carriers that have come to some fruition.

Are there any other -- have you been involved in negotiations?

MR. KRAUS: I have not personally attended the negotiations. I know that there have been several meetings between our union and the Applicants. My understanding is that they really are -- were not able to get anywhere, although they did meet and I'm sure will continue to try to meet.

But there was -- they're quite far apart is my understanding.

CHAIRMAN MORGAN: Mr. Edelman.

MR. EDELMAN: Yes, I'm glad you asked.

Again, I'm not personally involved in these, but people have --

CHAIRMAN MORGAN: But on behalf of your --

MR. EDELMAN: Yes.

CHAIRMAN MORGAN: -- the unions that you represent.

MR. EDELMAN: Generally, from what I understand from people, the carriers' approach has been pretty much take it or leave it. This is the
implementing agreement, this is what we want you to sign.

Maybe you can nick around with it here or there, but basically that's about it. And fundamental to it is the idea that their agreements are going to apply, in particular with the shop crafts and the dispatchers.

And we have people sitting there saying what is your problem; you were sitting there with a shop or an office in which virtually 100% -- the dispatchers will be 100% for the Altoona shops.

At NS it's probably about 95, 98%. For the three CSX shops, it's going to be 100% of the employees were former Conrail employees. We have -- and we provided for you the deposition testimony from Mr. Peifer and Mr. Spensky and their interrogatory answers.

There will be no interchange between those places and existing offices. Those are stand alone places. There is no reason in the world why they cannot keep the Conrail agreements in place there.

I mean, the joke is, as Mr. Kraus and Ms.
Willen have pointed out, these railroads already have multiple agreements; the fortuity for them here is that Conrail, for each craft, only has one. All they’ve got to do is take over one more in connection with acquiring a fairly large territory.

And it’s just the height of arrogance to sit there and say we don’t want it. And when we asked them -- and that’s one of the reasons why we’re asking the Board to affirmatively say there’s been no showing of necessity here to send a message to that arbitrator when it gets to them is that, when we asked them time and time again -- each of us asked them those questions.

And in interrogatories multiple times and again in deposition, and what do they come up with? Uniform payroll system. Our labor relations people are going to have to learn another agreement. Oh, my God, this is so complicated.

Things like that is what they’re talking about is why the entire agreements have to go. So you should know that yes, discussions are being held, but that’s what’s going in on the ground.
A labor relations official on -- for one of the organizations told me labor relations official on UP to describe to them in scatological terms what he would do with his collective bargaining agreement through the arbitration process.

It's about the same. So there have been meetings, but it's not that -- and, if I may, Madame Chairman, because I do want to be clear, you asked me to sort of characterize my questions.

We take the position that there may be no modification of substantive collective bargaining agreements terms by the Article I, Section 4 process, and that the only variances that can be done there are in scope and in seniority. So that's one.

Two, we do ask for an affirmative statement about what necessity means. It's gotten crazy because, from decisions of this Board and decisions of arbitrators, necessity has come to mean convenient for them or saving money for them.

So it can't just be that -- it can't just be necessary to the transaction if it reduces their labor costs. And we urge the Board to restore some
sense of decency and some realism and some law to this area.

Okay, and third, we do ask that you say -- we spent a lot of time in discovery to try and ask them to say where is the necessity here, and they had plenty opportunity to come up with it.

So I know they would sit there -- I'm sure they'll say afterwards we don't have to do that to you here; or don't worry about it, that will all get taken care of over in Article I, Section 4; but the point is, here they were under oath -- there they were under oath.

We asked them repeatedly. They couldn't come up with it.

CHAIRMAN MORGAN: Thank you.

Ms. Willen, did you have anything to add to any of this, or --

MS. WILLEN: No, I just wanted to make it clear that IAM also is in negotiations and has not been able to reach an agreement.

CHAIRMAN MORGAN: Okay.

Okay, well thank you all. This has been
very helpful.

Now, before we go to the next group of labor representatives, I need to step out of order.

Mr. O'Leary, who tried to be here earlier but didn't get on the plane -- he needed to get on.

So if you would present your testimony now. And I apologize for forgetting you earlier, but I got substantively involved in a panel, which is dangerous, and then I forget.

So I apologize.

MR. O'LEARY: Once the day is ruined, you don't expect to get cleared up.

CHAIRMAN MORGAN: Well, I didn't start your day ruined, right?

(Laughter.)

I'm not responsible for your day now.

MR. O'BRIEN: No, ma'am.

CHAIRMAN MORGAN: Only mine, and that's --

MR. O'BRIEN: Let me thank you, Madame Chairman, and the Board for being very thoughtful and accommodating to a situation that you had no -- nothing to do with. It was a very --
CHAIRMAN MORGAN: Airlines -- I have nothing to do with airlines.

MR. O'BRIEN: -- and we're going to deal with them in due course and bring them back subject to regulation.

(Laughter.)

CHAIRMAN MORGAN: Not me.

MR. O'BRIEN: Thank you very much.

With me today, as you said, is Thomas M. O'Leary, who is the executive director of Ohio's Rail Service Development Commission. He's here representing the entire State of Ohio, who has been very active throughout this proceeding.

We appreciate the opportunity to address the Board on behalf of the State of Ohio, and Ohio appreciates the time and effort and commends the Board and its staff for the tremendous amount of high quality work that has been accomplished in connection with the proposed division of Conrail's lines up to date.

At the beginning of the Conrail sale process, Chairman Morgan, you met with several Ohio
rail officials to provide an overview of the impending process. They appreciate that.

At the time, you advised that the job of the states would be to focus on the benefits versus the harms of the proposal in evaluating the proposed sale, and that is exactly what Ohio did. Ohio has never disputed that there would be benefits from the proposed transaction.

The serious question for Ohio has been would related harms be addressed? Ohio entered the Conrail sale process with an open mind. Ohio state agencies, the Attorney General's Office, the Public Utilities Commission and the Ohio Rail Development Commission conducted extensive outreach programs to include -- and including six public meetings across the state.

Concurrently, both houses of the Ohio legislature conducted hearing. All came to the same conclusion: that though the benefits of the proposed sale were substantial, the harms were grievous enough that Ohio had to stand up and oppose the proposed transaction.
Now displayed on the board is a quick listing of what those problems were deemed today, and I'd like to take a few minutes to focus on the overview of the harms that do face Ohio.

First and foremost, Ohio would be harmed by dramatic increases of trains through many of Ohio's cities, towns and villages, as you've heard throughout this morning and yesterday.

It's difficult to convey with charts and graphs the anguish of a family waiting for an ambulance or a fire truck that has not yet arrived because it's been detoured or blocked by a train, or the frustration of a driver who can't accomplish the simplest of errands without being stopped at an at grade crossing.

You get the idea of the magnitude of the problem by looking at the green lines on the map you now see. And I'm afraid it's not too clear, but there are numerous lines in Ohio where rail traffic is going to increase dramatically.

The bottom line is, Ohio communities rightly fear the adverse impacts of 20, 30, 40, even
60 additional trains per day passing through their towns and neighborhoods. Ohio has maintained vigorous support of its communities and their request for adequate mitigation in the adverse impacts of increased train traffic.

It is unacceptable to Ohio that, in the entire Conrail served sale area, the SEA recommended that Applicants negotiate with the local community for a grade separation in only one single instance.

Ohio requests that the Board go beyond the recommends of SEA and mandate that the Applicants continue to negotiate for a period of at least a year with communities on record in this proceeding which have requested grade separations.

Adversely impacted communities should have the right within a year to request that the Board review the record to determine if reopening this critical issue is warranted.

Although in instances such as grade separations we believe the SEA should have gone further, Ohio is very supportive of the many innovative recommendations in the EIS.
Ohio urges the Board to include the SEA recommendations as minimum mitigation for the adverse impacts that the proposed transaction would have on local communities.

In this regard, Ohio asks the Board to instruct the SEA to review and revise its recommendations to ensure that all similarly impacted communities will be provided operation response software and special training in Pueblo.

The SEA has reserved these valuable tools only for communities which had -- deemed to have environmental justice concerns. Ohio is very much concerned that numerous communities face that same problem throughout the State of Ohio.

Similarly, it's very unclear to Ohio why SEA recommended real time train monitoring technology for some communities and not for others. For example, in towns -- the towns of Grafton, Wilmington, Lagrange, daily train traffic will increase from 14 to 54 trains, and annual HAZMAT carloads will increase from 16,000 to 46,000.

Why didn't the SEA recommend that these
communities be provided the real time train monitoring
systems as it did for similarly impacted communities?

If these communities and others like them
cannot get help from the STB to require Applicants to
contribute to grade separations, at the very least
emergency response personnel should know when the
train is coming.

Because only one line is generally
involved, real time monitoring should be relatively
straightforward and inexpensive. Ohio does appreciate
that 29 of 89 crossing recommended for improved active
warning devices are in Ohio.

Where such devices are ultimately required
to be installed in Ohio, they should be required to
meet Ohio’s safety standards. That is that they
should include gates as well as flashes to ensure that
they’re adequately effective.

At the same time, Ohio wishes to advise
that it is continuing constructive negotiations with
the Applicants concerning grade crossing needs in
corridors that will be affected by the proposed
transaction.
Thus far, as a result of ongoing negotiations, arrangements have been made to upgrade over 70 crossings through joint funding arrangements. Presently, Ohio and joint Applicants are actively discussing the needs of four additional corridors and hope to conclude those negotiations within 120 days.

The Board’s active involvement and interest in grade crossing concerns is a key factor in the results that are being achieved.

And this morning, Madame Chairman, you made the comment "talking must not stop here," and we urge that that is the case.

Now on the commercial issues that so very much concern the state. And particularly, the Wheeling & Lake Erie. Wheeling & Lake Erie Railway is the fourth largest railroad in the state, and it faces possible bankruptcy.

For all rail dependent Ohio companies, a Wheeling bankruptcy cannot be accepted as business as usual. The uncertainty -- service interruptions and other unknowns that Wheeling bankruptcy would bring could have a devastating impact on key Ohio industries.
such as steel, stone, petrochemical and plastics.

The Wheeling is a critical part of Ohio’s transportation infrastructure serving the industries you see on the chart on the wall. These industries employ well over 20,000 people.

Ohio urges that the Board impose conditions needed to keep the Wheeling viable, and these conditions should include guaranteeing dependable competitive access for neomodal; opening access to Ohio’s coal producing regions, thereby putting Ohio mines on par with the Monongahela fields; and other conditions deemed necessary to keep Wheeling intact and viable.

As to Centerior Energy, Ohio supports Centerior’s efforts to retain the status quo in terms of competition with other utilities. It is manifestly unfair that Centerior’s competitors will gain rail to rail competition at electric generating sites while Centerior will not.

As you can see by the map that’s now projected on the wall, Detroit Edison is further from the Monongahela coal fields than any Centerior plant.

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Nevertheless, Detroit Edison will have cheaper coal transportation rights because of its newly found rail competitive advantage.

Here again, joint access to the Monongahela coal fields should be balanced with competitive access to Ohio coal regions.

Now, as to stone issues. The loss of single line service for Ohio's aggregate industry in western Ohio, what Ohio's been calling a one to two situation, is one of the most vexing and frustrating aspects of the entire Conrail sale transaction.

As you will see on the map on the wall, Ohio stone producers have spent many millions of dollars developing quarries that can function effectively because they currently have single line rail service from western Ohio to eastern Ohio.

The map on the wall shows how present single line stone moves will become -- will have to become two line hauls unless something is done about it. The cost of about four dollars a ton to move stone now is as shown.

The bottom line is that there are not
enough revenues to support two railroads handling what
is now a single line movement. The stone is just not
going to move from western Ohio to eastern Ohio points
and down beyond.

It will be replaced by stone coming from
the Lakes or some other source. There are no markets
in western -- for western Ohio stone quarries to
replace eastern Ohio markets.

The bottom line is Ohio producers and
users both stand to lose if the situation is not
redressed. Ohio supports the stone shippers' request
that the Applicants be required to preserve existing
single line hauls. Such a condition merely preserves
the status quo.

Now as the Ann Arbor Railroad. Ohio
continues to support the Ann Arbor and asks the Board
to mandate conditions necessary to keep it viable. In
its filings, Ann Arbor plainly described how it would
lose $3 million dollars in revenues due to the changes
in logistics of the proposed transaction.

The adverse consequences of such a loss
should not be ignored.
As to ASHTA Chemical, Ohio continues to support ASHTA Chemical, who made its case yesterday. They have raised a legitimate one to two issue and should be provided remedial measures which will eliminate the adverse impact of unnecessary circuitous movements of HAZMAT which would otherwise result.

As to neomodal, Ohio continues to support the efforts by neomodal to ensure that the state of the art intermodal facility is not isolated by the Applicants. Ohio supports the conditions sought by neomodal, including assurance of viable connections with Class I intermodal facilities.

As to rail labor, although many of the rail Brotherhoods now support the Conrail transaction, fair treatment of labor will remain an issue particularly in view of the disintegration of Conrail that will occur.

Adequate protective conditions and meaningful oversight will help to assure fair treatment.

Ohio wants to make it very clear. In seeking STB mandates to redress the transaction
related harms, it is -- it's not the only thing that
the state is doing. The state is investing
considerable time and millions of dollars in finding
reasonable solutions.

Before filing its protest to the proposed
transaction, Ohio committed $2 million dollars to a
corridor for safety flasher and gate initiatives on a
CSX Greenwich to Chicago double track line. Recently
Ohio committed another million dollars to the
Greenwich line for a portion of the corridor.

Ohio is currently working with NS on
similar multi-million dollar corridors.

If I might just conclude.

By seeking to redress the harms of the
protected Conrail sale transaction, Ohio is doing its
job to protect the public interest of Ohio communities
and businesses. I would like to close by urging the
Board to do the same.

You have broad authority to adopt
conditions as needed to redress the harms to the
public interest. Ohio urges you to adopt the
appropriate conditions to ameliorate the serious harms
it has identified.

And, at the same time, Madame Chairman, I would like, on behalf of Ohio, to commend the results of what has occurred in the settlements that we've heard about this morning.

We really strongly believe it's because of the Board's involvement and its nudging of the private interests to negotiate their solutions that these things have come about, and we urge you to keep involved.

Thank you very much.

CHAIRMAN MORGAN: Thank you.

Now, Mr. O'Leary, do you have some comments, or are you here to --

MR. O'LEARY: No, Madame Chairman; I'm here to respond to any questions you have.

CHAIRMAN MORGAN: Okay, good, okay. I wanted to make sure since you started off -- the way you started off, I wanted to make sure that we were together.

A couple of questions. You covered obviously all the issues that are important to Ohio,
and we’ve been dealing with each of these issues throughout these last two days. Let me just go into a couple of them and ask a couple of questions.

First of all, with respect to the environmental mitigation that covers Ohio, and I’m sure you’ve noticed that there’s a lot in the EIS related to Ohio, so we have attempted to address a lot of those issues.

One, of course, is Fostoria, which for everyone was an important issue to tackle and there were some important issues here.

Would you care to specifically comment on the EIS as it relates to Fostoria because I know that you all have been quite concerned about that.

MR. O’LEARY: Our frustration with the conclusions that the SEA came to with regard to Fostoria was that our belief is that they overstated the situation as existing conditions -- as far as existing conditions go.

As was said by the previous panel, these train movements that indicate -- there are 16 slow crossing moves or switching moves that will be reduced
to 11, therefore the conditions should improve; all
that is contingent on the plan as submitted being the
plan that’s implemented and the plan that the Fostoria
residents experience over a five or seven year period.

So to expect that the safety needs are
only going to be as severe as the plan indicates, I
think is a leap of faith in that the plan, as
submitted, will be how the operations roll out.

Our sense is that yes, there’s certainly
preexisting conditions there; but there are also
preexisting conditions on the NS and CSX system. They
are not Conrail preexisting conditions.

And so, in this situation where they’re
going to worsen the public safety response and it is
on their own current system, we believe that some sort
of grade separation mitigation is appropriate there.

CHAIRMAN MORGAN: Now I think I understood
you to say, with respect to grade separations in
general, that the mitigation that’s been imposed to
upgrade -- there’s a total of 89 grade crossings.

MR. O’LEARY: Crossings; yes, ma’am.

CHAIRMAN MORGAN: I meant grade crossings.
But with respect to the ones in Ohio, you would suggest more stringent upgrading standards be applied to the grade crossings in Ohio. Did I understand that you be your position?

MR. O'BRIEN: In particular, the concern there is where there were recommended flashers. Ohio has found, and as I understand in talking with the Public Utilities Commission of Ohio, they never do just one without the other, flashers and gates.

Because, to have adequate protection and adequate effectiveness, the two need to be installed together, and that was the concern we raised there.

MR. O'LEARY: Our most recent grade crossing fatality, Tuesday of last week, took place at a flasher only crossing. Although that is anecdotal, I think it makes the point that flashers only, as a recommended upgrade, really only do half the job.

And so we have, as an ongoing policy, where we're upgrading from passive to flashers and gates and not flashers only.

The other issue that we didn't perhaps articulate as clearly as we should is the notion that
we have four corridors that we're currently in discussion with, three on the NS side and one on the CSX side.

They happen to be corridors in which a number of the mitigation recommendations are made. And our belief is, if you give us 120 days to work those out, we will build significantly more crossings, as many as 75 additional to the 70 we've already built in relation to this transaction.

And we'll do that at a cost that I believe will not be significantly higher than if the Applicants pay for the recommended mitigation, 100%, at their expense. So the cost sharing corridor approach will provide Ohioans with far greater protection than the spot by spot mitigation that you find in the SEA's recommendations.

MR. O'BRIEN: If I may just add to that.

The state has been in a partnership type approach to this situation, as we've said in our pleadings, looking at the various corridors. And this is a joint investment by the state and by the Applicants in these corridors to upgrade the grade
crossings.

And what Mr. O’Leary is saying is, through the partnership arrangements, they’re going to get more accomplished than just what’s been accomplished solely by the recommendations of SEA.

MR. O’LEARY: But, if I could give you a specific, if you think in your minds the Bellevue to Columbus corridor, my recollection is there are six locations in which upgrades are recommended.

By rough accounting, that would cost Norfolk Southern in the neighborhood of a half million dollars to do that on their own. Five or six locations get upgraded.

The corridor we’re working on, we’re entertaining the improvement of 17 crossings. And the out of pocket cost to Norfolk Southern on that 17 project corridor would be $170,000.

So, if you allow us 120 days or so to work these out, my sense is that we won’t cost the Applicants much, if anymore, money and you’ll have a lot safer Ohio as a result of it because the corridor approach works.
You get economies of scale, you get good public awareness when the projects are going up, and we’re convinced we’re already saving lives as a result. If you only put up 29 crossings when we could do 75 for our people, my sense is that you tie our hands in advance.

As you know, there have been kind of macro -- major agreements being worked on in the past few weeks in the Cleveland metropolitan area. My sense is that that has required almost the entire attention of the railroads’ environmental mitigation teams.

My sense is when Bruno gets done fooling around with Cleveland and the CSX people get done fooling around with Cleveland, they’ll then be able to focus on these other corridors, and I’m confident that we can do this in a timely fashion.

The other corridor -- the CSX corridor I’d like to just make a comment or two on is the Perrysburg to Deshler corridor. You’re recommending, if memory serves me, about 11 or 12 structures there.

We’re building five of those are we’re speaking right now. They’re currently under
construction. We did that after the line was reactivated. So my sense is that, if we partner with CSX on that corridor, we can get increased protection there at less out of pocket cost to the railroad.

So give us a chance to keep up the negotiations. We’ve demonstrated we can negotiate safety quotas, we can negotiate environmental impacts in metropolitan areas. I’m confident, with the ongoing relationship we’re nurturing, we can work on these other aspects as well.

CHAIRMAN MORGAN: Well, I think, you know, clearly this environmental process has been an evolving one as it relates to this particular matter. And certainly the staff here has been trying to keep up with that and be part of that.

But I think the other point -- and this is why I’m pursuing this with you -- is that obviously we have responsibilities to respond to the environmental and safety issues that arise as a result of a transaction that we might approve.

And so we’ve had a lot -- we’ve heard a lot from a lot of different communities about the best
way to do that. You know, some have suggested that we impose X, Y and Z. Some have suggested, as you are today, time for negotiation.

And so I think our job is to try to --

MR. O'BRIEN: Could we just emphasize your response and your involvement, Madame Chairman, and this Board's involvement has facilitated much of what Mr. O'Leary's been talking about. It's gotten people to the table and it got them thinking about it.

And I think the frustration for Ohio right now is literally the hugeness of the Cleveland situation and the diversion of time and effort to get that solved. Mr. O'Leary has worked night and day on these corridors, and they do want to get it done.

It's a matter of there's just so little time to get it all done in. But your involvement has tremendously pushed this forward in a constructive way.

MR. O'LEARY: Madame Chairman, if I might just make the suggestion that if the 29 projects that are in the final environmental impact statement could be held in abeyance and give us 120 days to work on
these corridors, if we can't produce results on those, if we don't file signed agreements within that period, then the recommended mitigation then take place solely at the Applicants' expense.

But we think that would provide us some leverage and an incentive. As I articulated, the Columbus to Bellevue corridor is money in the bank for NS. They get 17 instead of a handful of projects at about three, four hundred thousand dollars less.

We don't bargain foolishly in Ohio, but we bargain fairly when it comes to the interest of the public safety. We have no interest in squeezing money out of the Applicants to make Ohio safer. We want to partner with the railroad to make our communities and our state safer.

CHAIRMAN MORGAN: Just to move on to a couple of other things, the competitive issues, the non-environmental issues for a minute.

You've talked about Wheeling & Lake Erie and Ann Arbor as two railroads --

MR. O'BRIEN: Yes.

CHAIRMAN MORGAN: -- of great importance
to the state. I think your suggestion in your testimony was to provide some sort of connection at Toledo that might help both of these railroads --

MR. O'BRIEN: Yes.

CHAIRMAN MORGAN: -- to achieve the viability or to maintain the viability that you feel is important to Ohio.

MR. O'BRIEN: That certainly would help them. That certainly would help the two.

MR. O'LEARY: One of the other kind of new issues -- and again, with reference to evolving process, Madame Chairman -- is that the notion that Centerior is articulating about competitive access at destination.

We believe that if you look at the Mon Coal Field joint access and you look just to the west of the Ohio coals, that there is an element of inequity there; that single access to the active Ohio mines, Conrail being the server now, there's an opportunity to inject competition into those coal regions by assigning competitive or trackage rights access down the current Conrail line that NS will take
over.

So if the notion is we want to get competition in the movement of coals and the relationship to generation of electricity in the midwest to open up joint access at the Mon Coal Fields and not open up joint access to Ohio coals, and then, on the flip side of that, to have captive shippers at Ohio’s electric generation facilities and utilities with joint access and competition in rates, we feel will really put our Ohio utilities behind the eight ball as this ongoing movement towards utility deregulation begins to hit.

And so that the neighboring utilities, Detroit Edison, will be able to wheel power into the First Energy Centerior area. And although this is not about electric utility deregulation, there’s a close relationship between the competition of coals and the competition -- price of a generated kilowatt of electricity.

I think it’s important, although it’s late entry, if you will, into the consideration, if we’re going to open up competition in high sulphur coals,
let's get competition in both West Virginia, Pennsylvania and Ohio.

CHAIRMAN MORGAN: Now just one last question. We heard from the aggregate shippers earlier, stone shippers, about their service concerns. And I asked, I believe, one of the witnesses about Wheeling & Lake Erie about how Wheeling & Lake Erie could help in that.

Do you have any comments on that particular issue, bringing two Ohio interests together?

MR. O'LEARY: We just invested a little over one million dollars in joint project with the Wheeling to improve the through put capability of the Wheeling's line to these origins and the destinations. So we're playing ball and we're working hard to make sure that Wheeling's viable there.

I think the issue that's important to note -- and my Conrail, BL&E friends that live in the general area that I do point out that there is a labor issue there as well.

Disrupting the labor unit, the local that
moves that coal now on the Conrail system is a problematic issue if you split that movement at Crestline between two Class I’s. So part of the solution for the Ohio stone is improving the Wheeling’s ability and keeping the Wheeling viable.

But it’s also important that these quarries in Spore and in Carey maintain single line Class I service. To put all of Ohio’s stone hopes in the Wheeling’s hands I think is an issue that -- we want the Wheeling to be viable, but we don’t want them to have a monopoly in the movement of stone in Ohio as well.

And unless single line Class I movements are preserved in those quarries, that’s exactly what will happen. The two line interline move -- once the NIT League agreement expires, it’s hard for me to understand how Norfolk Southern and CSX are going to interline move stone in a profitable way at the volumes that are currently being moved at Conrail single line.

CHAIRMAN MORGAN: Okay, thank you.

Vice Chairman.
VICE CHAIRMAN OWEN: No.

CHAIRMAN MORGAN: Okay, I appreciate it, and I'm glad we could get to you.

MR. O'LEARY: What a day. We appreciate your help in this effort.

MR. O'BRIEN: Thank you very much.

MR. O'LEARY: And we want to congratulate the railroads for their cooperation. It's been a tough road, Madame Chairman, but nothing --

CHAIRMAN MORGAN: No road is easy.

MR. O'LEARY: Nothing in this life worth having comes easy, and so we think that some of these agreements will provide lasting stability and safety and commercial success for this transaction.

CHAIRMAN MORGAN: Okay, thank you both.

Okay, let's -- we'll return to the labor -- the rest of the labor witnesses.

First we will hear from Clinton Miller, United Transportation Union; then Robert Godwin, Brotherhood of Locomotive Engineers--Consolidated Rail Corporation--General Committee of adjustment; Angelo Chick, Brotherhood of Locomotive Engineers, Division
227; Samuel Nasca, New York State Legislative Board, United Transportation Union; and then Harry Barbin and William O'Connell, Retirees--Former Employees of Conrail.

And I hope we have enough chairs. And if we don't, make sure we do, please.

Please proceed.

MR. MILLER: Chairman Morgan, I'll say hi to Vice Chairman Owen when he returns.

CHAIRMAN MORGAN: He just had to step out for one second.

MR. MILLER: I'm Clinton Miller, general counsel to the United Transportation Union. With me at the table, on behalf of the International, is UTU national legislative director James M. Brokenhofer, who will be available for questions along with me after our argument portion.

The UTU is in conditional support of the application on the basis of the commitments the carriers have made as to how the New York Dock conditions will be administered as to UTU members.

Rather than asking that these commitments
be made actual conditions by the Board subsequent to
its approval of the transaction, if permitted, UTU
requests that these commitments be noted in the
Board’s decision along with the statement that the
Board expects the Applicants to live up to their
commitments to UTU similar to what this Board put in
its decision at page 171 and footnote 218 of the
decision in the UP/SP merger.

The commitments the Applicants have made
here are similar to those made in the UP/SP merger,
but they have been improved for the benefit of UTU
members and, in fact, for the Applicants.

The carriers have committed to automatic
certification of UTU members as adversely affected by
the transaction without the necessity of identifying
or showing causal connection to the transaction.

This applies to the 132 trainmen whose
jobs will be transferred, the 329 trainmen whose jobs
will be abolished, and the 29 yard masters whose jobs
will be affected by this implementation if approval is

All is indicated in the Applicants’ labor
impact exhibit. Additionally and beyond that, this automatic certification will apply to all other train service employees, yard masters and hostlers identified by any Article I, Section 4 implementation notice served by the Applicant, as well as to engineers on those properties where UTU holds the contract for engineers.

The Applicants have also committed to providing the names and test period averages, or TPAs, of such employees as soon as possible upon implementation. In exchange for automatic certification, UTU committed to use its best efforts to negotiate agreements implementing Applicants' operating plan prior to the date of oral approval of the application and contingent entirely upon Board approval.

UTU has done so. Some of UTU's general committees of adjustment, which are in charge of contract administration, have reached tentative agreements, and a great number of others are close to tentative agreements with both CSX and NS, all subject to ratification.
In that connection and in line with their commitments, NS and CSX will apply automatic certification to Conrail employees who become their employees as a result of such implementing agreements. Anywhere implementing agreements are not reached, arbitration will commence within ten days of this Board’s written decision approving the application, assuming approval.

The Applicants have also committed to requesting only those changes in existing collective bargaining agreements that are necessary to implement the application if approved.

If, at any time, UTU International president Charles L. Little believes that the Applicants are acting inconsistently with these commitments, the Applicants have agreed to meet UTU, either the president or his designated representative, within five days of his notice to that effect with a written agreement to arbitrate within ten days thereafter if the dispute remains unadjusted.

The Applicants have also committed to preservation of the right of Conrail employees to flow
back to and from Amtrak under Section 1165 of the Northeast Rail Service Act of 1981. And to the remaining one time flow back opportunities, Metro North and New Jersey Transit Rail Operations employees have to Conrail under Section 1145 of the same statute, and to yard master agreements that cover the same general matters as to a one time move back to Conrail.

The Applicants have further committed to application of the New York Dock conditions regarding any use of leases or trackage rights to implement the transaction, if approved, with Mendocino Coast and Norfolk and Western conditions to apply only after the initial implementing agreements.

The UTU has more than 79,000 transportation industry workers. The UTU represents a very significant portion of the unionized work force of CSXT, Norfolk Southern and Conrail.

UTU, in fact, believes itself to be the largest labor organization in the rail industry. And its chief responsibility is to protect not only the economic, but also the safety interests of its members.
whose work makes possible the efficient functioning of
the nation's transportation system.

As the Board is aware, rail labor has been
very concerned about and very critical of mega rail
transactions because of the significant adverse
impacts that they all entail.

But UTU supports the proposed CSX, NS,
Conrail transaction for two key reasons. First, NS,
CSX and Conrail have committed to the conditions
described that will help mitigate the adverse impact
on our members as to how the New York Dock conditions
will themselves be administered.

Second, UTU is convinced that the proposed
division of Conrail between NS and CSX promises to
create two strong rail networks of broad and
comparable scope that should compete vigorously in the
main to provide efficient service throughout the
eastern United States; and that, UTU believes, is in
the best long run interest of rail labor.

By integrating certain Conrail routes and
facilities into their existing rail networks, CSX and
NS projected they will be able to provide better
service to existing customers and will also use improved service to attract new customers.

The creation of new single line routes and coordination of Conrail assets with existing CSX and NS assets should allow both rail systems to provide faster and more responsive service.

Equipment utilization should improve and loss and damage claims should decline. Customers will incur reduced cost. Most importantly, jobs -- or at least not as many of them in the operating craft will have to be eliminated.

Moreover, CSX and NS both project that the creation of new single-line routes will enhance their competitive positions, enabling them to win new traffic from trucks, both in the near term and on a long-term basis. The transaction should allow CSX and NS to become truly effective competitors for trucks, which handle the vast majority of freight in the east. In this event, new jobs may well be created for UTU-represented employees, and that is our expectation.

Overall, it is UTU’s opinion that the
immediate adverse job impact that UTU members will experience in implementation of this transaction, if approved, will be ameliorated by the applicants' commitments. And there's a possibility of long-term job growth.

You will be hearing shortly from UTU’s New York State Legislative Director Sam Nasca. He will describe in more detail the necessity of providing protection for employees of the Delaware and Hudson in this application, and UTU shares that view. UTU also shares his views, which he will detail with respect to New York State, regarding the need for more trained operating employees to meet the needs of implementation of this transaction, and to do so safely.

In that connection, UTU is acutely aware that creation of rail networks with broad geographic coverage and substantial traffic densities raise monumental safety concerns. While these networks create opportunities to "grow the business," as Mr. Snow says, recent experience tells us we must anticipate the traffic and safety problems inherent in
UTU has, therefore, in order to help the carriers achieve and maintain a sufficient complement of trained, safe employees, proposed that a task force be put in place on each property with committed carrier and union personnel that can deal with traffic and safety problems immediately while they are still in their infancy, or hopefully before they happen.

And UTU has received significant assurances from CSX and NS about their commitment to such a task force. It seems to be related to Mr. Snow's statement about labor councils, in our view.

UTU and its officers and members have been through the BN/SF merger, the UP/CNW merger, and the debacle of the startup of the UP/SP merger. We know what works, and we know what doesn't work with regard to traffic movement and safety. We are the resource the carriers should use.

As to traffic, as UTU International President Charlie Little said to a group of Class 1 carriers on our wage rule panel back last fall, the worst thing that operating employees can do to get
even with operations managers is to do exactly what they tell you.

Operating employees who actually move the freight can tell the carrier operating officers about how to avoid bottlenecks and gridlock, and there must be enough of them. The carriers may think they have enough operating employees, but based on UTU’s knowledge and experience, they do not. We have approached the carriers about adopting and expanding an existing agreement on a large portion of CSX that UTU holds that establishes procedures for the training of operating employees.

And we are hopeful that both carriers will get aboard to ensure that there are sufficient trained operating employees who can move traffic safely to avoid the problems experienced in the initial implementation of the UP/SP merger. As to safety, we share the concerns of Vice Chairman Owen and Congressman Nadler that safety whistleblowers be protected, and employees be free from harassment regarding safety.

While Mr. Snow accurately described, in
response to Vice Chairman Owen’s question, a new CSX
discipline policy worked out in conjunction with UTU
and BLE, which prefers training over discipline for
operating errors, employees need the confidence that
harassment will not become the rule when traffic
volume creates operating problems.

We recognize that the FRA has primary
jurisdiction regarding safety and harassment. But if
UP/SP has taught us anything, it is that safety is an
integral part of operations. If it is ignored,
operations are doomed to failure.

As a side bar, UTU understands the many
concerns of the many municipal and governmental
entities that have been presented here, and we believe
that settlements are the best way to resolve them.
That was the best way to resolve our concerns, at
least out of the box.

But UTU hopes that in that process, or in
whatever conditions the Board considers, UTU hopes
that there is recognition that the safety and job
security of operating employees should not be
compromised in any way that the operating plan changes
as occasioned by the settlements and by the conditions, because our people stand a chance of being affected if that is not carefully attended to.

We only want to be in that mix. We recognize and understand the municipality and the governmental entity's problems.

In sum, good labor relations are important to the success of implementation of this application, if approved, as the Chairman and Vice Chairman so ably indicated in your opening remarks about recognition of the interests of employees. But good labor management relations are not merely a goal or an end in themselves. They are a process.

The commitments the carriers have made to UTU here are a good first step, but they must keep UTU and the employees involved in the safety and operations process in order for this transaction to succeed if it is approved.

I’ll be available for questions at the conclusion of the panel.

CHAIRMAN MORGAN: Okay.

MR. MILLER: Thank you very much.
CHAIRMAN MORGAN: Thank you very much, and you can just sit right on the bench there.

MR. GODWIN: Good afternoon, Chairman Morgan, Vice Chairman Owen. My name is Robert Godwin. I'm General Chairman and Brother of the Locomotive Engineers, Conrail General Committee of Adjustment. My office is in Buffalo, New York.

I'm here to express the fears of my members in regard to their safety if the Surface Transportation Board approves the takeover of Conrail by the Norfolk Southern and CSXT.

In 1996, to placate the Union Pacific management, the Surface Transportation Board approved the acquisition of the Southern Pacific Corporation, creating the largest railroad in the United States, with nearly $10 billion in revenue, 35,000 miles of tracks, and 53,000 employees. In less than one year, total pandemonium set in. Five operating employees were killed, along with two civilians, and many more were injured.

Derailments, big and small, and gridlock nearly closed the Union Pacific down. Freight cars
and sometimes entire trains were lost for days. Railroad employees of all crafts had to work shifts of 12 hours on, eight hours off, and they're doing that up to today. This has adversely affected their physical well-being and their ability to work safely due to fatigue.

Almost every day since September 11, 1996, to today you can pick up a newspaper and read the foul-ups, accidents, injuries, deaths accredited to the poorly thought out railroad acquisition. In fact, last night I learned that an engineer and a conductor and a civilian were killed last week on the Union Pacific Railroad.

We can point the finger or fault at a lot of things such as little or no planning by UP hierarchy to ensure a safe and smooth transition from two separate carriers to a merged carrier; lack of qualified middle management and experienced field supervisors; lack of qualified operating employees, locomotive engineers, conductors, trainmen, trained dispatchers, and crew dispatchers; the rush to do away with support employees, clerks, carmen, locomotive
repairmen, yard masters, and maintenance of way employees; the shutting down of yards, terminals, repair facilities, and secondary lines.

However, the biggest share of the fault of the meltdown of the Union Pacific belongs to the Surface Transportation Board. In their rush to give the Union Pacific everything they wanted, the Surface Transportation Board failed in its duty to protect the public, the shippers, and the employees of the UP and SP.

I'm going to talk about Conrail now. Conrail, for the last 22 years, has provided service in the midwest and northeastern United States. It started in a very humble way on April 1, 1976, out of the ashes of seven bankrupt railroads under the leadership of L. Stanley Crane and the Conrail management employees who made the sacrifices that allowed Conrail to be today the best on-time performance railroad in the railroad industry with a safety record as good or better than any railroad in the United States.

If the Surface Transportation approves the
splitting up of Conrail by the Norfolk Southern and
CSXT as casually as they allowed the UP to acquire the
Southern Pacific, it will make the Union Pacific
fiasco like a walk in the park.

The northeastern United States is the
population center of this country. Some of the
biggest cities -- Boston, New York, Philadelphia,
Baltimore, Washington, D.C. -- are served by Conrail.
These eastern cities are spread out so far you could
call it a megalopolis.

A repeat of the Union Pacific Houston,
Texas gridlock fiasco in the northeast United States
could not only be a financial disaster, it would lead
to a disaster that would not only place the railroad
employees in harm's way; it would put the public in
that position.

A few short years ago, CSXT had a
derailment in New Orleans that caused thousands of
people to be evacuated to escape the vapors of the
hazardous material spill in one of their yards.
Imagine this type of incident in the New
Jersey-Philadelphia shared asset area, or Beacon Park
Yard on the banks of the Charles River in Boston, Mass.

The shared asset areas of New Jersey and Philadelphia are far more susceptible to gridlock than Houston, Texas. The yards are in compact areas, and they're surrounded by major highways and large urban areas.

When these yards, especially North Jersey consolidated, are under the control of Conrail as they are today, Conrail had the ability to control movement of trains in and out of North Jersey consolidated terminal by holding in-bound trains at Allentown, Harrisburg, Enola, Selkirk, or as far away as Conrail in Pittsburgh and Frontier Yard in Buffalo.

With two railroads -- Norfolk Southern and CSX -- in heated competition with one another, pushing trains into the New Jersey consolidated terminal to keep the competitive age will only take a day or two to cause gridlock. The carriers -- excuse me. I'm going to skip down that.

Another area of a sure target for deadly gridlock is Cleveland, Ohio. This is where the
Norfolk Southern comes off the water level route from Chicago to Cleveland, a multi-track territory, two single lines, one to Buffalo and one to Pittsburgh. The CSXT comes from the former Conrail water level route from Boston-New Jersey shared asset area to Cleveland onto the Short Line from Collingwood to Berea, controlled by Norfolk Southern, and then onto the CSXT lines to continue their trip west.

The concerns -- or the former concerns of United States Representative Kucinich and Cleveland Mayor are still in the minds of the locomotive engineers. A 35-year veteran locomotive who worked in the Cleveland area for his entire career put this situation in clear language when he told me recently, "In the first month of the takeover, we'll be able to walk to Buffalo on the top of railroad cars standing waiting to get through Cleveland."

In the last five years, over 30 locomotive engineers have been killed in the United States. A fair share of them have been on the combined Union Pacific, Southern Pacific, Conrail, CSXT, and Norfolk Southern. That number could be doubled if you take
into effect the deaths of brothers and sisters and other crafts in the railroad industry. The sad part of this is killing and maiming will continue.

The railroads in the United States have failed miserably in keeping enough employees to run this railroad safely. Conrail, Norfolk Southern, and CSX are very short of experienced locomotive engineers and conductors. This problem will continue because the locomotive engineers and conductors in their late fifties and early sixties are merger weary and are contemplating retirement as soon as possible.

This phenomenon will force the Norfolk Southern and CSXT to push new hires into position of serious responsibility. Locomotive engineers and conductors with very little hands-on experience is a sure ingredient to the transportation disaster.

I have worked in the railroad industry for 42 years. Forty of those years I have been a union officer, both on the local level and a full-time officer since 1983. I have seen all kinds of safety programs come and go. They all start with statements concerning commitment to program. They hold meetings,
hand out fliers, hats, buttons, T-shirts, and have hard talks with the employees. Six months later, they forgot there ever was a program.

The sad thing was that when the safety program was going full steam, if the safety program got in the way of the managerial prerogative or on-time performance, the safety program went out the window.

Norfolk Southern is already cutting corners when it comes to hiring experienced Conrail supervisors. We are hearing stories that our supervisors have been told that they are going to get demotions and pay cuts. They are doing the same thing to the Conrail locomotive engineers. These brothers and sisters will realize a cut in pay because their wages will be reduced from 1998 level to 1994 wage scale with a vague promise of a bonus based on carrier performance.

The last thing I'd like to say is I strongly suggest that we learn from our errors instead of repeating them.

Thank you very much.
CHAIRMAN MORGAN: Thank you, Mr. Godwin.

Mr. Chick?

MR. CHICK: Yes. I'm Angelo Chick. I represent the Brotherhood of Locomotive Engineers, Division 227, and quite a few other engineers -- Syracuse and east area -- that have the same interest that we do. Our only interest here today is the preservation of our prior rights to work that was guaranteed under Section 1146 of the NRSA Act.

I left a copy of our brief, and you can see on the second-to-the-last page that item 5 under Section 411 that prior freight service seniority rights and equities will be preserved as best possible. And if you read the plan that CSX has for the northern seniority district, they have no plan to protect our rights or our equities.

This morning we had Senator D'Amato. He mentioned equity for the shipper and fairness, and we ask for that.

And if CSX makes the argument that it's going to cost them money, the mechanics for the maintenance and the administration of the seniority
system is already in place in the Conrail computer system and it wouldn't cost CSX anything to maintain it, just to take over Conrail's computer system and add it to theirs.

And if you do away with our equities' location, such as North Jersey and Boston and other areas, employees will be affected. If they take all of the work from those locations and move it to another location, eliminating their equity, you'll have engineers there and other employees that will be affected, and they'll have to apply for New York Dock protection.

We have found in the past that applications for New York Dock protection, in order to collect, you've had to go to litigation, and mostly in the 10901 sales and have been overturned. We really need this for the members, and we ask you to consider it.

And I thank you for your indulgence today.

CHAIRMAN MORGAN: Thank you.

Mr. Nasca?

MR. NASCA: Thank you, Madam Chairperson
and Vice Chairman.

My name is Samuel Nasca. I am the Legislative Director for the United Transportation Union for New York State. The New York State Legislative Board of the United Transportation Union represents rail employees and computer rail, freight service, bus employees, and airport employees throughout New York State. We also represent a portion of the Transit Authority in the City of New York.

First of all, the International United Transportation Union has formally withdrawn their conditional opposition and are now formally supporting the transaction on a conditional basis. The UTU spokesperson has already presented the UTU International’s arguments earlier in these proceedings. And I’m not speaking in contradiction to any of those comments. In fact, I fully support them.

The first issue that I would like to present to you, Madam Chairperson, is I continue to hear the Norfolk Southern speak about their intentions to increase the traffic over the Southern Tier portion
of Conrail from Buffalo through Binghamton, Port
Jervis, and Oak Island. And I continue to be
skeptical of those intentions. What if those
intentions are correct?

My question is: how will they be able to
operate safely over that plant, which is primarily
single track with long passing sidings?

In the initial business plan, the Norfolk
Southern estimated that they would have to invest
approximately $30 million in upgrading this line which
had deteriorated immensely under Conrail. It is now
my understanding that recent engineering estimates
have placed those rehabilitation needs at over $100
million.

It's my fear that Norfolk Southern will
not be willing to invest that kind of money into
making the Southern Tier a safe operating line. It's
my feeling that they seriously estimated the
rehabilitation cost for that line. They do not have
the employment resources to operate that line today,
and my fears are that they won't have it on
implementation.
As far as safety in New York State is concerned, Conrail has done everything in their power to circumvent safety mandates. For more than a year and a half they ignored the requirements of 49 CFR Part 215, pre-departure inspections, and 49 CFR Part 23212, initial terminal air test, on all of their block-swapping trains at Buffalo, Syracuse, and Albany.

When an agreement was reached with the FRA to set aside those mandates on certain trains, Conrail simply violated the mandates on all trains. For nearly two years they violated the requirements of those two portions of 49 CFR, until the FRA started to cite them for it. Conrail has also eliminated the jobs of hundreds of car inspectors and car repair persons throughout New York State.

In the business plan, both CSX and Norfolk Southern have stated that they intend to increase the traffic volumes throughout New York State, but nowhere in the business plan does it reflect that they intend to increase those classes of employees -- car repair persons and car inspectors.
My question is: how do they intend to operate a safe railroad with that level of employees that do the inspection and car repairs?

Another issue that I’m concerned about is the dispatching forces that are going to be moved from Selkirk to Jacksonville, Florida. Norfolk Southern dispatching services also will be moved to another location. It’s my fear that dispatching services will be accomplished by employees who are not as familiar with the territory as those who now perform these services, and, therefore, place the employees who operate in New York State rail services in serious jeopardy.

As a recent report by the National Transportation Safety Board said of the fatal collision in Divine, Texas, reports cited overworked dispatchers, dispatchers being assigned to territories they were not familiar with, and because of the shortage of train-dispatching courses, more duties and territory assigned to each employee.

And my final point involves the Delaware and Hudson employees who now operate between Buffalo
and Binghamton and Binghamton and Philadelphia. They will be adversely affected as a result of approval of the transaction. For all practical purposes, a significant number of them will lose their jobs.

Most of the train operations operating in those corridors are interchange trains operated either for the Norfolk Southern or CSXT. Those two companies will assume operation of the interchange trains now being operated by the D&H.

The ironic part of all of this is the employees that are most apt to lose their jobs are those acquired from Conrail by the D&H back in 1976 when Conrail was formed. They should be afforded protection of some type, whether that be third party protection, or Norfolk Southern should be required to hire these employees as the Norfolk Southern does not have employees operating in those corridors today.

The D&H employees should not be simply forced into an unemployment situation as a result of this transaction without some kind of protection. As a matter of fact, this class of employees -- the D&H employees -- stand to be as adversely affected by the
transaction as any employee of any of the other three railroads involved.

And we are asking that the Surface Transportation Board take into consideration the fate of these employees because they are not -- I would like to point this out -- they are not involved in any of the negotiations that are being -- that are taking place today between the United Transportation Union or the Brotherhood of Locomotive Engineers, and the two railroads involved.

So they are kind of left out on an island, and, as I say, they stand to lose their jobs. And I would implore the Board to take into consideration their status, because, as I said, they stand to be the most adversely affected class of employees of all of the three railroads.

Thank you, Madam Chairperson, for the opportunity to comment.

CHAIRMAN MORGAN: Thank you.

And next we will have Mr. Barbin. And I have Mr. O'Connell here, too, but he's not with us or
MR. BARBIN: Yes, ma'am.

CHAIRMAN MORGAN: Oh, you are. I'm sorry.

MR. BARBIN: My name is Harry Barbin, and my partner, William O'Connell, is assisting me.

Good afternoon, members of the Board.

We represent certain former union and non-union employees of Conrail with respect to the pension interests and their interest in the pension plan. The plan that we're talking about is called the Conrail Supplemental Pension Plan, and it's a defined benefit contributory plan. And I'd like to emphasize that it is a contributory plan where both the employees and the employer, the company, contributed to this plan.

The non-union or management employees made mandatory matching contributions for many, many years, from the Pennsylvania Railroad years to Penn Central, up until 1965. The company stopped contributions to the plan in 1984. Why they did was because a very large surplus became involved with this plan, although the union employees continue to make matching contributions up to the time of their retirement.
In 1994, the last information we had, the plan had a surplus of $538 million. That’s four years ago. Well, we know what happened to the securities market. It’s undoubtedly substantially higher today.

This large surplus is attributable partly to both the employee and company contributions. And when we talk about surplus assets in a simplified fashion, it’s where the assets of the plan exceed the liabilities for benefits of the plan. And the question that we have raised many, many times is, what are the applicants’ intentions with respect to this plan and its surplus?

They could either do, it seems to me, one of two things. They can merge the plan, the Conrail plan, into either the CSX or the Southern -- Norfolk Southern plan, or they could terminate the plan. In either case, the federal pension statute, known as ERISA, protects the rights of the employees.

If the plan is terminated, the statute provides an allocation of rights of surplus to the employees who contributed. If the plan is merged, for example, into the CSX plan -- which, incidentally, is
a very large underfunded plan -- the security of the
benefits for all of the participants in the plan
become an issue

The rebuttal -- the applicants' rebuttal
is twofold. One, they say, "Well, ERISA is going to
protect everybody's rights." Well, this Board is
supposed to take into account, my understanding,
federal statutes, and ERISA is a very important
pension statute that protects the rights of employees.

They also said that we have previously
litigated this same issue in the federal courts.
Well, that same issue is pending presently in the
Supreme Court in the Jacobsen v. Hughes Aircraft case.
If the plan is terminated, which is the issue now --
part of litigation involved a pre-termination -- it's
a completely different issue than what's in the
litigation anyhow.

Under ERISA, the participants have a very
protected right in the surplus, and that has not been
revealed in any fashion by the applicants, although
requested many times.

We're asking certain conditions that are
set forth in our comments, but briefly it is, tell us what the intentions are with respect to this plan, and how you’re going to protect the interest of these employees.

Thank you very much.

CHAIRMAN MORGAN: Thank you.

Maybe I should just start with you, Mr. Barbin.

MR. BARBIN: Yes.

CHAIRMAN MORGAN: Mr. O’Connell, he’s just here to --

MR. BARBIN: Yes.

CHAIRMAN MORGAN: -- assist?

MR. BARBIN: Yes.

CHAIRMAN MORGAN: Okay. You do have a case pending on this in court? Has that gone to the Supreme Court? Am I --

MR. BARBIN: No. Our case has not gone to the Supreme Court.

CHAIRMAN MORGAN: Is there a cert --

MR. BARBIN: There is another case for this very similar issue as to the rights of employees
in the surplus of the plan, and that’s a case that’s
I think going to be a celebrated case. It’s called
Jacobsen v. Hughes Aircraft. And the Supreme Court
just granted a cert on it, and we’re petitioning the
court to join that case because our case, which the
Supreme Court denied cert in I think March, granted
cert in the Hughes case a month later.

Identical issue -- in the Ninth Circuit,
it went in favor of the employees, as to their
interest in the plan. In our case, which is a Third
Circuit case, went in favor of the company. So
there’s a definite split in the circuits on this very
issue, and the Supreme Court has decided to hear the
issue in the Hughes case.

CHAIRMAN MORGAN: I --

MR. BARBIN: Our case is not pending at
the moment.

CHAIRMAN MORGAN: But obviously --

MR. BARBIN: But that’s a different case,
Madam Chairman. The previous case involved a
pre-termination right to the surplus. In other words,
the plan was not terminated. The plan was not merged.
The question in that case is: what rights do the employees have in the surplus before termination? Now we're looking at something very different. We're looking at a termination. We're looking at a merger. Completely different aspect.

ERISA is very, very precise if you have a termination. The employees have a very valid, vested right in the surplus before there's any reversion to the company of the surplus. It's spelled out clearly, and I think there has never been an issue with respect to termination of the plan.

Now, we're looking at someplace between $500 million and a billion dollars in surplus here. Where is that going? We know CSX has a huge underfunded plan. I assume that they would merge at least part of the Conrail surplus plan into the CSX, but they have not revealed that.

They skirted and stonewalled the issue right through this proceeding, what they're going to do with the plan. They said, "We're going to -- everybody is going to be protected by ERISA." That begs a question.
CHAIRMAN MORGAN: Well, what are their legal responsibilities? I'm just trying to get educated a little bit on this. What are their legal responsibilities as to --

MR. BARBIN: Madam Chairman, that will depend on how they handle the termination of the plan. If they terminate the plan, or partially terminate the plan, they have to provide for the -- under ERISA, the employees' benefits and employees' rights to the surplus. Or they could merge the plan. If they merge it into CSX, which is underfunded, the whole issue of security of all the pensions will come into issue. But there may not be sufficient assets to cover both liabilities.

CHAIRMAN MORGAN: I think what I hear you saying is, number one, you'd like to get some certainty on what's going to happen.

MR. BARBIN: Exactly.

CHAIRMAN MORGAN: That's point number one.

MR. BARBIN: Exactly.

CHAIRMAN MORGAN: Then, once there's certainty as to what's going to happen, then I presume
kicks in some sort of other obligations. Am I right?

MR. BARBIN: Exactly. Exactly.

CHAIRMAN MORGAN: So how do we --

MR. BARBIN: We’ve asked the Board for a series of conditions.

CHAIRMAN MORGAN: Right. But I’m --

MR. BARBIN: One of the conditions is to say now to the applicants, “Tell us what you’re going to do. What is the plan to handle this pension -- the pension plan?” That will trigger, I think, a lot of other issues. We may not agree with what their plan is. They may not feel that they have to provide part of this surplus to the employees.

CHAIRMAN MORGAN: Okay. Well, I appreciate your educating. This is -- you know, obviously, this is not directly something we are involved in on a daily basis.

MR. BARBIN: Yes.

CHAIRMAN MORGAN: So I appreciate that.

Mr. Nasca, let me go to you next. You’ve discussed a couple of things -- labor protection for D&H employees, the Southern Tier and operational
concerns there, safety as a general matter, and then
dispatching, who will be doing the dispatching, and so
forth.

Now, of those issues, did I cover that
pretty well? Were those the four main --

MR. NASCA: Yes, ma'am.

CHAIRMAN MORGAN: Of those issues, I
understand the D&H issue, which is that you would like
the Board to impose labor protection on those
employees arguing that that is a result of this -- the
transaction, if we approve it --

MR. NASCA: Yes, ma'am. That --

CHAIRMAN MORGAN: That would be the result
of it.

MR. NASCA: Most of the trains that
operate in those corridors, or nearly all of those
trains, are Norfolk Southern/CSX trains interchange --
solid interchange trains. And the two companies that
acquire the lines are going to operate the trains
themselves, and those employees will be out.

CHAIRMAN MORGAN: Now, with respect to the
other three items, what specifically are you asking
the Board to do with respect to those three items?

MR. NASCA: Well, I --

CHAIRMAN MORGAN: I understand your concerns. I'm just --

MR. NASCA: I think there certainly should be some requirements imposed about trained employees to oversee the operation of the northeast portion of New York when these dispatching forces move, because as I cited in the Divine, Texas accident, it was the sole cause of those people losing their lives. And it was an offshoot -- a direct offshoot of the UP/SP merge.

CHAIRMAN MORGAN: So that pretty well covers what you're asking us for --

MR. NASCA: Yes, ma'am.

CHAIRMAN MORGAN: -- in that regard.

Okay. Thank you.

Mr. Chick, I understand that the National BLE has entered into an agreement with the applicants in this case. Am I right about that?

MR. CHICK: I'm not aware of any agreement that has been reached or ratified. But if Norfolk
Southern and CSX have agreed to live up to the certain portions of the law, mainly the flowback from metro north and any other commuter agencies, and the free flow between Conrail -- you know, Conrail and the northeast corridor, we see no reason why they can't live up to the section for freight employees that they have their prior rights, their prior prior rights, and their equities.

If you eliminate our equities, you'll have people's lives disrupted and they'll be moved from one location or another. I mean, it will be Conrail all over again. When Conrail was formed in '76, people were uprooted and moved hundreds of miles away. And what we're looking at is people being moved from Boston and North Jersey to Selkirk, and people from Syracuse to Buffalo, and Cleveland to Buffalo.

And what we're talking about here -- there's going to be no integration of traffic between -- on that northern seniority district, and that's Cleveland to Boston and New York, both sides of the Hudson River. And we see no reason why anything should change because all of the mechanics for the
maintenance of the seniority system were already in
place. And it seems to work fine.

CHAIRMAN MORGAN: Thank you.

Mr. Godwin, you talked about a lot of
different things, but focused specifically on --

MR. GODWIN: I apologize. In the rush to
not having the trap door spring open after me -- the
three bells --

(Laughter.)

CHAIRMAN MORGAN: There is no trap door.

MR. GODWIN: -- I missed my point. I
missed my point. I would -- and I apologize.

CHAIRMAN MORGAN: Well, this is your
chance. I'm giving you your chance.

MR. GODWIN: Okay. Thank you very much.

I would request that the Board hold the
approval of this merger until we get an unbiased
federal safety task force to review not only the
written material but the physical plant to ensure we
will not have a UP. This is my -- I hired out in '57,
and I was merged into -- from the Erie to the Erie
Lackawanna. This is my fifth merger.
The one thing I know is that what we’re told the day before the merger will never happen. It always changes and it’s like a growing thing. It’s never the same. It just keeps going and going and going. And usually the people that hold -- carry the cross, if I can use that statement, is the employees. I want the employees. I don’t want our people being killed like they’re killed out on the UP. I don’t want trains standing for hours.

I don’t want my engineers working 12 hours a day, eight hours off, and back on the train again like they’re doing all over the place. And I see it happening. I don’t want to see gridlock. I don’t want to see the northeastern United States being Houston, Texas.

I think that it would be a small sacrifice to have a safety task force, a federal safety task force, to investigate the legitimacy of the claims made by the carrier concerning safety.

CHAIRMAN MORGAN: Well, I certainly understand your concern about safety. And in this proceeding, you know, we did direct the carriers to
submit safety integration plans, and then --

MR. GODWIN: I read them.

CHAIRMAN MORGAN: -- if the merger is approved, there is a memorandum of understanding that has been entered into between the Board general counsel and the Department of Transportation which would ensure that the implementation plans are monitored and carried out, and that the FRA will be specifically involved in that monitoring.

So I certainly understand the concerns that you have about safety, and I think that the Board so far has responded to that. And this memorandum of understanding is intended to --

MR. GODWIN: That was --

CHAIRMAN MORGAN: -- take that one step further. And I don't know how you feel about that, but we do understand your concerns.

MR. GODWIN: I understand that that was done in the UP/SP merger, too, and it --

CHAIRMAN MORGAN: No, it was --

MR. GODWIN: It was not. Okay.

CHAIRMAN MORGAN: No.
MR. GODWIN: All right. Thank you.

CHAIRMAN MORGAN: And the only other question that I would have for you is that relative to your concerns -- and I'm going to discuss this a little bit more, too, with Mr. Miller -- but this notion of task forces and councils -- whatever we want to call them -- but an organization that is set up between labor and management to discuss issues such as safety implementation, and so forth, I think are -- I've had this conversation earlier in this hearing, but I think that is another way to -- if the merger is approved, to make sure that some of these issues are addressed. I don't know if you have any comments on that as well.

MR. GODWIN: Well, I've been negotiating with both the CSX and NS, and it's long, and it's arduous, and we're making some headway, not as good as what we should be doing. There has been no discussion whatsoever on safety, at least with the Conrail employees and their representatives in the BLE. There has been no -- any kind of communications stating that.
And I have met with operating people from
the CSX, and I have met with operating people from the
NS, and a plan like that has never been put on the
table. And I'm the chief negotiating officer for the
Conrail engineers. So this is all new to me.

CHAIRMAN MORGAN: Okay. Well, thank you.

MR. GODWIN: You're welcome.

CHAIRMAN MORGAN: Mr. Miller, you might
want to -- you talked about a couple of different
things. First of all, training I think was something
you talked about.

And clearly, if what we hear is correct,
which is that if the merger is approved there will be
-- well, there is hiring going on right now, I
understand, in some of these systems, and that if the
merger is approved there will be the need for -- there
is a plan for getting the workforce up to where it
should be to accommodate the traffic. Are you
involved in a formal way in making sure that through
this period that employees are properly trained?

MR. MILLER: The union has -- the union is
pleased with a training agreement that it has on a
large portion of CSX, because it’s very specific and it has worked very well. What UTU is trying to get the balance of -- CSX and NS to fully accept that as a modality, formalizing the training. And there are discussions going on about that.

CHAIRMAN MORGAN: I guess related to that, as we go through this process, if the merger is approved, the implementation process, there are concerns about safety and operations. I presume that you are involved in setting up some sort of formal process, if you’re not already in it, that would ensure that through this implementation process that safety is pursued.

MR. MILLER: Yes. That was the reason for the discussions, which have only occurred to date at a very high level. Our international president, one of our vice presidents, and the two vice presidents of labor relations of both CSX and NS -- that’s where the idea for a task force with respect to traffic and safety came up, on account of, frankly, an awful lot of what we’ve seen before this Board in oversight on UP/SP -- the necessity to get in and to involve the
union and to involve the employees.

CHAIRMAN MORGAN: So do you feel that those efforts are moving in the right direction? Obviously, if they’re occurring at high levels --

MR. MILLER: Yes, UTU has received sufficient assurance that that sort of thing is going to happen. It hasn’t taken precise shape, but it has been discussed at those levels.

CHAIRMAN MORGAN: Now with respect to safety, I’ve discussed with Mr. Godwin earlier about the memorandum of understanding between the Board and the Department in the event this merger is approved. I presume that that is a good step in your eyes, as it relates to safety?

MR. MILLER: Yes, we were aware of that and that was something that differentiated this proceeding from UP/SP and it was welcomed. But we felt the necessity at the very highest levels to get involved on the ground with the representatives of the operating employees and the carrier management, rather than to just rely upon that formal arrangement.

CHAIRMAN MORGAN: I think that’s
important. A lot of different efforts are going on to the same end. I think it's certainly important.

In monitoring the situation in the west, of course, we've been accumulating a lot of data and you all are very much a part of that, that effort out in the west. Is there any suggestion that you would have as we're looking to -- maybe he might want to answer that in -- if we do approve this merger and we do provide for monitoring, what sorts of data would be useful in that effort since we have been involved in that in the west?

MR. BROKENHOFER: Yes, I'd like to say it in a couple of different ways, if I could. I'm James Brokenhofer with the United Transportation Union.

First of all, right now we have Mr. Goode and Mr. Snow are lighting each other's cigars and telling everyone how everything is great. If this merger is approved they're going to be after each like Bosnia and Serbia trying to get traffic.

(Laughter.)

And that competition is kind of what a lot of people have talked about here. As you move forward
and you move forward and you consider this long list of things that everybody has brought before you today and yesterday these guys did an economic deal and when you start putting the conditions on it's what Clint covered in his testimony. If a balance is lost, then the other guy is going to get eaten alive. One of them is going to take advantage of the other. That's what competition is all about. So you play a very real role if you have conditions on this merger that changes the equation or changes the balance between the two carriers.

So I hope that as you consider all those people that are looking on Mr. Goode and Mr. Snow as being Santa Claus, I can assure you first that they're not. If they were, I would have gotten in line ahead of them.

(Laughter.)

And as you consider this, all of the people who have suggested that conditions be put on there at the applicants' cost, is that then changes the balance of the deal between the two carriers. And so when you do that it also cuts down the amount of
money that they can put into capital. If they’re going to have the service that’s going to be needed to compete, they’re going to need some money and some of the places that people are asking to go with the conditions will take away their ability to be able to put the physical plant in place.

Now I represent the victims. They’re going to cut us. They’re even going to cut our pay. They’re going to cut our work rules. They’re going to cut our security or they’re going to lay us off. And I would rather see that the companies go ahead and put in place the locomotives, the crews, the track to be able to compete and add to the security of our membership, rather than the money go towards some of the other things that the people have asked very nicely and I’m sure they are all justified. It’s just that I’m concerned that will destabilize them and then we become instead of people who get our lives added to a better life and more jobs is that we lose.

Now what -- I’m going to put on my good citizen hat here. That’s probably a challengeable position.
CHAIRMAN MORGAN: Aren't you always a good citizen?

(Laughter.)

MR. BROKENHOFER: In essence, that is the reports that you need. I went through UP/SP and it's about as much fun as when I had my head on collision in 1974 and I was in the hospital for months. It was very painful for everybody, the shippers, the communities. Lives were lost by Mr. Godwin and our members and I think if you could have gotten there sooner and you couldn't get there sooner because you didn't have the information. I would suggest that you look at what you're already getting from UP as a model and modify it, that you start getting reports now if not sooner about what the status of Conrail is between now and whenever this takes over. You want to make sure that Conrail doesn't fall off the track, doesn't fall into the dumper, that you need to be monitoring that. And then you need to do it on a kind of a division type basis of seeing so you have a basis to compare it with when the new guy takes over. Is this terminal? Is this area operating equal to what was
being operated while it was in Conrail's hands? That way when problems show up you will see a red flag immediately.

All of these railroads do something simpler, we call it a 5 AM or 7 AM report. It's just a report to the boss about hey, here's the problems of the last 24 hours. Here's where you are. Here's where you're not. Now I would suggest that they be very sensitive about releasing that information publicly. Quite frankly anybody out there that sees a DUPX cargo knows that's DuPont and if you see a 90 foot boxcar that's got CR on the side, it's probably full of auto parts. But they think it's a big secret and it's not. I guarantee if one of them doesn't deliver the Ford, they're calling the other one's marketing department to take the traffic.

I mean that's the marketplace, the reality. They think it's a secret. But they would be uncomfortable exposing too much information. So I would suggest some sort of redacted information. You don't need to know which train is being held out, but you need to know more than the system is holding 187
trains out. What you need to know is how many trains are being held at Cincinnati or how many trains are being held at a certain location. You need to know how many trains are being without crews or without power at a certain location because that's where you're going to need to be -- do the hiring. You need to know how many -- what the average work load is. If you have an average work load of 35 to 45 hours of Mr. Godwin's crews or my crews, they're going to keep working. When that starts hitting 55, 60, 65 and 70 hours, they're going to love it for about two or three months. They're going to like the overtime. And then all at once they're going to get tired and they're saying we ain't going any more. I want to be off. And what our good friends the employers will tell you well, they just don't want to work. Well, after three or four months of 60 to 70 to 80 to 90 hours a week, they're right. They don't want to work anymore.

But in that 90 -- when we see that number jump up from 35 to 45 hours to about 60 or 70, that's a red flag. You need to hire there. And so you need that information. You don't need to be sitting in the
office there waiting for some shippers to come in and
say this whole thing has melted two months, three
months, four months ago. As you look at this merger
and I'm assuming if you vote for it that you would
want to keep some sort of handle on it for a period of
time. And you're going to want to know very
operationally what's going on so that you can see that
red flag early on so some warning signals can go out.
This information will have no benefit to the union.
We're not going to make more money. We're not going
to have more claims collected. This is something that
if this agency is going to have to make these
decisions and oversee them and enforce them that I
don't want to see all of us get back into the UP/SP
where we're a year into something before we can dig
out. Maybe with proper information about what the
status is and I think you have to look at it terminal
by terminal and I think you have to include both of
that that's north of the Ohio and south of the Ohio,
not just the Conrail area because we have troubles at
North Platte. North Platte was not a part of the
Southern Pacific/Union Pacific merger, but it backed
up at North Platte. It backed up at Poccatello and it
backed up at Duluth. So you need it for all three
systems and you need it for both systems afterwards so
that you can make the type of judgments and the type
of enforcements or just file them as they come in. If
everything is going to be as good as both of these
nice gentlemen have assured everybody in the world
this is going to be the most successful merger ever,
is that you'll just file them and throw them away.
But without that information, and without those
reports I think you've got a difficult job.

CHAIRMAN MORGAN: Thank you. Just one
last question and then you -- you've been standing the
whole time here.

You mentioned dialogue and we've talked
about task forces, councils on some of these issues.
What could the Board do to encourage that continuing
dialogue? If we approve the merger, the dialogue
that's beginning here that has begun as it relates to
safety, as it relates to adequate training and so
forth, what could we do to continue that process?

MR. MILLER: I think at a minimum receive
periodic reports with respect to the dialogue so that that becomes part of your information base too and you may even see how that relates. I suppose the next level of involvement is to provide for some facilitation if dialogue is to break down, particularly in the areas of safety and traffic. So I would see at a minimum a reportage role would be desirable and perhaps the next level of some facilitation be available upon -- if not demand, at least if in your judgment it is required in a particular area.

MR. BROKENHOFER: Or someone could ask for that assistance, either side.

CHAIRMAN MORGAN: Thank you. Thank you all very much.

Next we're going to hear from Louis Gitomer representing APL Limited and Paul Donovan, Port Authority of New York and New Jersey.

MR. GITOMER: Madam Chairman, good afternoon, Chairman Morgan, Vice Chairman Owen. I'm Louis Gitomer and I'm appearing this afternoon on behalf of APL Limited and I'm really here to answer
any of your questions today.

APL is an ocean carrier that competes with
Sealand, an intermodal stack train operator that
competes with CSX intermodal. Both are CSX
affiliates. The proposed control and partition of
Conrail by CSX and Norfolk Southern is important to
APL because in 1996 APL paid over $600 million to ship
over 680,000 containers by rail in the United States;
150,000 of those containers moved between 15 points on
Conrail under a contract between Conrail and APL.

APL’s access to the northeast and reliance
on the APL contract, APL/Conrail contract is so
important that Mr. Timothy Ryan, the CEO and President
of APL traveled here from Korea for this hearing
today.

But, despite APL’s problem, APL
desperately wants CSX and the Norfolk Southern
transaction to work. APL is concerned that the
efficient system that it has established in
partnership with Conrail through the APL Conrail
contract will not survive this transaction as
currently proposed.
APL wants the right to negotiate modifications to the APL Conrail contract with CSX and NS pursuant to that contract so that APL can determine which of those two railroads handles which traffic that APL currently moves on Conrail. We negotiate about service, rates, confidentiality and other provisions. There are dozens of rates under that contract and as part of the negotiation give and take APL expects some of the rates to stay the same and some of the rates to come down and yes, we even expect some of the rates to go up and we’re willing to take that risk in the free market.

To paraphrase Vice Chairman Owen’s statement at the April 2nd Ex Parte 575 hearing, the private market must sit down and resolve its competitive differences. APL wants a chance to do just that. That’s all we’re asking for.

Indeed, this morning, Mr. Snow of CSX complimented the Board on the wisdom to seek private solutions to complex issues. Again, that’s what we’re seeking, a private solution and you, Chairman Morgan, applauded private sector solutions. That’s what we
want.

We are asking the Board to disapprove Section 2.2(c) of the transaction agreement between the applicants and not to override the anti-assignment clause in the APL Conrail contract so that we can negotiate individually with CSX and with Norfolk Southern. The Board has clear authority to modify the transaction agreement between the applicants under Section 1132(c). It's been done before in numerous cases.

APL is not asking for a physical restructuring of the transaction nor are we seeking to reduce the benefits of the transaction. The burden of proof to have the application, the transaction agreement and Section 2.2(c) of the transaction agreement approved is on the applicants. The applicants also have the burden of proof that the anti-assignment clauses in rail transportation contracts must be abrogated. They haven't met the burden of proof in any of these instances. There is no testimony from applicants on this issue, only their lawyers' argument. If Section 2.2(c) and the
abrogation of anti-assignment clauses are so important
where is the evidence? There is none. There is no
explanation in the application or in the rebuttal of
how Section 2.2(c) works. In facts, CSX and NS
disagree on some of the definitions and some of the
terms.

There is no evidence in the record that
the chaos mentioned yesterday by Mr. Snow and Mr.
Lyons would result if Section 2.2(c) were disapproved
and the anti-assignment clauses were allowed to stand.
Indeed, according to Norfolk Southern's Executive Vice
President of Marketing, Mr. Prilomen, there are other
ways for CSX and Norfolk Southern to allocate
Conrail's contracts in order to avoid operational and
administrative problems.

Contrary to Mr. Lyons' theory, there is no
evidence that the transaction must fail without
Section 2.2(c). There's also no evidence of the
number or value of contracts or how many contracts
there are between dual points, points which can be
served by both Norfolk Southern and CSX. Although APL
did seek some of this information in discovery and was
rebuffed by the applicants and the Administrative Law
Judge.

Disapproving Section 2.2(c) and not
overriding anti-assignment clauses will avoid the
anti-competitive effects of competitors sharing
commercially sensitive information and competitors
agreeing to the territorial division of traffic as Mr.
Smith of the Department of Transportation mentioned
yesterday.

Moreover, APL’s main competitor, CSX
intermodal and Sealand, would have access to our most
sensitive commercial information unless we can
negotiate additional protections in our contracts with
CSX.

Section 2.2(c) is inconsistent with the
APL contract itself, especially the inequities clause
which requires renegotiation where there is a
substantial change in circumstances such as the
control and then partition of Conrail. Without
negotiations, there could well be operating problems.
The APL operation is very complex. Applicants should
work with us, not tell us how they will move our
traffic.

The Board has no jurisdiction to preempt rail transportation contracts. Section 10709 specifically removes contracts from the Board's jurisdiction and explicitly states that contracts shall not be subject to Part A of Subtitle 4 which includes Section 11321(a). This has been the position of the ICC, the Board and the Courts have taken since the Staggers Act in 1980. We urge you to continue to follow that precedent.

CSX has mistakenly tried to tie APL's lease of the South Kearney Yard from Conrail for $1 a year to our rail transportation contract with Conrail. There is no tie and let me explain to you why APL pays $1 in rent. It's very simple. In 1988, we took -- we leased the facility from Conrail. At that time it was just dirt, nothing more. APL then spent $25 million to improve the facility to its state of the art intermodal facility. That's why we spend $1 a year, because we have $25 million tied up in it and the assets there revert to the owner of the property at the end of the lease. So if you just use simple
division, we're probably paying over $1 million a year in rent.

In fact, if CSX or Conrail would be willing to reimburse APL for its costs in constructing the facility at South Kearney, APL would be willing to pay market based rent.

South Kearney is critical to APL's operations and we believe that pursuant to the applicants' transaction agreement that APL and we think NS also believe this, expect CSX and Norfolk Southern to both have accept to South Kearney. That may not be the case based on the recent arguments of CSX.

APL wants to negotiate the allocation of its traffic under the APL Conrail contract with CSX and with NS in compliance with the contract in order to assure continued good service, to enhance the confidentiality of the contract, because of our competitive relations with the applicants' intermodal affiliates and to develop a good business relationship with CSX and NS among other things. In order to accomplish this, the Board should disapprove Section
2.2(c) and not abrogate anti-assignment clauses, but instead permit shippers like APL to choose which railroad they will use.

Thank you.

CHAIRMAN MORGAN: Thank you. Do you have anything to add?

MR. RYAN: No ma’am. I’m just here in case there’s a question counsel can’t deal with.

CHAIRMAN MORGAN: Okay. Let me -- we’ll hear from you now Mr. Donovan and then we’ll go to questions.

MR. DONOVAN: Thank you, Chairman Morgan, Vice Chairman Owen. I’d like to start out by thanking you for allowing me to rearrange from yesterday to today so I could be here. I appreciate it. Thank you.

On April 10th the Port Authority of New York and New Jersey filed NYNJ20. This is essentially an attached agreement, a settlement agreement between the Port Authority signed by its Chairman, Louis Eisenberg and its Executive Director, Robert Boyle, Chairman Snow and Chairman Goode, with respect to the
issues that were concerning the Port Authority in this proceeding.

Consistent with the terms of this agreement, we hereby wholly support the primary application. We didn’t come to this decision easily. As you know, you issued a couple of decisions, including decision 44 which required the applicants come forth with a whole new North Jersey shared asset operating area, operating agreement. It was painful. The applicants hated us. We drove them nuts. We got a lot of information. Eventually, we worked with them very closely. We’re continuing to work with them very closely and I have no question in the future we will continue to work with them very closely.

I think we’ve heard now about Houston about 55 times today. They don’t want a Houston. We don’t want a Houston. We’re going to share information. They’re going to share information with us. We have an on-going relationship. We’re going to work very closely and assist the Board to the extent you need our assistance in making this thing work in the North Jersey shared asset operating area.
Thank you.

CHAIRMAN MORGAN: Thank you and I guess Mr. Donovan, what I would ask you is that given the settlement that you have reached, the concerns that you have about operations or that you have had are addressed by way of the agreement. You’ve set up, I know monitoring and so forth within that agreement.

MR. DONOVAN: They’re addressed, but they’re not resolved. The resolution will take time.

CHAIRMAN MORGAN: But the mechanism is there to address the fears that you had?

MR. DONOVAN: That is correct. That is correct.

CHAIRMAN MORGAN: Mr. Gitomer. A couple of questions. Given the position that you are taking in this matter, I presume then that the concerns that have been raised about the transition period and operational confusion that might occur as contracts are running out and the scurry to figure out who is going to be handling the traffic on another contract doesn’t bother you? In other words, the argument has been made that the abrogation of contracts needs to
occur or nonassignability of contractual -- contracts needs to occur for operational reasons. I presume you don’t agree with that?

MR. GITOMER: I absolutely disagree, Madam Chairman for a number of reasons. First, you’re correct, the argument has been made, but there’s no evidence. There is one contract in the record before the Board and that is the APL contract. If the applicants are saying that they cannot allocate the APL contract without Section 2.2(c) without there being operational problems over the entire Conrail, Norfolk Southern and CSX system, then I think we have a much larger problem than just the allocation of contracts.

Secondly, as the Department of Transportation said yesterday, there are a number of -- there may be, we don’t know because there’s no evidence as to what the contracts contain in the record. There are contracts between two points where Norfolk Southern will be the railroad providing service. There are contracts between two points where CSX will be the railroad providing service and I think
that's pretty easy for the two of them to figure out.
Now the area of some concern is where both CSX and
Norfolk Southern can provide service and let me give
you an example from APL.

APL's main move of traffic is between
Chicago and Northern New Jersey. Conrail today moves
over 90,000 containers a year for us. After CSX and
Norfolk Southern acquire the control of Conrail and
partition Conrail, both of them will be able to
operate between Chicago and Northern New Jersey.
Which one will serve APL? We don't know. And we
don't think they know even under Section 2.2(c). In
depositions of their two operating—well, let me go
back to Section 2.2(c) first where both NS and CSX can
provide the service, Section 2.2(c) says it will be
divided based on essentially efficient operations
which of the railroads can provide the more efficient
operations? During depositions of the two operating
witnesses for CSX and Norfolk Southern, they were both
asked which one of you will be more efficient between
Chicago and the Kearney Yard of APL in Northern New
Jersey? Neither one would commit to which one was
more efficient. If the operating witnesses don’t know
which operation is going to be more efficient, how can
we figure it out? How can the railroads figure it
out? We want to be able to sit down with the two
railroads and work with them and let APL, the shipper
decide who handles the traffic.

CHAIRMAN MORGAN: Now we’ve heard from the
Department of Transportation an alternative proposal,
I guess, rather than a complete override of
nonassignability contracts, a mixed bag in essence.
I don’t know if you listened to their testimony?

MR. GITOMER: Yes, I did.

CHAIRMAN MORGAN: What is your position on
that proposal?

MR. GITOMER: We believe that the
Department of Justice is probably --

CHAIRMAN MORGAN: Actually, it’s the
Department of Transportation.

MR. GITOMER: Excuse me, Department of
Transportation is probably pretty close to being right
on that point and where service can be provided by
either railroad, the shipper should choose.
CHAIRMAN MORGAN: And that’s the main point?

MR. GITOMER: That is their main point and certainly that is APL's main point.

CHAIRMAN MORGAN: Thank you. Questions?

VICE CHAIRMAN OWEN: No questions.

CHAIRMAN MORGAN: Thank you all.

MR. GITOMER: Thank you very much for your time.

CHAIRMAN MORGAN: I think what we're going to do now is take a 20 minute break. Come back about 25 after 5 and then we will go to the applicants for their rebuttal.

(Off the record.)

CHAIRMAN MORGAN: Okay. We are on the last group.

As I understand it, Mr. Allen, you have 45 minutes. And Mr. Lyons and Mary Gay Sprague and Samuel Sipe have 45 minutes.

MR. ALLEN: Thank you, Madam Chairman -- Chairman Morgan, Vice Chairman Owen.

As we did in our briefs, my rebuttal will
focus on the arguments that have been made that are of principal relevance to Norfolk Southern, as well as on some of the issues that are common to all of the applicants. And I’ll address those arguments largely in the order that they’ve been presented here.

Before discussing the specific arguments of various parties, I would like to make some general points that I think are relevant to most of them. First, as has been discussed, the scope of this transaction and its public benefits are enormous and unprecedented. Norfolk Southern and CSX are making tremendous capital investments to bring about those benefits, not only through the price they are paying for Conrail, but also in the hundreds of millions of dollars of capital expenditures they will be making to improve and add to the infrastructure of their rail systems.

Furthermore, all of the many settlements applicants have reached with parties entail substantial additional costs and commitment of resources on the part of the applicants. This is all part of a tremendous resurgence in the rail industry
investment in rail infrastructure that is going on now in the industry that the rail industry has not seen for many decades.

And the reason for that is that thanks to the policies of Congress, and this Board, and the ICC, people are willing to invest their capital in an industry that they perceive to have opportunities for growth and for profits. That's why I submit that it is extremely important that this Board adhere to and continue to apply the policies that it and the ICC have consistently applied for the last 20 years.

We have seen that even rumors that Congress or this Board might change those policies can have serious repercussions in the capital markets. That's particularly so with respect to the Board's policies with respect to railroad consolidations and the imposition of conditions on consolidations. Those policies were put into the Board's regulations 20 years ago, and they have been consistently applied in every rail merger decision since then.

As we've seen over the past two days, when a transaction like this is presented to you, there are
great pressures to add more to the pie for all sorts of parties, other parties, all of whom insist that their situations are unique. It’s critical for the Board to realize, as I’m sure it does realize, that every one of the conditions you’re being asked to impose imposes a cost on this transaction.

There is no such thing as a free lunch. What you give to one company you take away from another. What you give to one community or region you take away from all other communities or regions.

What the Board has to keep firmly in mind, I submit, is the very reason this agency was created a hundred years ago, and why decisions like this are not left to the legislatures of various states or the mayors of various cities. This agency’s job, as I’m sure you are aware, is to protect the national interest in a strong transportation system.

Turning now to the claims and requested conditions of the various parties, I’ll begin with the contentions and claims that are raised by the broad shipper groups, National Industrial Transportation Group League, the Fertilizer Institute, CMA, and
With respect to the NIT League and the Fertilizer Institute, although we have reached a settlement with them, NIT League and the Fertilizer Institute did reserve the right to argue a number of general points. The first point has to do with the so-called acquisition premium that applicants Norfolk Southern and CSX assertively paid for Conrail.

NIT League, in common with a number of other parties, argues that CSX and Norfolk Southern should not be permitted to include the full acquisition cost of Conrail in their accounts for purposes of revenue adequacy determinations and jurisdictional threshold determinations. This contention is without merit for a number of reasons.

First of all, there is simply no basis for the premise of the argument that applicants have paid some sort of premium over the fair market value of Conrail. Indeed, I submit that it’s ludicrous to suppose that CSX or Norfolk Southern, in the competitive markets bidding against each other, paid any more for Conrail than they genuinely believed it
was worth on the fair market -- on the market.

Indeed, for the Board to conclude otherwise, and to accept the premise of this argument, would really be second guessing the capital marketplace, and it would also be inconsistent with the fairness determination that the Board is required to make that the transaction is fair to the stockholders of all the parties.

Second, the Board's rules governing the treatment of acquisition costs for these purposes in the accounts of railroads were determined -- was decided in an industry-wide proceeding not many years ago, and the Board adopted the rule that was urged upon it by the National Industrial Transportation League and others.

We think the rule that the Board adopted, or the ICC then adopted was correct for the reasons that we've elaborated at some length in our brief in our rebuttal. But in any event, as DOT has I think correctly recognized, if there were any warrant for reconsidering those rules, clearly it would not be this proceeding. It should be in some proceeding that
would apply to the industry at large. So, in short, we submit there is no merit to the acquisition premium argument.

The NIT League and others are also arguing that in this case the Board should impose conditions that change for Norfolk Southern and CSX -- would change the rules concerning the determination of market dominance and would impose some rate caps on certain traffic movements by Norfolk Southern and CSX in certain conditions.

Again, we submit that there is simply no merit to those requests. They would amount to a substantial reregulation of one segment of the railroad industry -- namely, Norfolk Southern and CSX. There is no showing made by any of the parties advocating this rule that the relief is in any way related to any anti-competitive effect of this merger.

As many people have noted in this -- over the last two days, this is the most pro-competitive merger in history, or certainly in recent history.

The Chemical Manufacturers Association is also concerned about gateways. They claim that they
are concerned that after the transaction, gateways for east-west chemical movements may change from Chicago and St. Louis, or wherever the current principal gateways are, to other gateways that would be on a more direct route between origin and destination.

Why they’re concerned about this is somewhat mystifying, but they claim that they’re concerned that the gateways will change but the rates will go up. That is, that the routes will become shorter but the rates will become higher. That is a contention that simply makes no economic sense. It’s almost preposterous on its face.

Furthermore, despite CMA’s disclaimer, the relief they want for this alleged concern they have, would really amount to the reimposition of conditions that the ICC many, many years ago used to impose, the so-called DT&I conditions, which froze gateways where they were, and which the ICC very correctly determined, I think in 1980 or shortly thereafter, really made no sense and has squarely rejected.

CMA and SPI also seek a number of conditions dealing with issues that are covered in the
NIT League settlement agreement, including conditions, one, prescribing switching charges; two, dealing with the allocation of Conrail contracts; three, implementation of the merger. There is no merit to any of these requested conditions for the reasons that we have discussed, again, in some detail in our pleadings.

Equally important, I would simply state today that we submit that for the Board to impose conditions on subjects that are dealt with in the NIT League agreement, that go beyond the terms of that agreement, or that would rewrite them in some way, would really be very destructive of the process of private negotiation and settlement that this Board has very wisely encouraged, unless the Board finds that somehow the terms of those agreements are plainly unreasonable.

But unless the Board does find that the terms are plain and reasonable, for them to impose conditions that go beyond those terms really sends exactly the wrong message. It would send to the shipper groups who negotiate with railroads in these
kinds of transactions the message that, well, let’s let one of our group reach an agreement with the railroads, and the others will see what we can get out of the STB.

And to carriers it would say that there is really no purpose in sitting down and negotiating with any of these groups. If we reach a settlement of some kind, you know, the ICC is going to feel free to rewrite it if some other group persuades them that, well, maybe there is better ways to do it.

So, again, I submit to you that unless you think that the terms of the NIT League agreement are plainly unreasonable in some respect, you should reject the request for conditions that would rewrite or go beyond it.

CHAIRMAN MORGAN: I would just say, Mr. Allen, that I think in past cases, as you know, we have taken negotiated agreements, and we have added to them as appropriate.

MR. ALLEN: As appropriate, and I don’t deny your authority to do so, or even the appropriateness of doing so in some cases. But I am
simply saying that I submit that there -- and I think
the Board recognizes this -- that a large measure of
deference should be given to these agreements in order
to encourage this process.

Turning now to some specific individual
shipper claims that are of particular relevance to
Norfolk Southern -- first, the claims of Eighty-Four
Mining Company, which as you may remember has a coal
mine in Pennsylvania that is outside of the
Monongahela coal fields, the common area.

Our position simply is that the
transaction will have no adverse competitive effect on
Eighty-Four Mining. Eighty-Four Mining’s claim is
that it will be competitively harmed and not by the
reduction of rail competition now available to it, but
vis-a-vis mines with which it competes in the
Monongahela coal region.

We think, first, that there is no factual
basis for that claim, and in that regard I would note
that there is an announcement very -- just a week or
so ago that Eighty-Four Mining Company’s parent has
been acquired by the Consol Group, which owns many of
the mines in the Monongahela itself.

Consol purchased Eighty-Four Mining's parent obviously aware of the fact that it will have access, if this transaction is approved, by Norfolk Southern, and obviously was of the view that there was -- or evidently of the view that the market for Eighty-Four Mining -- the prospects continue to be bright.

Second, even if there were some basis for Eighty-Four Mining's concern, the Board's decisions are clear and very consistent that that is not the kind of competitive harm for which conditions should be imposed.

In numerous cases parties have made the same kind of claim that, well, this transaction isn't going to hurt me directly, but it's going to help my competitor more. So please give me a condition that puts me on an even keel with the competitors, and the Board has quite properly recognized that that's not an appropriate basis for conditions.

Basically, Eighty-Four Mining is seeking to improve its competitive position. And as I stated
yesterday, this is squarely in conflict with the bedrock principle of the Board’s policies regarding conditions. And as I said yesterday, that policy is clearly correct.

Eighty-Four Mining’s contention and its circumstances is basically indistinguishable from a dozen or so other parties you heard from yesterday who are likewise seeking expansion of the shared asset area or additional access to additional rail carriers for the purpose of putting them on a par with their competitors.

And if you accepted the claim of any of those, there is really no basis for denying the similar claims of all other similar parties. And this points up, I think, the truth of what I was trying to say yesterday. Where a transaction like this itself causes the harm, there’s a rational basis for imposing a condition to cure that harm, and there’s a rational boundary for the condition to be imposed. That is, one that is sufficient to remedy the harm.

But if you got away from that principle and started imposing conditions that were not designed
to remedy harms caused by a transaction, there really
is no rational basis for the condition you impose, and
no rational boundaries for the conditions -- for
imposing -- for the conditions that might be imposed.
I mean, where would it end?

You can't really say to the State of New
York, "Okay. We're going to do it for you," but then
say to the State of Rhode Island, who is making the
same claim, "We're not going to do it for you." I
mean, what's the difference?

CHAIRMAN MORGAN: Well, I think the
challenge that we have right now is we've been accused
of taking a very narrow legalistic approach to a lot
of issues, faced with changing policies that our
implementation of the law should reflect. And I think
that's the challenge that we face.

MR. ALLEN: Well, you have been accused
perhaps by some who, of course, would like to utilize
transactions like this to improve their condition.
But I don't think the accusations have been fair. And
I think you've been faithful to your basic and
historic mission of protecting the national interest
in the national transportation system by your adherence to these policies that have been consistently applied.

CHAIRMAN MORGAN: But I think we're also being told that this is an opportunity to use the law in a way that promotes the policy of competition that people today feel we should be promoting.

MR. ALLEN: Well, I think it's an opportunity that is very dangerous for all of the reasons that I have just said. The rail industry today is the result, I believe, of the policies of Congress and the ICC and the Board, which have given investors and others a sense that this is an industry that has growth potential, and that has potential for profits.

And that's why we are seeing this huge investment of capital into this industry today. And I think it would be a very serious mistake to heed those who are saying, "Well, here's an opportunity to cure world hunger." I think that would be a very serious mistake. I don't know on what basis the Board could suddenly say, "Well, we've done it this way for
20 years, but now we’re persuaded by Senator X or Congressman Y that we need to be more liberal in our policies."

CHAIRMAN MORGAN: Well, I think at the same time government entities need to be flexible and need to apply their law as the world suggests that they do. So --

MR. ALLEN: Well --

CHAIRMAN MORGAN: It’s not quite that easy. I’m not necessarily disagreeing with you. But it’s not quite that easy.

MR. ALLEN: Well, I know your job is not an easy one, but there are very important issues at stake here.

So going on just down the list, Millennium Petrochemicals has several complaints, none of which are transaction-related. Its main concern relates to its regional distribution -- in fact, its concern is somewhat like Eighty-Four Mining’s. Its main concern relates to its regional distribution center at Finderne, New Jersey -- a facility which is now served by Conrail and which, after the transaction, will be
served by Norfolk Southern.

Like many other parties, Millennium Petrochemical would like its facility to be included in the North Jersey shared asset area. I’ve discussed our position on that and won’t repeat the discussion except to say that Millennium has made simply no showing that the transaction will in any way reduce the rail service or competition that is now available to it.

American Electric Power is asking for conditional conditions with respect to its Cardinal Plant on the Ohio River. There is no basis for this request. The Cardinal Plant now today has access to three railroads -- the Wheeling and Lake Erie, and Conrail and CSX via trackage rights over the Wheeling and Lake Erie.

More importantly, the plant is served by barge on the river, and, in fact, received 93 percent of its coal in 1995 by barge. Mr. McBride argued yesterday that the barge service is irrelevant to his claim, but I submit that it is quite relevant. The Board’s policies on conditions are that they will not
be imposed unless necessary to remedy a significant harm to competition.

Given the fact that after the transaction the plant will continue to have rail service and access to barge service in three railroads, there is simply no significant harm to competition with respect to that plant.

Metro-North commuter rail, again, has a concern that really is not transaction-related. Conrail has a line from Suffern to Port Jervis, New York, that Metro-North commuter rail currently uses. The operator is New Jersey Transit. Under the New Jersey metro rail’s agreement with New Jersey Transit and Conrail, the line is dispatched by New Jersey Transit, and there is preference for passenger trains.

And there is no showing that when the line goes to Norfolk Southern, if it does, that there will be any change whatever in that arrangement. And there’s no showing that Norfolk Southern will be any different from Conrail with respect to its relations with Metro-North.

Metro-North has asserted that it would
like to own the line, just because it feels like owning it, I guess. Well, that's all very nice, but that's not sufficient basis, I submit, for the Board to force Norfolk Southern to turn over its line to another party. We have, and are willing, obviously, to sit down and discuss concerns with Metro-North, and have done so and will continue to do so.

The Philadelphia Belt Line Railroad, in its filings, sought conditions that would basically -- Philadelphia Belt Line is a 16-mile line of railroad in Philadelphia in two -- has two segments, the north belt and the south belt. And it sought conditions in its filings that would give it -- would give future railroads that come into Philadelphia access to its north belt line.

As we've shown in our rebuttal filing, there is simply no basis for that claim. Right today, the north belt has access only to one Class 1 railroad, Conrail. After the transaction, it will have access to two. There is no change in circumstances with respect to the south belt line, and it's simply not transaction-related.
Yesterday, Mr. Spitulnik indicated that, well, he was just interested in the Board declaring that something called the Philadelphia Belt Line principle be declared by the Board to be inviolable. That is a principle that I think appears in a number of agreements over the years in different forms. We think there’s no merit to that request for relief.

But in any event, the latest form of that principle, as we understand it, specifically provides that it doesn’t give any additional access to any railroad to the Philadelphia belt.

CHAIRMAN MORGAN: Well, my understanding on that issue is that they don’t want the principle, as they see it, to be inadvertently overridden somehow by this transaction. Do I understand that? Is that the way you understand their argument?

MR. ALLEN: That’s what I understood Mr. Spitulnik to say. I don’t --

CHAIRMAN MORGAN: So if there was a statement made that that was not the intention, is that a problem? If it wasn’t the intention, then --

MR. ALLEN: I think the problem is that
I’m not sure what Philadelphia Belt Line principle and what formulation of it he has in mind. I don’t think that there’s really any basis in the record for the Board to make that kind of a declaration. It will have whatever effect it has on any agreements that may exist. I can’t think of any reason why this transaction would affect it, but I don’t see any basis for the Board to make that declaration.

The Reading, Blue Mountain Railroad is another railroad that has some relevance to Norfolk Southern. It is complaining about a provision in its agreement with Conrail. It is Conrail spinoff, I gather, that has some restrictions on the kind of traffic it can move, and the amount of traffic, and who it can interchange with. And it wants to have that restriction lifted.

Again, there is no showing by Reading, Blue Mountain that this transaction has any effect on that provision. Norfolk Southern is going to step into Conrail’s shoes, and it’s not going to change the situation in any respect for Reading, Blue Mountain.

The Illinois Port District’s basic
complaint is that -- and the remedy it seeks to address don’t relate to the effects of the transaction. Instead, they relate to the court’s complaint about Norfolk Southern’s existing service to the east side of the Port of Chicago, and they want the Board to grant other carriers trackage rights in order to bolster that service.

There is, again, no connection with this transaction, and, indeed, there are serious operating problems that we identified in our rebuttal statement with respect to allowing additional carriers to operate over this extremely busy section of track.

Their counsel yesterday said, well, he didn’t see why it made any difference what color the locomotives were. I don’t know how much experience he’s had in the rail industry, but it makes a great deal of difference whose locomotives are operating over which lines. And this would cause significant operational problems.

Two other railroads that have sought conditions that are relevant to Norfolk Southern are the Wheeling and Lake Erie and the Ann Arbor Railroad.
The Wheeling and Lake Erie asked for a long shopping list of conditions, and the basis for its claim is that the transaction will have very adverse effects on its revenues and that it needs these conditions basically to stay alive and continue to provide service. And you've heard a number of parties from the State of Ohio echoing the same arguments.

There are some very important principles, we submit, at stake here with respect to the Wheeling and Lake Erie. First of all, the record shows, I believe, that Wheeling and Lake Erie's financial problems are long-standing and have nothing to do with this transaction. And the Wheeling and Lake Erie also in our submission, as we have stated in some detail, greatly overstates its projected revenue losses.

But most importantly, the Wheeling and Lake Erie has submitted no evidence that its shippers will suffer a loss of rail competition or a loss of essential services. Indeed, there is no real claim by the Wheeling of loss of rail competition by its shippers. In fact, it admitted in its discovery responses that it couldn't identify any such
So its claim is that there's going to be a loss of essential rail services, but it simply makes no showing of that as required by the Board's decisions. And this is an important principle. In the old days, the ICC used to routinely protect carriers and their revenues from the effects of transactions like this. In the late 1970s and early 1980s, the ICC made a fundamental and historic change in the way it thinks about rail mergers and its policies on conditions.

As the Board said in its decision in the BN Frisco case, I believe in 1980, railroads do not have a proprietary right in the future to the traffic they've carried in the past. Therefore, we need not protect railroads from the possible loss of traffic through diversion to a merged railroad.

On the contrary, protecting competing railroads tends to limit a shipper's ability to obtain the best service from the merged company, and dampens the incentive for competitive responses to the merged company from existing railroads. While a shift in
traffic from one line to another may eliminate the need for service over the original line, this simply demonstrates that the earlier service is no longer essential.

The consignor or consignee has the ability to determine in most instances, and in most instances it does determine which railroad will receive traffic over specific routes. For that reason, the Board, recognizing that the mere protection of carriers can, in fact, be anti-competitive if you’re just trying to protect their revenues, have required carriers who are claiming that there’s going to be a loss of essential services to really present evidence, convincing evidence, that shippers are, as a result of its going out of business, going to lose essential rail services, which means, as the Board has -- and the ICC have said in its decisions, they have to show that there are no other transportation availabilities available to the shippers in question.

And the ICC has denied the claims of carriers seeking conditions where they have not shown that there are -- that its shippers don’t have

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Well, the Wheeling really has made no showing to that effect, and the principle that underlies the Board's decisions is a very important one, because if the Board inappropriately simply goes back to the policy of protecting existing carriers, that can have a very serious effect.

CHAIRMAN MORGAN: Let me just stop you right there --

MR. ALLEN: Yes.

CHAIRMAN MORGAN: -- because Wheeling and Lake Erie is --

MR. ALLEN: Yes.

CHAIRMAN MORGAN: -- obviously important to your --

MR. ALLEN: I understand.

CHAIRMAN MORGAN: -- railroad. Are you saying that you do not agree that there are any diversions associated with this transaction that would affect Wheeling and Lake Erie?

MR. ALLEN: No. We're not saying that.

The diversions, we have estimated, are much smaller
than the diversions that Wheeling claims.

CHAIRMAN MORGAN: Now, Wheeling and Lake Erie feels that right now they have a friendly connection with NS, but post-transaction they will not have a friendly connection with NS.

MR. ALLEN: That's correct.

CHAIRMAN MORGAN: How do you feel about that?

MR. ALLEN: I think that's correct. That's correct. If I can put the map up, perhaps that might help to discuss this issue.

Is that focused? Can we focus it any better?

Well, the colors aren't very good, but the dark line that you can see there is basically the Wheeling. And the other lines are either Norfolk Southern or CSX via trackage right.

And you can see that the Wheeling goes as far west as Bellevue and Carey, and at Bellevue today it connects with the Norfolk Southern, which it regards as a friendly connection. And it will, to the extent that those terms are meaningful, will lose that
friendly connection after the transaction.

The basic point of what I was saying earlier is that the Wheeling has simply presented none of the evidence that this Board's decisions clearly and correctly require to make an essential services claim.

If you look at the map, you will see that almost all of the principal markets served by the Wheeling are also served by other railroads. And, of course, this is in a -- in the east, and there is also highway service available to all of the shippers. And so just looking at the map we think illustrates that, in fact, there would be -- even if the Wheeling went out of business, there would be no loss of essential services to any shipper.

So there is no justification whatever for the laundry list of conditions that the Wheeling has sought. I mean, it sought trackage rights all the way to Chicago. And so we submit that if the Board follows this precedent, it would simply deny the Wheeling's requested conditions.

However, it is true that the Wheeling will
lose a friendly connection at Bellevue. And in the spirit of Chairman Morgan's statement this morning that she hopes that the railroads will respond to the concerns that have been expressed, we have discussed this issue and are hereby responding by saying we would not object to the Wheeling's getting trackage rights from Bellevue to Toledo to connect there with all the railroads serving Toledo, including the Ann Arbor, and including the Canadian National, a transcontinental railroad. And so we would not have an objection to that, even though we would otherwise believe it not to be competitively justified or justified under the Board's precedents.

Does that answer your question?

CHAIRMAN MORGAN: Yes, it does.

MR. ALLEN: Okay.

(Laughter.)

CHAIRMAN MORGAN: You've heard me answer it -- asking questions about Toledo. You've --

MR. ALLEN: Yes. We heard those questions loud and clear.

CHAIRMAN MORGAN: That's good.
(Laughter.)

It's hard to misunderstand me, you know.

(Laughter.)

MR. ALLEN: Ohio stone shippers -- we have also heard considerably about Ohio stone shippers and think we have, likewise, a response of the same nature.

Originally, in this case, there were three Ohio stone shippers that were seeking conditions. Their basic contention is that they'll be suffering because they're going to be going from single-line service to joint-line service, and they have asked for various conditions that would ensure that they would continue forever to get single-line service anywhere they want to go.

The NIT League agreement, of course, has dealt with the question of shippers that are going from one railroad to two, and we believe provides a reasonable accommodation for those shippers.

With respect to the three Ohio stone shippers that have presented requests for conditions in this case, we have had discussions with them with
respect to their problems and have tried very hard to work out their problems. We have not succeeded in reaching an agreement with all of them.

However, for perfectly valid and independent commercial reasons, Norfolk Southern and CSX concluded that, well, indeed, if a reciprocal grant -- not a reciprocal, but a grant to each other of operating rights would make sense, a grant to each other of operating rights that would permit one or the other of them to continue providing single-line service to those three shippers on the -- for the movements that they are currently moving, would make sense to both of our railroads.

Because of, really, the unique nature of this transportation -- its fairly short haul, it's a very low-rated commodity -- and for that reason, we have agreed among ourselves and have reached an agreement with ourselves -- between ourselves -- to give each other operating rights to permit single-line service to these three shippers.

We have offered each of those shippers to sign on to that agreement. One of them -- Martin
Marietta -- has done so, and has, therefore, withdrawn from this proceeding. The other two are not satisfied even so -- even still with what we have agreed to do. I think they -- I suppose that they want more and want to be able to have single-line service for the rest of time to wherever they may want to go.

We don’t, with all respect, think that’s a reasonable request. We think what we have done, what we have agreed with CSX to do, is a reasonable response to their concern. And to the extent that doesn’t satisfy them, we think the provisions in the NIT League agreement should. And that’s what we have done with respect to those stone shippers.

I leaped ahead a little bit when I finished talking about the Wheeling. I meant to talk right thereafter about the Ann Arbor. The Ann Arbor makes a similar claim to the Wheeling. It is a claim that -- their basic claim is that the transaction will hurt them and thereby jeopardize essential services.

As in the case of the Wheeling, we believe that the Ann Arbor has simply made no case for essential services. They have not identified any of
their shippers who would be losing -- or even explained how any of their shippers would lose transportation services if the Ann Arbor went out of business.

We also think, as we do with the Wheeling, that the Ann Arbor's stated claims about adverse impact on them are widely overstated.

Furthermore, the Ann Arbor really has made no showing -- they've shown that -- or they've claimed that they will be losing substantial revenues, but they have made no showing as to what effect that would have on their bottom line, and it made no showing that even if they lost all those revenues, which we don't think they will, that they would go out of business. So with respect to the Ann Arbor, we do think that their claim is simply without merit.

If the Board imposes the condition which we have now said we will agree to with respect to the Wheeling, that would give the Ann Arbor a connection with the Wheeling at Toledo, and we think would be of substantial benefit to the Ann Arbor.

One other point I would make about the Ann
Arbor is, as we have stated in our brief, the claims about the Ann Arbor -- the claims about the Ann Arbor's loss of revenues really is overstated because it doesn't reflect a contract that they recently obtained with Chrysler Corporation, the terms of which are confidential and I can't discuss here in the open meeting, but we have discussed them in our pleadings. And we think that they clearly undermine any claim of serious jeopardy to the Ann Arbor.

CHAIRMAN MORGAN: Well, my understanding is that they are concerned about performance under that contract if the merger is approved.

MR. ALLEN: Their concern -- I don't know why they would be concerned about the performance of the contract. They have -- the terms of the contract, it seems to me -- again, I can't go into them in detail -- give them -- should give them every assurance that they've got a long-term relationship with Chrysler.

How they're concerned or why they're concerned is not at all clear to us. So we don't think there's any basis for it.
The Delaware DOT wants the shared asset areas expanded to include the Port of Delaware. This is the same kind of claim made by many other parties, and we think it has no merit. But beyond that, we would say we think the Port of Wilmington will be very substantially benefitted by this transaction. It’s going to be served by Norfolk Southern -- a carrier with a far greater reach than Conrail which now serves it.

And it is a reach into the southeast for traffic that Conrail really had very little interest because it was a short move for Conrail. And we also have very substantial experience dealing and serving with and promoting traffic in ports, so we think Wilmington is going to be substantially better off.

CHAIRMAN MORGAN: But now, I heard earlier today that one of their concerns is this switching charge that they feel is too high. You heard that, too, I presume?

MR. ALLEN: Yes.

CHAIRMAN MORGAN: How do you feel about that in terms of its competitive effect?
MR. ALLEN: Well, I believe that -- I'm not sure what the switching charge they're referring to is. And I may be wrong in this, but I think that the agreement we have made in the NIT League agreement with respect to switching and switching charges would apply to Wilmington as well as it applies to all other parties, I believe.

Finally, I'd like to address briefly the labor issues that have been raised by some parties. With all respect, we submit that the labor issues are not significant in this case, notwithstanding the volume of words, both literally and figuratively, expended on them.

As I mentioned, applicants have settlement agreements with two of their largest unions -- the UTU, from whom you've heard, and the BLE -- both of whom you've heard from today. And they're in the process of negotiating implementing agreements with them. In fact, we have concluded now implementing agreements with three other unions -- the Boilermakers, the United Railway Supervisors Association, and the National Conference of Firemen
and Oilers just most recently.

Furthermore, the impact of the transaction on employees in this case is relatively modest. Proportionately, the adverse impact is significantly less than in the two most recent mergers -- UP/SP and BN/SF. There will be very little impact on the operating crafts, unlike the UP/SP case.

Also, the projected impacts are likely to be short-term. Most employees who lose their positions are likely to be offered jobs within three years due to normal attrition.

The applicants' proposed standard New York Dock conditions for any adversely affected employees, and there is simply no warrant in this case for any more. The New York Dock conditions are by far the most generous of any industry in the protections in any U.S. industry. They have been consistently applied in every merger case since they were adopted, including UP/SP, and there is no basis for any different treatment in this case.

The arguments of the unions that call themselves the Allied Rail Unions, that the Board's
order cannot override existing collective bargaining agreements, and that the Railway Labor Act procedures rather than New York Dock procedures must be used, merely reargue well-established principles that have been repeatedly and consistently decided against the union positions.

There is no warrant for the Board to make any of the declarations that ARU requests. Those would essentially either change the New York Dock conditions or be contrary to the Board’s consistent practice in every previous rail merger decision since New York Dock was decided in 1979.

There is also no warrant, with all respect to the Department of Transportation’s suggestion -- supported, of course, by TCU -- that New York Dock should be changed to permit employees to refuse relocation and still obtain benefits under New York Dock.

DOT cites the passage of time and the larger railroads for its suggestion that New York Dock be changed, but New York Dock was imposed in UP/SP and BN/SF just a year and two years ago. And,
Furthermore, it just makes no sense today, or in this transaction, to require railroads to hire additional employees that they need and also pay benefits to an employee that's refused a job.

There is clearly no basis, we submit, for the TCU request for attrition protection, lifetime protection. That protection has been requested and rejected in every previous merger case before the Board and the ICC.

In sum, as I said yesterday, we submit that this is a transaction that is manifestly in the public interest and should be approved as it has been proposed, with the conditions that we have agreed upon, including the one for the Wheeling. And, of course, including the conditions we've agreed upon with the NIT League and with Amtrak.

CHAIRMAN MORGAN: Okay. Let me just ask you a couple more questions.

MR. ALLEN: Okay.

CHAIRMAN MORGAN: Let me back up a minute.

You talked about Millennium.

MR. ALLEN: Yes.
CHAIRMAN MORGAN: It seems to me, from listening to their testimony, that they have an operational concern. They seem to feel that concerns that they’ve raised with you all about service have not been addressed. And so that has led them to request additional protection. Are discussions ongoing?

MR. ALLEN: My understanding is that they are, and we are trying to work out matters operationally with Millennium and certainly are willing to. We want to talk to all of our customers, and I think we have a pretty good reputation for that. We’d be foolish not to talk to our customers about their concerns.

And, you know, if they’re not satisfied to date, I’m sorry that they’re not, and I hope we can satisfy them. But in any event, those kind of operational discussions back and forth that happen every day between railroads seem to me to be not something that this Board gets into or tries to work out in approving a decision -- a transaction of this kind.
CHAIRMAN MORGAN: At the same time, I think that when you have a pending transaction that people fear could create operational issues if approved, that's when you hear these sorts of things.

MR. ALLEN: Absolutely.

CHAIRMAN MORGAN: So I think that --

MR. ALLEN: Absolutely.

CHAIRMAN MORGAN: -- you have to pay special attention to that.

MR. ALLEN: I agree.

CHAIRMAN MORGAN: Eighty-Four Mining -- how was the Monongahela area determined? In other words, you have these mines that are in the area, and then you have this mine outside --

MR. ALLEN: It was determined --

CHAIRMAN MORGAN: -- of the area.

MR. ALLEN: -- basically because it was an area that had previously been served by the Monongahela Railroad, and at one time I believe had service from two railroads. It has not had service from two railroads in recent years, but -- and I wasn't privy to the negotiations.
But I believe that it was basically
decided that, as I think Mr. Lyons and Mr. Snow said
yesterday, this is one of those areas where neither
railroad wanted to give it all to the other. And as
a result of the process of negotiation, they agreed
that while the Monongahela is going to go, we’ll both
have access to it.

CHAIRMAN MORGAN: Labor issues -- you
discussed the opposition to the proposal for providing
a separation allowance in the event that someone does
not move.

MR. ALLEN: Right.

CHAIRMAN MORGAN: This obviously, as I
understand it, was an issue that both the Burlington
Northern/Santa Fe and the UP/SP have addressed in the
context of implementing agreements, providing for a
separation allowance --

MR. ALLEN: That seems --

CHAIRMAN MORGAN: If this merger is
approved, what are the plans --

MR. ALLEN: Well, I don’t know what --

CHAIRMAN MORGAN: -- on your part of your
MR. ALLEN: I don't know what the specific plans are, but it certainly seems to me that is the appropriate venue to address those issues is an implementing agreement discussions. And I have no idea whether these railroads will take the same position as UP and BN.

But it certainly seems to me to be something that doesn't mandate imposition by this Board. It may be that we would be willing to do that. I'm not -- I have no idea, because I'm not involved in those discussions. But it may be that if the unions said, "Well, we'll do this if you do that," in the implementing agreement negotiations it might be something they would work out.

But as a general proposition, as I said before, it makes no sense to me for this Board to say to these railroads that need employees, "You've got to hire some new guy" when the old guy refused to move and is receiving benefits that you're paying for. That makes no sense. I mean, today -- in today's environment, relocation -- people are much more
mobile, even than they were 20 years ago. It's not unusual, as I think the Board has recognized in its decisions.

CHAIRMAN MORGAN: Now, regarding collective bargaining agreements, as you know, the Board has been accused of overriding collective bargaining agreements. How do you respond to that accusation?

MR. ALLEN: Well, I respond to it the way the Supreme Court did, I think, in the carmen and dispatchers' case, which is that the very nature of these transactions are something that necessitate overriding of collective bargaining agreements. They simply couldn't be done unless you did so in some respect.

This is a perfect illustration -- this transaction I think is a perfect illustration that they have to be overridden. You can't have both sets of agreements apply to the same employee. You can't have work rules that may dictate that one seniority district on Conrail when that seniority district is going to be split down the middle between Norfolk
Southern and CSX. Those agreements have to be changed.

How they are changed is really a process for implementing agreement negotiations, and, if necessary, for arbitration. But the accusation, I think, that the Board -- you know, accusing the Board of overriding these agreements I think is a bum rap. I think the people who make that accusation don't really understand the nature of the problem.

CHAIRMAN MORGAN: And then, lastly, with respect to the Department of Transportation's suggestion regarding necessity that the Board, in essence, if it approves this merger, not make a statement regarding necessity -- in other words, the fact that we approve the transaction does not mean that it is necessary to override collective bargaining agreements, how do you --

MR. ALLEN: Well, we --

CHAIRMAN MORGAN: What is your position on that?

MR. ALLEN: We think the Board should do what it has done in every previous merger case -- make
no statement one way or another about it. The
question of what is or what is not necessary -- and
necessity, of course, is somewhat of a legal term of
art that the courts have addressed and I think
defined.

But the question of what is or what isn’t
necessary is really a very factual, specific question.
It is a question that is subject, I think, in the
first instance to negotiations between the unions in
the process of implementing agreement negotiations,
and ultimately for an arbitrator to decide.

I think it would be inappropriate for the
Board to make any statement on the matter one way or
the other. It has not done so in any previous cases,
and we see no reason why it should do so here.

CHAIRMAN MORGAN: Okay. Thank you very
much.

MR. ALLEN: Thank you.

CHAIRMAN MORGAN: Do you need --

VICE CHAIRMAN OWEN: Yes. I’m just
wondering -- sorry about that. I’m about to lose my
voice today.
MR. ALLEN: Me, too.

VICE CHAIRMAN OWEN: But on the labor issue, one of the things that I brought up on the BN/Santa Fe, and also on the UP/SP, is just talking about the labor itself is a small portion of the overall product here, the gross product or the gross income, the operating income.

And so would it not be best to hang on to as many of those employees, if not all of them, for a period of time so that we don't get into the problem like we do have in the west that if we lay off some of those employees, especially in a tight job market like there is today, there is no way you can go out and find somebody that knows how to run a railroad.

MR. ALLEN: Well, we have employee needs, and in some areas there are very critical needs. There is no question about it. And to the extent the railroads have needs for employees, they will certainly hire employees. But it doesn't do anybody any good, I submit, to mandate that you keep an employee you do not need if this transaction has effects that permit us to operate some segment of the...
line with -- efficiently and safely with 500 employees, say, instead of 700 employees.

It doesn’t do anybody any good to make the railroad keep those extra 200 people standing around. It just doesn’t do any good. Those 200 people have, as I said, the most generous job protections of any industry in the United States, and --

VICE CHAIRMAN OWEN: I concur with all of that.

MR. ALLEN: Yes.

VICE CHAIRMAN OWEN: Kind of going the wrong way there, because, see, where you were having to work people 60 or 70 hours to make up for all of those lost employees that you laid off --

MR. ALLEN: Yes.

VICE CHAIRMAN OWEN: -- that --

MR. ALLEN: It may make sense, and if it does make sense for the railroad to make sure that they’ve got enough engineers and trainmen out there that they can handle the traffic, yes, they will hire those. But those needs don’t make any sense for us to keep on an extra 200 clerks that we don’t need. Those
clerks aren't going to be running the trains.

VICE CHAIRMAN OWEN: You might be able to
train those clerks a little bit faster than you train
somebody off the sidewalk, though.

MR. ALLEN: I don't know. I'm not sure
that's at all true.

(Laughter.)

VICE CHAIRMAN OWEN: On the non-assignment
clause, the overriding of the -- could we go back
through that again and what would be the disadvantage
of --

MR. ALLEN: Well, the disadvantages are
principally operational. We certainly agree with CSX
-- and we do think that the record does contain
evidence on this -- that if all of the contracts were
thrown up on day one, and there was just a -- kind of
an Oklahoma land rush, there would be serious
operational problems.

We need -- I mean, this transaction is,
obviously, unique. We need to be able to sit down and
plan which trains are going to go where and how many
locomotives we need to serve a particular area, how
many crewmen we need, we need the position people, we need to do all of that stuff. And that would be very difficult to do if suddenly, you know, all of these contracts were thrown up.

So there is a need definitely for a transition period, probably a year at least, to be able to work this stuff out. And that’s why we think 2.2(c) is necessary and appropriate.

VICE CHAIRMAN OWEN: But when you have a large shipper like APL that came in today, there’s a pretty high volume there. And so they are definitely about -- they want to renegotiate something.

MR. ALLEN: Sure they want --

VICE CHAIRMAN OWEN: To get the best deal.

MR. ALLEN: Yes.

VICE CHAIRMAN OWEN: Yes.

MR. ALLEN: Yes. And I don’t blame them. But there are operational problems with all shippers being able to do that.

VICE CHAIRMAN OWEN: Okay. I have no other questions.

CHAIRMAN MORGAN: Let me just ask one
other question before you sit down. We talked a lot about the Buffalo area the last two days. What is NS’s presence in Buffalo, do you know?

MR. ALLEN: NS is acquiring the old Erie-Lackawanna Line in Buffalo. NS presently serves Buffalo.

CHAIRMAN MORGAN: But, I mean, marketwise -- do you --

MR. ALLEN: Oh, market-wise, I have no idea what our market share is. Is that what your question was?

CHAIRMAN MORGAN: Yes.

MR. ALLEN: Hopefully, it will get bigger. We plan on increasing it.

CHAIRMAN MORGAN: Okay. Thank you.

Mr. Lyons, are you --

MR. LYONS: Mr. Sipe will speak first.

CHAIRMAN MORGAN: First? Okay.

Mr. Sipe?

MR. SIPE: Thank you, Madam Chairman, Vice Chairman Owen. I’m one of three speakers on behalf of CSX this afternoon. I’m going to address an issue
that you got into with Mr. Allen a little bit, which
is the request for so-called pro-competitive
conditions, including expansion of competitive access
areas. And I'll spend just a few minutes on that
subject.

Mr. Lyons will follow and address the
remainder of the commercial issues, competitive
issues, as well as a few others, and Ms. Sprague will
finish up and address environmental issues.

As you know, there are quite a number of
parties in this case seeking the expansion or creation
of additional shared assets areas or otherwise asking
the Board to impose conditions that would create
additional competitive options beyond those which
exist today. Those groups include the State of New
York, Erie Niagara Rail Steering Committee, the New
York City Economic Development Corporation, Niagara
Mohawk Power, the State of Rhode Island, Delaware Port
Authority, among others.

I want to stress CSX's very strong
opposition to these so-called pro-competitive
conditions. A grant of those conditions would turn
the Board's merger policy on its head. It would also have a disproportionate impact on CSX, which is the party that would have to grant access to a competitor in virtually all instances and fundamentally alter the terms of the deal, the basic business deal, that CSX and the NS negotiated for the acquisition and division of Conrail.

In fact, I think it's fair to say that if CSX had had any belief that there was a serious possibility that this kind of relief would be imposed in this proceeding, the deal never would have been done. And you heard the gentleman from UTU speak -- I want to say eloquently, but perhaps a better word is vividly -- on this subject. He recognized that this deal strikes a delicate commercial balance between these two railroads who are going head to head.

And if the Board were to impose this kind of condition, which had a disproportionate impact on CSX, that commercial balance could get badly out of whack, and the positive competitive effects that we do see stemming from this transaction could be eviscerated.
Yesterday, Chairman Morgan, you referenced this category of requests, and you asked Mr. Snow what he would do if he were in the Board’s shoes with respect to requests for expanded competition. Now, I’m a lawyer, and you know from our prior colloquys that I don’t always answer questions the same way Mr. Snow would, so I’m going to give a lawyer’s answer. But I think it’s also the right answer, and it’s the answer I believe is the correct one.

What the Board should do is adhere to its governing statute, its merger policy, and its unambiguous precedent. All make clear that the Board should impose a competitive access condition only to remedy a loss of competition resulting from the transaction under consideration. The statute speaks of the Board giving consideration to whether a proposed transaction would have an adverse effect on competition within a particular geographic area.

Plainly, the Board is charged with addressing reductions in competition, and it is not given carte blanche to use a control proceeding to manufacture additional competition.
I know the Congressmen said otherwise, and they may wish it were so. But they are the ones who have it in their power -- if they want to change what the statute is, they have it in their power to persuade a majority of their colleagues to change the statute, so that in merger proceedings you apply pro-competitive conditions. But that’s not what the statute says now, nor does the Board’s merger policy, which very clearly addresses reductions in competition and the circumstances in which conditions are appropriate.

CHAIRMAN MORGAN: Let me just stop you right there. I hear exactly what you’re saying. On the other hand, the argument has been made that we are here to do the public interest, and an interpretation of the public interest is adding competition. How do you respond to that?

MR. SIPE: I think that the public interest involves, as it has been applied consistently throughout the history of rail consolidations, involves a very broad balancing concept. Where there are component pieces of the statute and the policy...
that are more specific than the broad mandate to do the public interest, those specific provisions take precedence. And they’re not inconsistent with the public interest.

For example, a statutory provision that says you look at adverse effects on competition controls where the issue is competition. That doesn’t mean that overall you don’t strike the broad public interest balance.

Now, I’m not going to go into your precedents in any detail, because I know you are very much aware of them. But I will point out that you reminded parties in this proceeding, in your decision number 40, that if they were intending to file requests for responsive or inconsistent applications seeking conditions, they had to address the specific criteria set forth in prior cases for the imposition of conditions.

And, clearly, those specific criteria include the identification of competitive harm as the basis for a pro-competitive or a competitive remedy.

Unfortunately, but not surprisingly, some
parties to this proceeding seeking expansion of competition and expansion of shared assets areas have disregarded this admonition. They fall into a couple of different categories. They take rather divergent approaches to justifying why they are seeking something different.

The most candid statement that I heard justifying this approach was from the counsel yesterday for the Orange and Rockland Utilities who said flat out what I think you have been mulling over, Chairman Morgan, that the Board should change its policy. The Board should find sufficient flexibility under the statute to adopt a more pro-competitive approach.

But there are two problems with that. I have already alluded to one. The statute doesn’t permit it, nor do the Board’s precedents. Equally important, I think a change of policy of this nature would not be sound public policy. A change of policy to promote additional competition would not, in fact, comport with the public interest in the long run. And I’ll tell you why.
The existing scheme encourages initiatives by private parties to create additional competition where market conditions hold out the possibility that direct rail-to-rail competition will be sustainable over the long term. That is, where there is sufficient traffic, where there is sufficient market opportunities, private parties find a way to introduce additional competition.

This very deal illustrates that proposition. The CSX/NS deal to create the shared assets areas shows that private parties acting in their own self-interest will promote competition. The creation of these shared assets areas was not an act of altruism heralding a new age of socialism in rail transportation policy.

It was the product of a very hard-headed business deal, whereby both parties insisted they had to have access to certain areas or there would be no deal. That's the way it works. What proponents of competitive conditions are doing is not only substituting the government as the entity that would say, "Here's where you have more competition," but
they would interfere with a private agreement that has
already been made.

Now, other parties, recognizing that your
precedent calls for a showing of competitive harm in
order to justify expanded competition, adopt that
rubric and say that where you've created competitive
options for -- where you've created competitive
options, new competitive options for some members of
an industry, not creating additional competitive
options for others in the same industry constitutes a
reduction in competition.

But the same parties who make that
argument, including the Buffalo Niagara Rail Steering
Committee -- Erie Niagara -- acknowledge that what
they're really trying to do here is address a
preexisting condition. And the argument that a sole-
served shipper loses competition because his
competitor acquires two rail options is really nothing
more than a semantic game.

A customer whose rail options remain
unchanged as a result of a transaction does not suffer
a reduction in rail competition. The Board itself has
made clear that it will not impose a condition just because one group of shippers obtains pro-competitive merger benefits that other shippers do not enjoy.

Similarly, the Board has made clear that we do not have a mandate to equalize the competitive situation among the industries served by rail carriers. Indeed, such a mandate would be impossible to implement. If it had such a mandate, the Board would end up imposing hundreds of conditions in an effort to micromanage the competitive situations within dozens of different industries.

Let me also point out that there is a fundamental logical gap in the contention that the creation of the shared assets areas constitutes competitive harm for those who are not located in those areas.

The argument that those folks would make is that CSX will compete like mad to win traffic in a shared assets area, but ignore the traffic represented by its solely-served customers in places like Buffalo. The illogic of this position -- and I say illogic -- was addressed by Chris Jenkins, the Vice President of
Chemicals Marketing for CSX, in applicants' rebuttal statement. And I refer you to that statement.

Mr. Jenkins explained that CSX has a greater incentive to assure that solely-served traffic in an area like Buffalo moves over CSX's lines than traffic originating in the shared assets areas because that's traffic we will be assured of handling if it moves.

And what incentive do we have for that customer to shut down his facility or to reduce his shipments out of that facility? None. This is traffic we want to serve. And competition for traffic originating or terminating in the shared access areas will exert downward pressure on rates for solely-served CSX traffic in a place like Buffalo. That's only one of the pro-competitive aspects of this transaction for Buffalo.

Now, I know they're not getting everything they want, but they are getting more competition, and that's a benefit of this transaction.

CHAIRMAN MORGAN: Let's stop right there, because I did ask that question of a couple of witnesses.
MR. SIPE: Yes, you did.

CHAIRMAN MORGAN: And I did not get the same answer you're giving me. So --

MR. SIPE: Well, let's --

CHAIRMAN MORGAN: -- give it to me again.

MR. SIPE: Let me spell it out. First of all, counsel for Erie Niagara did acknowledge that the reduced switching charges would help some of the shippers in that area. And we heard estimates yesterday, I believe, from Congressman Quinn that that -- the number of affected shippers is somewhere in the range of 20 to 30 percent. It's not everybody, but it is a number of the shippers in the area who are better off.

Second, we know Norfolk Southern will have enhanced presence in Buffalo. We heard Mr. Allen, although he didn't quantify the current market share that they will have, we heard Mr. Allen explain that Norfolk Southern is going to compete for that traffic in Buffalo. They'll have a better route structure into and out of Buffalo. They've got a landing pad in Buffalo.
I think it's very important to focus on the prospective nature of that competition. If they want growth in the Niagara frontier, consider a situation of somebody seeking to open a new facility and considering the Niagara frontier. That's where the enhanced competition is going to come from. That shipper will have the opportunity to go to CSX, to go to NS, and say, "I want to locate in the Erie Niagara frontier. What will you do for me, Mr. Railroad, to make sure that I've got the best long-term deal here to make sure my freight moves competitively?"

These rail marketplaces are dynamic, and the fact that we've now got two strong carriers in Buffalo going forward means that as our industries change, and as the markets change prospectively, Buffalo is going to be increasingly better off.

I think the New York legislature can do things to make Buffalo attractive to industries locating there. The Erie County government can do so. And then those shippers considering locating in Buffalo can come to the two railroads and say, "Make me a deal." They will be better off, prospectively.
Existing shippers will also be better off because of the CN and CP deals which will facilitate movements of truck competitive traffic between the United States and Canada.

Now, I will acknowledge that not every shipper in the Niagara frontier area is better off as a result of this transaction, but that’s not the test at all. Nobody is claiming that anybody up there is harmed, and a lot of people will be better off.

Similarly, east of the Hudson, the argument has been made that people in the east of the Hudson are simply going to be in a status quo situation because they’re only getting one rail carrier. It’s a big difference, though. Conrail formerly served both east of the Hudson and west of the Hudson. It didn’t have any particular incentive to pay attention to the east of the Hudson, as we have heard.

Now CSX, as the deal is currently structured, will have a special incentive to serve that traffic east of the Hudson because it knows if that traffic is going to move by rail it will move by
CSX. There’s an opportunity there. Congressman Nadler said it’s a bank. We’d like to go to his bank. We’d like to make that traffic grow.

But do you think traffic that currently moves by truck in a region where there is clearly inadequate rail infrastructure is going to be enhanced by putting in two carriers into an area where there is not yet a proven track record of substantial freight movements? Which of the two would be willing to make the investments in the rail infrastructure east of the Hudson to make rail service more viable if there are two of them there?

If you let CSX take a crack at it, which is the current plan, there is a good chance that we’ll make the investments and we’ll be able to grow the business out of the east of the Hudson area.

CHAIRMAN MORGAN: Is there anything out of Congressman Nadler’s plan that your client would be supportive of or look more favorably upon? We’ve discussed -- I mean, presumably your focus is on the line up to Albany when you’re talking about east of the Hudson. But --
MR. SIPE: Well, Congressman -- I can't claim to be intimately familiar with his plan, and it's possible that one of my colleagues behind me here might want to speak to it. But as I understand it, his plan is to expand the shared assets area and then serve the east of the Hudson via a cross-river car float. And we don't see that plan as being one that is really going to help this.

We'd rather go in there and have the incentive to make the infrastructure investments knowing that we're going to serve the traffic.

CHAIRMAN MORGAN: So with his -- his concern, of course, is on truck -- with respect to the trucks and trying to get trucks off the highway.

MR. SIPE: Right.

CHAIRMAN MORGAN: So if we don't pursue his approach, how would you suggest that we make sure that we actually get to where he wants to go, which is getting trucks off the highway?

MR. SIPE: There is an important environmental issue -- the truck dimension of this proposal -- and with your indulgence, I'm going to
pass the buck on that to Ms. Sprague, because she
understands the issue and I would only confuse you by
pretending to explain it.

Mr. Lyons reminds me with respect to the
east of the Hudson proposal -- and this may or may not
be Congressman Nadler's, but I know somebody has
proposed a car float and tunnel study. I believe
perhaps the New York City Economic Development --

CHAIRMAN MORGAN: Yes, that's correct.

MR. SIPE: -- Corporation. And we are
going to participate in that study, and we are
interested in exploring it.

I've used more time probably than I
should. I want to make one final point about
expansion of these so-called shared assets areas.

The suggestion that these could simply be
ordered by the Board and go into effect, assuming the
transaction is approved on the split date, it seems to
me is extremely naive. The vagueness and uncertainty
by the proponents as to how these shared asset areas
that applicants haven't planned for would be operated
is really another reason why their requests should be
rejected.

As you know, in the shared asset areas that we have agreed to, those have been studied intensively for over a year now since the application was proposed. Additional studies were required with respect to the New York/New Jersey shared assets areas, and I believe the NIT League agreement called for us to submit supplemental studies on the other two shared asset areas.

Everybody knows that getting it right within those areas is not going to be easy. We think we've planned and we're going to be in a position to be able to do it, but how you could do it for other areas -- for instance, a place like Buffalo which will be in the middle of the CSX system, not a terminus like New Jersey, but smack in the middle, how that would work as a shared assets area nobody has the faintest idea. But I would think a lot of people who have appeared before you would be awfully nervous about that.

In sum, CSX believes that the calls for expanded access are unjustified and ill-conceived. We
strongly urge the Board to apply its clear precedent and reject it.

CHAIRMAN MORGAN: Well, let me just ask one more question.

MR. SIPE: Certainly.

CHAIRMAN MORGAN: Talk about Buffalo for a minute. The argument has been made that this is an opportunity to fix something that happened a while ago, and that the Board should not miss this opportunity. What can you say about that?

MR. SIPE: I am not an aficionado or a student of the final system plan, so I can't tell you how many -- I can't tell you how many specific industries in Buffalo had dual carrier service prior to the creation of Conrail.

I do know that in terms of the lines getting into Buffalo, what we're proposing now looks a whole lot more like what would have been done under the final system plan than what had been happening with Conrail.

And I'll also say that the test here clearly is not what the final system plan would have
done. The test here is, what does this transaction do? It doesn’t have any adverse competitive effect on the Buffalo area. It’s pro-competitive -- not as much as they want, but pro-competitive nonetheless.

CHAIRMAN MORGAN: So, in essence, your client is not offering up anything new in Buffalo is basically the bottom line, right?

MR. SIPE: We’re not --

CHAIRMAN MORGAN: You don’t feel the need --

MR. SIPE: Anything beyond what’s in the application?

CHAIRMAN MORGAN: Right.

MR. SIPE: We’re not offering anything beyond what’s in the application.

VICE CHAIRMAN OWEN: Excuse me. One question, please, if I could, Mr. Sipe.

If Buffalo were to be a shared asset area, and there’s not enough traffic there to generate two carriers being in there, the principal carrier would still operate the area; the other carrier would not be there, then. Would that not be the case?
MR. ALLEN: Vice Chairman, I don’t know --

VICE CHAIRMAN OWEN: Just speculating.

MR. ALLEN: I don’t know how it would operate.

VICE CHAIRMAN OWEN: I don’t either.

MR. ALLEN: NS gets there. They’re going to be operating traffic through Buffalo. They are going to be serving industries in Buffalo.

You know, they are a very aggressive, resourceful organization. I’m not privy to their marketing plans, but I expect that customers in Buffalo of all sorts are going to be benefitting from the presence of NS. But I can’t tell you how the shared assets area scenario would unfold.

CHAIRMAN MORGAN: Thank you.

Mr. Lyons?

MR. LYONS: Thank you, Madam Chairman.

and I would only confuse you by pretending to explain it.

Vice Chairman Owen, if I might add a word or two to what Mr. Sipe said.

I think it is the case that we have gone
well beyond the application in Buffalo, that one of the roughest places with the high Conrail switching charges was Buffalo. The average was 450. There was some 490, and we take those Conrail switches down to 250 across the board.

And the traffic studies that were prepared and put in by the Buffalo proponents for a shared asset area were prepared on the basis, of course, of the historic evidence, and they were prepared before the switching rates came down.

MR. SIPE: Well, I clearly misspoke on that. And I was, you know, basically assuming the NIT League agreement as part of what the package is. We haven’t gone beyond the NIT League agreement.

CHAIRMAN MORGAN: I was assuming NIT League too, but the point is taken.

MR. LYONS: But it is the case, it is the case.

I would like to talk briefly about Section 2.2(c) and then talk about the 30 or so protesting parties who are trying to take part of the CSX allocation in this transaction.
I think that probably there are more oxen of CSX that are proposed to be gored by the protesters here than there are of Norfolk Southern. I'll try and run through them as quickly as possible, but I do hope that the Board will indulge me in that.

CHAIRMAN MORGAN: And I may stop you as you discuss each one.

MR. LYONS: I would welcome that --

CHAIRMAN MORGAN: It could be a long evening, I don't know.

MR. LYONS: -- because I would like to see what is on your mind.

On 2.2(c), the issue is who is abrogating the contracts. Is it really the Applicants or is it the protesting parties who wish to tear up the contracts and start all over?

Perhaps the most interesting case is APL who claims that the dollar a year lease that they got had nothing to do with the contract. The lease itself says that the terms and conditions of the transportation service agreement and this lease are interdependent, and each agreement is, in part,
consideration for the other.

I had quite a fight to get that made public with APL’s counsel, but finally were able to read it to you. The purpose of a great deal of this is to break the contracts and to start all over with people who got a good and an acceptable deal from Conrail and now want to ratchet it up.

The principal reason, as Mr. Allen made plain, for both of us here and -- is the operational issue, however. Because contrary to what the DOT said, I think misspeaking themselves, this not a new issue in the case.

In the rebuttal, there were two verified statements, one by Mr. Priloman of Norfolk Southern, one by Mr. Christopher Jenkins of CSX, and they both said that there would be grave operational difficulties in trying to have a day one and with a backdrop of having unlimited competition and unlimited tearing up of the contracts, and that the contracts were necessary for an orderly transition here.

And the two CEO’s have given you that pledge, but they gave you that pledge on an
application that has 2.2(c) in it. And we urge the Board to stick to it.

There are a bunch of minor issues from APL. They are concerned that, because CSX's ocean carriers, that we will share their ocean carrier information with the ocean carrier affiliates. We are willing to give them a Chinese wall arrangement.

They needn't worry about that. We do business, as the evidence shows, a good business with other transportation companies that have competing ocean carriers to the ocean carrier that CSX has, so that's not really a problem.

There has been no answer, I should say, to the statements that have been made by the operating officers and by the marketing officers that there will be operational difficulties if 2.2(c) is set aside.

There's been no evidence responding to that, and I think the Board has to take that into account.

The issue that there's no jurisdiction to deal with the contracts -- what the intent of the statute very clearly is, is that the Board is not to
regulate the content of the contracts, but the Board regulated the opening or non-opening of contracts in the UP/SP case in the interest of perfecting that transaction, and the Board can do that here.

I don't want to talk about the anti-assignment clauses as a barrier. The ultimate thing here is that the Board can override them and that it's in the public interest that it should.

I should say that this emphasis on the anti-assignment clauses has emboldened the few interests, and the Gateway Western carrier was one of them, that are challenging the notion that, when you have a succession of one railroad to another in a transaction such as this, that the operating assets of the -- and the operational rights of the railroads do not pass from one to the other if there is some clause that purports to interfere with the Board's powers.

And that, we say, is a clear -- clearly contrary to the hard core sections of the words of Section 11321(a) which talk about having the successor company be in the position to operate the properties and franchises of the predecessor.
And if there is anything that is clear and that is ordinary in these cases, it is that the operating rights of the predecessors descend upon the successors. And there’s no need to file an application for terminal trackage rights.

That is the practice only where there is a gap in the predecessor’s system.

We had some testimony from our friends at the Justice Department who made their appearance in this case. And remarkably, they said that they didn’t look at the merger as a whole as to whether it was anti-competitive or pro-competitive.

What apparently they did was simply to look through it and see if they could find fault. And they came across two items in toto. One was they said there was a difficulty with Pepco even though it was sole served by -- at both its plants in main sole served.

Pepco evidently didn’t think so. Its evidence never adopted the Justice Department’s theories and it’s settled. The Justice Department insisted that it knew more than Pepco about Pepco’s
business.

The same was the case with the situation in Indianapolis, which I'm about to get into. There the Justice Department found fault with the arrangements at the Stout Plant and said that something should be done at that -- with that.

The remedy that they proposed was entirely different from the position even of IP&L, which is the last hold out of the shippers in Indianapolis. The other shipper who had filed, the Citizens Gas & Coke, have settled.

And we believe that the settlement with the city and the proffer which I made to the Board yesterday, and which I repeated at the side bar conference today, should resolve the remaining issues.

At Stout itself, for a period of 20 years, the existing arrangements under which there is access by the Indiana Southern and, indeed, the same rates that are being charged will be maintained subject to an index.

And so the Indiana Southern will have access, and that will be continued for 20 years. Of
course, the Indiana Railroad, which is a CSX subsidiary, will be able to furnish coal. As I say, the Indiana Southern will be able to get in on a switching basis where the cost is maintained for the 20 years.

And, in addition, Norfolk Southern can get in again on a concessionary basis through switching. So there will be three carrier access. Norfolk Southern presently does not have good access, of course, to Southern Indiana coal, but Indiana Southern obviously does.

And Norfolk Southern has access to lots of other coal once the next phase of the Clean Air Act comes around. So there will be triple service there. And similarly, at Stout -- I'm sorry, at Perry K, which is the other property for a period of years, the present arrangements will be maintained.

There are a series of other coal using companies. Centerior is presently sole served at its plants, and it will remain sole served after the transaction. It takes the tact of saying that it competes in the power grid with companies that are...
located in shared asset areas with Detroit or, I assume, with the Atlantic City or one of the others.

The fact of the matter, however, is that it is a net buyer of power in the grid. And so if their power is priced more cheaply, then it comes out ahead. That doesn’t have to be the result.

We believe that this is not a case that, if you favor one and bring competition into one area, you have to bring it into others or do the same for all shippers, as Mr. Sipe has pointed out.

Niagara Mohawk made similar contentions. They overlooked the fact that they are better off than they were before. They are sole served by Conrail. They will now be sole served by rail by CSX. But they have access to coal by water.

And now the Monongahela coal, which is their coal of choice, will be available to it on service from Norfolk Southern to the Lake ports out of the Mon.

And they say, of course -- they point out to us that water freezes, and that indeed is the case. But to the extent that the river is open, to the
extent that they can store coal, --

CHAIRMAN MORGAN: That's the clearest thing we've heard today.

MR. LYONS: Yes.

(Laughter.)

CHAIRMAN MORGAN: Thank you.

MR. LYONS: And they will have some relief. They may not have everything that they have asked for, but that is often not the human condition, that you get everything you ask for. They are better off than they are now.

The Orange and Rockland and Rochelle Electric Company has a contention that seems marvelous to some of us, that they are afraid of congestion on their line that will serve them. And because there is congestion, they want to bring in another railroad to ease the congestion.

And I have difficulty making sense out of that argument. They are presently single served. They will be single served after the transaction. They are west of the Hudson on a line which is busy, but their is no difficulty anticipated in serving
If there are service problems, they will be dealt with at the time.

I turn now to some of the railroads that have expressed an interest in forced sales of CSX's property. The gentleman from the Illinois Central last night said and predicted that I would tell you that their request for a chunk of the CSX main line into Memphis -- into the Memphis gateway -- that I would tell you that it was a preexisting problem.

And in fact, that -- he is right. That is what I tell you.

(Laughter.)

And the reason is because it is a preexisting problem.

CHAIRMAN MORGAN: But it's a problem that needs to get fixed one way or the other, right?

MR. LYONS: It's a problem that needs to be fixed. But having them take over the line which they characterize as a "backwater" -- this backwater happens to be CSX's sole access to the Memphis gateway.
And the effect both of this transaction which removes Conrail's desire to take everything out at St. Louis or Chicago, plus the difficulties at Houston which are affecting New Orleans, means that Memphis will have to be used more and more.

The only thing I think they say which is associated with the transaction is that, as a result of the transaction, the owner of the line is going to be using its property more than it did before. But we say that the keeping open of the gateway and the exchanges with UP/SP and with the Burlington Northern is highly important.

We will try to work out the problems in terms of the dispatching. It is rare that you have -- you see a situation where the tenant does not complain about the dispatching by the owner. And generally, these problems are viewed as subacute, that there is no legal fight except when you have a transaction such as this.

And people have a tendency to throw them in and to try and get radical relief in a transaction of this sort. And I think if the two sat down...
together and tried to work this out at a high level, that it could be done in terms of improving the dispatching.

But the radical remedy, I think, is beyond the pale here.

CHAIRMAN MORGAN: And I would just say on dispatching that, of course, we've been dealing with this issue in the west, and dispatching is an issue that can -- proper dispatching can resolve issues like this.

So I would encourage those kind of conversations.

MR. LYONS: Thank you.

In Chicago, we have a railroad, the Wisconsin Central, which wishes to own the Altenheim subdivision of the BOTC which is a subsidiary of CSX. And again, the complaint is about the dispatching.

Also there is expressed a fear of CSX and a fear that CSX will be in Wisconsin Central’s way both in getting to Norfolk Southern because it has to get through Norfolk Southern on the IHB, which I’ll come to in a moment, on which CSX will acquire an
interest.

And it also has to go through the BOTC in order to get to CSXT. It is -- was left unclear why there was this animosity by Wisconsin Central toward CSX. The fact of the matter is that CSX has an arbitration award for $20 million dollars against Wisconsin Central for Wisconsin Central's not paying money that it owed CSX.

And I think if I owed someone $20 million dollars and he had an arbitration award against me, that I wouldn't like him very much either.

The other conditions that Wisconsin Central is asking, that the BOTC no longer be considered a switching railroad. That, of course, was the controversy on which Wisconsin Central lost and the monies became payable. Those, I think, are all of the piece with it.

We had also a coalition last night, and the coalition consisting of a single railroad, a one year old railroad called the I&M Rail Link. The coalition used to consist of the EJ&E and the I&M. How the I&M got into it is obscure because the
attorney-client privilege was pleaded as to how they
got into the coalition.

But anyhow, EJ&E got out, I&M is left, and
this one year old railroad wishes to have a forced
sale of the 51% block of stock in the IHB made to it
so it will be in control of the IHB. It or anybody
else that can sign up for the consortium -- the
invitation to join the consortium, according to the
record, has been open since last August and there is
a net of one railroad in the consortium.

The Union Pacific has not joined. The
BN/SF has not joined. The railroads who have a
serious interest in the Chicago gateway are
comfortable with the arrangements that have been made.

If Your Honor will indulge me, there are
a lot of these.

CHAIRMAN MORGAN: Right, but I'm going to
ask you about Chicago though if you --

MR. LYONS: Sure.

CHAIRMAN MORGAN: I think we've heard some
concerns about the operations in Chicago, and I h? i ?
dialogue with Mr. Snow at the beginning of all this
about this. And I think that -- I hear that there are
plans to address possible congestion in Chicago --

        MR. LYONS: Yes.

        CHAIRMAN MORGAN: -- as we move through
this process.

        MR. LYONS: Yes.

        CHAIRMAN MORGAN: Is that --

        MR. LYONS: That is the case. The key to
them is, while it involves the IHB, it does not
involve the IHB in any dominant fashion. In other
words, the proposal is to continue to run the IHB as
an independent company with its own management and its
own people, its own payroll and the rest of it.

        And its large stockholder, the 51% stockholder, will continue to be Conrail. Conrail
used to, when as an independent railroad, own the 51% of the stock lock, stock and barrel and completely controlled IHB.

        The two, Norfolk Southern and CSX, will jointly vote that block of stock. And the reason why there's the voting agreement in the record is, of course, that we had to show that to the Board as to
how the control would be exercised.

But when Conrail was there owning the 51% stock, it didn't need to have a voting agreement with each other. It was the boss of the 51% of the stock.

But, in any event, what is going to be done in Chicago is that the two operating plans are harmonized so that there will be a counter clock-wise movement in Chicago.

There will be -- of the movements from the east to the west, there will be an emphasis on run through trains with concessions on the switching given to the western carriers if they participate and block their cars or make other arrangements so that the switching downtown is minimized.

And these things can happen under the plan.

There will be investments made in the infrastructure of the IHB by CSX which it will make out of its own pocket notwithstanding the fact that there are other owners in the IHB, i.e. Norfolk Southern is another owner, and the Canadian Pacific -- the Soo Line of the Canadian Pacific is another owner.
Also it owns 49% of the stock.

So those are the arrangements which are being made in an effort to try and prevent Chicago from becoming congested, and it has been very carefully thought out.

We have some New England carriers who say that they are going to be hurt by the transaction. What I think is a common thread in each of them is that they look at CSX and they say CSX is the only carrier here.

They overlook the -- our friends at Norfolk Southern. And very quickly, before the application was even filed, Norfolk Southern made arrangements to have haulage rights from Binghamton to Albany, and then came into an arrangement with Guildford, who goes to Boston.

And Guildford, as well as the Conrail line going to CSX, runs straight through Massachusetts and, to some extent, through southern Vermont and will connect with the New England Central Railroad.

Now, the New England Central Railroad has had some ambitious proposals for this case. It first
wanted -- in fact, still does want trackage rights all the way to the North Jersey shared asset area.

It also, at one stage, nominated itself as the trackage rights carrier under the City of New York plan on the east side of the Hudson, though the gentleman last night said they really weren't interested in doing that.

And I think most recently it has simply said that it really would be nice if it could get to Albany. It can get to Albany. It has an interchange near Brattleboro with the Guildford line, and Guildford goes to Albany.

So the set up of the routes that it has, which are multi-carrier routes, for the lumber products and the line that it gets from western Canada and the western United States should still work.

What it is concerned about is that its customers may instead buy lumber from the south. But if the customers prefer lumber from the south, and if the benefits of single line service bring it to them better, that is the customer's preference and it is not obviously a loss of essential services.
The estimates that have been contained as to its loss are hotly contested, and it does not present itself as a candidate for inclusion. If realistically all it wants is to get to Albany, it can get to Albany and it is not dependent on CSX to take it to Albany.

And from Albany it has access to the Norfolk Southern system through the haulage arrangement.

The Housatonic is another in this category. And it presently has an exchange at Pittsfield with Conrail. It will have one with CSX after the transaction. It made the remark that Conrail could have put it out of business over night if it wanted to.

That remark was made last night. Certainly its state with CSX is no worse than that, and CSX has no intent to put it out of business, and we’re unaware of whatever formula it is that Conrail has to do that.

The LAL, the Livonia, etc. railroad -- again, a railroad not in New England, but in upstate
New York -- has a complaint which is clearly about a preexisting situation. It presently lacks connectivity with the Rochester Southern.

It accepted some additional track in terms of getting closer to the Rochester Southern, though it was aware that Conrail would not sell it rights to make a connection. And now that Conrail is going out of the picture, it seeks trackage rights in order to make the connection.

As this is a preexisting situation, the general issues of connectivity, I think, are not presented by it. And it seems to be a clear violation of the teachings in decision number 40 that preexisting conditions were not to be imposed by the Board and not to be filed.

There are a few other isolated shippers which I'll mention very briefly. I was going to touch on the two -- the so-called one to twos, but my thunder was stolen by Mr. Allen who revealed the proposal that has been made that has taken one of the three Ohios out.

The others who are remaining apparently
want routes to be kept open which do not exist today
-- where no traffic is moving today, but they think
they might like to go in the future.

And, you know, soon we have to adapt
ourselves to the rail map as it changes, and we can't
move new traffic over routes that we never had moved
traffic on before. That is one of the marginal costs
of this transaction; that in order to divide Conrail
between the two carriers, you had to divide it, and
that meant that some things which were single line
became joint line.

The NIT League settlement addresses that.
This particular win-win transaction which provides for
single line service on trackage rights, which is
suitable in a few cases, has been proposed, and that
is proposed for that situation.

I think that about covers the points I
intended to make. I had one answer to a question that
was put to Mr. Allen about the labor issues which
would be a little different, that was to remind you of
a statement that Mr. Snow made yesterday.

And that is that CSX expects to front end
load its people and its locomotives and its physical
and capital material in going into this transaction;
that it expects to have a degree of redundancy going
in so that the points that the Vice Chairman made that
it was not a good idea to hire people after the crisis
occurred -- it was better to have them available in
the case of crisis.

That is something which Mr. Snow addressed
and which CSX is doing.

CHAIRMAN MORGAN: If I could just ask a
couple of questions.

You heard me earlier today -- in your talk
about labor. You heard me earlier today discuss with
the representative from the Transportation
Communications Union regarding this transfer of
seniority proposal and his concerns that that violates
New York Dock.

I'd like to hear your answer to his
comments.

MR. LYONS: I have a source of superior
wisdom on this available if he's still here. It's
rather complicated, and --
CHAIRMAN MORGAN: And then I want -- well, maybe before I could ask you two other questions and then he could come up.

MR. LYONS: Okay.

CHAIRMAN MORGAN: Why don't we do that.

Contracts.

MR. LYONS: Yes.

CHAIRMAN MORGAN: DOT has a proposal which you heard about earlier which is sort of a hybrid --

MR. LYONS: Yes.

CHAIRMAN MORGAN: -- of your position and others' positions.

MR. LYONS: Like --

CHAIRMAN MORGAN: What is your position on that?

MR. LYONS: Like a lot of hybrids, it's sterile. But the -- what I would say is this. The cases that it doesn't solve are the hard cases. The easy cases it does solve. The easy cases it says you will allocate in accordance with 2.2(c).

Those are the moves that are open only to one carrier. And those are easy to assign. There's
probably only one route that works for them. That is where the move is going on at the moment. And so the only thing to do is to find those contracts and take note of them and put them into the system.

The difficult ones are the ones that can be handled by either of the carriers. And, for example, most of the APL contract is that way. All of the New York to Chicago contracts are that way. And that was an enormous route for Conrail both from the two markets and through Chicago on an interchange basis on a transcontinental move.

And those are the difficult contracts because Conrail had different ways to move that traffic. It could move it on the Pennsylvania lines, it could move it on the New York Central line. And those now are being broken up.

So if you have the choice -- unlimited choice by the shippers, which is the proposal of the DOT, you are very likely to have an imbalance on day one. And --

CHAIRMAN MORGAN: And what do you mean by imbalance on day one?
MR. LYONS: Imbalance that you will have, say, 50% of the capacities on the New York Central line, 50% is on the Pennsylvania line, and the other ways that follow that to get to Chicago.

And however, 70% of the shippers choose CSX on day one, 70% choose Norfolk Southern, and each of those only has the -- its half of Conrail.

So Conrail could move 100% of its traffic on all of its lines, but that doesn't mean that either of the two could move all of Conrail's traffic from New York to Chicago on the lines that were given them. There would have to be some for the other carrier.

And to let the marketing people out of the stalls for day one and just to sell the service, what you probably would have is that things would be unbalanced on day one; that one set of the lines would be overcrowded and you'd have congestion, the other lines would be under utilized, and you would have some sort of mess on day one.

CHAIRMAN MORGAN: So the way --

MR. LYONS: And that's the concern. And the one thing that the plan of the DOT doesn't address
is the area where you have that problem, and that is
the problem where either of the two could provide a
single line service.

And those are the ones that are allocated
on the 50/50 basis for their duration, which is enough
to take you over the initial implementation of the
transaction. Those are the ones which are allocated
on the 50/50 basis.

The others are allocated under a verbal
formula which pretty easily identifies in 99% of the
cases which of the carriers will get the contract.
And it is the logical carrier: it is the carrier that
can perform single line service, if there is either
carrier that can perform single line service.

CHAIRMAN MORGAN: So is this a division of
assets issue or an operations issue?

MR. LYONS: It is both. It is --
obviously it's an operations issue because avoiding
chaos on day one and trying to go from a unitary
Conrail, which operated in each part in the interest
of the whole, into two competing parts is an
operational problem.
And unless you have a transition -- and we can’t pretend like Mr. Gitomer that there’s only one contract here -- 80% generally is the work figure as to how much of the railroads’ traffic is contract traffic.

And a lot of that on Conrail is on its favorite route, which its favorite route was New York to Chicago. And there’s a lot of New York to St. Louis as well, but it specialized in east-west movements. It had 100% of the Class I railroad movements out of New York, and it had facilities in Chicago.

So that was its big route. And you’ll find a lot of contracts there, I am certain.

CHAIRMAN MORGAN: My other question before we went to labor --

MR. LYONS: So the DOT solves --

CHAIRMAN MORGAN: So you’re not in favor of the DOT --

MR. LYONS: No, no.

CHAIRMAN MORGAN: -- proposal is the bottom line?
MR. LYONS: It solves the easy problems and leaves the hard problems unsolved. That's the difficulty with it.

CHAIRMAN MORGAN: Virginia Railway Express, which is another party that raised concerns -- I presume that CSX and VRE are in constant conversation about the matters that were brought up. Could you fill me in on some of that?

MR. LYONS: I believe they are.

CHAIRMAN MORGAN: Oh, you're going to speaking to that? Okay.

MR. LYONS: Ms. Sprague will address that in the environmental issues.

CHAIRMAN MORGAN: Okay.

MR. LYONS: Unless you or the Vice Chairman have other questions for me, --

CHAIRMAN MORGAN: Well, I think I wanted to get my labor question answered.

MR. LYONS: This is Mr. Ron Johnson, who is CSX's labor counsel.

MR. JOHNSON: Chairman Morgan, Vice Chairman Owen, what the CSX's proposal is here is, on
day one, they are clearly going to have many more clerical employees than they need given they're inheriting most of the clerical related operations of Conrail in Philadelphia.

And what they want to do though is they want to take advantage as much as they can of the experience of the Conrail clerical employees. So for those employees that they don’t need on day one, they still want to put them on day one on seniority rosters in Jacksonville so that, when jobs become available for clerical employees in Jacksonville, they’ll be able to move those people to Jacksonville and they can occupy those positions.

Otherwise, these clerical employees are going to be dismissed employees within the meaning of the Board’s conditions and they can just sit home and draw dismissal allowances.

We think it’s more in the public interest, it’s of more benefit to the carrier and to the employees as well to be able to come down and take these railroad jobs in Jacksonville.

And we want the valuable experience that
they have. Now, this is a proposal that CSX is making to the TCU in implementing agreement negotiations once we get there. I mean, TCU may agree, they may not agree.

We do not believe it is an illegal proposal or violates the New York Dock conditions. I was listening to Mr. Kraus talk about this in his presentation. He references two prior decisions of the ICC involving arbitration appeals where he characterizes those decisions as saying that CSXT's proposal violates the conditions.

There's a very important difference though between CSXT's proposal and the facts of those cases. In those cases, CSXT was not offering seniority rights at the locations to which the people were going to be transferred.

In that case, you had employees who had been dismissed, were drawing dismissal allowances under New York Dock. The question was, could they be recalled to locations where they had no seniority rights under the collective bargaining agreement or forfeit their protections?
And the ICC ruled that they could not be forced to give up their protections if they were being recalled to a location where they weren't required to protect the position under the collective bargaining agreement.

That's much different than what CSXT is proposing here. They are proposing that these people have seniority rights at these locations. Again, this is a proposal. It's something that we think is going to be worked out one way or the other in the implementing agreement negotiations.

And I might mention as kind of a technical issue, it is addressed in the parties' briefs, and we did respond to this issue in the rebuttal narrative.

Thank you.

CHAIRMAN MORGAN: Thank you.

MS. SPRAGUE: Thank you, Chairman Morgan.

Chairman Morgan, Vice Chairman Owen, many parties have come here in the last couple of days asking for conditions based on environmental concerns. The guidebook for my response to their concerns is the
Final Environmental Impact Statement that was prepared by the Board's section of environmental analysis.

I think that document should be the Board's guidebook as well to resolving these requests for conditions.

The FEIS was the most exhaustive environmental analysis ever undertaken of a transaction, to our knowledge. All of the environmental issues that have been brought before the Board in the last two days have been addressed in detail in the FEIS.

I'd like to reiterate what Ms. Christian said in the opening. There is no question that this environmental impact statement has satisfied every requirement of the National Environmental Policy Act.

The section of environmental analysis gathered information from innumerable sources including extensive consultation with communities. They reviewed hundreds of comments on the scope of the EIS and on the draft environmental impact statement.

They evaluated the potential impacts of this transaction both quantitatively and
qualitatively. They defined objective criteria of significance for impacts. But this was not just a pocket calculator exercise.

Where there were special circumstances in a community, this section environmental analysis looked at those and it addressed those. And among those communities that would not have warranted mitigation under a strictly numerical statistical approach were Fostoria and the Four Cities.

But given the detailed review of the special circumstances of those communities, mitigation was recommended in the Final Environmental Impact Statement.

We believe that the Final Environmental Impact Statement correctly analyzed all of the environmental issues that were raised here in the last two days, and that the Board can rely on that analysis with confidence that all the relevant information was taken into account and that it was correctly and carefully analyzed.

The particular issues I would like to address are the claims for conditions of the Four
Cities, the groups in the east of the Hudson area, various persons from Ohio, the passenger issues (VRE and the American Public Transit Association), and the American Trucking Association briefly.

I'd like to begin with the Four Cities. There's no question that the Four Cities has a preexisting problem with vehicle delay grade crossings. The FEIS understands that; we understand that. But we believe that the CSX operating plan is going to improve the situation over the status quo.

Mr. Snow spoke about Chicago in his opening. Mr. Lyons just spoke about it. The Chicago terminal area is critical for the success of the CSX operating plan. The capital improvements that have been planned in the Chicago area approach $100 million dollars.

Very careful analysis went into devising the traffic flows through the Chicago terminal area, and that includes through the Four Cities consortium area which is on the eastern side of the Chicago terminal area.

Even though there are substantial
improvements being made that will allow the flows to occur much more efficiently, there are not going to be substantial traffic increases on the lines in the Four Cities.

The line that is of particular concern to the Four Cities is the BOCT line from Pine Junction to Calumet Park. Under our original operating plan, we were expecting a 5.7 train a day increase. Now, I understand that the Four Cities is saying that no increase is acceptable, but this is not a big increase on a double track signal line.

This is the CSX main line into Chicago. Nevertheless, we met with the Four Cities, we reviewed their filings, we understood their concerns. And we went back to our operating plan and we found a way to put an additional train over the Lakefront line and we moved a couple of trains down to the alternate Conrail Porter Branch.

And so we believe now our projected increase on the BOCT line is about two trains rather than about six trains. But the issue is really not the number of trains. That obviously is one component
of traffic delay.

But the entire CSX plan for Chicago is designed to move that traffic more quickly through the Four Cities. And we expect to achieve speed increases over the BOCT that are going to more than offset any slight increase in traffic.

We truly believe we are going to be improving the situation in the Four Cities. And we have every intent to make these capital and operating plan improvements because it’s in our economic interest to do so.

But I understand that the Four Cities say that they want accountability. We believe the recommendations in the Final Environmental Impact Statement provide that accountability. There are detailed recommendations in condition 24 that we are willing to live by, but they do provide accountability.

There is a clear expectation that we are going to make those improvements, both capital and operational; that we’re going to get those trains through the Four Cities. Part of condition 24 is that
we need to sit down and meet with the Four Cities on a regular basis.

Mayor White, talking about the settlement in Cleveland, spoke about a similar provision in our settlement with Cleveland that he clearly thought was not just window dressing but was a real benefit in making sure that the problems in Cleveland are resolved.

We believe that the similar approach in the Four Cities will ensure that we are held accountable; that they will be able to measure the progress and see what is happening.

One proposal for accountability that we seriously disagree with is a proposal that there should be a cap on the number of trains on our BOCT line. Such a condition would be unprecedented. The Board, as you know, in UP/SP imposed temporary caps in two situations pending further environmental review of impacts on those line segments.

The Board had to do that because it has done an environmental assessment rather than an environmental impact statement. This is a very
different situation.

The FEIS concludes or recommends that the Board not impose such a condition because CSX needs to maintain routing flexibility as it implements its operating plan, and we wholeheartedly concur with that recommendation.

I could not say -- express this point more clearly than the FEIS does at page 5-69 in rejecting the notion of train caps as an accountability device. The FEIS says "the Board licenses railroads as common carriers, meaning that railroads are required to accept goods and materials for transport from all customers upon reasonable request and at a reasonable rate."

"The Board does not regulate how many trains the railroads operate or where they can operate. Railroads are able to operate as many trains as they need in order to serve their customers."

We wholeheartedly concur with that statement.

There is no basis for mandating that CSX rehabilitate that out of service portion of the IHB
that is part of the Four Cities’ alternative routing plan. There is no demonstrated impact that would justify the imposition of a $4 million dollar condition.

As I have stated, CSX is already investing almost $100 million dollars in the Chicago terminal area, the purpose being to get the traffic through. This is what is going to benefit the Four Cities on their BOCT line.

There is also no basis for prohibiting the reactivation of the Ft. Wayne line. Now we understand that this may mean that there are some additional crossings that are being reactivated, but this is going to be to the benefit of the Four Cities on the BOCT line.

The point of the Ft. Wayne line reactivation is to provide a separate route for the slower moving traffic into the Chicago terminal area. We want to use our B&O and the B&O for the fast moving intermodal traffic and the merchandise traffic. We want to get the unit trains off that line and we want to put them on the Ft. Wayne line.
This is going to benefit the Four Cities on the BOCT line which is the line that is of primary concern to them.

The alternative that they proposed in lieu of activation of the Ft. Wayne line is not feasible. This is the conclusion of the Final Environmental Impact Statement after careful review, after field visits, and we wholeheartedly concur.

We just don’t believe it’s feasible.

So for all of these reasons, we stand here willing to undertake the many aspects of condition 24. We will continue to work with the Four Cities. We understand their concerns. But we believe that this transaction, as we have presented it and as the Board -- or as the section of environmental analysis has recommended that it be conditioned, is adequate to satisfy their concerns.

I would like to address briefly the east of the Hudson matters. The commercial aspects of this proposal have been discussed. I would like simply to correct one factual mistake and the premise for the claim that this transaction as we have proposed it
will exacerbate traffic congestion and air pollution in the New York City area.

And again, I would refer the Board to the Final Environmental Impact Statement. There's a very clear analysis of the math there which I will go through very briefly in Appendix H. None of the people speaking on the east of the Hudson issue have asserted that the analysis in Appendix H is incorrect.

And I think they cannot because Appendix H is not incorrect. Essentially the claim of increased congestion in the New York City area comes out of the reports in our operating plan that we are expecting combined in the four intermodal facilities in northern New Jersey about an additional 640 truckloads a day.

If you multiply that by two for two truck trips for each load, you get 1,280 truck trips that are projected to be added in the northern New Jersey area as a result of this transaction.

Congressman Nadler assumes that 1,000 of these trucks are going to cross the George Washington Bridge into New York. This is not correct. A high
portion of these trucks go to warehouse distribution centers and ports in northern New Jersey. They never cross the George Washington Bridge into New York. But even assuming that 1,000 trucks a day are going over the George Washington Bridge into New York, this is not new freight to the New York City area.

This is simply freight that, rather than taking its entire journey on a truck, is going to go part way on a truck and part way on a train.

So as the section of environmental analysis correctly analyzed, the question is whether that freight, when it goes part way on a train rather than all the way on a truck, how does that affect the local traffic patterns?

What it would do in certain circumstances is pull some of the traffic that was moving north of the city over the Tappanzee Bridge -- pull that traffic south so it would go over the GW Bridge into the intermodal terminals that are located within a couple miles of the GW Bridge.

The FEIS estimates how many trucks are
being pulled down this way to the intermodal terminals in northern New Jersey, and they estimate a maximum of 253 trucks a day. And they emphasize this is a very conservative maximum estimate.

CSX had -- when this issue came up, we went back into our diversion studies, which is another way of looking at this, and tried to look at exactly what was coming from New England, the origin destination pairs, to figure out what was going over the Tappanzee and to look at it that way and figure out what we would be pulling down over the GW Bridge to these northern New Jersey intermodal terminals.

We came up with about six trucks a day.

The average daily traffic on the George Washington Bridge is 265,342 vehicles. Even at 253 trucks added to that bridge, that’s .09% increase in traffic. This is simply a de minimis effect.

This is not a serious effect on traffic or air quality in the New York area.

The Final Environmental Impact Statement could have gone a step further, which it didn’t need to do, but that is that some of the trucks that are
coming down out of New England and over the GW Bridge, because of the advantages of our transaction, we are going to be diverting those trucks off the highway in Massachusetts to the intermodal terminals in Beacon Park, Worcester and Springfield.

So trucks that would be going over the GW Bridge won’t anymore because we’re going to put them on trains in Massachusetts and they will head to Albany and on their merry way on the trains and never come through the New York City area.

Now I think part of the argument of east of the Hudson is somewhat different. It’s not a claim that our operating plan is going to exacerbate the existing situation, but the statement that if CSX does develop the business east of the Hudson River or if, under their plan, whomever developed the business, then there would be fewer trucks east of the Hudson and that would improve the situation.

We can’t -- I mean, that’s true. But that goes to the merits issue and that is a suggestion that things improve.

So I think that just needs to be
separated, the claim that this transaction will make things worse, which is demonstrably false, from the statement which is true, that if the business is developed east of the Hudson, then that would remove trucks and improve the situation.

CHAIRMAN MORGAN: So when I was having the dialogue earlier on this point then, I remember asking whether the proposal would take trucks off the road and the answer was well, not in the New York City area.

I don’t know if you heard that answer, but do you have a response to that?

MS. SPRAGUE: I wasn’t sure if the answer was whether our proposed transaction would take trucks off the road. That’s how I understood the question. I think that may be how the speaker understood the question.

Well, I shouldn’t speak for the speaker. I’m not sure.

CHAIRMAN MORGAN: Well, let me ask you the question that I thought I was asking him and then see what your answer is.
And what I was asking him was, does the proposal before us take trucks off the road in the New York City area?

MS. SPRAGUE: I think --

CHAIRMEN MORGAN: Because if the basis for the east of the Hudson is get more trucks off the road, --

MS. SPRAGUE: Right.

CHAIRMEN MORGAN: -- I was trying to say well even without the east of the Hudson, are trucks getting off the road in the New York City area?

MS. SPRAGUE: I guess the question would be the balance between the number of trucks that we’re expecting to divert to the intermodal facilities in Massachusetts as opposed to the -- when you talk about the area, you have to talk about right about, you know, the George Washington Bridge in the New York City area versus the number of additional trucks that you would be pulling down to go to the intermodal terminals in northern Jersey.

And I can’t give you a quantification. We did quantify the number that we thought we would
actually be pulling down over the George Washington Bridge of six, and I think it’s fair to say that we’re expecting to divert more than six to our intermodal terminals in Massachusetts a day, but I don’t have a quantification for you on that.

I would like to turn now to issues raised by various representatives and residents of the State of Ohio. The first is the proposal of the Ohio Rail Development Commission for the corridor approach to the grade crossing warning system upgrades.

This is a proposal that we are in agreement with. We have been working with Ohio since last summer and that work has culminated into very important agreements. Last November we signed an agreement for upgraded warning systems between Greenwich and the Indiana-Ohio state line.

Conrail also entered into an agreement for upgrading warning systems between Berea and Greenwich, which is a line segment that is going to be experiencing a substantial increase in traffic.

We pushed ahead with these agreements because we understood that upgrading the warning
systems was important. The Ohio Public Utilities Commission, working with the railroad and the Ohio Rail Development Commission, did an exhaustive analysis of every crossing along the line.

And I believe between the two agreements that 70 crossings are going to be upgraded as specified by the corridor agreement.

I wanted to emphasize that this approach is not designed to have us upgrade fewer crossings. This is not something we’re doing to try to save money. We are going to be paying a substantial share to upgrade many, many more crossings than were identified in the Final Environmental Impact Statement.

And we agree that applying this corridor approach to some of the other line segments in Ohio that are going to experience traffic increases as a result of the transaction is the appropriate thing to do.

So we do agree with the recommendation of the State of Ohio in that regard. I believe they suggested 120 day period to forge ahead, and CSX and
I understand NS are both agreeable to that recommendation.

If we’re not able to reach agreement, if there’s some problem, we would anticipate reporting back to the Board. I would point out that condition eight, which provides the specific list of grade crossings, has a two year provision for completion.

So there’s no conflict between these provisions. I would see it as an acceleration of that process in the State of Ohio.

Now when we get to grade separations, however, the proposal was made to have a further one year review period for further negotiations on the grade separations. This is not a procedure that we believe needs to take place under the auspices of the Board.

The FEIS exhaustively analyzed crossings on all the line segments that we’re expecting increases, looked at detailed information about traffic flows, and made a recommendation with respect to a grade separation in Indiana.

As was pointed out, there were no
recommendations for grade separations in Ohio. Now, of course, our settlements with various communities in Ohio included provisions under which CSX and NS undertook substantially greater than the usual proportion for funding.

VICE CHAIRMAN OWEN: Are those underpasses or overpasses?

MS. SPRAGUE: Well, I know specifically at Berea that was an issue and that under passes were agreed upon, at least for Bagley Road. Front Street too?

And Front Street as well. I'm afraid I can't speak to the --

VICE CHAIRMAN OWEN: What was the estimated cost, just round numbers? Do you have any idea?

MS. SPRAGUE: Front Street was $25 and Bagley was $18.


Thank you.

MS. SPRAGUE: I am not positive of the
precise number, but I believe that there have been in
the neighborhood of 50 proposals for grade separations
in the State of Ohio alone. Now you asked for the
cost of these crossings -- were $18, $27 million.

   Even taking $10 million dollars as an
average cost of a grade separation these days, we're
talking about $500 million dollars. We don't know
what Ohio has in mind for the railroad share of that.
But presumably, because they're seeking Board
auspices, they were thinking of more than the
traditional 5% railroad share.

   And this is something that is not
agreeable to CSX, and I believe I can speak for NS in
that regard as well.

   We think that the Board has gone as far as
it should go in terms of environmental mitigation;
that to start getting beyond what the FEIS recommended
would be unduly burdensome on this transaction that
bring significant environmental benefits.

   There would be no basis for doing a
further study and reporting back to the Board. We see
this as a very different situation from the grade
crossing warning device upgrade situation where there
really is an expertise to bring to bear that we
believe the state agencies have in identifying the
particular crossings for upgrade and identifying
crossings that should be closed, which is something
the Board has not gotten into, but the local agencies
and the state agencies can make those decisions.

But the grade separations are basically a
matter of prioritizing this extraordinary cost within
the state. And we do not agree to a further process
under the Board's auspices. We don't voluntarily sign
up for that, I should say.

Congressman Boehner spoke here in support
of the transaction. He acknowledged the significant
investment that CSX was making in Ohio including
Willard Yard, Collingwood Yard and other investments.

He didn't even address the benefits of the
settlements that we had made, but substantial money
for grade separations is going to be going to the
State of Ohio through these settlements.

He asked the Board not to further encumber
the transaction with burdensome conditions. And, in
our view, an extensive program of building railroad
funded grade separations in Ohio would certainly
qualify as such a burdensome condition.

Okay, I am informed that our truck
diversion study shows that about 21,000 truckloads
will be diverted to rail for traffic moving between
central New England and the southeast. And we would
expect a substantial percentage of this traffic is
today moving by truck through the New York City area.

Thank you.

Okay, VRE -- I'd like to point out that,
when we opened this hearing yesterday, Congressman
Bliley and Senator Warner from the State of Virginia
both came here to express their complete support for
this transaction.

They expressed no reservation that the
transaction would have a deleterious effect on VRE.
And we think that's because there will be no such
effect. Congressman Bliley, in particular, spoke
about the benefits to Virginia of removing 26,000
truckloads from the highway.

A lot of these truckloads are going to be
coming from I-95 and onto the CSX line from Richmond to Washington. We agree with Congressman Bliley that this is a great benefit from this transaction.

These additional trains though is what VRE has been here complaining about. We don’t believe that VRE is seeking narrowly tailored conditions. In effect, what they are trying to do is have the Board rewrite their contract to shift responsibility from them to CSX for building additional capacity on the D.C.-Fredericksburg line.

Under their contract, they have obligations for paying for that additional capacity if they want to expand their service. I’d also point out that FRA is presently working on the Washington-Richmond corridor transportation plan.

This is a long term program of the capacity improvements with federal-state funding designed to reduce running time and increase service frequency of inner city passenger and commuter rail service.

The FEIS, after thorough analysis, correctly concluded that there would be no adverse
effect from this transaction, let alone an effect that
would warrant this kind of extraordinary relief of
shifting responsibility for these kinds of capacity
improvements for passenger service to CSX as a
condition of this transaction.

In answering your earlier question about
discussions with VRE, we are in constant discussion
with VRE. Last summer, CSX hired Paul Weistrup, the
former president and CEO of Amtrak, as our coordinator
for passenger relations.

And CSX has experience presently with
passenger service -- VRE, of course, and our MARC
service. But in light of the increased relationship
in Philadelphia and Boston and New York, New Jersey
areas, Paul was hired.

He has been doing an excellent job. He is
in constant communication with VRE. I think his
commitment has resulted in the excellent on time
performance that VRE has been achieving over the last
number of months.

Last summer they did have a hard time when
we had an accident that took out the signaling system.
But the work that has gone on since then to get right on top of problems and make sure things operate smoothly has really paid off.

And VRE has been having excellent on time service. Their management sends CSX complimentary letters on a regular basis. And we look forward to a continued good relationship with VRE.

Here again, the FEIS recognizes that good management and commitment will go a long way towards ensuring that the commuters run on time, and I think that is very amply demonstrated here.

The American Public Transit Association came with what I take to be their very broad legislative agenda. We think everything they are asking for goes far beyond anything that’s an appropriate condition of this transaction.

I would just point out briefly that five of its members support this transaction. The Mass Transit Administration of Maryland, the MBTA, Chicago Metro, New Jersey Transit and SEPTA all support this transaction.

APTA asked for what seemed to be a broad
oversight of commuter performance and pointed to the Amtrak settlement. We don't believe that that is appropriate. This Board does have responsibility for certain matters relating to Amtrak, and I think it is appropriate and that is part of the settlement, that the Board would consider the on time performance of Amtrak in the oversight period.

But we don't believe that that is appropriate to extend to the commuters. As the freight railroads have been getting out of the commuter business over the last 30 years, this Board has also been getting out of the business of supervising the commuter-freight relationship.

That is a matter that's left arms length negotiation and we believe that the transaction does not change that.

I had a response to ASHTA Chemical. I don't know if you want to hold on just another minute to hear that.

CHAIRMAN MORGAN: Go right ahead.

MS. SPRAGUE: There is an answer to ASHTA.

ASHTA --
CHAIRMAN MORGAN: Since I asked a question about it.

MS. SPRAGUE: ASHTA brought the environmental concern into this case in April of this year for the first time.

And they did so in response to a supplemental notice of the section of environmental analysis identifying the Norfolk Southern line segment between Buffalo and Ashtabula as the line segment that was getting increased hazardous materials traffic.

And that notice asked for comment, and ASHTA's comments were filed in response to that. Prior to that comment, ASHTA had been seeking reciprocal switching strictly on competitive grounds.

The story with ASHTA is that, presently, all of their traffic does go from Ashtabula to Buffalo to be classified. Most of it goes on its way to the east from there, but some of it does get put on through trains in Buffalo that then travel back to the southwest through Ashtabula and on their way.

This was not always the case. We inquired of Conrail when the ASHTA issue was raised in April as
to what the situation was, and they informed us that they didn’t always do it that way.

But there were service problems, and they found that once they started just taking it all to Buffalo and classifying it there, they got it on its way and to the destination much faster, more efficiently.

There is -- in our operating plan, we simply propose, for purpose of traffic figures, to do things the way Conrail was doing them. But there is nothing about this transaction that requires CSX to take ASHTA’s freight to Buffalo for classification.

CSX may well find it more appropriate as it works with ASHTA to take its freight bound for the south and west to Willard or to Indianapolis for classification. Now that ASHTA apparently has this concern about having its freight go and come back for -- and I’m not making light of it.

I mean, one shouldn’t haul freight around for no good reason, particularly hazardous materials. But if that is really a concern of theirs, then CSX is more than willing to meet with them and talk to them.
about how they wish to have their freight classified.

And we're more than willing to work with them on that. So there is nothing about this transaction that is causing hazardous materials to be hauled over circuitous routings and we're happy to work with them.

No condition of the nature that they have requested is warranted on any environmental basis.

CHAIRMAN MORGAN: Anything else?

MS. SPRAGUE: I think that's it.

CHAIRMAN MORGAN: For clarification, when is day one?

MR. LYONS: Day one is the so-called closing date, and it is the date when Conrail stops being a separate entity running trains of long haul nature and the two parts of it are allocated, one of them to CSX and the other to Norfolk Southern.

CHAIRMAN MORGAN: But when is that date?

(Laughter.)

I need to know the date --

MR. LYONS: When is it going to be?

CHAIRMAN MORGAN: -- so that I know what
it is.

MR. LYONS: I'd like to know myself.

There are conditions -- there is no fixed date for it. Under the NIT League settlement, we will not go to day one, which is the closing date, until there are all necessary labor agreements and until all the management information systems are in place to the extent necessary to have an orderly day one.

There is also, as set forth in one of the petitions that was filed back a week or so ago, the matter of sorting out the contracts and getting that part of the operations ready.

And exactly when that will all be known and when that will be done is hard to guess. There will be a period where, if the transaction is approved, the two will be in control of Conrail; that the voting trust will terminate.

The two will be in control of Conrail, but Conrail will still be running as an independent -- as a separate railroad even though controlled by the two.

But I cannot give you an estimate with any reliability as to when the closing date, day one, will
1 occur.
2
3 CHAIRMAN MORGAN: Okay.
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5 MR. LYONS: Do you have a --
6
7 (Laughter.)
8
9 CHAIRMAN MORGAN: He leapt up. I guess he must.
10
11 MR. ALLEN: I would just add to that for Norfolk Southern that we think it's extremely important that day one happen as quickly as possible. And we have indeed agreed in the NIT League settlement to make every effort to make sure that that happens.
12
13 MR. LYONS: Yes, that is certainly the case. But exactly when it is, we don't know.
14
15 CHAIRMAN MORGAN: Okay. Before we close, let me just ask if you would all get us, by close of business tomorrow, two lists; one a list of all the parties that have withdrawn completely and a second list of all the parties that have withdrawn in part -- you know, where some things have been resolved and some things haven't.
16
17 Then we also need a list of what conditions you want us to impose by way of settlement.
agreements. In other words, you’ve entered into settlement agreements; we need to know which ones you’re requesting be imposed since you’ve entered into some of these very recently.

If we could have that list and some sort of description, that would be very helpful by close of business tomorrow.

I’ve asked my staff if there was any other question that they wanted me to ask and they said no, -- (laughter) -- which I think is their message that we want to go home, and they know I have a habit of going on and on. But yes, this -- we are finished. This oral argument is finished.

I want to thank all of you who have appeared yesterday and today, and those of you who still remain in the room. This has been a long two days, but I think it has been worth it.

I know I have been studying this record for several weeks, but I think we have been able to hone in on some issues in a very productive way the last two days. We’ve heard a lot. We’ve heard from the Applicants about the benefits of this proposal.
We’ve heard from a lot of other people who have worked things out with the Applicants as recently as this morning and who now want this deal. And we’ve heard from a lot of people who want the deal if they get some changes.

And these are all serious issues, serious concerns, and we take them seriously. We will be studying the record further, and then we will decide this case. We have a voting conference scheduled for next Monday afternoon at 1:00 where we expect to discuss and vote on the application.

I know we’ll have another full room with many of the faces I see tonight again. We have copies of the press release that explains the details of the voting conference as you go out the door.

Again, thank you all. And I want to thank the staff who again has been here another long day and we could not do it without all of you. Thank you.

And we will have a long weekend, and we will be back here on Monday.

(Whereupon, the proceedings were adjourned at 8:27 p.m.)