action. Simply put, the harm alleged here has not matured sufficiently to warrant judicial intervention. Based on the foregoing, Conrail respectfully requests this Court to dismiss P&W's Complaint in its entirety.[5]

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Attorneys for Defendant
Consolidated Rail Corporation

Dated: December 19, 1997

[5] Indeed, there is also a serious question, as to whether P & W's invocation of its rights in the context of the Transaction is superseded or affected by the STB's jurisdiction under 49 U.S.C. § 11321.

CERTIFICATE OF SERVICE

I, H. David Kotz, certify that, on this date, I served two copies of the foregoing Defendant's Motion to Dismiss Complaint and accompanying Statement of Points and Authorities in Support thereof, by hand-delivery on the following:

David K. Monroe, Esquire
Gallard, Kharasch, Garfinkle, P.C.
Canal Square
1054 Thirty-First Street, N.W.
Washington, D.C. 20007-4492

H. DAVID KOTZ

DATED: December 19, 1997

US OFFICE PRODUCTS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PROVIDENCE AND WORCESTER RAILROAD COMPANY :

V. : Civ. No. 1:97RR2[1]

CONSOLIDATED RAIL CORPORATION :

WEINER, J.[2] January 22, 1998

MEMORANDUM OPINION AND ORDER

Plaintiff, Providence and Worcester Railroad Company (P&W) brought this action seeking declaratory relief, and for enforcement of an order of the Special Court, against Consolidated Rail Corporation (Conrail). Presently before the court is a motion by Conrail to dismiss. For the reasons which follow, the motion is granted.

The complaint asserts that, with the passage of the Northeast Rail Service Act of 1981, the Federal Railroad Administrator commenced proceedings to transfer Conrail's rail lines in Connecticut and Rhode Island to one or more railroads in the Northeast Region. In connection with

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[1]The Special Court, Regional Rail Reorganization Act of 1973 was abolished by Congress effective January 17, 1997, and its original jurisdiction transferred to the United States District Court for the District of Columbia.

[2]United States District Judge for the Eastern District of Pennsylvania and from 1982 to 1997 Judge of the Special Court sitting by designation.

those proceedings, P&W submitted a proposal to acquire all of Conrail's freight operations and freight service obligations in Connecticut and Rhode Island, as well as certain rail assets in New York and Massachusetts. Following the receipt of proposals from P&W, as well as other regional railroads, the Administrator convened a series of meetings in an attempt to reach a negotiated settlement accommodating the interest of the prospective purchasers of Conrail's assets, including Conrail itself. In December 1981, P&W, Conrail and the Boston and Maine Railroad entered into an agreement in principle regarding the allocation of certain of Conrail's assets in Connecticut and Rhode Island, and participated, along with the Administrator, in drafting a proposed order to this court. On April 13, 1982, this court issued an order approving the agreement and directing the parties to consummate the transaction. Pursuant to the order, P&W acquired certain Conrail assets. In addition, P&W alleges it was granted exclusive rights to succeed to Conrail's freight operations and freight service obligations on the line between Westbrook and New Haven, Connecticut, and Conrail's terminal properties known as the New Haven Station.[3]

The complaint alleges that the joint tender offer of CSX and Norfolk Southern railroads to gain control of Conrail resulted in a merger consummated in June 1997. According to the complaint, the assets of Conrail will be divided between the acquiring railroads and Conrail will

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[3]Specifically, Paragraph 21 of the order provided:

> if Conrail elects to withdraw from or abandon or discontinue freight service obligations on the "Shore Line" between Westbrook, Connecticut (MP 101.2) and New Haven, Connecticut (MP 70.2) or on the terminal properties known as "New Haven Station" . . . and if the Administrator shall find, on application of P&W, that P&W is continuing to operate as a self-sustaining railroad capable of undertaking additional common carrier responsibilities without federal financial assistance, Conrail shall sell said rail properties at a reasonable price and on reasonable terms and conditions to be agreed upon by Conrail and P&W or, in the absence of agreement, in accordance with the procedures of the American Arbitration Association, and P&W shall succeed to Conrail's service obligations . . . .

no longer hold itself out to the public as performing transportation services directly for its own account. The New Haven Station is one of the rail properties which will allegedly be controlled by CSX. P&W alleges that, as a result of the merger, **Conrail** will no longer provide freight services at the New Haven Station, triggering the operation of Paragraph 21 of the court's order. Accordingly, P&W seeks a declaration that its right to purchase the station upon reasonable terms has matured. P&W asserts it has advised Conrail of its intention to exercise its rights to acquire the station, including the entirety of the Cedar Hill Yard, and has requested that Conrail enter into negotiations. P&W alleges that Conrail has refused to abide by Paragraph 21 or submit the matter to arbitration, thus creating an actual controversy between the parties.

In its motion to dismiss, Conrail argues that, since the proposed merger has not been approved by the Surface Transportation Board, the P&W complaint is not yet ripe for adjudication. We must agree. As stated succinctly by Conrail, a case may not be ripe for decision, and therefore not justiciable, if the viability of the claims asserted depends, in whole or in part, on the occurrence of uncertain events. We find the pending regulatory approval of the proposed merger is just such an occurrence.

Under the ripeness doctrine, federal courts will not decide a case where the claim involves "contingent future events that may not occur as anticipated, or indeed may not occur at all." Thomas v. Union Carbide Agricultural Products, Co., 473 U.S. 568, 580-81 (1985). The doctrine is designed to prevent courts "through premature adjudication, from entangling themselves in abstract disagreements." Abbott Laboratories v. Gardner, 387 U.S. 136, 148 (1967). A determination of ripeness "requires the court to balance its interest in deciding the issue in a more concrete setting against the hardship to the parties caused by delaying review." Webb v. Department of Health and

Human Services, 696 F.2d 101, 106 (D.C. Cir. 1982). If we find the hardship to be slight, "only a minimum showing of countervailing judicial or administrative interest is needed . . . to tip the balance against judicial review." Id.

It is clear from the face of the pleadings that further factual development may well alter the nature of this suit. The court takes judicial notice that the proposed sale of Conrail to CSX and Norfolk Southern is contingent upon the Surface Transportation Board's approval. Should the STB disapprove the sale, the rail properties at issue here will, presumably, remain under the control of Conrail. While P&W argues that the conditional nature of the STB's approval is irrelevant, because Conrail's decision to enter into the sale itself constituted the "election" under Paragraph 21, the simplicity of this assertion does not hold up under close scrutiny. Conrail's "election" to merge itself into CSX and Norfolk Southern is itself contingent upon regulatory approval. It remains at this time that Conrail is still a working enterprise conducting freight operations under its own corporate identity.[4]

In addition, we perceive little hardship to the plaintiff in deferring judgment until the STB acts on the proposed merger. P&W asserts that, were it to wait for the STB to act, CSX could assume control of the New Haven Station before it had sufficient time to litigate its rights, negotiate terms of a sale and prepare for the orderly transition of freight service. It also argues that CSX could encumber the property or affect railroad operations to P&W detriment. First, we doubt that CSX will take operational control of the New Haven Station immediately concurrent with the issuance of the STB's decision. Some lag time in inherent is a merger of such complexity. Second, P&W makes

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[4]Of course we express no opinion on the ultimate question of whether Conrail's "election" to merge itself into CSX and Norfolk Southern constituted an "election" to withdraw from or abandon the freight service as that term is used in Paragraph 21.

no showing why it would be prevented from securing equitable relief at that time to prevent CSX from affecting its rights under Paragraph 21, pending a final order of this court. On the other hand, there are substantial countervailing judicial and administrative interests militating against judicial review at this time. Any decision this court issues prior to final review by the STB will undoubtedly affect that agency's consideration of the merger because this action raises issues within the primary jurisdiction of the STB. The agency is charged in railroad merger cases to ensure, inter alia, that the public will continue to receive adequate transportation services, and that competition will not be harmed unduly. The Board is also required to address the effect of the proposed merger on essential services and whether other railroads should be included in the transaction. 49 C.F.R. § 1180.1. Exercising our own judgment at this juncture on the definition of "election", would impact on the rail properties which the merger parties consider to be part of the assets to be transferred.

Accordingly, we must conclude that this action is not yet ripe for adjudication. Our decision will not, however, end the controversy between these parties should the STB approve the proposed merger. We thus will grant P&W leave to refile this action, or take any other appropriate steps upon the conclusion of the STB proceedings. An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PROVIDENCE AND WORCESTER RAILROAD COMPANY :

V. : Civ. No. 1:97RR2

CONSOLIDATED RAIL CORPORATION :

ORDER

The motion of defendant Consolidated Rail Corporation to dismiss the complaint of Providence and Worcester Railroad Company pursuant to Fed. R. Civ. P. 12(b)(6) is GRANTED.

The complaint of Providence and Worcester Railroad Company is DISMISSED with leave to refile after a final decision is rendered by the Surface Transportation Board in the matter of CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company -- Control and Operating Leases/Agreements -- Conrail Inc. and Consolidated Rail Corporation, STB Finance Docket No. 33388.

IT IS SO ORDERED.

Charles R. Weiner

CHARLES R. WEINER

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HOPKINS & SUTTER

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February 23, 1998

Office of the Secretary
Case Control Branch
ATTN: STB Finance Docket No. 33388
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

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

Dear Secretary Williams:

Enclosed are an original and twenty-five (25) copies of the Brief of the City of Cleveland, Ohio (CLEV-18) for filing in the above-referenced proceeding. An additional copy is enclosed for file stamp and return with our messenger. Please note that a copy of this filing is also enclosed on a 3.5-inch diskette in WordPerfect 5.1 format.

Please note that this brief is denominated CLEV-18. City of Cleveland's Comments in Opposition and Request for Conditions was numbered CLEV-9, and attached Verified Statement numbered CLEV-10 through CLEV-17. City of Cleveland inadvertently re-used CLEV-10 to denominate its Comments on the DEIS. We begin numbering here with the first unused number, CLEV-18. We apologize for any confusion this error may have created.

Sincerely,

Charles A. Spitulnik

Enclosure

cc: The Honorable Jacob Leventhal
All Parties of Record

185901

CLEV-18

Before the
SURFACE TRANSPORTATION BOARD
Washington, D.C. 20423

Finance Docket No. 33388

CSX Corporation and CSX Transportation Inc.,
Norfolk Southern Corporation and
Norfolk Southern Railway Company
-- Control and Operating Leases/Agreements --
Conrail Inc. and Consolidated Rail Corporation

BRIEF OF THE CITY OF CLEVELAND, OHIO

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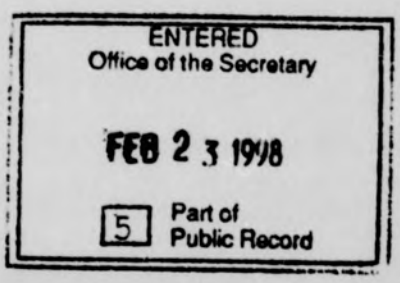
Dated: February 23, 1998



CLEV-18

Before the
SURFACE TRANSPORTATION BOARD
Washington, D.C. 20423

Finance Docket No. 33388

CSX Corporation and CSX Transportation Inc.,
Norfolk Southern Corporation and
Norfolk Southern Railway Company
-- Control and Operating Leases/Agreements --
Conrail Inc. and Consolidated Rail Corporation

BRIEF OF THE CITY OF CLEVELAND, OHIO

The City of Cleveland, by its undersigned counsel, hereby submits its Brief in opposition to the transaction as proposed in this proceeding, and requests that this Board reject the Applications unless and until the Applicants present a plan, acceptable to Cleveland and the surrounding communities, that will effectively and responsibly mitigate the inordinately large impacts this transaction will otherwise cause for the people who live, work, raise children and plan their futures in its neighborhoods. The people of the City of Cleveland further request that the Board use its authority to protect the health and safety of Cleveland's families and the quality of life in these neighborhoods by requiring, at the very least, (1) a detailed study of possible mitigation of the substantial adverse impacts the proposed transaction will create, and (2) a limit on the number of trains moving through its neighborhoods and the surrounding communities until the study is completed and a comprehensive mitigation plan that is

acceptable to the affected communities in this region, is developed and approved for prompt implementation.

I. INTRODUCTION

The City of Cleveland has undergone a hard-fought renaissance in recent years. The City has spent over $2.5 billion since 1980 in major projects for redesign, redevelopment and rehabilitation of neighborhood districts and the downtown area.[1] A $3 million initiative has resulted in a comprehensive updating of the City's downtown plan, City Plan and Zoning Code. *Id.* The City has coordinated the development of more than 40 housing developments including over 2400 homes in Cleveland's neighborhoods since 1990.[2] The City is currently administering a $40 million Neighborhood Development Fund for major land development and economic development projects, and a $177 million Empowerment Zone Program.[3] Mayor Michael R. White, who made improving the quality of life in Cleveland's neighborhoods one of his top priorities, proclaimed success in making Cleveland a better place to live and work, noting:

> We have faced down criminals, reducing crime by 17% since 1990, and have established financial incentives and neighborhood development activities that have created more than 8,000 jobs and retained another 10,000 positions. We have seen growth in new home construction and a 300% increase in rehabilitation of formerly abandoned homes.

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[1]Verified Statement of Hunter Morrison ("V.S. Morrison") attached to Comments in Opposition and Requests for Conditions of the City of Cleveland, Ohio (CLEV-9) filed October 21, 1997, at 1.

[2]Verified Statement of Terri D. Hamilton ("V.S. Hamilton"), attached to CLEV-9, at 2.

[3]Verified Statement of Christopher P. Warren ("V.S. Warren"), attached to CLEV-9, at 1.

Verified Statement of Mayor Michael R. White ("V.S. White"), attached to CLEV-9, at 2.

The transaction proposed in this proceeding places all those hard-won gains at risk. The cause of the potentially devastating effects on the people of the City of Cleveland is the proposal by CSX Corporation and CSX Transportation, Inc. (collectively, "CSX") and Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively, "NS")[4] to acquire the stock and divide the rail operating and other assets of Conrail Inc. and Consolidated Rail Corporation (collectively, "Conrail"). The Applicants' insensitivity to the devastating "real life" human impacts of their plan, and their unwillingness to work with the affected communities to address comprehensively and responsibly the City's serious, legitimate and documented concerns has left the City with no choice but to oppose the Application. Cleveland asks this Board to send a clear message that the health and safety of the City's families, the viability of its neighborhoods, and the preservation and enhancement of the quality of life in its communities must be viewed as high priorities by the Applicants in devising and implementing any operating plan.

The City understands the Applicants' desire to maximize rail efficiency and to enhance their respective competitive positions in the industry. However, Cleveland is fortunate to have an existing, robust rail infrastructure that provides the Applicants with ample opportunities to devise an efficient operating plan that directs freight train traffic through industrial corridors and away from residential neighborhoods. Instead, the Applicants have chosen to propose increases in train frequencies that will produce virtually no benefit to the City and will burden residential neighborhoods with increased

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[4]In this Brief, CSX and NS are sometimes referred to collectively as "Applicants".

danger at the many at-grade crossings, with increased noise, air pollution and vibrations as trains pass through back yards and near schools, religious institutions and hospitals, and with increased burden on highway infrastructure. Some of Cleveland's poorest neighborhoods with high proportions of citizens of color, face the very real prospect of a 1,188% increase in train frequencies through their neighborhoods. V.S. Hamilton at 5; V.S. Morrison at Att. 3. These are densely populated urban neighborhoods where more than 64,000 residents live within 1000 feet of the rail right-of-way. V.S. Hamilton at 3-10. Noise levels from increased train operations will escalate dramatically in these neighborhoods -- from a combination of whistle blasts at crossings, the roar of locomotive engines racing past bedroom windows of nearby residences day and night, and the loud squeal of brakes and steel wheels on hardened rails. Buildings will shake from the vibrations of the trains as they roar past. The increased train volumes will severely compromise City safety services and dramatically increase the risk of exposure to hazardous materials as a result of accidents.

Worse yet, the most serious impacts, and a disproportionate amount of the adversity, will fall on the backs of the City's minority and low income populations because the Applicants plan to increase enormously the frequency of trains running through residential neighborhoods inhabited by members of these groups. Raw increases in train frequencies is not the only source of harm to residents. Children in schools, patients in nearby hospitals, elderly citizens in nearby assisted living centers, concert-goers at Severance Hall, the home of the world renowned Cleveland Orchestra, patrons of the many restaurants and other commercial establishments in Little Italy and the thriving University Circle area, all face exposure to an enormous increase of hazardous materials that will move through the heart of their communities and beside

their schools, homes, churches and places of business. Businesses will suffer from delays in receipt of materials and supplies as a result of delays in transit caused by traffic congestion at crossings. Emergency fire and rescue equipment will be prevented from reaching both homes and businesses for the same reasons. People who are suffering with traumatic injuries, or whose homes are burning, or who are being victimized by a thief or worse, will watch valuable minutes tick by while the police or fire and rescue vehicles sit at crossings waiting for trains to pass. People will die because of these delays -- a three-minute or greater delay in response means 0% survivability to a person suffering cardiac arrest. Verified Statement of William Denihan ("V.S. Denihan"), attached to CLEV-9, at 4.

While CSX and NS tout substantial public benefits from this transaction, the people of Cleveland's neighborhoods will bear burdens far outweighing any minimal benefits that may flow in their direction. Property values along the affected lines will plummet. The value of existing homes will decrease, reversing the trend the City's redevelopment efforts have established. New construction in these neighborhoods faces a double whammy. In one new project under construction in the Mill Creek area in the Kinsman/South Broadway section of the City, the planned increase of 1,188% in train frequencies will present "... a two-fold problem. The increased vibrations will create problems in the construction process for the 190 or so units that are yet to be built. Then, once the houses are completed, the new train frequencies and associated effects will decrease the attractiveness of these homes to prospective buyers." V.S. Hamilton at 5.

In short, the proposed operating plan is based upon a needless choice by the Applicants to route high volumes of freight train traffic through residential

neighborhoods, when viable alternative routing in and around Cleveland exists. Applicants promise that the proposed transaction will bring to the City the benefit of improved access to a revitalized and improved rail network serving the midwestern gateways and the east coast ports. However, the disproportionately adverse impact on the poor and minority communities in the City and the absence of real stimulus to the economy, since most of the traffic will be through rather than local, far outweigh any small economic benefits the Applicants may be able to conjure as an alleged reason for looking past the serious problems this transaction will create.

The impacts on the City and its people have been outlined in detail in the Comments in Opposition and Request for Conditions of the City of Cleveland, Ohio, filed on October 21, 1997 ("CLEV-9"), and in the Comments of the City of Cleveland, Ohio on the Draft Environmental Impact Statement, filed on February 2, 1998 ("CLEV-10"). The interests of the public in the City of Cleveland and its suburban neighbors are clear. This transaction should not be approved unless and until this Board requires Applicants to take steps acceptable to the affected communities to reduce its adverse impacts on the City of Cleveland and its suburban neighbors.

The Applicants have refused to voluntarily devise an effective, responsible, comprehensive mitigation plan for Cleveland and its neighboring communities. As a last-ditch effort to "jump start" serious discussions about resolving the devastating neighborhood impacts associated with the proposed operating plan, the City of Cleveland, in CLEV-10, has proposed two possible alternative routing plans for this region. Although the Applicants have failed to advance any credible opposition to the Cleveland alternatives, they insist these proposals will not work, and steadfastly refuse to provide the affected communities with a detailed, substantiated explanation of their

objections. Even more disappointing is the Applicants' fierce resistance to a meaningful dialogue with the affected communities about the possibility of utilizing alternative routes, with the goal of working together to devise a routing plan that serves both the business interests of the Applicants and the human needs of the people of this community.

Instead, the Applicants have chosen to pursue a strategy of "divide and conquer"[5] through isolating Cleveland from our neighboring communities by attempting to buy out these surrounding communities one by one. For example, on February 18, 1998, CSX announced a deal with the City of East Cleveland that "is conditioned upon CSX being able to secure the STB's approval of the Conrail transaction and to implement the CSX/NS Operating Plan that will move CSX trains over the Short Line and to the Collinwood terminal." A copy of the letter from Michael J. Ruehling of CSX to Hon. Emmanuel W. Onunwor, dated February 11, 1998 is included in Attachment 1 to this Brief. The Applicants' proposed use of the segment of the Short Line through Collinwood that runs along the border between Cleveland and East Cleveland will result in an increase from 7 to 44 trains per day, 65% of which will roar through the neighborhood in the evening, *see* CLEV-10 at 22, and an increase from 0 to 44,000 car loads of hazardous materials. Not only is this by far one of the most devastating neighborhood impacts in the United States, but the Applicants are well aware that this is a primary reason for Cleveland's strenuous objection to the proposed operating plan. And what have the Applicants offered as a means of reducing these

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[5]See Comments of Bay Village Mayor Thomas L. Jelepis, quoted in "E. Cleveland makes deal with CSX"; Cleveland Plain Dealer, February 19, 1998, at B-5.

impacts? Reductions in the train frequencies? No. Reductions in the potential exposure to hazardous materials? No. Reductions in actual noise impacts? No.

Instead, Applicants offer cash: $2 million to be paid over five years to the City of East Cleveland to strengthen its emergency response teams' capabilities, and an additional $200,000 to assist in general planning for contingencies; $4,000 each for 120 households that will require additional sound insulation "and for relocation"; job opportunities at Collinwood (at the expense of residents of the City of Cleveland and other neighboring communities who will also experience the adverse effects of the transaction); and implementation of the highly touted CSX noise abatement plan. *See* Letter to Hon. Emmanuel W. Onunwor, dated February 11, 1998, attached at Attachment 1. The railroads' approach to East Cleveland will not stem the flow of hazardous materials that seep, or worse, explode, into these densely inhabited neighborhoods when an incident happens in one of the 44,000 car loads per year -- 120 car loads each day -- that will move past these homes. Trees and berms will not stop the incessant thundering noise of these trains that will race through the days and nights of these residents' lives. According to Cleveland's experts, *see* CLEV-10 at 23, $4,000 per household will not buy the insulation that is required to block out this noise.[6] $4,000 given to approximately 120 homeowners abutting the tracks will do nothing for the approximately 800 other residential properties within 1000 feet of the track on the East Cleveland side of the line who will be subject to the same noise, vibrations, threat of hazardous material spills, diminish quality and other impacts on

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[6]In a letter to East Cleveland City Council President Jeremiah Johnson, dated February 19, 1998, Mayor White stated that the cost of thorough sound insulation of homes near Hopkins Airport is in the $15,000 - $20,000 range. A copy of this letter is attached as Attachment 2.

their neighbors. $4,000 surely will not give anyone in this area the ability to buy new homes elsewhere.

The Applicants are well aware that the City of Cleveland has proposed alternative routing as a means to minimize the adverse impacts of this transaction. *See*, CLEV-10 at 39-54. The goal of the leadership of the City of Cleveland and many of its neighbors continues to be reduction of the impacts, despite the railroads' offers to buy the support of other cities' leaders. *See* "Railroads bargaining for support", *Cleveland Plain Dealer*, Feb. 21, 1998 at 1B, 4B (Bay Village Mayor Tom Jelepis "said the goal of the mayors remains the same -- that the merger does not jeopardize safety, harm the quality of life or cost any of the affected communities money"), a copy of which is included in Attachment 3. Cash payments to neighboring communities make good press for the railroads but do little for the people who live and work next to train tracks that will see increases of up to 1188% in train frequencies. This transaction has created a complex, regional problem that cries out for a comprehensive, long-term regional solution.

Now is the time for this Board and the Applicants to recognize that this Board's legal standards and basic principles of fairness and equity prevent the approval and consummation of the proposed transaction without imposition of conditions to reduce substantially the adverse impact of this transaction on the City of Cleveland, its suburban neighbors and the people who live and work there. The Applicants' inability or unwillingness to agree voluntarily to a plan that effectively mitigates the impacts on the City of Cleveland requires decisive action by this Board. Consistent with recent precedent, the Applicants should be prohibited from adding train frequencies to the lines through the City and surrounding communities unless and until the affected communities are presented with an acceptable comprehensive mitigation plan. The

City of Cleveland has no interest in creating a situation where congestion on the Applicants' lines leads to the delays and frustration currently being experienced by shippers who rely on movements through Houston on the lines of the Union Pacific Railroad Company.[7] However, until the Applicants seriously engage the affected communities and commit to working with us to devise a comprehensive, long term regional plan, the Applicants' plan cannot be approved or implemented.

II. STATEMENT OF FACTS

The transaction proposed by CSX and NS is designed to promote rail efficiency and economic benefits for the Applicants. However, Applicants have admitted that they did not study, and therefore gave no consideration when developing the operating plan, to the serious threat to the health and safety of our families, and the severe consequences to the quality of life in our neighborhoods. Applicants also admit that they failed to assess or even consider the disproportionately high and adverse impact on minority and low-income families living in Cleveland's neighborhoods before they submitted their proposed operating plan to the Board for approval. *See* Response of Applicants to the First Set of Interrogatories and Document Requests of the City of Cleveland (CSX/NS-115) at 5, Resp. No. 1 ("Applicants did not conduct such an analysis to identify and address human and environmental effects of the transaction described in the Application on minority and low income populations in Cleveland and in other areas of the United States").

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[7]The record developed by this Board in Ex Parte 573, *Rail Service in the Western United States*, is replete with descriptions of the magnitude of this problem, and Cleveland will not restate it here.

If approved, this transaction will cause a redistribution of the operating assets of Conrail between CSX and NS. Both currently move traffic between the east coast and the midwest, and both will have, post-consummation, a revised rail network that each hopes will make it a better, stronger competitor than the other. The reconfigured routes of the two companies will form an "X", with Cleveland at the center where they cross. *See* V.S. Morrison at 14, Rebuttal Verified Statement of John W. Orrison, included in Applicants' Rebuttal CSX/NS-177 filed December 15, 1997 ("R.V.S. Orrison"). Applicants predict that once the transaction is implemented and the new service routes described in their application are in place, train service of the two companies will follow three principal routes through the City. These are:

(1) The CSX line from Ashtabula, which enters Cleveland on the east side of the City in the South Collinwood and Forest Hills neighborhoods, south of I-90 near East 131st Street, and continues in a southerly and southwesterly direction through the Little Italy, University Circle, Fairfax, Kinsman and South Broadway neighborhoods, before crossing the Cuyahoga River and paralleling I-480 to West 150th Street. The typical increased traffic for this line is from 7 trains per day to 44 trains per day, an increase of six times the existing train frequency. *See* V.S. Morrison" at 3 and Att. 1.

(2) The route NS originally proposed for traffic to and from Buffalo crosses Cleveland in an east-west direction, entering from the west in the Edgewater and Cudell neighborhoods, continuing through the Detroit Shoreway and Ohio City neighborhoods, crossing the Cuyahoga River through the Industrial Valley, and continuing east through the Kinsman, University Circle/Fairfax and Little Italy neighborhoods, passing through East Cleveland, and then exiting Cleveland through the Euclid - Green and South Collinwood/Nottingham neighborhoods.[8] This line is proposed

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[8]By letter to the STB dated October 29, 1997, NS proposed a revision to this routing that would take much of the traffic away from the line that parallels the lake shore and traverses the west side of Cleveland and the suburbs of Lakewood, Bay Village and Rocky River. Upon construction of a connection at Cloggsville the new routing would allow much of this traffic to move away from the lake shore line on the west side of the City to a connection with the other NS line for movement to or from Vermilion. *See* Letter dated October 29, 1997 from Bruno Maestri, System Director, Environmental

to increase in traffic volume from 14 to 38 trains per day, an increase of 181% over the existing frequency. *Id.* at 3 and Att. 2.

(3) The second NS line, for traffic to and from Pittsburgh, begins near downtown Cleveland (at the former Conrail Lakeshore Line), and continues in a southerly and southeasterly direction through the Goodrich (Payne-Sterling), Central, Fairfax, Kinsman and South Broadway neighborhoods before exiting into Garfield Heights. Traffic on this line is proposed to increase from 13 trains to 27 trains per day, more than doubling existing traffic. *Id.*

A. The Environmental Injustice of Applicants' Proposed Operating Plan.

The neighborhoods most endangered by Applicants' activities are neither sparsely settled rural farmlands nor industrial corridors with few residents along the lines. They are densely settled, well-established urban neighborhoods, thick with homes, schools, churches, hospitals, parks and small businesses. Photographs attached to V.S. Hamilton at Att. 2, 3 and 4, give a flavor of the density of the population along these lines. 64,400 people live within 1000 feet of the right-of-way on these three lines. Approximately 54% are non-white and 38% live in poverty. CLEV-9 at 11. For the different segments and impacted communities identified on the maps attached to V.S. Morrison at Atts. 1 and 2, the numbers and demographics of people who live within 1000 feet of the right-of-way on the affected lines are as follows:

Protection, to Elaine K. Kaiser, Chief of the STB's Section of Environmental Analysis. This letter describes the benefits of reduced train frequency through residential neighborhoods and through the many at-grade crossings on the west side and through the west shore suburbs. Implementation will require "not only public and regulatory support from the federal government, the State of Ohio, and local officials but the commitment of public funding for these important safety-enhancing projects." *Id.* at 9 (emphasis supplied). Maps showing the original proposed NS route and the revised proposal are attached to CLEV-10 at Tab 4, pp. 1 and 2. These maps are attached to this Brief at Attachment 4 for the Board's ready reference.

NEIGHBORHOOD	TRAINS/DAY % INCREASE	POP.	% NON-WHITE	% BELOW POVERTY
Forest Hill, South Collinwood (CSX line)	6.8 --> 43.8 **544%**	5,479	99.2%	33.9%
Little Italy, University Circle, Fairfax (CSX and NS joint segment)	6.8 --> 43.8 **544%**	9,459	65.6%	44.0%
Kinsman, South Broadway (CSX line)	3.8 --> 43.8 **1188%**	10,379	72.0%	39.3%
Edgewater, Cudell, Detroit-Shoreway, Ohio City (first NS line)	13.5 --> 37.8 **181%**	20,541	20.9%	36.5%
Kinsman (first NS line)	13.5 --> 37.8 **181%**	4,913	80.1%	48.4%
Euclid-Green, South Collinwood (first NS line)	13.5 --> 37.8 **181%**	5,481	56.7%	20.1%
Goodrich, Central, Fairfax (second NS line)	12.5 --> 26.8 **114%**	6,683	72.8%	56.5%
Kinsman, South Broadway (second NS line)	12.5 --> 26.8 **114%**	6,536	58.1%	37.3%
TOTAL FOR ALL 3 LINES	**33 --> 108 277%**	**64,440**	**53.8%**	**38.0%**

CLEV-9 at 10 - 11, citing VS Morrison at Att. 1 and 2, V.S. Hamilton at 3 - 11.

B. The Raw Impacts of the Increases in Train Frequencies

Increases in train frequency on various segments range from a low of 114% to **1188%**, and these trains do not come alone. They bring with them a host of problems that have been detailed in the City's submissions in this case. William Denihan,

Director of the Department of Public Safety, was quite clear that the City sees "this transaction as having a serious negative impact on the ability of Cleveland's safety forces to adequately respond to emergencies in this community." V.S. Denihan" at 1. Mr. Denihan's concerns about this transaction arise out of the delays at the numerous grade crossings on the affected lines that emergency response vehicles will experience. "Police department records show that trains sometimes block these crossings from two (2) to five (5) minutes and delays have extended to five (5) and ten (10) minutes." *Id.* at 3.

The potential delays at these crossings will prevent emergency medical care from reaching people in need in time to help them. The following table shows the number of calls made to rescue, police and fire teams, and the delays those emergency response teams experience. At crossings in three areas of the City, train movements cause delays of any where from 4 up to 7.2 minutes to reach people stricken with heart attacks or other medical problems:

LOCATION	1996 EMS RUNS	INCREASED EMS DELAYS	1996 FIRE RUNS	INCREASED FIRE DELAYS
Nottingham (4 rail crossings from Dille Road to London Road)	EMS: 4,456 Police: 12,701	7.2 minutes (detour route = 3.7 miles)	235	7.4 minutes (detour route = 3.9 miles)
Aetna (2 rail crossings at Bessemer and Aetna)	EMS: 5,840	4.8 minutes (detour route = 2.3 miles)	450	4.2 minutes (detour route = 1.6 miles)

LOCATION	1996 EMS RUNS	INCREASED EMS DELAYS	1996 FIRE RUNS	INCREASED FIRE DELAYS
Edgewater (6 rail crossings from West 110th to West 117th Streets)	EMS: 1,593 Police: 15,878	4.0 minutes (detour route = 1.9 miles)	282	4.4 minutes (detour route = 2.2 miles)

V.S. Denihan at Attachments 1 - 3.

In Nottingham and Edgewater, increases of 181% in train daily frequency (from 13.5 to 37.8) will cause these delays to occur nearly three times as often as they do now. In the Aetna area, increases in daily train frequency of 114% (from 12.5 to 26.8) will cause these delays to occur nearly twice as often as they do now.

Mr. Denihan underscored how important each second is to a person experiencing cardiac arrest, noting that the chances of survival from such an incident decrease as follows:

--	Thirty second delay:	12.5%
--	One minute delay:	25%
--	One and one-half minute delay:	37.5%
--	Two minute delay:	50%
--	Two minute and thirty second delay:	62.5%
--	Three minute delay:	75%

A response time of three minutes or greater virtually guarantees 0% survivability, *id.* at 4, that is, if this transaction proceeds as proposed people in Cleveland's neighborhoods will die as a direct result of these delays.

Police and fire response will see the same impacts. A train blocking a crossing prevents police from responding to Priority One calls (when shots have been fired or a violent crime is in progress) within the four to six minute goal they have established. *Id.* at 5. Firefighters who have to wait at crossings for a train, or who choose to take

a detour to avoid a blocked crossing, will risk losing valuable minutes many times more each day as the frequency of trains increase. In 1996, delays in the arrival of a fire truck at any one of the 450 fire runs in Aetna, or the 235 emergency runs in the Nottingham neighborhood, or the 282 runs in Edgewater could have spelled disaster, especially if the emergency was at one of the many multi-family dwellings in these parts of the City. *Id.* at 6-7. Mr. Denihan clearly summarized the problem these trains will create in stark terms:

> This is a serious matter. Five minutes more for an ambulance can literally be the difference between life and death for a person suffering a heart attack. Two minutes can make the difference when officers need to defuse an explosive situation involving a shooting or other violent crimes.

Id. at 9.

Delays at crossings are not the only problem that Applicants will create by the substantial increase in the number of trains moving through these communities. Applicants have projected that the volumes of hazardous materials moving through these communities will increase enormously -- from 0 carloads per year on some segments to as much as 44,000 carloads per year on those same segments. *See* Draft Environmental Impact Statement ("DEIS"), vol. 3B, Table 5-OH-55 at OH-147. According to Mr. Morrison, "[a] total of nine (9) primary and secondary schools and five (5) neighborhood playgrounds or playfields in the City of Cleveland are located in proximity to railroad grade crossings on lines where significant increases in rail freight traffic have been proposed." V.S. Morrison at 7. As Mr. Morrison explains, one of these schools, the Louisa May Alcott Elementary School, is within 250 feet of the railroad tracks (*id.* at 8 and V.S. Hamilton at Att. 1, p. 2 of 4). Others are within 1,000 to 2,500 feet from the right-of-way. *Id.* at 7-9. Applicants plan to expose these school children,

the patients at the University Hospitals complex that is adjacent to both the NS and CSX tracks in the University Circle area on the east side (including the recently expanded Rainbow Babies and Children facility that is 1,000 feet from the tracks), *id.* at 11, and the thousands of residents who live within 1,000 feet of the tracks, to potential disaster in the event of a spill, leak or explosion of one or more of these cars as they pass along these lines. Applicants have proposed virtually no mitigation for hazardous materials spills or other incidents, yet they express surprise and indignation when Cleveland expresses its opposition to the imposition of increased train frequencies and increased hazardous material movements through these areas.

Noise is another serious issue. Train noise is never a subtle addition to any residential community's environment, and under Applicants' plans the noise along some of these lines will be multiplied by the arrival of up to 44 trains per day. *See* CLEV-9 at 10-11. A line that sees 4 trains per day will see 44, an increase of 1,188%. Lines that see 7 trains per day today will also see 44, an increase of 544%. *Id.* In CLEV-10, the City commented on the inadequacy of SEA's noise study, the even worse understatement of impacts, the ludicrous attempts at noise abatement included in the recent additional study conducted by CSX, and the results of the City's own consultant's assessment of the impacts of the proposal. CLEV-10 at 17-23.

Why is noise such a concern to the City? Because, according to the City's consultant, the homes, schools, hospitals and businesses that are near these tracks will experience a nearly ***three-fold increase in noise***. *Id.* at 22. When the tracks carrying these increasing numbers of trains are elevated, as they are when traversing the east side of Cleveland, such as in the Little Italy/University Circle/Fairfax neighborhood, *see* V.S. Hamilton at 4 and Attachment 2, the impacts from noise are greater, "particularly

when the tracks run at the level of upper-floor bedroom windows." V.S. Morrison at 6. Tripling the subjective noise levels at the Abington Arms senior citizen apartment building, which is located less than 500 feet from the NS and CSX lines, where a combined increase in train volumes of 302% (from 20 to 81 trains per day) is anticipated, *see* V.S. Hamilton at Att. 1, p. 3 of 4, or at historic Severance Hall in University Circle where the Cleveland Orchestra rehearses and performs throughout the year[9], is not beneficial to the community.

In response to the noise increases, CSX has offered a community beautification program, hoping that adding trees to the landscape will provide a sufficient reduction to the train noise. This proposal fails. CSX chooses to deal with the damage they will cause to the residents along the Short Line not by proposing noise mitigation that will, in fact, alleviate the three-fold increase in noise that they will create but, instead, by sending to residents along the Short Line a glossy brochure that claims that CSX has "developed a comprehensive plan to ensure the least amount of impact on your quality of life." This cleverly worded pamphlet obscures the real impact of a dramatic increase in train traffic and is no substitute for real solutions which truly protect the interests of the affected households and neighborhoods.

As the City stated in CLEV-10, the low landscaped berm and railroad tie walls that are recommended in the CSX report simply do not provide a credible method for mitigation of the substantial increases in noise along the affected line segments. This cosmetic approach to a serious noise problem fails to mitigate the noise that will be

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[9]*See* Letter dated January 30, 1998 from John S. Wilbur, President and Chief Executive Officer, University Circle Incorporated, to Office of the Secretary, STB, attached to CLEV-10 at Tab 1, at 2.

generated by the dramatic increase in freight traffic on the Short Line. The berms, trees and low railroad tie walls will, at best, achieve a noise reduction of 5 L_{dn}, nowhere near the 15 L_{dn} required to eliminate the projected impact on the adjacent communities. The landscape-only "solution" proposed by CSX as the sole noise mitigation measure on the segment between Fairhill Road and Norman in the Fairfax neighborhood, is completely without noise mitigation value. Simply put, the "solution" proposed by CSX to mitigate the noise increases that will occur in predominantly minority residential communities, University Circle and the Little Italy historic district, is inadequate, impermanent, and unacceptable. *Id.* at 23-24. Worse, the plan includes no proposal at all for maintenance of the trees and the wall. The railroads' gift to the City of more trees and a gently inclining earthen wall will neither fix the problem it is supposed to address, nor provide more than another maintenance burden to the City of Cleveland.

These are neighborhoods where property values have begun to rise as a result of improvements done under the aegis of the City's Department of Community Development, *see* V.S. White at 2, V.S. Warren at 1. Now, those property values are at risk again. The demographics of these communities underscore the fragility of their residents' grasp on the ladder of success that leads to economic improvement -- the percentage of people living below the poverty line in the neighborhoods that will experience train frequency increases of 181% to 1188% ranges from 33.9% to 48.4%. CLEV-9 at 10-11. As Mr. Morrison stated in his testimony: "... these households often lack the financial resources and the options to move away from the impacted area." V.S. Morrison at 5.

Unstudied and unquantified increases in vibration, substantial increases in air pollutant emissions -- all of this coupled with the adverse impacts described above, and

detailed further in CLEV-9 and CLEV-10, has driven Mayor White to conclude that the proposed transaction "will wreak havoc on the lives and businesses of the people" he represents, and that he has no choice but to oppose it. V.S. White at 1. To his astonishment, the Applicants

> . . . have brazenly pushed forward their plan to bring substantial amounts of increased traffic, with all of its attendant increases in noise, vibrations, traffic delays and safety risks to communities throughout the Cleveland metropolitan area, without consulting first with the communities that will experience the detrimental effects of those increases.

Id. at 5. Mayor White called upon the Applicants to come forward with proposals to diminish the adverse impacts on the City and its surrounding communities. *Id.*

3. The Problems Applicants Will Create in Cleveland's Neighborhoods Require a Comprehensive, Long Term, Regional Solution.

Cleveland and the surrounding communities have spent a great deal of time and resources to uncover, analyze, and document the severe neighborhood impacts of the proposed transaction. The City has also earnestly attempted to understand the noise mitigation plan proposed by CSX by retaining its own noise consultant and conducting an independent noise assessment. The CSX plan does not work. CLEV-10 at 23-24. For this reason, specifically, the City asked the Applicants to present alternative routing proposals, noting that a substantial rail infrastructure exists throughout the state and in the Cleveland metropolitan area. Because so many of the trains are through trains, not local,[10] and because there is a great deal of line capacity available nearby and in other areas of the state, the City believed some rerouting might be possible. For

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[10]*See* discussion of rerouting opportunities in Verified Statement of Philip G. Pasterak ("V.S. Pasterak"), attached to CLEV-9, at 2-3.

months, the City deferred to the railroad's expertise, however, the City stopped short of offering alternatives. As Mr. Morrison stated:

> While we firmly believe, based on our own investigation and analysis, that efficient alternatives promising fewer adverse impacts clearly exist, we are not in a position as a municipality to make specific proposals for routing alternatives to those currently proposed by CSXT and Norfolk Southern. The burden for identifying and testing specific routing alternatives can and should fall on the railroads who together are proposing a structure which so clearly and adversely impacts Cleveland and its neighborhoods. They, not we, are most familiar with the markets and customers they serve and with the operational characteristics of their systems, and with the routing options available to them.
>
> They, not we, are in a position to simulate and test the alternatives for efficiency; to identify the likely noise, vibration, traffic, safety and air quality impacts; and to propose suitable mitigation measures. As the advocates -- and the principal beneficiaries -- of this dramatic change in the operations of rail service through the City, they, not we, have the principal responsibility to deal honestly, directly, and completely with the consequences for the City of the changes they propose and to level with the Board, the City, and the public at large regarding the actions they propose and the reasonable measures that can and will be put in place to mitigate the adverse impacts on people and property.

V.S. Morrison at 15-16 (emphasis added).

Together, the Applicants filed a rebuttal to Cleveland's request for conditions. The Applicants' basic approach is that the lines they plan to use have been in place for many years, the right-of-way is there to be used, and they plan to use it to the fullest extent possible. In a Rebuttal Verified Statements, filed on December 15, 1997, Applicants' witness John W. Orrison made the following points:

- Despite the Applicants' obvious experience and expertise in rail operations, the City and not the Applicants should bear the burden of finding a way to mitigate the severe neighborhood impacts of the transaction. Orrison suggested that if the City has a problem with the routing proposed by Applicants, it should formulate alternatives. Further, he criticized without substantiation, the City's witness Philip Pasterak who has over 16 years of rail industry experience, for being unable to devise an alternative that works. R.V.S. Orrison at 79 (P-550).

- Without substantiation or further explanation, Mr. Orrison notes Applicants' operating plan was developed following the expenditure of much time and resources by Applicants. R.V.S. Orrison at 3-4 (P474-P475). Here, the Applicants imply that if they spent this much time on it and decided it was good, nothing else can approach it in terms of efficiency and operational benefits for the reconfigured systems.

- Without substantiation or further explanation, he states that any rerouting of trains would add time and thereby reduce competitiveness of the service of either of NS or CSX. R.V.S. Orrison at 79-80 (P550-P551).

- Without substantiation or further explanation, he states that the plan advanced by Congressman Kucinich for a neutral operator in the Cleveland area to manage the operations and route trains in a way that will not create the same level of adverse effects is not workable. Orrison R.V.S. Orrison at 82 (P553).[11]

NS has responded to the City's and its suburban neighbors' pleas for reduction of the impacts with a routing proposal that will reduce the projected increases through the west shore suburbs and through the western part of the City along the lake. *See* f.n.8, *supra* and CLEV-10 at Att. 2 p.2. However, this proposal leaves many problems unsolved and creates new ones of its own. Once again, NS submitted a proposal without careful study of the potential neighborhood impacts. This routing diverts traffic to neighborhoods with significant minority populations and leaves increased train frequencies running through Cleveland's east side neighborhoods, offering no solution to the substantial problems created there.

Incredibly, CSX has been even less forthcoming. It has prepared a study that projects economic benefits for the City but has released to the City of Cleveland only the "Executive Summary," a document that is remarkably short on detail as to how and

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[11] Applicants made this blanket assertion in their rebuttal, even though Congressman Kucinich's plan is similar in many respects to the idea espoused by Applicants in their creation of three Shared Assets Operating Areas in Northern New Jersey, Philadelphia/South Jersey and Detroit.

why these benefits will occur. Unlike a true economic cost-benefit analysis which compares likely benefits with likely costs, the CSX document focuses only on the former and ignores the costs to the community that will result from the significant increase of freight traffic through residential neighborhoods. By ignoring the rest of the story, CSX once again takes a superficial approach to a serious question of environmental impact and environmental justice, misleading both the Cleveland community and the Board about the true net costs of their proposal. The study provides no substantiation for the billions of dollars in economic benefits CSX promises, and gives no explanation of whether the "worker years" it cites will be either from "new or continued" employment. CSX appears to expect credit for continuing the revitalization of Cleveland's commercial life that the City has struggled on its own to accomplish. The benefits CSX asserts flow to a larger, 8 county area than just the City and its immediate neighbors. Worse, CSX does not acknowledge that each element of the benefits it claims can be achieved if the alternative routes the City has proposed in CLEV-10 and in discussions with the railroads are implemented. Now, the benefits to the City of Cleveland have been reduced even further by CSX's promise to East Cleveland, as part of that proposed settlement, to hold 15% of the new jobs (a grand total of 15) for people from East Cleveland. *See*, Letter from Mayor Michael R. White to Hon. Jeremiah Johnson, Attachment 2 to this Brief, at 2; "East Cleveland makes deal with CSX," Cleveland Plain Dealer, Feb. 19, 1998, 1B, 5B (included in articles at Attachment 3).

CSX likewise has relied on PR and not solid environmental engineering when dealing with the threefold increase in noise that will occur along the Short Line as a result of its proposal. CSX proposes berms and trees, a noise abatement scheme that

will not work and has refused to consider means -- such as rerouting, train limits or curfews -- that would significantly reduce noise impacts on neighborhoods along the Short Line.

Since Applicants have refused to create a plan to reduce the impacts of the transaction, the City has developed and presented its own proposals, recognizing "that these are not the only possible alternatives that CSX and NS should consider. However, an analysis of these possible solutions can form the baseline for beginning to create a solution that meets all of the parties' objectives." CLEV-10 at 6. Cleveland's alternatives, explained in detail in CLEV-10, have the potential to accomplish the City's dual objectives of: (1) allowing the Applicants to achieve the benefits of their proposed transaction, while (2) reducing the otherwise intolerable impacts on the life and fabric of the communities in and around the City.

The reconfigured routes Cleveland has proposed were described in CLEV-10[12] as follows:

> Cleveland has a better idea. It has studied the configuration of lines in the region and developed two alternative arrangements that reverse the ownership of the lines in the area from the arrangement proposed by CSX and NS. In the first Cleveland alternative solution, CSX traffic from Greenwich would continue to enter the region in Berea, but would use the Lake Shore route via the Cleveland Lakefront to Collinwood. This line is currently used heavily by rail traffic. NS traffic bound for Pittsburgh and beyond would continue to enter the area at Olmsted Falls/Berea, but would use the Short Line to White, then diverge southeast through Bedford. In Alternative Number 2, NS Pittsburgh traffic would not use the Flats Industrial Track north and east of Short, using instead the Short Line east to Marcy. The southern portion of the Short Line would become NS's main line for both Pittsburgh and Buffalo traffic flows. At Marcy, NS traffic bound to and from

[12]The maps attached at Tab 4 to CLEV-10 showing these routes are replicated in Attachment 4 to this Brief.

Buffalo would continue on the existing Short Line through University Circle to Mayfield. Near the existing Mayfield connecting track, a new higher-speed connection would be built between the Short Line and the NS line to Buffalo for trains to join the existing route.

Under both alternatives, each railroad would also have the use of a secondary line for overflow traffic, transfer movements, maintenance needs and emergency use. CSX's secondary route would be via the Short Line from Collinwood to Berea as CSX has currently proposed in its operating plan. Ownership of the Collinwood to Marcy segment could be in the hands of CSX. Trackage rights over NS would be required from Marcy to Berea. NS's secondary route for Pittsburgh traffic would also be the via the route it now designates as its primary route, that is from White to the Cleveland Lakefront to Berea. Under the City's alternatives, the route from the Cleveland Lakefront to Berea would be via trackage rights over CSX.

The railroads' response has been to belittle the proposals with minimal explanation and without any glimmer of recognition that they are designed to begin the process of working towards a solution. Rather than trying to find a way to truly mitigate the harm the proposed transaction will cause, Applicants have tried to buy peace with neighboring suburbs through promises of cash or other public improvements that sound attractive on their face, but on further study are shown to provide no real mitigation. At the end of the day the dramatic problems created by the transaction will still be seen, smelled, felt and heard by the affected residents, even if their communities' coffers are temporarily a little fuller.

The City has put forth these proposals because unless one of them, or a reasonable and workable alternative to them, is approved and implemented, the proposed transaction will be wholly inconsistent with the interests of the public in the City of Cleveland. For the residents of Cleveland's neighborhoods, if the railroads will not talk about plans to restructure operations, including spending money to solve the

problems the railroads are creating, the only solution is to deny the Application. This is a simple solution and one that satisfies the Applicants' apparent objective of spending almost no money to solve an enormous problem they plan to create. On the other hand, if the Application is approved, the Applicants should not be permitted to increase the number of trains that operate on the lines through the City. CLEV-10 at 55. Absent any satisfactory remedial action for the impacts they will create, the Applicants will create a situation where the substantial and adverse impacts of this transaction will be experienced disproportionately by the minority and poor populations of the neighborhoods of Cleveland where these lines are located. That result would be contrary to the law and to the clear public policy of the United States. Absent any such remedial action, the Application will have to be denied.

III. ARGUMENT

THE PROPOSED TRANSACTION WILL CREATE SUBSTANTIAL HARDSHIPS FOR THE PEOPLE OF CLEVELAND, WITH DISPROPORTIONATE ADVERSE IMPACTS ON POOR AND MINORITY COMMUNITIES, AND IS NOT CONSISTENT WITH THE PUBLIC INTEREST UNLESS THE HARMFUL EFFECTS ARE REDUCED BY THE IMPOSITION OF AMELIORATIVE CONDITIONS.

This transaction cannot be approved as proposed. There is no other way to view this proposal. The City of Cleveland has demonstrated that the interests of the public that lives and works in its neighborhoods will be directly and seriously harmed by this transaction. CSX and NS tout the benefits of this transaction, citing nearly $1 billion in annual improvements to revenue and from efficiencies, attempting to create the inference that this transaction must be good if that much money is involved. However, this monetary benefit to the Applicant companies and the improved service they proclaim for their shippers, benefits which can not be gainsaid even if they ultimately

are not as large as Applicants predict, are projected to be achieved on the backs of the people of the City of Cleveland. Cleveland has proposed alternative routings that will solve many of the problems this transaction creates. Without the imposition of conditions that will address the adverse impacts of the transaction, including limiting the number of trains passing through Cleveland's neighborhoods, the transaction cannot be approved.

A. The Public Interest Standard.

This Board can approve the transaction proposed by CSX and NS only if it "finds the transaction is consistent with the public interest," and has broad discretion to impose conditions governing the transaction. 49 U.S.C. §11324(c); *Grainbelt Corp. v. S.T.B.*, 109 F.3d 794, 798, (D.C. Cir. 1997), quoting *Southern Pacific Trans. Co. v. I.C.C.*, 736 F.2d 708, 721 (D.C. Cir. 1984). The description of the National Rail Transportation Policy in the statute gives some insight into the meaning of the term "public interest" by listing the objectives of the government's continued regulation of interstate transportation. While that policy promotes competition and reduction in regulatory control over the rail transportation system, it recognizes that these benefits should not be achieved to the "detriment ... [of] public health and safety." 49 U.S.C. §10101(8).

The Board's regulations provide further guidance regarding the statutory mandate to consider the public interest. 49 C.F.R. Part 1180. After reciting the statutory criteria in 49 C.F.R. §1180.1(b)(1), the regulations state the following: "The . . . [Board] must also consider the impact of any transaction on the quality of the human environment and the conservation of energy resources." 49 C.F.R. §1180.1(b)(2). Continuing, the regulations require the Board to determine whether a

proposed transaction is consistent with the public interest by balancing "the potential benefits to Applicants and the public against the potential harm to the public. The . . . [Board] will consider whether the benefits claimed by applicants could be realized by means other than the proposed consolidation that would result in less potential harm to the public." 49 C.F.R. §1180.1(c).

The Board imposes conditions to ameliorate the adverse impacts of a transaction. These conditions can provide a remedy for anti-competitive effects of a proposed merger, *Grainbelt, supra*, or for mitigation of adverse environmental impacts. *Union Pacific Corp., et al. -- Control and Merger -- Southern Pacific Rail Corp., et al.*, F.D. No. 32760, Decision No. 44 (Service Date August 12, 1996) ("*UP/SP*"), at 218-225 and App. G.

B. Environmental Justice Standards.

The President of the United States has added another dimension to the Board's public interest analysis and to the assessment of the environmental impacts of the transactions it considers. When the transaction is reviewed in the context of the President's Environmental Justice Order, the Board can only conclude that it cannot be approved without mitigation of the impacts on the poor and minority communities that live in the path of on-rushing freight trains.

In Executive Order No. 12898, the President stated the following:

> "To the greatest extent practicable and permitted by law, and consistent with the principles set forth in the report on the National Performance Review, each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies and activities on minority populations and low income populations in the United States ...."

Executive Order No. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations, §1-101, 3 C.F.R. 859 (1995), 30 Weekly Comp. Pres. Doc. 276 (Feb. 11, 1994). Fulfilling its mandate to devise a means to comply with Executive Order No. 12898, the U.S. Department of Transportation has recently adopted an Order that describes the process that the Office of the Secretary and each Operating Administration will use to incorporate environmental justice principles into existing programs, policies and activities. 62 Fed. Reg. 18377 (April 15, 1997). DOT's order[13]

> ... provides that disproportionate impacts on low-income and minority populations are to be avoided, if practicable, that is, unless avoiding such disproportionate impacts would result in significant adverse impacts on other important social, economic, or environmental resources.

Id. at 18378. This Board has incorporated an analysis of the "Environmental Justice" impacts of a proposed transaction in determining whether to approve applications. *E.g.*, Finance Docket No. 32830, *Alameda Corridor Construction Application*, slip op., 1996 WL 297102 (ICC), Service Date June 6, 1996; Finance Docket No. 32704, *East Cooper & Berkeley R. -- Construction and Operation of a Rail Line -- Berkeley Co., S.C.*, 1995 WL 64898 (Environmental Assessment, prepared by Section of Environmental Analysis, Service Date Sept. 22, 1995, includes evaluation of "environmental justice" impacts). The DEIS issued in this proceeding acknowledges the substantial Environmental

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[13]This Order is not specifically binding on the Surface Transportation Board, which has not yet devised its own regulations to address the President's directive. However, its approach provides useful insight into the way in which regulatory approvals of matters in the transportation industries, all of them, including rail, should take environmental justice issues into account.

Justice issues presented by the proposed transaction in the Cleveland area. *E.g.*, DEIS at Vol. 3B, pp. OH-118 - OH-127.

In a case that predated the President's Environmental Justice Order, the Court examined the same type of disparate impacts as are at issue here. *Coalition of Concerned Citizens Against I-670 v. Damian*, 608 F.Supp. 110 (S.D. Ohio 1984) ("*Concerned Citizens*"). *Concerned Citizens* involved a proposed highway construction project which had a disparate impact on minority communities, and provided useful insight into the scope of the analysis of the impacts. In *Concerned Citizens*, a group of citizens challenged the proposed construction under Title VI of the Civil Rights Act (42 U.S.C. §2000d), alleging that either (1) the highway could not be built as planned because the route selected would have a disproportionate impact on minority citizens, or (2) the planners at least had an obligation to consider carefully alternatives with less discriminatory impact. *Id.* at 126-127, citing *Guardian Ass'n v. Civil Service Comm'n of the City of New York*, 463 U.S. 582 (1983); *Lau v. Nichols*, 414 U.S. 563 (1974). The Court confirmed that "discriminatory effect in the absence of discriminatory purpose can violate Title VI." *Id.* at 126. To assess the impact on minority populations, the Court did not look at the 5.7 mile length of the proposed road, but looked instead at individual neighborhoods through which the road would pass. In findings quite similar to the record of the impacts of the proposed CSX-NS acquisition of Conrail on the City of Cleveland, the Court stated the following:

> There is no dispute that parts of I-670 would travel through neighborhoods that range from 50% to over 90% minorities... [citation omitted] Further, of the 355 persons displaced by the construction of I-670, 260 or nearly 75% are members of racial minorities ... [citation omitted] There is also ample evidence to support a finding that the disruptions and negative impacts of highway construction and after the highway is operating will fall primarily upon neighborhoods that are

> mostly comprised of minorities. Tr. 21-3. The Court finds defendant Damian's attempt to portray the benefits of I-670 to be speculative and unsupported by the record.

Id. at 127.[14]

The proposed CSX/NS acquisition of Conrail embodies the environmental injustice the President seeks to prevent. Assessing the impacts of the proposed transaction on a local basis, not on the grossly misleading system-wide basis that CSX and NS advocate in their environmental reporting, *see* CSX Corporation and CSX Transportation, Inc.'s Comments on Draft Environmental Impact Statement, filed February 2, 1998, at 3, the transaction can not fly. To remedy this injustice, Applicants must either re-route the trains away from the affected Cleveland neighborhoods, or limit the numbers of trains that operate through them pending adoption of a meaningful mitigation plan to address the significant adverse impacts.

The foundation of the proposed transaction begins to falter as soon as the analysis of its impacts focuses on the demographics of the neighborhoods that will experience the most serious effects:

- In the Kinsman/South Broadway community, where daily train frequencies on the post-transaction CSX line will increase from 3.8 to 43.8, an increase of 1188%, 72% of the population living within 1000 feet of the tracks is non-white and 39.3% live below the poverty line. V.S. Hamilton at 6.

- In the Forest Hill/South Collinwood community, where daily train frequencies on the post-transaction CSX line will increase from 6.8

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[14]The Court went on to deny the requested injunction against the proposed construction nevertheless, because the alternate route for the highway would have had even worse impact on racial minorities, and the other transportation alternatives did not solve the area's transportation problems. *Id.* at 127-128. In stark contrast, Cleveland's analysis shows that the alternative routes it proposes will have a lesser impact on minority populations than the Applicants' proposed Operating Plan. CLEV-10 at 51.

to 43.8, an increase of 544%, 99.2% of the population living within 1000 feet of the tracks is non-white and 33.9% live below the poverty line. *Id.* at 3.

- In the Little Italy/University Circle/Fairfax area, where daily train frequencies on the post-transaction CSX and NS joint line segment will increase from 6.8 to 43.8, an increase of 544%, 65.6% of the population living within 1000 feet of the tracks is non-white and 44% live below the poverty line. *Id.* at 4-5.

On these three line segments, which have the largest increase in trains and the most devastating adverse environmental impacts, the minority populations are more than 65% of the people living within 1000 feet of the right-of-way. Only one segment in the City that will experience huge increases in train traffic has a population that is less than 55% minority. CLEV-9 at 11.

Cleveland does not assert that Applicants have a discriminatory intent, but none is necessary. It is sufficient that the impact is discriminatory in order for the transaction to run afoul of the President's Environmental Justice Order. *See also Concerned Citizens* at 126, citing, *Guardian Ass'n v. Civil Service Comm'n of the City of New York*, 463 U.S. 582 (1983); *Lau v. Nichols*, 414 U.S. 563 (1974). Looking at the impacts of this transaction on the affected communities within Cleveland, there can be no conclusion other than that approval of the transaction would violate that mandate. Because better, less offensive alternatives exist, the Board should consider them carefully before approving the Applicants' proposal that so clearly violates the President's Environmental Justice Order

C. The Environmental Review Process

This Board stands as the bulwark against a transaction that will wreak havoc on the lives of innocent neighbors who will experience devastating adverse environmental impacts from its implementation. The Board's review of this transaction

-- all of its impacts, including the adverse environmental effects -- is the forum available to the citizens of Cleveland to protect themselves against these adverse impacts. This Board has the authority to condition its approval on mitigation to offset adverse environmental impacts, and should use that authority in this case. The Board's regulations speak for themselves. The Board must act affirmatively to remedy the adverse impacts found in the EIS process. Development of the EIS is not just a ministerial task with no serious implications for Applicants' ability to implement their proposal. To fulfill its obligations under the Act, its promise to the citizens of Cleveland and communities like it, this Board must take a hard look at the impacts on the environment and order Applicants to take steps to fix them when the impacts are this great. Without that last step, the environmental review process would be a meaningless exercise.

The National Transportation Policy, 49 U.S.C. § 10101(8) and the Board's own regulations, 49 C.F.R. § 11(b)(2) indicate that the impact on the human environment is a factor that must be included in any analysis of a transaction proposed under 49 U.S.C. § 11323. The Board's environmental regulations, 49 C.F.R. § 11105.1, et seq., "are designed to assure adequate consideration of environmental and energy factors in the . . . [Board's] decision making process pursuant to the National Environmental Policy Act, 42 U.S.C. 2332 . . . ." 49 C.F.R. §1105.1. The Guidelines published by the Council on Environmental Quality which implement NEPA, require as does the Act itself, an assessment of "alternatives to the proposed action." 42 U.S.C. §4332(C)(iii); 40 C.F.R. §1502.14. Where a proposed transaction has adverse environmental impacts, as does the proposed acquisition of Conrail by CSX and NS, the Board's authority to impose conditions includes requiring applicant carriers to make changes or adopt

mitigation measures that address those impacts. 49 C.F.R. §1105.10(f). This includes the authority to delay implementation of a transaction pending resolution of environmental issues raised but not resolved. *Id.*; *e.g. UP/SP* at 222 (pending development of an effective mitigation plan, applicants were permitted "to add only an average of two additional freight trains per day to the affected line segments ..., which is below the threshold level for environmental analysis") and App. G. Limitation on the numbers of trains in the affected neighborhoods to preserve the status quo, rerouting of some trains away from those neighborhoods, construction of rail/highway or rail/rail separations -- all are available to address and defeat adverse impacts of the magnitude present in this case.

The process for developing mitigation plans used by the Board in *UP/SP* to address the impacts on the Cities of Wichita, Kansas and Reno, Nevada, is a useful guideline for the procedure that is absolutely required in this case. A comparison of the relative train frequency increases in Wichita and Reno, with those projected in Cleveland's neighborhoods highlights the necessity for the Board to mandate development of an appropriate mitigation plan prior to approving implementation of this transaction, and to prevent CSX and NS from increasing the number of trains until that mitigation is in place:

LOCATION	TRAINS/DAY	%INCREASE
Reno, Nevada[15]	11.3 -->25.1	122%
Wichita, Kansas[16]	4.0 --> 9.6	140%

[15]UP/SP Merger, Reno Mitigation Study, Preliminary Mitigation Plan (September 1997), at p. 4-3.

LOCATION	TRAINS/DAY	%INCREASE
Kinsman, South Broadway (CSX line)	3.8 --> 43.8	1188%
Forest Hill, South Collinwood (CSX line)	6.8 --> 43.8	544%
Little Italy, University Circle, Fairfax (CSX and NS joint segment)	6.8 --> 43.8	544%
Edgewater, Cudell, Detroit-Shoreway, Ohio City (first NS line)	13.5 --> 37.8	181%
Kinsman (first NS line)	13.5 --> 37.8	181%
Euclid-Green, South Collinwood (first NS line)	13.5 --> 37.8	181%
Goodrich, Central, Fairfax (second NS line)	12.5 --> 26.8	114%
Kinsman, South Broadway (second NS line)	12.5 --> 26.8	114%

As the chart demonstrates, the impact upon Cleveland is ten times greater than in either Wichita or Reno. Nevertheless, Applicants ignore Cleveland's pleas for mitigation, contending Cleveland should be thankful for the alleged boon to its economy. What boon? Instead, Cleveland, like both Wichita and Reno, fears the impact of noise increases due to the increased frequency of train operations through the middle of its neighborhoods.

In *UP/SP*, the Board's Section of Environmental Analysis ("SEA") had completed an extensive environmental assessment of the impacts of the proposed transaction, but had not developed "specifically tailored mitigation plans that will ensure that localized environmental issues unique to these two communities are effectively addressed." *UP/SP* at 221. The Board ordered further study, to be completed within 18 months of the merger approval, and to address the grade separation/safety, air quality and noise

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[16]UP/SP Merger, Wichita Mitigation Study, Preliminary Mitigation Plan - September 1997, at p. ES-3.

impacts of the proposed train increases. Although the Board concluded that the studies and mitigation plans need not be in place prior to implementation of the transaction, it concluded that preservation of the operating status quo from before the transaction was in the public interest, stating:

> In the meantime, as explained in the Post-EA, during the 18-month study period UP/SP will be permitted to add only an average of two additional freight trains per day to the affected rail line segments ... [footnote omitted] which is below the threshold level for environmental analysis. [footnote omitted] UP/SP will be prohibited from increasing traffic to the levels they projected under the merger (11.3 daily trains for Reno and 7.4 trains for Wichita) without our approval. [footnote omitted] Thus, there will be no significant adverse environmental impacts to these communities while SEA, the Board and the parties work to arrive at additional tailored mitigation for those cities.

UP/SP at 222-223.

In this case, the Board has already gone beyond the reporting required in *UP/SP* and determined that an Environmental Impact Statement ("EIS") is necessary because of "the nature and scope of the environmental issues that may arise." F. D. No. 33388, Notice of Final Scope of Environmental Impact Statement, Service Date Oct. 1, 1997. To its credit, the Board has gone further than this Board or the ICC before it has ever gone before by ordering an EIS. However, the work required to fulfill its obligation to protect the people -- the ones who are truly affected by the transaction -- from these adverse impacts is not yet complete.

The environmental costs here are too great, and the study conducted by the Board requires a great deal more work to document them and to plan for mitigation. The Board has taken the necessary first steps by ordering the completion of an EIS, rather than any of the lesser alternative environmental reporting vehicles available

under the environmental regulations. 49 C.F.R. §1105.6. Next, it is imperative to complete the studies begun by SEA and its consultants in a way that uses accepted methodologies. The studies should "consider every significant aspect of the environmental impact of a proposed action ... [and] evaluate different courses of action." *Dubois v. U.S. Department of Agriculture*, 102 F.3d 1273, 1286 (1st Cir. 1996), *cert. denied, Loon Mtn. Recreation Corp. v. Dubois*, ___ U.S. ___, 117 S.Ct. 2510 (1997). "The discussion of impacts must include both direct and indirect effects (secondary impacts)" of a proposed project . . . . [cite omitted] The agency need not speculate about all conceivable impacts, but it must evaluate the reasonably foreseeable significant effects of the proposed action." *Id.* Most important, the courts have made clear that ". . . the agency has a duty "to study all alternatives that appear reasonable and appropriate for study . . . as well as significant alternatives suggested by other agencies or the public during the comment period." *Id.* (emphasis supplied).

As Cleveland has explained at length in CLEV-10, the study done to date is wholly inadequate. To satisfy the mandate of NEPA and the Board's regulations, SEA's next steps must include, at a minimum:

- Conduct studies that focus on the affected neighborhoods, not on lengthy line segments that allow the study to mask the impacts on the people who will truly experience them. CLEV-10 at 9-11.

- Correct the study of delay times at crossings to account for actual speeds, not posted speeds, since trains may be slowing to enter or accelerating upon leaving yards or other restricted speed zones as they traverse the lines and affected crossings. CLEV-10 at 34-36. The DEIS minimizes the number of crossings and trivialize the potential impact of crossing delays. It fails to acknowledge the central problem created by worsening response times. People will die if ambulances or police or fire equipment cannot reach them in a timely way, and some mitigation must be available to reduce the likelihood that this will occur.

- Conduct studies that address localized air quality impacts, and that assesses particulate emissions (PM_{10}). CLEV-10 at 11-12, 25-27.

- Give serious consideration to the enormous increase in hazardous materials to be transported across the lines through these neighborhoods, an increase from 0 to 44,000 in some places (*see* DEIS, Table 5-OH-10, at vol. 3B, p. OH-30). In fact, because of the proximity of the NS and CSX lines in the University Circle area, the volume of hazardous materials moving through this busy commercial, residential, hospital, and cultural area will increase from 7,000 carloads per year, to 81,000 carloads per year, **among the three largest increases in hazardous materials transportation across the entire system.** DEIS, Vol. 5A, Attachment B-5. There must be an analysis of the resulting impacts and a proposal for meaningful mitigation, even if many of the trains are rerouted. CLEV-10 at 12-14, 27-33.

- Conduct a more rigorous analysis of the noise impacts of the transaction, including compliance with 49 C.F.R. §1105.7(e)(6), which requires quantification of the noise increases for sensitive receptors, and which complies with the procedures identified in CLEV-10 at 21. The noise study conducted by CSX fails to accurately assess the noise impacts, and recommends mitigation that does not begin to address the true impacts of the transaction.[17]

- Study the impacts of increases in vibration. No such study has been conducted.

- Study the impact on historic and cultural resources, an analysis that is missing except for the assessment of impacts of the proposed new construction at Collinwood Yard. The DEIS totally overlooks the impacts of train frequency increases on the nationally registered or locally certified historic districts or individual buildings that are close to the lines that are slated to experience substantial increases in daily train operations. CLEV-10 at 36-39.

In addition to all of these additional analysis, SEA must assess the impact of a request that is directly related to this transaction that Applicants and Conrail have only just sprung on the City. Just last week, Conrail requested that Cleveland Public Power

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[17]As described in CLEV-10 at 21-22, Cleveland's consultants began to monitor continuous noise on the corridors that will be affected by the potential increases in train frequencies. However, this study was only the beginning and should be completed by SEA in order to fully assess the impacts of the transaction.

("CPP"), a division of the City of Cleveland, relocate at least six 138,000-volt transmission line poles to allow construction of new trackage on the Short Line to accommodate the proposed Operating Plan. Three of these poles are located in Collinwood near Aspinwall Avenue, and the other three are in the area of Quincy Avenue and East 105th Street. This proposed major construction project was not identified as a construction activity in the Operating Plan, nor was it disclosed in time to permit analysis in the environmental study. Moreover, at no time during recent meetings with the Mayor and other representatives of the City of Cleveland -- including a tour of the Short Line with CSX and Cleveland City officials -- did the Applicants even mention that such a request would be forthcoming.

It is outrageous that this construction project was not identified in the proposed Operating Plan construction activities, nor was it addressed as an environmental issue. As yet, Conrail has not provided sufficient information to permit analysis of its proposal, but it is clear that this proposed major construction project would have a severe impact on the operations of CPP, and potentially its customers and the residents of the City as well. This transmission line was constructed in 1991 after payment of an substantial fee to Conrail, and is an integral part of the high-voltage transmission system needed for CPP to provide service to the entire east side of the City. The line provides a crucial link to the strongest of CPP's three interconnections needed to serve its customers. The hospital system in the University Circle area depends on this power, and it provides the primary source of power for the City's water system. The City spent considerable resources to insure a system with adequate "redundancy," that is, back up for each part, to insure that service remains available and reliable at all times. The line also

provides critical fiber-optic communications used for remote monitoring and control of CPP electric facilities.

Taking this line out of service during construction would greatly impair the reliability of electric service to some of the largest health-care facilities in the City, to major water filtration plants, and to thousands of residential, commercial, and industrial customers. Any interruption of service that occurs as a result of the relocation of these poles will cause irreparable harm to the reputation of CPP and to its ability to compete for business in a highly competitive environment.

If approval of this transaction and construction of the improvements required to move Applicants' trains over the Short Line requires relocation of these poles, the transaction must be stopped. Applicants cannot force this change on the City without compensation, replacement of the poles and reconfiguration of the grid before any change takes place, and without providing an absolute guarantee that there will be no disruption -- none -- of the CPP's ability to provide power safely and reliably to its residential and institutional customers.[18]

Only after the studies necessary to complete the final EIS are completed, including a comprehensive study of the newly raised CPP power pole issue, will the SEA and the Board have completed the next important part of the "detailed statement"

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[18]This Board should specifically state that its approval of the proposed transaction does not constitute an order to CPP to move these poles. The City's easement from Conrail requires relocation at the City's costs only when the request is due to a mandatory order or regulation requiring relocation. Conrail has already requested relocation of the poles, and it has done so for business purposes and not in response to an existing order or regulation mandating relocation. Second, there has been no showing in this case -- in fact no discussion any where -- of this proposal and Applicants can not be allowed to bootstrap their way into requiring this substantial undertaking that will be so deleterious to CPP's service.

of the environmental impacts that is required by NEPA, as explained in *Calvert Cliffs*, 449 F.2d at 1114. Only then will "the agency have available, and [be able to] carefully consider, detailed information concerning significant environmental impacts ...." *Robertson*, 490 U.S. at 349.

Then, when the study of the impacts of the proposed transaction is complete, the SEA and the Board can turn to "the heart of the environmental impact statement" -- the consideration of alternatives. *Dubois*, 102 F.3d at 1286, quoting 40 C.F.R. §1502.14. As the Court stated in *Dubois*:

> The regulations require that the EIS "[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated." 40 C.F.R. §1502.14(a). It is "absolutely essential to the NEPA process that the decisionmaker be provided with a detailed and careful analysis of the relative environmental merits and demerits of the proposed action and possible alternatives, a requirement that we have characterized as 'the linchpin of the entire impact statement.' "

Dubois, 102 F.3d at 1286-87, quoting, *NRDC v. Callaway*, 524 F.2d 79, 92 (2d Cir. 1975).

Cleveland is an extraordinary situation, created by Cleveland's location at the "X" of these networks, and careful analysis of possible mitigation strategies is the next step. When preparing an EIS, "one important ingredient . . . is the discussion of the steps that can be taken to mitigate adverse environmental consequences." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). Because consideration of potential alternatives is "the heart of the environmental impact statement", an assessment without recognition and "a reasonably complete discussion of potential mitigation measures would undermine the 'action-forcing' functions of NEPA." *Robertson*, 490 U.S. at 352. An agency can act before a complete action plan is

formulated, *id.* at 353, as this Board did in *UP/SP*. However, where the general requirements of NEPA, 42 U.S.C. §2332, are considered in conjunction with the public interest standards of the statute that guides the Board's determination whether to approve a transaction, the mitigation plan must be prepared at a meaningful time in a way that will protect the public from the adverse effects of the transaction to the fullest extent possible. In the case of the CSX/NS proposal, the one meaningful time is now, before any change in train operations that will disrupt the lives of Cleveland's neighborhoods can be allowed to proceed.

One of the early cases that interpreted the guidelines of NEPA for incorporating an evaluation of the environmental impacts of a transaction made clear that the study of alternatives required by the NEPA and the CEQ guidelines must be an extensive inquiry. *Calvert Cliffs' Coordinating Committee, Inc. v. Atomic Energy Commission*, 449 F.2d 1109 (D.C. Cir. 1971). The requirement of assessing alternatives to the proposed action "seeks to ensure that each agency decision maker has before him and takes into proper account all possible approaches to a particular project (including total abandonment of the project) which would alter the environmental impact and the cost-benefit balance." *Id.* at 1114. The Court noted that where an agency, like the STB, has a particular mandate to consider the public interest, the environmental analysis must play a major role in that consideration. *Id.* at 1119 n.21 ("This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission", quoting, *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608, 620 (2d Cir. 1965)). The agency making a decision about a proposed transaction must conduct a "balancing analysis to ensure that, with possible alterations, the

optimally beneficial action is finally taken. . . . It may be that the environmental costs, though passing prescribed standards, are nonetheless great enough to outweigh the particular economic and technical benefits involved in the planned action." *Id.* at 1123.

The City of Cleveland has repeatedly called upon the Applicants to develop alternative operating scenarios that will lessen the environmental impact of the transaction. *See, e.g.*, V.S. Morrison at 15-17. The Applicants have resisted such an effort.[19] Out of frustration at the Applicants' inaction, Cleveland has proposed alternatives, not as the only likely solution, but as a starting point for discussions with the Applicants of ways to remedy the disastrous impacts the transaction will bring to the City's and its suburban neighbors' communities. These alternatives, described in CLEV-10 at 39-53, warrant consideration. This Board's obligation to protect the interests of the people of Cleveland requires that these alternatives be carefully assessed to find the best way of balancing the interests of the public against the financial incentives that motivate the Applicants' refusal to talk seriously about alternatives.

Applicants protest that rerouting the trains from their current proposal will reduce the competitiveness of the routes. R.V.S. Orrison at 79-80 (P550-P551). They provide no data to justify that prediction of train delays, nor any substantiation whatsoever for their irrational refusal to consider alternatives to their plan. This Board cannot countenance the Applicants unreasonable refusal to discuss and explain their position. Applicants must remember that this Board serves the public, not them. The

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[19]The NS alternative proposal for the west side of the City is the sole exception to the resistance that has greeted the requests of the City and the surrounding communities for assistance in developing alternative operating scenarios. *See* f.n. 8, *supra.*

people who make their homes in Cleveland's neighborhoods deserve proper consideration of the alternatives Cleveland has suggested. This Board's review of the proposed transaction does not have as its goal allowing the Applicants to optimize their competitive prowess at the expense of all other considerations. The Board is required to balance the competing interests of the railroads and the affected public to determine whether the improvements in the railroads' competitive posture come at too great a cost to the public. 49 C.F.R., § 11801.(c).

Part of that balance is reflected in the NEPA process, which requires full consideration of every aspect of alternatives to the proposed transaction. These alternatives propose to achieve a permanent mitigation of the dramatic, adverse impacts of the Applicant's operating plan on Cleveland neighborhoods in general, and on low income and minority households in particular, by routing the bulk of freight rail traffic away from established neighborhoods and into existing industrial corridors. The Cleveland options would involve a rail-to-rail grade separation in Berea which would enable both rail lines to operate through that city without either interfering with each other or completely disrupting the City of Berea. Included in the proposed rail-to-rail separation would be road-to-rail grade separations on Front Avenue accomplished in a manner that does not adversely impact existing businesses that are vital to the economy of that city. *See* CLEV-10 at 44-46.

By contrast with the Cleveland alternatives, the Applicants propose either to do nothing to mitigate the impact of running over 100 trains per day at grade over the two Front Street grade crossings -- effectively isolating Berea -- or constructing an unspecified type of grade separation. Applicants provide no information about their proposal, which could be a 30-foot high bridge structure taking Front Street over the

two rail lines, isolating existing businesses located between them, and seriously compromising the visibility and the value of two successful auto dealerships located on Front Street. While criticizing Cleveland's proposal, the Applicants have done nothing to describe their alternative solution to the devastating impact of their actions on the City of Berea or to document the dramatic environmental consequences their proposal will have on businesses and historic properties in that community. While Cleveland has advanced the design of its alternatives with the preparation of photo renderings and a scale model, the Applicants have offered the City of Berea, this Board, and other interested parties only words and a due bill for the public funds to pay for the bulk of the costs of their proposed bridge.

In advancing the proposition that a rail-to-rail separation in Berea is both desirable and feasible, Cleveland acknowledges that the engineering and construction term challenges of such a proposition are significant -- but not insurmountable. Cleveland has ample and recent experience constructing facilities for passenger rail services over active freight lines, with no interruption in freight service. Cleveland knows it can be done. Cleveland takes seriously the issues of constructability and maintenance of service when it proposes a rail-to-rail crossover in Berea to address, in a permanent manner, the problem of providing the least disruptive, most efficient routing through the City of Cleveland. This Board should not countenance the Applicants' incredible suggestion that their operating plan is subject to no modification or adjustment to account for the fact that Cleveland -- not Houston or Reno, or any other community that the Board has dealt with -- is at the heart of the country's northern rail system and that its neighborhoods, its cultural and historic districts, and its low income and minority households -- because of being located in the bulls eye --

will bear, for decades to come, a disproportionate share of the burdens resulting from the break up and acquisition of Conrail.

Applicants can not be allowed to treat this process of finding an alternative to the burdens they propose as an insignificant and meaningless exercise that they can dismiss with conclusory statements of impractability. Applicants' failure or unwillingness to engage in this process of developing alternatives can and must lead the Board to follow the same procedure used in *UP/SP* in Reno and Wichita. There, where the impacts of the proposed control transaction, with its reconfiguration of operating arrangements, was proposed to cause significant increases in train operations through the center of the cities, the Board required the company to hold train operations at a level that increased only by two trains pending the base year operations pending completion of a detailed mitigation study. The procedure the Board followed in Reno and Wichita could provide a framework for the study of options for Cleveland absent an agreement on a mitigation plan in advance of the decision in this case. Train limits for the short term, or even, if necessary, for the long term, will preserve the status quo and eliminate the impacts this transaction promises to bring to the poor and minority communities in the City.

This analysis is the minimum next step required by NEPA, the Board's regulations and by the facts of this case. Then, the Board, the Applicants, the City and all interested parties can investigate alternatives in a careful, deliberate way. Cleveland has offered its alternatives as a beginning for the discussions that must occur. Rather than accepting these alternatives, modifying them, or using them as a point of departure to other possible solutions that could lead to a compromise, CSX has expressed the position in discussions, for example in a meeting on February 13, that

the alternative routings and configuration of the proposed grade separation at Berea may in fact be workable from an operating standpoint. However, CSX argues that train delays and local impacts that would result during construction of the separation would be unacceptable.

CSX repeatedly raises the spectre that Cleveland's proposal will lead to the same much publicized rail service problems that have resulted in extensive delays to freight traffic, other problems in Houston, Texas, and elsewhere on the Union Pacific-Southern Pacific system.[20] The City of Cleveland and its representatives do not purport to have comprehensive knowledge of the Houston and Union Pacific situation. However, CSX and the Board should carefully consider whether the numerous and complex issues involved in Houston are in fact similar to those potentially resulting in Cleveland. Cleveland believes that they are not. For one reason, the relatively large volume of rail traffic that originates/terminates in Houston complicates rail traffic patterns by involving several train movements per car handled. Train delays in Houston are magnified by the resulting need to store large volumes of entire train freight cars, which strains yard capacities and can cause further train delays. In comparison, post-acquisition rail traffic in Cleveland appears to involve a far greater proportion of through trains. V.S. Pasterak at 2-3. Several of the other potential causes lie within the railroads' control. Fixing the problems Applicants plan to create in Cleveland must be done, and can be accomplished without creating the same problems that UP is experiencing in Houston.

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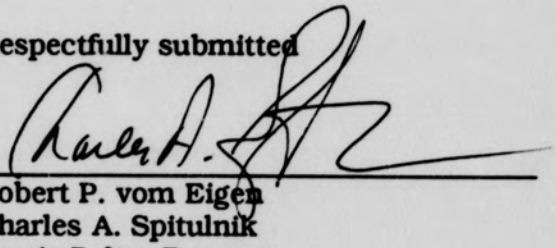
[20]UP's problems in Houston and the west are documented extensively in the record in Ex Parte No. 573, *Rail Service in the Western United States*; Service Order No. 1518, Joint Petition for Service Order.

CONCLUSION

Nearly 65,000 people in the City of Cleveland need this Board's protection from the extraordinary adverse impacts that Applicants in this case -- unapologetically and with no regard for the human toll their transaction will take -- seek to impose upon them. This Board's governing statute and regulations stand as a shield between the people of Cleveland and the Applicants. The "public interest" is the focal point of the Board's determination whether to approve this transaction. The interests of the public in Cleveland's neighborhoods is clear. Too many trains will bring too much noise, too many hazardous materials, too many crossing delays that endanger too many lives, too much increased air pollution and too much adverse impacts to a City that has fought its way back from the brink of disaster. This transaction cannot be approved without modification. At the very least, if the Board is inclined to approve this transaction, this approval, along with the Applicants' ability to implement the increases in train frequency, must be held in abeyance until this Board develops a plan, acceptable to the affected communities, to limit the impacts on these neighborhoods. Train limits are one solution. Rerouting trains along the lines of the proposals the City of Cleveland has offered is another. Without such a solution, the transaction proposed

by Applicants contravenes, directly and irreparably, the interests of the City of Cleveland and can not be approved.

Respectfully submitted



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Counsel for the City of Cleveland, Ohio

Dated: February 23, 1998

CERTIFICATE OF SERVICE

I hereby certify that on February 23, 1998, a copy of the foregoing Brief of the City of Cleveland, Ohio (CLEV-18) was served by hand delivery upon the following:

The Honorable Jacob Leventhal
Administrative Law Judge
Federal Energy Regulatory Commission
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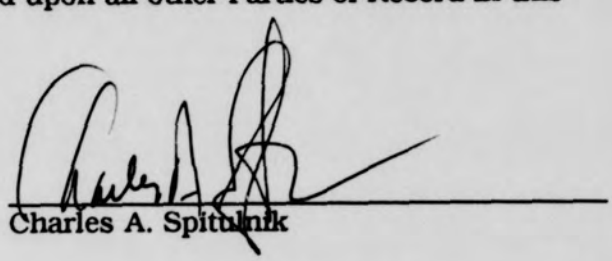

Charles A. Spitulnik

ATTACHMENT 1

BRIEF OF THE CITY OF CLEVELAND, OHIO

DATED: FEBRUARY 23, 1998

CSX Corporation

One James Center
Richmond, Virginia 23219
(804) 782-1444

Michael J. Rushling
Vice President
State Relations

February 11, 1998

The Honorable Emmanuel W. Onunwor
The City of East Cleveland
14340 Euclid Avenue
East Cleveland, Ohio 44112

Dear Mayor Onunwor:

Thank you again for the time you have dedicated to the issues and opportunities associated with CSX's proposed operations over the Short Line and Collinwood Yard. Your efforts have identified a number of areas where CSX, working with you and other officials of the City, can best address not only the local effects associated with our proposed operations, but also the larger issues associated with opportunities to enhance economic development for the City.

As you've pointed out to us, since the City of East Cleveland has the largest residential stake along the Short Line, it is important that a negotiated joint program be developed to serve the best interests of the City. Consistent with these concerns, CSX is most appreciative of your leadership in engaging the City's residents, members of the City Council, and other city officials in a constructive dialogue. Your recent town hall meeting and citizens group meeting have provided all parties an excellent forum to design a joint program serving everyone's interest and objectives. Based on your efforts, we have come to the final terms which will form the basis of our new relationship with your City:

1. Community Support - Commencing in 1999, CSX will make a total payment of $2 million to the City, to be allocated over a four-year or five-year period, at the City's option, to be used to strengthen the City's police, fire and service departments to deliver service to residents and to ensure your employees are ready to handle any rail-related emergencies. We are agreeable that the use and distribution of these funds be monitored and implemented by a joint committee consisting of one representative from the Mayor's office, one representative from East Cleveland City Council; one CSX official, one member of the City's business community; and one resident. The business member and resident member will be jointly approved by the Mayor, City Council and CSX.

2. Planning/Contingency - CSX will make a $200,000 payment to the City in 1998 to assist it in general planning for activities associated with CSX's proposed operations and for other contingencies that may result.

3. Job Opportunities/Economic Development -

a. CSX will offer at least 15 percent of the jobs to be created at the Collinwood intermodal center to residents of the City of East Cleveland.

b. CSX will work cooperatively with the City of East Cleveland's Department of Economic Development and/or designated consultant to identify businesses that can be located within the community.

c. In developing the intermodal center, CSX will work cooperatively with the City of East Cleveland to identify contractors who are willing to hire a significant percentage of East Cleveland residents in meaningful and productive jobs. The City will develop a "job bank" and identify residents interested in performing a number of unskilled, semi-skilled and skilled jobs with contractors by CSX to develop the intermodal center.

4. Noise Abatement - CSX conducted a Noise Impact Analysis and has proposed a program of noise mitigation and landscaping to address the noise impact and to improve the appearance of the Short Line in the City of East Cleveland. CSX agrees to adopt that program and to consult with the City over its final design and continued maintenance.

5. Housing Improvement and Relocation - Our Noise Impact Analysis identified 120 residential buildings that may be affected in the City of East Cleveland. For each of these homes, CSX will provide $6,000 per residence for insulation, sound proofing, other noise abatement home improvements, and for relocation. A number of these 120 homes have been abandoned and CSX will cooperate with the City should it desire to apply the above allowances to an improvement project accommodating a park or other community initiative. This program and these funds will be administered by the City.

6. Bridges - CSX agrees to repair and maintain those bridges on the Short Line through the City of East Cleveland that it will acquire from Conrail. This commitment shall be consistent with any agreement pertaining to those bridges that Conrail may have entered into.

In exchange for CSX's commitments to the City, the City will indicate its support for our transaction and mitigation measures before the Surface Transporation Board and state and other federal agencies. CSX and the City will make a joint filing of this arrangement with the STB. Of course, this joint program for the City is conditioned upon CSX being able to secure the STB's approval of the Conrail transaction and to implement the CSX/NS Operating Plan that will move CSX trains over the Short Line and to the Collinwood terminal. We would like to commence our new partnership with the City by jointly announcing the CSX commitments and the City's support at your earliest convenience.

If this joint program is acceptable to the City, kindly indicate your agreement in the space provided below.

Very truly yours,

Michael J. Ruehlmann

brf

The Honorable Emmanuel W. Ommwor
Mayor, City of East Cleveland

ATTACHMENT 2

BRIEF OF THE CITY OF CLEVELAND, OHIO

DATED: FEBRUARY 23, 1998

City of Cleveland
Michael R. White, Mayor

Cleveland City Hall
601 Lakeside Avenue
Cleveland, Ohio 44114
216/664-2220

February 19, 1998

Mr. Jeremiah Johnson
City Council President
City of East Cleveland
14340 Euclid Avenue
East Cleveland, Ohio 44112

Dear Council President Johnson:

I was shocked to learn that the City of East Cleveland has apparently agreed to support the proposed CSX/NS routing plan through Cuyahoga County in exchange for a set of commitments made by CSX. This decision is shortsighted and, I strongly believe, has been made without full consideration of the long-term harm CSX's plan would have on both East Cleveland and Cleveland residents.

As you know, CSX's plan calls for increasing high-speed train traffic through East Cleveland and Glenville neighborhoods by more than 600% - from 7 to 44 trains a day - with no guarantees these volumes would not increase even further in future years. You also know these trains will run past the backyards of hundreds of homes and apartment units with the majority of traffic occuring at night. Our analysis indicates noise and vibration will increase to unacceptable levels and CSX's proposed mitigation will not make an appreciable difference. Moreover, CSX has yet to explain how these households living less than 100 feet from the elevated line would be protected if a CSX train derailed or, worse yet, if hazardous materials spilled into their yards and basements.

In short, the residents of the areas surrounding CSX's proposed mainline, their children, and their children will be put in harms way. They will be deprived of peaceful enjoyment of their homes, they will be exposed to potentially catastrophic accidents, and the value of their property will sharply depreciate. They will pay dearly.

Mr. Johnson, CSX's offer of $4,000 per residence to help overcome these problems or to help residents move is a woefully inadequate and a cruel hoax coming from a company who stands to earn billions of dollars in profits from a government approved acquisition of Conrail assets. Drawing from our experience in retrofitting hundreds of homes near Hopkins Airport, we know the costs of a thorough sound insulation job is in the $15,000 to $20,000 range. Those costs typically include:

• Window replacements and treatments	-	$6,500
• Door replacements and treatments	-	$4,000
• Extensive weatherstripping and miscellaneous finish work	-	$2,000
• Installation of central air conditioning (needed because if windows are opened in summer, households are exposed to noise)	-	$4,500
Total	-	$17,000

Clearly, $4,000 will only begin to deal with the true costs of protecting residents from the noise and vibration. It is self-evident that no amount of home insulation will allow residents to use their yards in a manner they are entitled. At $4,000 per house, the relocation alternative is equally absurd. The one and two family homes adjacent to the Short Line are valued at between $40,000 to $75,000 each.

Mayor Onunwor and your City Council are aware that we have been working very hard to suggest technically sound alternatives to both CSX and Norfolk Southern. Mayor Onunwor, in fact, attended a meeting several weeks ago at our City Hall where we outlined two routing alternatives that would sharply reduce train traffic on the Short Line through both Cleveland and East Cleveland. We have presented these proposals to the railroads in the spirit of trying to reach a compromise that preserves their legitimate business interests while protecting citizens throughout our region from impacts that have century-long implications.

CSX has offered to pay East Cleveland $2 million over four or five years as a way to help East Cleveland respond to rail emergencies. Mr. Johnson, I respectfully ask you, do you and your colleagues truly believe $400,000 or $500,000 a year could ever compensate your City for the disastrous consequences of a derailment involving hazardous materials falling into your citizens back yards? Moreover, where is CSX's concern and commitment after four or five years?

CSX's pledge to hire East Clevelanders for 15% of the jobs at their proposed inter-modal facility in Cleveland (about 15 jobs) could never offset the perils to our citizens caused by CSX's decision to run their mainline through the heart of residential areas. In the same vein, I am appalled that CSX thinks their commitment to repair and maintain their bridges is a concession. Repairs and maintenance are their legal responsibilities.

I urge you and your colleagues to reconsider East Cleveland's position on this issue and join Cleveland and other communities to insist on a plan that first and foremost preserves the health and safety of our residents. If we allow CSX or Norfolk Southern to divide us through sugarcoated enticements, they will surely conquer us all.

Sincerely,

Michael R. White
Mayor

MRW: cpw

Cc: City Councilwoman Saratha Goggins
City Councilman O. Mays
City Councilman Nathaniel Martin
City Councilman Elizabeth Omar

ATTACHMENT 3

BRIEF OF THE CITY OF CLEVELAND, OHIO

DATED: FEBRUARY 23, 1998

PLAIN DEALER

E. Cleveland makes deal with CSX

hite says 'bribery' ed about-face pact th railroad firm

By JOHN F. HAGAN
and KEVIN HARTER
PLAIN DEALER REPORTERS

AST CLEVELAND — Break- ranks with Cleveland and er affected communities, East veland Mayor Emmanuel unwor signed an agreement terday with CSX Transporta- tion dropping his city's opposition to the railroad company's planned merger and expansion.

The move set off an angry rebuke from Cleveland Mayor Michael R. White, an opponent of the plan, who labeled the deal "bribery," and said it was proof that "CSX is attempting to isolate Cleveland from neighboring communities by attempting to buy out our neighbors and pick them off — one by one."

East Cleveland, which will receive more than $2 million from CSX as part of the agreement, is the first Cuyahoga County community along the rail route to sign off on the merger.

The merger would blend what is now Conrail into CSX and Norfolk Southern. CSX trains traveling from Buffalo would come into Cleveland's Collinwood neighborhood, pass through East Cleveland, University Circle, cross the Cuyahoga River and travel to Berea before continuing west.

The proposal would increase traffic along one route, called the Short Line, from about seven to about 45 trains per day.

Within hours of East Cleveland's announcement, Onunwor received notice from Cleveland saying its Division of Water was no longer considering taking over East Cleveland's water system. That takeover would have saved East Cleveland the costs of running its own water system, and the talks had been going on for two years.

Onunwor called the notice "quick and unChristian-like retaliation," and said White was "attempting to intimidate those who disagree with him into accepting his way of thinking."

White said in a statement that he was disappointed and surprised with East Cleveland's decision in light of Onunwor's previously stated opposition to the CSX plan.

SEE JOBS/5-B

Plain Dealer, Feb 17, 1998 (PSD)

East Cleveland Mayor Emmanuel Onunwor, right, explains why the city is withdrawing its opposition to the proposed merger of Conrail with CSX Transportation and Norfolk Southern. Looking on are, from left Stephen L. Watson, CSX regional vice president, Councilwoman Saratha Goggins, Councilman O. Mays, Councilman Nathaniel Martin, Michael J. Ruehling, CSX vice president for state relations and Council President Jeremiah Johnson.

E. Cleveland has deal with CSX Transportation

JOBS FROM 1-B

Onunwor had attended a White news conference earlier this year to discuss opposition to the rail merger. Further, Onunwor has written to the federal Surface Transportation Board, which must approve the merger, saying his city was "deeply concerned" about the merger's adverse impact on East Cleveland.

In explaining his about-face, Onunwor said that after he looked at the issue more clearly "my eyes were open to the reality of this plan."

He also said an alternative rail route proposed by White provided economic development for Cleveland "and nothing for us."

CSX has agreed to pay East Cleveland $2 million over four or five years. That money could go for safety training, ensuring that the city could respond to railroad emergencies.

CSX will give the city an additional $200,000 to help with city planning for the expansion. And the railroad has promised that 15 percent of the jobs that would be created at the proposed Collinwood intermodal center will go to residents of East Cleveland.

The railroad estimates that 110 jobs would be created, meaning 17 jobs would go to the suburb's residents.

CSX also will develop a noise-[illegible] between tracks and homes. A CSX study identified 120 homes and apartments that may be affected by the increase in train traffic. CSX will provide $4,000 per residence for insulation, sound-proofing and other improvements, and for relocation in some cases.

White was critical of that amount, noting that Cleveland pays much more — $19,000 — in construction for sound insulation of homes near Cleveland Hopkins International Airport.

East Cleveland City Council passed a resolution Tuesday supporting the agreement with CSX. Council President Jeremiah Johnson said the economic opportunities that come with the CSX package "are just too good to pass up."

CSX spokesman Robert L. Gould said the railroad continues to work to resolve the concerns of those affected by the proposed merger.

"We are working with the affected communities and we are pleased East Cleveland has agreed to support us in return for some seed money," Gould said.

Bay Village Mayor Thomas L. Jelepis said he was not surprised by East Cleveland's move. "The divide-and-conquer strategy of the railroad seems to have worked," said Jelepis, the spokesman for West Shore mayors, which have been fighting the proposed merger since August.

(landscaping and other business)

PERG

Plain Dealer (P. 1B)

SATURDAY, FEBRUARY 21, 1998 B

Railroads bargaining for support

Promises of aid drawing suburbs behind merger

By KEVIN HARTER
PLAIN DEALER REPORTER

Three more suburban mayors appear ready to support a proposed railroad merger that will bring more trains through their communities.

The support from the cities — Brook Park, Berea and Olmsted Falls — would come with the promise of multimillion-dollar improvements to reduce road-rail traffic jams.

Brook Park Mayor Thomas J. Coyne said yesterday that a tentative agreement has been reached between the three cities and CSX Transportation and Norfolk Southern railroads. The railroads want to acquire Conrail and divide its routes as part of an estimated $10 billion merger.

"We have, in principle, an agreement," Coyne said. In addition to the road improvements, the railroads would, as a federal condition of the merger, make other improvements, including noise abatement.

The railroads would pay for a major portion of the improvements. City and railroad officials would work with state and federal officials to raise the remainder of the money needed for underpasses and overpasses to keep traffic flowing through the communities.

Olmsted Falls Mayor Tom Jones said if improvements are made at no cost to the cities, it will resolve a major problem that would have been made significantly worse by the merger.

"If we can work this out, in the long term, the city will be better off if the acquisition takes place," Jones said. "I was encouraged by the railroads' willingness to work with us to find mutually agreeable solutions, but there's still a lot that must be done."

Berea Mayor Stanley J. Trupo did not return phone calls yesterday. Norfolk Southern officials also did not return calls.

Robert L. Gould, CSX spokesman, said he could not comment until the agreement was signed. But he agreed with Coyne and Jones that there was cause for optimism. "We are making great progress," he said.

If the federal Surface Transportation Board approves the merger in July, CSX will take over Conrail's Collinwood Yard and increase freight train traffic on the "short line" — between Collinwood and Berea — from about seven trains each day to about 45.

Norfolk Southern has proposed increased freight train traffic along the shoreline, which travels through Cleveland and the densely populated west shore suburbs, including Lakewood. As an alternative, the railroad has said it could divert some traffic south, through Berea.

That caused concern in Brook Park, Berea and Olmsted Falls. All of the merger proposals — and alternative plans — increase traffic through the three communities, but Berea would experience the greatest impact because the two railroads would cross there, creating downtown gridlock.

Several underpasses or overpasses are needed, Coyne said, including at Snow Rd. in Brook Park, Bagley Rd. in Berea and

(continued)

Plain Dealer
(p. 4B)
February 21, 1998

promises lift support for merger

RAILROADS FROM 1-B

The biggest hurdle is how to pay for the improvements. Rep. Steven C. LaTourette, who met with Coyne yesterday, was also optimistic. "The news is more good than bad. We are moving in the right direction," he said.

LaTourette, a member of the House Transportation Committee, said Congress will soon revise and could fund projects, including those needed in Berea.

"Our job is to figure out how much will be federal, local and what the railroads will kick in," he said.

If the tentative agreement becomes a reality, it could lead to an agreement between west shore communities and Norfolk Southern.

"Things are moving quickly," said Bay Village Mayor Thomas L. Jelepis, spokesman for mayors from Bay Village, Rocky River, Westlake and Lakewood, who organized to oppose the merger last August.

Jelepis said the goal of the mayors remains the same — that the merger does not jeopardize safety, harm the quality of life or cost any of the affected communities money.

Negotiations continued with Norfolk Southern yesterday, he said, but nothing will be done until all the mayors can meet with Rep. Dennis J. Kucinich, who has been out of the country.

Kucinich, in a phone interview from Bosnia yesterday, called the proposed deal interesting.

"I look forward to reviewing it when I return," he said. "Our goals all along have been to protect the city of Cleveland and the west shore from the hazards or increased traffic while providing the suburbs to the south with protection in the form of underpasses and overpasses," Kucinich said.

If those southern suburbs are happy, and some of the trains can be diverted from the west shore down through Berea, it would ease some of the west shore's concerns, Jelepis said.

A deal with Brook Park, Berea, Olmsted Falls and the railroads threatens an alternative routing plan proposed by Mayor Michael R. White, which the railroads rejected, and the mayors of the southwest Cuyahoga County communities questioned.

continued →

East Cleveland Mayor Emmanuel Onunwor also rejected Cleveland's plan and signed an agreement this week dropping the city's opposition to the pro-

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A deal with Brook Park, Berea, Olmsted Falls and the railroads threatens an alternative routing plan proposed by Mayor Michael R. White, which the railroads rejected and the mayors of the southwest Cuyahoga County communities questioned.

East Cleveland Mayor Emmanuel Onunwor also rejected Cleveland's plan and signed an agreement this week dropping the city's opposition to the proposed merger and expansion.

"Cleveland's proposal just didn't make any sense," Coyne said. "The city of Cleveland cannot drive every issue."

White, who continues to lead his own campaign to oppose the merger, issued a one-paragraph statement on the pending deal.

"We are aware that the railroads are in continuous communication with representatives of the west shore cities. Our administration is continuing our dialogue with these communities as well. We have worked well in the past, and I would anticipate that we will continue to do so."

PLAIN DEALER (EDITORIAL) FEB 22, 1998

Derailing a crusade

East Cleveland's deal with CSX undercuts Cleveland but reflects need to resolve its own problems

The Cleveland-led crusade against proposals that would change railroad traffic patterns in parts of the city and neighboring communities turned nasty last week when impoverished East Cleveland cut its own deal with CSX Transportation Inc.

AGENDA '98

THE REGION

What East Cleveland did was bargain for the railroad to address concerns raised by the suburb's officials and residents. Money was promised, it is true, but for Cleveland Mayor Michael R. White to characterize the deal as "bribery" was ungracious and deserved the blistering response it elicited from East Cleveland Mayor Emmanuel W. Onunwor.

White no doubt considered Onunwor's action a betrayal of the coalition White had attempted to forge against routes chosen by CSX and Norfolk Southern for their heavy traffic once they have carved up Conrail. Perhaps he blamed the railroad more than his fellow mayor.

But when, with suspicious timing, Cleveland said it was no longer interested in acquiring East Cleveland's water system, as it had been negotiating to do to the potential advantage of both cities, it was hard not to conclude that White was punishing one of the most economically disadvantaged communities in the state.

Yet East Cleveland has more at stake than its big neighbor in attempting to minimize the impact of a CSX plan to operate 44 trains a day along the so-called Short Line, a belt of track that curves south and west from Cleveland's Collinwood yards. Two miles of railroad run through residential districts of the suburb, about 1.3 miles in Cleveland.

Onunwor struck a deal he saw no need to be ashamed of; provisions include soundproofing of nearby homes or relocation of residents, and $2 million toward training of safety forces to deal with railroad emergencies. He also received a promise that 15 percent of jobs to be created at a proposed Collinwood intermodal center would go to residents of East Cleveland.

Cleveland officials dispute the effectiveness of trackside anti-noise measures proposed by CSX. And they are contemptuous of the amount the railroad will pay to soundproof homes. The mayor is fond of citing the larger amounts that Cleveland will pay for similar work on homes near Cleveland Hopkins International Airport, but what he's really doing is comparing apples with oranges.

Cleveland has every right to drive a hard bargain with the railroad, but it simply is not true, as Cleveland officials allege, that CSX has made no move to ease the city's concerns over vastly increased use of the Short Line. It is not clear, however, how good-faith negotiations can take place when the White administration is dead-set against any major diversion of traffic to the Short Line, preferring that trains use the lakefront.

For the most part, the Short Line is free of grade crossings — the bane of emergency squads, motorists and those wakened easily by railroad whistles in the dead of night. Where crossings exist, in Brook Park and Berea, officials seem ready to follow in East Cleveland's footsteps and work out deals of their own.

Of course, CSX-Norfolk Southern's plans for Conrail will have an impact throughout Cuyahoga County and the entire region. On balance, however, benefits to the entire area should outweigh the disadvantages that might be felt here and there throughout the network. And even those difficulties can be surmounted.

That could be especially true if, like East Cleveland, the affected communities identify where increased traffic could be troublesome and demand that the railroads mitigate those concerns.

ATTACHMENT 4

BRIEF OF THE CITY OF CLEVELAND, OHIO

DATED: FEBRUARY 23, 1998

STB FD 33388 2-23-98 E 185897

185897

DONELAN, CLEARY, WOOD & MASER, P.C.

ATTORNEYS AND COUNSELORS AT LAW
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1100 NEW YORK AVENUE, N.W.
WASHINGTON, D.C. 20005-3934

OFFICE: (202) 371-9500

TELECOPIER: (202) 371-0900

February 23, 1998

E

Via Hand Delivery
Honorable Vernon A. Williams
Office of the Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: Finance Docket No. 33388

Dear Secretary Williams:

Please find enclosed for filing in the above-referenced proceeding an original and twenty-five (25) copies of this letter brief submitted on behalf of The National Industrial Transportation League.

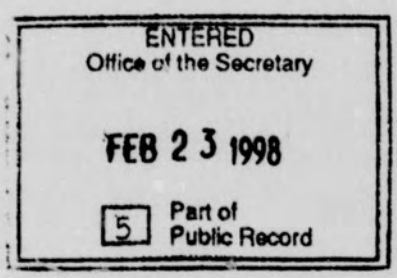
Respectfully submitted,

Nicholas J. DiMichael

Nicholas J. DiMichael
Attorneys for The National Industrial
Transportation League

ENCLOSURES
0124-532

cc: All Parties of Record



185897

DONELAN, CLEARY, WOOD & MASER, P.C.

NITL-13

ATTORNEYS AND COUNSELORS AT LAW
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1100 NEW YORK AVENUE, N.W.
WASHINGTON, D.C. 20005-3934

OFFICE: (202) 371-9500

TELECOPIER: (202) 371-0900

February 23, 1998

Hon. Vernon A. Williams
Secretary
Surface Transportation Board
Room 711
1925 K St. N.W.
Washington, D.C. 20423-0001

RE: Finance Docket No. 33388

Dear Secretary Williams:

This letter brief is being filed by The National Industrial Transportation League ("League") in this proceeding. The League has filed this day a joint brief along with several other parties to this proceeding, related to certain in this proceeding (NITL-12). This letter brief is to discuss other issues related solely of concern to the League.

First, on December 12, 1997, the League entered into a settlement agreement with Norfolk Southern and CSX with respect to certain issues raised in the League's October 21 Comments. The League now supports the transaction in all respects other than matters directly related to certain Post-Implementation Rate Conditions contained in its October 21 Comments that are defined in the settlement agreement . Those Post-Implementation Rate Conditions are in fact the conditions that are the subject of the joint brief. On January 13, 1998, the League filed a Supplement to its Comments and Requests for Conditions (NITL-11) that discussed the settlement agreement entered between the League, NS and CSX, along with a motion requesting leave to file that Supplement. The League's position with respect to the settlement is contained in NITL-11.

Finally, the League wishes to comment on one other aspect of the proposed transaction, namely, operating restrictions that have been or may be proposed for this transaction in order to accomodate a variety of concerns, including environmental concerns.

The League believes that it is crucial for shippers nationwide that implementation of this transaction should avoid the severe service problems that have plagued the implementation of the merger of the Union Pacific and Southern Pacific. Thus, the League would be very concerned about imposition by the Board of localized operating restrictions or forced reroutings that would undermine the efficiency of the carriers' proposed operations. The League believes that, while environmental concerns must be considered, mitigation of environmental effects must be balanced against the harm that might be caused to the national transportation system as a result of such mitigation.

In this connection, the League would note that the Board is required, as part of its evaluation of the public interest in a proceeding that involves the control of two or more Class I rail carriers, to consider the effect of the proposed transaction on "the adequacy of transportation to the public." 49 U.S.C. §11324(b). Unwise or inefficient operating restrictions imposed for otherwise laudable purposes, or traffic disruptions resulting from reconstruction of lines to mitigate alleged envirommental harm, could undermine this important consideration, and result in severe service disruptions.

The League appreciates this opportunity to make its views known to the Board.

Sincerely,

NICHOLAS J. DIMICHAEL

Counsel for The National Industrial Transportation League

cc: All parties of record

185894

National Mining Association
Foundation For America's Future

Harold P. Quinn Jr.
Senior Vice President
Legal and Regulatory Affairs
General Counsel and Secretary

February 23, 1998

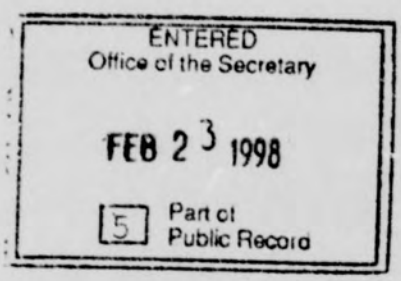
BY HAND DELIVERY

Office of the Secretary
Case Control Branch: Attn: STB No. 33388
Surface Transportation Board
1925 K Street, N.W.
Room 715
Washington, D.C. 20423-0001

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

Dear Sir/Madam:

Please find enclosed for filing in the above-referenced proceeding, an original, 25 copies, and 3.5-inch diskette (labeled "STB FD-33388, NMA-3) containing the Brief of the National Mining Association.



Respectfully submitted,

Harold P. Quinn, Jr. by MB

Harold P. Quinn, Jr.

Enclosures

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

BRIEF OF THE NATIONAL MINING ASSOCIATION

In comments filed with the Surface Transportation Board ("STB") on October 21, 1997, the National Mining Association ("NMA") requested that the STB impose the following conditions for approval of the subject application to acquire, control, and operate assets of Conrail: (1) Applicants prepare and file a detailed initial plan of operations which addresses actions to avert service disruptions and to assure, at no less than prevailing service levels, continuation of railroad transportation services provided coal producers and consumers; (2) the STB afford at least a 120-day comment period to respond to such plan proposed by applicants; (3) the STB require applicants to adhere to the approved plan as a condition of approval of the application. *See NMA Comments and Requests for Conditions* (Appendix A).

NMA again requests that the STB impose these conditions because they are in the public's interest in the continuation of a sound and efficient transportation system in the eastern United States. The recent experience in railroad services in the western United States following major railroad mergers and consolidations clearly evince the importance of assuring that the pending transaction will not diminish railroad freight services. *See Rail Service in the Western United States*, STB Ex Parte No. 573. NMA submits that in view of the recent oversight activities and measures taken by railroads in the west to recover from a serious deterioration in services, it is particularly appropriate for the STB to take meaningful actions here through conditions of approval in order to avert similar problems in the east as a result of the pending transaction.

NMA has examined the applicants' "safety integration plans" entered into the public record of this proceeding on December 5, 1997 in response to a request of the United States Department of Transportation's Federal Railroad Administration. The proposed measures to assure safety with regard to train operations, railroad employees, and the public is a desirable step in the process of considering the application. Likewise, it is important to document a "detailed initial plan of operations", as requested by NMA, to ensure that, in addition to safety considerations, service and performance criteria are established to assure that producers, consumers, and shippers have access to reliable, efficient and reasonably priced railroad transportation services without interruption throughout the service areas in existence now for Conrail and the rail carriers owned and operated by CSX and NS in the eastern United States.

CONCLUSION

NMA strongly supports the development and continuation of reliable and efficient railroad freight transportation services. Toward this end, NMA requests that the Board, as a condition for approval of the application, require: the Applicants to submit a detailed initial plan of operations designed to ensure the continuation of rail service at performance levels at least equal to that currently provided by Conrail; public comment in response to the plan; revisions to the plan as necessary in response to such comment; and adherence to the plan by the applicants.

Respectfully submitted,

Harold P. Quinn, Jr. by M

Harold P. Quinn, Jr.
Senior Vice President and
General Counsel
National Mining Association
1130 17th Street, N.W.
Washington, D.C. 20036
(202) 463-2652

February 23, 1998

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of February, 1998, a copy of National Mining Association's "Brief" in STB Finance Docket No. 33388 has been served by first class mail, postage prepaid, upon Administrative Law Judge Jacob Leventhall, each of the Applicants' representatives and all Parties of Record.

Harold P. Quinn, Jr. by MLS

Harold P. Quinn, Jr.

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

COMMENTS AND REQUEST FOR CONDITIONS
IN RESPONSE TO THE
CSX AND NS APPLICATION TO ACQUIRE,
CONTROL AND OPERATE ASSETS OF
CONRAIL

The National Mining Association ("NMA") submits the following comments and request for conditions in response to the application filed by CSX Corporation and CSX Transportation, Inc. ("CSX"), Norfolk Southern Corporation and Norfolk Southern Railway Co. ("NS"), and Consolidated Rail Corporation ("Conrail") seeking the Surface Transportation Board's ("the Board") authorization for the acquisition by CSX and NS of control of Conrail and the division of assets of Conrail by and between CSX and NS.

IDENTITY AND INTERESTS OF THE NATIONAL MINING ASSOCIATION

NMA is an industry trade association whose members are engaged in the mining and processing of coal and minerals; the manufacturing and supplying of mining and minerals processing machinery, equipment, materials and services; and other minerals-related activities. The mining industry produces vital resources needed to fuel our economy and manufacture virtually all commodities sold in domestic and foreign markets. Coal is used to generate 56 percent of the electricity consumed on an annual basis in the United States. Mining companies produced $39 billion worth of nonfuel minerals last year, which in turn were used to manufacture $395 billion worth of products for use by Americans and for export to trading partners around the world. The principal purpose of NMA is to represent those with interests in the Nation's mineral resource industries in the important public policy issues affecting the development and use of mineral resources. Toward this end, NMA seeks to develop policies that will foster the efficient production, distribution and use of mineral products.

NMA's members produce approximately two-thirds of the coal produced in the United States and most of the Nation's non-metallic minerals and metallic ores. NMA's members rely on the timely availability of efficient railroad transportation services for the distribution of their products to domestic consumers, and to inland and coastal port terminals where their products are transloaded into vessels destined for domestic or export markets. The acquisition of Conrail by CSX and NS will result in a massive restructuring of the railroads in the eastern United States, and will impact long-haul shipments of mineral products, machinery and supplies within the eastern United States and by connections with western railroads throughout the Nation.

Coal relies on railroad transportation services continually throughout the year. In 1996, railroads were called upon to originate more than 705 million tons of coal freight, approximately 70 percent of total coal production in the United States. In terms of both originated and terminated coal traffic, the railroads handled almost 869 million tons of coal in 1996, or approximately 40 percent of total railroad freight tonnage carried by Class I railroads. Railroad coal transportation demand is a substantial component of the total demand for railroad transportation services, and requires a relatively constant level of transportation services month-to-month inasmuch as coal is the low cost fuel of choice for generating 56 percent of the Nation's electricity. More than 80 percent of all coal mined in the U.S. is consumed for domestic power generation. Accordingly, there must be certainty in the delivery system as now provided by CSX, NS, and Conrail. Another 90 million tons of coal are moved annually to port terminals for export to other countries with much of the coal export tonnage handled by CSX, NS, and Conrail in shipments from mines to ports on the Atlantic Coast.

I. THE ACQUISITION, CONTROL AND OPERATION OF CONRAIL'S ASSETS BY CSX AND NS WOULD IMPOSE A NEW AND SIGNIFICANTLY HIGHER DEMAND ON THE CARRIERS' COAL TRAFFIC OPERATIONS.

In 1996, CSX originated 157 million tons of coal and handled more than 171 million tons of coal including coal tonnage originated and/or terminated by the rail carrier. In the same year, NS originated more than 115 million tons of coal and handled nearly 135 million tons of coal. Conrail originated more than 53 million tons of coal and handled nearly 70 million tons of coal. In 1996 CSX, NS, and Conrail together originated 325 million tons of

coal, or 46 percent of all coal freight tonnage which was originated by the Nation's railroads last year.

That level of coal traffic on the three railroads in 1996 was typical of the railroad coal transportation demand during the mid-1990's and remains so today. There have been times during the mid-1990's when coal transportation services in the eastern United States have been seriously inadequate due to:

1. Insufficient numbers of locomotives, crews and/or railcars in coal transportation service to accommodate the demand for timely coal shipments, especially to power plants in the eastern and southern United States.

2. Failure to provide effective communications between rail carrier dispatching and operations personnel and coal producers, shippers and consumers on train arrival times resulting in losses in productivity and economic harm.

3. Scheduling of major and lengthy track maintenance and rehabilitation work without adequate advance notice to coal producers, shippers and consumers.

These experiences considered with the forecasted one to three percent annual growth in the demand for electricity, and the quest of CSX and NS to attract more intermodal trailer-on-flatcar and container-on-flatcar traffic to their system, raises serious questions about the ability of CSX and NS to absorb the current demand for coal and noncoal transportation services now provided by Conrail immediately upon their acquisition, control and operation of Conrail's assets in June, 1998 as set forth in the current schedule established by the Board.

II. NMA DOES NOT OPPOSE CSX AND NS ACQUISITION, CONTROL AND OPERATION OF CONRAIL'S ASSETS IF CONDITIONED ON A PLAN OF OPERATIONS DESIGNED TO AVERT SERVICE DISRUPTIONS.

NMA's concerns with the subject transaction have been heightened substantially by the debilitating losses of critical coal transportation services in the western United States. The

current deterioration of transportation services in the western United States occurred after the Union Pacific Railroad absorbed the Chicago & NorthWestern Transportation Company and the Southern Pacific Transportation Co., including the Denver & Rio Grande Western Railroad Company and the St. Louis Southwestern Railway Company, which followed the Burlington Northern Railroad Company merger with the Santa Fe Railway Co. Whether or not the current service problems in the western United States result from the UP SP merger, or some other conditions that preceded the merger, the current difficulties there clearly disclose the need to ensure that the transaction under consideration here fully considers a plan of operations designed to avert service disruptions once CSX and NS begin to take over train movements now handled by Conrail.

Toward this end, NMA requests that the Board:

(1) Require the applicants to prepare and file a detailed initial plan of operations focused on actions to avert service disruptions and to assure continuation, at not less than prevailing service levels, the railroad transportation services provided coal producers, consumers and or shippers by Conrail as a condition to be met before approving the pending transaction;

(2) Provide for a public comment period of not less than 120 days for the public to respond to the detailed initial plan of operations; and

(3) Consider the comments, order appropriate revisions to the plan of operations, and require the applicants' adherence to the approved plan of operations as a condition for the approval of the subject transaction.

NMA's request is fully consistent with our Nation's rail transportation policy which, *inter alia*, provides that: "In regulating the railroad industry, it is the policy of the United States Government -- to ensure the *development and continuation of a sound rail*

transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense." 49 U.S.C. § 10101(4) (emphasis supplied). Similarly, in a proposed transaction of this nature, the Board, at a minimum, must consider "the effect of the proposed transaction on the adequacy of transportation to the public." 49 U.S.C. § 11324(b)(1).

The Board's responsibility and mandate in reviewing the pending transaction requires the consideration and imposition of necessary conditions which will ensure that services will continue at a level of performance at least equal to the prevailing level for railroad freight now handled by Conrail once CSX and NS take control of Conrail's assets. The operating plans for CSX and NS lodged in this proceeding describe steps to be implemented with regard to various commodity groups. *See Railroad Control Application, Vols. 3A and 3B.* These steps include actions which may be beneficial such as more single-line routes and less circuity for selected shipments. However, because many coal movements are served by only one rail carrier, the benefits of those actions, while appreciable, may become more apparent than real if the market dominant rail carrier fails to share with the shipper the benefits that may accrue from services that are less costly to the carriers because joint-line movements are eliminated and or distances traversed are less from origin to destination.

NMA's concerns about the pending transaction, however, are not based solely on the plight of a captive shipper, *per se*, since those concerns exist whether the condition is confronted at the immediate point at which a change in service from Conrail to CSX or NS occurs, or at a subsequent time. Rather, our concerns arise from two facets of the transition problem which must be considered carefully and addressed in this proceeding. First, the

development and implementation of enhanced transportation operations command and control facilities which unify dispatching of CSX trains including those acquired from Conrail, and of NS trains including those acquired from Conrail. Second, the preservation of sufficient operating personnel to assure that when the transaction occurs the applicants will provide railroad services commensurate with the anticipated demand and current performance levels. The subject application projects a net loss of about 2,650 jobs of the total employment of CSX, NS, and Conrail over the first three years, with many of those reductions occurring in the first year. Although the reduction of rail costs through measures designed to attain higher efficiency and productivity are welcome positive effects, premature massive reductions of the work force engaged in train operations could cause severe disruptions in train service before the newly expanded CSX and NS railroad systems have been rationalized from a systems management perspective.

CONCLUSION

NMA strongly supports the development and continuation of reliable and efficient railroad freight transportation services. Toward this end, NMA requests that the Board, as a condition for approval of the application, require: the Applicants to submit a detailed initial plan of operations designed to ensure the continuation of rail service at performance levels at least equal to that currently provided by Conrail; public comments in response to the plan;

revisions to the plan as necessary in response to such comment; and adherence to the plan by the applicants.

Respectfully submitted.

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October 21, 1997

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NLS-6

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 AND CONSOLIDATED RAIL CORPORATION

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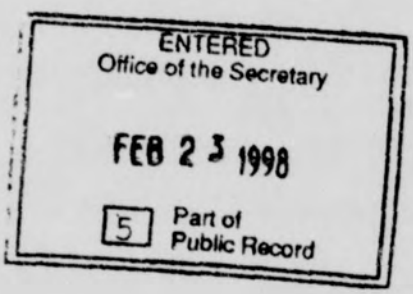
BRIEF OF NATIONAL LIME AND STONE COMPANY IN SUPPORT OF PROTEST AND REQUEST FOR IMPOSITION OF CONDITIONS



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February 23, 1998

TABLE OF CONTENTS

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NLS-6

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 AND CONSOLIDATED RAIL CORPORATION

BRIEF OF NATIONAL LIME AND STONE COMPANY IN SUPPORT OF PROTEST AND REQUEST FOR IMPOSITION OF CONDITIONS

SUMMARY OF ARGUMENT

In support of its Protest and Request for Conditions filed on October 21, 1997, National Lime and Stone Company (National) hereby submits its brief in this proceeding. The record in this matter shows that the proposed transaction, whereby CSX Corporation (CSX) and Norfolk Southern (NS) would acquire control of, and divide, the assets of Conrail Inc. (Conrail), will injure National in two ways that are material to the Surface Transportation Board's (Board) analysis of railroad mergers. First, the proposed transaction will significantly degrade the adequacy of essential rail transportation service presently provided to National. National relies heavily on single-line service provided by Conrail. After the transaction, National's only rail transport option to markets now served solely by single-line transportation from Conrail will involve joint-line service over CSX and NS. These markets are located to the east of National's

quarries in Carey and Bucyrus, Ohio. After the proposed transaction, joint-line service to such markets would involve, first, a movement on CSX, and then a movement on NS. This switch to joint-line service will degrade the character of rail transportation service currently linking National's Bucyrus and Carey facilities to destination markets in eastern Ohio, Pennsylvania and West Virginia. This "one to two" effect of the transaction will harm National in three ways: (1) transportation costs to National or its customers will increase; (2) rail cars will be more difficult to source; and (3) service will be slower and less reliable. The record shows that the switch to joint-line service will effectively bar National from selling its products in these eastern markets.

National faces a second category of injury as a result of the proposed transaction. With respect to its Carey facility, National's rail transport options will be reduced from at least three to two, and may be reduced as a result of the transaction from three to one. An important existing supplier of rail transport service -- Conrail -- will be lost immediately when the relevant Conrail facilities are controlled by CSX. At the same time, the proposed transaction is likely to divert business away from the Wheeling & Lake Erie Railway Company (WLE). WLE claims that if such diversion of traffic occurs, it will no longer be able to provide existing services. This threatens National with a reduction in its rail transport options at Carey from three to one.

To avoid a loss of essential services to National, National proposes a narrowly tailored trackage rights arrangement between CSX and NS. Such trackage rights would be provided only on those facilities over which National currently obtains single-line service from Conrail. This remedy will provide National with essential single-line service between Carey and Bucyrus and National's eastern markets. To assure that National retains at least two rail options, National proposes that, if WLE is not sustained as a viable alternative to CSX and one of the railroads

involved in this proceeding acquires WLE, then trackage rights over these WLE facilities must be offered to another railroad. Without this remedy, National will lose an important rail option serving its Carey facility.

THE STATE OF THE RECORD

The only credible testimony in this proceeding regarding the impact of the proposed transaction on National is the Verified Statement of Ronald W. Kruse, submitted as an attachment to National's October 23, 1997 Protest and Request for Conditions (NLS-2, Kruse VS). Mr. Kruse, National's Vice President of Marketing, explains in detail how the conversion of existing single-line service into joint-line service will result in the loss of an essential service to National. He also describes National's heavy reliance on WLE and how the loss of WLE as an independent service provider would injure National.

The Primary Applicants' December 15, 1997 rebuttal contains three pieces of "evidence" that purport respond to Mr. Kruse's Verified Statement. None of these materials undermines Mr. Kruse's testimony. The first is the Rebuttal Verified Statement of Donald W. Seale. With regard to National, that testimony is pure speculation and is entitled to no weight. As Mr. Seale acknowledged repeatedly during his deposition, his testimony is not based on any studies or analyses that specifically address National. See Attachment A (excerpts from the January 14, 1998 deposition of Donald W. Seale).

Next, the Primary Applicants claim that National's discovery responses in this proceeding weaken Mr. Kruse's testimony. As will be discussed in detail below, however, the Primary Applicants' have drawn conclusions from these discovery materials that cannot be supported by the materials themselves.

Finally, the Primary Applicants rely on the testimony of John W. Orrison. Mr. Orrison's Rebuttal Verified Statement, however, is "big picture" testimony. Mr. Orrison claims that if every request for trackage rights and other conditions put forward in this proceeding were granted, then the Primary Applicants would face difficulties achieving the increased operational efficiencies they desire. Orrison RVS, P-477. Mr. Orrison says absolutely nothing about the specific remedies sought by National. Mr. Orrison's testimony consists entirely of sweeping generalities that do not address the significant real-world harm to National Mr. Kruse identifies in his Verified Statement.

In sum, the record evidence in this proceeding fully supports National's request for conditions to avoid a loss of essential services by National and to avoid a loss of a critical rail transportation option.

GOVERNING STATUTES AND REGULATIONS

By statute, the Board shall approve and authorize the acquisition of control of a rail carrier by one or more other rail carriers "when it finds the transaction is consistent with the public interest."[1] In a proceeding involving the merger or control of at least two Class I railroads, the Board shall consider at least the following five factors:

> (1) the effect of the proposed transaction on the adequacy of transportation to the public;
>
> (2) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction;
>
> (3) the total fixed charges that result from the proposed transaction;
>
> (4) the interest of rail carrier employees affected by the proposed transaction; and

---

[1] 49 U.S.C. § 11324(c) (1994).

> (5) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region or in the national rail system.[2]

Subject to this same public interest standard, the statute authorizes the Board to "impose conditions governing the transaction, including the divestiture of parallel tracks or requiring the granting of trackage rights and access to other facilities."[3]

The Board's application of this statute is guided by its "policy statement" for mergers of Class I railroads, contained in 49 C.F.R. § 1180.1 (1997).[4] There, the Board explains that it "encourages private industry initiative that leads to the rationalization of the nation's rail facilities and reduction of its excess capacity" through, among other means, rail consolidation.[5] However, the Board does not favor consolidations if (1) the controlling entity does not assume full responsibility for carrying out the controlled carrier's common carrier obligation "to provide adequate service upon reasonable demand," or (2) the transaction "substantially reduces the transport alternatives available to shippers" unless there are substantial and demonstrable benefits to the transaction that cannot be achieved in a "less anticompetitive fashion."[6]

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2 49 U.S.C. § 11324(b) (1994).

3 49 U.S.C. § 11324(c) (1994). This "conditioning" provision does not explicitly refer to the public interest standard. However, the context of the statute and the legislative history establishes "beyond cavil" that it was Congress' intent that the Board "apply the same 'public interest' test both to the basic merger and to any conditions it imposes on the merger." Lamoille Valley Railroad Co. v. ICC, 711 F.2d 295, 301 n.3 (D.C. Cir. 1983) (Lamoille).

4 In the policy statement, the Board notes that its analysis is also guided by the national rail transportation policy contained in 49 U.S.C. § 10101 (1994).

5 49 C.F.R. § 1180.1(a) (1997).

6 Id.

The critical inquiry under the policy statement is whether the transaction is consistent with the public interest.[7] The policy statement states:

> In determining whether a transaction is in the public interest, the Board performs a balancing test. It weighs potential benefits to the applicants and the public against the potential harm to the public. The Board will consider whether the benefits claimed by the applicants could be realized by means other than the proposed consolidation that would result in less potential harm to the public.[8]

As potential benefits of a transaction, the Board will consider whether the transaction results in a financially sound competitor "better able to provide adequate service on demand."[9] This can occur where a transaction allows the consolidated carrier to realize operating efficiencies, including a "reduction in redundant facilities" and an increase in the traffic on under-used lines.[10]

The policy statement identifies two potential harms from a transaction -- "reduction of competition and harm to essential services."[11] With respect to a reduction in competition, the policy statement notes that a merger of two railroads serving the same market will result in a loss of competition. Whether or not this loss of competition is significant depends on the other transportation options available to serve those markets. The policy statement recognizes that "intermodal competition from motor and water carriers" may play a key role in this analysis.[12]

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7 49 C.F.R. § 1180.1(b) (1997).

8 49 C.F.R. § 1180.1(c) (1997).

9 Id.

10 49 C.F.R. § 1180.1(c)(1) (1997).

11 49 C.F.R. § 1180.1(c)(2) (1997).

12 49 C.F.R. § 1180.1(c)(2)(i) (1997). "In some markets the Board's focus will be on the preservation of effective intermodal competition, while in other markets (such as long haul (continued...)

As an example of a harm to essential services, the Board notes that a transaction often results in a shift in "market patterns."[13] In some instances, a carrier will lose its ability to serve a market due to such a shift in traffic.[14] The policy statement explains that a service is essential "if there is sufficient public need for the service and adequate alternative transportation is not available."[15]

Finally, the policy statement notes the Board's "broad authority" to impose conditions on consolidations, but states that such conditions frequently lessen the benefits of the transaction to both the carrier involved and the public.[16] The Board will not normally impose conditions on a transaction unless essential services are affected and the condition: (1) is shown to be related to the transaction's harmful effect; (2) is designed to enable shippers to receive adequate service; (3) would not pose "unreasonable operating or other problems for the consolidated carrier"; and (4) would not "frustrate the ability of the consolidated carrier to obtain the anticipated public benefits."[17] As discussed below, these standards are met in this case. Under its statutes and regulations, the Board can and should impose on the proposed transaction the conditions requested by National.

(...continued)
movement of bulk commodities) effective intramodal competition may also be important." Id.

13 49 C.F.R. § 1180.1(c)(2)(ii) (1997).

14 Id.

15 Id.

16 49 C.F.R. § 1180.1(d)(1) (1997).

17 49 C.F.R. § 1180.1(d)(1) (1997).

ARGUMENT

I. The Board should impose conditions to avoid a loss of essential services to National and its customers.

Consistent with the standards discussed above, the only probative and relevant record evidence demonstrates that National will suffer a loss of essential services as a result of the proposed transaction and that the conditions proposed by National will remedy this injury. See NLS-2, Verified Statement of Ronald W. Kruse. In their rebuttal submission, the Primary Applicants do not present credible evidence to the contrary. Thus, National has satisfied the Board's requirement that petitioners seeking the imposition of conditions "present substantial record evidence that approval of the primary application without imposition of the conditions will harm either their ability to provide essential services and/or competition."[18] In response, the Primary Applicants present no evidence whatsoever that the conditions proposed by National would pose an "unreasonable" operating problem for the Primary Applicants. Nor do the Primary Applicants even attempt to show that National's conditions will frustrate the Primary Applicants' ability to obtain anticipated public benefits. On the basis of the substantial record evidence supporting National's request for conditions, and the failure of the Primary Applicants to rebut this showing with evidence of its own, National has satisfied the Board's requirements for the imposition of the specific conditions requested by National to remedy a loss of essential services.

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18 CSX/NS -- Control -- Conrail, STB Finance Docket No. 33388, Decision No. 29 (Sept. 11, 1997), citing Lamoille, supra footnote 3.

A. The proposed transaction will result in a loss of essential services.

1. The Verified Statement of Ronald Kruse demonstrates that National will suffer a loss of essential services.

The record in this proceeding establishes that an essential rail service will be lost if the proposed transaction is approved without conditions. Following the proposed transaction, Conrail assets located in western Ohio will be controlled by CSX while Conrail assets located in eastern Ohio will be controlled by NS. National is one of the largest suppliers of crushed limestone products in Ohio.[19] National operates eight quarry and stone processing locations (at Bucyrus, Buckland, Carey, Delaware, Findlay, Lima, Marion, Upper Sandusky, and Wapakoneta, Ohio), four rail distribution yards (at Wooster, Canton, Tusky Valley (Midvale), and Cadiz, Ohio), and two truck distribution yards at (Rimer and Westerville, Ohio).

National ships its products by rail or by truck, as appropriate, given the availability of service and relative cost. National has for many years been a substantial shipper of limestone and limestone products on Conrail, CSX, NS and WLE. National currently has available to it single-line hauls on Conrail and CSX to major customers of National's limestone and limestones products produced at its Bucyrus and Carey, Ohio quarries. At Bucyrus, Conrail is the only provider of rail transportation service available to National. NLS-2, Kruse VS at p. 5. At Carey, National has three rail service providers: Conrail, CSX and WLE. Id. at p. 3. However, service

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19 Limestone aggregate products are used for road stone and construction. Limestone is used as an industrial mineral in the making of glass and steel. Limestone is also used in environmental protection processes and for agricultural purposes. Purchasers of limestone products select sources of supply based on particular chemical characteristics. NLS-2, Kruse VS at p. 2. National sells limestone as crushed stone for aggregate applications and processes limestone by drying or calcining to produce dried limestone and lime products, respectively, for industrial mineral uses.

on WLE is available to only a few destination markets; single-line service to several key destination markets is available only via Conrail or CSX. Id.

The record is unambiguous that these existing single-line services are essential to National and its customers. In his Verified Statement, Mr. Kruse described the specific movements originating at Carey and Bucyrus that will affected by the proposed transaction. NLS-2, Kruse VS at pp. 4-6. As Mr. Kruse explained, if National "were faced with the prospect of 'two line hauls' from Carey and Bucyrus to points east of Crestline, Ohio, it would suffer the loss of all the business currently shipped by Conrail from these locations[.]" Id. at p. 6. One reason for this result is that the proposed transaction will dramatically increase National's freight costs on the relevant movements originating at Carey and Bucyrus.

On the affected movements (on Conrail and WLE) originating at Carey, National estimates that the proposed transaction will increase its freight costs by $6,500,000 annually. Id. at p. 7. In 1996, these movements generated a total sales volume of $6,364,743.[20] Thus, on these Carey movements, the proposed transaction increases National's shipping costs by an amount that is greater than National's total sales volume on these movements. On the affected movements originating at Bucyrus, National estimates that the proposed transaction will increase its freight costs by $1,900,000 annually. Id. at p. 8. In 1996, these movements generated a sales volume of $3,107,460.[21] Thus, on these Bucyrus movements, the proposed transaction increases National's

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[20] Mr. Kruse sets out National's sales volume on each movement originating at Carey. Id. at pp. 4-5. When added together, the sales volume for these movements in 1996 equal $6,364,743.

[21] Mr. Kruse provides National's sales volume on each movement originating at Bucyrus. Id. at pp. 5-6. When added together, the sales volume for these movements in 1996 equal $3,107,460.

shipping costs by an amount equal to 60 percent of National's total sales volume from these movements. If faced with such increases in its shipping costs as a result of the proposed transaction, National obviously would not be able to sustain its sales to its eastern markets that are now accomplished using single-line Conrail service.

Mr. Kruse also explained that the proposed transaction will degrade the quality of transportation service National currently receives. With the onset of joint-line service, the "need for coordinating between the two lines for switches of locomotives and transfer of cars would inevitably result in delays and poor service to the detriment if National's ability to deliver timely products to its customers." Id. at p. 7.

Compounding the injury to National, National has invested significant sums based on the assumption that National would continue to have access to single-line service over existing single-line routes. National has invested in excess of $6,200,000 to acquire the property and to make the improvements for its sales yards in eastern Ohio (in Wooster). NLS-2, Kruse VS at p. 8-9. According to Mr. Kruse, this entire investment "would be worthless if National is unable to ship its aggregate products to these locations by rail via single line hauls." Id. In addition, National has invested in excess of $6,000,000 to make capital improvements at its Bucyrus plant. Id. at p. 9. Once again, this investment was "predicated on producing limestone products for its sales yards in eastern Ohio. This investment would be rendered useless if National is unable to ship its aggregate products to these locations by rail via single line hauls." Id. Moreover, as a result of the impact of the proposed transaction, more than 40 people would lose their jobs. Id.

The proposed transaction also has the impact of allocating one key part of Nationals' business (its Carey and Bucyrus plants) to a service territory controlled by CSX. A second key

component of National's business (its sales yard at Wooster) will be allocated to the NS service territory. Presently, single-line rail service from Conrail provides an essential service integrating these different facilities and linking these facilities to key markets. Without such single-line service, National's ability to ship its product will suffer tremendous damage. At the same time, National's customers will lose National as an economically viable competitor for their custom. These customers will suffer economic injury because National will no longer constrain the prices charged or quality of product and service provided by other suppliers that are not injured by the proposed transaction.

Finally, Mr. Kruse's testimony establishes that no other form of transport -- including joint-line rail movements and/or trucking -- will protect National from the harmful effects of the proposed transaction. Because it results in increased costs and lower reliability and quality of service, joint-line service is not an adequate substitute for the single-line service National will be losing. See NLS-2, Kruse VS at p. 6-7. Trucking is not a viable alternative because of the volume of truck shipments that would be needed and because shipping by truck would drive up National's transportation costs. Id. at p. 7.[22]

The situation confronting National is similar to that discussed by the ICC in Union Pacific/MKT.[23] There, the ICC found that trucking was not competitive with rail with respect to shipments from particular aggregate quarries to the Houston destination market:

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[22] Likewise, shipping by barge is not an option for National. NLS-2, Kruse VS at p. 3 ("Barge shipping is not available to National, as the closest navigable body of water, Lake Erie, is 60 miles from Carey and 50 miles from Bucyrus.").

[23] Union Pacific Corp. et al. -- Control -- Missouri-Kansas-Texas Railroad Co. et al., Finance Docket No. 30800, 4 I.C.C. 2d 409 (1988), aff'd on other grounds sub nom., 883 F.2d 1079 (D.C. Cir. 1989).

> The Houston area provides essentially the only market for these aggregates. Truck transport is prohibitively expensive for the long haul; crushed stone is a high bulk, heavy loading commodity, for which motor carriers are effective only for a distance of less than 75 to 100 miles. There are no barge connections from these quarries to the Houston market. Rail, therefore, provides the only access to the Houston area.[24]

In Union Pacific/MKT, as here, the extra expenses associated with trucking and the sheer volume of trucks needed meant that such intramodal competition could not protect the affected shipper.[25] In addition, the ICC recognized the injury to shippers because: (1) other sources of crushed stone would be of limited suitability for the markets served by the shippers; and (2) the crushed stone shipper had made "a considerable investment in rail delivery facilities and equipment."[26] Customers frequently select National's limestone products due to the specific chemical characteristics of the limestone available at National's quarries. NLS-2, Kruse VS at p. 2. In addition, National has invested more than $12,000,000 in facilities that will be rendered useless if National loses its existing single-line services. Id. at pp. 8-9. Thus, both of the factors relied upon by the ICC in Union Pacific/MKT are present here as well.

In sum, consistent with the Board's policy statement on railroad mergers, 49 C.F.R. § 1180.1(c)(2)(ii) (1997), the record evidence submitted by National establishes that continued

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24 Id. at 464.

25 As one shipper of crushed stone in that case explained, "truck movements from TCS' quarry to the Houston receivers would not be feasible, both because an extraordinary number of trucks would be required to move even a portion of the crushed stone, and because the added expense would price TCS out of the market." Id. at 466.

26 Id. at 466. Although the ICC's in Union Pacific/MKT was evaluating the competitive effects of that transaction, the same inquiry is relevant to an essential services claim. In both instances, the lack of a viable form of alternative transportation service shows that such alternatives will not mitigate an injury threatened by a proposed transaction.

access to single-line service linking its Carey and Bucyrus plants to National's eastern markets is essential both to National and its customers. In addition, because neither joint-line service nor intramodal service can duplicate the high quality and low cost associated with single-line service, there is "no adequate alternative transportation" available to replace this existing single-line service.

2. The Primary Applicants have failed to rebut Mr. Kruse's testimony.

In response to National's protest and Mr. Kruse's Verified Statement, the Primary Applicants contrived several arguments for why the loss of single-line service will not harm National as much as National believes. None of these arguments is supported by credible record evidence. Hence, Mr. Kruse's testimony that National will lose an essential service is uncontroverted.

The Primary Applicants proffered only a single rebuttal witness, Mr. Donald W. Seale, to address the impact of the proposed transaction on National. However, Mr. Seale offers only a few generalized statements about the potential for stone producers in some instances to ship via joint-line service and for such shippers to obtain access to new single-line services after the proposed transaction. See Primary Applicants' Rebuttal (PAR) Vol. 2B, Seale RVS at P-491-98. As he admitted in his deposition, however, none of Mr. Seale's conclusions is based on any study or analysis of the situation confronting National. Seale Deposition, Attachment A at pp. 52-61.[27]

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[27] In CSX/NS -- Control and Operating Leases/Agreements -- Conrail, STB Docket 33388, Decision No. 64 (decided January 28, 1998), the Board upheld the Administrative Law Judge's decision allowing a party to depose a CSX rebuttal witness. The Board relied on Union Pacific Corp. -- Control and Merger -- Southern Pacific Rail Corp., Decision No. 35, slip op. at 3 (served May 9, 1996), where the Board permitted a party to cross-examine a rebuttal witness "and address the deposition testimony in its brief."

Indeed, at one point in his deposition, Mr. Seale acknowledges that a statement contained in the Primary Applicants' rebuttal statement regarding National was "just a guess" and admitted that "the marketing folks and the sales folks of National Lime and Stone are in the best position to determine" how the proposed transaction wold affect National. Id. at p. 60.[28] As the deposition of Mr. Seale demonstrates, the Primary Applicants have failed to address the specific factual issues raised by National in this proceeding. Hence, none of the Primary Applicants' arguments in response to National's protest has any evidentiary support.

The Primary Applicants' principal argument is to suggest that joint-line service from NS and CSX will satisfy National's transport needs. Indeed, they boldly claim that "the creation of these new joint-line movements is not a harm to be remedied" by the Board. PAR Vol. 1 at P-490. In essence, the Primary Applicants are arguing that the loss of single-line service cannot result in a loss of an essential service so long as National has access to any rail service. This argument is unsustainable in light of Guilford Transportation Industries, Inc. -- Control -- Boston and Maine Corp., et al., Finance Docket No. 29720, 5 I.C.C. 2d 202 (1988). There, Canadian National Railway Corporation (CN) argued that the closure of a CN route would constitute a harm to essential services. The ICC noted that there were alternative rail transport routes. The ICC then went on to determine whether these alternate transport routes were in fact "adequate." The ICC explained that the court's remand order in Lamoille, supra footnote 3, offered the view that, although efficiency alone will not make a route essential, "unless the difference in efficiency

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[28] Similarly, when asked about the conditions National had requested in this proceeding, Mr. Seale admitted that he was "not aware of their concern." Id. at p. 46.

is minor, the public interest supports preserving the more efficient route."[29] Although the ICC in Guilford ultimately concluded that the route at issue was not essential, the agency acknowledged that the issue presented a "close case" in part because of the "superior service available over the CN route."[30] Here, as discussed above, there are dramatic cost and quality differences between the single-line service National currently receives and the joint-line service described by the Primary Applicants.

To support their claim that joint-line service is adequate service, the Primary Applicants rely on Mr. Seale's testimony. PAR Vol. 1, P-505. Mr. Seale claims that "joint line movement of stone can and does work in many cases" and that rail carriers can work together to "simulate" single-line service. Seale RVS, PAR Vol. 2B, P-495-96. In his deposition, however, Mr. Seale could recall only a single instance when NS had worked with a stone shipper through a joint-line arrangement. Seale Deposition, Attachment A at p.54. Mr. Seale did not rely on and was not aware of any study that indicates whether such "simulated" single-line service could offer adequate service between National's plants and its eastern markets. Id. at p. 55. In short, Mr. Seale's generalized assertion about the adequacy of joint-line service is based on no facts or studies that specifically address National and its shipping patterns.

[[[

]]] This criticism misses the mark. National is not claiming that the proposed

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29 Id. at 208.

30 Id. at 211.

transaction will injure every National movement. Rather, Mr. Kruse has explained that National will not be able to move its products to certain critically important destinations without continued single-line service. NLS-2, Kruse VS at p. 7. [[[

]]] In short, Mr. Kruse has specifically addressed the injury National will face over its existing single-line routes, and the fact that National has undertaken several unrelated joint-line movements from its Carey plant does not alter Mr. Kruse's conclusions.

In a related argument, the Applicants suggest that because they have agreed to adhere to Conrail's existing contracts, National will not suffer a loss of essential services. PAR Vol. 1 at P-506. This argument suffers two defects. First, Applicants have agreed to adhere to these contracts only until the end of 1999. PAR Vol. 2B, Seale RVS at P-497. This short time horizon does not permit National to recoup the investments of more than $12,000,000 National has made at Wooster and Bucyrus -- investments premised on the continued availability of single-line service at these locations. NLS-2, Kruse VS at pp. 8-9. In addition, the Primary Applicants' proposal to adhere to National's Conrail contracts through 1999 does not address the fact that joint-line service is less reliable and lower in quality than is single-line service. See pp. 11-12

above. The continuation of the Conrail contracts will not protect National from the severe decrease in the quality of service that would result from the proposed merger.

For the same reasons, the settlement agreement between the National Industrial Transportation League (NITL) and the Primary Applicants does not protect National from a loss of essential services. Under the NITL Settlement, the Primary Applicants have agreed that "single-line to joint-line" shippers will be allowed (upon request) to maintain their existing Conrail rates (subject to certain increases) for a period of three years. See PAR Vol. 1 at p. 29. As noted above, this "settlement" does not protect National's facility investments premised on continued access to single-line rail service, nor does the "settlement" avoid the service degradation that will accompany the conversion to joint-line service. The term of this proposal is too short to protect National from injury.

The Primary Applicants also assert that, because National ships a significant quantity of its product by truck, the loss of single-line service to eastern markets will not injure National. PAR Vol. 1 at p. 505. Once again, however, the Primary Applicants have not analyzed or addressed the specific situation confronting National. Mr. Kruse has explained that the movements at issue are critical to National's business, and that these specific movements will not take place without single-line service. NLS-2, Kruse VS at pp. 6-7. In his deposition, Mr. Seale described the factors that are relevant to evaluating whether trucks can compete with rail for a specific movement:

> Whether you are talking about rail miles or highway miles; whether [the rail route] is circuitous compared to a truck direct route; the availability of trucks in that market; the availability of backhaul commodities for round trip for trucking. All the factors and components of competition.

Seale Deposition, Attachment A at p. 59. Mr Seale, the Primary Applicants' only witness to specifically address National's claims, did not analyze any of these factors with respect to National's eastern shipments. Id. However, National's witness, Mr. Kruse, did consider these factors when he analyzed National's eastern shipments. NLS-2, Kruse VS at p.7.

As Mr. Kruse explained, if National switched to trucks to handle the movements from Carey at issue here, National estimates that its freight costs would increase by $6,500,000 annually. NLS-2, Kruse VS at p. 7. However, this assumes that enough trucks would be available. In fact, handling these movements by truck would not be feasible because "it would require in excess of 57,000" truck shipments. Id. In addition, the distances involved (160 miles, 250 miles and 210 miles) make truck shipments infeasible. Id. Likewise, from Bucyrus, a switch to trucks would increase National's freight costs for the movements at issue here by $1,900,000 annually. Id. at p. 8. For these movements, 22,000 truck shipments would be needed to replace rail service. Id. In sum, Mr. Kruse explained clearly why trucking is not a viable option for the National movements at issue here, while the Primary Applicants rest their case on speculative generalizations.[31]

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[31] [[[

]]] In addition, these arguments do not respond to Mr. Kruse's testimony that National has organized key aspects of its business around the availability of single-line service to eastern markets and has invested significant sums to expand its capacity to ship by rail. NLS-2, Kruse VS at pp. 8-9. Thus, even if a switch to trucks were feasible, National would lose significant facility investments made to enhance National's ability to ship via single-line rail service.

Finally, the Primary Applicants speculate that the "benefits to National's business that could result from new single-line rail service might very well exceed any harm to National's business resulting from the creation of joint-line movements." PAR Vol. 1 at P-506. Mr. Seale, however, acknowledged in his deposition that "there is speculation in that sentence and it's not to be judged as factual one way or the other. It's speculation." Seale Deposition, Attachment A at p. 61. [[[

]]] In addition, "new" single-line movements are not capable of addressing a fundamental harm the proposed transaction inflicts on National. Access to National's Wooster sales yard will be controlled by NS, while access to the Bucyrus and Carey plants is controlled by CSX. As noted above, National coordinates the operations of these different facilities through Conrail single-line services. Following the transaction, National will be unable to integrate these facilities. New single-line opportunities will do nothing to change this fact.

3. The Primary Applicants' claims that National is not injured by the switch to joint-line service are disingenuous and are contradicted by the Primary Applicants' own testimony.

In their unsuccessful attempts to rebut Mr. Kruse's Verified Statement, the Primary Applicants have danced around a fundamental flaw in their case. When the issue is directly presented, the Primary Applicants must concede that single-line service is far superior to joint-line

service. The corollary principle is that a switch from single-line service to joint-line service constitutes a material degradation of service to the affected shipper. The Primary Applicants have repeatedly acknowledged both of these facts.

The superiority of single-line service is a central justification for the proposed transaction. In their Application, CSX and NS boast about the benefits of moving from joint-line to single-line service. See Kalt VS at p. 28; Gaskins VS at p. Jenkins VS at p. In his Verified Statement, Mr. John W. Snow, CSX Corporation's Chairman, President and Chief Executive Officer, stated that 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 times, and less handling of freight." Snow VS at p. 9. In his Verified Statement, the Primary Applicants' witness Dr. Gaskins describes the service degradation that comes from joint-line service:

> Cars were frequently delayed, lost, mis-switched, and inefficiently prioritized -- while each carrier pointed to the other as the guilty party. As a result, shippers face an increase in actual transit time and transit time availability. As any inventory management professional will state, an increase in either will lead to a costly increase in product inventory levels, further reducing the attractiveness of rail.

Gaskins VS at p. 14.

The statements of the Primary Applicants' witnesses are consistent with ICC and Board precedent. For example, in the Burlington Northern/Santa Fe decision,[32] the ICC explained:

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[32] Burlington Northern Inc. and Burlington Northern Railroad Company -- Control and Merger -- Santa Fe Pacific Corporation and the Atchinson, Topeka and Santa Fe Railway Company, Finance Docket No. 32549, 1995 ICC LEXIS 214 (August 16, 1995) (BN/SF), aff'd, Western Resources, Inc. v. Surface Transportation Board, 109 F.3d 782 (D.C. Cir.
(continued...)

> Single-line service is important to shipper logistics strategies. Interchange between railroads can be costly. A single-line railroad route is becoming more important for carriers wanting to compete for more service-sensitive freight. As a result of the new single-line service capability of the combined BN/Santa Fe, shippers will likely see decreases in working capital requirements as base inventories shrink due to improved transit times, and as safety stocks of inventory are reduced because the combined system can eliminate the uncertainty of interchange. The transaction costs shippers incur in initial rate negotiations, in arranging equipment supply, in tracking shipments, and in billing and payment procedures, will likely be reduced.[33]

The Primary Applicants also acknowledged the inevitable degradation of service that accompanies a switch from single-line service to joint-line service. In deposition testimony attached to the protest of Martin Marietta Materials, Inc. (MMM-2), Mr. Snow and Mr. Gaskins confirmed that a switch from single-line service to joint-line service would have the effect of: extending transit times, diminishing operating efficiencies, increasing operating costs, increasing the handling of freight, and increasing the risk of loss and damage. See MMM-2 at pp.6-9 and attached deposition transcript pages. In their attempt to rebut National's protest, the Primary Applicants argue that possible benefits from new single line service might "exceed any harm to National's business resulting from the creation of joint-line movements." PAR Vol. 1 at D-506. Whether any new, realistic single-line movements will be available to National after the transaction is pure speculation. Seale Deposition, Attachment A at p. 61; [[[

]]] It is clear from the record, however, that the degradation of service that accompanies a conversion to joint-line service is an inherent feature of the proposed transaction.

(...continued)
1997).

[33] 1995 ICC LEXIS 214 at *167-68.

B. The conditions proposed by National are related to the transaction's harmful effect and will enable National to receive adequate service.

Under its policy statement regarding mergers of Class I railroads, the Board generally requires that a condition to remedy a loss of essential services be related to a transaction's harmful effects and be designed to enable shippers to receive adequate service.[34] Here, National has requested that the Board impose three conditions to address the loss of essential services to National:

1. CSX grants NS trackage rights from Crestline, Ohio to Spore (the site of National's Bucyrus plant);
2. CSX grants NS trackage rights from Upper Sandusky to National's Carey, Ohio plant; and
3. NS grants CSX reciprocal trackage rights to enable CSX to compete to deliver single-line service to National's existing and future markets east of Crestline, Ohio.

NLS-2, Protest at p. 3-4. As discussed above, the conversion of existing single-line service to joint-line service constitutes a loss of essential services. These conditions specifically remedy this problem. For example, if NS possesses trackage rights over the specific CSX facilities identified above, NS will be in a position to offer single-line service that links National's Bucyrus and Carey plants with National's key eastern destination markets.

By reinstating a single-line service option, National's proposed conditions remedy the two harmful effects of the proposed transaction: (1) National will not be forced to pay two separate rail carriers for services National can presently obtain through a single carrier; and (2) National

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[34] 49 C.F.R. § 1180.1(a) (1997).

will not suffer the delays and diminished quality of service that would occur if National's only option for these movements was joint-line service.

National does not seek to impose every detail of the contemplated trackage rights arrangement on NS and CSX. Indeed, if the Board here instructs NS and CSX to negotiate (and then file with the Board) a trackage rights arrangement that provides National with a single-line service option linking National's Carey and Bucyrus plants to its eastern markets, then the threatened loss of essential services to National can be avoided. This form of remedy is consistent with the ICC's action in BN/SF, supra footnote 32. There, at the request of Phillips Petroleum Company, the ICC required, as a merger condition, the grant of trackage rights by Burlington Northern (BN) to Southern Pacific (SP). These rights were in addition to those rights already agreed to by BN and SP in a settlement agreement. The Commission gave BN, SP and Phillips "an opportunity to reach a negotiated settlement respecting the precise details of the condition we are imposing. . . . If the parties are unable to agree to such terms, they shall submit, [within 120 days], separate proposals respecting implementation, and we will establish the terms." Id. at *253. Such an approach will protect National here, so long as the negotiated arrangements allow National to retain a single-line service option linking National's Carey and Bucyrus plants with its eastern markets.

Rather than contend that trackage rights would not remedy the injury identified by National, the Primary Applicants argue that the trackage rights requested are "new" and "unprecedented." PAR Vol. 1 at p. 491. Conditioning a merger on an agreement whereby the applicants transfer trackage rights is neither new nor unprecedented. The governing statute explicitly authorizes the Board to "impose conditions governing the transaction, including the

divestiture of parallel tracks or requiring the granting of trackage rights and access to other facilities."[35] The Board has "broad authority to impose conditions on consolidations[ ]"[36] The ICC has used its conditioning power to require a grant of trackage rights as a condition to its approval of a merger.[37] Regardless of whether the underlying injury is a "competitive" injury or an "essential services" injury, the same "public interest" inquiry guides the Board in establishing conditions.[38] Thus, so long as a condition is shown to be in the public interest, there is nothing new or unprecedented about the Board imposing such a condition. National has made just such a showing here.

C. The conditions will not pose unreasonable operating conditions or other problems for the consolidated carrier, nor will the conditions frustrate the ability of the consolidated carrier to obtain the anticipated public benefits.

The Primary Applicants argue that National's proposed conditions should be rejected because National has not analyzed the impact of these conditions on the operations of NS and CSX and that National's proposed conditions are vague and imprecise. PAR Vol. 1 at P-506-07.

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35 49 U.S.C. § 11324(c) (1994).

36 49 C.F.R. § 1180.1(d)(1) (1997).

37 Louisville & Nashville R.R. -- Merger -- Monon R.R., 338 I.C.C. 134, 145-56, 168-69 (1970). As the Seventh Circuit later explained, the "ICC stated that it would not approve the acquisition unless the L & N granted trackage rights; the L & N consented and completed the transaction." Matter of Chicago, Milwaukee, St. Paul & Pacific R.R. Co., 799 F.2d 317, 332 (7th Cir. 1986).

38 The "same 'public interest' test [applies] both to the basic merger and to any conditions it imposes on the merger." Lamoille Valley Railroad Co. v. ICC, 711 F.2d 295, 301 n.3 (D.C. CIR. 1983). See also Southern Pacific Transportation Co. v. ICC, 736 F.2d 708, 712 (D.C. Cir. 1984) ("In deciding whether and what conditions to impose, the Commission's guide is the public interest.").

The Primary Applicants then assert, relying on the Rebuttal Verified Statement of John W. Orrison, that grants of trackage rights are "potentially disruptive to CSX's operations." Id. at P-507. Significantly, the Primary Applicants present no testimony or evidence indicating that the specific conditions proposed by National will pose an operational problem for NS or CSX or that National's conditions will frustrate the Primary Applicants' ability to secure anticipated public benefits from the transaction.

Mr. Orrison's rebuttal testimony stands only for the proposition that the Primary Applicants might face difficulties achieving the increased operational efficiencies they desire if every request for trackage rights and other conditions put forward in this proceeding were granted. See Orrison RVS, PAR Vol. 2A at P-477-82. For example, Mr. Orrison argues that any "sudden, precipitous change in traffic flows would be detrimental -- possibly devastating -- to the successful implementation of the CSX Operating Plan." Id. at P-479. Mr. Orrison's testimony is not only weak in its conclusion, it is absolutely silent with respect to the problems and solutions identified by National.

National is not arguing that every condition proposed in this proceeding could or should be accommodated simultaneously. However, Mr. Orrison acknowledges that, even on the grand scale at which he is testifying, changes from the filed Operating Plans can be accommodated. He states: "I am not suggesting that change cannot be accommodated or even that change is undesirable. Exactly the opposite is true. The key is ensuring that change in traffic flows occurs gradually rather than as a sudden cataclysmic shift. We deal with traffic gains and losses constantly." Id. at P-480-81.

National's proposed conditions have been designed to avoid a loss of essential services -- but to avoid this injury in a flexible manner. National's approach gives the Primary Applicants the opportunity to negotiate a trackage rights arrangement in a manner that maximizes their ability to secure the operating efficiencies they seek in the proposed transaction. An effort by National to dictate the exact time and location of every train that will provide National with single-line service under the proposed conditions would be attacked by the Primary Applicants as "micro-management" of their post-merger operations. Instead, National seeks a remedy that can be implemented in a flexible manner so that National can retain continued access to essential services while allowing NS and CSX to maximize their ability to secure transaction-related efficiencies.

Nor can the Primary Applicants seriously contend that National's proposed conditions will reduce the public benefits made possible by the merger. As noted above, one of the key merger benefits claimed by the Primary Applicants is the creation of new single-line service opportunities.[39] National's proposed conditions do nothing to upset these new single-line service offerings. In fact, if National's request for conditions is granted, there will be an increase in such single-line service opportunities.

To the extent there is any doubt as to whether National's proposed conditions will burden the Primary Applicants or undercut claimed public benefits that will arise from the transaction, such doubts should be resolved in favor of National. As discussed above, National has met the Board's requirement that it "present substantial record evidence that approval of the primary application without imposition of the conditions will harm either their ability to provide essential

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[39] Also as noted above, National itself cannot receive the asserted benefits under the Primary Applicants' proposal because National's essential shipping points have been "split" between NS and CSX.

services and/or competition."[40] In contrast, the Primary Applicants have failed to demonstrate that the conditions proposed by National will pose an "unreasonable" operating problem for the Primary Applicants or that the proposed conditions will frustrate the Primary Applicants' ability to obtain anticipated public benefits. The Primary Applicants are in a far better position to assess whether National's proposed conditions will have any impact on their transaction. As the court noted in Lamoille, the Board cannot stack the deck against parties seeking conditions.[41] National has made the affirmative showings required by the Board, and the Primary Applicants have failed to rebut those showings either directly or through a demonstration that the proposed conditions will impose an "unreasonable" burden on the Primary Applicants or undermine anticipated public benefits.

Finally, the Board can modify National's proposed conditions to avoid any incidental impact these conditions may have on the merger benefits claimed by the Primary Applicants. The Board is not forced to choose between National's proposed conditions and no conditions at all. Rather, "if the [Board] believes that an unconditioned merger would harm the public interest but finds a proposed condition inappropriate, its duty to advance the public interest requires it to devise appropriate conditions, if such conditions can be developed with reasonable effort."[42]

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40 CSX/NS -- Control -- Conrail, STB Finance Docket No. 33388, Decision No. 29 (Sept. 11, 1997), citing Lamoille, supra footnote 3.

41 "It is implicit in our analysis, however, that if the Commission imposes too heavy a burden on competing railroads to prove the need for protective conditions, a reviewing court may find that the Commission has neither met its affirmative duty to determine whether the unconditioned merger is consistent with the public interest nor developed substantial evidence to support its conclusions." Lamoille, 711 F.2d at 322 n.57.

42 Lamoille, 711 F.2d at 321-22 (citations omitted).

Because the proposed transaction harms the public interest by eliminating an essential service, the Board should impose appropriate conditions.

II. The Board should impose conditions to mitigate the transaction's anticompetitive effects.

A. The transaction threatens a significant reduction of competition in an affected market.

National presently has access to three rail carriers for service beginning at National's Carey, Ohio plant: Conrail, CSX and WLE. The Conrail assets that serve Carey will be transferred to CSX as a result of the proposed transaction. The transaction will therefore reduce National's rail options at Carey from "three-to-two." In addition, the proposed transaction threatens the financial viability of WLE. If WLE is driven out of business, National will be left with only one rail option at Carey.

In their rebuttal, the Primary Applicants argue that National's concern that the proposed transaction may drive WLE out of business is "mere speculation." PAR Vol. 1, P-507. Contrary to the Primary Applicants' claim, record evidence supports National's position.

The WLE has submitted testimony and studies that describe the impact that the proposed transaction will have on WLE. In its October 21, 1997 Responsive Application (WLE-4), WLE submitted the testimony of Wilbert A. Pinkerton, Jr. and Reginald M. Thompson in support of their contention that the proposed transaction will rob WLE of its financial viability unless the Board imposes specific conditions. See WLE-4, Thompson VS at pp. 2-2-7 and attached exhibits; WLE-4, Pinkerton VS at pp. 3-8. Based on his analysis, Mr. Pinkerton concludes that the impacts of the proposed transaction will "make it impossible for W&LE to continue to function as the high service, competitive regional rail carrier which its customers rely upon for

essential transportation requirements." WLE-4, Pinkerton VS at p. 8. Mr. Pinkerton goes on to conclude that "the losses from the proposed transactions will seriously threaten [WLE's] continued existence." Id. As WLE witness Larry Parsons explained in his Reply Verified Statement, WLE views this proceeding as a "fight for our survival." WLE Reply, January, 1998 (WLE-7), Parsons RVS at p. 3. WLE also has specifically requested the Board "to reserve jurisdiction to entertain an inclusion petition should financial considerations make that necessary as an alternative to bankruptcy liquidation[.]" WLE-4, Responsive Application at p. 9. Record evidence -- not "speculation" -- supports National's fear that the proposed transaction will reduce National's rail options at Carey from three-to-one.

The Primary Applicants also suggest that National has failed to explain how it currently benefits from "competition among the three rail carriers that serve its Carey facility." PAR Vol. 1 at P-507. According to the Primary Applicants, National's desire to retain existing single-line services indicates that "National would always choose the carrier that provided single-line service from Carey to a given destination, regardless of the number of carriers serving Carey." Id.

This argument is a red herring. There is nothing inconsistent about National's desire to retain existing single-line services and National's desire to retain at least two service options at its Carey facility. In the best of all worlds, National would have more than one single-line service option from each of its production facilities. Both competition and single-line service work to the benefit of shippers and consumers. Likewise, shippers and consumers are injured if existing competitive or single-line service options are lost due to a railroad merger. Here, the proposed transaction imposes both of these injuries on National and its customers.

From Carey, National can currently reach markets for its limestone products through three separate rail carriers. The existence of multiple carriers serving Carey exerts price pressure on all of these carriers. For example, if one rail carrier raises its prices or allows the quality of its service to drop, National would have access to two alternate rail carriers and could concentrate its marketing efforts on the markets served by the alternate carriers. If National's rail transport options at Carey are reduced from "three-to-one," then National will be at the mercy of a single carrier for all of its markets served by rail. The merger to monopoly effect of the proposed transaction at Carey would place the remaining monopoly carrier in the position to increase the rate National pays (or lower service quality) on all three existing routes, making it impossible for National to avoid injury.[43]

B. The condition proposed by National is narrowly tailored to address the merger's harmful effects.

The retention of a viable and independent WLE following the proposed transaction provides National with an essential rail transport option. As discussed above, without WLE, National's movements from Carey will suffer a "three-to-one" reduction in service. National strongly supports WLE's efforts in its responsive application to maintain a viable and independent service option for shippers such as National. In addition, National supports several aspects of WLE's responsive application that are specifically designed to provide services to National. See WLE-4, Verified Statement of Steven W. Wait at pp. 10-11 (seeking trackage rights to serve National's Bucyrus plant).

---

[43] National also has established that competition from trucking does not provide a viable alternative with respect to these movements. See supra, pp.12, 18-19.

National's own proposed condition addresses a more limited concern, however. National's goal is to retain two transport options at its Carey plant even if WLE is acquired by one of the two applicants in this proceeding. To accomplish this objective, National's fourth proposed condition reads as follows:

> If control over WLE or its facilities changes as a result of the transaction, a railroad other than WLE's successor should be granted trackage rights over WLE's tracks to National's markets now served by WLE.

NLS-2, Protest at p. 4. National's protest also described each of the three movements WLE currently handles for National. Id. at p. 8.

This remedy is narrowly focused to resolve a harm caused by the merger. The grant of trackage rights covering National's existing WLE routes ensures that National will not be forced, after the proposed transaction, to rely on a single railroad to obtain service starting at its Carey plant. The condition is only triggered if either NS or CSX acquires control of WLE's assets and routes. The remedy simply restores the status quo.

The Primary Applicants have recognized the legitimacy of this remedy. In their rebuttal, the Primary Applicants argue that shippers would not necessarily be injured if WLE goes out of business. PAR Vol. 1 at P-402-03. According to the Primary Applicants, "to the extent that the cessation of W&LE service would result in creation of any 2-to-1 points, the affected shippers and customers could be protected through various means, including, as appropriate, direct access to another carrier, trackage rights or ownership of lines." PAR Vol.1 at P-402-03 This is exactly what National requests here.

The Primary Applicants argue that National's proposed condition "is too vague and speculative for the Board to approve." PAR Vol. 1 at P-508. Once again, however, the Primary

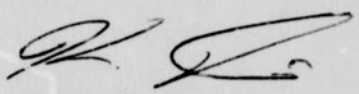
Applicants mistake flexibility for vagueness. As discussed above, a Board order requiring the implementation of this condition through negotiations by the interested parties should remedy the threatened loss of competition. If this process provides National with a second rail option at Carey over the WLE routes identified in National's protest, then a reduction in competitive options will be avoided. In short, the Primary Applicants are free to arrange the precise details of this remedy, so long as a viable set of trackage rights are established over these specified routes.

C. The benefits of the proposed condition outweigh any reduction in the public benefits created by the merger.

Notably, the Primary Applicants do not allege that National's proposed condition would reduce the public benefits created the merger. This is because National has carefully devised a condition that will be triggered only if WLE is forced out of business by the proposed transaction and if WLE facilities are acquired by either NS or CSX. The Primary Applicants can hardly argue that driving WLE out of business or placing control over these assets in the hands of either CSX or NS will generate public benefits. National's proposed condition will be triggered only when a loss of competitive rail options occurs, and the condition will not reduce any of the merger benefits claimed by the Primary Applicants.

WHEREFORE, for the reasons stated above, National respectfully requests that the Board impose on the proposed transaction the conditions discussed in the text of this brief in order to prevent a loss of essential services and to prevent a reduction in competition.

Respectfully submitted,



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Counsel for
NATIONAL LIME & STONE COMPANY

February 23, 1998

Attachment A

ZUCKERT, SCOUTT & RASENBERGER, L.L.P.

Via facsimile

MEMORANDUM

TO: All Parties on the Restricted Service List in STB Finance Docket No. 33388

FROM: John V. Edwards

DATE: January 26, 1998

RE: Deposition Transcript of Donald W. Seale on January 14, 1998

Consistent with practice in prior cases, Norfolk Southern and CSX will designate the transcripts of the depositions of their witnesses as "HIGHLY CONFIDENTIAL" for purposes of the Board's Protective Order in this case until they have had an opportunity to review them and determine, and notify the parties, which portions of it may be changed to a "CONFIDENTIAL" or "PUBLIC" status. We will do so as quickly as possible.

We have now reviewed the transcript of the deposition of Donald W. Seale on January 14, 1998, and have determined to change all of it to a PUBLIC status except the exhibits, which remain HIGHLY CONFIDENTIAL.

TRANSCRIPT OF PROCEEDINGS

BEFORE THE

SURFACE TRANSPORTATION BOARD

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

DEPOSITION OF DONALD WAYNE SEALE

C O N F I D E N T I A L

Washington, D. C.

Wednesday, January 14, 1998

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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 not 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

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

there that says, "NS can and has been able to work with connections such as Conrail in providing completely satisfactory joint line service for stone shippers in Ohio."

Would you be able to list for me, Mr. Seale, the stone shippers with whom you have been able to work to provide completely satisfactory joint line service?

A. I do not have a list in my head, obviously, but one that I've mentioned previously in the testimony this morning is Sandusky Crushed Stone from Parkertown, Ohio, to Twinsburg.

Q. And although you can't specifically recall additional names, any sense of the total number of stone shippers that that sentence is designed to describe?

A. No, I do not have a total number or volume in my head.

Q. Is it higher than the one that you've identified thus far or is it just one?

A. I'm not -- I can't recall the number.

Q. Okay. I'd like to now refer you to a

reference in your own verified statement that's at page P-496. There's a sentence at the top of that page that begins "Rail carriers can and do work together in joint line movements to simulate single line service for shippers," and then that sentence continues on.

Have the applicants made or have they had made any studies to determine whether such simulated single line service could economically be provided to National Lime and Stone for the rail movements that National has identified in its protest, which we characterize them as east of Crestline movements.

A. I'm not aware of the simulation. That's not to say that it hasn't been done in our operational group.

Q. But you did not rely on any such study in the preparation of your own verified statement in this proceeding then?

A. I am not sure of that.

Q. So you may have relied on a study?

A. I don't know.

Q. Okay. I thought earlier when I'd asked whether there were any studies performed in connection with National's positions thus far that you had indicated that you weren't aware of any such studies.

A. And I'm saying that I'm not aware.

Q. Whether they were relied on?

A. Whether -- correct. Correct.

Q. Mr. Seale, are you knowledgeable about the termination date of National's contracts with Conrail that have been for the movements that have been at issue in National's protest?

A. I am not personally knowledgeable of those dates.

Q. Would it be fair to say that at that termination date, that would be the point in time at which any effects from joint line service in comparison to single line service would begin to be felt by National Lime and Stone?

A. Could you restate the question?

Q. Yes. Is the termination date of the existing contracts between National and Conrail for

single line service east of Crestline, is that the appropriate date for identifying any effects of joint line service?

MR. ALLEN: I object to the question because he can't probably answer it, not knowing what the termination dates are. It might be tomorrow.

MR. DRIVER: Well, I'm not asking him to guess as to -- assuming it's not tomorrow.

MR. ALLEN: It might be the day after tomorrow.

BY MR. DRIVER:

Q. Okay. I guess the question is straightforward. Is the date that the contracts end the date at which National would begin to feel the effects of joint line service?

MR. ALLEN: Again, I reiterate my objection. He can't possibly answer that question without knowing what the dates are.

BY MR. DRIVER:

Q. Would you please answer the question?

A. I don't know.

Q. Has Norfolk Southern or the applicants performed or had performed any specific studies that analyze or determine how the Norfolk Southern operating plan would be affected by offering to National Lime continued single line service to its eastern market by employing truck interhaulage rates or similar means?

A. I'm not personally aware of that.

Q. Do you agree that for stone products, trucking cannot compete with rail line transportation for hauls over 50 miles or shipments over 1,000 tons?

A. That's a broad generalization and I think you'd have to look at the competitive situation that exists in that market. There is no way to reach that conclusion unilaterally without market information to document it.

Q. And what would be the relevant factors that would cause one to either view that as too short a distance or too long a distance, or too high a weight or too low a weight?

A. Whether you were talking about rail miles

or highway miles; whether it is circuitous compared to a truck direct route; the availability of trucks in that market; the availability of backhaul commodities for round trip for trucking. All the factors and components of competition.

Q. And did you analyze these factors with respect to National Lime and Stone's shipments to the east in preparing your testimony?

A. I did not personally do that.

Q. I'd like to refer you once again to the applicant's narrative rebuttal if I can find the right reference here. That reference is on P-505. There's a statement there at the bottom after a comma that says, "National also ignores the benefits of single line service it will or could enjoy on other movements."

And in fact on page P-506 it goes on to say that, "the benefits to National's business that could result from new single line rail service might very well exceed any harm to National's business resulting from the creation of joint line movements." Do you know the basis for that

statement?

A. I -- I don't have specific information with respect to the basis of that specific statement, but what it's saying is that National Lime and Stone will have access to a single line market in a broader sense than it does today.

Q. And do you know whether those single line services, the benefits to National may in fact outweigh the costs associating with losing single line service to the east?

A. Since I have no way knowing what the cost of losing single line rate to joint line service is, if any, I think that's just a guess and it's not appropriate to do that.

Q. And do you think that there's any basis for assessing the benefits of new single line service to the west?

A. I think the -- I think the marketing folks and the sales folks of National Lime and Stone are in the best position to determine that.

Q. And do you agree with the premise at the end of that sentence that's on page 506 that

National Lime might be harmed by the joint line movements that will result from this transaction?

MR. ALLEN: I don't think that's what the sentence says -- oh, okay.

THE WITNESS: I underscore the word "might," and I think there is speculation in that sentence and it's not be judged as factual one way or the other. It's speculation.

MR. DRIVER: And can you give me just one moment?

(Pause.)

BY MR. DRIVER:

Q. Mr. Seale, are you aware of whether National currently employs any joint hauls from its Carey plant?

A. I'm not aware of those.

Q. Thank you for your time.

MR. SIPE: No questions from me.

(Whereupon, at 11:22 a.m., the deposition was concluded.)

JONES, DAY, REAVIS & POGUE

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January 27, 1998

VIA FACSIMILE

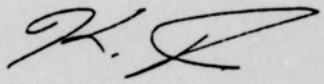
Ms. Patricia E. Bruce
Zuckert, Scoutt & Rasenberger, L.L.P.
888 Seventeenth Street, N.W.
Suite 600
Washington, D.C. 20006-3939

Re: STB Finance Docket No. 33388

Dear Ms. Bruce:

As we discussed, I have attached a page from the transcript of the January 14, 1998 deposition of Mr. Donald Wayne Seale. I have marked two changes to the transcript that I believe are necessary to ensure that the transcript accurately reflects statements made at the deposition. Please call me as soon as possible if there is any disagreement with the two changes I have identified.

Very truly yours,



Kenneth B. Driver

Enclosure
cc: Clark Evans Downs, Esq.

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BEFORE THE

SURFACE TRANSPORTATION BOARD

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

DEPOSITION OF DONALD WAYNE SEALE

C O N F I D E N T I A L

Washington, D.C.

Wednesday, January 14, 1998

75

trackage or haulage rights

Q. Has Norfolk Southern or the applicants performed or had performed any specific studies that analyze or determine how the Norfolk Southern operating plan would be affected by offering to National Lime continued single line service to its eastern market by employing ~~truck interhaulage rates~~ or similar means?

A. I'm not personally aware of that.

Q. Do you agree that for stone products, trucking cannot compete with rail line transportation for hauls over ~~50~~ miles or shipments over 1,000 tons?

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Q. And what would be the relevant factors that would cause one to either view that as too short a distance or too long a distance, or too high a weight or too low a weight?

A. Whether you were talking about rail miles

CERTIFICATE OF SERVICE

I certify that I will cause today to be served a conformed copy of the foregoing Brief in Support of Protest and Request for Conditions of National Lime and Stone Company filed in Finance Docket No. 33388, by first class mail, properly addressed with postage prepaid, or more expeditious manner of delivery, upon all persons required to be served as set forth in 49 C.F.R. § 1180.(d), namely:

(i) The applicants;

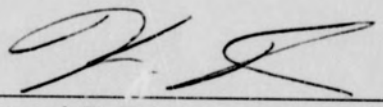
(ii) The Secretary of the United States Department of Transportation (Docket Clerk, Office of Chief Counsel, Federal Railroad Administration, Room 5101, 400 7th Street, S.W., Washington, D.C. 20590);

(iii) The Attorney General of the United States;

(iv) Judge Jacob Leventhal; and

(v) All parties of record in Finance Docket 33388.

Dated at Washington, D.C., this 23rd day of February, 1998.



Kenneth B. Driver

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February 23, 1998

VIA HAND DELIVERY

Mr. Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W., Room 700
Washington, DC 20423-0001

Re: **Finance Docket No. 33388** 185890
CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company -- Control and Operating Leases/Agreements -- Conrail Inc. and Consolidated Rail Corporation

Finance Docket No. 33388 (Sub-No. 36) 185892
Elgin, Joliet and Eastern Railway Company, Transtar, Inc. and I & M Rail Link, LLC -- Purchase -- Stock of Indiana Harbor Belt Railroad Company Controlled by Consolidated Rail Corporation

Dear Secretary Williams:

Enclosed for filing with the Board in the above-captioned proceedings are an original and twenty-five copies of the **Brief of Elgin, Joliet and Eastern Railway Company, Transtar, Inc. and I & M Rail Link, LLC** (EJE-19/IMRL-8), dated February 23, 1998. A computer diskette containing the text of EJE-19/IMRL-8 in WordPerfect 5.1 format also is enclosed.

Please note that EJE-19/IMRL-8 has been designated as highly confidential and is being filed under seal. It has been served on the Primary Applicants and all parties appearing on the highly confidential restricted service list in this proceeding. A redacted version of EJE-19/IMRL-8 will be filed tomorrow and served on all remaining designated parties of record in this proceeding.

I have also enclosed herewith an extra copy of EJE-19/IMRL-8 and this transmittal letter. I would request that you date-stamp those items to show receipt of this filing and return them to me in the provided envelope.

Please feel free to contact me should any questions arise regarding this filing. Thank you for your assistance on this matter.

Respectfully submitted,

Tom Healey

Thomas J. Healey
Attorney for Elgin, Joliet and Eastern
Railway Company, Transtar, Inc. and
I & M Rail Link, LLC

TJH:tjl

Enclosures

cc: Counsel for Primary Applicants
Parties on Highly Confidential Restricted Service List