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February 23, 1998

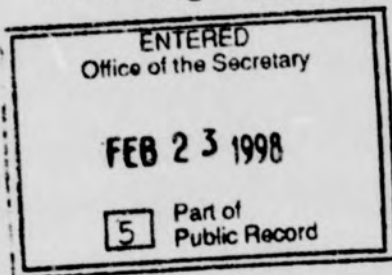
Office of the Secretary
Case Control Branch
ATTN: STB Finance Docket No. 33388
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

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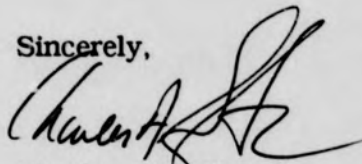
Re: CSX Corporation and CSX Transportation Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company -- Control and Operating Leases/Agreements -- Conrail Inc. and Consolidated Rail Corporation, Finance Docket No. 33388

Dear Secretary Williams:

Enclosed are an original and twenty-five (25) copies of the **Public Version** of the Brief of New York City Economic Development Corporation (NYC-20). 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.



Sincerely,


Charles A. Spitulnik

Enclosure

cc: Honorable Jacob Leverthal
Applicants' Counsel

PUBLIC VERSION

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

BRIEF OF
NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION

Dated: February 23, 1998

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PUBLIC VERSION

NYC-20

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

**BRIEF OF
NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION**

The New York City Economic Development Corporation ("NYCEDC") by counsel, in accordance with Decision 12 (served May 30, 1997), hereby submits its brief in support of its Comments and Responsive Application (submitted jointly with the State of New York ("the State")), and filed with the Board on October 21, 1997. NYCEDC respectfully submits that the joint application of CSX Corporation, CSX Transportation, Inc. (hereinafter referred to as "CSX"), Norfolk Southern Corporation, Norfolk Southern Railway Company (hereinafter "NS")(collectively, "Applicants"), Conrail, Inc. and Consolidated Rail Corporation (hereinafter "Conrail")(the "Transaction") should not be approved absent imposition of the conditions requested by NYCEDC and NYS.

CONDITIONS REQUESTED

In its Responsive Application, NYCEDC and NYS request the imposition of the following conditions:

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1. Full service trackage rights in favor of a rail carrier other than Conrail or CSX, to be designated jointly by New York and NYCEDC, over the lines of Conrail between points of connection with D&H at CP-160 near Schenectady, NY and Selkirk Yard near Selkirk, NY, and CP-75 near Poughkeepsie, NY, together with sufficient rights on tracks within the Selkirk Yard to permit the efficient interchange of freight with D&H; and

2. Full service trackage rights in favor of a rail carrier other than Conrail or CSX, to be designated jointly by New York and NYCEDC, over the lines of Conrail between the point of Conrail ownership at Mott Haven Junction ("MO"), NY and the point of connection with the lines of the Long Island Railroad near Fresh Pond ("MONT"), NY, via the Harlem River Yard.

Joint Responsive Application, NYS-11/NYC-10 ("J.R.A.") at 5. In addition, NYCEDC and the State request that the Board issue a declaration acknowledging Metro-North's right to negotiate with and grant rights over lines leased and controlled by Metro-North between CP-75 near Poughkeepsie and Mott Haven Junction ("MO"). *Id.* at 5-6.

United States Senators, the Honorable Alfonse D'Amato and the Honorable Daniel P. Moynihan have submitted to the Board a letter indicating their strong support and approval of the conditions requested by NYCEDC and the State. A copy of this letter is attached hereto as Attachment A. Similarly, in their Petition for Intervention, which included a Request for Conditions, United States Representative, the Honorable Jerrold Nadler, et al., requested a package of conditions that are designated to address the anti-competitive impacts of the proposed Transaction. In a letter to the Board dated January 14, 1998, Deputy Mayor Randy L. Levine said:

Mayor Guiliani, with Congressman Nadler as a key ally, has made addressing the region's over-dependency on trucks a key priority and has made significant investments to promote rail freight. Notwithstanding these investments,

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there is no substitute for the benefits that would be derived from real competition east of the Hudson.

Pursuant to these considerations, the City joined the State of New York in filing its joint Responsive Application. We view the Petition [of Congressman Nadler *et al.*] as complementary to the joint Responsive Application. We therefore urge the STB to grant, in full, the relief sought in the joint Responsive Application and to grant the Petition to the extent consistent with the joint Responsive Application.

Levine Letter at 2-3. For the reasons set forth below, NYCEDC's requested conditions should be granted.

STATEMENT OF FACTS

The New York City Economic Development Corporation

NYCEDC is a private non-profit corporation created by the City of New York. Its mission is to serve as a catalyst for public and private investment to promote the long term viability of New York City, and to attract and provide opportunities to its businesses and citizens. Verified Statement of Michael Canavan ("VS Canavan"), attached to Comments of NYCEDC (NYC-9/NYC-10) as Attachment 3, at 2. As part of that mission, NYCEDC is responsible for securing transportation access to the region's markets and overseeing the City's freight transportation and distribution facilities. *Id.*

The New York metropolitan region is one of the largest population and commercial centers in the world. However, not only is it a huge consumer market, it is also a large manufacturing market. *Id.* There remain numerous manufacturing facilities in the City and on Long Island. *Id.* The construction industry remains strong, and lumber and other building materials must be delivered to these markets. *Id.* Food and consumer products, of course, are a substantial part of this market. *Id.* In

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addition, waste is among the largest commodities outbound from this market, and has been for some time. *Id.*

New York City's huge consumer and industrial market is continuing to grow. Growth in commodities which would commonly move by rail to and from the nation's rail network is expected to grow 23% by the year 2020. *Id.* at 3. This means that there will be an even greater need than there is today for adequate, competitive rail service. *Id.*

Rail Service to the New York Market: The Formation of Conrail

In enacting the Rail Reorganization Act of 1973, Congress had as one of its stated goals "the retention and promotion of competition in the provision of rail and other transportation services in the [Midwest and Northeast] region." Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, § 206(a)(5), 87 Stat. 984, 995 (1974) (the "3R Act"); accord *Regional Rail Reorganization Act of 1973: Report by the Comm. on Interstate and Foreign Commerce Together With Supplemental and Additional Views [To Accompany H.R. 9142]*, 93d Cong. 48 (1973). The United States Railway Association ("USRA"), which developed the Final System Plan for the region in accordance with the mandate of the 3R Act, echoed this goal. Final System Plan, July 26, 1975, Volume I at 2. USRA emphasized that the "basic structure" of the Plan was to "offer competition between at least two railroads in major markets of the Region, supplemented by the services of smaller railroads." *Id.* at 3. During the process of developing the plan, there were a number of parties which advocated the creation of two or more railroads out of fear that a single large entity like Conrail would "harm other railroads, shippers and localities." *Id.* USRA nevertheless chose to have Conrail

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as the predominant carrier operating in the Northeast, finding that this solution "offers the best opportunity to achieve a revitalized, profitable and competitive rail service system in the Region under private management." *Id.* at 6, 36.

In spite of these goals, since 1976 when the Final System Plan was implemented, Conrail has held a virtual monopoly on rail service in the New York Metropolitan region. To reach the New York market from the North, Conrail operates parallel service on two lines: (i) on the east side of the Hudson River from Fresh Pond, N.Y., located in the borough of Queens, to Albany, N.Y.; and (ii) on the west side of the river from Northern New Jersey to Albany, N.Y. All rail freight traffic originating or terminating in the New York City/Long Island/Northern New Jersey area must be handled by Conrail. J.R.A. at 8. A shipper seeking access to line-haul transportation alternatives via CSX or NS either must route its traffic in interline service with Conrail as an origin, destination or bridge carrier, or use non-rail modes (*e.g.* motor carrier or vessel) to move the freight. *Id.* In the Hudson Valley, Conrail controls the rail freight facility essential to the movement of traffic between the New York metropolitan area (and stations to the north) and Albany. *Id.*

The Application

In their Primary Application filed on June 23, 1997, Applicants propose to acquire the stock of and allocate the assets of Conrail. Application, Vol. 1 at 1. Northern New Jersey will become a "shared access area," which means that both buyers of Conrail -- CSX and NS -- will have the ability to reach and to compete for traffic that moves to and from that region. *Id.* at 4. CSX will acquire lines to the north from this region, along both sides of the Hudson River, and will succeed to the

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monopoly enjoyed by Conrail in this region. *Id.* at 35. There is a new haulage agreement between NS and Canadian Pacific Railway Company ("CP") for service through the Albany gateway that will create a new connection for shippers and receivers in New York routing freight to and from CP. See Application, Vol. 3B, Mohan V.S. at 19-20. As currently envisioned, the haulage agreement would benefit only those shippers and receivers on the west side of the Hudson River where NS will provide some competition for traffic to and from the southeast. Application, Vol. 1, McClellan V.S. at 516-17, 532-34. However, for example, shippers in Hunts Point, N.Y. and Long Island will be limited to CSX service and route options for movement to and from western gateways and southern origins and destinations. See Verified Statement of Anthony M. Riccio, Jr. ("Riccio V.S."), attached to Comments of NYCEDC (NYC-9/NYC-10) as Attachment 1; Verified Statements of Stephen D'Arrigo ("D'Arrigo V.S."), Alan Firestone ("Firestone V.S.") and Jim Christie ("Christie V.S."), all attached to the Comments of the State (NYS-10); Verified Statement of Ronald Klempner ("Klempner V.S."), attached to the Joint Rebuttal Statement of NYCEDC and the State ("J.R.S.")(NYS-24/NYC-17). In contrast, their Northern New Jersey competitors, will enjoy lower prices and multiple routing options as a result of competition in that area. *Id.*

The Applicants have touted their proposed Transaction as "a unique, pro-competitive proposal to reconfigure the railroad industry in the eastern United States." Application, Vol 1, at 2. They also promise that the Transaction, if approved, "will create two strong rail networks of broad geographic scope that will reach virtually all major ports, gateways and commercial areas in the eastern United States." *Id.* With

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regard to New York, the Applicants claim that "[t]he transaction is unique in its competitive dimensions -- not only does it entail virtually no reduction in rail competition, it will create new rail competition, most notably in the large New York/New Jersey area." *Id.* at 4. However, in essence, Applicants, two similarly situated competitors, have jointly agreed to split the New York market in two, using the Hudson River as the dividing line. On the west side of the river, they have chosen to introduce competition, while on the east side they have agreed that there will be no competition and that CSX will have a monopoly. Application, Vol 1 at 4, 35-38; *McClellan V.S.* at 15. The only direct rail service to New York City will continue to be via one carrier's lines. *Id.*

This new monopoly, while different in configuration than the Conrail monopoly, may create new disadvantages to shippers east of the Hudson. In the Verified Statement of Andrew Robertson ("Robertson V.S."), submitted by NYCEDC and the State in support of their Joint Responsive Application, Mr. Robertson contrasts the two systems:

Conrail now serves as the terminal railroad for the Northeastern United States where it terminates much more traffic than it originates. Because so much traffic originates outside its territory, Conrail can be neutral towards its interchange railroads (and their shippers) from the South, West, Midwest, Canada and New England. Unlike Conrail, CSX originates many of the commodities consumed by rail users in the Northeast such as coal, lumber and paper. Following industry practice and consistent with their desire to maximize single system routing, CSX can be expected to favor its system longhaul when it acquires its portion of Conrail. New York receivers who can now choose from a variety of off-line carriers will likely be "encouraged" to use only CSX where CSX can provide single line service. This single line service, touted as one of the major benefits from

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the merger, will have obvious and immediate negative effects on those New England, Canadian and Midwestern shippers served by Guilford, CN, Canadian Pacific, Union Pacific, Burlington Northern Santa Fe, Illinois Central, Kansas City Southern and Wisconsin Central.

Robertson V.S. at 4.

NYCEDC Concerns Regarding Competition and Its Requested Conditions

From the perspective of the City of New York, the Application raises very striking concerns regarding lack of competition on the east side of the Hudson River. Although the Applicants' Plan did improve upon the current Conrail system by creating competition in Northern New Jersey and the west side of the Hudson River, it left the east side of the Hudson River without any competition at all. Application at 1, 4 and 35. By creating competition in surrounding areas, while leaving a monopoly on the east side of the Hudson River, the Applicants have placed shippers at an even greater competitive disadvantage than they previously experienced under the Conrail operations. Riccio V.S. at 2, 4. In order to remedy this anti-competitive effect, NYCEDC and the State have sought the imposition of conditions to bring competition to the east side of the Hudson River. *See generally* J.R.A. at 4-6.

The conditions requested by NYCEDC and the State will introduce competitive service to the New York metropolitan region for the first time in twenty years. Verified Statement of Robert L. Banks ("Banks V.S."), attached to the Comments of the State (NYS-10) at 28-30. There is no doubt that the infrastructure is there to support competitive rail service east of the Hudson River. Metro-North supports and is willing to accommodate a competitive freight carrier along the portion of its line that will be used here. Verified Statement of Donald N. Nelson ("Nelson V.S."), attached to the

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J.R.A. at 3, 7-9; Verified Statement of Walter H. Schuchmann ("Schuchmann V.S.") attached to the J.R.A. at 5. Further, a CSX witness, John W. Orrison, testified that an additional 30 to 50 freight trains per day could be run over the Hudson River Line. Orrison Dep. 51-52, 67-68; Schuchmann V.S. at 6. Indeed, presently, freight utilization is at an all time low on the Hudson River Line. Nelson V.S. at 8. The conditions as requested by NYCEDC and the State will also accomplish the goals Congress and USRA sought when they promulgated the 3R Act and implemented the Final System Plan, respectively, over twenty years ago.

Not only is the proposed use of the line east of the Hudson operationally feasible, it makes economic sense because there is an adequate customer base to utilize the lines. Robertson V.S. at 8-12; Supplemental Verified Statement of Andrew Robertson, attached to the J.R.S. ("Robertson S.V.S.") at 5. According to Mr. Robertson, there is enough potentially divertible traffic that is now either moving via rail through New Jersey or by truck to the City and Long Island to support the operations of a second carrier on the line. Robertson V.S. at 11. Using Conrail's 1995 waybill files, Mr. Robertson analyzed how much existing traffic could potentially be diverted to the new operator. *Id.* at 8-9. He concluded that although the precise amount of divertible traffic would depend upon which carrier was selected to be the operator¹ there is no doubt that the total existing and potential traffic base for a new east of the Hudson carrier is large enough to support a new competitor to CSX and NS service in New Jersey. *Id.* at 8.

¹ This carrier may be any one of a number of carriers, such as the Delaware & Hudson, the New York & Atlantic or even the NS. (Robertson V.S. at 8.)

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To arrive at this conclusion, Mr. Robertson looked first at Conrail's carload traffic to and from the New York Business Economic Area ("BEA" 12) that is east of the Hudson River. *Id.* at 8-9. Excluding traffic from the General Motors automotive plant at Tarrytown, N.Y which recently closed, and excluding traffic moving to and from CSX points and those Conrail stations to be inherited by CSX (which would likely remain with CSX even if a second carrier were present on the line), Mr. Robertson concluded that the remaining traffic base would be approximately cars southbound and cars northbound. *Id.* at 9. The southbound number represents mostly processed food, paper and produce, while the northbound number is largely solid waste products leaving New York City and Long Island. *Id.*

Mr. Robertson also examined traffic moving in and out of the New Jersey side of the New York BEA as a potential source of traffic. *Id.* Again, excluding all carload traffic to/from Conrail, NS and CSX stations and the states in the South and Midwest where NS and CSX are key players, as well as several commodities such as chemicals, hazardous materials, waste and coal because they were unlikely candidates for diversion, Mr. Robertson found that the inbound New Jersey carload traffic totaled over cars with about cars outbound. *Id.* at 10. Mr. Robertson then made the assumption, based upon the ability of the new carrier to find cooperative interchange partners, that the new carrier would be able to capture 50% of the non-CSX traffic on the east side and 10% of the non-CSX traffic on the New Jersey side. *Id.* at 11.

Combining both New York and New Jersey diversions, he then determined that the new carrier could attract cars southbound on the line east of the Hudson with carloads moving northbound. *Id.* Making final assumptions that the equipment

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could not be reloaded in New York and that service would take place 260 days per year, Mr. Robertson concluded that over loaded and empty carloads per year could be generated, enough to move an additional train of carload traffic per day. *Id.* This figure, Mr. Robertson concluded, would only be the starting point for a new carrier because of the great potential for development of new rail traffic coming from substantial untapped intermodal and truck traffic that exists in the region. *Id.*

In his Supplemental Verified Statement, Mr. Robertson then provided an estimate of intermodal traffic potential for a new carrier in New York City. Robertson S.V.S. at 3. In order to determine that number, Mr. Robertson first isolated existing Conrail intermodal traffic in New Jersey that could move efficiently by rail over the East Side Line to New York. *Id.* To accomplish this, he eliminated from his analysis all Conrail intermodal traffic to and from the Southeast, and to or from NS, CSX and Conrail-served points. *Id.* He assumed 100% of Conrail's existing traffic to and from New York will continue to move through New Jersey terminals. *Id.* He then found that almost

trailers move beyond NS/CSX/Conrail territory -- traffic that would be available to a new carrier. *Id.* Then, using the assumption from his previous study that 10% of Conrail's New Jersey traffic is actually originated or terminated in New York, he concluded that the new carrier could attract between and trailers per year to a new east side intermodal service. *Id.*

Applicants' Response to Requested Conditions

In response to NYCEDC and the State's request for conditions, Applicants raise a number of readily dismissable arguments, as fully set forth in NYCEDC and the State's Joint Rebuttal Statement. First, Applicants' claim that their increased reliance

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upon drayage and trucking to get east-of-the-Hudson shippers' materials to the areas where there will be competition, *e.g.* North Jersey (Applicants' Rebuttal at VIII-13-14; Rebuttal Verified Statement of Joseph P. Kalt ("Kalt R.V.S.") Vol. 2A, at 16-17) is sufficient. This suggests, of course, that substantial volumes of traffic will be moving over the highways and bridges that lead to and cross the River to reach those terminals. Kalt R.V.S. at 15-17. This plan, however, does not account for the extreme congestion that already exists on those highways and bridges, nor does it consider the environmental impact of the additional motor carrier movements.

As fully set forth in the Verified Statement of Seth O. Kaye, nearly 50,000 trucks cross the City's bridges and tunnels daily. Verified Statement of Seth O. Kaye ("Kaye V.S.") attached to J.R.S. at 1. These trucks are then routed on only three major truck routes that must provide access to the New York City, Long Island, and Southern New England markets. *Id.*

The City is a designated severe non-attainment zone for ozone. *Id.* at 3. It must, therefore, reduce emissions so as to attain the United States Environmental Protection Agency's National Ambient Air Quality Standards ("NAAQS") for ozone by 2007. *Id.* The New York Metropolitan area was required to reduce emissions of volatile organic compounds -- an ozone precursor -- by fifteen (15) percent by 1996 and must further reduce them an additional three (3) percent for each year between 1996 and 2007. *Id.* at 3-4. Trucks and motor vehicles are a major source of ozone precursors in New York City. *Id.* at 4-5. In addition, heavy duty diesel vehicles are responsible for a disproportionately large share of the emissions of nitrogen oxides from on-road vehicles. *Id.* at 5. Thus, the need for additional truck trips to New Jersey to transport goods to

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the area where rail competition exists will likely impede the City's efforts to improve air quality, and in fact, will likely cause air quality to become worse. *Id.*

Likewise, in his Rebuttal Verified Statement, John F. Guinan, Assistant Commissioner for Passenger and Freight Transportation of the New York State Department of Transportation ("Guinan R.V.S.") explains that reliance on trucks is not competitive with rail. In order to truck their commodities from west of the Hudson, shippers would have two (2) bridges routes: the northern George Washington Bridge - Cross Bronx Expressway route, and the southern Goethals - Verrazano Narrows Bridge route. Guinan R.V.S. at p. 7. These routes routinely experience near gridlock conditions. *Id.* at 7-11. Gridlock results in delays, and the delays are reflected in surcharges imposed by truckload carriers, up to \$200 per load for movements with designations in New York City or on Long Island. *Id.* at 3-4. The Bi-State Transportation Forum found that the cost of motor freight transit from Northern New Jersey to Long Island was comparable to the cost of transportation from New Jersey to Pittsburgh, some 300 miles farther away. *Id.* at 6.

Not only is reliance on trucks expensive for the shippers, but it is also expensive for New York. Each year, almost \$95 million is spent by the Port Authority of New York and New Jersey on bridge repairs, maintenance and capital projects. *Id.* at 4. In addition, the City and State of New York spend approximately \$30 million and \$40 million, respectively, on bridges. *Id.* A truck is the equivalent of six (6) automobiles in terms of its impact on traffic streams and infrastructure. *Id.* at 4-5. At normal traffic growth rates, a new traffic lane must be added to the Hudson crossings every ten (10) years just to maintain current service levels. *Id.* at 5. Indeed, in order to divert some

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traffic off the roadways, New York has invested \$200 million in the Oak Point Link, which will divert drayed and truckload freight to direct rail. *Id.*

Second, Applicants claim shippers east of the Hudson River will have competitive alternatives to CSX as a result of recent settlements between Applicants and CP and the Canadian National Railway. Applicant's Rebuttal, Vol. 1, Narrative at VIII-17-18. This conclusion, however, ignores the terms of those agreements including the and contained therein.

Third, Applicants argue that the trackage rights requested by NYCEDC and the State are not economically viable due to the low projected traffic densities and the absence of an identified trackage rights operator. *Id.* at VIII-16-17. Finally, Applicants claim that the subject trackage rights are not operationally feasible, due to the presence of passenger trains on key segments of the Hudson Line. *Id.* at 18. Applicants' arguments regarding both economic and operational feasibility ignore the testimony of NYCEDC's and the State's witnesses submitting directly opposing views.

For the reasons set forth below, the Applicants' arguments against imposition of the conditions requested by NYCEDC must be rejected and the requested conditions imposed.

ARGUMENT

APPLICANTS' TRANSACTION IS AGAINST THE PUBLIC INTEREST AND SHOULD NOT BE APPROVED ABSENT IMPOSITION OF NYCEDC'S REQUESTED CONDITIONS

In transactions such as this, the Interstate Commerce Act, 49 U.S.C. § 11323(c), mandates that the "single and essential standard of approval is that the [Board] find the transaction to be 'consistent with the public interest.'" Finance Docket No. 32760,

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Union Pacific Corporation et al. -- Control and Merger -- Southern Pacific Rail Corporation et al. ("UP-SP"), served August 12, 1996, *slip op.* at 98, citing *Missouri-Kansas-Texas R. Co. v. United States*, 632 F.2d 392, 395 (5th Cir. 1980). Accord *Penn-Central Merger and N & W Inclusion Cases*, 389 U.S. 486, 498-99 (1968). To make this public interest finding, the Board employs a balancing test, weighing the benefits to applicants and the public against harm to the public if the transaction as proposed is approved. 49 C.F.R. § 1180.1(c). This balancing test focuses primarily on the effects on competition generated by the transaction. *Id.*; see also *UP-SP*, Finance Docket No. 32760, served August 12, 1996, *slip op.* at 98-99.

As more fully set forth below, with respect to the effects on New York City, there can be no doubt that the Transaction is not consistent with the public interest. The Transaction, as proposed, would greatly impede the ability of shippers in the City to compete effectively. Because there will be only one rail carrier serving the east side of the Hudson, CSX, while both Northern New Jersey and the west side of the Hudson will benefit from direct rail competition, shippers to and from New York City and Long Island will not be able to obtain competitive rates and service. In addition, the City will suffer from increases in truck and related motor carrier traffic as shippers attempt to reach the Northern New Jersey and west of the Hudson areas in which competition and, therefore, more competitive rates, exist. This will increase not only traffic congestion, but also cause a negative environmental impact upon the New York Metropolitan region.

In contrast, the conditions requested by NYCEDC and the State which would create competition on the east side of the Hudson, are feasible and in the public

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interest. They would serve to make this Transaction acceptable from a competitive standpoint and place the entire New York area in the competitive situation it should have been in since the 3R Act and the implementation of the Final System Plan. Applicants have given no valid reason for these conditions not to be imposed.

A. The Effects of the Application in the New York City Market are Anti-Competitive.

1. *Anti-Trust Principles Reveal That This Transaction, as It Affects New York, is Anti-Competitive.*

As a preliminary matter, anti-trust principles demonstrate that what CSX and NS are attempting to do in New York City is against the public interest and in violation of the law. In anti-trust parlance, the agreement between NS and CSX, two similarly situated competitors, to carve up the market and decide among themselves where competition should and should not take place is not in the public interest and would likely, in an unregulated environment, be considered a horizontal market allocation and a *per se* violation of Section 1 of the Sherman Act. 15 U.S.C. §1. While this Board is not bound by anti-trust principles when reviewing a merger transaction such as this one, according to the Supreme Court of the United States, these laws do give the Board "understandable content to the broad statutory concept of the public interest." *FMC v. Aktiebolaget Linien*, 390 U.S. 238, 244 (1968). In *United States v. Interstate Commerce Comm'n*, 396 U.S. 491 (1970) ("*Northern Lines*") the Court stated that Congress has neither "made the anti-trust laws wholly inapplicable to the transportation industry nor has authorized the Commission in passing on a proposed merger to ignore their policy." 396 U.S. at 512, citing, *Mc Lean Trucking Co. v. United*

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States, 321 U.S. 67 (1944). The Court went on to state that the mere fact that the carriers in an authorized merger may obtain immunity from anti-trust prosecution

'in no sense relieves the Commission of its duty, as an administrative matter, to consider the effect of the merger on competitors and on the general competitive situation in the industry in light of the objectives of the national transportation policy.'

Id.

In *United States v. Topco Assoc., Inc.*, 405 U.S. 596 (1972), the Supreme Court found a *per se* violation of Section 1 of the Sherman Act when members of a cooperative association of small and medium sized regional supermarket chains, who did not compete with each other previously, agreed to define exclusive territories in which individual members could and could not compete. 405 U.S. at 608. The Supreme Court rejected the claim, which had been accepted by the lower court, that such an agreement was permissible because it was intended to allow each member of the cooperative to compete more effectively with the large national and regional supermarket chains within a given territory. *Id.* at 610 ("[T]he Court has consistently rejected the notion that naked restraints of trade are to be tolerated because they are well intended or because they are allegedly developed to increase competition.").² In

² See also *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 49 (1990) ("[I]t is equally clear that the district court and the court of appeals erred when they assumed that an allocation of markets or submarkets by competitors is not unlawful unless the market in which the two previously competed is divided between them.... [Horizontal allocation] agreements are anticompetitive regardless of whether the parties split a market within which both do business or whether they merely reserve one market for one and another for the other"); *United States v. Sealy, Inc.*, 388 U.S. 350 (1967) (where licensees control manufacturing company, company-approved division of territories is *per se* unlawful); *Blackburn v. Sweeney*, 53 F.3d 825, 827-29 (7th Cir. 1995) (Partnership dissolution agreement which divides (continued on next page)

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Topco, the Court found further that implicit in the freedom to compete "is the notion that [competition] cannot be foreclosed with respect to one section of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important section of the economy." *Id.*

In this case, CSX and NS have agreed to do exactly what the Supreme Court in *Topco* says is a *per se* violation of anti-trust law because they have allocated the New York market between them and decided for themselves which segment of that market (Northern New Jersey) is more deserving of competition. Even more egregious, however, the agreement between CSX and NS, unlike that of the cooperative members in *Topco*, does not even have the worthwhile purpose of fostering competition in the territory allocated, because CSX will have absolutely no competitors to and from the New York City region's market east of the Hudson River once the allocation agreement is implemented. If the Supreme Court found a violation of the anti-trust laws in an agreement to allocate markets when the ultimate purpose was to benefit the public interest through increased competition, the Board should look very carefully at the agreement between CSX and NS, whose underlying purpose would not promote competition but would instead prevent it from developing.

(continued from previous page) territory in which former partners can advertise for new clients is *per se* unlawful allocation agreement even where all had previously worked as part of one firm and had not competed against each other before.); *Garrett Anderson Agencies v. Blue Cross & Blue Shield United of Wisconsin*, 1993-1 Trade Cas. (CCH) ¶70,235 at 70,162 (N.D. Ill. 1993) ("Assuming Blue Cross entered an agreement whereby it agreed to stay out of the Illinois health insurance market but Health Care [its competitor] did not reciprocally agree to stay out of the Wisconsin health insurance market, the net effect is an anticompetitive effect on the Illinois health insurance market. This is sufficient to render the agreement between Blue Cross and Health Care unlawful on its face....").

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The Board should also consider the anti-trust concept of shared use of essential facilities in reaching a determination regarding this Transaction. The essential facilities doctrine holds that an anti-trust defendant may have acted anti-competitively, in violation of Section 2 of the Sherman Act, if the circumstances of the case satisfy a four-part test: (1) the defendant is a monopolist in control of a facility or a resource that is essential to a competitor's operation; (2) the facility or resource cannot practically or reasonably be duplicated by competitors; (3) the monopolist refuses to deal with competitors; and (4) the monopolist could feasibly deal with competitors. See *MCI Communications Co. V. A.T. & T*, 708 F.2d 1081, 1132 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983)(citations omitted)(AT&T required to make available to MCI connection to local exchanges, which were otherwise unavailable to MCI.)

Here, CSX's monopoly over the east side of the Hudson satisfied the criteria establishing anti-competitive behavior pursuant to the essential facilities test. First, there is no doubt that CSX controls the tracks on the east side of the Hudson. These tracks are the facilities essential to have another rail carrier compete with CSX. Second, the facility cannot be duplicated, as there are no other tracks upon which an east-of-the-Hudson carrier can transport goods, and construction of a competing line would be too costly and virtually impossible in view of the population density along much of the line. Third, the Operating Plan clearly establishes that the monopolist, CSX, refuses to deal with competitors. Indeed, it has an opportunity to create competition on the east side of the Hudson either by a shared agreement with NS, or with a third carrier, as proposed by NYCEDC, and it has refused. Finally, as

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demonstrated *infra* it would be both economically and operationally feasible for CSX to deal with competitors.

The seminal case regarding the essential facilities doctrine is *United States v. Terminal R.R. Ass'n*, 224 U.S. 383 (1912) ("*Terminal Railroad*"). There, a combination of some, but not all, of the railroads to and from St. Louis, purchased the important railroad junction controlling passage into and out of St. Louis. 224 U.S. at 393. The combination of railroads owning the facility could then set rates for use of the facility to exclude or disadvantage competitors seeking passage to, from or through St. Louis. *Id.* at 405. The Court remedied this anti-competitive effect by requiring nonmember competitors to be admitted to the consortium controlling the junction. *Id.* at 411. See also *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973) (requiring a monopolist power company to provide local distribution of electric power to municipalities, although power company wanted to keep municipalities out of local distribution business); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985) (holding that a multi-mountain lift ticket was an essential facility that defendant was required to share with competing ski company so that the two companies could offer a combined lift ticket.)

By creating a monopoly on the east side of the Hudson, Applicants, like the St. Louis consortium in *Terminal Railroad*, have excluded other carriers from using the line, and prevented any competition on the east side of the Hudson and south of Albany. Just as the consortium in *Terminal Railroad* foreclosed passage into and out of St. Louis, CSX here is foreclosing rail transportation to any competitor east of the Hudson. This anti-competitive behavior will likely result in CSX setting unreasonably

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high rates for the use of the facilities to the disadvantage of shippers who have no alternatives. The proposed arrangement, therefore, will harm the competitive balance in the region, adversely affect the businesses in New York City and Long Island, and cannot be allowed to proceed without imposition of conditions.

2. *The Transaction As Proposed Will Adversely Affect
New York City And Long Island Businesses.*

a. *Impact of Competition in Northern New Jersey
and West of the Hudson*

The evidence presented by NYCEDC firmly establishes that shippers, receivers and others dependent on rail transportation into and out of New York City and Long Island will be competitively harmed by the Applicants' decision to perpetuate a monopoly on the east side of the Hudson River while introducing competition on the west side and in Northern New Jersey. These shippers demonstrate the direct detrimental impact that creation competition on the west side of the Hudson and in Northern New Jersey will have on those shippers suffering from continuation of the rail carrier monopoly in the hands of CSX on the east side of the Hudson.

With its Comments, NYCEDC submitted the Verified Statement of Anthony M. Riccio, Jr., the operator of the Harlem River Yard located in the Bronx, New York. With its comments, the State submitted the Verified Statements of shippers/receivers Stephen D'Arrigo, Alan Firestone and Jim Christie, all of whom explained the direct adverse affects of the proposed Transaction. All four of these shippers rely upon rail service along the east side of the Hudson, and they compete with shippers in North Jersey and on the west side of the Hudson.

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Mr. Riccio is a relatively new rail yard operator (the Yard opened for rail operations in June, 1996) and the operator of a new intermodal facility at the Yard that will be completed in Spring, 1998. If the proposed Transaction is approved without the imposition of the conditions requested by NYCEDC and the State, his competitors on the west side of the River will have rail competition, thus resulting in better rates and better service to offer their customers. Riccio V.S. at 6. Then, the new tenants Mr. Riccio hopes to attract to his yard, such as the New York Post and the New York Paper Mill Corporation, will instead use the services offered by his counterparts. *Id.* at 2-3. Mr. Riccio will also be unable to attract the business of his neighbors, the Hunts Point Market, whose fresh produce wholesalers represent the greatest potential for rail service coming into the City and Long Island, but whose reliance on trucks has grown because of a lack of rail competition and accompanying lack of service. *Id.* at 3-4.

While Mr. Riccio's ability to provide such service has been limited with Conrail before this Transaction, all shippers and consumers in the New York/New Jersey region were similarly situated and, even though New Jersey enjoyed some operational advantages, the playing field was relatively even. *Id.* at 4. The proposed Transaction would destroy that level playing field and provide benefits to his counterparts on the west side of the Hudson and in New Jersey, such as lower rates, better service and alternative routing options, that Mr. Riccio will not enjoy.

Steven D'Arrigo, President of D'Arrigo Bros. Co. of New York and Chairman of the Traffic Committee of the Hunts Point Market, in his Verified Statement notes that the perishable nature of fresh produce and the long distances that shipments to Hunts Point Market must travel make such shipments ideal for reliable train transportation.

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D'Arrigo V.S. at 1. Service under Conrail's monopoly was not consistent and was expensive, therefore, the Market began to rely heavily upon trucks. *Id.* at 2. The Applicants' Plan would further exacerbate this situation. CSX would inherit Conrail's monopoly, but competition would exist in Northern New Jersey and on the west side of the Hudson. The Market's competitors would benefit from this competition between rail carriers to the detriment of the Hunts Point Market. *Id.* at 3.

Alan Firestone of Firestone Plywood Corp. (a shipper located in Hicksville, on Long Island), a distributor of plywood and plywood products, expresses similar concerns. Firestone V.S. at 1. If his product costs are higher than his Northern New Jersey rivals as a result of lack of rail competition on the east side of the Hudson, his business will suffer greatly. *Id.* All of these shippers/receivers demonstrate clearly how the absence of competition, and now the advent of competition to their competitors in New Jersey, will have harmful and immediate impacts on their businesses.

b. CSX Will Have Every Incentive to Maximize Single System Routing to The Shippers' Detriment

If this Transaction is approved without imposition of the conditions requested by NYCEDC and the State, the ability of these shippers, receivers and yard operators to compete will also be hampered by the fact that the new monopolist, CSX, will have a different market orientation than Conrail, one which will encourage less, not more, attention to their needs. Conrail now serves as the terminal railroad for the Northeastern United States where it terminates much more traffic than it originates. Robertson V.S. at 4. Because so much traffic originates outside its territory, Conrail can be neutral towards its interchange railroads (and their shippers) from the South, West,

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Midwest, Canada and New England. *Id.* Unlike Conrail, CSX originates many of the commodities consumed by rail users in the Northeast such as coal, lumber and paper. *Id.* Following industry practice and consistent with their desire to maximize single system routing, CSX can be expected to favor its system longhaul when it acquires its portion of Conrail. *Id.* In practice, Mr. Robertson notes, CSX will favor shippers in the South over those in places such as Maine or Quebec and this will be harmful to New York City receivers who often look to Canadian and Western sources for needed materials. *Id.* at 6.

Mr. Robertson provided another clear example of this problem when looking at the rail market for paper. *Id.* at 6. Currently, Conrail customers in the Midwest and Northeast source paper from a broad range of off-line origins such as Maine, Quebec, Georgia, Louisiana and Wisconsin. *Id.* By contrast, NS and CSX customers source most of their paper from Southern points on NS or CSX, respectively. *Id.* So, even if CSX chooses to maintain adequate service standards on the east side, it will likely choose to source traffic from its own origins, thus precluding Canadian, Western and New England shippers of paper from competing in the New York market. *Id.* at 6-7. As Mr. Robertson emphasizes, New York City and Long Island shippers and receivers will not have a semblance of intramodal competition to check CSX and ensure that their needs are being met. *Id.* at 7. CSX has provided no assurance that it will not choose to demarket the service on the east side of the river. *Id.* at 5-6. This result would be equally harmful in its impact on the ability of shippers and receivers to move traffic by rail, and therefore to compete in the market.

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The experience of shippers on the east side of the Hudson confirms Mr. Robertson's conclusions. Jim Christie, Regional Vice President of USA Waste (the current tenant at the Harlem River Yard), expressed his concern not only about the competitive impact of a CSX monopoly versus competition in the shared assets area, but also the loss of intramodal transportation competition that USA Waste will experience as a result of the lack of east side rail alternatives. Christie V.S. at 1-4. As Mr. Christie states, while Conrail is a monopolist, it is neutral when it comes to joint line shipments involving NS or CSX. *Id.* at 2. After the Transaction, with CSX as the monopolist, Waste USA's option to use NS will be severely curtailed as CSX favors its long hauls to the detriment of NS. *Id.* at 3. Ultimately, this will increase Waste USA's transportation costs.

Finally, Ronald Klempner of American Marine Rail ("AMR"), a solid waste shipper, concurs with Mr. Christie's assessment of the impact of the CSX monopoly on intramodal shipping. Klempner V.S. at 3-4. When Conrail takes AMR's shipments that are headed to the south, AMR currently negotiates with either NS or CSX to complete the route. *Id.* at 3. When Mr. Klempner sought a quote from Conrail for a unit train of 60 or more cars of waste that would commence after the proposed Transaction, the Conrail marketing person directed him to CSX. *Id.* CSX quoted him a rate nearly double the then current Conrail rate and refused to quote a unit train rate (which can be less than one-half of the rate for single cars or small groups of cars). *Id.* 3-4. When he questioned the CSX representative about the rate, she responded that AMR could resort to trucks if the rate was unacceptable. *Id.* at 4. Then, she refused to discuss rates further. *Id.*

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The potential detriment of lack of intramodal competition to check CSX is not only a theoretical possibility posed by a consultant, but a real problem experienced by a shipper east of the Hudson. The Transaction, rather than creating competition, will leave shippers east of the Hudson at an even greater competitive disadvantage than the one from which they presently suffer.

B. The Applicants Wrongly Conclude that Shippers East of the Hudson Will Derive Benefits from CSX/NS Competition to the West

Despite the overwhelming evidence to the contrary, Applicants claim that shippers east of the Hudson will have an effective alternative to CSX because of the opportunity to dray to and from the North Jersey Shared Assets Area. Applicants' Rebuttal, Vol. 1, Narrative at VIII-13-14. The Applicants further claim that shippers east of the Hudson will have competitive alternatives to CSX as a result of Applicants' settlements with Canadian Pacific and Canadian National Railway Company. These summary conclusions, however, ignore the transportation realities east of the Hudson.

1. Drayage is Not a Viable Option

The Applicants posit that shippers east of the Hudson stand to benefit from this Transaction because of the "close proximity of the bulk of purportedly harmed shippers to the SAA [Shared Assets Area] in the New York Metropolitan area and the ready accessibility of trucks to the bulk of the traffic of such shippers." Kalt R.V.S. at 15. Kalt makes the assumption that nearly half of the commodities shipped to and from the region may be moved by truck. *Id.* Nowhere, however, do the Applicants, or their witnesses, address the actual viability of moving more goods by truck through the

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already highly congested New York Metropolitan area. The reason for this omission is simple -- the proposed solution is not feasible.

In his Rebuttal Verified Statement, John F. Guinan, Assistant Commissioner for Passenger and Freight Transportation of the New York State Department of Transportation explains why Kalt's conclusion is unrealistic. The two bridge routes over which commodities from west of the Hudson must be shipped, the northern George Washington Bridge - Cross Bronx Expressway route, and the southern Goethals - Verrazano Narrows Bridge route, are heavily congested and indeed, routinely experience near gridlock conditions. Guinan R.V.S. at 7-11. As a result of delays caused by gridlock, truckers impose surcharges, up to \$200 per load for movements with designations in New York City or on Long Island. *Id.* at 3-4. Recognizing this problem, New York has sought to divert some traffic off the roadways. It has invested \$200 million in the Oak Point Link, which will divert drayed and truckload freight to direct rail. *Id.* at 5. Now, Applicants propose to create a situation that will result in even more truck traffic, and claim that it will be good for the area.

Nor do Applicants address the implications for commodities that cannot be readily shipped by truck, even if such trucking were feasible. The Verified Statement of Ronald Klempner reveals that, like many other similarly situated shippers, trucking is simply not an option for his waste removal company. Klempner V.S. at 2-3. He states that it takes approximately six (6) times as many trucks than rail cars, or 250 times more trucks than "unit trains," to move the waste his company handles. *Id.*

Applicants, likewise, ignore the severe environmental impact that diversion to truck from rail will create. As demonstrated in the Verified Statement of Seth Kaye,

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EPA has designated the City or a portion of the City as being a non-attainment area with three of the six criteria pollutants -- ozone, carbon monoxide and particulate matter. The New York Metropolitan area is a severe non-attainment area for ozone, and therefore must reduce emissions, with steady interim reductions, by the year 2007. Kaye V.S. at 3. The New York Metropolitan area is also required to reduced volatile organic compounds and nitrogen oxides, both ozone precursors. Trucks and other motor vehicles are a major source of ozone, ozone precursors, carbon monoxide and particulate matter. The increased truck trips envisioned by Applicants will not only add to this pollution but also impede the City's efforts to improve air quality both as a result of additional trucks on the road, and the attendant congestion created by these additional trucks.

Not only will the air quality effects be detrimental to New York City, they will also result in adverse impacts in New York's neighboring state, New Jersey, the destination of the increased truck trips envisioned by Applicants. As set forth in the Comments on the Draft Environmental Impact Statement submitted by the Tri-State Transportation Campaign ("Tri-State Comments"), by letter dated February 1, 1998:

Due to New Jersey's failure to produce an adequate attainment plan for ozone, the State will be under a 'conformity freeze' beginning on April 10, 1998 during which no new transportation programs and plans can be adopted. EPA's recent revision of the health-based air quality standards confirm that the region's problem is even more serious than previously acknowledged.

Tri-State Comments at 7.

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The environmental impacts set forth above confirm that the drayage and trucking options suggested by Applicants to bring competition to the east side of the Hudson are not viable, and indeed are harmful to the New York Metropolitan region.

2. *The CP and CN Settlement Do Not Provide Competitive Alternatives*

Applicants argue that the CN and CP/D&H settlement agreements will result in "improved rail access to the area east of the Hudson." Applicants' Rebuttal, Jenkins R.V.S. at 15. "Both Canadian carriers will now have increased commercial access to New York City." *Id.* However, while these agreement appear to

east of the Hudson.

As a preliminary matter, the base

cost that CSX would incur in providing service from the Selkirk interchange to New York City. J.R.S. at 31; Verified Statement of Thomas D. Crowley, attached to the J.R.S. at 2. As a result, CP must include

. CP, therefore, will not be able to compete effectively with CSX for the east of the Hudson business.

In the Joint Rebuttal Statement, NYCEDC and NYS identified additional limitations, other than cost, that demonstrate the flaw in Applicants' theory that the CP and CN settlement provide competitive options for east of the Hudson shippers. For example, the ratemaking framework

CSX-69-HC-000102; the agreement covers

excluded;

; CP's right to quote

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rates for CSX

Id.; the agreement

presumably for its own account (CSX-69-HC-

000103); the CSX

established under the agreement

(CSX-69-HC-

000106); and the agreement

(Applicants'

Rebuttal, Vol. 2A, Jenkins R.V.S. at 16).

The Agreement between CN and CSX, likewise offers

. As demonstrated in the NYCEDC and the State's Joint Rebuttal Statement, the agreement specifically from its coverage, and offers no means by which east of the Hudson shippers can gain access to NS line-haul service in competition with CSX. Moreover,

. J.R.S. at 34.

Thus, neither the CP nor the CN settlement provide a valid competitive alternative to east of the Hudson shippers. As demonstrated above, Applicants cannot rely upon these agreements to fulfill the need for competitive trackage rights requested by NYCEDC and the State in this proceeding.

C. **The Proposed Transaction Insofar As It Relates To New York City And Long Island Is Against Public Policy.**

The adverse impact of the Transaction is not limited to shippers and receivers. New York City itself will suffer greatly in the absence of competition along the line east of the Hudson River. The Transaction raises very important and far-reaching public

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policy concerns. The first, of course, is the economic well-being of the City and its ability to maintain and attract manufacturing and distribution facilities within City limits. New York City is not just a huge consumer market. There are still manufacturing facilities in the City and on Long Island and the construction industry remains strong. *Canavan V.S.* at 2. Both markets are growing rapidly. According to a recent study conducted by Mercer Management Inc. ("Mercer"), the potential for rail oriented traffic -- commodities which would commonly move by rail to and from the nation's rail network -- in the New York City area is expected to grow 23% by the year 2020. *Id.* at 3. So, when the many businesses and individuals in New York and Long Island that are heavily reliant on transportation services are harmed because of the competitive options (or lack thereof) available to them in their present location, they will naturally look to relocate to places where they will enjoy greater competition and more choice of service. The harm demonstrated from the proposed Transaction, therefore, will not only affect the individual businesses identified there, but will also adversely affect the City itself.

NYCEDC has established, and Applicants have concurred, that the lack of adequate rail alternatives means resort to trucks. *Kalt R.V.S.* at 15-17; Verified Statement of Randy L. Levine ("*Levine V.S.*"), attached to NYCEDC Comments as Attachment 2, at 2; *Canavan V.S.* at 1. In the past decade, traffic overall on the cross-Harbor tunnels and bridges has increased significantly reaching nearly 30,000 trips per day. *Canavan V.S.* at 4. Under the proposed Transaction, that number will continue to increase dramatically. The increased congestion associated with the use of these trucks will also interfere with the economic development of the businesses and industry

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located with the City. *Id.* When traffic rises to an unacceptable level and businesses are given no alternative means of moving or receiving their goods, these businesses will suffer. If the problem becomes worse, as it will if the Transaction is consummated (when competition on the west side of the Hudson, with its attendant lower rates and better service, will likely force City and Long Island shippers to truck their goods to and from New Jersey), manufacturing and distribution facilities which rely very heavily upon transportation services may choose to relocate out of the City. *Id.*

The use of trucks also takes its toll on the roadways and on the bridges, which causes further concern to the City. *Id.* The increased traffic adds to the physical deterioration of the roadways and bridges. Trucks add congestion to overcrowded highways and their emissions add to air pollution in a metropolitan area that needs to find ways to improve, not worsen, the quality of the air. *Levine V.S. at 2-3; Canavan V.S. at 4.*

Lack of competitive rail options also adversely impacts the already enormous cost of moving waste out of the City. The magnitude of this market's transportation of waste has grown over the past several years to nearly 14 million tons per year in 1995, (*Canavan V.S. at 2*), and is still growing. With the upcoming closing of the Fresh Kill landfill on Staten Island, transportation of waste beyond the City will become an even greater issue than in the past. *Id.* As Mr. Klempner testified, after the closure of the Fresh Kill land fill in Staten Island, approximately 11,700 tons of waste a day, 6 days per week, will require transportation elsewhere. *Klempner V.S. at 4.* If this waste is trucked rather than moved by rail, it will require 585 trucks per day, or 3,510 trucks per week, to move the waste. *Id.* Efficient and cost effective rail service must exist as

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the City moves forward with its plans to manage this additional municipal solid waste. Canavan V.S. at 2-3. Otherwise, trucks will once again be depended upon at the cost of increased congestion, expense and safety. *Id.* at 3.

Given its current infrastructure, the City has little choice in the manner in which it moves freight into and out of the City. The float bridge system now operating through the New York Harbor is inadequate because of limited capacity and problems with the current operator. Canavan V.S. at 3. The only alternative, absent trucks, which, as noted above, pose serious environmental and economic development problems, is the use of the east line of the Hudson. Yet the lack of competition diminishes the value of this route as a competitive alternative. Without competition, and in the face of new competition in Northern New Jersey and the west side of the Hudson, the competitive value of the line east of the Hudson will decline even further. The proposed Transaction, while itself not the cause of some of the problems of freight rail transportation in the New York City region, will nevertheless directly and adversely impact the competitive balance of the region and market in and around New York City. Where monopoly currently produces mediocre service and rates for all in the region, the advent of competition for a limited segment of the market will make rail freight service unfeasible for those not lucky enough to have competition. Such an outcome is surely not in the public interest.

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D. The Trackage Rights Sought by NYCEDC and the State Are Economically Viable and Operationally Feasible and Solve the Problem

1. The Trackage Rights are Economically Viable

Applicants are wrong when they say that there is insufficient traffic density to support a second rail carrier on the east side of the Hudson. NYCEDC Witness Robertson testified that diversion from present carload traffic alone could provide to the second rail carrier sufficient traffic for at least one 50 car train each day. Moreover, in response to Applicants' attempt to characterize that traffic density as insufficient, Mr. Robertson in his Supplemental Verified Statement testified as to additional prospective traffic on this route. Based upon the availability of competitive rail service to terminals east of the Hudson, such as Oak Point Link, the increased volumes of outbound bulk shipment of commodities such as municipal waste, and the general growth in demand for rail service following the advent of competition, Mr. Robertson concludes that the new carrier could attract to trailers per year to a new east side intermodal service. This evidence clearly establishes sufficient traffic to support a second rail carrier on the east side of the Hudson.

Although Applicants express skepticism regarding the availability of a carrier to service this second rail line, NYCEDC and the State have demonstrated the interest of at least three carriers in pursuing this opportunity should the Board grant their requested conditions. CP, New York and Atlantic Railway (NY&A) and New England Central ("NECR") have expressed interest in conducting operations over this line. NYS-15 at 4; Verified Statement of Greg Petersen, attached to J.R.S. at 2; Transcript of Proceedings, November 25, 1997, attached to J.R.S., at 36-38. Since, as NYCEDC

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demonstrates above, the CP agreement

when the NYCEDC/NYS conditions are approved, CP's commercial interests could compel it to compete to become that operator. Contrary to Applicants' suppositions, there is no indication that the CP settlement has detracted from CP's interest in pursuing rights over this line. Before it settled out of this proceeding by reaching agreements with both NS and CSX, CP had indicated its own interest in providing direct rail service in this corridor. Nothing in its agreements with Applicants

Applicants' arguments against the viability of this service fail to consider or recognize the strong evidence in this proceeding demonstrating the need for a second carrier on the line east of the Hudson to redress the anti-competitive impacts of the Transaction on the shippers in this market. The service is workable and makes economic sense; an operator will come forward and seek the rights to provide the service. The Board's order will not appoint a carrier; instead it will make it possible for the City of New York, the State and shippers in this market to seek an alternative to the single-carrier arrangement with which they have been saddled for over twenty years and which the proposed redistribution of Conrail's assets will perpetuate and, indeed, make worse.

2. The Trackage Rights are Operationally Feasible

Applicants assert, without any basis, that "the proponents of trackage rights East of the Hudson fail to acknowledge, let alone address, a variety of serious physical and operational implementing problems." Applicants' Rebuttal, Vol. 1, Narrative at VIII-18.

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Applicants wholly ignore the Verified Statement of Donald N. Nelson, President of Metro-North Commuter Railroad, who stated that rail service offered by a second carrier would not conflict with Metro-North passenger operations. Nelson V.S. at 7-8. Without any evidence that contradicts the person who knows this line the best, Applicants claim that a second freight line would conflict with passenger operations. That conclusion simply is not credible in light of the unrefuted testimony submitted by NYCEDC and the State.

Applicants also offer the conclusory statement that the Harlem Yard and Oak Point Yard do not have the capacity to accommodate additional carriers. Rebuttal Verified Statement of John W. Orrison ("Orrison R.V.S."), Applicants Rebuttal, Vol. 2A at 123. Applicants again offer no evidence to support this summary statement. They certainly have not addressed the statements of witness Walter Schuchmann, an expert with 20 years' experience in railroad operating and related matters, who testified from first hand observations of both the lines and the yards that they indeed do have the capacity to handle the additional freight carrier proposed by NYCEDC and the State. Schuchmann V.S. at 5-6.

Finally, although he backs away from the statement in his overly generalized conclusions contained in his Rebuttal Verified Statement, Mr. Orrison, during his prior deposition, had reached the conclusion that the Hudson Line of Metro-North could handle additional freight traffic without undue risk to passenger service. Orrison Depo. Tr. at 56. The Applicants' opposition regarding the operational feasibility of a second freight carrier is disingenuous, at best. Applicants have offered no testimony, other than conclusory allegations, to contradict NYCEDC and the State's position that the

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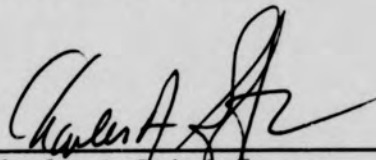
proposed trackage rights are both a pro-competitive arrangement and operationally feasible. The Board should, therefore, grant NYCEDC and the State's request for trackage rights.

CONCLUSION

NYCEDC has clearly established that the conditions requested by it and the State are necessary to remedy the anti-competitive effects of the Transaction. Without imposition of these conditions, shippers on the east side of the Hudson will be left without competition while their competitors in Northern New Jersey and west of the Hudson will benefit from competition. This inequity will not only harm the shippers, but the economic vitality of the New York metropolitan region as a whole. The alternative proposed by Applicants, trucking and drayage is simply not feasible either from an economic or environmental standpoint. In contrast, the conditions requested by NYCEDC and the State are both economically and operationally feasible. For all the reasons set forth herein, NYCEDC requests that the Board grant the trackage rights requested by NYCEDC and the State.

Dated: February 23, 1998

Respectfully Submitted,



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ATTACHMENT A

United States Senate

WASHINGTON, DC 20510

January 9, 1996

The Honorable Linda Morgan
Chairman
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: STB Finance Docket No. 33362.
CSX Corporation, et al. -- Control
and Operating Leases Agreements
-- Conrail Inc., et al

Dear Chairman Morgan:

When Congress responded to the 1970s bankruptcies of the northeastern rail carriers, one of its goals was the enhancement of rail competition throughout New York and the neighboring region. Unfortunately, New York ultimately was left with a Conrail freight monopoly, and the consequences for service quality and freight costs were predictable.

Now before the Board is an application by CSX and Norfolk Southern to acquire and divide Conrail. Through their plan, these carriers claim the restoration of railroad competition in New York which will lead to more efficient service, lower transportation rates, and diversions of freight from overburdened roads. Their plan is ambitious and in many respects, promising. In at least two critical areas affecting New York, however, their proposal needs to be enhanced to meet the needs of New York shippers.

First, shippers east of the Hudson River in New York City, Long Island, and the eastern Hudson River Valley would be served by a single railroad -- CSX. We are concerned this will not spark economic development nor service quality nor cost benefits claimed elsewhere, but would leave rail users in key New York industries at a competitive disadvantage versus their New Jersey counterparts, who will enjoy new, rail-to-rail competition. New York shippers from produce distributors to solid waste transporters to wood products manufacturers will suffer as a result. In addition, inadequate rail competition provides no relief of the commercial traffic congestion that is currently experienced throughout Long Island -- particularly along the Long Island Expressway -- and the New York metropolitan area.

The Honorable Linda Morgan
January 9, 1998
page 2

Realization of New York City and western Long Island's potential as a modern transshipment facility for international container cargo likewise will be stifled without modifications of the proposed transaction. We understand that a recent agreement between CSX of CP Rail may open up some options for certain commodities moving to and from Canada. This settlement, however, is too limited in too many respects to be considered an adequate substitute for true competition.

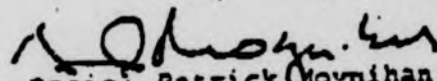
Second, the proposal for the division of Conrail lines in the Buffalo area would leave most points solely served by either CSX or Norfolk Southern. Particularly in light of their plan to bring rail competition to Detroit -- Buffalo's competitor for U.S. - Canada trade -- this action unfairly prejudices a region critical to the health of the New York economy.

The State of New York, together with the New York City Economic Development Corporation (NYCEDC), has proposed an effective solution to the east of the Hudson problem. Their plan, which is supported by local New York shippers and commuter rail authorities, would create balanced competition by allowing a second rail freight carrier to operate over the Hudson line from the Albany area to Long Island. Likewise, the Erie-Niagara Rail Steering Committee, supported by New York State, has proposed alternative plans for promoting competition in the Buffalo area, that will place that region back on par with Detroit in terms of transportation access.

We strongly support the petitions of the State of New York and the NYCEDC, and the conditions requested by the Erie-Niagara Rail Steering Committee, and urge that both be granted by the Surface Transportation Board. The relief they seek is consistent with the intent of Congress when it started the process that led to the creation of Conrail, and gives full effect to CSX and Norfolk Southern's stated purposes in their plan for Conrail's division.

Sincerely,


Alfonse M. D'Amato
United States Senator


Daniel Patrick Moynihan
United States Senator

cc: Honorable Gus Owens
Secretary, Surface Transportation Board

CERTIFICATE OF SERVICE

I hereby certify that on February 23, 1998, a copy of the foregoing **Public Version** of the Brief of The New York City Economic Development Corporation (NYC-20) was served by hand delivery upon the following:

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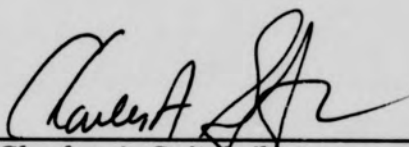
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ORIGINAL

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33338

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



OAG-9

BRIEF OF THE OHIO ATTORNEY GENERAL, THE
OHIO RAIL DEVELOPMENT COMMISSION AND THE
PUBLIC UTILITIES COMMISSION OF OHIO

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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33388

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

OAG-9

BRIEF OF THE OHIO ATTORNEY GENERAL, THE
OHIO RAIL DEVELOPMENT COMMISSION AND THE
PUBLIC UTILITIES COMMISSION OF OHIO

I.

INTRODUCTION

Pursuant to the procedural schedule established by the Board in Decision Nos. 6, 12 and 52, served May 30, 1997, July 23, 1997 and November 3, 1997, respectively, the Ohio Attorney General (OAG), the Ohio Rail Development Commission (ORDC) and the Public Utilities Commission of Ohio (PUCO) (collectively Ohio) hereby file their brief in this proceeding

Ohio has actively participated in this proceeding initially by stating its opposition to the Primary Application¹ unless the Board adopts adequate protective conditions and other measures deemed to be essential as set forth in Ohio's October 21, 1997, submission (OAG 4 and 5). The Applicants responded to Ohio and other commenters, protestants and responsive applicants in their Rebuttal filed December 15, 1997, as CSX/NS 176.² Subsequently, Ohio filed comments in support of responsive applications filed by R. J. Corman Railroad Company,³ Indiana & Ohio Railway Company,⁴ Ann Arbor Acquisition Corporation,⁵ and Wheeling & Lake Erie Railway Company⁶ in Ohio's December 15, 1997, submission entitled "Comments of the Ohio Attorney General, Ohio Rail Development Commission and Public Utilities Commission

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

² In CSX/NS 194 the Applicants identified what points in their Rebuttal they discuss issues relevant to Ohio.

³ Finance Docket No. 33388 (Sub-No. 63).

⁴ Finance Docket No. 33388 (Sub-No. 77).

⁵ Finance Docket No. 33388 (Sub-No. 70).

⁶ Finance Docket No. 33388 (Sub-No. 80).

of Ohio to the Responsive Applications". Thereafter, on February 2, 1998, Ohio filed comments and specific requests for protective conditions in response to the Draft Environmental Impact Statement issued by the Board's Section on Environmental Analysis (SEA) in its February 2, 1998, submission entitled "Responsive Comments to Draft Environmental Impact Statement and Request for Protective Conditions Submitted on behalf of the Ohio Attorney General, Ohio Rail Development Commission and the Public Utilities Commission of Ohio.

II.

SUMMARY OF REQUESTED RELIEF

In OAG 4 and 5 Ohio stated that it is well served by its existing 5,800 route mile network comprised of 3 Class I rail carriers, a Class II regional carrier and 33 short line rail carriers which currently meet the needs of Ohio communities and industries throughout the State. That situation could change dramatically for the worse under the proposed division of Conrail lines between the remaining Class I carriers. The Wheeling & Lake Erie Railway (W&LE) and the Ann Arbor Railroad (AARR) would be confronted with substantial losses of traffic and revenue to a degree sufficient to threaten insolvency for the W&LE and to seriously affect the ability of AARR to continue providing essential rail service. Ohio's energy supplier, Centerior Energy Corporation, would be deprived of existing single-line access to coal producers and Ohio stone producers, National Lime and Stone Company, Wyandot Dolomite, Inc. and Martin Marietta Materials,

Inc. face similar losses of efficient single-line service. ASHTA Chemicals⁷ and the public would be burdened with unnecessarily circuitous and inefficient movements of its hazardous chemical traffic and the Ohio Neomodal intermodal terminal facility faces extinction if its only rail connection (W&LE) should fail. Ohio is also concerned that a number of Ohio-based railroad employees face the prospect of losing their jobs or being transferred out of the State.

Unless these and other serious ramifications of the proposed Transaction are mitigated, it is clear that Ohio communities and industries face loss of competitive rail service in many instances, loss of efficient single-line service in others and even the threat of loss of rail service altogether for some customers and communities. Ohio is also very much concerned with adverse safety and serious environmental impacts facing cities and communities throughout the State which will occur as a direct result of re-routing plans that would be implemented by the Applicants following consummation of the proposed Transaction. Ohio submits this brief in support of its position that the proposed Transaction, as submitted, is not in the public interest and should be denied unless the Board subjects approval to protective conditions and other measures adequate to ameliorate adverse consequences that will otherwise impact on

⁷ As an active participant in this proceeding ASHTA Chemicals has raised environmental and service issues that are shared by Ohio. Under those the circumstances Ohio has determined to support the relief sought by ASHTA.

Ohio communities, its industry and on the rail transportation network that serves those interests. Specifically, Ohio urges that vital public interest concerns require that any grant of the requested authority be predicated on protective measures including at least the following:⁸

1. Careful evaluation of remediation proposals sought by Wheeling & Lake Erie Company (W&LE) and adoption of conditions adequate to assure that it can remain fully intact as an independent and viable Ohio based regional carrier.
2. Adoption of conditions adequate to assure that utilization and viability of the Neomodal intermodal facility will not be undermined as a result of the proposed Transaction.
3. Assure Centerior Energy Corporation of continued availability of efficient single-line service from coal suppliers by obligating NS to assume trackage rights over the CSX line between Centerior's Lake Shore

⁸ Some transaction related problems and requests for remedial conditions previously supported by Ohio have been resolved through negotiation or clarification which has been accomplished between directly affected Ohio shippers/short line carriers and one or more of the Applicants. As appropriate, those issues and requests for relief are not encompassed in the conditions and other remedial measures deemed essential by Ohio.

generating station in Cleveland and "CP124" located east of Ashtabula.

4. Imposition of conditions adequate to preserve service and pricing elements of single-line service currently available to Ohio aggregate shippers.

4. Imposition of protective conditions adequate to ameliorate the adverse impact of loss of revenue traffic on the ability of Ann Arbor Railroad to continue providing adequate service.

5. Prescription of reciprocal switching between CSX and NS at Ashtabula to avoid circuitous and inefficient handling of hazardous chemical shipments for ASHTA Chemicals, Inc.

6. Imposition of a condition requiring that Applicants may not effect substantial increases in traffic over Ohio corridors and/or through Ohio cities and communities without first having negotiated and committed to agreements with State and local officials which will mitigate adverse safety and environmental impacts that would otherwise impact on Ohio constituents. Wherever possible Applicants should be required to

fully evaluate and present to local state and Board officials options to re-route traffic which would reduce substantial increases in rail traffic currently proposed by Applicants.

7. Adoption of pro-active oversight provisions to assure that trackage rights agreements between Applicants are being operated in the interest of shippers; that safety and environmental problems as well as rail labor issues have been adequately recognized and mitigated; and that all concerned parties have access to effective post-Transaction relief as warranted.

III.

ARGUMENT AND STATEMENT OF CONTINUING INTEREST OF OHIO

Ohio remains opposed to the proposed control and operation of CR lines by CSX and NS unless the Board adopts protective conditions and other measures adequate to avoid adverse effects that would otherwise impact on Ohio shippers, its communities and on the rail carriers that serve them. Such measures must include provisions to ameliorate adverse impacts on public safety and environmental concerns and on adequacy of rail service. Ohio has also insisted upon the importance of pro-active oversight measures in the public interest as necessary to preserve adequate competition, ensure continued availability of

essential rail service and to assure that safety and environmental problems are effectively resolved.

In maintaining its steadfast opposition to the Primary Application, Ohio is mindful that the relevant statute directs the Board to approve or authorize the Transaction if it finds that the proposal is consistent with the public interest.⁹

Among the factors that must be considered in making a public interest determination are:

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

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

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

The Board's consideration of any railroad transaction must also be guided by the Rail Transportation Policy set forth at 49 U.S.C. § 10101 which mandates at subparagraphs (3), (5) and (8) promotion of a safe and efficient rail transportation system by allowing carriers to earn adequate revenue, fostering sound economic conditions in transportation and assurance that

⁹ 49 U.S.C. § 11324(c).

transportation facilities and equipment will be operated without detriment of the public health and safety.

In addition to other relevant issues, the Board also must consider the environmental and safety impacts of the proposed Transaction as required by the National Environmental Policy Act and 42 U.S.C. § 435 and the Board's implementing regulation set forth at 49 C.F.R. Part 1105.

Ohio currently is well served by three Class I rail carriers and 33 short line and regional carriers. However, virtually every aspect of Ohio's public and private fabric including all the regional and short lines will be affected by the proposed control and operation of CR lines by CSX and NS. Some of Ohio's shippers could benefit from increased availability of single line rail service which could be offered by CSX and NS and some of Ohio's short line rail carriers could benefit from increased single line loads from their respective points of interchange and access to new corridor services planned by CSX and NS. However, Ohio remains very much alarmed that some of its small and regional rail carriers would clearly experience substantial losses of traffic and revenue sufficient to threaten bankruptcy of the Wheeling & Lake Erie Railway (W&LE) and to seriously impact on the ability of Ann Arbor to continue providing adequate service for Ohio shippers.

Ohio is mindful that the Applicants project 450 Ohio based railroad jobs would be lost through the proposed Transaction. Ohio remains concerned that any employees that may

be displaced by the proposed Transaction should be adequately considered and afforded every protection that is their due.

Ohio has manifested its very serious concern in regard to numerous safety and environmental problems that will directly impact on Ohio communities and individuals in the event the proposed Transaction is consummated. Applicants urge that the Board should not weigh all such impacts separately but rather should view them in the context of the entire proposal.¹⁰ Ohio maintains that each serious safety or environmental impact warrants careful consideration and provision for measures to adequately ameliorate the specific harm to the public interest. If that is not possible in the context of this proceeding, the Transaction should be denied as contrary to the public interest.

Ohio recognizes that the Board does have broad authority to impose conditions governing railroad consolidations. The controlling issue is whether a proposed transaction will result in a lessening of adequacy of transportation to the public. CSX Corp.--Control--Chessie and Seaboard CN, 301 I.C.C. 521, 577 (1980). In appropriate circumstances conditions are imposed to ameliorate harm when a proposed transaction is demonstrated to produce significant loss of competition or harm to essential services¹¹ or to remediate safety or environmental problems directly related to a proposed transaction.¹²

¹⁰ CSX/NS-176, Volume 1 of 3, p. 696.

¹¹ 49 C.F.R. § 1180.1.

¹² 49 C.F.R. § 1105.10(f).

In deciding whether to impose conditions, the Board like the Interstate Commerce Commission before it examines the alleged anticompetitive consequences of the transaction as well as harm to the public interest.

The basic consideration for determining whether a need for a public interest condition exists is whether the transaction will have anticompetitive consequences (or threaten other possible harm to the public interest). . . . If a transaction threatens harm to the public interest, then public interest conditions should be imposed if they are operationally feasible, ameliorate or eliminate the harm threatened by the transaction, and they are of greater benefit to the public than they are detrimental to the transaction. Union Pacific--Control--Missouri Pacific; Western Pacific, 366 I.C.C. 462, 563-564 (1982) (hereinafter, "UP/MP/WP").

More recently, the Board stated:

We will adhere to the criteria for imposing conditions set out in UP/MP/WP Conditions will not be imposed unless the merger produces effects harmful to the public interest (such as a significant loss of competition) that a condition will ameliorate or eliminate. See, Finance Docket No. 32760, Union Pacific Corporation, et al. -- Control and Merger -- Southern Pacific Rail Corporation, et al., Decision No. 44 (served Aug. 12, 1996), slip op. at 147-151 (hereinafter UP/SP).

In its separate submissions¹³ Ohio has identified several specific public interest issues that warrant imposition of such conditions and other remedial measures.

¹³ OAG-4 and 5, OAG-8, and Ohio's Responsive Comments to Draft Environmental Impact Statement and Request for Protective Conditions.

Competitive Access

Applicants have identified four points in Ohio as locations where the number of rail carriers would be reduced from 2 to 1 under the proposed Transaction. These include the Cities of Upper Sandusky, Sidney, Avon Lake, and Sandusky. Absent remedial measures, shippers in these communities would face loss of competitive alternatives for moving their products or raw materials. As captive shippers they would also face the prospects of being forced to pay increased rates as a result of the absence of competition.

Applicants have proposed to mitigate these serious concerns through a grant of trackage rights to each other. However, as discussed in the Statement of Dr. Wesley W. Wilson,¹⁴ trackage rights can only be effective in ameliorating competitive harm if such rights afford full access to customers along the route (not merely terminal access), include non-discriminatory service terms, and are subject to cost based trackage rights fees.

Although the Board has recognized trackage rights as an appropriate remedy, Ohio urges it is critical for the Board to closely examine trackage rights proposed by the applicants to assure that they will serve to mitigate the harm threatened by the reduction in competition. Based upon problems arising from the UP/SP merger, Ohio urges that the Board should attach a

¹⁴ OAG-5, Exhibit 5.

common carrier obligation to such grants and retain oversight to ensure that service is available under the described condition.

Wheeling & Lake Erie Railway

Ohio has manifested support for the responsive application filed by the Wheeling & Lake Erie Railway (W&LE) and strongly urges the Board to mandate concessions sufficient to assure survival of an independent and fully intact W&LE should the Primary Application be granted.

W&LE fills a critical rail service niche in Ohio which Ohio deems essential for continued economic development. With 450 of its route miles in Ohio, W&LE is large enough to offer "big railroad" services such as access to Lake Erie and Ohio River docks, direct access to major classification yards, extensive locomotive and car repair facilities, track maintenance and engineering capacity and an intermodal ramp (Neomodal). At the same time W&LE is small enough that many of its customers deal directly with top management in making decisions on new plant locations, expansion or new service needs.

Contrary to Primary Applicants' assertions that W&LE is a failing railroad burdened by poor management, careful review of recent W&LE financial statements demonstrate that it is a railroad which has weathered a number of financial storms many of which were beyond its control, in large part due to skilled management and aggressive marketing. However, W&LE's current status as a marginally profitable regional railroad is in dire jeopardy. As stated by Ohio's expert witness, George L. Stern,

in his verified statement submitted on October 21, 1997, "there is substantial reason to worry that W&LE is in 'mortal danger' and 'on bankruptcy's brink' from diversion due to acquisition of Conrail lines by NS and CSX."¹⁵

Rail bankruptcies always have serious repercussions including protracted uncertainties, changes in service patterns, adjustments to new personnel and business strategies all of which impact to the detriment of shippers and communities that depend upon availability of adequate rail service. Here, the advent of a W&LE bankruptcy would be particularly disruptive for major Ohio rail users including steel, stone, plastic and coal producers due to the likelihood of a piecemeal breakup of W&LE's rail system.¹⁶ In this regard it is quite possible that fragmentation of W&LE would mean that there would be different rail carriers operating W&LE lines in western Ohio and the Ohio River area in eastern Ohio. Recently new aggregate business was developed by W&LE largely because of its ability to provide an efficient single-line haul. Ohio believes it is quite likely that this business would disappear in the event of a W&LE bankruptcy.¹⁷

In evaluating the impact of the proposed Transaction, the ability of W&LE to continue providing services deemed

¹⁵ Verified Statement of George L. Stern, pp. 17, 18, Exhibit 3 appended to OAG 4.

¹⁶ See OAG 8, p. 10.

¹⁷ V.S. Thomas M. O'Leary, Executive Director of the Ohio Rail Development Commission in support of Reply of Responsive Applicant Wheeling & Lake Erie Railway Company (WLE-7).

essential by Ohio and shippers it now serves, the Board should focus on the very substantial volume of interchange traffic between W&LE and NS. This partnership arrangement currently serves as a competitive alternative to Conrail service throughout Ohio. However, under the proposed division of Conrail lines, NS would become a direct competitor to the W&LE/NS partnership with dire and wholly predictable results for W&LE and the partnership arrangement. Nevertheless, NS and CSX maintain that the proposed Transaction will have minimal impact on W&LE.

NS and CSX also argue that any decisions on whether NS will cancel W&LE's lease to the NS owned Huron Docks, thus depriving W&LE of \$1.8 million in annual revenue, would not be related to the proposed Transaction. NS expert John Williams opines:

Clearly it is the potential expiration of W&LE's lease for the Huron Docks -- not the Conrail transaction -- which would cause the loss of W&LE's iron ore traffic. In the absence of the Conrail transaction, the termination of W&LE's Huron Docks lease would cause the loss of W&LE's iron ore traffic. Thus, the Conrail transaction has no effect on whether or not W&LE's iron ore traffic is lost.¹⁸

That statement glosses over some very critical facts that clearly support a very different conclusion. The W&LE uses the Huron Dock to serve Wheeling and Pittsburgh Steel along the Ohio River. NS does not currently serve Wheeling-Pittsburgh but after consummation of the proposed transaction it will. Thus, if

¹⁸ Williams, p. 53/Volume 2B of 3, Rebuttal Verified Statement.

the transaction is approved, NS and W&LE will compete head to head for the Wheeling-Pittsburgh business. At the stroke of a pen, NS can eliminate rail competition for the Wheeling-Pittsburgh business by cancelling the W&LE lease to the Huron Docks. Yet Applicants claim that if W&LE loses its lease to the Huron Docks and consequently the Wheeling-Pittsburgh business, it will not be because the proposed transaction would allow them to pick up uncontested \$1.8 million new revenue.

Availability of a viable W&LE and its neutral access to all of Ohio's class I railroads at key yard facilities has been a pivotal factor in the decision of such companies as Best Plastics, Georgia Pacific, Inland Containers, Primary Packaging, Republic Engineered Steels and Sterilite to locate new plants or expand existing facilities along W&LE lines. A failure of the W&LE would confront all of these businesses with very serious problems.

Since the W&LE provides the Neomodal intermodal terminal with its only connection to the rail system, a W&LE failure would isolate Neomodal and summarily foreclose this important intermodal project from reaching its expected place as a key component in the Ohio transportation system. Neomodal's dependence upon W&LE service clearly meets the essential services test as defined in Lemoille Valley R. Co. v. ICC, 711 F.2d 295 (D.C. Cir. 1985).

The great value of the W&LE to Ohio is its service to large and small shippers throughout its system. That service

includes meeting the needs of shippers and receivers of high density low value aggregate material. A fragmented or failed W&LE would be a serious blow to Ohio's aggregate producers.

In keeping with the importance Ohio ascribes to a viable W&LE the State has invested over \$6 million to assist W&LE in rebuilding its system from the deteriorated condition left behind by NS at the time of the original W&LE sale. Currently, ORDC is considering a \$600,000 track improvement project on one of W&LE's lines serving the aggregate industry.¹⁹

Barring a negotiated settlement the Board must decide whether to grant remedial conditions as sought by W&LE's responsive application.²⁰ If the Board decides to grant the Primary Application, Ohio urges the Board to do now what must be done to assure an independent and viable W&LE after consummation of the Transaction. Anything less would almost surely leave W&LE in immediate jeopardy and the shippers that depend upon its service in extreme circumstances. That latter alternative is wholly unacceptable to Ohio.

Ohio Stone Producers ("1-to-2" Shippers)

One of the most unappealing consequences of the Transaction for Ohio's shippers are the so-called "1-to-2"

¹⁹ O'Leary V.S. W&LE-7 at 90.

²⁰ Ohio remains committed to W&LE's request for haulage/trackage rights access to industries and facilities in and around Toledo, OH. Ohio notes in particular that direct interchange between W&LE and the Ann Arbor Railroad would be mutually beneficial to both railroads, and will assist both in recovering revenues that each would otherwise stand to lose as a result of the Transaction. See, also, Stern V.S. at 9, OAG-4.

situations that will arise as various Conrail lines throughout the state are divided between NS and CSX. Such "1-to-2" impacts are most acute for those shippers who rely heavily on the economies of single-carrier (or "single-line") rail service to be able to successfully market their products. In Ohio, three aggregate and limestone facilities will be especially hard hit as "1-to-2" shippers -- National Lime and Stone Company ("National"), Wyandot Dolomite, Inc. ("Wyandot") and Martin Marietta Materials, Inc. ("MMM"). Because the line divisions resulting from the Transaction will present each of these shippers with less efficient rail service than they receive today, the Board must act to grant the narrowly tailored relief that these shippers have already requested. Should the Board fail to take appropriate remedial action, the consequences would be critical to Ohio's construction economy, would increase costs of State and local highway maintenance, and would degrade Ohio's air quality.

As Ohio and the aggregate shippers have pointed out in earlier submissions, aggregate is a low value product, the transport costs of which typically dictate a producer's market reach. In many cases, the length of haul requires the lower costs of rail service for stone to be economically marketed at all. Because of the tight margins associated with aggregate transport, shippers depend upon the lower costs and other operating efficiencies associated with single-carrier service.

As mentioned above, National, Wyandot, and MMM have submitted to the Board the particular adverse impacts each will suffer as a result of the Transaction. Each has presented the Board with requests for conditions that are narrowly tailored and are carefully drawn so as to require those who would otherwise create the "1-to-2" situations (specifically, NS and CSX) to shoulder the responsibilities for correcting them. None of these three aggregate shippers has received a proposal from the Applicants that would resolve for the long term the adverse "1-to-2" impacts of the Transaction.²¹

The Board can and must act to impose the relief requested by National, Wyandot, and MMM. To begin with, there is little doubt that the Applicants do not desire additional aggregate business. (In fact, in the case of at least one of these shippers -- Wyandot -- the Applicants have made clear that they would rather that W&LE be designated to provide the necessary single-carrier service. See, Seale RVS at 7.)²²

²¹ Ohio notes that the Applicants have suggested that they could devise certain "joint-line" operating arrangements that would allegedly replicate the efficiencies of single-carrier service. While the Applicants may suggest that they could undertake such arrangements, their actions speak much louder than their words. In fact, Ohio understands that not one of these three aggregate shippers has received a proposal from the Applicants that would ensure the same operating and cost efficiencies as they receive today.

²² Ohio recognizes that W&LE stands in a position to provide single-carrier service for both National and Wyandot, as an alternative to the relief that those two shippers have requested on October 21, 1997. In order for W&LE to be able to provide service replacing the "all-Conrail" service that National and Wyandot receive today, W&LE would need to obtain trackage rights access to stone distribution terminals at Wooster and

Nonetheless, the Board must weigh the needs of these shippers, and the interests of the public generally against the Applicants' designs to avoid less "convenient" traffic. Concerning these aggregate shippers, the Transaction would impose operating inefficiencies that the Board has the authority and the duty to remedy.²³ In this regard, Ohio strongly agrees with the Board in its observation that loss of single-line service as a consequence of a railroad transfer would take the railroad system backwards. (UP/SP at 158). Clearly, maintaining single-carrier service for National, Wyandot, and MMM, where each of these carriers enjoys such service today is entirely consistent with Ohio's interests. For these reasons, Ohio urges that the Board grant the requests of National, Wyandot and MMM in full.

As the Board can see, Ohio does not embrace the National Industrial Transportation League's ("NITL") Settlement Agreement with the Applicants (hereinafter, the "NITL Settlement Agreement") because it provides inadequate protection for National, Wyandot, and MMM. In essence, the NITL Settlement Agreement provides a three-year moratorium on service rates for

Alliance, OH and access to National Quarry at Bucycus.

²³ The Board is both authorized and mandated to act in the interests of these shippers because it is required under 49 U.S.C. §11324(b)(1) to preserve adequate transportation to the public, and it is required under 49 U.S.C. §10101(3) and (14) to promote efficient rail transportation services and to promote energy conservation. Clearly, none of these important statutory mandates will be served if receivers of stone in Ohio must resort to a larger degree on either -- (1) more expensive and less efficient two-carrier service, or (2) costly, road-damaging, highway congesting, and air polluting truck transport.

"1-to-2" shippers after the transaction is consummated. The agreement does not address service inefficiency questions, nor does it adequately protect shippers three years down the line. In this respect, the NITL Settlement Agreement glosses over the fundamental adverse impacts of the transaction, and buys for National, Wyandot, and MMM what amounts to a three-year "stay of execution."

ASHTA Chemical, Inc.

ASHTA Chemical, Inc. (ASHTA) is one of the largest shippers of chemical products in Ashtabula, OH and is actively participating in this proceeding. ASHTA currently ships its products classified as hazardous materials to customers throughout the continental United States and Canada.

As a result of the proposed Transaction, CSX will gain exclusive control of Conrail's east-west Chicago rail line on which ASHTA's manufacturing facility is located. CSX intends to continue to ship all of ASHTA's traffic to Buffalo, NY, for switching to ASHTA's customers in southern and western locations. These shipping arrangements are inefficient and offer no competitive alternatives to ASHTA as they do not offer access to NS. ASHTA has argued that a reciprocal switching arrangement, for which ASHTA would pay a reasonable fee (see ASHTA-11) would avoid this unnecessary and costly movement of freight through Buffalo, NY.

CSX and NS have suggested that their acquisition of Conrail will result in the improvement of service yet the

proposed action will have an adverse impact on ASHTA's ability to ship their products directly south on NS. NS could serve ASHTA at Conrail's West Yard in Ashtabula; however, CSX will control the West Yard and refuses to consider reciprocal switching or any other arrangement which would allow NS to provide more efficient routing of ASHTA's product to its customers. (See Christopher Jennings letter dated October 2, 1997, Exhibit D to ASHTA-11).

Despite the inefficiencies produced by the circuitous routing of ASHTA's shipments, CSX will not agree to a reciprocal switching arrangement that will allow ASHTA to ship on NS' north-south line. ASHTA has determined that there are no economically feasible competitive alternatives available to it if the Transaction is approved as proposed and, without appropriate relief ASHTA maintains that it will be put at a competitive disadvantage.

Ohio strongly favors remedial measures that will eliminate unnecessary circuitous movement of hazardous materials as very much in the public interest. In addition, ASHTA has advised that a substantial number of its existing single railroad shipments would become inefficient and more costly two carrier rail shipments (a "1 to 2" situation) absent appropriate remedial measures. Ohio supports ASHTA in the relief it seeks.

Ann Arbor Acquisition Corporation
d/b/a Ann Arbor Railroad

Quite simply, Ohio's support of the Ann Arbor Railroad ("AARR") responsive application springs from the State's interest in preserving the services that AARR provides in northwestern

Ohio. As was made clear in AARR's responsive application filed on October 31, 1997, and in Ohio's comments of December 15, 1997,²⁴ AARR stands to lose substantial revenues as a result of the proposed Transaction. Most of the debilitating revenue losses AARR will incur relate to traffic the Applicants will be able to divert away from AARR lines. Admittedly, such traffic diversions would flow from new operating and routing efficiencies that the Applicants would enjoy post-Transaction, but they also threaten AARR's future economic health and its ability to provide essential services to its customers, including customers in Ohio.

Ohio need not revisit here the array of economic calamities that would befall AARR in the event that the Transaction is consummated without appropriate protective conditions. That is evidence already well-presented in AARR's earlier filings. It is sufficient to note that Ohio regards AARR as an essential rail service provider within the State. Furthermore, Ohio recognizes that, without expanded access to markets not now available to AARR, that carrier's future is in serious jeopardy.

Ohio does not request that the Applicants forego the new routing and operating efficiencies (benefits that spring, in part, because the Applicants will be able to by-pass AARR trackage and interchanges) that will be available to them post-Transaction. Ohio asks only that the Board recognize the serious revenue losses AARR would suffer and fashion remedies designed to

²⁴ OAG-8.

enable AARR to survive. Consistent with this objective, Ohio calls upon the Board to permit AARR access to adequate, "replacement" revenue opportunities through expanded operating rights and market access.

Centerior Energy Corporation

Ohio continues to avidly support Centerior Energy Corporation ("Centerior") -- a Cleveland-based electric company with subsidiary-owned plants in such places as Ashtabula, Eastlake, and Cleveland, OH. As a result of the Transaction, it is likely that Centerior's ability to compete against other area electricity producers will be significantly eroded. The harm Centerior faces results primarily from the fact that Centerior's facilities will become "1-to-2" industries, and will have to depend upon joint NS-CSX service where today it can receive steam coal in single-line service from Conrail. Because Centerior's ability to (1) provide cost-effective power to nearby Ohio communities and (2) compete with power plants in the Detroit area is of critical public interest to the State, Ohio urges the Board to impose the protective conditions that Centerior requested on October 21, 1997.

In support of Centerior, Ohio notes that the primary sources of coal for Centerior's power plants at Eastlake and Ashtabula are mines located in Ohio. Today, Ohio coal for Centerior's power plants is carried from origin to destination by just one carrier -- Conrail. However, if the Transaction is implemented as proposed, NS will serve Ohio's major coal

producers, but only CSX will serve Centerior's Eastlake, Lake Shore and Ashtabula plants. Obviously, the result of this division of Conrail assets will leave Centerior in the unenviable position of facing -- whether one, two, or three years from the date of consummation of the transaction -- higher delivery costs and less efficient service for its closest available steam coal sources.²⁵

Ohio recognizes that, whether it takes place immediately post consummation or three years thereafter, Centerior will pay a higher delivery price for coal. This, of course, affects the competitiveness of Centerior-generated electricity when compared to other electric utilities located in the area. This is an especially galling matter for Centerior and Ohio consumers, because other nearby electric utilities in Michigan and Pennsylvania stand to benefit from expanded competitive rail access. In particular, the "Detroit Shared Assets Area" will open up joint access to certain Detroit area electric utilities, better enabling these Centerior competitors to use previously unavailable rail competition to lower their coal transportation costs.

²⁵ Ohio is aware of the Applicants's Settlement Agreement with the National Industrial Transportation League. This agreement assertedly addresses so-called "1-to-2" situations, but in fact only provides an effective three-year stay of execution. The NITL Agreement does not afford Centerior economical access to other Ohio-based coal producers -- coal mines not now utilized by Centerior, but ones from whom Centerior could today receive coal in Conrail single-carrier service.

Ultimately, the result of the Transaction, absent the relief Centerior seeks and Ohio supports, is arbitrarily to skew the local electric generating market in favor of non-Ohio utilities. As it has done in contemplation of the North American Free Trade Agreement ("NAFTA") when granting relief to the Texas-Mexican Railroad (and more directly the Laredo gateway) in the UP-SP railroad merger,²⁶ the Board should take action to promote a level playing field in support of the federally mandated deregulation of the electric utility industry. For these reasons, Ohio urges the Board to grant Centerior the relief it has requested.

Viability of Neomodal Terminal

The state of the art Neomodal Terminal at Navarre, OH, was built with the assistance of State and federal funding to facilitate intermodal movements of traffic that would otherwise burden Ohio's highways. Ohio continues in its support of the Stark Development Board and the W&LE in urging the Board to mandate protective conditions to assure that utilization and viability of Neomodal intermodal facilities will not be undermined as a result of the proposed Transaction.²⁷

The new rail routes CSX and NS propose to acquire from Conrail have caused both railroads to re-examine their intermodal options. CSX, which does market Neomodal traffic now is planning to capitalize on acquiring access to Cleveland by greatly

²⁶ UP/SP, supra.

²⁷ OAG-4, pp. 16, 17; and O'Leary V.S. W&LE-7 at 89.

expanding Conrail's Collinwood Yard intermodal terminal.

(CSX/NS-176). With an expanded terminal in such close proximity to Navarre, it is unlikely that CSX would aggressively market the Neomodal site. For its part, NS has stated that it is looking to replace cramped Cleveland facilities with a new facility in the Cleveland area. (V.S. Christopher P. Warren, CLEV-9, p. 3).

Ohio is concerned that such new terminals would adversely impact on the future utilization of the Neomodal terminal by drawing intermodal traffic from the Canton area. At the same time, increased truck traffic into the congested Cleveland area would add to that region's worries in terms of increased air pollution and noise and added burdens on an already overburdened railroad infrastructure in neighborhoods surrounding the Collinwood yard. (Warren V.S., CLEV-9, p. 4). Ohio joins Cleveland in urging that CSX and NS should be required to consider alternatives that would alleviate such unwelcome impacts on Cleveland. (Comments, p. 5, CLEV-15). Further utilization of the Neomodal facility would serve to accommodate that objective.

Clearly the prospects for economic viability of the Neomodal facility would be severely damaged in the event the Board grants the Primary Application without protective conditions which would foster increased utilization of the facility. Since W&LE serves that facility, such conditions would also serve to mitigate some of the lost revenue W&LE will suffer from a grant of the Application. At the same time the requested conditions would serve to alleviate some of the environmental

problems that otherwise would result from a grant of the Primary Application.

Provision for Mitigation of Safety
and Environmental Impacts

Ohio has no fewer than 27 line segments that would experience increases in rail traffic that meet or exceed the Board's environmental analysis threshold of 8 or more trains per day.²⁸ Because urbanization of Ohio followed construction of many of these lines, the main line system often bisects the center of Ohio's communities. Some of Ohio's most densely populated areas would experience a serious escalation in problems with at grade highway rail crossings as a result of proposed increases in rail traffic. These problems include the untenable prospect of increased crossing accidents, decreased emergency response time when police, fire and ambulance vehicles are delayed at crossings and increased noise and air pollution.

Individual Ohio communities such as Fostoria are confronted with very serious problems that would result from increased train traffic. Currently an average of 84 trains a day pass through Fostoria on 3 different lines. After the proposed acquisition of Conrail lines by CSX and NS, the number of trains moving through Fostoria will escalate by nearly 30 percent to 108 trains per day. In addition, many trains traveling through

²⁸ Exhibit 1 appended to Ohio's "Responses to Draft Environmental Impact Statement and Request for Protective Conditions" shows the location of Ohio line segments that will experience increases of as many as 40 trains a day under current operating plans which would be implemented by applicants.

Fostoria would be traveling at slower speeds as they switch from one main line to another or cross over the line of another railroad.

With the increased train volume resulting from the proposed acquisition, one or more at grade crossings in Fostoria will be blocked over 6 of the 24 hours, which is over 25 percent of the day.²⁹ That situation would present an intolerable roadblock for Fostoria in its efforts to provide its residents with adequate emergency, police, fire and ambulance service. As a result Ohio has joined with Fostoria in urging that CSX and NS be required to build 3 grade separations to alleviate the impact of increased rail traffic.³⁰

Despite the dire situation faced by Fostoria, SEA's Draft Environmental Impact Statement did not address the critical need for the construction of grade separations in that community in the event the Application is granted. Other Ohio communities face similar safety consequences which would be directly related to proposed increases in traffic of between 20 and 30 trains a day. Increases of this magnitude will cause serious problems in emergency situations when tracks subject to substantial increases in utilization must be crossed by police, fire and ambulance

²⁹ Currently, train movements block one or more crossings 4.6 hours. The prospective increase in train traffic will mean a 30 percent increase in such blockage which will mean life or death in extremis circumstances.

³⁰ "Responsive Comments to Draft Environmental Impact Statement and Request for Protective Conditions", pp. 26-33, and "Conrail Acquisition Fostoria Remediation Study", appended to that submission as Exhibit 4.

vehicles. To mitigate these public safety problems, grade separations may also be needed in numerous smaller Ohio communities, many not even mentioned in the Draft EIS. Thus far, with only one exception (Greenwich) neither CSX nor NS has committed to provide grade separations for any of the small communities that will experience the impact of proposed increases in rail traffic.

Ohio agrees with SEA's conclusion that crossing delay issues are most effectively resolved when the Joint Applicants work together with state and local highway officials on a cooperative basis.³¹ A concrete example of the effective results that can be achieved through such cooperation is the agreement which was negotiated between CSX and Ohio officials to enhance safety at public grade crossings located along 75 miles of the B&O corridor extending from Greenwich, OH to the Ohio-Indiana border.³² Ohio selected this corridor for early focus because it contains a large number of passively protected crossings and post acquisition traffic is projected to more than double on certain portions of the corridor. This important public safety agreement fairly allocates costs of safety upgrades and includes provisions that PUCO and ORDC work closely with local communities to

³¹ Draft EIS Executive Summary, p. ES-3 served Dec. 12, 1997.

³² The B&O Corridor Agreement was approved and adopted by the Public Utilities Commission of Ohio on November 25, 1997. (See Exhibit 3 appended to Ohio's "Responsive Comments to Draft Environmental Impact Statement and Request for Protective Conditions".

are committed to appropriate mitigation agreements with state and community officials. Indeed the relevant regulations provide that "the [Board] will withhold a decision, stay the effective date of any exemption or impose appropriate conditions upon any authority granted when an environmental . . . issue has not yet been resolved."³³ In this regard it is noteworthy that the Board recently found it appropriate to limit merger related increases in traffic through Reno and Wichita pending approval of specific mitigation measures for those communities. (UP/SP, supra). While Applicants strongly oppose such a step complaining that it might delay the benefits they seek to derive from this Application, Ohio urges there is no better motivation to prompt Applicants to focus now on the serious safety and environmental ramifications of their proposed operating plans and to expedite constructive arrangements similar to the B&O Corridor Agreement. While Applicants are anxious to derive economic benefit from their proposed Transaction, it is, after all, the Ohio constituents located in affected rail corridors and communities who will be impacted by substantial increases in rail traffic and who would have to face the public safety and environmental consequences of dramatic changes sought for the benefit of Applicants. Ohio maintains that it is entirely appropriate that Applicants be required to participate in solving the adverse safety and environmental ramifications of their proposal before

³³ 49 C.F.R. § 1105.10(f).

identify grade crossing locations that could be closed permanently as an alternative to construction of warning devices.

The milestone corridor agreement resulted from constructive negotiations between CSX and Ohio officials who were motivated to mitigate safety problems that would otherwise result from substantial increases in traffic over this corridor.

The B&O Agreement demonstrates the effectiveness of results from negotiations involving interested rail and public officials. However, this was but the initial step in adequately addressing acquisition related safety and environmental concerns. Ohio urges that application of the same formula is by far the best way to achieve effective resolution of serious safety and environmental problems that would arise from proposed increases in rail traffic over specific corridors and through Ohio communities. Ohio is convinced that direct negotiations between motivated stakeholders can best achieve adequate results, including commitments of resources and funding, to resolve acquisition related problems in the public interest.

Ohio officials are ready, willing and able to continue working with Applicants to achieve remediation agreements in the interest of Ohio corridors and communities that will be severely impacted by operating changes CSX and NS propose to effect.

Ohio urges that the best possible way to ensure that serious Transaction related safety and environmental problems faced by Ohio corridors and communities is to require that no significant increases in traffic can be effected until applicants

they commence changes that would result in serious safety and health problems for Ohio.

Ohio also experiences a large volume of hazardous materials movements through its borders and thus it clearly has a vested interest in safe rail transportation of hazardous materials. In view of substantial increases in hazardous materials traffic that would move through certain areas of Ohio under operational changes proposed by Applicants, Ohio has urged that Applicants be required to expand current employee and public emergency response training. In addition, Ohio urges that Joint Applicants be required to fund equipment purchases, advance hazardous materials training and actively participate in implementation of constructive emergency response plans which will be necessitated by substantial increases in hazardous materials traffic over specific routes, particularly in view of the fact that many impacted areas must currently rely on voluntary emergency services. To assure maximum effort to avoid calamities resulting from substantial hazardous materials movements, Ohio urges that Applicants should be subjected to continuing Board oversight for at least five years and to monetary sanctions for patterns of violations of key route and major key route conditions.

Essential Relief for Cleveland

The Greater Cleveland area is confronted with tremendous safety and environmental problems that would directly result from the proposed division of Conrail lines and

substantial increases in train traffic over selected lines as contemplated by Applicants. Under the original CSX/NS proposal, train densities on the NS lines through east Cleveland, west Cleveland, Lakewood, Rocky River, Bay Village, Avon Lake and other area communities would increase from 14 per day to 34 per day. This drastic change would bring about severe grade crossing safety, emergency vehicles access and quality of life problems for the area. While NS subsequently proposed re-routing of some trains to alleviate some of the problems, it also asserted that the public should pay a substantial portion of the costs of relieving the burden the Transaction will place on the public. Forcing such a financial burden on the public is hardly appropriate when the problem would be created solely because of private benefits sought by NS in this proceeding. Reliance on public funding is particularly troublesome when considering that additional re-routing relief can be achieved by using the lines of the W&LE. Evidence of the fact that the Applicants have not explored this alternative is demonstrated by the fact that neither NS nor CSX have held substantive discussions with W&LE since October 1997. If the so-called Cloggsville connection and associated grade separations are not funded or W&LE re-routing is not negotiated, the Board should mandate train limits to protect public safety.

Under the Applicants' proposed operating plans volumes of hazardous materials carried through some east Cleveland neighborhoods would increase from zero to 44,000 carloads a year

without any significant mitigation of the resulting hazard for area residents. At the same time the volume of hazardous materials carried through the University Circle area, the region's second largest employment center, would dramatically increase by over 1100 percent from 7,000 carloads to 81,000 carloads a year without any significant mitigation.

Train volume through the City of East Cleveland and neighborhoods on the east side of Cleveland are proposed to increase from 3 and 7 trains a day to 44 trains per day over elevated tracks that pass close by the bedroom windows of thousands of area residents. On February 17, 1998, CSX and East Cleveland reached an accommodation, but that agreement did not address the issue of hazardous materials traffic and did not address noise mitigation issues raised by the City of Cleveland.

In their current form CSX/NS operating plans would severely impact 68,000 people in the City of Cleveland alone. Of those so affected, more than 50 percent are non-white and 35 percent have households with income below the poverty line.³⁴

Capable railroad engineers retained by the City of Cleveland and working in close cooperation with the Ohio Development Commission have developed comprehensive alternatives to CSX/NS operating plans which would eliminate the most severe impacts for the region by keeping train volume through east and

³⁴ See comprehensive summary of the substantial impacts of the proposed transaction in Cleveland as set forth in "Comments of the City of Cleveland, Ohio, on the Draft Environmental Impact Statement", CLEV=9 filed October 21, 1997.

west side neighborhoods at about their current levels. Under the Cleveland alternative the only place where train volume would significantly increase would be through industrial areas.

The Cleveland plan would assure that NS traffic would not cross CSX traffic at grade. To do so, Cleveland has proposed that two rail lines that now cross at grade in Berea be grade separated. Several rail/highway grade separations are also included in the plan.³⁵

The re-routing of train traffic as contemplated in the Cleveland plan would involve significant dollar costs of between \$148 million (alternative 2) and \$172 million (alternative 1). However, the severe safety crossing delay, hazardous materials, noise and environmental issues raised by Cleveland clearly warrant such mitigation at the expense of Applicants who stand to realize tremendous increases in revenue and profits as a result of the proposal which will otherwise cause severe adverse impacts on the area. Alternatively, the Board can relieve Cleveland issues by train limits and by mandating that CSX make more usage of its trackage rights over the NS lake front line.

Ohio stands with Cleveland in insisting that the proposed Transaction cannot be found to be in the public interest unless and until Applicants have committed to mitigation of the serious Transaction related safety and environmental impacts including adoption of re-routing options such as those proposed

³⁵ See Comments of the City of Cleveland, Ohio on The Draft Environmental Impact Statement, CLEV-10, filed February 2, 1998.

by the City of Cleveland. In any event, the Board should restrict Applicants from increasing traffic levels over seriously impacted routes and through adversely affected communities until mitigation agreements have been concluded.

Impact on Rail Labor

Ohio is very much aware of the potential consequences of the proposed Transaction on railroad employees located throughout the State. Of particular concern to Ohio is the projected net loss of approximately 450 Ohio based railroad jobs if the Transaction is consummated. An additional 300 positions are projected to be transferred out of the State.

Ohio considers statutory labor protection is at best a safety net designed to cushion the economic impacts of a rail merger. It does not prevent personal disruption caused by job loss or dislocation nor the loss to Ohio communities that would occur when rail employees and their families are forced to relocate. For these reasons Ohio has urged the Board to carefully consider the impact of the proposed Transaction on affected employees and on the State and to impose the highest level of labor protection as appropriate in the circumstances.

Essential Oversight

Should the Board ultimately determine that the proposed Transaction can be granted subject to conditions demonstrated to be necessary in the public interest, Ohio has urged the Board to provide for phased implementation and a thorough pro-active post consummation process. In view of recent developments in the west

it is all the more important that the Board assume a high degree of responsibility and assume a continued and active leadership role to assure that this Transaction will unfold in a manner that is least disruptive and harmful to affected shippers, railroad employees and communities.

Ohio urges that provision for oversight should extend for at least five years and should include careful monitoring of trackage rights agreements between Applicants and be subject to periodic reporting requirements concerning adequacy of service, safety, environmental and competitive issues including assessment as to utilization of trackage rights granted in connection with this proceeding. The Board should also retain authority to request additional information from Applicants or any other party of record as circumstances may warrant and to assure that all concerned parties have access to effective post-Transaction relief as warranted.

Prominent among Ohio's concerns are the safety ramifications of a transaction of this magnitude. During oversight the Board must be particularly alert that safety and environmental problems are identified and promptly resolved. The Board should also retain jurisdiction to assure that corridor and other safety and environmental mitigation agreements are fully implemented. In this undertaking, Ohio urges that appropriate provisions must be made for active participation by the Federal Railroad Administration and state agencies authorized to review and enforce safe railroad practices.

Assuming the Primary Application is granted in some form, the Board should retain jurisdiction to ensure full compliance with employee protection conditions. Ohio urges that it is particularly important for the Board to establish and follow a schedule pursuant to which it will respond to progress reports and ensure that all concerned parties have access to effective post transaction relief. In this regard, Ohio deems it essential that the Board must rise to the challenge of a Transaction of this magnitude as an effective enforcer of its decision.

IV.

CONCLUSION

The ultimate question in this proceeding comes down to whether the proposed Transaction is in the public interest. Not long ago this Board's predecessor summed up the factors which must be weighed in making such a determination as follows:

For us to determine the public interest, we must balance the various competing interests involved. It is a fundamental principle that the public interest includes the interest of competing carriers as well as the interest of the general public. The public interest, however, must always be construed in light of the national transportation policy, which in part declares its purpose "to promote safe, adequate, economical, and efficient service in transportation and among the several carriers." Southern Pacific Co. Merger, 354 I.C.C. 100, 111 (1977).

Ohio has weighed all of the aspects of the proposed division of Conrail lines between CSX and NS and remains

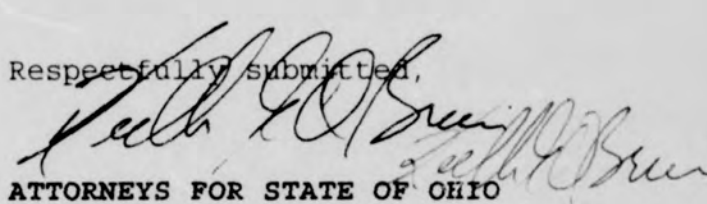
convinced that the Transaction is not in the best interests of its communities and its industry and the rail network they depend upon for essential transportation service. In identifying its most serious concerns, Ohio has proposed remedial measures which would ameliorate the problems that compelled the State to oppose the Primary Application. All of the measures proposed or supported by Ohio are deemed essential as they would alleviate serious public interest concerns that weigh heavily against a grant of the Primary Application.

For all the above reasons, Ohio urges the Board to deny the proposed Application or in the alternative, to subject any grant of the requested authority to adoption of the specific conditions and other measures as advocated by the State of Ohio in the public interest.

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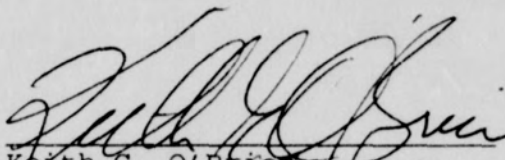
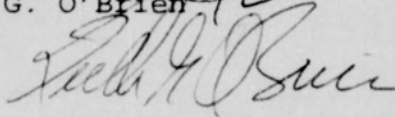
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DATED: FEBRUARY 23, 1998

CERTIFICATE OF SERVICE

I hereby certify that I have this 23rd day of February, 1998, served the foregoing Brief of the Ohio Attorney General, the Ohio Rail Development Commission and the Public Utilities Commission of Ohio upon counsel for the Applicants via messenger and all other parties of record by first class mail, properly addressed with postage prepaid.


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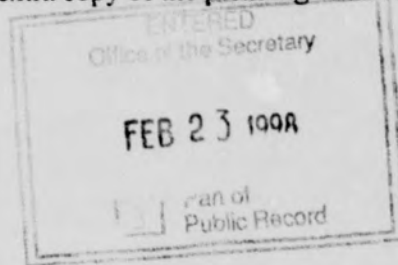
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RE: Finance Docket No. 33388, *CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company – Control and Operating Leases/Agreements – Conrail Inc. and Consolidated Rail Corporation*

Dear Secretary Williams:

Enclosed for filing in the above captioned docket are the original and twenty-five copies of the Brief of The Gateway Western Railway and Gateway Eastern Railway.

The text of this pleading is contained on the enclosed 3.5-inch diskette. Please date stamp the enclosed extra copy of the pleading and return it to the messenger for our files.



Sincerely,

William A. Mullins
Attorney for The Gateway Western
and Gateway Eastern Railway

cc: The Honorable Jacob Leventhal
All Parties of Record

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UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

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

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CITY OF ROCKY RIVER,
AND CITY OF LAKEWOOD, OHIO

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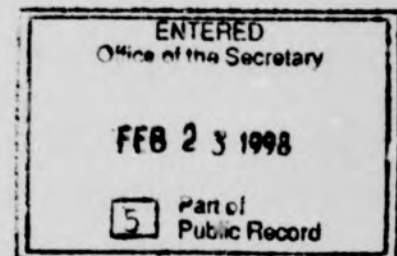
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Dated: February 23, 1998



UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

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

BRIEF OF
CITY OF BAY VILLAGE,
CITY OF ROCKY RIVER,
AND CITY OF LAKEWOOD, OHIO

Pursuant to the schedule adopted for this proceeding, the cities of Bay Village, Rocky River, and Lakewood, Ohio (collectively referred to as "BRL") submit their brief. BRL assert that the mitigation proposals of the Section of Environmental Analysis ("SEA") in the December 12, 1997 Draft Environmental Impact Statement ("DEIS") are inconsistent with the Surface Transportation Board's ("STB" or "Board") responsibilities under (1) the ICC Termination Act of 1995 ("ICCTA"); (2) the National Environmental Policy Act ("NEPA"); and (3) the National Freight Transportation Policy of the U.S. Department of Transportation ("DOT").

BRL further assert that the Board should order, as a condition of its approval of the Conrail Acquisition, three

measures to mitigate the environmental (public health and safety) impacts of the Norfolk Southern Railway Company's ("NS") proposal to increase traffic on its Cleveland to Vermillion line segment ("Line Segment").

First, the Board should mandate full implementation of the mitigation measures proposed by NS on November 25, 1997. Those mitigation measures, referred to herein as the "Maestri Plan",¹ should be fully funded by NS.

Second, NS should be permitted no increase in traffic volume over the Line Segment.

Finally, the Board should retain jurisdiction for five years to ensure its ability to order further measures in the event that the environmental impacts of the Conrail Acquisition as mitigated by the Maestri Plan are more severe than they appear at this time.

I. BACKGROUND

BRL's concerns with the proposed division and control of Consolidated Rail Corporation by NS and CSX Transportation, Inc. arise out of the NS proposal to increase traffic on the Line

¹ The elements of the Maestri Plan are summarized hereinbelow. BRL note the NS assertion that, even if it were to agree to the Maestri Plan through negotiations with BRL, that agreement should not be made a formal condition of Board approval of the Conrail Acquisition. NS comments on the DEIS at 2-13. NS is wrong. The Interstate Commerce Commission ("ICC") has determined correctly that certain types of agreements require approval "because they affect not only the private interests of the involved carriers but also the public interest in a sound and efficient national transportation system as defined by the Interstate Commerce Act." Norfolk Southern Corp. -- Control -- Norfolk & W. Ry. Co., 366 I.C.C. 173, 240 (1982).

Segment from a Base Case 13.5 trains per day to a Post-Acquisition Case 34.1 trains per day. If this increase in traffic were to be permitted, the resulting adverse environmental impacts -- identified in the DEIS and in the BRL and DOT comments on the DEIS -- would be felt by BRL residents in virtually all facets of everyday life. They also would be inescapable. The NS proposal would mean that, on average, there would be one NS train every 42 minutes on this line segment. Air quality would be degraded; railroad-generated noise would increase to levels unacceptable for residential areas; pedestrians and street traffic would be placed in increased danger; street traffic would be delayed; the ability of public safety providers, i.e. police, fire, and ambulance services, to reach victims in a timely manner would be seriously degraded; and property values would be reduced.

As detailed in BRL's comments on the DEIS, SEA's initial evaluation of the public health and safety impacts on the Line Segment reflects, inter alia, NS's estimates of additional trains, which are bound to be minimized,² and reflects other serious analytical and evaluation errors. However, neither the understated impacts as determined by the DEIS nor the more serious impacts reflected in the BRL comments are unavoidable.

² Both the ICC and the courts have recognized that self-serving statements by a merging railroad "are entitled to little credence." See Norfolk & W. Ry. Co. -- Control -- Detroit, Toledo & Ironton R.R., 360 I.C.C. 498, 512 at n. 27 (1979) and Lamoille Valley R.R. v. I.C.C., 711 F.2d 295, 318 (D.C. Cir. 1983).

To the contrary, as explained in the November 25, 1997 letter from Bruno Maestri, System Director, Environmental Protection of NS,³ an alternative route is available for all, or virtually all,⁴ the additional trains proposed for operation by NS over the Line Segment. And, NS is willing to use this alternative route. The one thing that NS is unwilling to do is to pay for the construction necessary to make this alternative route viable.⁵

Reduced to its essentials, the NS approach to this transaction is a simple one. On the one hand, NS proposes a consolidation with Conrail that will provide it "net operating benefits [read "profits"] in a normal year of \$553 million."⁶ On the other hand, NS proposes that the public either suffer the environmental degradation that would result from the consolidation or pay the cost of the steps necessary to eliminate that degradation.⁷

³ This letter is reproduced in Volume 5C, Appendix S of the DEIS. See also DEIS Volume 2, NS Safety Integration Plan, at 196.

⁴ Mr. Maestri does not explain the operational reason why the proposed alternative route cannot be used for all of the additional traffic or, for that matter, why it cannot be used for all traffic proposed for this Line Segment.

⁵ Mr. Maestri has estimated a cost of approximately \$47 million for the construction package outlined in his letter. NS-67-P-00484. NS restates its demand for public funding at page 5-12 of its comments on the DEIS.

⁶ CSX/NS-18 at 19.

⁷ Among the costs contemplated by NS is the suggestion that Lakewood close several grade crossings. DEIS, Volume 3B at OH-139. This is not an action the Board can require Lakewood to take and Lakewood has advised NS on more than one occasion that it will not close its streets for the convenience of the railroad.

BRL do not accept, and the Board should not accept, the "heads I win, tails you lose" bargain offered by NS. For the reasons stated herein, the Board should adopt BRL's proposed mitigation.

II. THE DEIS DOES NOT PROPOSE LEGALLY SUFFICIENT MITIGATION

As an initial matter, the Board should recognize that the "mitigation" proposals contained within the DEIS are not legally sufficient. The recommended mitigation for BRL is as follows:

20. NS shall continue to consult with local and county government agencies, the Ohio Department of Transportation, elected representatives from the west Cleveland suburbs and the City of Cleveland, and other appropriate parties to address concerns about train traffic increases on the Cleveland to Vermilion rail line segment (Nickel Plate Line). Specifically, NS shall meet with these parties to negotiate a mutually-acceptable binding agreement on the construction and funding allocation of NS's preliminary alternative routing plan to balance train traffic on the Cleveland to Vermilion rail line segment and the Lakeshore Line through Berea, and associated improvements that include new rail line connections, possible grade separations, upgrading warning devices at some highway/rail at-grade crossings, and highway/rail at-grade crossing closures. The preliminary mitigation plan developed by NS was recently submitted to SEA. SEA invites public comments on appropriate alternative mitigation that the Board could require in the event that the parties cannot reach a mutually-acceptable binding agreement prior to issuing the Final EIS.⁸

BRL submit that the quoted language does not constitute

⁸ DEIS, Volume 4 at 7-19, Section 7.2.4, paragraph 20. The wording of the preliminary SEA recommendation in Volume 3B at OH-140 is slightly different, but the substance appears to be the same.

legally cognizable "recommended mitigation." Rather, as recognized in the final sentence quoted above, the DEIS contains no recommended mitigation in the hope that interested parties can reach agreement with NS. Failing that, the DEIS effectively proposes to "start from scratch" in the FEIS.

Given applicable court precedent, it is clear that the Board's final order in this proceeding cannot adopt a "consultation" requirement in lieu of definitive mitigation requirements. As the court stated in State of Idaho By & Thru Idaho Pub. Util. v. I.C.C., 35 F.3d 585, 596 (D.C. Cir. 1994),

... the conditions imposed by the Commission require only that Union Pacific consult with various agencies about the impacts of salvage; thus, only Union Pacific will be in a position to assess the total environmental impact of salvage activities and perform an "individualized balancing analysis." We have held that NEPA prohibits such an abdication of regulatory responsibility in favor of the regulated party.

See also Illinois Commerce Com'n v. I.C.C., 848 F.2d 1246, 1258 (D.C. Cir. 1988).

Simply stated then, the DEIS provides no guidance to the Board as to appropriate mitigation for BRL. Accordingly, BRL will, in the following sections of this brief, outline the statutory considerations for that mitigation and summarize the facts and precedent supporting the mitigation BRL advocate.

III. The ICC Termination Act of 1995

Two sections of the ICC Termination Act of 1995 ("ICCTA") are critical to the Board's consideration of the Conrail Acquisition and the BRL mitigation proposals. First, Section 11324(c) requires the Board to approve the proposed transaction

if it is "consistent with the public interest"⁹ and authorizes the Board to "impose conditions governing the transaction."¹⁰ Second, Section 10101(8) states that "In regulating the railroad industry, it is the policy of the United States Government -- to operate transportation facilities and equipment without detriment to the public health and safety."¹¹

When read together, Sections 11324(c) and 10101(8) provide the Board with three options in reviewing public health and safety issues raised in the Conrail Acquisition proceeding. First, the Board could determine that the adverse impacts of the Conrail Acquisition on the public health and safety outweigh any claimed benefits, thus mandating a finding that the Conrail Acquisition is inconsistent with the interest and must be denied. While BRL do not propose that the Board prohibit the Conrail Acquisition, it remains worthwhile to consider the one case in which the ICC denied an application on environmental grounds.

In Indiana & Ohio Railway Company -- Construction and Operation -- Butler, Warren, and Hamilton Counties, OH,¹² the ICC denied the application of the Indiana & Ohio Railway Company ("I&O Railway") to reconstruct a 2.9-mile line over an abandoned railway because of its environmental impacts. The Commission relied on "public convenience and necessity" language in section

⁹ 49 U.S.C. § 11324(c).

¹⁰ Id.

¹¹ 49 U.S.C. § 10101(8).

¹² 9 I.C.C.2d 783 (1993).

10901(c) of the Interstate Commerce Act ("ICA") in finding that the project's adverse impacts on public safety outweighed its transportation benefits. Citing Louisville & Jefferson County Port Authority and CSX Transp., Inc. -- Construction and Operation Exemption, 4 I.C.C. 2d 749 (1988), the ICC relied upon section 10101 of the ICA to define the public interest when considering whether an action conforms with the public convenience and necessity.¹³

Given I & O Railway precedent, it is clear that (1) transportation-related benefits claimed for a transaction may be outweighed by serious public health and safety concerns¹⁴ and (2) when these public health and safety concerns cannot be mitigated adequately, the application must be denied.

This brings BRL to the second of the above-noted three options available to the Board in dealing with environmental issues in acquisition cases. That is, in some cases, the Board may determine that adverse impacts of the proposal on the public health and safety are so minor as to not only permit a finding that the proposal is consistent with the public convenience and necessity, but to permit a further finding that no applicant-funded mitigation is required. As explained infra, the environmental impacts of the Conrail Acquisition on BRL are too

¹³ Id. at 788. See also Chesapeake and Ohio Ry. v. United States, 704 F.2d 373, 376 (7th Cir. 1983), which states that the Rail Transportation Policy "is to guide the Commission in applying the rail provisions of the Interstate Commerce Act."

¹⁴ 9 I.C.C.2d at 790.

substantial to justify such a determination.

The Board's third option, exemplified by Decision No. 44 and subsequent SEA documents¹⁵ in the Union Pacific/Southern Pacific proceeding,¹⁶ is to find that while public health and safety concerns do not rise to the level that would mandate a denial of the acquisition, they do rise to the level that mandate the imposition of conditions pursuant to Section 11324(c). This option requires a careful analysis of the environmental degradations resulting from the acquisition and a subsequent consideration of methods of mitigation and cost of mitigation options.

It is this third option that is advocated by BRL. And, for the reasons discussed infra, BRL advocate the adoption of the Maestri Plan, fully funded by NS, as a condition of Board approval of the Conrail Acquisition.

Prior to leaving our discussion of the ICCTA, one of its other provisions should be noted. That is, 49 U.S.C. § 11321(a) states that the Board's authority over railroad consolidations "is exclusive." Accordingly, the NS assertion that the Board should not impose mitigation that "conflicts with the traditional

¹⁵ See, e.g. the February, 1992 Final Mitigation Plan for Reno, Nevada ("Reno FMP").

¹⁶ Finance Docket No. 33760, Union Pacific Corporation, Union Pacific Railroad Company, And Missouri Pacific Railroad Company -- Control And Merger -- Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., And The Denver And Rio Grande Western Railroad Company.

role of state DOTs"¹⁷ is meritless.¹⁸

IV. The National Environmental Policy Act

Section 102(2)(C) of the National Environmental Policy Act directs all federal agencies to include an Environmental Impact Statement ("EIS") in proposals for legislation and other major federal actions significantly affecting the quality of the human environment. The EIS must include an analysis of the following:

1. the environmental impact of the proposed action;
2. any adverse environmental effects which can not be avoided should the proposal be implemented;
3. alternatives to the proposed action;
4. the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and
5. any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.¹⁹

The Supreme Court has described a reviewing court's responsibility as follows: "[t]he role of the courts is simply to

¹⁷ NS comments on the DEIS at 2-5 through 2-7. The NS position is a transparent effort to utilize state and federal funding mechanisms to cure environmental problems engendered not by normal railroad operations, but solely by a consolidation within the Board's exclusive jurisdiction. As DOT states at page 18 of its comments on the DEIS, "the applicants should be responsible for mitigation of those problems."

¹⁸ NS's position also runs afoul of the D.C. Circuit's "'chutzpah' doctrine." Marks v. Commissioner, 947 F.2d 983, 986 (D.C. Cir. 1991). The court has defined "chutzpah" as "a young man, convicted of murdering his parents, who argues for mercy on the ground that he is an orphan." Harbor Ins. Co. v. Schnabel Found. Co., 946 F.2d 930, 937, n.5 (D.C. Cir. 1991).

¹⁹ 42 U.S.C. § 4332 (2)(C).

ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary and capricious."²⁰ In considering whether an agency decision is arbitrary and capricious, the reviewing court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."²¹ The arbitrary and capricious standard requires that an agency take a "hard look" at relevant environmental factors.²² The upshot of the "hard look" requirement is that the agency must adequately consider all "reasonable" and "feasible" alternatives (like the Maestri Plan) prior to reaching a decision on the proposed action.²³

NS would have the Board review the procedural, as opposed to substantive, mandate of NEPA and the "arbitrary and capricious" standard of review as giving rise to either an obligation of the

²⁰ Baltimore Gas & Elec. Co. v National Resources Defense Council, 462 U.S. 87, 97 (1983).

²¹ Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378 (1989) (citation omitted). The arbitrary and capricious standard derives from the Administrative Procedure Act, which provides that an appellate court shall set aside an agency decision that is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

²² Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989); Kleppe v. Sierra Club, 427 U.S. 390, 410 n. 21 (1976).

²³ Missouri Mining, Inc. v. I.C.C., 33 F.3d 980, 984 (8th Cir. 1994); City of Grapevine, Tex. v Depart. of Transp., 17 F.3d 1502, 1506 (D.C. Cir, 1994) (citing 40 CFR § 1502.14(a)-(c)). See Natural Resources Defense Council v. Morton, 458 F.2d 827, 834 (D.C. Cir. 1972).

Board to, or a license to, minimize the use of the Board's conditioning power under the ICCTA. NS goes so far as to say that "[t]he Board is obligated by NEPA and the ICCTA to balance adverse environmental effects against offsetting positive environmental effects and, importantly, non-environmental public benefits of the Transaction." NS comments on the DEIS at 2-3.

NS is, of course, wrong. There is nothing in NEPA that permits, let alone requires, the Board to find that environmental degradations to the BRL communities should not be mitigated either because of improvements to the environment in other portions of the Country or because of claimed economic benefits of the transaction. To the contrary, as exemplified by Decision No. 44 in the Union Pacific/Southern Pacific transaction, the benefits of a railroad consolidation are balanced only against harms "that cannot be mitigated by conditions." Decision No. 44 at 99 (emphasis added).

There are six interrelated questions asked by the Board in determining whether to utilize its conditioning power:

- 1) Will the merger produce effects harmful to the public interest that a condition will ameliorate or eliminate?
- 2) Will the condition be operationally feasible, and produce net public benefits?
- 3) Will the condition broadly restructure the competitive balance among railroads with unpredictable effects?

- 4) Does the condition address an effect of the transaction?
- 5) Is the condition narrowly tailored to remedy adverse effects of the transaction?
- 6) Does the condition put the proponent in a better position than it occupied before the consolidation?

Decision No. 44 at 144-145. See also Union Pacific -- Control -- Missouri Pacific; Western Pacific, 366 I.C.C. 462, 562-565 (1982).

As will be demonstrated herein, the answers to each of these questions justify the relief sought by BRL. That is,

- 1) The Conrail Acquisition will produce public health and safety effects harmful to the public interest that the Maestri Plan will ameliorate or eliminate.
- 2) The Maestri Plan is conceded by NS to be operationally feasible and to produce net public benefits.
- 3) The Maestri Plan will not affect the competitive balance among railroads.
- 4) The Maestri Plan addresses effects of the transaction not only in the BRL communities, but in Berea and Olmsted Falls.
- 5) The Maestri Plan is narrowly tailored to remedy adverse effects of the transaction in

that it proposes a rerouting of only new trains.

- 6) The Maestri Plan will not put BRL in a better position than it occupied before the consolidation in that it will not reduce the number of trains currently operating in BRL.

V. DOT Policy

The Maestri Plan has an estimated cost of approximately \$47 million, a considerable sum. However, this cost cannot be viewed in either a policy vacuum or what we will term a transactional vacuum.

DOT policy is clear. It is to reduce the "social costs of environmental degradation" and to ensure that these social costs "are more accurately reflected in the price of transportation services."²⁴ As discussed infra, the "social costs of environmental degradation" of concern to BRL are enormous. These costs include (1) noise at levels unacceptable under standards adopted by the United States Department of Housing and Urban Development ("HUD")²⁵; (2) one additional railroad-street vehicle accident every two years; (3) hundreds of emergency vehicles being delayed every year because of trains blocking the streets;

²⁴ DOT, National Freight Transportation Policy, 62 F.R. 785, 788 (January 6, 1997). BRL note that DOT's policy is consistent with Congressional intent "that environmental concerns be moved higher up" on regulatory agencies' agendas. Platte River Whooping Crane v. F.E.R.C., 876 F.2d 109, 118 (D.C. Cir. 1989).

²⁵ DOT has similar standards. See Grapevine, supra note 23, 17 F.3d at 1507-08.

and (4) reduced property values for thousands of homes near the tracks.

What is not clear is whether ordering NS to fully fund the Maestri Plan will have any significant impact on the "price of transportation services." NS has stated that this transaction will provide it "net operating benefits [read "profits"] in a normal year of \$553 million."²⁶ Is this amount sufficient to absorb a one-time \$47 million mitigation package without affecting freight rates? Of course. But, even if it is not, it is not DOT policy to permit NS to "externalize" these costs by forcing them on the public. To the contrary, DOT policy is to require NS to "internalize" these "social costs of environmental degradation."

This is not, by any means, a radical result. Just as the Board has made it clear that the Union Pacific must be responsible for environmental mitigation required as a result of its merger with Southern Pacific, the Board must tell NS that it cannot accept the benefits of this transaction and pass the costs onto others.

VI. The Facts Mandate Adopting The Maestri Plan As A Condition

The imposition of merger mitigation conditions related to claims of environmental degradation must be based on a realistic appraisal of all of the facts of record. To date, the facts relating to BRL's concerns have been addressed in the DEIS and that document, in turn, has been the subject of comments by a few

²⁶ CSX/NS-18 at 19.

parties, notably BRL, NS, and DOT.

A. Cumulative Impacts Must Be Considered

Prior to summarizing the environmental impacts set forth in the DEIS, BRL must note our overriding concern with its narrow focus. That is, while the "West Cleveland Suburbs, Ohio" were identified as an "area of special concern" at the outset of the DEIS,²⁷ the remainder of the DEIS failed to address the cumulative environmental impacts on BRL. Individual environmental components of the NS proposal, e.g. noise and air quality degradation, were discussed, albeit incorrectly, but the cumulative impact of these components were ignored.

In taking this approach, the DEIS implicitly rejected the logic of DOT's October 21, 1997 Preliminary Comments.²⁸ In addressing highway-rail crossings, DOT noted that a large increase is projected for the "NS line through Lakewood, Ohio" and stated that "[a]ll of the crossings on [this segment] should be analyzed together as a corridor and mitigation measures designed to reduce risk along entire segments rather than on a crossing-by-crossing basis."²⁹

DOT has seen the same fatal flaw in the DEIS. Its February 2, 1998 comments on the DEIS (DOT-5) informed SEA of DOT's "view that a purely technical application of environmental thresholds can result in real-world impacts being overlooked" and further

²⁷ DEIS, Executive Summary, ES-12.

²⁸ DOT-3.

²⁹ DOT-3 at 24.

concluded that "the DEIS analysis isolates some of the 'individual' impacts of the transaction in such a way that it fails to identify certain broader consequences" "DOT recommends that the final EIS should focus more broadly in order to measure the transaction's true impacts more accurately" Id. at 2.

While substantial time and effort must, of necessity, be expended in an examination of the "trees", the Board should not lose sight of the "forest", i.e. the total environmental and socio-economic impact of a dramatic increase in trains on BRL. The point here is a basic one. The three standards that the Board considers in designing environmental mitigation are whether the proposed condition is "reasonable", whether it is "directly related to the action proposed for approval", and whether it is "supported by the information developed during the environmental analysis."³⁰ These standards cannot be met simply by viewing individual impacts, e.g. air quality or noise. Rather, it is the total impact of the NS proposal on BRL that must determine whether a mitigation proposal meets the Board's three criteria.³¹

Let us then turn to a summary of the DEIS evaluation of the "trees" and what that evaluation says about the "forest."

- 1) Safety, Highway/rail at-grade crossings: In unexplained

³⁰ DEIS, ES-14.

³¹ As NS notes in its comments on the DEIS, a finding of cumulative impact is based on the idea that synergies between multiple effects can create more substantial effects. NS comments at 4-53. In other words, the whole is frequently greater than the sum of its parts.

contrast to its approach of considering "freight rail accidents" on a line segment basis,³² and in contrast to the corridor-based approach to accidents in the Reno FMP (at 2-11), the DEIS examined "highway/rail at-grade crossing safety" on a crossing-by-crossing basis and considered mitigation for certain crossings "if the accident frequency increased by one additional accident every 100 years."³³ As recognized by DOT, the DEIS focus on individual crossings is in error and the Board should adopt a "corridor-based analysis."³⁴

Consider the DEIS evaluation tool in light of the total accident frequency for BRL. DEIS Volume 3B, Table 5-OH-8 establishes that between West 117th Street, the border between Cleveland and Lakewood,³⁵ and Bradley Road, the western-most crossing considered in Bay Village, the Post-Acquisition annual accident frequency would be 0.5824 greater than the Pre-Acquisition annual accident figure. In other words, the DEIS predicts that BRL will experience one additional accident at a grade crossing every two years as a result of the NS proposal on trackage through BRL that has been described by a Norfolk Southern manager of grade crossing safety as "one of the most

³² DEIS, Volume 1 at 3-6 and Volume 3B at OH-14.

³³ DEIS at ES-18; See also Volume 1 at 3-11.

³⁴ DOT-5 at 17-19.

³⁵ The border actually is in the middle of West 117th Street.

dangerous in our 15,000 miles of track."³⁶

2) Hazmat accidents: While the DEIS predicted that the post-acquisition interval between mainline hazardous materials accidents would remain substantial,³⁷ it also predicted a **252.4% increase in hazmat releases on the Cleveland to Vermilion line segment**.³⁸

3) Highway/rail at-grade crossing traffic delay: The data in the Supplemental Errata, Table 5-OH-11 (Revised), establish that, as a result of the proposed increases in NS traffic volumes, **the average delay per vehicle at the five crossings considered would increase by 163%.**

4) Air Quality: Cuyahoga County, Ohio, in which BRL are located, would experience substantially higher emissions increases than any other county considered in the DEIS.³⁹ Volume 3B, Table 5-OH-16 indicated that these increases exceed the emissions screening level "after netting" and further found that these emissions would exceed 1% of total county emissions for

³⁶ NS-67-P-00739. As explained in a December 19, 1991 NS memorandum, "Train traffic thru [sic] Lakewood can be at various speeds and the majority of the present warning systems are not of the constant warning time type. **Train/auto accidents are not uncommon.**" NS-67-P-01705.

³⁷ DEIS volume 5A, Appendix B, Attachment B-1.

³⁸ Id. Attachment B-5 identifies the Cleveland-Vermilion line segment as a "new major key route" for hazardous materials. DEIS, Volume 3B, Table 5-OH-10 finds that NS will increase its annual car loads of hazmats from 9,000 to 32,000 on this Line Segment.

³⁹ DEIS, Volume 5A, Appendix E, Attachment E-3], County Total Emissions Increases for Threshold Activities, in Decreasing Order of Total NOx (Prior to Netting Analysis).

NOx.

5) Noise: The woefully inadequate DEIS noise analysis (see infra) found that **the number of receptors on the Cleveland-Vermilion line segment would be 4,439.**⁴⁰ Even assuming, arguendo, that this number is not understated, it is still 83% higher than on any other line segment. Each of these "receptors", a rather bland term including homes, schools, and hospitals, would experience railroad noise 34.1 times per day. This is once every 42 minutes, 24 hours per day, seven days per week, 365 days per year.

The Board should not presume that each of these trains would give rise to noise for only a short duration. To the contrary, the DEIS finds that "wheel/rail noise from train operations may last three to four minutes per location"⁴¹ **This means that the wheel/rail noise would be experienced between 1.705 hours and 2.273 hours per day.**

Further, the DEIS finds that "locomotives must sound their horns through much of Lakewood because its 27 highway/rail at-grade crossings are spaced only hundreds of feet apart."⁴² Again, this means that **railroad horn noise would be experienced by thousands of Lakewood residents for hours each day.**

6) Emergency Response: The DEIS found two ways to evaluate

⁴⁰ DEIS, Volume 5A, Appendix F, Attachment F-1, Rail Line Segments that Meet STB Requirements for the Noise Analysis.

⁴¹ DEIS, Volume 3B at OH-137.

⁴² Id.

the potential effect of the Conrail acquisition on emergency vehicle response times, i.e. crossing delay per stopped vehicle and total daily crossing blockage time.⁴³ It also found that the total blocked crossing time on the Line Segment would increase by 158%. **This means that emergency response vehicles would be blocked up to 1.2 hours each day.**⁴⁴

7) Summary Of DEIS Findings: Even if the Board were to find that none of these adverse public health and safety impacts has been understated in the DEIS, but see infra, and that none of these adverse public health and safety impacts is, standing alone, sufficient cause for mitigation, it must still conclude that, collectively,

one additional railroad accident every two years, and
a 252.4% increase in hazmat releases, and
a 163% increase in average delay per vehicle, and
higher emissions increases than any other county, and
4,439 adversely impacted sensitive noise receptors, and
a 158% increase in emergency vehicle delays,
constitute ample cause for mitigation. The market views these impacts as serious -- houses near the tracks are not selling⁴⁵ -- and the Board should do no less.

B. The DEIS Understated Environmental Impacts

While the DEIS asserted that SEA has "reviewed and verified"

⁴³ DEIS, Volume 1 at 3-18.

⁴⁴ See DEIS, Volume 3B at OH-137.

⁴⁵ See infra.

the data submitted by NS,⁴⁶ a review of the DEIS establishes that the data used to perform analyses of each of the matters considered are incorrect. Thus, the environmental impacts summarized above are understated.

1) Train Speeds: In DEIS Volume 5A at A-1, the first data element listed for verification is train speeds. According to Section A.4.2, the DEIS utilized two different speeds in its analysis. For purposes of its safety analysis, the DEIS used the maximum operating speed. This maximum speed also was used in the DEIS calculations of Average Delay Per Vehicle.⁴⁷ For purposes of air quality analysis, the DEIS used what it described as "typical freight train speed." However, this speed also was deemed equal to the maximum operating speed when the maximum operating speed is 35 mph and below (as it is on portions of the Line Segment).⁴⁸

The DEIS is in error. We note at the outset that NS has no data as to its average speeds in BRL. According to a December 8, 1997 letter from counsel for NS to BRL, "NS has not calculated average speeds for these trains."

At least part of the reason that NS does not operate at its maximum allowable mainline track speed through BRL is that, also according to the December 8th letter, 20% of its trains utilize a

⁴⁶ DEIS, Volume 3A at 5-2.

⁴⁷ See, e.g., DEIS Volume 3B, Table 5-OH-11.

⁴⁸ The maximum speed at the easternmost 31 grade separations in BRL (32 including 117th Street) is 35 mph.

siding within BRL.⁴⁹ The maximum speed entering, operating through, and leaving the siding is 25 mph.⁵⁰

A more important reason that NS does not operate at anywhere near its maximum speed in BRL is the inherent danger of operating through communities with so many grade crossings over such a short distance. **In Lakewood there is one grade crossing every 485 feet.**⁵¹ Moreover, because of track curves and the number of buildings located close to the tracks, NS engineers are unable to see many of the crossings until they are close to them and thus they run the trains far below the maximum speed.

As recounted in BRL-2 at 9, a review of police accident reports in Lakewood for railroad/street vehicle accidents since 1992 revealed an average speed for the NS trains of 31 mph. The Lakewood police confirmed this figure by using a radar gun to determine the average speed of NS trains during the period January 22 through January 27, 1998. The average speed at Bunts Road in Lakewood during that period was 30.6 mph. Similarly, the Bay Village police used radar guns to determine the speed of NS trains during the period January 22 through January 27, 1998.

⁴⁹ Clague Siding, located between MP B 193.9 and MP B 197.0. NS-32 at 6.

⁵⁰ NS-32, response to interrogatory 1(d).

⁵¹ In order to place this figure in context, the Board is requested to note that the Reno FMP contains a listing of "crossings per distance" in selected urban areas. Table 2.4-1. That table finds that the "Cleveland/Lakewood, Ohio" area has 33 crossings in 3 miles. This is one per .09 miles. Only one other community in the Country, West Palm Beach, Florida, has grade crossings that close together, and that community only has one-third as many grade crossings.

The average speed at Dover Road was 38.9 mph, substantially lower than the 50 mph speed used in the DEIS. Rocky River police also used radar guns to determine the speed of NS trains during the period January 22 and January 26, 1998. The average speed at the Elmwood crossing was only 23 mph.

Even these figures overstate the "average" speed of NS trains during the course of a year in that they do not include data for trains that stop prior to, or in the middle of, a crossing. Just such an event happened on January 22nd. An eastbound NS train entered the view of the police at 4:30 p.m. and was initially clocked at 34 mph. However, it started to slow at 4:32 p.m. and then stopped. When it finally cleared the Elmwood crossing, it was traveling at only 8 mph.

Reduced to its essentials then, the BRL comments demonstrate that each calculation in the DEIS that relies on train speed, e.g. traffic delay and emergency service vehicle delay, understates the impact of the Conrail Acquisition on BRL.

2) Trains Per Day: The second data element listed in DEIS Volume 5A at A-1 is trains per day. BRL take it as a given that any train count projection in a consolidation proceeding will be, at best, an estimate. And, as noted above, the applicant has a "self-serving" incentive to understate the number of new trains. In fact, NS has not provided any data to support the train count upon which the DEIS relies.

BRL note that NS already has revised its train counts once

in this proceeding.⁵² Of greater importance, NS cannot "verify" its train count for this line segment. The October 30, 1997, letter from counsel for NS to BRL admitted that "Norfolk Southern does not have a list identifying each train that is projected to travel over this line segment, and would have to perform a special study to make such an identification." If NS does not have such a list, the DEIS could not have verified the NS projection.

Once again, this means that every calculation in the DEIS that relies on the NS train count projection is unverifiable.

3) Noise: The DEIS suggested that, as a result of a pending rulemaking before the Federal Railroad Administration ("FRA"), the Board should not propose specific mitigation for the railroad horn noise impacts of the NS proposal.⁵³ Following this conclusion -- which obviously ignored the fact that adoption of the Maestri Plan as a condition could not possibly run afoul of FRA efforts -- the DEIS considered "wayside noise effect."⁵⁴ Rail line segments were deemed eligible for noise mitigation "for noise sensitive receptors exposed to at least 70 dBA Ldn and an

⁵² See CSX/NS-54, the August 28, 1997 document that reduced the proposed train count over the Cleveland to Vermilion line segment from 37.8 trains per day to 34.1 trains per day.

⁵³ DEIS, ES-23; Volume 3A at 5-9; and Volume 3B at OH-71.

⁵⁴ DEIS, Volume 3B at OH-74 and Volume 5A, Appendix F at F-5.

increase of at least 5 dBA Ldn."⁵⁵

The DEIS wayside noise effect analysis was in error for several reasons.

First, the DEIS ignored all of the noise generated by the 20% of NS trains that idle on Clague Siding.

Second, contrary to the approach taken by other agencies,⁵⁶ the DEIS omitted any consideration of the number of "sensitive receptors" in determining whether mitigation is required. Further, the DEIS mitigation proposals are not based on total noise, total railroad noise impacts, or the total number of new trains. Rather, those proposals are premised on nothing more than the percentage increase in trains. The significance of this is established in DEIS, Volume 5A, Attachment F-1 at 2. There, the Oak Harbor to Bellevue line segment is deemed eligible for noise mitigation because its change in dBA is 5.5 (resulting from a 253% increase in the number of trains). However, there are only 513 sensitive receptors on that segment. In contrast, while the change in dBA is "only" 4.0 for the Cleveland to Vermilion segment, the number of sensitive receptors found by the DEIS on

⁵⁵ DEIS, Volume 3B at OH-74. The DEIS contains no source for this standard and no analysis of the difference between this standard and the Board's 3 dB increase/65 dB total noise standard. 49 CFR § 1105.7(e)(6).

⁵⁶ In Transcontinental Gas Pipe Line Corporation, 79 FERC ¶ 61,346 at 62,475 (1997), the Federal Energy Regulatory Commission relied on the fact that "the noise sensitive areas (i.e. residences) in this case are more numerous and are closer to the new compressor stations than the noise sensitive areas in the three cases cited by Transco."

this Line Segment is 4,439.⁵⁷

Stated another way, even using the understated DEIS numbers, approximately nine times as many sensitive receptors (read "people living in predominantly residential areas") would be affected by increased noise on the Line Segment. The fact that the percentage increase in noise level is less than would be experienced on another line segment should not be dispositive when a vastly greater number of people would be adversely impacted by unacceptable noise levels.

Consider again the finding of the DEIS "that wheel/rail noise from train operations may last three to four minutes per location."⁵⁸ This means that if NS increases its trains by 20.6 to a total of 34.1 trains per day, the sensitive receptors on the Line Segment would be subject to this noise between 1.7 and 2.3 hours per day, seven days per week, 365 days per year. This is a greater noise frequency than would be experienced on the Oak Harbor to Bellevue line segment. And, BRL would experience a greater increase in number of trains than would be experienced on the Oak Harbor to Bellevue line segment (20.6 trains per day as compared to 19.5 trains per day).

⁵⁷ BRL maintain that the DEIS count of sensitive receptors is substantially understated. The verified statements of Kevin F. Beirne, Brian F. Moran, and James M. Sears identify 1,338 sensitive receptors in Rocky River, 3,944 sensitive receptors in Lakewood, and 1,920 sensitive receptors in Bay Village in the post-acquisition case. **Thus, these three communities alone have 7,202 sensitive receptors, 62% more than the DEIS found for the entire Cleveland to Vermilion line segment.**

⁵⁸ DEIS, Volume 3B at OH-137.

Third, the above-noted "70 dBA Ldn and 5 dBA Ldn increase" standard also is arbitrary and capricious in that it ignores the standards adopted by other federal agencies. As explained in the verified statement of Edward J. Walter, Jr., the Environmental Protection Agency and the Department of Housing and Urban Development (HUD) use 55 decibels as their goal for outdoor noise in residential areas. Outdoor noise above 65 dB but not exceeding 75 dB is "normally unacceptable" for HUD-assisted development. **Outdoor noise above 75 dB is "unacceptable" to HUD.**

In light of the clear HUD standard for acceptable noise levels, the DEIS standard for considering the significance of noise increases cannot be justified. If noise levels will increase to a level deemed unacceptable by HUD as a result of increased train movements, it makes no sense to say that this level of noise does not require mitigation simply because the increase in noise is less than approximately 320%, i.e. a 5 dB increase. If an increase in pre-existing levels from 65 dB to 70 dB is worthy of mitigation, a locale with a pre-existing dB level of between 70 and 75 should not have to experience a 320% increase in noise to justify mitigation.

This is precisely the case in the BRL communities. The average 100' Ldn at 13.5 trains per day is 72.6. **At 34.1 trains per day, the average 100' Ldn would be 76.6, well above the HUD level of "unacceptable."**

Without mitigation, the quality of life of the residents of BRL's "sensitive receptors" would be severely impacted and their

economic losses also would be great. As Mr. Walter explains, not only would unacceptable noise levels prohibit HUD funding for new development, but HUD considers this factor in determining the amount of insurance or other assistance that may be given.

Prospective purchasers also consider noise in determining the value of housing. As recently reported, a Lakewood Realtor has stated that "Houses next to the tracks are virtually unsellable. I have seen four listings in Lakewood that are directly on the tracks that have sold for substantially less dollars."

In brief, increased noise translates to lower property values, another cost proposed to be borne by the BRL communities to allow NS to obtain "net operating benefits in a normal year of \$553 million."

These concerns are not limited to just a few citizens of Lakewood, Rocky River and Bay Village. As reflected in Mr. Walter's exhibits EJW-2 and EJW-3, with 34.1 trains per day, the noise levels at the 100 feet distance would be above 75 dB, i.e. "unacceptable", at eight of the nine tested locations. In fact, noise would, on average, be at the 75 dB level 164 feet from the tracks. The 65 dB level, i.e. the bottom end of the "normally unacceptable" level, would not be reached for hundreds of feet from the NS tracks.

There are two fundamental points here. First, the DEIS 70 dba/5 dBA Ldn increase standard is meritless. If a quantitative approach is to be used, the HUD standards should be adopted.

Second, under any reasonable standard, the 100' Ldn levels and the number of sensitive receptors within the 65 db contour line in the BRL communities which would result from an increase in the number of trains per day to 34.1 demand mitigation. As computed by Mr. Walter, the 100' Ldn levels average 76.6. Given the 7,202 sensitive receptors in BRL, representing tens of thousands of people that would be faced with these unacceptable noise levels, NS should be ordered to take its additional trains elsewhere.

4) Air Quality: As explained by the verified statement of David H. Minott, the DEIS air quality analysis ignores the fact that projected CO impacts resulting from motor vehicles queued at grade crossings exceed the "significant impact thresholds" by substantial amounts at Hird Avenue in Lakewood. This air quality impact was ignored in the DEIS, thus understating the negative environmental consequences of the Conrail Acquisition.

5) Maximum Delay For At-Grade Crossings And Its Impact On Emergency Services: As noted above, the train speed issue cuts across a number of the DEIS analyses. One affected calculation is the purported "Estimated Maximum Delay (in Minutes) for At-Grade Roadway Crossings" found in DEIS, Volume 3B, Table 5-OH-53. It should be clear that the figures shown in this table cannot possibly be the "maximum" delay at the BRL grade crossings because this table assumes that NS will operate each one of its trains at the maximum authorized speed.

If the maximum delay at-grade crossings is to be used as a

criterion for the need for mitigation, it should be computed to reflect the likely average speeds as discussed above and the correct "time in minutes for gate closing and opening prior to and after the passage of the train" discussed in BRL's comments on the DEIS.

The DEIS also failed to recognize that changes in the total blocked crossing time per day are a more than reasonable tool to estimate changes in the number of emergency vehicles that would be delayed every year in BRL if NS is allowed to operate 34.1 trains per day. However, in Volume 3B at OH-137, the DEIS states: "SEA has not predicted frequencies of delay for emergency response vehicles, due to the inherent uncertainties and obvious localized issues such as locations of responding emergency vehicles." BRL submit that the DEIS analysis is incorrect and that our contention that the proposed increase in NS traffic would result in over 600 delays to emergency services vehicles annually can be verified easily.⁵⁹

Based on the data in BRL-2, we know that the Lakewood, Bay Village, and Rocky River police, fire, and EMS services are blocked by trains at least 253 times per year under current conditions. Since the total blocked crossing time per day with

⁵⁹ As noted by DOT, "[T]rain traffic following the integration of Conrail will clearly cut [Lakewood] in half by blocking virtually all of its 27 crossings." DOT-5 at 19. DOT states that "Impacts on emergency vehicle access should receive special concern as a general matter because of the obvious risks involved." *Id.* at 20. **This special concern is particularly needed in the BRL communities since there are no hospitals north of the tracks.**

34.1 trains per day is 258% of total blocked crossing time per day with 13.5 trains per day (see DEIS Table 5-OH-53), there would be approximately 653 emergency vehicle delays per year if NS operates 34.1 trains per day. BRL submit that this is an unacceptable result and requires mitigation.

6) Roadway Crossing Delay: As described in DEIS Volume 1 at 3-19, the DEIS used a "level of service" ("LOS") analysis to measure the significance of delays to highway traffic resulting from increased rail traffic. Simply stated, the DEIS does not consider the impact of additional rail traffic on highway traffic to be significant unless it results "in (1) a post-Acquisition level of service E and F regardless of the pre-Acquisition condition, or (2) a reduction from pre-Acquisition level-of-service C or better to a post-Acquisition level of service D."⁶⁰

The DEIS LOS analysis reasonably may be characterized as "a straw that broke the camel's back" approach. That is, in all but the most extreme situations, even if the impact of increased rail traffic on street traffic would be severe, it would not give rise to a mitigation recommendation unless the pre-existing condition was poor at best. In fact, the only grade crossing for which a grade separation is recommended by the Supplemental Errata has a pre-acquisition LOS of D.

This approach to traffic mitigation differs markedly from the above-described DEIS approach to noise mitigation. In the

⁶⁰ This second option for relief does not appear in Volume 5A at C-15. Thus, it is not clear which of these two sets of criteria were used by the DEIS.

noise context, a finding that mitigation is necessary is actually less likely if pre-acquisition noise levels are high. In contrast, in the context of viewing traffic impacts, unless the pre-acquisition LOS is high, the post-acquisition LOS could not rise to a level at which a grade separation is considered necessary.

At the same time, the DEIS approach to mitigation to alleviate traffic delay problems differs markedly from the approach SEA has taken in other proceedings. By way of example, the Reno FMP does not rely on an LOS analysis. Rather, based on a review of the totality of the facts, SEA there has recommended millions of dollars of improvements to Union Pacific tracks in order to mitigate the delays to street traffic that otherwise would result from the Union Pacific/Southern Pacific merger.

A review of the DEIS Supplemental Errata, Table 5-OH-11 (Revised), establishes part of the basis for BRL's concern with vehicle delays. According to the DEIS analysis, the "average delay per vehicle", i.e. the numerical equivalent of the LOS grade, would increase by 163% at the five BRL crossings considered, West 117 St, Bunts Rd, Columbia Rd, Dover Center Rd, and Bradley Rd, as a result of the Conrail Acquisition. Even assuming, arguendo, that the average delay per vehicle has been calculated accurately, this is a substantial increase in average vehicle delay. And yet, because of its failure to consider cumulative impacts, the DEIS does not consider whether this increase in average vehicle delay should serve as part of the

justification for environmental mitigation. This is error. The purpose of environmental mitigation should be to identify not just substantial individual environmental degradations, but to identify all environmental degradations and to return communities, as closely as possible, to the pre-existing condition.

In any event, the "pre" and "post" "crossing delay per stopped vehicle" and "average delay per vehicle" still must be calculated accurately. And, it is clear that the figures presented in Table 5-OH-11 (Revised) are not accurate for the following reasons.

First, as discussed previously, the DEIS has erred in utilizing the maximum allowed speed rather than a reasonable estimate of an average speed.

Second, as also discussed previously, the DEIS has erred in accepting a post-acquisition trains per day figure that NS has not been able to verify.

Third, in computing the "blocked crossing time per train", another of the components of both the crossing delay and the average delay, the DEIS utilized an understated constant, i.e. 0.50 minutes, to reflect the "time in minutes for gate closing and opening prior to and after the passage of the train."⁶¹ As demonstrated in BRL's comments on the DEIS, the correct time for NS is 0.66 minutes.

7) Pedestrian Safety: "SEA did not separately consider potential

⁶¹ DEIS, Volume 5A at C-11.

pedestrian impacts."⁶² BRL cannot ignore pedestrian safety and see no reason why the Board should do so. As reported in BRL-2 and BRL-3, children attending 22 elementary and middle schools in BRL cross the tracks each day. This fact must be considered by the Board in determining the need for environmental mitigation.

8) Summary Of Environmental Degradation: As established herein, our prior summary of the DEIS findings obviously does not fully reflect the environmental degradation proposed to be borne by BRL in order to improve NS's bottom line. To that prior list, we must add the following:

every DEIS calculation including train speed understates environmental impacts, and

every DEIS calculation including the number of NS trains is unsupported in the record, and

every DEIS analysis of noise impacts is based on an incorrect methodology, and

every DEIS analysis of noise impacts understates the number of sensitive receptors, and

the DEIS analysis of air quality impacts ignores CO impacts above significant impact thresholds, and

the DEIS understates the maximum delay at grade crossings, and

the DEIS ignores the fact that BRL would experience approximately 653 emergency vehicle delays per year, and

the DEIS ignores pedestrian safety.

⁶² DEIS, Volume 1 at 4-13.

BRL submit that the environmental degradation resulting from the NS proposal for the Line Segment is substantially greater than the environmental degradation discussed by SEA in its recently issued Reno FMP.⁶³ We further submit that the Maestri Plan is the only approach that NS has conceded to be available to eliminate that environmental degradation.

IV. The Maestri Plan

As outlined in Mr. Maestri's November 25, 1997 letter to Elaine Kaiser, the Maestri Plan contemplates three fundamental elements. First, NS would upgrade the existing Conrail track to Cloggsville and would construct a connection at Vermilion. Second, NS would construct a grade separation at Front Street in Berea. Third, NS would construct a grade separation at Fitch Street in Olmsted Falls.⁶⁴

In light of the above-described Board analysis of proposed mitigation, several points must be noted with regard to the Maestri Plan.

First, the Maestri Plan is designed only to eliminate the need for new traffic over the Line Segment.⁶⁵ Thus, it would not improve the environmental status quo.

⁶³ This results, in part, from the fact that the projected increase in trains through Reno is 11.3 per day (Reno FMP at 2-2) as opposed to the 20.6 train per day increase proposed by NS for BRL.

⁶⁴ Maestri letter, DEIS Volume 5C, Appendix S at 9.

⁶⁵ Id. at 2.

Second, the Maestri Plan is operationally feasible.⁶⁶

Third, the Maestri Plan, by eliminating new traffic and the environmental degradation resulting from that traffic, produces net public benefits, including improving conditions in Berea and Olmsted Falls. In fact, NS, the party with the burden of proof in this proceeding, has not even suggested that the annual costs of its investment in the Maestri Plan would be greater than the net public benefits. Rather, NS has asserted only that the cost of this plan "outweighs any economic benefits to NS."⁶⁷ This is irrelevant under the Board's criteria.

Fourth, the Maestri Plan would not affect the competitive balance among railroads.

Fifth, the Maestri Plan obviously addresses an effect of the Conrail Acquisition.

Sixth, the Maestri Plan is narrowly tailored to remedy adverse effects of the transaction and would not put BRL in a better position than it occupied before the consolidation. That is, there would be no reduction in the current number of trains operating through BRL.

In brief, the Maestri Plan meets every criterion for environmental mitigation conditions. It should be adopted by the Board. And, since this is baseline (Tier 1) mitigation, Union Pacific/Southern Pacific Decision No. 71 calls for it to be fully

⁶⁶ Id. at 1.

⁶⁷ DEIS, Volume 2, NS Safety Integration Plan at 196 (emphasis added).

funded by NS.

VI. No Increase In Traffic Over The Line Segment Should Be Permitted Until The Construction Required For The Maestri Plan Has Been Completed.

As SEA has implicitly recognized in the Reno FMP, railroads should not be free to visit environmental degradation on communities by increasing train traffic before they complete the mitigation measures required by the Board. "SEA also recommends that the Board continue to impose on UP the current cap of 14.7 daily freight trains through Reno until these physical installations are made." Reno FMP at 2-25.

BRL request a similar condition in this proceeding. That is, the 14.7 train per day cap adopted for Reno was two trains per day more than the Base Case in the UP/SP proceeding. In this case, the Base Case is 13.5 trains per day and the train cap should be 15.5 trains per day.

VII. The Board Should Retain Oversight For Five Years.

BRL previously have advocated that the Board retain jurisdiction over the Conrail Acquisition for purposes of expanding environmental mitigation in the event that the impacts of the transaction are greater than those that can be estimated today.⁶⁸

DOT has joined BRL in requesting the Board to retain oversight. DOT-5 at 2, 9 and 21. "[W]e strongly recommend that the STB retain jurisdiction for a five year period to monitor relevant developments . . . and to remain in a position to

⁶⁸ BRL-2 and BRL-6.

address . . . issues that may arise." Id. at 13.

Similarly, the Town of Haymarket has set forth a substantial case for retention of jurisdiction by the Board. TOH-2. Among other things, Haymarket explains that retention of oversight is consistent with the Agreement Between The National Industrial Transportation League, NS, And CSX. CSX/NS-176 at 771.

Retention of jurisdiction is amply supported by precedent, e.g. Penn-Central Merger & N&W Inclusion Cases, 389 U.S. 486, 522 (1968); Baltimore & Ohio R. Co. v. United States, 386 U.S. 372, 387 (1967) ("Once a valid order is entered by the Commission, it, of course, has the power to retain jurisdiction for the purpose of making modifications that it finds necessary in the light of subsequent circumstances or to assist in compliance with prior conditions previously required or, of course, to correct any errors.").

Similarly, retention of jurisdiction is amply supported by the fundamental uncertainty as to the number of trains NS would operate over the Line Segment. Since train counts obviously are a vital input to any environmental analysis, the Board should adopt DOT's position and retain jurisdiction for five years.

Conclusion

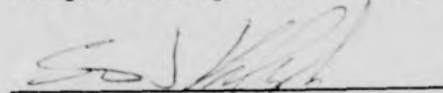
BRL do not gainsay that \$47 million, the NS cost estimate of its mitigation proposal to eliminate the environmental damage to BRL, is a substantial sum. But, even in the unlikely event that the entire cost of this mitigation were to be expensed in one year, it would be only 8% of that year's "net operating benefits

in a normal year of \$553 million." If this cost is amortized over only ten years, the minimum one would expect, it would be only 0.8% of those years' "net operating benefits." Again, this would be a reasonable expenditure even if the data presented in the DEIS fully reflected the environmental harms to BRL resulting from the NS proposal.

WHEREFORE, BRL respectfully request the Board to impose three environmental mitigation conditions on the Conrail Acquisition. First, the Board should mandate full implementation of the Maestri Plan at the sole expense of NS. Second, NS should be permitted no increase in traffic volume over the Line Segment until such time as it completes the construction required under

the Maestri Plan. Finally, the Board should retain jurisdiction over the Conrail Acquisition for five years.⁶⁹

Respectfully submitted,



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Dated: February 23, 1998

⁶⁹ If, for any reason, the Board does not impose the three conditions advocated by BRL, BRL would request in the alternative that NS be required to (1) install gates and lights at all grade crossings in BRL; (2) pay for the construction of a new Fire/EMS station in Rocky River north of the tracks; (3) replace Clague Siding with a new siding west of BRL; (4) repair the bridge located to the west of the Westlake Hotel; (5) follow the best practices permitted by the FRA for noise abatement following completion of FRA's ongoing study; and (6) fund studies to determine whether grade separations are feasible in BRL and fully fund any feasible grade separations.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served copies of the foregoing upon all parties of record by first class mail, postage prepaid.

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


Steven J. Kalish

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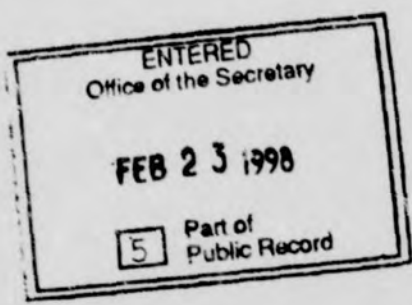
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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33388



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

BRIEF OF ORANGE AND
ROCKLAND UTILITIES, INC.

In its October 21, 1997 Comments and Request for Conditions, Orange and Rockland Utilities, Inc. ("Orange and Rockland") cited certain respects in which the breakup of Conrail, and its absorption by Applicants CSX Transportation, Inc. ("CSX") and Norfolk Southern Railway Company ("NS") will have adverse impacts on Orange and Rockland. In the relatively brief discussion of these issues in their Rebuttal, Applicants have failed to establish legal or policy grounds for denying the conditions sought by Orange and Rockland.

Orange and Rockland's concerns focus on the 700,000 tons of extremely low sulfur "superccompliance" coal that is necessary to fuel the Lovett Plant, located on Conrail's River Line in Tomkins Cove, New York. Today, all coal burned at the Lovett Plant is delivered by Conrail. Under the Applicants' proposal, CSX would

take over Conrail's River Line, and would be the sole delivering railroad to the Lovett Plant. Orange and Rockland would go from being captive to Conrail today, to being captive to CSX after implementation of the proposed Railroad Control Application.

Although this suggests an equivalence of service for Orange and Rockland before and after this proceeding, Orange and Rockland has shown that its ability to meet its obligations to its customers is threatened by aspects of the Applicants' proposal that could be cured, in an operationally feasible manner, without jeopardizing any benefits that may also flow from the breakup of Conrail. Where conditions are requested that can meet these criteria, well-established precedent calls for the imposition of such conditions. See, e.g., Union Pacific -- Conrail -- Missouri Pacific; Western Pacific, 366 I.C.C. 462, 565 (1982).

I. SERVICE PROBLEMS

As explained by Orange and Rockland Witness Bogin, substitution of CSX service for Conrail service jeopardizes operations at the Lovett Plant in two ways. First, documented deficiencies in service by Conrail to the Plant will be exacerbated as a result of the proposed Transaction. This diminution in service quality is due in part to the many difficulties CSX is certain to experience in integrating approximately 42% of Conrail into its system.

The Board has heard at length from shippers (and railroads) in the Western United States about service problems, and problems in shippers' plant operations, resulting from Union Pacific's acquisition of Southern Pacific. These problems have lasted for many months, are still being "solved", and are producing effects and aftereffects that will be felt for years to come. Much of the resulting damage will never be corrected or compensated.

Orange and Rockland has every reason to fear similar problems or worse problems, if CSX absorbs part of Conrail. CSX must integrate half of a major railroad into its own operations, avoiding disruption of services formerly provided by Conrail and CSX, while also preserving coordination with other carriers including NS, which will be experiencing its own growing pains. In comparison, UP's takeover of SP, an intact railroad, should have been an easier task.

Even if a UP-type "meltdown" can be avoided, Orange and Rockland remains concerned about increased congestion on the River Line between Albany and New York City, producing more frequent and more extended delays in coal deliveries to the Lovett Plant. As Orange and Rockland Witness Bogin explains (V.S. at 5) service to the Lovett Plant over the River Line is constrained by the fact that traffic can move over the line in only one direction at a time. A short delay in departure can and does mean that trainloads of coal arrive at the Lovett Plant a full day late, due to the narrow "window of opportunity" for deliveries.

The Applicants' own projections call for a significant increase in traffic over the River Line if CSX takes over. Almost 20% more rail tonnage is projected, and the Applicants have repeatedly cited their expectations of inducing shippers via motor carrier to divert some or all of their freight from truck to rail.

In their Rebuttal, the Applicants promise repeatedly that there will be no recurrence in the East of UP's disastrous service problems in the West. Extensive planning and coordination efforts are said to be underway, and the Board is invited to exercise oversight of implementation of the Transaction for a three-year period.

It is obviously in Applicants' own interests to avoid any service problems in the new configuration contemplated by this Transaction. The fact remains that breaking up Conrail into separate (and shared) portions, and integrating the resulting operations, is likely to be more complicated than UP's acquisition of SP. And if Applicants have discussed measures to avoid service problems to the Lovett Plant, those measures have not been discussed with or disclosed to Orange and Rockland. Moreover, while STB oversight in Ex Parte No. 573, Rail Service in the Western United States, and the resulting service order were helpful, oversight alone has not resolved western shippers' problems, and is unlikely to be able to resolve any service problems the Conrail breakup may produce.

Of course, it is small consolation to Orange and Rockland if the Transaction avoids service problems on a UP/SP scale, but leads to impaired fuel deliveries to the Lovett Plant. As railroad mergers and acquisitions become larger and more complex, it becomes possible for the Applicants to dismiss larger and more damaging service problems as "isolated" or "incidental".

The Board must not make the mistake of tolerating major service disruptions in the context of major mergers, merely because minor service disruptions have been tolerated in minor proceedings. The statute and the Board's own regulations recognize that major transactions require special handling, and the only mergers that could exceed the impact of this one would be transcontinental mergers, e.g., NS with BNSF or CSX with UP. Because major mergers can produce major problems as well as major benefits, proceedings like this one require additional regulatory scrutiny and vigilance, and a greater readiness to impose corrective conditions.

Finally, Orange and Rockland's concerns about greater congestion on the River Line have been ignored by the Applicants. At pp. 452-453 of their Rebuttal, they call Orange and Rockland's contention that existing service problems will be aggravated "totally speculative", and they go on (inconsistently) to claim that CSX will provide "the same consistently high level of service" Orange and Rockland receives today. But today's service is poor, and there is nothing speculative about Orange and Rockland's

concerns about congestion; they are based on the Applicants' own projections.^{1/}

Notably, the response of Applicants' Witness Sansom to Orange and Rockland's Comments does not contend that they are "speculative", or that current service quality is high. His response is rather than Orange and Rockland has a water delivery option rendering rail service concerns immaterial. As explained below, Witness Sansom is wrong, but even if water delivery were feasible, this alleged option would not enable Orange and Rockland to avoid service problems on coal deliveries covered by rail transportation contracts. Plainly, contracts have not protected UP shippers on the Texas Gulf Coast.

Orange and Rockland's concerns about adverse impacts from this Transaction on timely and reliable service to the Lovett Plant warrant remedial action in this proceeding.

II. REDUCED COMPETITION

Even if there were any basis for Applicants' claims that CSX will provide better service to the Lovett Plant than Conrail (and there is none), Orange and Rockland would still seek conditions on any approval of this Transaction by the Board. Absent conditions, the proposed Transaction will permit CSX to foreclose competition for coal and for coal transportation that Orange and Rockland now enjoys.

^{1/} See Railroad Control Application, Volume 3A, Attachment 13-6 (page 448) and Attachment 13-7 (page 470).

As explained by Orange and Rockland Witness Bogin (V.S. at 2), the Lovett Plant burns special "supercompliance" coal characterized by high Btu content (13,000 Btu per pound) and extremely low sulfur (1.0 lbs. per MMBtu). This low sulfur content is necessary under applicable environmental regulations. Because Conrail originates relatively little of this Central Appalachian-type supercompliance coal, Conrail's market dominance over service to the Lovett Plant has not restricted Orange and Rockland's ability to take advantage of origin competition on two levels.

First, Orange and Rockland has been able to obtain bids from supercompliance coal producers served by NS, and from competing coal producers served by CSX. As a result, Orange and Rockland has had a free hand to choose the supercompliance coal with the combination of features -- price, quantity, burn characteristics and emission impacts -- that best meets Orange and Rockland's needs. Second, Orange and Rockland has been free to negotiate with CSX and NS for the optimal combination of transportation rates and rail service terms.

So long as Conrail received the revenues it demanded for its services, it was indifferent to the identity of the coal producer and delivering carrier. CSX will not be so impartial. At best, CSX can be expected to price its services in such a way as to neutralize any competitive advantage currently enjoyed by coal producers served by NS. And 80% of the supercompliance coal

available from Massey Coal Sales, Orange and Rockland's current primary producer, is served only by NS. Bogin V.S. at 9.

At worst, CSX can foreclose access to NS-originated coal supplies for the Lovett Plant. CSX's market power will enable it to insure that the delivered price of such coal always exceeds the delivered price of coal from mines CSX serves, no matter how competitive the NS coal, or the NS rate from the mine to the interchange point with CSX.

The result would be a clear distortion of the marketplace not just for coal transportation, but also for coal itself. As Witness Bogin states, "CSX should not be allowed to use its market power to steer Orange and Rockland away from efficient mines producing the best coal at the best price and toward less efficient mines producing less suitable coal at higher prices, merely because it has the ability to monopolize Orange and Rockland's rail service." V.S. at 8.

The Applicants acknowledge Orange and Rockland's argument and Witness Bogin's testimony in their Rebuttal (Volume I at p. 83-84) but appear to miss the point. They say that Orange and Rockland "offers no proof at all of this alleged origin competition", when in fact, Witness Bogin explains the competition in the marketplace to supply and transport supercompliance coal for the Lovett Plant quite well, from her own personal knowledge as Orange and Rockland's coal buyer.

The concept is not difficult to grasp. Rail competition, though desirable in itself, is also desirable as a means of transmitting the benefits of competition in commodity markets from sellers to their customers. The avowed goal of natural gas pipeline and electric utility restructuring in recent years has been to allow the markets for those commodities to operate freely, without distortion by monopoly pipelines or electric utilities. Indeed, the need for protection from market distortions by railroads is arguably greater than the need for such protections with respect to gas and electricity, because those commodities are fungible compared with coal.

How is the public interest served if Orange and Rockland's present ability to choose freely between qualified producers of a scarce commodity -- supercompliance coal -- is significantly impaired because CSX wants coal for the Lovett Plant to come only from mines it serves? Assuming other benefits of the Conrail breakup outweigh this reduction in competition for Orange and Rockland's business, what is the rationale for not conditioning merger approval on imposition of protective conditions requested by Orange and Rockland?

The Applicants argue that, under the "one-lump" theory, origin competition is a myth. However, even their consultant, Dr. Kalt, concedes in his Rebuttal Verified Statement (Vol. 2A, page 34) that where the rates of "upstream" railroads like NS and CSX are not

driven by competition down to incremental costs, "some of the lump may be retained by the upstream carriers". In other words, there may be more than one "lump".

Some support for both sides of this debate is provided by Delaware & Hudson Railway Co. v. Consolidated Rail Corp., 902 F.2d 174 (2d Cir. 1990). It is clear from that opinion that Conrail sought to put full-blown "one-lump" pricing into effect when it demanded an 800% increase in its revenues for a joint haul with the D&H, effectively forcing D&H to earn no profit on its participation in a haul that could also move via Conrail direct. However, the court of appeals concluded that Conrail's actions could be in violation of the antitrust laws. The case was later settled.

There are relatively few antitrust cases involving the railroad industry, and it is a safe bet that this decision received wide attention. It is also likely that the decision contributed to a reluctance by delivering railroads to risk similar challenges by employing full "one-lump" pricing. And, of course, no railroad that used such pricing would be invulnerable to retaliation in other situations, in which it lacks a destination monopoly.

Ultimately, the railroads cannot have it both ways. If the one-lump theory holds, it makes no sense to require captive shippers to challenge anything other than the bottleneck rate, since all abuse of market power is concentrated in that rate. If, on the other hand, origin competition among railroads exists,

remedial measures should be taken in merger proceedings to minimize any merger-related diminution in that competition.

And even if it is assumed that the one-lump theory is correct as to upstream rail competition, the Board must not ignore deleterious effects on source competition of a Transaction like this. Conrail's neutrality as to Orange and Rockland's coal purchasing decisions meant that all of the low-sulfur mines in Central Appalachia could compete to supply coal to the Lovett Plant. There is a natural incentive on CSX's part to discourage Orange and Rockland's purchases of coal from NS-served mines that will, in turn, reduce the incentive of CSX-served mines to offer their lowest prices to Orange and Rockland.

To Applicants' Witness Sansom, such concerns are academic. He argues that Orange and Rockland will not be captive to CSX because ships can deliver coal to the Lovett Plant, bypassing CSX's destination monopoly.

Mr. Sansom's position rests on erroneous assumptions. His "best evidence" for his conclusion is the fact that a different utility, Central Hudson Gas and Electric Corp., uses "ocean-going self-unloading" ships to deliver "the same supercompliance coal ORU uses" to Central Hudson's Danskammer plant, 26 miles up the Hudson River from the Lovett Plant. Applicants' Rebuttal Volume 2B, Sansom Rebuttal V.S. at 64. He goes on (id. at 67) to argue that Orange and Rockland "can import super compliance coal if necessary."

One problem with this analysis is that Central Hudson does not use the same coal as Orange and Rockland. Danskammer is able to burn coal with a sulfur content of 1.1 lb SO₂/MMBtu, while the coal burned at the Lovett Plant cannot exceed 1.0 lb SO₂/MMBtu sulfur. The difference may seem small, but its impact on coal purchases is significant. Central Hudson has apparently located foreign coal producers that will commit to supply large volumes of 1.1 lb. SO₂ coal. Orange and Rockland's attempts to identify reliable, long-term foreign sources of 1 lb. SO₂ coal have been unsuccessful.

A second disparity between Orange and Rockland's situation and Central Hudson's is that there are no coal unloading facilities at the Lovett Plant. Assuming arguendo that such facilities could be built, why would Orange and Rockland incur the considerable expense of doing so, if there are no reliable foreign sources of the supercompliance coal required at the Lovett Plant? Domestic supercompliance coal delivered by a combination of rail and water would not be competitive with all rail deliveries even if unloading facilities at the Lovett Plant were already in place.

In positing a scenario (which is, unfortunately, factually erroneous) in which Orange and Rockland could bypass the CSX bottleneck monopoly over River Line deliveries to the Lovett Plant, Mr. Sansom is implicitly conceding the need for such protection. Water deliveries will not achieve this goal, but there are conditions the Board can and should impose that will.

III. ORANGE AND ROCKLAND'S
REQUESTED CONDITIONS
ARE NECESSARY

In its Comments, Orange and Rockland requested the imposition of conditions that would cure both of its concerns. Specifically, trackage rights for NS over the River Line from Northern New Jersey to the Lovett Plant would enable Orange and Rockland to obtain coal deliveries despite service problems on NS or CSX, as they attempt to absorb their respective portions of Conrail's lines. Trackage rights over the final 50 miles of movements from Central Appalachia to the Lovett Plant would also preserve the benefits of origin competition that Orange and Rockland now enjoys.

The Board could also order CSX to establish reasonable interchange rates over the final delivery leg of movements from NS-served mines. Such a condition would enable NS and CSX, and the mines they serve, to compete based on price and quality. The danger of foreclosure or exclusionary pricing by CSX would be mitigated. CSX would be encouraged to attract Orange and Rockland's business by making its own service better than Orange and Rockland obtains today, rather than by making NS joint line service worse.

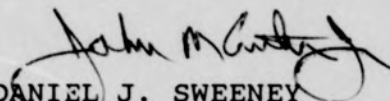
The requested conditions are justified by economic and service considerations by policy, and by precedent. Because they do no more than prevent the withholding, as opposed to the sharing, of the efficiency gains the Applicants promise to achieve, imposition of these conditions will not harm the Transaction. On the contrary, by conditioning any approval order as requested by Orange

and Rockland, the Board will not just preserve, but will enhance, the public interest.

IV. CONCLUSION

New competition in the electric utility industry means that reliable, cost-effective railroad deliveries of low sulfur coal have become critical. While true "partnerships" between utilities and railroads hold great promise, consolidations in the railroad industry also create great dangers to the continued production of dependable, low-cost electric power. For the reasons set forth in Orange and Rockland's Comments and in this Brief, the Board should grant Orange and Rockland's request for the imposition of protective conditions.

Respectfully submitted,



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Dated: February 23, 1998

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CERTIFICATE OF SERVICE

I hereby certify that I have this 23d day of February, 1998, caused the foregoing Brief to be served by first-class mail on counsel for the applicants and on the FERC Administrative Law Judge assigned to handle discovery matters, as indicated below. Copies have also been served by first-class mail on all parties of record on the official service list.

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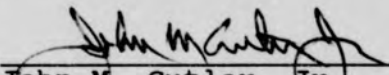
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WILLIAM P. JACKSON, JR.

February 23, 1998



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

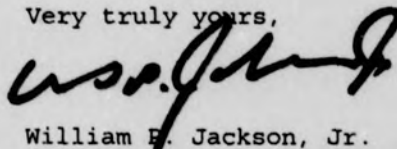
Dear Mr. Williams:

Enclosed for filing are the original and twenty copies of ATMC-4, Brief of A. T. Massey Coal Company, Inc., in Support of Request for Imposition of Conditions. Also enclosed is a computer disk in WordPerfect 7 format containing the document.

You will note from the certificate of service appended to the Brief that a copy of it has been served upon all parties of record in the referenced proceeding.

Please acknowledge receipt and filing of the above by file-stamping a copy of this letter and the Brief and returning them to the person hand-delivering the documents and disk.

Very truly yours,

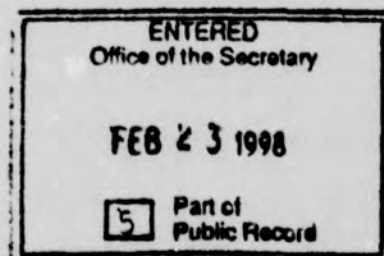


William P. Jackson, Jr.

WPJ/jmb

Enclosures

cc: James L. Gardner, Esquire
Mr. Jerry M. Eyster
Mr. Jeffrey A. Wilson



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ATMC-4

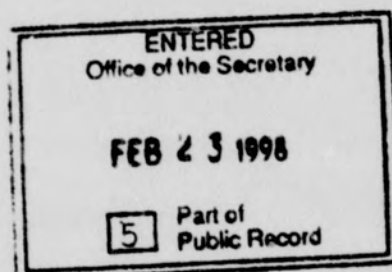
BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.

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



BRIEF OF
A. T. MASSEY COAL COMPANY, INC.,
IN SUPPORT OF REQUEST FOR
IMPOSITION OF CONDITIONS



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Due and Dated: February 23, 1998

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.

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

BRIEF OF
A. T. MASSEY COAL COMPANY, INC., ET AL.
IN SUPPORT OF REQUEST FOR
IMPOSITION OF CONDITIONS

Comes now A. T. Massey Coal Company, Inc. (Massey), and its subsidiaries Bandytown Coal Company, Central West Virginia Energy Company, Eagle Energy, Inc., Elk Run Coal Company, Inc., Goals Coal Company, Green Valley Coal Company, Hillsboro Coal Company, Independence Coal Company, Inc., Knox Creek Coal Corporation, Long Fork Coal Company, Marfork Coal Company, Inc., Martin County Coal Corporation, Massey Coal Sales Company, Inc., New Ridge Mining Company, Omar Mining Company, Peerless Eagle Coal Co., Performance Coal Company, Rawl Sales & Processing Co., Sidney Coal Company, Inc., Stirrat Coal Company, Stone Mining Company, Tennessee Consolidated Coal Company, United Coal Company, Vantage Mining Company, Vesta Mining Company, Wellmore Coal Corporation, Power Mountain Coal Company

and Spartan Mining Company, and submit this brief in support of their request for the imposition of conditions in the captioned proceeding.¹

MASSEY'S INTEREST

Massey is one of the five largest marketers of coal in the United States. Transportation of coal is vital in its operations. Massey is headquartered in Richmond, VA. Massey produces, processes and sells bituminous, low sulfur coal of steam and metallurgical grades from 19 mining complexes (17 of which include preparation plants) located in West Virginia, Tennessee, Kentucky and Virginia.

To show the magnitude of Massey's activities, following is a table listing Massey's coal production for the last three fiscal years.² Data provided are in thousands of short tons, with the last three zeros omitted. Figures are given for steam coal, metallurgical coal, and total for each year.

<u>Year</u>	<u>Steam Coal</u>	<u>Metallurgical Coal</u>	<u>Total</u>
1994	17,120	7,333	24,453
1995	15,790	11,634	27,424
1996	17,578	13,616	31,194

Massey expects its production and sales to continue to rise in the future, provided it is able to get needed transportation service from NS and CSX at a price that will move Massey's coal.

¹ For ease of reference, Massey and its subsidiaries will be referred to collectively simply as "Massey," unless the context requires a different treatment.

² Massey's fiscal year ends on October 31.

Quite obviously, Massey is heavily dependent upon rail service to move coal to its customers. Massey is concerned that its competitive position not be harmed by the proposed split of Conrail assets. To guard against that potential harm, Massey has requested that oversight conditions be imposed on the realignment of the railroad system in the East for a period of ten years following consummation.

For the first four years, Massey proposes that oversight proceedings be held annually. After that, they should be held biennially or at such intervals as the STB, in its discretion, may find useful. The results produced in the aftermath of Union Pacific Corp., Union Pacific Railroad Co., and Missouri Pacific Railroad Co.--Control and Merger--Southern Pacific Rail Corp., Southern Pacific Transportation Co., St. Louis Southwestern Railway Co., SPCSL Corp. and The Denver and Rio Grande Western Railroad Co., Finance Docket No. 32760 ("UP/SP"), definitely show that it is wise not to take at face value what railroad applicants say in a proceeding that involves unknown and unknowable major consequences at the time approval is given.

In UP/SP, oversight has been prescribed for a five year period. Based on the grave service deficiencies and other problems that have arisen subsequent to that merger, STB oversight is definitely needed. Without the potential for STB intervention to correct problems, it is almost a certainty that the problems in the Gulf Coast area following the merger of UP and SP would not have been the subject of a voluntary agreement³ between BNSF and UP which will apparently lead to joint

³ There was a Union Pacific press release on February 13, 1998, which gave the outline of the agreement that had been reached between UP and BNSF. The Associated Press also reported the agreement on the same date.

ownership of certain critical track, as well as the availability of service by either BNSF or UP to many shippers in Houston and along the Gulf Coast.

If parties know that their conduct will be scrutinized, it will open up possibilities for negotiation and compromise that would not otherwise exist.⁴ Massey is seeking regulatory scrutiny by the STB over a meaningfully long period of time in order to have an appropriate remedy for such future problems as may be produced by the division of Conrail's assets between NS and CSX. Governmental intervention is not something that should be relied upon to solve all problems, but the mere fact that circumstances would allow such intervention would be an impetus for the involved carriers and shippers to work things out among themselves.

THE THREE YEAR OVERSIGHT PERIOD
CALLED FOR IN THE AGREEMENT BETWEEN
NITL AND APPLICANTS IS FAR TOO SHORT

While it is good that the National Industrial Transportation League ("NITL") and Applicants have reached an agreement ("NITL AGREEMENT") that narrows the issues markedly in this proceeding, that should not influence the STB to defer unduly to them in discharging its regulatory responsibilities. Indeed, the STB has been subjected to criticism from numerous quarters for allowing the rail applicants and certain shipper organizations to formulate most of the conditions that were ultimately adopted by the STB in Union Pacific Corp., Union Pacific Railroad Co., and

⁴ One might consider this to be roughly analogous to the theorem in physics which says that a closed system cannot be observed without inducing change in it.

Missouri Pacific Railroad Co.--Control and Merger--Southern Pacific Rail Corp., Southern Pacific Transportation Co., St. Louis Southwestern Railway Co., SPCSL Corp. and The Denver and Rio Grande Western Railroad Co., Finance Docket No. 32760, Decision No. 44, 1996 STB Lexis 220 (August 12, 1997). There are those who contend that failure of the STB to come up with more meaningful conditions is what led to the massive service failures involving rail service at Houston and along the Gulf Coast.

The distaste of the STB for the very practical solution of divestitures in that case has aroused comment in many circles. It is now a bit ironic that the two principal railroads involved in UP/SP who agreed earlier on extensive conditions that involved primarily trackage rights should now come back with another agreement to swap ownership rights in certain Gulf Coast rail properties due to the infeasibility of trackage rights as a solution. What else may be required to achieve a solution that is in the public interest? How long will these problems persist? What other problems may become evident as the situation develops? Certainly reserving a five year period for continuing oversight in the less complex UP/SP merger proceeding will undoubtedly turn out to be a wise decision on the part of the STB. Indeed, an even longer oversight period could ultimately be required in the UP/SP merger proceeding.

If the condition requiring a five year oversight period in the UP/SP merger was appropriate, then the proposed three year oversight period called for in the NITL Agreement is entirely too short. The division of Conrail property between NS and CSX is a much more complex undertaking than

the absorption of SP by UP. Cutting the oversight period down to three years to be consonant with the NITL Agreement would logically appear to be the reverse of what should occur.

Many contracts for the transportation of coal and other commodities are multiyear in duration. As contracts end, it is important to know that meaningful recourse may be had to the regulatory structure if necessary for redress of potentially troublesome transportation grievances. The availability of oversight proceedings, rather than the need to initiate complaints, will assist in the fair and equitable resolution of differences that inevitably will arise between shippers and carriers. Moreover, continuing oversight should materially assist in alleviating, through future action perhaps, the feeling in the shipper community that typically the STB is not very helpful when major rail interests weigh in against shippers.⁵ Furthermore, as concentration increases in the rail industry, it becomes more important that there be at least a perception in the broader community that the regulator is not in bed with the regulated. An extended rather than abbreviated oversight period would therefore serve a useful purpose in more than one arena.

Especially important to Massey, and many other shippers as well, is the implementation of competitive access. On April 5, 1996, Massey made a successful bid to purchase major coal

⁵ There are indications that the STB may be readjusting the balance in its decisions so as to be less favorably tilted towards major railroads; if so, further confirmation will be welcomed by shippers. See, e.g., FMC Wyoming Corporation and FMC Corporation v. Union Pacific Railroad Company, STB Finance Docket No. 33467, served December 16, 1997.

production facilities⁶ that were served by both Conrail and CSX via a jointly controlled railroad⁷ only to have Conrail and CSX agree to divide up that railroad and liquidate it⁸ shortly thereafter.

Following the agreement of Conrail and CSX to divide their jointly controlled railroad, Massey was left with coal shipping facilities that were in all instances served by only one rail carrier.

In the absence of competition, rail rates inevitably will be higher than if there is competition for the subject coal traffic, unless "virtual" competition is injected via the regulatory process. Indeed, this is perhaps the best current justification for having a regulatory agency such as the STB. But with the acceptance of differential pricing practices of railroads, regulators have ipso facto awarded at least a modicum of monopoly rents to the railroads.

It is bad enough that shippers such as Massey must put up with the added weight of monopoly rents – indeed, excessive rents have been known to cause revolutions.⁹ But what is

⁶ Shown on Appendix A (map) to ATMC-3 as the Green Valley Plant.

⁷ The Nicholas, Fayette & Greenbrier Railroad.

⁸ Following a request for regulatory relief filed by Green Valley Coal Company, a Massey subsidiary, in Consolidated Rail Corporation and CSX Transportation, Inc. - Acquisition and Operation - Nicholas, Fayette and Greenbrier Railroad Company, Finance Docket No. 32845 (petition filed April 23, 1996), there was a negotiated settlement which resulted in withdrawal of the Green Valley Coal Company's opposition to the transaction proposed in that proceeding. Had it been known then that CSX and NS would thereafter, in a fairly short time, agree to divide Conrail's assets, Green Valley Coal Company would not have acquiesced in losing service from Conrail without some additional agreed protection to simulate intramodal rail rate competition. The Green Valley Plant would have been a two-to-one point but for the division of the NF&G assets by Conrail and CSX. Was the division of the NF&G part of an orchestrated prelude to the liquidation of Conrail?

⁹ For example, the rise to prominence of Charles Stuart Parnell in Ireland in the 19th century was attributable to an unfair system of land tenure, including the squeezing of as much rent as possible from the Irish peasantry, and was an underlying cause of the rebellion of the

(continued...)

especially distressing to Massey is the prospect that many of its geographically close competitors – specifically, coal shippers on the old Monongahela Railroad (“MGA”) – will be served after the division of Conrail by both NS and CSX, whereas presently they are served only by Conrail.

The response of the Applicants has been that it does not matter that Massey will be hurt competitively following the merger, since it is the marketplace that must be considered, and there will be more rather than less competition for coal traffic following the Conrail carve-up. Moreover, they state – quite correctly, as Massey has already agreed – that in many instances Massey will have a single line connection rather than a joint line connection to many more major coal users.

Quite candidly, Massey has not been able to deduce from the facts it has to work with whether the proposed transaction to dismember Conrail will be favorable or adverse to Massey. One main reason for this is that the resolution to this conundrum is dependent upon the future actions of NS and CSX. If Massey’s competitors become more favored due to concessions brought about by intramodal rail competition, then Massey’s ability to market coal will be diminished. Of course, the best resolution would be for Massey’s facilities to be accorded real – as distinguished from virtual – competitive intramodal rail service.

Although the next millennium is close at hand, real rail competition for Massey’s coal is not. Accordingly, virtual competition – regulation, as it were – must be provided if Massey is to be accorded relief from future adverse impact due to the division of Conrail.

(...continued)

Irish that led to formation of what is now the Republic of Ireland.

Jerry M. Eyster, Massey's Vice President - Corporate Development, said the following in his verified statement, ATMC-3, at page 6:

Should it become apparent post-consummation that Massey's competitive position has suffered vis-a-vis its competitors who will have competitive rail service following consummation, then Massey requests leave to seek the imposition of competitive access or other conditions in the oversight proceedings to remedy the harm to Massey's relative competitive position. Imposition of a condition based on this principle will encourage fair treatment of Massey. The mere existence of such a condition would militate against its ever being used. But without such a condition, railroad pricing practices may adversely affect Massey's competitive position in the future.

Keeping the door open for a request for competitive access or other relief in oversight proceedings will act as a safety valve. Provided the involved railroads act in a responsible manner, establishing a ten year period for oversight will cost the regulatory budget very little.

**MASSEY SHOULD BE GRANTED LEAVE
TO FILE FOR SPECIFIC RELIEF
DURING THE OVERSIGHT PERIOD
IF IT SUFFERS HARM**

As a captive shipper of a monopolist railroad, Massey should be allowed to file for appropriate relief in the oversight proceedings that will take place following consummation of the division of Conrail between NS and CSX if Massey suffers as a result of the splitting up of Conrail. As noted earlier, Massey is not certain what the impact of the transaction upon it will be. Massey

wants to reserve the right to seek regulatory relief, such as competitive access solutions, should it be adversely impacted as a result of favored treatment being given to its competitors.¹⁰

The former Interstate Commerce Commission recognized in its last days that the freight railroads required federal economic regulatory oversight because the rail industry retains monopoly power over certain sectors of traffic. Policy Statement on the Transportation Industry Regulatory Reform Act, Ex Parte No. MC-222, served March 12, 1997, p. ES-4. The Interstate Commerce Commission then, in that same report, goes on to say:

Although competitive transportation alternatives exist for much of the traffic carried by rail today, some traffic is nevertheless captive to railroads. Such traffic includes bulk commodities such as coal, chemicals, grain, and other raw materials; heavy, oversized equipment; and certain hazardous materials.

The potential for the exercise of monopoly power by a railroad makes continued regulatory oversight essential. The competitive portion of the industry's business complicates the regulatory task. Successful regulation of the rail industry must not be so restrictive as to hamper the railroads' ability to compete effectively and maximize profits on competitive traffic. Yet regulation must be sufficiently vigilant, forceful, and effective to provide the constraints needed to protect the public from abuses of monopoly power.

Policy Statement on the Transportation Industry Regulatory Reform Act, *supra*, p. 4.

Persons having monopoly power can be devilishly clever. One can only hope that the exercise of such power will be benign, for if not, far-reaching adverse consequences can flow from it.

¹⁰ Adding to the mix of concerns is the fact that a subsidiary of NS, Pocahontas Land Corporation, is a major owner of coal reserves in Appalachia. Its total holdings include 900,000 acres in the southern and midwestern United States. See CSX/NS-18, p. 72. So, not only are coal producers on the MGA a source of concern, but one of the Applicants has a subsidiary whose activities could be troublesome in the future.

With respect to the regulated activities of railroads, it does no good to talk about the protection afforded by the antitrust laws of the United States, because regulation by the STB significantly insulates railroads from antitrust perils. Indeed, that was brought home most forcefully by the arguments of the United States Department of Justice in UP/SP, supra, and most pointedly in the oral argument of Assistant Attorney General Bingaman.¹¹ The argument, of course, failed, and that is why the STB is now occupied with devising remedial solutions – formal and informal – in the aftermath of the UP/SP merger.

APPLICANTS GIVE NO REASONS
OTHER THAN SELF-INTEREST
FOR A SHORT OVERSIGHT PERIOD

In discussing the concerns of Massey in their rebuttal, Applicants proceed from basically an *a fortiori* argument that oversight beyond three years is not needed because it is not needed. The mere fact that some parties got together and decided it would be nice to agree on a three year oversight period does not negate the need for continued scrutiny of one of the largest and most complex rail realignments in history. Such a transaction is clearly due more than a polite nod and wink and a touch by a rubber stamp. The STB, in the exercise of its regulatory functions, ought clearly to recognize the need for keeping its options open longer than might be needed for nearly any other rail consolidation matter.

¹¹ The oral argument was delivered before the STB by Ms. Bingaman on July 1, 1996, in Washington, DC. There can be no doubt that approval for the merger transaction as it was proposed would not have been forthcoming had usual antitrust mechanisms been applicable.

Applicants criticize numerous parties for suggesting that the oversight period, at a minimum, should be as long as that prescribed in UP/SP. See Applicants' Rebuttal, CSX/NS 176, p. HC-726, n. 10. They urge that the imprimatur of the subscribing parties on the NITL Agreement clearly makes the agreed three year oversight period the greatest reasonable upper bound for such a period.

Now it is true that NITL is the largest shipper organization in the United States.¹² But it is equally true that it speaks only for a minor fraction of the entire shipper community. Massey, for one, is not a member of NITL.¹³ Neither are most of the other parties in this proceeding, should they be counted using that standard. But even if Massey were to be a member of NITL, all members of that group hold, inviolate, the right to independent action in matters such as this. NITL is an umbrella group.¹⁴ As such, it is controlled by certain elements. Its committee structure makes it quite susceptible to capture by narrow, special interest groups.¹⁵ Political considerations often drive the actions of such an organization. All of this should be recognized so that the significance of the terms in the agreement between NITL and the Applicants can be evaluated. When that is done, it will be seen that a good argument can be made for these terms being used as minimum points of

¹² NITL had 711 member companies as of January 12, 1998. As of that same date, NITL also had 219 "associates," who are generally carriers or third party logistics providers. See Internet Worldwide Web at URL <http://www.nitl.org/meminfo/curlm&a.htm>.

¹³ Neither is Massey's parent, Fluor Corporation.

¹⁴ Its Internet web page at URL <http://www.nitl.org/meminfo/curlm&a.htm> contains a list of members and "associates." The "associates" pay dues. Listed among the associates are Norfolk Southern Corporation, CSX Transportation, Burlington Northern Santa Fe, Illinois Central Railroad, and Union Pacific Railroad.

¹⁵ This is not a condemnation, but rather a statement of how nearly all organizations such as NITL operate. In particular, smaller voices - even those with important interests - get lost.

departure in the quest for appropriate regulatory solutions. But they are not benchmarks for what is needed.

COMPETITIVE ACCESS RULES NEED REVIEWING

The STB¹⁶ has been very sparing in its use of regulatory authority to prescribe competitive access.¹⁷ The rules which it inherited from the ICC, as interpreted in Midtec,¹⁸ are atrocious in their complexity and have never been successfully used by shippers seeking relief as a result. This truly was a successful exercise in docket control.

Certainly in the case of competitive access policy, the status quo is not worthy of continuation. Some real and meaningful relief must be made available if American industry, and most particularly the coal industry, is to be truly competitive with foreign coal producers. It is hardly a testament to the efficiency of the American transportation system when coal can be delivered from South Africa or Poland less expensively than from American sources due to the high cost of rail freight. The anomaly comes home even more clearly when freight rates from the Powder

¹⁶ And its predecessor, the ICC, as well.

¹⁷ Even the use of Service Order 1518, prescribing access over the lines of UP following its merger with SP and made necessary due to the monumental failures of service in the Houston area and along the Gulf Coast, was clearly done with distaste for government intervention and was first made effective for a more limited period of time than was warranted. Joint Petition for Service Order, STB Service Order No. 1518, served October 31, 1997.

¹⁸ See Midtec Paper Corp. v. Chicago and North Western Transportation Co. (Use of Terminal Facilities and Reciprocal Switching Agreement), 3 I.C.C.2d 171 (1986), affirmed sub nom. Midtec Paper Corp. v. United States, 857 F.2d 1487 (D.C. Cir. 1988).

River Basin are considered; following the development of rail competition for that traffic, rates tumbled from theretofore lofty levels.

Electric utilities are major users of coal, and are major customers for Massey. These utilities are being subjected to deregulation of their markets, and from necessity look for the most cost-effective sources of coal in order to survive in the marketplace. A number of them have even built shortline railroads or spur tracks in order to gain service from more than one major railroad and thus force competition into play.¹⁹ Certainly the electric utilities, themselves now facing the discipline of competition, can fairly ask that the same remedy be applied to the railroads bringing their coal - whether the competition be virtual or real.

As concentration in the railroad industry increases, so, too, does the need increase for regulatory rules that will allow meaningful competitive access to be obtained by shippers and receivers of coal and other rail-captive commodities.

THE RELIEF MASSEY SEEKS

In view of the great uncertainty and significant problems that could develop following the division of Conrail assets, Massey requests that oversight proceedings be conducted for at least a ten-

¹⁹ There are those who criticize such actions by the utilities as a misallocation of resources. Construction of new rail lines merely for the purpose of fostering competition for coal traffic would have been unnecessary had the ICC adopted more market-oriented competitive access policies. It was because the ICC was perceived as a part of the problem rather than holding an answer that it is now extinct. George Santayana's admonition regarding history ought well to be a talismanic guide for the STB.

year period following consummation of the CSX and NS proposal to divide the assets of Conrail.

Massey proposes the following in that regard:

1. Oversight proceedings should be conducted for each of the first four years.
2. Oversight proceedings should then be conducted biennially for the balance of the oversight period.
3. Because of the consequences that will flow from consummation, the Board should reserve continuing jurisdiction to impose such conditions as future facts and circumstances may warrant, in order to correct problems as and if they occur.
4. Should it become apparent after consummation that Massey's competitive position has suffered with respect to its competitors who will have competitive rail service following consummation, then Massey should be granted leave to seek the imposition of competitive access or other conditions in the oversight proceedings to remedy any substantial harm that may be done to Massey's relative competitive position as a result of changed rail service.

Imposition of conditions based on the foregoing standards will encourage fair treatment of Massey by the Applicants. The mere existence of such conditions will tend to negate the need to invoke the help of the STB. But without such conditions and the possible imposition of appropriate sanctions, railroad pricing practices may adversely affect Massey's competitive position in the post-consummation future.

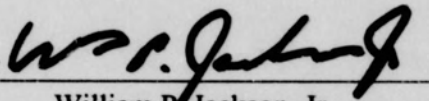
As a major coal marketer, Massey usually can take care of itself. That may not necessarily be true, however, when Massey faces the monolithic power of a monopoly railroad. Make no mistake about it; a squeeze which is business-contracting and which chills business activity can emanate from such. Massey prays, for the reasons stated in this brief, that the conditions which it

has requested will be imposed as conditions to granting the application of NS and CSX to divide the assets of Conrail between them.

Respectfully submitted,

A. T. Massey Coal Company, Inc.,
and Named Subsidiaries

By

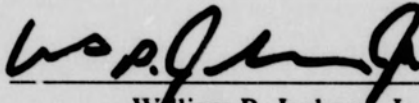


William B. Jackson, Jr.
Their Attorney

Of Counsel:
Jackson & Jessup, P.C.
3426 North Washington Boulevard
Arlington, VA 22210
(703)525-4050

CERTIFICATE OF SERVICE

I, William P. Jackson, Jr., hereby certify that on this 23rd day of February, 1998, I have served a copy of the foregoing Brief of A. T. Massey, Inc., in Support of Request for Imposition of Conditions upon all parties of record in this proceeding, by first class mail, postage prepaid.



William P. Jackson, Jr.

STB

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STEPHEN C. HERMAN
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February 20, 1998

By UPS overnight (Monday delivery)

Vernon A. Williams, Secretary
Surface Transportation Board
Case Control Unit, Suite 713
1925 K Street, N.W.
Washington, DC 20423-0001

E

Re: STB Finance Docket No. 33388, *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.*

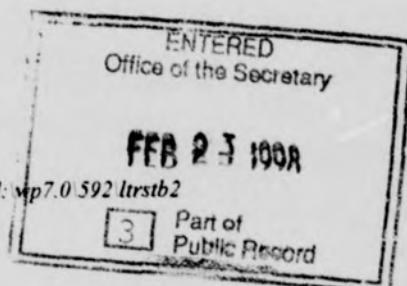
Dear Mr. Williams:

Enclosed please find an original and 25 copies of the Brief, for filing with the Board in the above referenced matter.

Also enclosed is the document on a diskette formatted to WP7.0.

Kindly acknowledge receipt by date stamping the enclosed duplicate copy of this letter and return in the self-addressed stamped envelope.

Very truly yours,



TMCF:kl:enc:d:wp7.0 592 ltrstb2

Tom McFarland

Thomas F. McFarland, Jr.
Attorney for Eight State Rail Preservation Group

ORIGINAL

BEFORE THE
SURFACE TRANSPORTATION BOARD

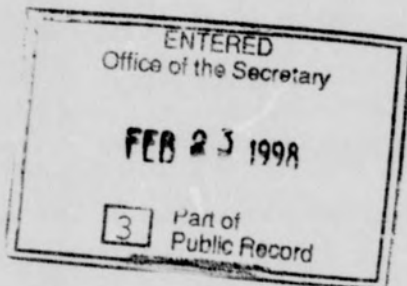


CSX CORPORATION AND CSX)
TRANSPORTATION, INC. AND)
NORFOLK SOUTHERN CORPORATION)
AND NORFOLK SOUTHERN RAILWAY) FINANCE DOCKET
COMPANY -- CONTROL AND) NO. 33388
OPERATING LEASES/AGREEMENTS --)
CONRAIL INC. AND CONSOLIDATED)
RAIL CORPORATION)

BRIEF

EIGHT STATE RAIL PRESERVATION GROUP
JEANNE WALDOCK, President
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(716) 372-0854

Protestant



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Attorney for Protestant

Due Date: February 23, 1998

BEFORE THE
SURFACE TRANSPORTATION BOARD

CSX CORPORATION AND CSX)	
TRANSPORTATION, INC. AND)	
NORFOLK SOUTHERN CORPORATION)	
AND NORFOLK SOUTHERN RAILWAY)	FINANCE DOCKET
COMPANY -- CONTROL AND)	NO. 33388
OPERATING LEASES/AGREEMENTS --)	
CONRAIL INC. AND CONSOLIDATED)	
RAIL CORPORATION)	
)	

BRIEF

The Eight State Rail Preservation Group (8-State) hereby submits its brief in this proceeding.

STATEMENT OF POSITION

8-State is opposed to the proposed transaction unless as a condition to approval NS is required to maintain former Conrail rail lines between Hornell, NY and Corry, PA and between Meadville, PA and Youngstown, OH in condition adequate to accommodate through traffic on a continuous basis. This provision includes requiring NS to restore those lines to that condition if they are currently below that condition.

8-State also supports Condition No. 3 sought by Southern Tier West Regional Planning and Development Board (STW-RPDB) in its Comments dated October 21, 1997, i.e., that NS be required to repair specified washouts on the Hornell-Corry line and otherwise restore that line to operable status.

ARGUMENT

Historically, there were three major single-line routes for through traffic moving between New York and Chicago, i.e., (1) New York Central, (2) Pennsylvania Railroad, and (3) Erie-Lackawanna (E-L). All three of those routes were taken over by Conrail. As a result, rail competition was virtually eliminated between those major markets. However, Conrail had maximum service flexibility provided by multiple through routes.

8-State's position focuses on the former E-L route and, in particular, on the portion of that route known as the Southern Tier Extension or "Southern Tier West." The eastern portion of the former E-L route extends between the Port of New York (at Jersey City, NJ) and Hornell, NY. That portion is part of a longer line between Buffalo, NY and the Port of New York, known as the Southern Tier. The Southern Tier is a major route for traffic moving between Canada and points west of Buffalo, on the one hand, and the Port of New York and points south thereof, on the other.

The Southern Tier Extension extended west from Hornell to Chicago. Major portions of the Extension west of Youngstown, OH have been abandoned and removed, but the line remains basically intact between Hornell and Youngstown. There is a good map of that portion of the Extension attached as Exhibit A to the Comments of STW-RPDB, dated October 21, 1997. The segment of the Extension between Corry, PA and Meadville, PA was authorized for abandonment by Conrail, but has been acquired by Northwest Pennsylvania Rail Authority (NPRA) in lieu of its abandonment.

As proposed in this proceeding, NS would acquire the portions of the Southern Tier Extension owned by Conrail, i.e., Hornell-Corry and Meadville-Youngstown. However, as noted

in the Comments of STW-RPDB, NS's plans for those rail lines are not disclosed in any of its filings in this proceeding, except that NS has stated that it does not plan to restore operations on segments of the lines that are out of service. (Applicants' Rebuttal, Vol. 1, p. 383).

The proposed transaction should not be approved unless it is conditioned on a requirement that NS maintain the Hornell-Corry and Meadville-Youngstown lines in condition adequate to accommodate through traffic on a continuous basis (and to restore any part of those lines to that condition, if necessary). As used herein, a "condition adequate to accommodate through traffic on a continuous basis" means all trackage maintained at least to FRA Class 2 safety standards, permitting train speed of at least 25 m.p.h.

That condition is essential to ensure that there is not yet another rail service catastrophe resulting from rail consolidation. The service failures resulting from the *Union Pacific-Southern Pacific* merger are well known. Service failures of a similar nature, though on a lesser geographic scale, had resulted from the immediately previous *Union Pacific-Chicago North Western* merger. The current Board review of rail service in the West has revealed that the Burlington Northern-Santa Fe merger also resulted in widespread rail service disruptions. The public interest requires that all available means be utilized to avoid these debilitating service failures before they occur.

The proposed NS-CSX acquisition of Conrail is likely to overwhelm rail capacity even more than the other recent mergers. Not only will NS and CSX transport former Conrail traffic over the acquired Conrail routes, they will funnel a significant volume of their own traffic over those routes. Even more significantly, NS and CSX have stated that they will attract large volumes of new traffic over Conrail's routes that they will divert from motor carriers. These huge

traffic volumes promise to tax the former New York Central and Pennsylvania Railroad routes to be acquired by NS and CSX far beyond their capacities.

The Southern Tier Extension from Hornell to Youngstown is in an ideal position to furnish the needed additional capacity. Being part of the former main line of the Erie-Lackawanna, the Extension was constructed to exacting main line standards. At Youngstown, connection is made with CSX, providing for alternate routes if NS is experiencing service difficulties. 8-State is confident that NPRA would extend trackage rights to NS between Corry and Meadville in order to alleviate harmful rail traffic congestion. In that manner, the Southern Tier Extension would relieve traffic congestion and resulting service failures from the through routes west from Buffalo and from Philadelphia.

However, in order to be in a position to provide the required capacity, the Extension must be restored to serviceable condition for through traffic and be maintained continuously in that condition. Especially in recent years, Conrail allowed portions of the Extension to deteriorate to the point that parts were taken out of service and track conditions were allowed to decline on an overall basis.

If NS is permitted to acquire the segments of the Southern Tier Extension between Hornell and Corry and between Meadville and Youngstown, NS should be required to restore those lines to serviceable condition for through traffic and maintain them in that condition continuously. It is not enough for NS to say that it has no plan to abandon those lines. Even if NS keeps those lines in place, they do no good in relieving debilitating rail traffic congestion if segments are out-of-service or not in condition to accommodate through traffic. The lines must be in condition to prevent service disruptions on an immediate basis.

In light of the serious service problems resulting from recent rail mergers, the Board should be diligent in protecting the public interest in adequate rail transportation service. The Board should do so by requiring NS to keep the Hornell-Corry and Meadville-Youngstown lines in service-ready condition to relieve capacity problems that would adversely affect rail service.

Rail service considerations thus require imposition of the condition sought by 8-State if the transaction is not disapproved. But that condition also is warranted from the standpoint of preserving the opportunity for adequate rail competition.

The proposed transaction will have profound and permanent impacts on rail competition in the East. The net result of the transaction would be the creation of a strong oligopoly to replace the Conrail monopoly. While that would be a competitive improvement, by no means does it follow that the oligopoly would be in the public interest. Too often when powerful oligopolists dominate, there are tacit divisions of markets between them that harm the public interest in competitive rail service.

If the Hornell-Corry and Meadville-Youngstown lines were required to be kept in "through traffic" condition, they could provide part of a third competitive route between the Atlantic seaboard and Chicago in conjunction with the NPRA line between Corry and Meadville and trackage rights east of Horneil and west of Youngstown. Thus, the condition sought by 8-State would provide the Board with the ability to alleviate competitive harms in an oversight proceeding following the proposed transaction, if required. That could be crucial to the public interest.

8-State also supports Condition No. 3 sought by STW-RPDB. NS should be required to repair the washouts identified by STW-RPDB and restore the Southern Tier West line to operable

status. NS should be required to do so not only because it is stepping into Conrail's shoes and Conrail is contractually committed to do so, but more importantly because the public interest in adequate rail service and effective rail competition compels that action.

CONCLUSION

The future of rail service and rail competition in the East is brought to the crossroads by the proposal of the two major Eastern rail carriers to absorb Conrail. The former Erie-Lackawanna Southern Tier Extension provides the means to assure sufficient capacity for adequate rail service and effective rail competition in the Eastern region. If the Board imposes the condition sought by 8-State, that capacity would be preserved to further the public interest in good rail service and meaningful rail competition. If that condition is not imposed, the Extension would continue to be downgraded to the point that it would be unable to provide required capacity on any timely basis. Recent experience underscores the importance in the public interest of retaining sufficient rail capacity. The condition sought by 8-State would further that public

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interest. The proposed transaction would not be in the public interest unless the condition sought by 8-State is imposed. Consequently, the transaction should be denied or, if it is approved, it should be conditioned as requested by 8-State.

Respectfully submitted,

EIGHT STATE RAIL PRESERVATION GROUP
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Olean, NY 14760
(716) 372-0854

Protestant

Thomas F. McFarland Jr.

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Chicago, IL 60606-2902
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Attorney for Protestant

Due Date: February 23, 1998

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing document, Brief, on all parties of record,
by first-class, U.S. mail, postage prepaid, this 20th day of February, 1998.

Thomas F. McFarland Jr.
THOMAS F. McFARLAND, JR.

STB

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February 21, 1998

BY FEDERAL EXPRESS DELIVERY

SURFACE TRANSPORTATION BOARD
1925 K Street, N.W.
Washington, DC 20423-0001

Attn: Honorable Vernon A. Williams, Secretary

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

Dear Secretary Williams:

Enclosed for filing in the above-captioned docket are an original and twenty-five (25) copies of Illinois International Port District's Brief in Support of Illinois International Port District's Request for Conditions to the Approval of the Application (CHI/PORT-4). Also enclosed is a 3.5-inch IBM compatible disc, formatted in Word Perfect 7.0, containing this Brief.

Copies of the Brief are being served on all parties of record, on Administrative Law Judge Jacob Leventhal, and on counsel for Applicants and Conrail, Inc., by Federal Express Mail, in accordance with the mailing instructions for Illinois Port District service list, a copy of which is attached to the Certificate of Service.

SURFACE TRANSPORTATION BOARD

Attn: Honorable Vernon A. Williams
Secretary

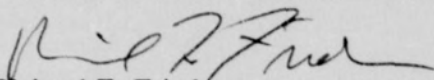
February 21, 1998

Page 2

Should you have any questions in connection with this matter, please do not hesitate to contact the undersigned.

Very truly yours,

EARL L. NEAL & ASSOCIATES, L.L.C.

By: 
Richard F. Friedman
Attorneys for ILLINOIS INTERNATIONAL PORT
AUTHORITY

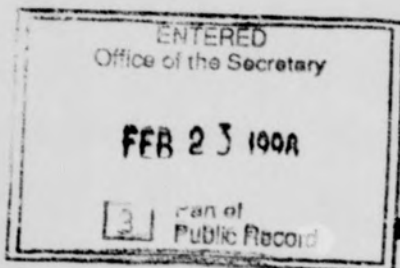
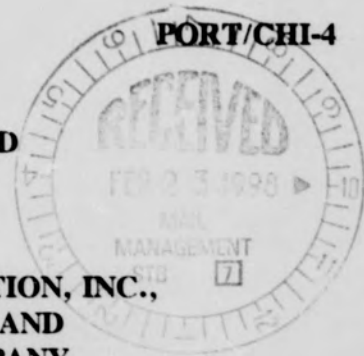
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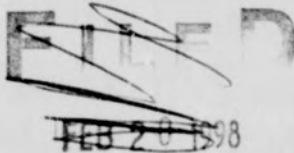
**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket 33388

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



**BRIEF IN SUPPORT OF
ILLINOIS INTERNATIONAL PORT DISTRICT'S
REQUEST FOR CONDITIONS
TO THE APPROVAL OF APPLICATION**



**ILLINOIS INTERNATIONAL PORT DISTRICT
THE PORT OF CHICAGO**

**EARL L. NEAL & ASSOCIATES, L.L.C.
Earl L. Neal
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Attorneys for Illinois International Port District

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket 33388

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

**BRIEF IN SUPPORT OF
ILLINOIS INTERNATIONAL PORT DISTRICT'S
REQUEST FOR CONDITIONS
TO THE APPROVAL OF APPLICATION**

The **ILLINOIS INTERNATIONAL PORT DISTRICT** (the "Port of Chicago"), a unit of local government of the State of Illinois, by **EARL L. NEAL & ASSOCIATES, L.L.C.**, its attorneys, files this brief in support of its request that the Surface Transportation Board ("STB") impose conditions upon the Norfolk Southern Railway Company ("NS"), as stated herein, if the STB approves the subject application. In support hereof, the Port of Chicago states as follows:

I.

STATEMENT OF CONDITIONS REQUESTED

To remedy delays and poor service to customers on the east side of the Port of Chicago's Calumet Harbor, to increase intermodal competition and to increase competition with other ports, the Port of Chicago requested the following conditions. The NS should be required to allow operating rights to, with associated service to customers, over its trackage serving the east side of Calumet Harbor, Lake Calumet, Port of Chicago. The Port of Chicago proposes that the NS be directed to provide competitive rail service by allowing local switching carriers the rights to

serve customers over NS trackage on the east side of Lake Calumet. Operating rights should be accorded to the Chicago, South Shore and South Bend Railroad Company, Chicago Pail Link, and CSX.

II.

SUMMARY OF THE PORT DISTRICT'S STATEMENT OF FACTS SUPPORTING THE REQUEST FOR CONDITIONS

Background. The Port of Chicago, created by the Illinois General Assembly, is the largest port on the Great Lakes and the Sixteenth Largest Port in the United States.¹ The Port of Chicago at Calumet Harbor, Lake Calumet, is divided into separate east and west sides. Trackage to both sides is owned by the NS or related companies. On the west, various other trunk and switching carriers have trackage rights over the NS to serve the Port and its tenants. No issue is raised by this arrangement. On the east, NS service is exclusive; NS has repeatedly turned down requests to permit other trunk and switching carriers access to the east side of the Port of Chicago.

The differential treatment of the two sides of the Port results in increasing service to shippers on the side that has full accessibility and decreasing service to the shippers on the side that is restricted to service from the NS. On the west side, service more than doubled to more than 8,000 cars annually during the period 1989-96. In contrast, in the four year period of 1992-96, annual rail movements on the east decreased by 40 percent to 4,000 cars.

1/ The facts are summarized from the Port of Chicago's Request for Conditions, Port/Chi-2, and the Verified Statements appended thereto of Anthony G. Iannello, Executive Director of the Port of Chicago and Thomas A. Collard, an independent consultant.

Non-Competitive Rates and Service Reduce Demand. Because of the non-competitive situation on the east side of Calumet Harbor, rail customers lose business because they are unable to obtain rail service from NS at desired levels of quantity and quality. The Executive Director of the Port of Chicago, Anthony G. Ianello, described in his Verified Statement the reports received from many tenants who are rail users. Two in particular, as described in his Verified Statement, report instances of substantial lost business due to the expense and unavailability of rail service because NS is the sole provider on the east side. The restricted rail service situation on the east has been reported many times by rail user organizations and Port of Chicago tenants.

Current and Increasing Service Delays Due to Conditions at the Calumet Yard. In addition to non-competitive rates, poor service has caused a reduction in rail service to the east side of Calumet Harbor. The existing service situation results in part from the crowded conditions and the understaffing of the Calumet Yard which serves the east side of Lake Calumet. The service situation will be aggravated by the Applicants' further reduction in personnel and planned conversion of the yard to an intermodal yard. The Applicants' Application notes that the Calumet Yard's operation would be relocated to Elkhart, Indiana.

Intermodal Impact. Allowing trackage rights to other carriers in order to serve the east side of Calumet Harbor, as requested by the Port of Chicago, will promote intermodal competition. The bulk terminals, warehouse and manufacturers at Lake Calumet may choose among ocean carriers, truck carriers and rail carriers. The current limitation on rail service into the east side of Calumet Harbor reduces intermodal competition--rail-ocean vessel and rail-truck interchanges are restricted and cannot increase. Further, competition from non-rail carriers is stifled by the lack of rail competitors.

Other Anti-Competitive Effects. The Verified Statement of Thomas A. Collard showed that the Port of Chicago's Calumet Harbor competes with other port facilities on the Great Lakes and on the Atlantic coast. Many of these ports do not have the service restrictions at issue here. At others, the Applicant has entered into shared asset agreements allowing competitive access. The restricted access imposed by the NS at Calumet Harbor restricts the ability of the Port of Chicago to compete with other ports.

The Verified Statements conclude that the transferring of the classification and train functions from the Calumet Yard to Elkhart, Indiana, 80 miles distant, and the dispersal of those functions throughout the area, will result in service degradation.

III.

APPLICANTS' EVIDENCE SUMMARIZED

The Applicants' evidence consisted of the Verified Statement of John T. Moon, II, Manager, Strategic Planning, Norfolk Southern Railway Company. It was his testimony that the NS provides efficient and timely service to the shippers located on the east side of Lake Calumet.

The Verified Statement contends that even with the transfer of the classification function of the Calumet Yard to Elkhart, Indiana, the service functions supporting switching to the east side of Lake Calumet will be relocated to the 97th Street Yard, adjacent to the Calumet Yard. Service to and from Lake Calumet will be the same as it is today, except for a move of about two miles.

The Applicants' Verified Statement describes the switching moves that would be required for carriers other than the NS to access the east side of Calumet Harbor over NS tracks. Other carriers, such as CSXT, Chicago South Shore and South Bend Railroad, and Chicago Rail Link, would operate over NS tracks. The Verified Statement concludes that any carrier utilizing NS

lines to access the east side of Lake Calumet “. . . will cause disruption to NS operations at Calumet Yard or at the Ford Mixing Center [Ford Assembly Plant].”

IV.

DISCUSSION OF THE EVIDENCE

The evidence provided in the Port of Chicago's Verified Statements stand un rebutted, except for conclusions not supported by any statements or reference to fact.

Insufficient Service. The Verified Statement of an officer of the Railroad submitted by the Applicants contains no facts or information as to how the affiant arrived at the conclusion that “NS provides efficient and timely service to the shippers located on the east side of the Lake.” Mr. Moon cited no surveys, discussions with shippers or any other investigation to verify the conclusion. “[S]elf-serving statements by a merging railroad's officers are entitled to little credence.” *Lamoille Valley R.Co. V. Interstate Commerce Commission*, 711 F.2d 295, 319 (D.C. Cir., 1983). In contrast, the Verified Statement of the Executive Director of the Port of Chicago states that he is acquainted with rail customers who are tenants and users of the Calumet Harbor. Mr. Ianello, as Executive Director, is in communication with tenants and shippers and cites in his Verified Statement information that he has obtained and specific delays and service problems that the shippers and tenants are experiencing. Cited are specific instances of customer losses on account of unavailable or unresponsive rail service. With respect to the loss of the Calumet Yard, the Applicants' Verified Statement reiterates that the Yard is likely to be converted to an intermodal yard.

Competition - Quantity of Service. Mr. Ianello's Verified Statement quantifies the loss of service that has an impact on competition. In recent years, the west side of Calumet Harbor, which is open to other rail carriers, has experienced a doubling of rail service. In contrast, the east side of Calumet Harbor has suffered a forty percent loss of service. None of these statistics are addressed by the Applicants' Rebuttal.

Interference by Other Carriers if the Condition is Granted. Competition from other carriers cannot be tolerated, according to the Applicants' Verified Statement, because service by other carriers will be over NS tracks and will interfere with NS movements. The Applicants' Verified Statement failed to address the number of such movements, or the times of day when such other movements by other carriers may occur. But perhaps the most important flaw in the Applicants' Verified Statement was its failure to account for the fact that if NS continues to be the sole switching carrier into the east side of Lake Calumet, its own movements will create the same interference. Where else but over NS tracks will NS switchers operate? The same potential for interference occurs, whether the movements are made by NS over NS tracks or other carriers over NS tracks.

Intermodal Competition. If service to the east side of Lake Calumet remains static, shippers' rail carriage service will be unchanged (or will be worse, depending upon the impact of the abandonment of the Calumet Yard). In such a case, the shippers will have the same (or worse) access to rail service. Maritime-rail truck-rail interchanges will be limited. The silence of the Applicants' Verified Statement on the issue of intermodal competition implicitly admits that without the conditions requested by the Port of Chicago, intermodal competition will not be further encouraged.

Competition with Other Ports. The Port of Chicago's Verified Statements addressed the inequitable situation faced by the east side of Calumet Harbor when compared with other Great Lakes or Atlantic ports. The Applicants' Rebuttal and Verified Statement fail to address this question. The conditions proposed by the Port of Chicago would enable the east side of Calumet Harbor to compete with competitors on the Great Lakes and the Atlantic coast in terms of rail service to customers. The Applicant has not addressed the facts or conclusions drawn from the facts. Accordingly, the need for conditions to resolve this question must be deemed admitted.

V.

LEGAL ARGUMENT

Congress and the STB have determined that the criteria for judging an application of this kind is its impact on competition and its ability to enhance transportation alternatives to shippers, including the preservation of effective intermodal competition. Congress has determined that one of the criteria for judging an application that involves the control of Class 1 railroads is whether it will "have an adverse effect on competition among rail carriers. . . ." 49 U.S.C. §11324(b)(5). To implement this policy, the federal regulations provide that consolidations are not favored "that substantially reduce the transport alternatives to shippers." 49 C.F.R. §1180.1(a).

An important factor in this consideration is how the application will affect intermodal competition: "In some markets the Commission's focus will be on the preservation of effective intermodal competition. . . ." 49 C.F.R. §1180.1(c)(2)(i).

The STB has authority to impose conditions upon approvals of consolidations, "including those that might be useful in ameliorating potential anticompetitive effects of a consolidation, . . ." 49 C.F.R. §1180.1(d)(1). Such conditions must show, as the Port of Chicago has shown here, that the conditions are "designed to enable shippers to receive adequate service . . . [and] would not impose unreasonable operating or other problems" for the carrier. 49 C.F.R. §1180.1(d)(1)(ii) and (iii).

The facts demonstrate that the Port of Chicago has met the criteria for imposing conditions on the Application. The lack of competition on the east side of Calumet Harbor has resulted in poor service to customers, which in turn has prevented growth and resulted in loss of business through the Port. The Applicants' proposed Operating Plan demonstrates that service will be further reduced. The proposed method for accommodating the east side of Calumet Harbor is through a distant yard without any assurance that the port's needs can be met. Allowing the application without conditions would doom the east side of the port to further deterioration of service, limiting service to the public, and reducing the ability of maritime carriers to compete.

The conditions that the Port of Chicago proposes meet the criteria established pursuant to federal regulations. Allowing local switching carriers to provide service, in addition to that now provided by the NS, will encourage competition. Competitive carriers will compete for customers by improving service. Shippers will have a choice of carriers. The options available to customers will be maritime movements, as well as by rail carriage, since access to the port's facilities would be increased.

The Port of Chicago will be able to provide a more rational service, with both sides of the port offering customers access to rail carriers of their choice. More importantly, the Port of Chicago will be able to compete on an equitable basis with other ports which are not limited by the anti-competitive access rights.

The requested conditions are "related to the impact of the consolidation." 49 C.F.R. §1180.1(d)(1)(i). According to both the Application and the Rebuttal's Verified Statement of Mr. Moon, the Application will result in the closing of the Calumet Yard, which serves the east side of Calumet Harbor. Congestion and understaffing of the Yard currently contributes to the service problems on the east side of Calumet Harbor. Allowing the Yard to be closed as the Applicants request will cause even the present poor levels of service to deteriorate further.

Finally, there is no financial or operating detriment to the NS in requiring it to provide equal access to other carriers. Although the NS notes that other carriers serving the east side of Calumet Harbor would necessarily use NS tracks, the same can be said for the service provided by NS, itself. It has not been demonstrated that moves by other carriers would be more detrimental than NS' own trains into the Port.

V.

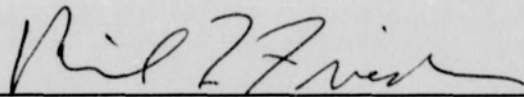
CONCLUSION

For the foregoing reasons, the Port of Chicago requests that the STB impose conditions upon the approval of the current application to promote competition. The Port of Chicago requests that the approval of the application be conditioned upon NS's offering trackage rights and

access to customers over its lines into the east side of Calumet Harbor to the Chicago South Shore and South Bend Railroad Company and Chicago Rail Link or, alternatively, CSX.

Respectively submitted,

ILLINOIS INTERNATIONAL PORT DISTRICT

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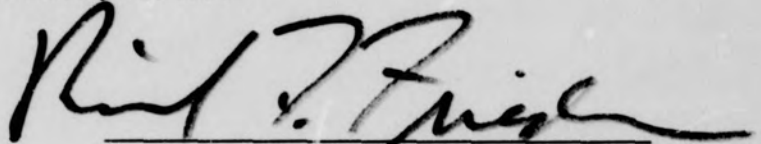
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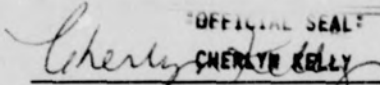
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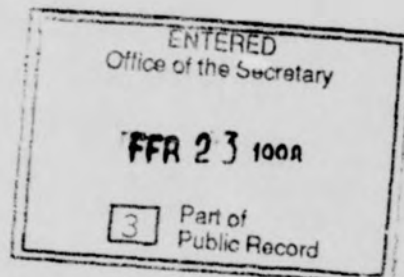
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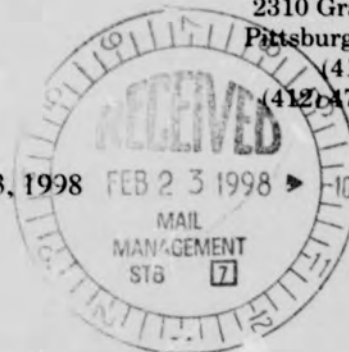
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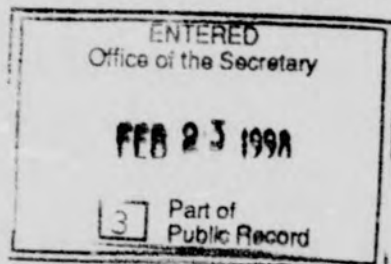
Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, N.W., Room 715
Washington, DC 20423-0001

Re: Brief in Support of Comments of Richard M. Novotny, Chairman,
Northwest Pennsylvania Rail Authority, Seeking Reciprocal
Overhead Trackage Rights between Corry, PA and Waterboro, NY.

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:

On behalf of the Northwest Pennsylvania Rail Authority, I enclose for filing an original and twenty-five copies of NW Pa Rail - 3, Brief in Support of Comments of Richard M. Novotny, Chairman, Northwest Pennsylvania Rail Authority, Seeking Reciprocal Overhead Trackage Rights between Corry, PA and Waterboro, NY. Also enclosed is a 3.5" computer disk containing the pleading in Microsoft Word 7.0 format. Should you have any questions regarding this submission, please contact the undersigned.



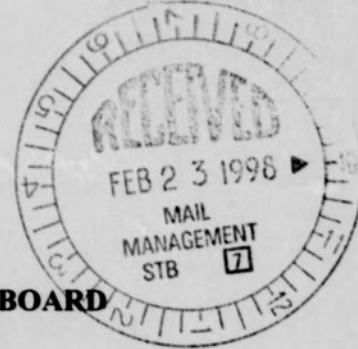
Very truly yours,

RICHARD R. WILSON, P.C.

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RRW/klh
Enclosures

xc: The Honorable Jacob Leventhal
Northwest PA Rail Authority
All Parties of Record



**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 33388

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

**Brief in Support of Comments by
Northwest Pennsylvania Rail Authority Seeking Reciprocal
Overhead Trackage Rights between Corry, PA and Waterboro, NY**

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Dated: February 23, 1998

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 33388

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

**Brief in Support of Comments by
Northwest Pennsylvania Rail Authority Seeking Reciprocal
Overhead Trackage Rights between Corry, PA and Waterboro, NY**

I. INTRODUCTION AND SUMMARY

The acquisition of Consolidated Rail Corporation ("Conrail") by NS Corporation ("NS") and CSX Corporation ("CSX") is, in their own words, "a transaction unique in the history of rail combinations." (Applicants Rebuttal Vol. 1, P-13) Moreover, were this transaction not subject to the jurisdiction of the Surface Transportation Board and therefore exempt from antitrust laws, such an allocation of markets by two competitors would not survive Justice Department review.

Nonetheless, despite the unprecedented scope and nature of this transaction, Applicants contend throughout their initial filings and their rebuttal statements that the Board should apply policies and precedents from previous merger proceedings, which in light of the UP and BNSF transactions, are of questionable merit. Accordingly, this unique transaction must be evaluated by the Board on its own terms and the Board must

respond to the numerous issues raised by participating parties with conditions or remedies based on the record in this proceeding. The Board must address the operational and competitive problems created by this unique transaction with new and innovative solutions, that will serve the competitive goals of the national rail transportation policy and the public interest.

II. LEGAL ARGUMENT

- A. NS has failed to demonstrate that the reciprocal overhead trackage rights between Corry, PA and Waterboro, NY sought by Northwest Pennsylvania Rail Authority are inconsistent with the public interest.

The governing standard, as Applicants acknowledge, for this proceeding is set forth in 49 U.S.C. §11324(c) which provides that:

The Board shall approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest.

In enacting predecessor provisions to Section 11324(c), Congress expressly stated its intent to "encourage mergers, consolidations and the joint use of facilities that tend to rationalize and improve the Nation's rail system."¹ As the Surface Transportation Board and its predecessor agency, the ICC, have repeatedly recognized, the gains in operating efficiency and marketing capability realized by these railroad consolidations make new, better competitors that can provide quality service on demand. E.g. UP/SP at 108; BN/Santa Fe at 54; UP/CNW at 56; SP/DRTW at 854; UP/MKT at 428; UP/MP/WP at 486; NS at 192.

However, contrary to Applicants' contentions, there is nothing in the merger statutes which requires the Board to restrict the benefits of railroad consolidations or the joint use of facilities exclusively to the Applicants themselves. Try as they might,

Applicants cannot wrap themselves in a public interest flag and contend that anything proposed by commenting parties is inconsistent with that standard. The results of a constricted application of the public interest standard which benefits only the Applicants has, in past merger cases, contributed to the service meltdown which now afflicts the western railroads. The public interest in safe and efficient rail service requires the Board to look beyond the Applicants' pleadings and to assure that communities and shippers have sufficient alternative rail options so that service failures or financial difficulties by one rail carrier do not deprive the public of essential rail transportation services.

The Congressional policy favoring rail consolidations, has substantially reduced the number of competing Class I carriers over the last twenty years. Much of this consolidation has been beneficial but a point of diminishing returns has been reached. In this transaction the Applicants will divide most of the Class I rail service east of the Mississippi into two major rail systems. The Board must take a proactive stance in molding and modifying this merger application to preserve alternative rail transportation service and competitive options. The trackage rights which Northwest Pennsylvania Rail Authority seeks between Corry, PA and Waterboro, NY are precisely and narrowly tailored to achieve that goal in northwestern Pennsylvania and western New York.

The struggle by Northwest Pennsylvania Rail Authority to preserve the Meadville-Corry line is well known to the Board. For over ten years the communities in northwestern Pennsylvania have fought to preserve the Meadville-Corry line and to rebuild rail service as a critical part of a regional economic development plan. Prior to the proposed acquisition of Conrail by the Applicants, preservation of the rail line between Meadville and Corry was inconsistent with Conrail's long range strategic and

¹ S.Rep.No. 94-499, 94th Cong., 1st Sess. 20 (1975).

competitive objectives. Now, however, the restructuring of the Conrail system proposed by the Applicants presents new opportunities for the reestablishment of effective rail competition in the Northeast. Northwest Pennsylvania Rail Authority merely seeks an opportunity to participate efficiently and competitively in that restructured rail system.

The most essential condition sought by the Authority is the grant of overhead trackage rights from M.P. 102.3 to M.P. 60.5 so that the Authority's operator, the Oil Creek and Titusville Lines - Meadville Division, can provide efficient single line service between the Meadville/Corry line and the New York and Lake Erie Railroad Company line at Waterboro, NY. In an effort to provide mutually improved efficiency, the Authority offered NS a new high speed connection at M.P. 64.1 +/- and trackage rights between M.P. 64.1 +/- and 60.5. The joint use of facilities proposed by the Authority is precisely the type of project which Congress sought to encourage under Section 11324(b) and is consistent with the public interest.

- B. NS's response to the Authority's Comments confirms that the trackage rights requested by the Authority are in the public interest.

At page 382-383 of its Rebuttal Statement, NS responded to the NWPRA proposal. NS contends that the Authority "does not argue that the reciprocal trackage rights are justified to resolve any transaction-related harm". Yet in the very next paragraph, NS states:

NS does not anticipate sending any through traffic over NWPRA's segment....NS has no immediate plans to restore operations on other segments on the route that are presently out of service, and the trackage rights are not essential to NS's service to local customers.

NS witness Mohan states:

NS has no immediate plans to restore through operations on the segments that are presently out of service between Corry and Lake, and between Olean and Hornell, and so NS does not need the NWPRA's segment for through movements. NS will provide local service in these segments to any customer who requests such service. Reb. V.s. of D. Michael Moham, p. 69-70, App.Reb. Vol 2A of 3, P. 434-435.

Despite repeated efforts on the part of the Authority to ascertain from NS precisely what operating plans it proposed for rail service north of Corry, the NS Rebuttal Statement is the first time that NS has publicly acknowledged that it does not intend to reinstitute rail service on the western end of the Southern Tier line as a part of its acquisition of Conrail lines in this region. Thus, NS has announced to the communities of northwestern Pennsylvania and the Southern Tier West region of New York that this transaction offers no hope for improved rail service or access to the competitive rail service proposed by the Applicants for other regions and communities.

The fact that NS does not intend to provide rail service between Corry and Jamestown, NY does not make the overhead trackage rights sought by the Authority contrary to the public interest. The use of these trackage rights by the Oil Creek and Titusville Lines - Meadville Division would provide revenue contribution to NS which it would not otherwise receive. Nor does NS intend to provide any scheduled local service between Jamestown to Waterboro, NY. Accordingly, there can be no argument that joint use of this line would cause congestion or operational problems for NS or involve unwarranted costs.

The response by NS is also distressing because it demonstrates another significant harm posed by this transaction: the creation of extensive national rail systems which are

institutionally unable to respond to local economic and community concerns where those concerns do not involve sufficient economic benefit to warrant management attention or allocation of corporate resources. Institutional indifference to local transportation needs on the part of large Class I railroads is well documented.² Over the last ten years, it has spawned the rapid growth of short line railroads in markets and communities where Class I carriers could not economically provide responsive local rail service. The Authority also understands that the overhead trackage rights which it seeks are not important component of this transaction from NS's standpoint. However, these trackage rights are absolutely critical to the efforts by the Authority and its operator to preserve essential rail service and promote economic development projects for Northeastern Pennsylvania which may ultimately benefit NS as a receiving carrier.

Since the Authority's rail project is, by its nature, long term and will not immediately generate substantial volumes of revenue carloads for Class I connections, there is little incentive for NS to cooperate with an economic development project which does not pose immediate financial or operational benefits. Nonetheless, NS financial and operational objectives are not equivalent to the public interest.

The Authority's request for reciprocal trackage rights as a condition of this merger:

- (1) offer NS an improved high speed connection west of Corry, PA.
- (2) provide NS with a high speed, low density alternative route through rural areas of northwestern Pennsylvania and western New York which avoid congestion and safety problems caused by increased traffic density on its Cleveland/Buffalo main line.

² As noted, the Authority sought to negotiate these arrangements with NS outside the context of this merger proceeding but that effort received no substantive response. Accordingly, it became necessary to bring this matter to the attention of the Board as part of this proceeding.

- (3) preserves essential rail infrastructure in northwestern Pennsylvania and western New York.
- (4) provides efficient single line service to competitive connections at the Buffalo Gateway for northwestern Pennsylvania and western New York shippers.
- (5) productively utilizes rail lines which NS will acquire but not operate.
- (6) Places control over regional rail revitalization and economic development projects in the hands of local officials and rail operators who are far more responsive to small shippers and community needs than some over committed mid-level manager in Roanoke, VA or Atlanta, GA.
- (7) provides opportunities for efficiency enhancing haulage agreements under which light density local service between Corry, PA and Waterboro, NY could be provided by the Authority's operator for the account of NS.

In contrast to these public interest benefits, NS announces that it will provide:

- (1) no through service on the line between Corry, PA and Olean, NY.
- (2) no local service from Corry, PA to Jamestown, NY since that portion of the line is out of service.
- (3) local service only "upon request" between Jamestown, NY and Waterboro, NY. (and at what price?)

This response by NS is nothing but a commitment by Conrail's successor in interest to continue the process of line degradation and segmentation which has repeatedly hamstrung state and local efforts to preserve rail service and promote economic development in northwestern Pennsylvania and western New York. Even under the narrowest of statutory interpretations, there can be no doubt that the conditions sought by the Authority promotes the public interest far better than the indifferent "do nothing" approach proffered by NS.

- C. NS has ignored the potential use of the Authority's rail facilities as part of a high speed, low density alternative route for avoiding congestion and safety problems on its Cleveland/Buffalo main line.

Other pleadings in this proceeding filed by the Federal Railroad Administration and communities in the Cleveland area document the potential operating and crossing safety problems related to the substantially increased traffic volumes on the NS main line between Cleveland and Buffalo. In light of these circumstances, the Authority notes that the operating plans proposed by NS have ignored the high speed potential for avoiding those operational and safety constraints through the routing of traffic via Youngstown, Meadville, Corry and Hornell or Erie, Corry and Hornell. While NS is better able to evaluate its operating requirements than the Authority, the line from Meadville to Olean provides a clearance free route which avoids major urban centers and many of the safety and operational problems which have been voiced in this proceeding. Given this record, the Board should examine whether the former Southern Tier route through Meadville and Corry and western New York state communities provides an alternative rail corridor that would be of significant benefit in addressing operational congestion and crossing safety problems on the Cleveland/Buffalo main line.

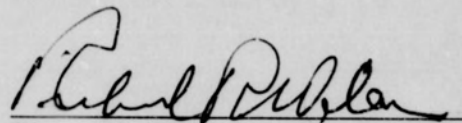
III. CONCLUSION

The reciprocal trackage rights sought by the Authority as a condition for this merger are consistent with the public interest. This condition will provide an opportunity for the Authority and the communities which it serves to preserve essential rail service and continue critical economic development projects based on that railroad infrastructure. NS has finally announced that it does not intend to provide scheduled rail service over the rail lines for which these trackage rights are sought. The Authority therefore requests the Surface Transportation Board, as a condition of its approval of the proposed transaction,

direct NS and the Authority to grant reciprocal overhead trackage rights as outlined in the Authority's Comments.

Respectfully submitted:
RICHARD R. WILSON, P.C.

By:

A handwritten signature in dark ink, appearing to read "Richard R. Wilson", written over a horizontal line.

Richard R. Wilson
Attorney for Northwest Pennsylvania
Rail Authority

Date: February 23, 1998