

SURFACE TRANSPORTATION BOARD

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1 carriers that have come to some fruition.

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

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

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

12 CHAIRMAN MORGAN: Mr. Edelman.

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

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

16 CHAIRMAN MORGAN: But on behalf of your --

17 MR. EDELMAN: Yes.

18 CHAIRMAN MORGAN: -- the unions that you
19 represent.

20 MR. EDELMAN: Generally, from what I
21 understand from people, the carriers' approach has
22 been pretty much take it or leave it. This is the

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1 implementing agreement, this is what we want you to
2 sign.

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

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

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

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

22 I mean, the joke is, as Mr. Kraus and Ms.

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1 Willen have pointed out, these railroads already have
2 multiple agreements; the fortuity for them here is
3 that Conrail, for each craft, only has one. All
4 they've got to do is take over one more in connection
5 with acquiring a fairly large territory.

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

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

19 Things like that is what they're talking
20 about is why the entire agreements have to go. So you
21 should know that yes, discussions are being held, but
22 that's what's going in on the ground.

1 A labor relations official on -- for one
2 of the organizations told me labor relations official
3 on UP to describe to them in scatological terms what
4 he would do with his collective bargaining agreement
5 through the arbitration process.

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

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

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

20 So it can't just be that -- it can't just
21 be necessary to the transaction if it reduces their
22 labor costs. And we urge the Board to restore some

1 sense of decency and some realism and some law to this
2 area.

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

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

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

15 CHAIRMAN MORGAN: Thank you.

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

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

21 CHAIRMAN MORGAN: Okay.

22 Okay, well thank you all. This has been

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1 very helpful.

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

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

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

10 So I apologize.

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

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

15 (Laughter.)

16 I'm not responsible for your day now.

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

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

19 MR. O'BRIEN: Let me thank you, Madame
20 Chairman, and the Board for being very thoughtful and
21 accommodating to a situation that you had no --
22 nothing to do with. It was a very --

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1 CHAIRMAN MORGAN: Airlines -- I have
2 nothing to do with airlines.

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

6 (Laughter.)

7 CHAIRMAN MORGAN: Not me.

8 MR. O'BRIEN: Thank you very much.

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

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

21 At the beginning of the Conrail sale
22 process, Chairman Morgan, you met with several Ohio

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1 rail officials to provide an overview of the impending
2 process. They appreciate that.

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

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

17 Concurrently, both houses of the Ohio
18 legislature conducted hearing. All came to the same
19 conclusion: that though the benefits of the proposed
20 sale were substantial, the harms were grievous enough
21 that Ohio had to stand up and oppose the proposed
22 transaction.

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1 Now displayed on the board is a quick
2 listing of what those problems were deemed today, and
3 I'd like to take a few minutes to focus on the
4 overview of the harms that do face Ohio.

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

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

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

21 The bottom line is, Ohio communities
22 rightly fear the adverse impacts of 20, 30, 40, even

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1 60 additional trains per day passing through their
2 towns and neighborhoods. Ohio has maintained vigorous
3 support of its communities and their request for
4 adequate mitigation in the adverse impacts of
5 increased train traffic.

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

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

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

19 Although in instances such as grade
20 separations we believe the SEA should have gone
21 further, Ohio is very supportive of the many
22 innovative recommendations in the EIS.

1 Ohio urges the Board to include the SEA
2 recommendations as minimum mitigation for the adverse
3 impacts that the proposed transaction would have on
4 local communities.

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

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

15 Similarly, it's very unclear to Ohio why
16 SEA recommended real time train monitoring technology
17 for some communities and not for others. For example,
18 in towns -- the towns of Grafton, Wilmington,
19 Lagrange, daily train traffic will increase from 14 to
20 54 trains, and annual HAZMAT carloads will increase
21 from 16,000 to 46,000.

22 Why didn't the SEA recommend that these

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1 communities be provided the real time train monitoring
2 systems as it did for similarly impacted communities?

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

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

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

18 At the same time, Ohio wishes to advise
19 that it is continuing constructive negotiations with
20 the Applicants concerning grade crossing needs in
21 corridors that will be affected by the proposed
22 transaction.

1 Thus far, as a result of ongoing
2 negotiations, arrangements have been made to upgrade
3 over 70 crossings through joint funding arrangements.
4 Presently, Ohio and joint Applicants are actively
5 discussing the needs of four additional corridors and
6 hope to conclude those negotiations within 120 days.

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

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

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

18 For all rail dependent Ohio companies, a
19 Wheeling bankruptcy cannot be accepted as business as
20 usual. The uncertainty -- service interruptions and
21 other unknowns that Wheeling bankruptcy would bring
22 could have a devastating impact on key Ohio industries

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1 such as steel, stone, petrochemical and plastics.

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

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

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

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

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

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

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

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

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

22 The bottom line is that there are not

1 enough revenues to support two railroads handling what
2 is now a single line movement. The stone is just not
3 going to move from western Ohio to eastern Ohio points
4 and down beyond.

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

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

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

21 The adverse consequences of such a loss
22 should not be ignored.

1 As to ASHTA Chemical, Ohio continues to
2 support ASHTA Chemical, who made its case yesterday.
3 They have raised a legitimate one to two issue and
4 should be provided remedial measures which will
5 eliminate the adverse impact of unnecessary circuitous
6 movements of HAZMAT which would otherwise result.

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

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

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

21 Ohio wants to make it very clear. In
22 seeking STB mandates to redress the transaction

1 related harms, it is -- it's not the only thing that
2 the state is doing. The state is investing
3 considerable time and millions of dollars in finding
4 reasonable solutions.

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

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

13 If I might just conclude.

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

19 You have broad authority to adopt
20 conditions as needed to redress the harms to the
21 public interest. Ohio urges you to adopt the
22 appropriate conditions to ameliorate the serious harms

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1 it has identified.

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

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

11 Thank you very much.

12 CHAIRMAN MORGAN: Thank you.

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

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

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

21 A couple of questions. You covered
22 obviously all the issues that are important to Ohio,

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1 and we've been dealing with each of these issues
2 throughout these last two days. Let me just go into
3 a couple of them and ask a couple of questions.

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

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

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

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

20 As was said by the previous panel, these
21 train movements that indicate -- there are 16 slow
22 crossing moves or switching moves that will be reduced

1 to 11, therefore the conditions should improve; all
2 that is contingent on the plan as submitted being the
3 plan that's implemented and the plan that the Fostoria
4 residents experience over a five or seven year period.

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

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

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

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

21 MR. O'LEARY: Crossings; yes, ma'am.

22 CHAIRMAN MORGAN: I meant grade crossings.

1 But with respect to the ones in Ohio, you
2 would suggest more stringent upgrading standards be
3 applied to the grade crossings in Ohio. Did I
4 understand that you be your position?

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

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

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

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

21 The other issue that we didn't perhaps
22 articulate as clearly as we should is the notion that

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1 we have four corridors that we're currently in
2 discussion with, three on the NS side and one on the
3 CSX side.

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

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

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

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

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1 crossings.

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

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

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

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

18 So, if you allow us 120 days or so to work
19 these out, my sense is that we won't cost the
20 Applicants much, if anymore, money and you'll have a
21 lot safer Ohio as a result of it because the corridor
22 approach works.

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1 You get economies of scale, you get good
2 public awareness when the projects are going up, and
3 we're convinced we're already saving lives as a
4 result. If you only put up 29 crossings when we could
5 do 75 for our people, my sense is that you tie our
6 hands in advance.

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

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

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

21 We're building five of those are we're
22 speaking right now. They're currently under

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1 construction. We did that after the line was
2 reactivated. So my sense is that, if we partner with
3 CSX on that corridor, we can get increased protection
4 there at less out of pocket cost to the railroad.

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

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

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

21 And so we've had a lot -- we've heard a
22 lot from a lot of different communities about the best

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1 way to do that. You know, some have suggested that we
2 impose X, Y and Z. Some have suggested, as you are
3 today, time for negotiation.

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

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

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

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

19 MR. O'LEARY: Madame Chairman, if I might
20 just make the suggestion that if the 29 projects that
21 are in the final environmental impact statement could
22 be held in abeyance and give us 120 days to work on

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1 these corridors, if we can't produce results on those,
2 if we don't file signed agreements within that period,
3 then the recommended mitigation then take place solely
4 at the Applicants' expense.

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

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

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

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

21 MR. O'BRIEN: Yes.

22 CHAIRMAN MORGAN: -- of great importance

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1 to the state. I think your suggestion in your
2 testimony was to provide some sort of connection at
3 Toledo that might help both of these railroads --

4 MR. O'BRIEN: Yes.

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

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

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

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

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1 over.

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

13 And so that the neighboring utilities,
14 Detroit Edison, will be able to wheel power into the
15 First Energy Center area. And although this is not
16 about electric utility deregulation, there's a close
17 relationship between the competition of coals and the
18 competition -- price of a generated kilowatt of
19 electricity.

20 I think it's important, although it's late
21 entry, if you will, into the consideration, if we're
22 going to open up competition in high sulphur coals,

1 let's get competition in both West Virginia,
2 Pennsylvania and Ohio.

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

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

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

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

22 Disrupting the labor unit, the local that

1 moves that coal now on the Conrail system is a
2 problematic issue if you split that movement at
3 Crestline between two Class I's. So part of the
4 solution for the Ohio stone is improving the
5 Wheeling's ability and keeping the Wheeling viable.

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

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

21 CHAIRMAN MORGAN: Okay, thank you.

22 Vice Chairman.

1 VICE CHAIRMAN OWEN: No.

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

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

6 MR. O'BRIEN: Thank you very much.

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

10 CHAIRMAN MORGAN: No road is easy.

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

15 CHAIRMAN MORGAN: Okay, thank you both.

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

18 First we will hear from Clinton Miller,
19 United Transportation Union; then Robert Godwin,
20 Brotherhood of Locomotive Engineers--Consolidated Rail
21 Corporation--General Committee of adjustment; Angelo
22 Chick, Brotherhood of Locomotive Engineers, Division

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1 227; Samuel Nasca, New York State Legislative Board,
2 United Transportation Union; and then Harry Barbin and
3 William O'Connell, Retirees--Former Employees of
4 Conrail.

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

7 Please proceed.

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

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

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

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

22 Rather than asking that these commitments

1 be made actual conditions by the Board subsequent to
2 its approval of the transaction, if permitted, UTU
3 requests that these commitments be noted in the
4 Board's decision along with the statement that the
5 Board expects the Applicants to live up to their
6 commitments to UTU similar to what this Board put in
7 its decision at page 171 and footnote 218 of the
8 decision in the UP/SP merger.

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

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

17 This applies to the 132 trainmen whose
18 jobs will be transferred, the 329 trainmen whose jobs
19 will be abolished, and the 29 yard masters whose jobs
20 will be affected by this implementation if approval is
21 granted.

22 All is indicated in the Applicants' labor

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1 impact exhibit. Additionally and beyond that, this
2 automatic certification will apply to all other train
3 service employees, yard masters and hostlers
4 identified by any Article I, Section 4 implementation
5 notice served by the Applicant, as well as to
6 engineers on those properties where UTU holds the
7 contract for engineers.

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

17 UTU has done so. Some of UTU's general
18 committees of adjustment, which are in charge of
19 contract administration, have reached tentative
20 agreements, and a great number of others are close to
21 tentative agreements with both CSX and NS, all subject
22 to ratification.

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1 In that connection and in line with their
2 commitments, NS and CSX will apply automatic
3 certification to Conrail employees who become their
4 employees as a result of such implementing agreements.

5 Anywhere implementing agreements are not
6 reached, arbitration will commence within ten days of
7 this Board's written decision approving the
8 application, assuming approval.

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

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

21 The Applicants have also committed to
22 preservation of the right of Conrail employees to flow

1 back to and from Amtrak under Section 1165 of the
2 Northeast Rail Service Act of 1981. And to the
3 remaining one time flow back opportunities, Metro
4 North and New Jersey Transit Rail Operations employees
5 have to Conrail under Section 1145 of the same
6 statute, and to yard master agreements that cover the
7 same general matters as to a one time move back to
8 Conrail.

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

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

19 UTU, in fact, believes itself to be the
20 largest labor organization in the rail industry. And
21 its chief responsibility is to protect not only the
22 economic, but also the safety interests of its members

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1 whose work makes possible the efficient functioning of
2 the nation's transportation system.

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

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

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

20 By integrating certain Conrail routes and
21 facilities into their existing rail networks, CSX and
22 NS projected they will be able to provide better

1 service to existing customers and will also use
2 improved service to attract new customers.

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

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

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

22 Overall, it is UTU's opinion that the

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1 immediate adverse job impact that UTU members will
2 experience in implementation of this transaction, if
3 approved, will be ameliorated by the applicants'
4 commitments. And there's a possibility of long-term
5 job growth.

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

16 In that connection, UTU is acutely aware
17 that creation of rail networks with broad geographic
18 coverage and substantial traffic densities raise
19 monumental safety concerns. While these networks
20 create opportunities to "grow the business," as Mr.
21 Snow says, recent experience tells us we must
22 anticipate the traffic and safety problems inherent in

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1 them.

2 UTU has, therefore, in order to help the
3 carriers achieve and maintain a sufficient complement
4 of trained, safe employees, proposed that a task force
5 be put in place on each property with committed
6 carrier and union personnel that can deal with traffic
7 and safety problems immediately while they are still
8 in their infancy, or hopefully before they happen.

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

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

19 As to traffic, as UTU International
20 President Charlie Little said to a group of Class 1
21 carriers on our wage rule panel back last fall, the
22 worst thing that operating employees can do to get

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1 even with operations managers is to do exactly what
2 they tell you.

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

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

22 While Mr. Snow accurately described, in

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1 response to Vice Chairman Owen's question, a new CSX
2 discipline policy worked out in conjunction with UTU
3 and BLE, which prefers training over discipline for
4 operating errors, employees need the confidence that
5 harassment will not become the rule when traffic
6 volume creates operating problems.

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

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

18 But UTU hopes that in that process, or in
19 whatever conditions the Board considers, UTU hopes
20 that there is recognition that the safety and job
21 security of operating employees should not be
22 compromised in any way that the operating plan changes

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1 as occasioned by the settlements and by the
2 conditions, because our people stand a chance of being
3 affected if that is not carefully attended to.

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

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

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

19 I'll be available for questions at the
20 conclusion of the panel.

21 CHAIRMAN MORGAN: Okay.

22 MR. MILLER: Thank you very much.

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

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

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

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

21 Derailments, big and small, and gridlock
22 nearly closed the Union Pacific down. Freight cars

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1 and sometimes entire trains were lost for days.
2 Railroad employees of all crafts had to work shifts of
3 12 hours on, eight hours off, and they're doing that
4 up to today. This has adversely affected their
5 physical well-being and their ability to work safely
6 due to fatigue.

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

14 We can point the finger or fault at a lot
15 of things such as little or no planning by UP
16 hierarchy to ensure a safe and smooth transition from
17 two separate carriers to a merged carrier; lack of
18 qualified middle management and experienced field
19 supervisors; lack of qualified operating employees,
20 locomotive engineers, conductors, trainmen, trained
21 dispatchers, and crew dispatchers; the rush to do away
22 with support employees, clerks, carmen, locomotive

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1 repairmen, yard masters, and maintenance of way
2 employees; the shutting down of yards, terminals,
3 repair facilities, and secondary lines.

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

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

22 If the Surface Transportation approves the

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1 splitting up of Conrail by the Norfolk Southern and
2 CSXT as casually as they allowed the UP to acquire the
3 Southern Pacific, it will make the Union Pacific
4 fiasco like a walk in the park.

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

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

17 A few short years ago, CSXT had a
18 derailment in New Orleans that caused thousands of
19 people to be evacuated to escape the vapors of the
20 hazardous material spill in one of their yards.
21 Imagine this type of incident in the New
22 Jersey-Philadelphia shared asset area, or Beacon Park

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1 Yard on the banks of the Charles River in Boston,
2 Mass.

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

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

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

21 Another area of a sure target for deadly
22 gridlock is Cleveland, Ohio. This is where the

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1 Norfolk Southern comes off the water level route from
2 Chicago to Cleveland, a multi-track territory, two
3 single lines, one to Buffalo and one to Pittsburgh.
4 The CSXT comes from the former Conrail water level
5 route from Boston-New Jersey shared asset area to
6 Cleveland onto the Short Line from Collingwood to
7 Berea, controlled by Norfolk Southern, and then onto
8 the CSXT lines to continue their trip west.

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

18 In the last five years, over 30 locomotive
19 engineers have been killed in the United States. A
20 fair share of them have been on the combined Union
21 Pacific, Southern Pacific, Conrail, CSXT, and Norfolk
22 Southern. That number could be doubled if you take

1 into effect the deaths of brothers and sisters and
2 other crafts in the railroad industry. The sad part
3 of this is killing and maiming will continue.

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

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

17 I have worked in the railroad industry for
18 42 years. Forty of those years I have been a union
19 officer, both on the local level and a full-time
20 officer since 1983. I have seen all kinds of safety
21 programs come and go. They all start with statements
22 concerning commitment to program. They hold meetings,

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1 hand out fliers, hats, buttons, T-shirts, and have
2 hard talks with the employees. Six months later, they
3 forgot there ever was a program.

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

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

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

22 Thank you very much.

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1 CHAIRMAN MORGAN: Thank you, Mr. Godwin.

2 Mr. Chick?

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

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

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

20 And if CSX makes the argument that it's
21 going to cost them money, the mechanics for the
22 maintenance and the administration of the seniority

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1 system is already in place in the Conrail computer
2 system and it wouldn't cost CSX anything to maintain
3 it, just to take over Conrail's computer system and
4 add it to theirs.

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

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

19 And I thank you for your indulgence today.

20 CHAIRMAN MORGAN: Thank you.

21 Mr. Nasca?

22 MR. NASCA: Thank you, Madam Chairperson

1 and Vice Chairman.

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

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

19 The first issue that I would like to
20 present to you, Madam Chairperson, is I continue to
21 hear the Norfolk Southern speak about their intentions
22 to increase the traffic over the Southern Tier portion

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1 of Conrail from Buffalo through Binghamton, Port
2 Jervis, and Oak Island. And I continue to be
3 skeptical of those intentions. What if those
4 intentions are correct?

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

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

15 It's my fear that Norfolk Southern will
16 not be willing to invest that kind of money into
17 making the Southern Tier a safe operating line. It's
18 my feeling that they seriously estimated the
19 rehabilitation cost for that line. They do not have
20 the employment resources to operate that line today,
21 and my fears are that they won't have it on
22 implementation.

1 As far as safety in New York State is
2 concerned, Conrail has done everything in their power
3 to circumvent safety mandates. For more than a year
4 and a half they ignored the requirements of 49 CFR
5 Part 215, pre-departure inspections, and 49 CFR Part
6 23212, initial terminal air test, on all of their
7 block-swapping trains at Buffalo, Syracuse, and
8 Albany.

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

17 In the business plan, both CSX and Norfolk
18 Southern have stated that they intend to increase the
19 traffic volumes throughout New York State, but nowhere
20 in the business plan does it reflect that they intend
21 to increase those classes of employees -- car repair
22 persons and car inspectors.

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1 My question is: how do they intend to
2 operate a safe railroad with that level of employees
3 that do the inspection and car repairs?

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

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

21 And my final point involves the Delaware
22 and Hudson employees who now operate between Buffalo

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1 and Binghamton and Binghamton and Philadelphia. They
2 will be adversely affected as a result of approval of
3 the transaction. For all practical purposes, a
4 significant number of them will lose their jobs.

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

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

18 The D&H employees should not be simply
19 forced into an unemployment situation as a result of
20 this transaction without some kind of protection. As
21 a matter of fact, this class of employees -- the D&H
22 employees -- stand to be as adversely affected by the

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1 transaction as any employee of any of the other three
2 railroads involved.

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

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

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

19 CHAIRMAN MORGAN: Thank you.

20 And next we will have Mr. Barbin. And I
21 have Mr. O'Connell here, too, but he's not with us or
22 --

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1 MR. BARBIN: Yes, ma'am.

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

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

5 Good afternoon, members of the Board.

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

15 The non-union or management employees made
16 mandatory matching contributions for many, many years,
17 from the Pennsylvania Railroad years to Penn Central,
18 up until 1965. The company stopped contributions to
19 the plan in 1984. Why they did was because a very
20 large surplus became involved with this plan, although
21 the union employees continue to make matching
22 contributions up to the time of their retirement.

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1 In 1994, the last information we had, the
2 plan had a surplus of \$538 million. That's four years
3 ago. Well, we know what happened to the securities
4 market. It's undoubtedly substantially higher today.

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

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

19 If the plan is terminated, the statute
20 provides an allocation of rights of surplus to the
21 employees who contributed. If the plan is merged, for
22 example, into the CSX plan -- which, incidentally, is

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1 a very large underfunded plan -- the security of the
2 benefits for all of the participants in the plan
3 become an issue

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

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

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

22 We're asking certain conditions that are

1 set forth in our comments, but briefly it is, tell us
2 what the intentions are with respect to this plan, and
3 how you're going to protect the interest of these
4 employees.

5 Thank you very much.

6 CHAIRMAN MORGAN: Thank you.

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

9 MR. BARBIN: Yes.

10 CHAIRMAN MORGAN: Mr. O'Connell, he's just
11 here to --

12 MR. BARBIN: Yes.

13 CHAIRMAN MORGAN: -- assist?

14 MR. BARBIN: Yes.

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

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

20 CHAIRMAN MORGAN: Is there a cert --

21 MR. BARBIN: There is another case for
22 this very similar issue as to the rights of employees

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1 in the surplus of the plan, and that's a case that's
2 I think going to be a celebrated case. It's called
3 Jacobsen v. Hughes Aircraft. And the Supreme Court
4 just granted a cert on it, and we're petitioning the
5 court to join that case because our case, which the
6 Supreme Court denied cert in I think March, granted
7 cert in the Hughes case a month later.

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

15 CHAIRMAN MORGAN: I --

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

18 CHAIRMAN MORGAN: But obviously --

19 MR. BARBIN: But that's a different case,
20 Madam Chairman. The previous case involved a
21 pre-termination right to the surplus. In other words,
22 the plan was not terminated. The plan was not merged.

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1 The question in that case is: what rights do the
2 employees have in the surplus before termination? Now
3 we're looking at something very different. We're
4 looking at a termination. We're looking at a merger.
5 Completely different aspect.

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

12 Now, we're looking at someplace between
13 \$500 million and a billion dollars in surplus here.
14 Where is that going? We know CSX has a huge
15 underfunded plan. I assume that they would merge at
16 least part of the Conrail surplus plan into the CSX,
17 but they have not revealed that.

18 They skirted and stonewalled the issue
19 right through this proceeding, what they're going to
20 do with the plan. They said, "We're going to --
21 everybody is going to be protected by ERISA." That
22 begs a question.

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1 CHAIRMAN MORGAN: Well, what are their
2 legal responsibilities? I'm just trying to get
3 educated a little bit on this. What are their legal
4 responsibilities as to --

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

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

18 MR. BARBIN: Exactly.

19 CHAIRMAN MORGAN: That's point number one.

20 MR. BARBIN: Exactly.

21 CHAIRMAN MORGAN: Then, once there's
22 certainty as to what's going to happen, then I presume

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1 kicks in some sort of other obligations. Am I right?

2 MR. BARBIN: Exactly. Exactly.

3 CHAIRMAN MORGAN: So how do we --

4 MR. BARBIN: We've asked the Board for a
5 series of conditions.

6 CHAIRMAN MORGAN: Right. But I'm --

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

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

18 MR. BARBIN: Yes.

19 CHAIRMAN MORGAN: So I appreciate that.

20 Mr. Nasca, let me go to you next. You've
21 discussed a couple of things -- labor protection for
22 D&H employees, the Southern Tier and operational

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1 concerns there, safety as a general matter, and then
2 dispatching, who will be doing the dispatching, and so
3 forth.

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

6 MR. NASCA: Yes, ma'am.

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

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

13 CHAIRMAN MORGAN: That would be the result
14 of it.

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

21 CHAIRMAN MORGAN: Now, with respect to the
22 other three items, what specifically are you asking

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1 the Board to do with respect to those three items?

2 MR. NASCA: Well, I --

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

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

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

15 MR. NASCA: Yes, ma'am.

16 CHAIRMAN MORGAN: -- in that regard.
17 Okay. Thank you.

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

21 MR. CHICK: I'm not aware of any agreement
22 that has been reached or ratified. But in Norfolk

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1 Southern and CSX have agreed to live up to the certain
2 portions of the law, mainly the flowback from metro
3 north and any other commuter agencies, and the free
4 flow between Conrail -- you know, Conrail and the
5 northeast corridor, we see no reason why they can't
6 live up to the section for freight employees that they
7 have their prior rights, their prior prior rights, and
8 their equities.

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

17 And what we're talking about here --
18 there's going to be no integration of traffic between
19 -- on that northern seniority district, and that's
20 Cleveland to Boston and New York, both sides of the
21 Hudson River. And we see no reason why anything
22 should change because all of the mechanics for the

1 maintenance of the seniority system were already in
2 place. And it seems to work fine.

3 CHAIRMAN MORGAN: Thank you.

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

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

9 (Laughter.)

10 CHAIRMAN MORGAN: There is no trap door.

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

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

15 MR. GODWIN: Okay. Thank you very much.

16 I would request that the Board hold the
17 approval of this merger until we get an unbiased
18 federal safety task force to review not only the
19 written material but the physical plant to ensure we
20 will not have a UP. This is my -- I hired out in '57,
21 and I was merged into -- from the Erie to the Erie
22 Lackawanna. This is my fifth merger.

1 The one thing I know is that what we're
2 told the day before the merger will never happen. It
3 always changes and it's like a growing thing. It's
4 never the same. It just keeps going and going and
5 going. And usually the people that hold -- carry the
6 cross, if I can use that statement, is the employees.
7 I want the employees. I don't want our people being
8 killed like they're killed out on the UP. I don't
9 want trains standing for hours.

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

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

20 CHAIRMAN MORGAN: Well, I certainly
21 understand your concern about safety. And in this
22 proceeding, you know, we did direct the carriers to

1 submit safety integration plans, and then --

2 MR. GODWIN: I read them.

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

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

14 MR. GODWIN: That was --

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

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

20 CHAIRMAN MORGAN: No, it was --

21 MR. GODWIN: It was not. Okay.

22 CHAIRMAN MORGAN: No.

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1 MR. GODWIN: All right. Thank you.

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

15 MR. GODWIN: Well, I've been negotiating
16 with both the CSX and NS, and it's long, and it's
17 arduous, and we're making some headway, not as good as
18 what we should be doing. There has been no discussion
19 whatsoever on safety, at least with the Conrail
20 employees and their representatives in the BLE. There
21 has been no -- any kind of communications stating
22 that.

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1 And I have met with operating people from
2 the CSX, and I have met with operating people from the
3 NS, and a plan like that has never been put on the
4 table. And I'm the chief negotiating officer for the
5 Conrail engineers. So this is all new to me.

6 CHAIRMAN MORGAN: Okay. Well, thank you.

7 MR. GODWIN: You're welcome.

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

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

21 MR. MILLER: The union has -- the union is
22 pleased with a training agreement that it has on a

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1 large portion of CSX, because it's very specific and
2 it has worked very well. What UTU is trying to get
3 the balance of -- CSX and NS to fully accept that as
4 a modality, formalizing the training. And there are
5 discussions going on about that.

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

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

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1 union and to involve the employees.

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

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

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

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

22 CHAIRMAN MORGAN: I think that's

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1 important. A lot of different efforts are going on to
2 the same end. I think it's certainly important.

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

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

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

20 (Laughter.)

21 And that competition is kind of what a lot
22 of people have talked about here. As you move forward

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

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

17 (Laughter.)

18 And as you consider this, all of the
19 people who have suggested that conditions be put on
20 there at the applicants' cost, is that then changes
21 the balance of the deal between the two carriers. And
22 so when you do that it also cuts down the amount of

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1 money that they can put into capital. If they're
2 going to have the service that's going to be needed to
3 compete, they're going to need some money and some of
4 the places that people are asking to go with the
5 conditions will take away their ability to be able to
6 put the physical plant in place.

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

20 Now what -- I'm going to put on my good
21 citizen hat here. That's probably a challengeable
22 position.

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1 CHAIRMAN MORGAN: Aren't you always a good
2 citizen?

3 (Laughter.)

4 MR. BROKENHOFER: In essence, that is the
5 reports that you need. I went through UP/SP and it's
6 about as much fun as when I had my head on collision
7 in 1974 and I was in the hospital for months. It was
8 very painful for everybody, the shippers, the
9 communities. Lives were lost by Mr. Godwin and our
10 members and I think if you could have gotten there
11 sooner and you couldn't get there sooner because you
12 didn't have the information. I would suggest that you
13 look at what you're already getting from UP as a model
14 and modify it, that you start getting reports now if
15 not sooner about what the status of Conrail is between
16 now and whenever this takes over. You want to make
17 sure that Conrail doesn't fall off the track, doesn't
18 fall into the dumper, that you need to be monitoring
19 that. And then you need to do it on a kind of a
20 division type basis of seeing so you have a basis to
21 compare it with when the new guy takes over. Is this
22 terminal? Is this area operating equal to what was

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1 being operated while it was in Conrail's hands? That
2 way when problems show up you will see a red flag
3 immediately.

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

17 I mean that's the marketplace, the
18 reality. They think it's a secret. But they would be
19 uncomfortable exposing too much information. So I
20 would suggest some sort of redacted information. You
21 don't need to know which train is being held out, but
22 you need to know more than the system is holding 187

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1 trains out. What you need to know is how many trains
2 are being held at Cincinnati or how many trains are
3 being held at a certain location. You need to know
4 how many trains are being without crews or without
5 power at a certain location because that's where
6 you're going to need to be -- do the hiring. You need
7 to know how many -- what the average work load is. If
8 you have an average work load of 35 to 45 hours of Mr.
9 Godwin's crews or my crews, they're going to keep
10 working. When that starts hitting 55, 60, 65 and 70
11 hours, they're going to love it for about two or three
12 months. They're going to like the overtime. And then
13 all at once they're going to get tired and they're
14 saying we ain't going any more. I want to be off.
15 And what our good friends the employers will tell you
16 well, they just don't want to work. Well, after three
17 or four months of 60 to 70 to 80 to 90 hours a week,
18 they're right. They don't want to work anymore.

19 But in that 90 -- when we see that number
20 jump up from 35 to 45 hours to about 60 or 70, that's
21 a red flag. You need to hire there. And so you need
22 that information. You don't need to be sitting in the

1 office there waiting for some shippers to come in and
2 say this whole thing has melted two months, three
3 months, four months ago. As you look at this merger
4 and I'm assuming if you vote for it that you would
5 want to keep some sort of handle on it for a period of
6 time. And you're going to want to know very
7 operationally what's going on so that you can see that
8 red flag early on so some warning signals can go out.
9 This information will have no benefit to the union.
10 We're not going to make more money. We're not going
11 to have more claims collected. This is something that
12 if this agency is going to have to make these
13 decisions and oversee them and enforce them that I
14 don't want to see all of us get back into the UP/SP
15 where we're a year into something before we can dig
16 out. Maybe with proper information about what the
17 status is and I think you have to look at it terminal
18 by terminal and I think you have to include both of
19 that that's north of the Ohio and south of the Ohio,
20 not just the Conrail area because we have troubles at
21 North Platte. North Platte was not a part of the
22 Southern Pacific/Union Pacific merger, but it backed

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1 up at North Platte. It backed up at Pocatello and it
2 backed up at Duluth. So you need it for all three
3 systems and you need it for both systems afterwards so
4 that you can make the type of judgments and the type
5 of enforcements or just file them as they come in. If
6 everything is going to be as good as both of these
7 nice gentlemen have assured everybody in the world
8 this is going to be the most successful merger ever,
9 is that you'll just file them and throw them away.
10 But without that information, and without those
11 reports I think you've got a difficult job.

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

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

22 MR. MILLER: I think at a minimum receive

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

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

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

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

19 MR. GITOMER: Madam Chairman, good
20 afternoon, Chairman Morgan, Vice Chairman Owen. I'm
21 Louis Gitomer and I'm appearing this afternoon on
22 behalf of APL Limited and I'm really here to answer

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1 any of your questions today.

2 APL is an ocean carrier that competes with
3 Sealand, an intermodal stack train operator that
4 competes with CSX intermodal. Both are CSX
5 affiliates. The proposed control and partition of
6 Conrail by CSX and Norfolk Southern is important to
7 APL because in 1996 APL paid over \$600 million to ship
8 over 680,000 containers by rail in the United States;
9 150,000 of those containers moved between 15 points on
10 Conrail under a contract between Conrail and APL.

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

16 But, despite APL's problem, APL
17 desperately wants CSX and the Norfolk Southern
18 transaction to work. APL is concerned that the
19 efficient system that it has established in
20 partnership with Conrail through the APL Conrail
21 contract will not survive this transaction as
22 currently proposed.

1 APL wants the right to negotiate
2 modifications to the APL Conrail contract with CSX and
3 NS pursuant to that contract so that APL can determine
4 which of those two railroads handles which traffic
5 that APL currently moves on Conrail. We negotiate
6 about service, rates, confidentiality and other
7 provisions. There are dozens of rates under that
8 contract and as part of the negotiation give and take
9 APL expects some of the rates to stay the same and
10 some of the rates to come down and yes, we even expect
11 some of the rates to go up and we're willing to take
12 that risk in the free market.

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

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

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1 want.

2 We are asking the Board to disapprove
3 Section 2.2(c) of the transaction agreement between
4 the applicants and not to override the anti-assignment
5 clause in the APL Conrail contract so that we can
6 negotiate individually with CSX and with Norfolk
7 Southern. The Board has clear authority to modify the
8 transaction agreement between the applicants under
9 Section 11324(c). It's been done before in numerous
10 cases.

11 APL is not asking for a physical
12 restructuring of the transaction nor are we seeking to
13 reduce the benefits of the transaction. The burden of
14 proof to have the application, the transaction
15 agreement and Section 2.2(c) of the transaction
16 agreement approved is on the applicants. The
17 applicants also have the burden of proof that the
18 anti-assignment clauses in rail transportation
19 contracts must be abrogated. They haven't met the
20 burden of proof in any of these instances. There is
21 no testimony from applicants on this issues, only
22 their lawyers' argument. If Section 2.2(c) and the

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1 abrogation of anti-assignment clauses are so important
2 where is the evidence? There is none. There is no
3 explanation in the application or in the rebuttal of
4 how Section 2.2(c) works. In facts, CSX and NS
5 disagree on some of the definitions and some of the
6 terms.

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

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

1 rebuffed by the applicants and the Administrative Law
2 Judge.

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

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

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

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1 traffic.

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

11 CSX has mistakenly tried to tie APL's
12 lease of the South Kearney Yard from Conrail for \$1 a
13 year to our rail transportation contract with Conrail.
14 There is no tie and let me explain to you why APL pays
15 \$1 in rent. It's very simple. In 1988, we took -- we
16 leased the facility from Conrail. At that time it was
17 just dirt, nothing more. APL then spent \$25 million
18 to improve the facility to its state of the art
19 intermodal facility. That's why we spend \$1 a year,
20 because we have \$25 million tied up in it and the
21 assets there revert to the owner of the property at
22 the end of the lease. So if you just use simple

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1 division, we're probably paying over \$1 million a year
2 in rent.

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

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

14 APL wants to negotiate the allocation of
15 its traffic under the APL Conrail contract with CSX
16 and with NS in compliance with the contract in order
17 to assure continued good service, to enhance the
18 confidentiality of the contract, because of our
19 competitive relations with the applicants' intermodal
20 affiliates and to develop a good business relationship
21 with CSX and NS among other things. In order to
22 accomplish this, the Board should disapprove Section

1 2.2(c) and not abrogate anti-assignment clauses, but
2 instead permit shippers like APL to choose which
3 railroad they will use.

4 Thank you.

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

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

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

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

17 On April 10th the Port Authority of New
18 York and New Jersey filed NYNJ20. This is essentially
19 an attached agreement, a settlement agreement between
20 the Port Authority signed by its Chairman, Louis
21 Eisenberg and its Executive Director, Robert Boyle,
22 Chairman Snow and Chairman Goode, with respect to the

1 issues that were concerning the Port Authority in this
2 proceeding.

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

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

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1 Thank you.

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

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

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

12 MR. DONOVAN: That is correct. That is
13 correct.

14 CHAIRMAN MORGAN: Mr. Gitomer. A couple
15 of questions. Given the position that you are taking
16 in this matter, I presume then that the concerns that
17 have been raised about the transition period and
18 operational confusion that might occur as contracts
19 are running out and the scurry to figure out who is
20 going to be handling the traffic on another contract
21 doesn't bother you? In other words, the argument has
22 been made that the abrogation of contracts needs to

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1 occur or nonassignability of contractual -- contracts
2 needs to occur for operational reasons. I presume you
3 don't agree with that?

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

15 Secondly, as the Department of
16 Transportation said yesterday, there are a number of
17 -- there may be, we don't know because there's no
18 evidence as to what the contracts contain in the
19 record. There are contracts between two points where
20 Norfolk Southern will be the railroad providing
21 service. There are contracts between two points where
22 CSX will be the railroad providing service and I think

1 that's pretty easy for the two of them to figure out.
2 Now the area of some concern is where both CSX and
3 Norfolk Southern can provide service and let me give
4 you an example from APL.

5 APL's main move of traffic is between
6 Chicago and Northern New Jersey. Conrail today moves
7 over 90,000 containers a year for us. After CSX and
8 Norfolk Southern acquire the control of Conrail and
9 partition Conrail, both of them will be able to
10 operate between Chicago and Northern New Jersey.
11 Which one will serve APL? We don't know. And we
12 don't think they know even under Section 2.2(c). In
13 depositions of their two operating-- well, let me go
14 back to Section 2.2(c) first where both NS and CSX can
15 provide the service, Section 2.2(c) says it will be
16 divided based on essentially efficient operations
17 which of the railroads can provide the more efficient
18 operations? During depositions of the two operating
19 witnesses for CSX and Norfolk Southern, they were both
20 asked which one of you will be more efficient between
21 Chicago and the Kearney Yard of APL in Northern New
22 Jersey? Neither one would commit to which one was

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1 more efficient. If the operating witnesses don't know
2 which operation is going to be more efficient, how can
3 we figure it out? How can the railroads figure it
4 out? We want to be able to sit down with the two
5 railroads and work with them and let APL, the shipper
6 decide who handles the traffic.

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

12 MR. GITOMER: Yes, I did.

13 CHAIRMAN MORGAN: What is your position on
14 that proposal?

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

17 CHAIRMAN MORGAN: Actually, it's the
18 Department of Transportation.

19 MR. GITOMER: Excuse me, Department of
20 Transportation is probably pretty close to being right
21 on that point and where service can be provided by
22 either railroad, the shipper should choose.

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1 CHAIRMAN MORGAN: And that's the main
2 point?

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

5 CHAIRMAN MORGAN: Thank you. Questions?

6 VICE CHAIRMAN OWEN: No questions.

7 CHAIRMAN MORGAN: Thank you all.

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

10 CHAIRMAN MORGAN: I think what we're going
11 to do now is take a 20 minute break. Come back about
12 25 after 5 and then we will go to the applicants for
13 their rebuttal.

14 (Off the record.)

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

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

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

22 As we did in our briefs, my rebuttal will

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1 focus on the arguments that have been made that are of
2 principal relevance to Norfolk Southern, as well as on
3 some of the issues that are common to all of the
4 applicants. And I'll address those arguments largely
5 in the order that they've been presented here.

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

18 Furthermore, all of the many settlements
19 applicants have reached with parties entail
20 substantial additional costs and commitment of
21 resources on the part of the applicants. This is all
22 part of a tremendous resurgence in the rail industry

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1 investment in rail infrastructure that is going on now
2 in the industry that the rail industry has not seen
3 for many decades.

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

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

21 As we've seen over the past two days, when
22 a transaction like this is presented to you, there are

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1 great pressures to add more to the pie for all sorts
2 of parties, other parties, all of whom insist that
3 their situations are unique. It's critical for the
4 Board to realize, as I'm sure it does realize, that
5 every one of the conditions you're being asked to
6 impose imposes a cost on this transaction.

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

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

18 Turning now to the claims and requested
19 conditions of the various parties, I'll begin with the
20 contentions and claims that are raised by the broad
21 shipper groups, National Industrial Transportation
22 Group League, the Fertilizer Institute, CMA, and

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1 Society of Plastics.

2 With respect to the NIT League and the
3 Fertilizer Institute, although we have reached a
4 settlement with them, NIT League and the Fertilizer
5 Institute did reserve the right to argue a number of
6 general points. The first point has to do with the
7 so-called acquisition premium that applicants Norfolk
8 Southern and CSX assertively paid for Conrail.

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

16 First of all, there is simply no basis for
17 the premise of the argument that applicants have paid
18 some sort of premium over the fair market value of
19 Conrail. Indeed, I submit that it's ludicrous to
20 suppose that CSX or Norfolk Southern, in the
21 competitive markets bidding against each other, paid
22 any more for Conrail than they genuinely believed it

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1 was worth on the fair market -- on the market.

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

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

16 We think the rule that the Board adopted,
17 or the ICC then adopted was correct for the reasons
18 that we've elaborated at some length in our brief in
19 our rebuttal. But in any event, as DOT has I think
20 correctly recognized, if there were any warrant for
21 reconsidering those rules, clearly it would not be
22 this proceeding. It should be in some proceeding that

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1 would apply to the industry at large. So, in short,
2 we submit there is no merit to the acquisition premium
3 argument.

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

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

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

21 The Chemical Manufacturers Association is
22 also concerned about gateways. They claim that they

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1 are concerned that after the transaction, gateways for
2 east-west chemical movements may change from Chicago
3 and St. Louis, or wherever the current principal
4 gateways are, to other gateways that would be on a
5 more direct route between origin and destination.

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

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

21 CMA and SPI also seek a number of
22 conditions dealing with issues that are covered in the

1 NIT League settlement agreement, including conditions,
2 one, prescribing switching charges; two, dealing with
3 the allocation of Conrail contracts; three,
4 implementation of the merger. There is no merit to
5 any of these requested conditions for the reasons that
6 we have discussed, again, in some detail in our
7 pleadings.

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

18 But unless the Board does find that the
19 terms are plain and reasonable, for them to impose
20 conditions that go beyond those terms really sends
21 exactly the wrong message. It would send to the
22 shipper groups who negotiate with railroads in these

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1 kinds of transactions the message that, well, let's
2 let one of our group reach an agreement with the
3 railroads, and the others will see what we can get out
4 of the STB.

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

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

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

20 MR. ALLEN: As appropriate, and I don't
21 deny your authority to do so, or even the
22 appropriateness of doing so in some cases. But I am

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1 simply saying that I submit that there -- and I think
2 the Board recognizes this -- that a large measure of
3 deference should be given to these agreements in order
4 to encourage this process.

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

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

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

1 the mines in the Monongahela itself.

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

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

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

21 Basically, Eighty-Four Mining is seeking
22 to improve its competitive position. And as I stated

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1 yesterday, this is squarely in conflict with the
2 bedrock principle of the Board's policies regarding
3 conditions. And as I said yesterday, that policy is
4 clearly correct.

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

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

21 But if you got away from that principle
22 and started imposing conditions that were not designed

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1 to remedy harms caused by a transaction, there really
2 is no rational basis for the condition you impose, and
3 no rational boundaries for the conditions -- for
4 imposing -- for the conditions that might be imposed.
5 I mean, where would it end?

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

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

17 MR. ALLEN: Well, you have been accused
18 perhaps by some who, of course, would like to utilize
19 transactions like this to improve their condition.
20 But I don't think the accusations have been fair. And
21 I think you've been faithful to your basic and
22 historic mission of protecting the national interest

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1 in the national transportation system by your
2 adherence to these policies that have been
3 consistently applied.

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

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

16 And that's why we are seeing this huge
17 investment of capital into this industry today. And
18 I think it would be a very serious mistake to heed
19 those who are saying, "Well, here's an opportunity to
20 cure world hunger." I think that would be a very
21 serious mistake. I don't know on what basis the Board
22 could suddenly say, "Well, we've done it this way for

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1 20 years, but now we're persuaded by Senator X or
2 Congressman Y that we need to be more liberal in our
3 policies."

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

8 MR. ALLEN: Well --

9 CHAIRMAN MORGAN: It's not quite that
10 easy. I'm not necessarily disagreeing with you. But
11 it's not quite that easy.

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

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

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1 served by Norfolk Southern.

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

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

17 More importantly, the plant is served by
18 barge on the river, and, in fact, received 93 percent
19 of its coal in 1995 by barge. Mr. McBride argued
20 yesterday that the barge service is irrelevant to his
21 claim, but I submit that it is quite relevant. The
22 Board's policies on conditions are that they will not

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1 be imposed unless necessary to remedy a significant
2 harm to competition.

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

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

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

22 Metro-North has asserted that it would

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

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

16 As we've shown in our rebuttal filing,
17 there is simply no basis for that claim. Right today,
18 the north belt has access only to one Class 1
19 railroad, Conrail. After the transaction, it will
20 have access to two. There is no change in
21 circumstances with respect to the south belt line, and
22 it's simply not transaction-related.

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1 Yesterday, Mr. Spitulnik indicated that,
2 well, he was just interested in the Board declaring
3 that something called the Philadelphia Belt Line
4 principle be declared by the Board to be inviolable.
5 That is a principle that I think appears in a number
6 of agreements over the years in different forms. We
7 think there's no merit to that request for relief.

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

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

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

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

22 MR. ALLEN: I think the problem is that

1 I'm not sure what Philadelphia Belt Line principle and
2 what formulation of it he has in mind. I don't think
3 that there's really any basis in the record for the
4 Board to make that kind of a declaration. It will
5 have whatever effect it has on any agreements that may
6 exist. I can't think of any reason why this
7 transaction would affect it, but I don't see any basis
8 for the Board to make that declaration.

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

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

22 The Illinois Port District's basic

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1 complaint is that -- and the remedy it seeks to
2 address don't relate to the effects of the
3 transaction. Instead, they relate to the court's
4 complaint about Norfolk Southern's existing service to
5 the east side of the Port of Chicago, and they want
6 the Board to grant other carriers trackage rights in
7 order to bolster that service.

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

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

20 Two other railroads that have sought
21 conditions that are relevant to Norfolk Southern are
22 the Wheeling and Lake Erie and the Ann Arbor Railroad.

1 The Wheeling and Lake Erie asked for a long shopping
2 list of conditions, and the basis for its claim is
3 that the transaction will have very adverse effects on
4 its revenues and that it needs these conditions
5 basically to stay alive and continue to provide
6 service. And you've heard a number of parties from
7 the State of Ohio echoing the same arguments.

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

16 But most importantly, the Wheeling and
17 Lake Erie has submitted no evidence that its shippers
18 will suffer a loss of rail competition or a loss of
19 essential services. Indeed, there is no real claim by
20 the Wheeling of loss of rail competition by its
21 shippers. In fact, it admitted in its discovery
22 responses that it couldn't identify any such

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1 competitive loss.

2 So its claim is that there's going to be
3 a loss of essential rail services, but it simply makes
4 no showing of that as required by the Board's
5 decisions. And this is an important principle. In
6 the old days, the ICC used to routinely protect
7 carriers and their revenues from the effects of
8 transactions like this. In the late 1970s and early
9 1980s, the ICC made a fundamental and historic change
10 in the way it thinks about rail mergers and its
11 policies on conditions.

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

18 On the contrary, protecting competing
19 railroads tends to limit a shipper's ability to obtain
20 the best service from the merged company, and dampens
21 the incentive for competitive responses to the merged
22 company from existing railroads. While a shift in

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1 traffic from one line to another may eliminate the
2 need for service over the original line, this simply
3 demonstrates that the earlier service is no longer
4 essential.

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

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

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1 available transportation alternatives.

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

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

10 MR. ALLEN: Yes.

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

13 MR. ALLEN: Yes.

14 CHAIRMAN MORGAN: -- obviously important
15 to your --

16 MR. ALLEN: I understand.

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

21 MR. ALLEN: No. We're not saying that.
22 The diversions, we have estimated, are much smaller

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1 than the diversions that Wheeling claims.

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

6 MR. ALLEN: That's correct.

7 CHAIRMAN MORGAN: How do you feel about
8 that?

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

12 Is that focused? Can we focus it any
13 better?

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

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

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1 friendly connection after the transaction.

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

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

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

22 However, it is true that the Wheeling will

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

14 Does that answer your question?

15 CHAIRMAN MORGAN: Yes, it does.

16 MR. ALLEN: Okay.

17 (Laughter.)

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

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

22 CHAIRMAN MORGAN: That's good.

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1 (Laughter.)

2 It's hard to misunderstand me, you know.

3 (Laughter.)

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

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

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

20 With respect to the three Ohio stone
21 shippers that have presented requests for conditions
22 in this case, we have had discussions with them with

1 respect to their problems and have tried very hard to
2 work out their problems. We have not succeeded in
3 reaching an agreement with all of them.

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

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

21 We have offered each of those shippers to
22 sign on to that agreement. One of them -- Martin

1 Marietta -- has done so, and has, therefore, withdrawn
2 from this proceeding. The other two are not satisfied
3 even so -- even still with what we have agreed to do.
4 I think they -- I suppose that they want more and want
5 to be able to have single-line service for the rest of
6 time to wherever they may want to go.

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

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

20 As in the case of the Wheeling, we believe
21 that the Ann Arbor has simply made no case for
22 essential services. They have not identified any of

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1 their shippers who would be losing -- or even
2 explained how any of their shippers would lose
3 transportation services if the Ann Arbor went out of
4 business.

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

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

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

22 One other point I would make about the Ann

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

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

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

20 How they're concerned or why they're
21 concerned is not at all clear to us. So we don't
22 think there's any basis for it.

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1 The Delaware DOT wants the shared asset
2 areas expanded to include the Port of Delaware. This
3 is the same kind of claim made by many other parties,
4 and we think it has no merit. But beyond that, we
5 would say we think the Port of Wilmington will be very
6 substantially benefitted by this transaction. It's
7 going to be served by Norfolk Southern -- a carrier
8 with a far greater reach than Conrail which now serves
9 it.

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

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

20 MR. ALLEN: Yes.

21 CHAIRMAN MORGAN: How do you feel about
22 that in terms of its competitive effect?

1 MR. ALLEN: Well, I believe that -- I'm
2 not sure what the switching charge they're referring
3 to is. And I may be wrong in this, but I think that
4 the agreement we have made in the NIT League agreement
5 with respect to switching and switching charges would
6 apply to Wilmington as well as it applies to all other
7 parties, I believe.

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

14 As I mentioned, applicants have settlement
15 agreements with two of their largest unions -- the
16 UTU, from whom you've heard, and the BLE -- both of
17 whom you've heard from today. And they're in the
18 process of negotiating implementing agreements with
19 them. In fact, we have concluded now implementing
20 agreements with three other unions -- the
21 Boilermakers, the United Railway Supervisors
22 Association, and the National Conference of Firemen

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1 and Oilers just most recently.

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

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

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

21 The arguments of the unions that call
22 themselves the Allied Rail Unions, that the Board's

1 order cannot override existing collective bargaining
2 agreements, and that the Railway Labor Act procedures
3 rather than New York Dock procedures must be used,
4 merely reargue well-established principles that have
5 been repeatedly and consistently decided against the
6 union positions.

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

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

19 DOT cites the passage of time and the
20 larger railroads for its suggestion that New York Dock
21 be changed, but New York Dock was imposed in UP/SP and
22 BN/SF just a year and two years ago. And,

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1 furthermore, it just makes no sense today, or in this
2 transaction, to require railroads to hire additional
3 employees that they need and also pay benefits to an
4 employee that's refused a job.

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

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

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

19 MR. ALLEN: Okay.

20 CHAIRMAN MORGAN: Let me back up a minute.
21 You talked about Millennium.

22 MR. ALLEN: Yes.

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1 CHAIRMAN MORGAN: It seems to me, from
2 listening to their testimony, that they have an
3 operational concern. They seem to feel that concerns
4 that they've raised with you all about service have
5 not been addressed. And so that has led them to
6 request additional protection. Are discussions
7 ongoing?

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

15 And, you know, if they're not satisfied to
16 date, I'm sorry that they're not, and I hope we can
17 satisfy them. But in any event, those kind of
18 operational discussions back and forth that happen
19 every day between railroads seem to me to be not
20 something that this Board gets into or tries to work
21 out in approving a decision -- a transaction of this
22 kind.

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1 CHAIRMAN MORGAN: At the same time, I
2 think that when you have a pending transaction that
3 people fear could create operational issues if
4 approved, that's when you hear these sorts of things.

5 MR. ALLEN: Absolutely.

6 CHAIRMAN MORGAN: So I think that --

7 MR. ALLEN: Absolutely.

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

10 MR. ALLEN: I agree.

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

15 MR. ALLEN: It was determined --

16 CHAIRMAN MORGAN: -- of the area.

17 MR. ALLEN: -- basically because it was an
18 area that had previously been served by the
19 Monongahela Railroad, and at one time I believe had
20 service from two railroads. It has not had service
21 from two railroads in recent years, but -- and I
22 wasn't privy to the negotiations.

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1 But I believe that it was basically
2 decided that, as I think Mr. Lyons and Mr. Snow said
3 yesterday, this is one of those areas where neither
4 railroad wanted to give it all to the other. And as
5 a result of the process of negotiation, they agreed
6 that while the Monongahela is going to go, we'll both
7 have access to it.

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

12 MR. ALLEN: Right.

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

18 MR. ALLEN: That seems --

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

21 MR. ALLEN: Well, I don't know what --

22 CHAIRMAN MORGAN: -- on your part of your

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1 client --

2 MR. ALLEN: I don't know what the specific
3 plans are, but it certainly seems to me that is the
4 appropriate venue to address those issues is an
5 implementing agreement discussions. And I have no
6 idea whether these railroads will take the same
7 position as UP and BN.

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

16 But as a general proposition, as I said
17 before, it makes no sense to me for this Board to say
18 to these railroads that need employees, "You've got to
19 hire some new guy" when the old guy refused to move
20 and is receiving benefits that you're paying for.
21 That makes no sense. I mean, today -- in today's
22 environment, relocation -- people are much more

1 mobile, even than they were 20 years ago. It's not
2 unusual, as I think the Board has recognized in its
3 decisions.

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

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

16 This is a perfect illustration -- this
17 transaction I think is a perfect illustration that
18 they have to be overridden. You can't have both sets
19 of agreements apply to the same employee. You can't
20 have work rules that may dictate that one seniority
21 district on Conrail when that seniority district is
22 going to be split down the middle between Norfolk

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1 Southern and CSX. Those agreements have to be
2 changed.

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

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

18 MR. ALLEN: Well, we --

19 CHAIRMAN MORGAN: What is your position on
20 that?

21 MR. ALLEN: We think the Board should do
22 what it has done in every previous merger case -- make

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1 no statement one way or another about it. The
2 question of what is or what is not necessary -- and
3 necessity, of course, is somewhat of a legal term of
4 art that the courts have addressed and I think
5 defined.

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

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

16 CHAIRMAN MORGAN: Okay. Thank you very
17 much.

18 MR. ALLEN: Thank you.

19 CHAIRMAN MORGAN: Do you need --

20 VICE CHAIRMAN OWEN: Yes. I'm just
21 wondering -- sorry about that. I'm about to lose my
22 voice today.

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1 MR. ALLEN: Me, too.

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

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

15 MR. ALLEN: Well, we have employee needs,
16 and in some areas there are very critical needs.
17 There is no question about it. And to the extent the
18 railroads have needs for employees, they will
19 certainly hire employees. But it doesn't do anybody
20 any good, I submit, to mandate that you keep an
21 employee you do not need if this transaction has
22 effects that permit us to operate some segment of the

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1 line with -- efficiently and safely with 500
2 employees, say, instead of 700 employees.

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

8 VICE CHAIRMAN OWEN: I concur with all of
9 that.

10 MR. ALLEN: Yes.

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

15 MR. ALLEN: Yes.

16 VICE CHAIRMAN OWEN: -- that --

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

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1 clerks aren't going to be running the trains.

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

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

7 (Laughter.)

8 VICE CHAIRMAN OWEN: On the non-assignment
9 clause, the overriding of the -- could we go back
10 through that again and what wou'd be the disadvantage
11 of --

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

19 We need -- I mean, this transaction is,
20 obviously, unique. We need to be able to sit down and
21 plan which trains are going to go where and how many
22 locomotives we need to serve a particular area, how

1 many crewmen we need, we need the position people, we
2 need to do all of that stuff. And that would be very
3 difficult to do if suddenly, you know, all of these
4 contracts were thrown up.

5 So there is a need definitely for a
6 transition period, probably a year at least, to be
7 able to work this stuff out. And that's why we think
8 2.2(c) is necessary and appropriate.

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

13 MR. ALLEN: Sure they want --

14 VICE CHAIRMAN OWEN: To get the best deal.

15 MR. ALLEN: Yes.

16 VICE CHAIRMAN OWEN: Yes.

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

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

22 CHAIRMAN MORGAN: Let me just ask one

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1 other question before you sit down. We talked a lot
2 about the Buffalo area the last two days. What is
3 NS's presence in Buffalo, do you know?

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

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

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

12 CHAIRMAN MORGAN: Yes.

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

15 CHAIRMAN MORGAN: Okay. Thank you.

16 Mr. Lyons, are you --

17 MR. LYONS: Mr. Sipe will speak first.

18 CHAIRMAN MORGAN: First? Okay.

19 Mr. Sipe?

20 MR. SIPE: Thank you, Madam Chairman, Vice
21 Chairman Owen. I'm one of three speakers on behalf of
22 CSX this afternoon. I'm going to address an issue

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1 that you got into with Mr. Allen a little bit, which
2 is the request for so-called pro-competitive
3 conditions, including expansion of competitive access
4 areas. And I'll spend just a few minutes on that
5 subject.

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

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

20 I want to stress CSX's very strong
21 opposition to these so-called pro-competitive
22 conditions. A grant of those conditions would turn

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1 the Board's merger policy on its head. It would also
2 have a disproportionate impact on CSX, which is the
3 party that would have to grant access to a competitor
4 in virtually all instances and fundamentally alter the
5 terms of the deal, the basic business deal, that CSX
6 and the NS negotiated for the acquisition and division
7 of Conrail.

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

17 And if the Board were to impose this kind
18 of condition, which had a disproportionate impact on
19 CSX, that commercial balance could get badly out of
20 whack, and the positive competitive effects that we do
21 see stemming from this transaction could be
22 eviscerated.

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1 Yesterday, Chairman Morgan, you referenced
2 this category of requests, and you asked Mr. Snow what
3 he would do if he were in the Board's shoes with
4 respect to requests for expanded competition. Now,
5 I'm a lawyer, and you know from our prior colloquys
6 that I don't always answer questions the same way Mr.
7 Snow would, so I'm going to give a lawyer's answer.
8 But I think it's also the right answer, and it's the
9 answer I believe is the correct one.

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

19 Plainly, the Board is charged with
20 addressing reductions in competition, and it is not
21 given carte blanche to use a control proceeding to
22 manufacture additional competition.

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1 I know the Congressmen said otherwise, and
2 they may wish it were so. But they are the ones who
3 have it in their power -- if they want to change what
4 the statute is, they have it in their power to
5 persuade a majority of their colleagues to change the
6 statute, so that in merger proceedings you apply pro-
7 competitive conditions. But that's not what the
8 statute says now, nor does the Board's merger policy,
9 which very clearly addresses reductions in competition
10 and the circumstances in which conditions are
11 appropriate.

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

18 MR. SIPE: I think that the public
19 interest involves, as it has been applied consistently
20 throughout the history of rail consolidations,
21 involves a very broad balancing concept. Where there
22 are component pieces of the statute and the policy

1 that are more specific than the broad mandate to do
2 the public interest, those specific provisions take
3 precedence. And they're not inconsistent with the
4 public interest.

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

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

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

22 Unfortunately, but not surprisingly, some

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1 parties to this proceeding seeking expansion of
2 competition and expansion of shared assets areas have
3 disregarded this admonition. They fall into a couple
4 of different categories. They take rather divergent
5 approaches to justifying why they are seeking
6 something different.

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

15 But there are two problems with that. I
16 have already alluded to one. The statute doesn't
17 permit it, nor do the Board's precedents. Equally
18 important, I think a change of policy of this nature
19 would not be sound public policy. A change of policy
20 to promote additional competition would not, in fact,
21 comport with the public interest in the long run. And
22 I'll tell you why.

1 The existing scheme encourages initiatives
2 by private parties to create additional competition
3 where market conditions hold out the possibility that
4 direct rail-to-rail competition will be sustainable
5 over the long term. That is, where there is
6 sufficient traffic, where there is sufficient market
7 opportunities, private parties find a way to introduce
8 additional competition.

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

16 It was the product of a very hard-headed
17 business deal, whereby both parties insisted they had
18 to have access to certain areas or there would be no
19 deal. That's the way it works. What proponents of
20 competitive conditions are doing is not only
21 substituting the government as the entity that would
22 say, "Here's where you have more competition," but

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1 they would interfere with a private agreement that has
2 already been made.

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

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

20 A customer whose rail options remain
21 unchanged as a result of a transaction does not suffer
22 a reduction in rail competition. The Board itself has

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1 made clear that it will not impose a condition just
2 because one group of shippers obtains pro-competitive
3 merger benefits that other shippers do not enjoy.

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

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

17 The argument that those folks would make
18 is that CSX will compete like mad to win traffic in a
19 shared assets area, but ignore the traffic represented
20 by its solely-served customers in places like Buffalo.
21 The illogic of this position -- and I say illogic --
22 was addressed by Chris Jenkins, the Vice President of

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1 Chemicals Marketing for CSX, in applicants' rebuttal
2 statement. And I refer you to that statement.

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

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

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

21 CHAIRMAN MORGAN: Let's stop right there,
22 because I did ask that question of a couple of witnesses.

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1 MR. SIPE: Yes, you did.

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

4 MR. SIPE: Well, let's --

5 CHAIRMAN MORGAN: -- give it to me again.

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

15 Second, we know Norfolk Southern will have
16 enhanced presence in Buffalo. We heard Mr. Allen,
17 although he didn't quantify the current market share
18 that they will have, we heard Mr. Allen explain that
19 Norfolk Southern is going to compete for that traffic
20 in Buffalo. They'll have a better route structure
21 into and out of Buffalo. They've got a landing pad in
22 Buffalo.

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1 I think it's very important to focus on
2 the prospective nature of that competition. If they
3 want growth in the Niagara frontier, consider a
4 situation of somebody seeking to open a new facility
5 and considering the Niagara frontier. That's where
6 the enhanced competition is going to come from. That
7 shipper will have the opportunity to go to CSX, to go
8 to NS, and say, "I want to locate in the Erie Niagara
9 frontier. What will you do for me, Mr. Railroad, to
10 make sure that I've got the best long-term deal here
11 to make sure my freight moves competitively?"

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

17 I think the New York legislature can do
18 things to make Buffalo attractive to industries
19 locating there. The Erie County government can do so.
20 And then those shippers considering locating in
21 Buffalo can come to the two railroads and say, "Make
22 me a deal." They will be better off, prospectively.

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1 Existing shippers will also be better off
2 because of the CN and CP deals which will facilitate
3 movements of truck competitive traffic between the
4 United States and Canada.

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

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

19 Now CSX, as the deal is currently
20 structured, will have a special incentive to serve
21 that traffic east of the Hudson because it knows if
22 that traffic is going to move by rail it will move by

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1 CSX. There's an opportunity there. Congressman
2 Nadler said it's a bank. We'd like to go to his bank.
3 We'd like to make that traffic grow.

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

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

17 CHAIRMAN MORGAN: Is there anything out of
18 Congressman Nadler's plan that your client would be
19 supportive of or look more favorably upon? We've
20 discussed -- I mean, presumably your focus is on the
21 line up to Albany when you're talking about east of
22 the Hudson. But --

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1 MR. SIPE: Well, Congressman -- I can't
2 claim to be intimately familiar with his plan, and
3 it's possible that one of my colleagues behind me here
4 might want to speak to it. But as I understand it,
5 his plan is to expand the shared assets area and then
6 serve the east of the Hudson via a cross-river car
7 float. And we don't see that plan as being one that
8 is really going to help this.

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

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

15 MR. SIPE: Right.

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

20 MR. SIPE: There is an important
21 environmental issue -- the truck dimension of this
22 proposal -- and with your indulgence, I'm going to

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1 pass the buck on that to Ms. Sprague, because she
2 understands the issue and I would only confuse you by
3 pretending to explain it.

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

9 CHAIRMAN MORGAN: Yes, that's correct.

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

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

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

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1 rejected.

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

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

21 In sum, CSX believes that the calls for
22 expanded access are unjustified and ill-conceived. We

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1 strongly urge the Board to apply its clear precedent
2 and reject it.

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

5 MR. SIPE: Certainly.

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

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

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

21 And I'll also say that the test here
22 clearly is not what the final system plan would have

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1 done. The test here is, what does this transaction
2 do? It doesn't have any adverse competitive effect on
3 the Buffalo area. It's pro-competitive -- not as much
4 as they want, but pro-competitive nonetheless.

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

8 MR. SIPE: We're not --

9 CHAIRMAN MORGAN: You don't feel the
10 need --

11 MR. SIPE: Anything beyond what's in the
12 application?

13 CHAIRMAN MORGAN: Right.

14 MR. SIPE: We're not offering anything
15 beyond what's in the application.

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

18 If Buffalo were to be a shared asset area,
19 and there's not enough traffic there to generate two
20 carriers being in there, the principal carrier would
21 still operate the area; the other carrier would not be
22 there, then. Would that not be the case?

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1 MR. ALLEN: Vice Chairman, I don't know --

2 VICE CHAIRMAN OWEN: Just speculating.

3 MR. ALLEN: I don't know how it would
4 operate.

5 VICE CHAIRMAN OWEN: I don't either.

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

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

15 CHAIRMAN MORGAN: Thank you.

16 Mr. Lyons?

17 MR. LYONS: Thank you, Madam Chairman.

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

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

22 I think it is the case that we have gone

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1 well beyond the application in Buffalo, that one of
2 the roughest places with the high Conrail switching
3 charges was Buffalo. The average was 450. There was
4 some 490, and we take those Conrail switches down to
5 250 across the board.

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

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

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

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

19 I would like to talk briefly about Section
20 2.2(c) and then talk about the 30 or so protesting
21 parties who are trying to take part of the CSX
22 allocation in this transaction.

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1 I think that probably there are more oxen
2 of CSX that are proposed to be gored by the
3 protestants here than there are of Norfolk Southern.
4 I'll try and run through them as quickly as possible,
5 but I do hope that the Board will indulge me in that.

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

8 MR. LYONS: I would welcome that --

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

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

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

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

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1 consideration for the other.

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

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

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

21 And the two CEO's have given you that
22 pledge, but they gave you that pledge on an

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1 application that has 2.2(c) in it. And we urge the
2 Board to stick to it.

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

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

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

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

20 The issue that there's no jurisdiction to
21 deal with the contracts -- what the intent of the
22 statute very clearly is, is that the Board is not to

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1 regulate the content of the contracts, but the Board
2 regulated the opening or non-opening of contracts in
3 the UP/SP case in the interest of perfecting that
4 transaction, and the Board can do that here.

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

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

18 And that, we say, is a clear -- clearly
19 contrary to the hard core sections of the words of
20 Section 11321(a) which talk about having the successor
21 company be in the position to operate the properties
22 and franchises of the predecessor.

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1 And if there is anything that is clear and
2 that is ordinary in these cases, it is that the
3 operating rights of the predecessors descend upon the
4 successors. And there's no need to file an
5 application for terminal trackage rights.

6 That is the practice only where there is
7 a gap in the predecessor's system.

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

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

19 Pepco evidently didn't think so. Its
20 evidence never adopted the Justice Department's
21 theories and it's settled. The Justice Department
22 insisted that it knew more than Pepco about Pepco's

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1 business.

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

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

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

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

21 And so the Indiana Southern will have
22 access, and that will be continued for 20 years. Of

1 course, the Indiana Railroad, which is a CSX
2 subsidiary, will be able to furnish coal. As I say,
3 the Indiana Southern will be able to get in on a
4 switching basis where the cost is maintained for the
5 20 years.

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

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

18 There are a series of other coal using
19 companies. Centerior is presently sole served at its
20 plants, and it will remain sole served after the
21 transaction. It takes the tact of saying that it
22 competes in the power grid with companies that are

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1 located in shared asset areas with Detroit or, I
2 assume, with the Atlantic City or one of the others.

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

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

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

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

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

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1 extent that they can store coal, --

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

4 MR. LYONS: Yes.

5 (Laughter.)

6 CHAIRMAN MORGAN: Thank you.

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

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

18 And I have difficulty making sense out of
19 that argument. They are presently single served.
20 They will be single served after the transaction.
21 They are west of the Hudson on a line which is busy,
22 but there is no difficulty anticipated in serving

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1 them.

2 If there are service problems, they will
3 be dealt with at the time.

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

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

13 (Laughter.)

14 And the reason is because it is a
15 preexisting problem.

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

18 MR. LYONS: It's a problem that needs to
19 be fixed. But having them take over the line which
20 they characterize as a "backwater" -- this backwater
21 happens to be CSX's sole access to the Memphis
22 gateway.

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1 And the effect both of this transaction
2 which removes Conrail's desire to take everything out
3 at St. Louis or Chicago, plus the difficulties at
4 Houston which are affecting New Orleans, means that
5 Memphis will have to be used more and more.

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

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

20 And people have a tendency to throw them
21 in and to try and get radical relief in a transaction
22 of this sort. And I think if the two sat down

1 together and tried to work this out at a high level,
2 that it could be done in terms of improving the
3 dispatching.

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

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

11 So I would encourage those kind of
12 conversations.

13 MR. LYONS: Thank you.

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

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

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1 interest.

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

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

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

18 We had also a coalition last night, and
19 the coalition consisting of a single railroad, a one
20 year old railroad called the I&M Rail Link. The
21 coalition used to consist of the EJ&E and the I&M.
22 How the I&M got into it is obscure because the

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1 attorney-client privilege was pleaded as to how they
2 got into the coalition.

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

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

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

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

19 MR. LYONS: Sure.

20 CHAIRMAN MORGAN: I think we've heard some
21 concerns about the operations in Chicago, and I had a
22 dialogue with Mr. Snow at the beginning of all this

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1 about this. And I think that -- I hear that there are
2 plans to address possible congestion in Chicago --

3 MR. LYONS: Yes.

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

6 MR. LYONS: Yes.

7 CHAIRMAN MORGAN: Is that --

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

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

19 The two, Norfolk Southern and CSX, will
20 jointly vote that block of stock. And the reason why
21 there's the voting agreement in the record is, of
22 course, that we had to show that to the Board as to

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1 how the control would be exercised.

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

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

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

15 And these things can happen under the
16 plan.

17 There will be investments made in the
18 infrastructure of the IHB by CSX which it will make
19 out of its own pocket notwithstanding the fact that
20 there are other owners in the IHB, ie. Norfolk
21 Southern is another owner, and the Canadian Pacific --
22 the Soo Line of the Canadian Pacific is another owner.

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1 Also it owns 49% of the stock.

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

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

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

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

21 Now, the New England Central Railroad has
22 had some ambitious proposals for this case. It first

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1 wanted -- in fact, still does want trackage rights all
2 the way to the North Jersey shared asset area.

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

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

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

17 What it is concerned about is that its
18 customers may instead buy lumber from the south. But
19 if the customers prefer lumber from the south, and if
20 the benefits of single line service bring it to them
21 better, that is the customer's preference and it is
22 not obviously a loss of essential services.

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1 The estimates that have been contained as
2 to its loss are hotly contested, and it does not
3 present itself as a candidate for inclusion. If
4 realistically all it wants is to get to Albany, it can
5 get to Albany and it is not dependent on CSX to take
6 it to Albany.

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

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

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

21 The LAL, the Livonia, etc. railroad --
22 again, a railroad not in New England, but in upstate

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1 New York -- has a complaint which is clearly about a
2 preexisting situation. It presently lacks
3 connectivity with the Rochester Southern.

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

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

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

22 The others who are remaining apparently

1 want routes to be kept open which do not exist today
2 -- where no traffic is moving today, but they think
3 they might like to go in the future.

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

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

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

22 And that is that CSX expects to front end

1 load its people and its locomotives and its physical
2 and capital material in going into this transaction;
3 that it expects to have a degree of redundancy going
4 in so that the points that the Vice Chairman made that
5 it was not a good idea to hire people after the crisis
6 occurred -- it was better to have them available in
7 the case of crisis.

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

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

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

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

20 MR. LYONS: I have a source of superior
21 wisdom on this available if he's still here. It's
22 rather complicated, and --

1 CHAIRMAN MORGAN: And then I want -- well,
2 maybe before I could ask you two other questions and
3 then he could come up.

4 MR. LYONS: Okay.

5 CHAIRMAN MORGAN: Why don't we do that.
6 Contracts.

7 MR. LYONS: Yes.

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

10 MR. LYONS: Yes.

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

13 MR. LYONS: Like --

14 CHAIRMAN MORGAN: What is your position on
15 that?

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

21 Those are the moves that are open only to
22 one carrier. And those are easy to assign. There's

1 probably only one route that works for them. That is
2 where the move is going on at the moment. And so the
3 only thing to do is to find those contracts and take
4 note of them and put them into the system.

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

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

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

21 CHAIRMAN MORGAN: And what do you mean by
22 imbalance on day one?

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1 MR. LYONS: Imbalance that you will have,
2 say, 50% of the capacities on the New York Central
3 line, 50% is on the Pennsylvania line, and the other
4 ways that follow that to get to Chicago.

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

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

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

20 CHAIRMAN MORGAN: So the way --

21 MR. LYONS: And that's the concern. And
22 the one thing that the plan of the DOT doesn't address

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1 is the area where you have that problem, and that is
2 the problem where either of the two could provide a
3 single line service.

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

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

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

17 MR. LYONS: It is both. It is --
18 obviously it's an operations issue because avoiding
19 chaos on day one and trying to go from a unitary
20 Conrail, which operated in each part in the interest
21 of the whole, into two competing parts is an
22 operational problem.

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1 And unless you have a transition -- and we
2 can't pretend like Mr. Gitomer that there's only one
3 contract here -- 80% generally is the work figure as
4 to how much of the railroads' traffic is contract
5 traffic.

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

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

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

17 MR. LYONS: So the DOT solves --

18 CHAIRMAN MORGAN: So you're not in favor
19 of the DOT --

20 MR. LYONS: No, no.

21 CHAIRMAN MORGAN: -- proposal is the
22 bottom line?

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1 MR. LYONS: It solves the easy problems
2 and leaves the hard problems unsolved. That's the
3 difficulty with it.

4 CHAIRMAN MORGAN: Virginia Railway
5 Express, which is another party that raised concerns
6 -- I presume that CSX and VRE are in constant
7 conversation about the matters that were brought up.

8 Could you fill me in on some of that?

9 MR. LYONS: I believe they are.

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

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

14 CHAIRMAN MORGAN: Okay.

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

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

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

21 MR. JOHNSON: Chairman Morgan, Vice
22 Chairman Owen, what the CSX's proposal is here is, on

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1 day one, they are clearly going to have many more
2 clerical employees than they need given they're
3 inheriting most of the clerical related operations of
4 Conrail in Philadelphia.

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

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

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

22 And we want the valuable experience that

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1 they have. Now, this is a proposal that CSX is making
2 to the TCU in implementing agreement negotiations once
3 we get there. I mean, TCU may agree, they may not
4 agree.

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

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

17 In that case, you had employees who had
18 been dismissed, were drawing dismissal allowances
19 under New York Dock. The question was, could they be
20 recalled to locations where they had no seniority
21 rights under the collective bargaining agreement or
22 forfeit their protections?

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1 And the ICC ruled that they could not be
2 forced to give up their protections if they were being
3 recalled to a location where they weren't required to
4 protect the position under the collective bargaining
5 agreement.

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

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

15 Thank you.

16 CHAIRMAN MORGAN: Thank you.

17 Ms. Sprague.

18 MS. SPRAGUE: Thank you, Chairman Morgan.

19 Chairman Morgan, Vice Chairman Owen, many
20 parties have come here in the last couple of days
21 asking for conditions based on environmental concerns.
22 The guidebook for my response to their concerns is the

1 Final Environmental Impact Statement that was prepared
2 by the Board's section of environmental analysis.

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

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

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

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

21 They evaluated the potential impacts of
22 this transaction both quantitatively and

1 qualitatively. They defined objective criteria of
2 significance for impacts. But this was not just a
3 pocket calculator exercise.

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

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

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

21 The particular issues I would like to
22 address are the claims for conditions of the Four

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1 Cities, the groups in the east of the Hudson area,
2 various persons from Ohio, the passenger issues (VRE
3 and the American Public Transit Association), and the
4 American Trucking Association briefly.

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

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

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

22 Even though there are substantial

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

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

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

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

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1 of traffic delay.

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

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

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

19 There is a clear expectation that we are
20 going to make those improvements, both capital and
21 operational; that we're going to get those trains
22 through the Four Cities. Part of condition 24 is that

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1 we need to sit down and meet with the Four Cities on
2 a regular basis.

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

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

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

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

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1 different situation.

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

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

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

19 We wholeheartedly concur with that
20 statement.

21 There is no basis for mandating that CSX
22 rehabilitate that out of service portion of the IHB

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1 that is part of the Four Cities' alternative routing
2 plan. There is no demonstrated impact that would
3 justify the imposition of a \$4 million dollar
4 condition.

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

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

16 The point of the Ft. Wayne line
17 reactivation is to provide a separate route for the
18 slower moving traffic into the Chicago terminal area.
19 We want to use our B&O and the BOCT for the fast
20 moving intermodal traffic and the merchandise traffic.

21 We want to get the unit trains off that
22 line and we want to put them on the Ft. Wayne line.

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1 This is going to benefit the Four Cities on the BOCT
2 line which is the line that is of primary concern to
3 them.

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

9 We just don't believe it's feasible.

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

18 I would like to address briefly the east
19 of the Hudson matters. The commercial aspects of this
20 proposal have been discussed. I would like simply to
21 correct one factual mistake and the premise for the
22 claim that this transaction as we have proposed it

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1 will exacerbate traffic congestion and air pollution
2 in the New York City area.

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

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

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

20 Congressman Nadler assumes that 1,000 of
21 these trucks are going to cross the George Washington
22 Bridge into New York. This is not correct. A high

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1 proportion of these trucks go to warehouse
2 distribution centers and ports in northern New Jersey.

3 They never cross the George Washington
4 Bridge into New York. But even assuming that 1,000
5 trucks a day are going over the George Washington
6 Bridge into New York, this is not new freight to the
7 New York City area.

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

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

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

22 The FEIS estimates how many trucks are

1 being pulled down this way to the intermodal terminals
2 in northern New Jersey, and they estimate a maximum of
3 253 trucks a day. And they emphasize this is a very
4 conservative maximum estimate.

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

13 We came up with about six trucks a day.
14 The average daily traffic on the George Washington
15 Bridge is 265,342 vehicles. Even at 253 trucks added
16 to that bridge, that's .09% increase in traffic. This
17 is simply a de minimis effect.

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

20 The Final Environmental Impact Statement
21 could have gone a step further, which it didn't need
22 to do, but that is that some of the trucks that are

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1 coming down out of New England and over the GW Bridge,
2 because of the advantages of our transaction, we are
3 going to be diverting those trucks off the highway in
4 Massachusetts to the intermodal terminals in Beacon
5 Park, Worcester and Springfield.

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

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

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

22 So I think that just needs to be

1 separated, the claim that this transaction will make
2 things worse, which is demonstrably false, from the
3 statement which is true, that if the business is
4 developed east of the Hudson, then that would remove
5 trucks and improve the situation.

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

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

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

18 Well, I shouldn't speak for the speaker.
19 I'm not sure.

20 CHAIRMAN MORGAN: Well, let me ask you the
21 question that I thought I was asking him and then see
22 what your answer is.

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1 And what I was asking him was, does the
2 proposal before us take trucks off the road in the New
3 York City area?

4 MS. SPRAGUE: I think --

5 CHAIRMAN MORGAN: Because if the basis for
6 the east of the Hudson is get more trucks off the
7 road, --

8 MS. SPRAGUE: Right.

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

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

21 And I can't give you a quantification. We
22 did quantify the number that we thought we would

1 actually be pulling down over the George Washington
2 Bridge of six, and I think it's fair to say that we're
3 expecting to divert more than six to our intermodal
4 terminals in Massachusetts a day, but I don't have a
5 quantification for you on that.

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

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

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

21 We pushed ahead with these agreements
22 because we understood that upgrading the warning

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1 systems was important. The Ohio Public Utilities
2 Commission, working with the railroad and the Ohio
3 Rail Development Commission, did an exhaustive
4 analysis of every crossing along the line.

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

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

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

20 So we do agree with the recommendation of
21 the State of Ohio in that regard. I believe they
22 suggested 120 day period to forge ahead, and CSX and

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1 I understand NS are both agreeable to that
2 recommendation.

3 If we're not able to reach agreement, if
4 there's some problem, we would anticipate reporting
5 back to the Board. I would point out that condition
6 eight, which provides the specific list of grade
7 crossings, has a two year provision for completion.

8 So there's no conflict between these
9 provisions. I would see it as an acceleration of that
10 process in the State of Ohio.

11 Now when we get to grade separations,
12 however, the proposal was made to have a further one
13 year review period for further negotiations on the
14 grade separations. This is not a procedure that we
15 believe needs to take place under the auspices of the
16 Board.

17 The FEIS exhaustively analyzed crossings
18 on all the line segments that we're expecting
19 increases, looked at detailed information about
20 traffic flows, and made a recommendation with respect
21 to a grade separation in Indiana.

22 As was pointed out, there were no

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1 recommendations for grade separations in Ohio. Now,
2 of course, our settlements with various communities in
3 Ohio included provisions under which CSX and NS
4 undertook substantially greater than the usual
5 proportion for funding.

6 VICE CHAIRMAN OWEN: Are those under
7 passes or overpasses?

8 MS. SPRAGUE: Well, I know specifically at
9 Berea that was an issue and that under passes were
10 agreed upon, at least for Bagley Road. Front Street
11 too?

12 And Front Street as well. I'm afraid I
13 can't speak to the --

14 VICE CHAIRMAN OWEN: What was the
15 estimated cost, just round numbers? Do you have any
16 idea?

17 MS. SPRAGUE: Front Street was \$25 and
18 Bagley was \$18.

19 VICE CHAIRMAN OWEN: \$27 million? Pretty
20 healthy.

21 Thank you.

22 MS. SPRAGUE: I am not positive of the

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1 precise number, but I believe that there have been in
2 the neighborhood of 50 proposals for grade separations
3 in the State of Ohio alone. Now you asked for the
4 cost of these crossings -- were \$18, \$27 million.

5 Even taking \$10 million dollars as an
6 average cost of a grade separation these days, we're
7 talking about \$500 million dollars. We don't know
8 what Ohio has in mind for the railroad share of that.
9 But presumably, because they're seeking Board
10 auspices, they were thinking of more than the
11 traditional 5% railroad share.

12 And this is something that is not
13 agreeable to CSX, and I believe I can speak for NS in
14 that regard as well.

15 We think that the Board has gone as far as
16 it should go in terms of environmental mitigation;
17 that to start getting beyond what the FEIS recommended
18 would be unduly burdensome on this transaction that
19 bring significant environmental benefits.

20 There would be no basis for doing a
21 further study and reporting back to the Board. We see
22 this as a very different situation from the grade

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1 crossing warning device upgrade situation where there
2 really is an expertise to bring to bear that we
3 believe the state agencies have in identifying the
4 particular crossings for upgrade and identifying
5 crossings that should be closed, which is something
6 the Board has not gotten into, but the local agencies
7 and the state agencies can make those decisions.

8 But the grade separations are basically a
9 matter of prioritizing this extraordinary cost within
10 the state. And we do not agree to a further process
11 under the Board's auspices. We don't voluntarily sign
12 up for that, I should say.

13 Congressman Boehner spoke here in support
14 of the transaction. He acknowledged the significant
15 investment that CSX was making in Ohio including
16 Willard Yard, Collingwood Yard and other investments.

17 He didn't even address the benefits of the
18 settlements that we had made, but substantial money
19 for grade separations is going to be going to the
20 State of Ohio through these settlements.

21 He asked the Board not to further encumber
22 the transaction with burdensome conditions. And, in

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1 our view, an extensive program of building railroad
2 funded grade separations in Ohio would certainly
3 qualify as such a burdensome condition.

4 Okay, I am informed that our truck
5 diversion study shows that about 21,000 truckloads
6 will be diverted to rail for traffic moving between
7 central New England and the southeast. And we would
8 expect a substantial percentage of this traffic is
9 today moving by truck through the New York City area.

10 Thank you.

11 Okay, VRE -- I'd like to point out that,
12 when we opened this hearing yesterday, Congressman
13 Bliley and Senator Warner from the State of Virginia
14 both came here to express their complete support for
15 this transaction.

16 They expressed no reservation that the
17 transaction would have a deleterious effect on VRE.
18 And we think that's because there will be no such
19 effect. Congressman Bliley, in particular, spoke
20 about the benefits to Virginia of removing 26,000
21 truckloads from the highway.

22 A lot of these truckloads are going to be

1 coming from I-95 and onto the CSX line from Richmond
2 to Washington. We agree with Congressman Bliley that
3 this is a great benefit from this transaction.

4 These additional trains though is what VRE
5 has been here complaining about. We don't believe
6 that VRE is seeking narrowly tailored conditions. In
7 effect, what they are trying to do is have the Board
8 rewrite their contract to shift responsibility from
9 them to CSX for building additional capacity on the
10 D.C.-Fredericksburg line.

11 Under their contract, they have
12 obligations for paying for that additional capacity if
13 they want to expand their service. I'd also point out
14 that FRA is presently working on the Washington-
15 Richmond corridor transportation plan.

16 This is a long term program of the
17 capacity improvements with federal-state funding
18 designed to reduce running time and increase service
19 frequency of inner city passenger and commuter rail
20 service.

21 The FEIS, after thorough analysis,
22 correctly concluded that there would be no adverse

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1 effect from this transaction, let alone an effect that
2 would warrant this kind of extraordinary relief of
3 shifting responsibility for these kinds of capacity
4 improvements for passenger service to CSX as a
5 condition of this transaction.

6 In answering your earlier question about
7 discussions with VRE, we are in constant discussion
8 with VRE. Last summer, CSX hired Paul Weistrup, the
9 former president and CEO of Amtrak, as our coordinator
10 for passenger relations.

11 And CSX has experience presently with
12 passenger service -- VRE, of course, and our MARC
13 service. But in light of the increased relationship
14 in Philadelphia and Boston and New York, New Jersey
15 areas, Paul was hired.

16 He has been doing an excellent job. He is
17 in constant communication with VRE. I think his
18 commitment has resulted in the excellent on time
19 performance that VRE has been achieving over the last
20 number of months.

21 Last summer they did have a hard time when
22 we had an accident that took out the signaling system.

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1 But the work that has gone on since then to get right
2 on top of problems and make sure things operate
3 smoothly has really paid off.

4 And VRE has been having excellent on time
5 service. Their management sends CSX complimentary
6 letters on a regular basis. And we look forward to a
7 continued good relationship with VRE.

8 Here again, the FEIS recognizes that good
9 management and commitment will go a long way towards
10 ensuring that the commuters run on time, and I think
11 that is very amply demonstrated here.

12 The American Public Transit Association
13 came with what I take to be their very broad
14 legislative agenda. We think everything they are
15 asking for goes far beyond anything that's an
16 appropriate condition of this transaction.

17 I would just point out briefly that five
18 of its members support this transaction. The Mass
19 Transit Administration of Maryland, the MBTA, Chicago
20 Metro, New Jersey Transit and SEPTA all support this
21 transaction.

22 APTA asked for what seemed to be a broad

1 oversight of commuter performance and pointed to the
2 Amtrak settlement. We don't believe that that is
3 appropriate. This Board does have responsibility for
4 certain matters relating to Amtrak, and I think it is
5 appropriate and that is part of the settlement, that
6 the Board would consider the on time performance of
7 Amtrak in the oversight period.

8 But we don't believe that that is
9 appropriate to extend to the commuters. As the
10 freight railroads have been getting out of the
11 commuter business over the last 30 years, this Board
12 has also been getting out of the business of
13 supervising the commuter-freight relationship.

14 That is a matter that's left arms length
15 negotiation and we believe that the transaction does
16 not change that.

17 I had a response to ASHTA Chemical. I
18 don't know if you want to hold on just another minute
19 to hear that.

20 CHAIRMAN MORGAN: Go right ahead.

21 MS. SPRAGUE: There is an answer to ASHTA.

22 ASHTA --

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1 CHAIRMAN MORGAN: Since I asked a question
2 about it.

3 MS. SPRAGUE: ASHTA brought the
4 environmental concern into this case in April of this
5 year for the first time.

6 And they did so in response to a
7 supplemental notice of the section of environmental
8 analysis identifying the Norfolk Southern line segment
9 between Buffalo and Ashtabula as the line segment that
10 was getting increased hazardous materials traffic.

11 And that notice asked for comment, and
12 ASHTA's comments were filed in response to that.
13 Prior to that comment, ASHTA had been seeking
14 reciprocal switching strictly on competitive grounds.

15 The story with ASHTA is that, presently,
16 all of their traffic does go from Ashtabula to Buffalo
17 to be classified. Most of it goes on its way to the
18 east from there, but some of it does get put on
19 through trains in Buffalo that then travel back to the
20 southwest through Ashtabula and on their way.

21 This was not always the case. We inquired
22 of Conrail when the ASHTA issue was raised in April as

1 to what the situation was, and they informed us that
2 they didn't always do it that way.

3 But there were service problems, and they
4 found that once they started just taking it all to
5 Buffalo and classifying it there, they got it on its
6 way and to the destination much faster, more
7 efficiently.

8 There is -- in our operating plan, we
9 simply propose, for purpose of traffic figures, to do
10 things the way Conrail was doing them. But there is
11 nothing about this transaction that requires CSX to
12 take ASHTA's freight to Buffalo for classification.

13 CSX may well find it more appropriate as
14 it works with ASHTA to take its freight bound for the
15 south and west to Willard or to Indianapolis for
16 classification. Now that ASHTA apparently has this
17 concern about having its freight go and come back for
18 -- and I'm not making light of it.

19 I mean, one shouldn't haul freight around
20 for no good reason, particularly hazardous materials.
21 But if that is really a concern of theirs, then CSX is
22 more than willing to meet with them and talk to them

1 about how they wish to have their freight classified.

2 And we're more than willing to work with
3 them on that. So there is nothing about this
4 transaction that is causing hazardous materials to be
5 hauled over circuitous routings and we're happy to
6 work with them.

7 No condition of the nature that they have
8 requested is warranted on any environmental basis.

9 CHAIRMAN MORGAN: Anything else?

10 MS. SPRAGUE: I think that's it.

11 CHAIRMAN MORGAN: For clarification, when
12 is day one?

13 MR. LYONS: Day one is the so-called
14 closing date, and it is the date when Conrail stops
15 being a separate entity running trains of long haul
16 nature and the two parts of it are allocated, one of
17 them to CSX and the other to Norfolk Southern.

18 CHAIRMAN MORGAN: But when is that date?

19 (Laughter.)

20 I need to know the date --

21 MR. LYONS: When is it going to be?

22 CHAIRMAN MORGAN: -- so that I know what

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1 it is.

2 MR. LYONS: I'd like to know myself.

3 There are conditions -- there is no fixed
4 date for it. Under the NIT League settlement, we will
5 not go to day one, which is the closing date, until
6 there are all necessary labor agreements and until all
7 the management information systems are in place to the
8 extent necessary to have an orderly day one.

9 There is also, as set forth in one of the
10 petitions that was filed back a week or so ago, the
11 matter of sorting out the contracts and getting that
12 part of the operations ready.

13 And exactly when that will all be known
14 and when that will be done is hard to guess. There
15 will be a period where, if the transaction is
16 approved, the two will be in control of Conrail; that
17 the voting trust will terminate.

18 The two will be in control of Conrail, but
19 Conrail will still be running as an independent -- as
20 a separate railroad even though controlled by the two.

21 But I cannot give you an estimate with any
22 reliability as to when the closing date, day one, will

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1 occur.

2 CHAIRMAN MORGAN: Okay.

3 MR. LYONS: Do you have a --

4 (Laughter.)

5 CHAIRMAN MORGAN: He leapt up. I guess he
6 must.

7 MR. ALLEN: I would just add to that for
8 Norfolk Southern that we think it's extremely
9 important that day one happen as quickly as possible.
10 And we have indeed agreed in the NIT League settlement
11 to make every effort to make sure that that happens.

12 MR. LYONS: Yes, that is certainly the
13 case. But exactly when it is, we don't know.

14 CHAIRMAN MORGAN: Okay. Before we close,
15 let me just ask if you would all get us, by close of
16 business tomorrow, two lists; one a list of all the
17 parties that have withdrawn completely and a second
18 list of all the parties that have withdrawn in part --
19 you know, where some things have been resolved and
20 some things haven't.

21 Then we also need a list of what
22 conditions you want us to impose by way of settlement

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1 agreements. In other words, you've entered into
2 settlement agreements; we need to know which ones
3 you're requesting be imposed since you've entered into
4 some of these very recently.

5 If we could have that list and some sort
6 of description, that would be very helpful by close of
7 business tomorrow.

8 I've asked my staff if there was any other
9 question that they wanted me to ask and they said no,
10 -- (laughter) -- which I think is their message that
11 we want to go home, and they know I have a habit of
12 going on and on. But yes, this -- we are finished.
13 This oral argument is finished.

14 I want to thank all of you who have
15 appeared yesterday and today, and those of you who
16 still remain in the room. This has been a long two
17 days, but I think it has been worth it.

18 I know I have been studying this record
19 for several weeks, but I think we have been able to
20 hone in on some issues in a very productive way the
21 last two days. We've heard a lot. We've heard from
22 the Applicants about the benefits of this proposal.

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1 We've heard from a lot of other people who
2 have worked things out with the Applicants as recently
3 as this morning and who now want this deal. And we've
4 heard from a lot of people who want the deal if they
5 get some changes.

6 And these are all serious issues, serious
7 concerns, and we take them seriously. We will be
8 studying the record further, and then we will decide
9 this case. We have a voting conference scheduled for
10 next Monday afternoon at 1:00 where we expect to
11 discuss and vote on the application.

12 I know we'll have another full room with
13 many of the faces I see tonight again. We have copies
14 of the press release that explains the details of the
15 voting conference as you go out the door.

16 Again, thank you all. And I want to thank
17 the staff who again has been here another long day and
18 we could not do it without all of you. Thank you.

19 And we will have a long weekend, and we
20 will be back here on Monday.

21 (Whereupon, the proceedings were adjourned
22 at 8:27 p.m.)