

SURFACE TRANSPORTATION BOARD

06/03/98

FD#33388

241-300

1 members of Congress, members of the Senate, and local  
2 communities, to arrive at solutions to many of these  
3 concerns. Great progress has been made.

4 If there is one overriding concern that  
5 encompasses the issues I will raise today, it is the  
6 concern for safety. I was pleased that the section on  
7 environmental analysis saw the need for safety  
8 mitigation throughout our state. I am particularly  
9 grateful that 28 of the 89 crossings that were  
10 recommended for improved active warning devices  
11 happened to be located in my home state of Ohio.

12 However, I must tell you that I remain  
13 concerned that many towns, many communities and  
14 villages will be short changed in their efforts to  
15 keep Ohioans safe. Ohio has a demonstrated track  
16 record of successful negotiations with CSX and NS  
17 regarding safety corridors.

18 While SEA has recognized the need for  
19 grade crossing safety, I believe its approach, one  
20 which emphasizes individual sites rather than rail  
21 corridors is frankly inferior to Ohio's. My  
22 understanding is that Ohio is currently negotiating

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1 with CSX and NS on a number of rail corridors. I  
2 would hope that the Board would mandate that these  
3 negotiations to finalize these agreements continue for  
4 120 days. If by the end of that time resolutions can  
5 not be reached, then the SEA recommendations should of  
6 course be enforced.

7 Many areas in Ohio will experience sharp  
8 increases in train traffic as a result of this  
9 acquisition. These increases could impact the ability  
10 of cities and towns located along the rail lines to  
11 provide emergency services to its citizens, services  
12 such as fire, police, or ambulatory services. These  
13 are services where a few seconds can make the  
14 difference literally between life and death.

15 Increased train traffic also increases the  
16 likelihood of derailments, increases the potential for  
17 train and car collisions at many rail grade crossings.

18 Last October I wrote a letter to the SEA  
19 outlining my concerns about the sharp increases in  
20 train traffic that many communities would face if this  
21 acquisition does go forward. In that letter I  
22 highlighted the west side of Cleveland and its west

1 shore suburbs as examples of how increased train  
2 traffic could devastate small communities.

3 I was very pleased to learn that the  
4 process of negotiation and resolution was effective in  
5 dealing with the concerns of Ohio communities around  
6 Cleveland. All parties, both public and private,  
7 deserve a great deal of thanks for their diligence in  
8 resolving these differences. I remain hopeful that  
9 this spirit of collaboration will continue and that  
10 CSX and the city of Cleveland, and I know we're  
11 working on this as we speak, will be able to reach a  
12 mutually agreeable resolution to their differences.

13 It is my understanding that CSX and NS  
14 have been active in resolving these problems. That's  
15 good news for those communities. But what about towns  
16 such as Fostoria, who have been seeking acceptable  
17 mitigation, but have to this date gotten no relief?  
18 As an example, all parties including the railroads  
19 agree that Fostoria will be severely impacted as a  
20 result of increased train traffic.

21 I had the opportunity, Madam Chairman, to  
22 visit Fostoria about a month ago and to talk to the

1 safety director, talk to the mayor and other elected  
2 officials about the tremendous impact that this is  
3 going to have.

4 I will just be very candid with you. They  
5 are very frightened, if I can use that term, about  
6 what they foresee as their safety problems that are  
7 going to take place because of this.

8 In the entire area affected by the  
9 acquisition, only one grade separation has been  
10 ordered. In short, I support Ohio's local communities  
11 and efforts for adequate mitigation, and request that  
12 as a condition of approval the Board go beyond the  
13 recommendations of the SEA and mandate that the  
14 applicants continue negotiations for a period of at  
15 least one year with the communities on record in this  
16 proceeding which have requested grade separations.  
17 The communities should have the right within one year  
18 to request that the Board review the record to  
19 determine if reopening of the issue would be  
20 warranted.

21 I am also concerned about the SEA's  
22 criteria for recommending which communities receive

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1 different tools for dealing effectively with hazardous  
2 waste transportation through their communities. Two  
3 examples of course are Operation Response Software and  
4 the special HazMat training in Pueblo.

5 The SEC appears to reserve and seems to  
6 have reserved these valuable tools for communities  
7 with environmental justice concerns. I understand  
8 that. However, many communities that face the same  
9 problems are not recommended to receive these items.  
10 I would request that the Board instruct the SEA to  
11 determine which additional communities should be  
12 provided Operation Respond and other special training.

13 Finally, I have concerns about the effect  
14 of the acquisition on the Wheeling and Lake Erie  
15 Railway. More than 20,000 Ohio jobs and Ohio's  
16 investment in the neo-modal facility in Star County  
17 are directly related to Wheeling's post acquisition  
18 viability.

19 Over the past year, Wheeling has  
20 negotiated with Norfolk Southern to reach a mutually  
21 agreeable solution to their problems. Unfortunately  
22 they have not been able to reach as of this date an



1 acceptable conclusion.

2 If Wheeling is allowed to go bankrupt, the  
3 resulting uncertainties, ranging from service  
4 interruptions to other unknowns, would have a  
5 devastating impact on key Ohio industries such as  
6 steel, stone, petrochemicals and plastics, just to  
7 name several.

8 I believe that the Board must impose  
9 conditions that are sufficient to keep the Wheeling  
10 and Lake Erie Railway viable. It is very important  
11 for our state.

12 In conclusion, I believe that CSX and  
13 Norfolk Southern's acquisition of Conrail has enormous  
14 potential to benefit Ohio's economy. However, the  
15 harm that it will bring to Ohio's community and Ohio's  
16 economic interests are too great to support the  
17 acquisition in its current form. It is the function  
18 of a Service Transportation Board of course to mandate  
19 conditions under which a deal of this importance and  
20 magnitude can go forward. I urge the Board to ensure  
21 that these conditions address the vital safety issues  
22 that I have talked about today.

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1                   Again, Madam Chairman, let me just thank  
2                   you for allowing me to go out of order. I apologize  
3                   to my friends who I have interrupted. I appreciate  
4                   your courtesy very much.

5                   CHAIRMAN MORGAN: Well certainly this  
6                   transaction has a great effect on Ohio. So we are  
7                   happy you are here to express your views. We will be  
8                   hearing from other people from Ohio as the day wears  
9                   on and tomorrow. So thank you.

10                  SENATOR DEWINE: Thank you very much.

11                  VICE CHAIRMAN OWEN: Senator, one other  
12                  point on this, if you will. A number of the highways  
13                  do come to the railroads. Towns are built around the  
14                  railroads. As the ISTEPA and the BESTPA funding goes  
15                  forward, sometimes there might be some funds found in  
16                  those particular programs. We trust it's there to  
17                  assist your community.

18                  SENATOR DEWINE: We trust that they will  
19                  be.

20                  VICE CHAIRMAN OWEN: Okay. I just thought  
21                  I would urge you to look in that direction.

22                  SENATOR DEWINE: Thank you very much.

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1 CHAIRMAN MORGAN: Mr. McBride?

2 MR. MCBRIDE: Thank you, Madam Chairman,  
3 Mr. Vice Chairman. TFI supports the NIT League  
4 argument you just heard. We filed this morning a  
5 letter of support for the transaction with two  
6 exceptions, the captive shipper protections Mr.  
7 DiMichael spoke about and TFI's contention that any  
8 rail cost adjustment factor that the Board uses in  
9 those captive shipper protections or otherwise in the  
10 transaction must be adjusted for productivity.

11 That is the RCAF the ICC adopted, this  
12 Board follows, and most importantly, Madam Chairman,  
13 as you yourself have said many times, you follow the  
14 law around here. We commend you for it. I have put  
15 the law before you. The law is sparkingly clear.  
16 Any RCAF that you use shall be adjusted for  
17 productivity. So in any captive shipper remedies  
18 that you adopt, you must use the productivity adjusted  
19 RCAF.

20 Now in the settlement agreement we have  
21 reached with the applicants, in view of the fact that  
22 they have reduced the switching charges, we have

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1 agreed not to insist on application of the  
2 productivity adjusted RCAF to those. But in all other  
3 respects you must follow the productivity adjustment.

4 The NIT League settlement was a settlement  
5 with NIT League, not with the rest of us. We weren't  
6 part of it. We are not bound by it.

7 Now let me turn to the other captive  
8 shipper issues. As Mr. DiMichael told you, the  
9 purchase price paid by CSX and Norfolk Southern is  
10 over \$20 billion. That is not our number. That is  
11 their number. It comes from the erratum to witness  
12 Whitehurst's testimony. It's not a \$10 billion  
13 transaction as has been reported. It assumed another  
14 \$10 billion in debts and liabilities, severance  
15 payments and the like.

16 So they have raised costs, not lowered  
17 them. We are greatly concerned that the only way they  
18 are going to pay for this is out of the captive  
19 shippers. But in the immortal words of Mr. McClellan  
20 from Norfolk Southern, this is at ACE et al 18 Exhibit  
21 3. That's a risk NS took. Mr. Anderson of CSX told  
22 shippers, the same exhibit, that CSX would not

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1 raise rates to pay for this transaction. So hold them  
2 to it.

3 Mr. Goode and Mr. Snow told you this  
4 morning that's not how they intend to pay for it.  
5 They intend to pay for it by growing the business and  
6 by cutting costs. Fine. They also like to argue  
7 around here they can't raise our rates any higher  
8 because they are as high as they can be. If so, hold  
9 them to it. Just order them to do what they said they  
10 would do.

11 If we are wrong and they can't raise their  
12 rates anyway, it won't matter. But if we are right,  
13 we will be protected as we have a right to be.  
14 Because as Mr. DiMichael told you, and this is where  
15 we part company with the DOT, this premium is a result  
16 of this transaction. We are entitled to be protected  
17 here. The Board said we would be protected here.

18 Now on revenue adequacy and jurisdictional  
19 threshold. These are important matters. They are  
20 affected uniquely by NS and CSX's premium. We are  
21 talking about their revenue adequacy calculation and  
22 their jurisdictional thresholds. Under your costing

1 system, the acquisition premium becomes a variable  
2 cost which would raise the variable cost denominator,  
3 if we go back to our high school arithmetic, and lower  
4 the jurisdictional -- raise the jurisdictional  
5 threshold so captive shippers would not be able to get  
6 protection until their rates were raised even higher.

7 As with that, the revenue adequacy  
8 calculation, the same kind of effect will occur.  
9 Since the investment will go up, their return on the  
10 investment will go down. As Dr. Kahn explained to you  
11 in the ex parte 575 proceeding, in no other regulated  
12 industry would anyone ever be allowed to pay the sky  
13 is the limit in acquiring one another and then pass it  
14 through to the captive customers. No other industry  
15 allows that. You can't allow it here.

16 There has never been an acquisition  
17 premium remotely this large. You have never ruled on  
18 this issue before. There is no precedent to allow  
19 this. You must protect the captive shippers from  
20 this. We were not consulted about the amount of the  
21 acquisition premium.

22 When I had my first opportunity about a

1 day after they filed the notice with you that they  
2 wanted to buy Conrail and put it in a voting trust, I  
3 said time up. Order them to go negotiate a lower  
4 price. You said we don't have the authority to do  
5 that, but we'll treat it as an issue in this  
6 proceeding. Fine. We are here. We have been  
7 waiting.

8 You have to tell them that we didn't play  
9 a part in this. We can't be made to pay for this.  
10 Madam Chairman, we can't be consigned to rulemaking  
11 proceedings and rate complaints. The harm will have  
12 already occurred. We need to be protected from it  
13 now. We ask you to order them to do what they have  
14 told us, that they will not do anyway, which is to  
15 raise our rates. Thank you very much.

16 CHAIRMAN MORGAN: I guess we can get the  
17 lights.

18 Why don't we turn next to you.

19 MR. STONE: Chairman Morgan, Vice Chairman  
20 Owen, ladies and gentleman, I am Scott Stone of Patton  
21 Boggs, here for CMA. With me is Tom Schick of CMA and  
22 Marty Bercovici of Keller and Heckman for the Society

1 of Plastics Industry. Mr. Schick and I will be  
2 presenting the argument jointly for CMA and SPI. We  
3 would appreciate it if it's possible to set the clock  
4 for 10 minutes. We'll both promise to finish up  
5 before then.

6 CMA and SPI can not support this  
7 transaction. There are too many risks of serious  
8 service disruptions. There are too few benefits to  
9 shippers of chemicals and plastics. We don't think  
10 our members should be asked to bear those risks.

11 We will address two main categories of  
12 problems with the transaction. First, the likelihood  
13 of impaired service. Second, various threats to rate  
14 and service competition.

15 CMA and SPI have proposed conditions that  
16 would mitigate but not eliminate these problems.  
17 These are set forth in attachment 1 to our brief. We  
18 don't have time to address all of the conditions  
19 today, so if we don't mention something that's a  
20 condition we refer you to our comments in our brief,  
21 including our supplemental comments on the NIT League  
22 agreement.



1 I would like to assure the Board that CMA  
2 and SPI have devoted considerable time to trying to  
3 reach accommodation with the railroads. We have been  
4 unsuccessful unfortunately, and I don't think it would  
5 be appropriate to comment on the details, but we have  
6 tried.

7 First I would like to address what we see  
8 as a serious risk of service disruptions during  
9 implementation. There are serious questions of how NS  
10 and CSX are going to unscramble the various pieces of  
11 Conrail and reintegrate them into their own respective  
12 systems. We are colored in our perspective by the  
13 Union Pacific situation. I would just like to say  
14 that many of the problems that UP has seen do relate  
15 squarely to difficulties in integrating the SP and the  
16 UP.

17 For example, cars were lost because UP and  
18 SP car tracking systems didn't mesh. Operations were  
19 hampered because labor agreements weren't in place so  
20 UP crews couldn't work on the SP territory and vice  
21 versa. Efficient utilization of SP facilities was  
22 undermined by the departure of many skilled SP

1 employees. All of this happened despite the fact that  
2 Union Pacific was always considered a well managed  
3 railroad. I hope they still are.

4 Plainly, the Board as part of its public  
5 interest inquiry must look at the issue of whether the  
6 operations proposed will be feasible and the  
7 transportation adequate. We see the potential for  
8 even greater service problems with this transaction  
9 than was the case with UP because as I said, before NS  
10 and CSX can begin to operate their pieces of Conrail,  
11 they have to figure out what it is they own and  
12 unscramble it.

13 Some assets obviously like track and  
14 equipment are easy to split up. But others, like  
15 databases, communications systems, and the many  
16 physical and electronic links that tie Conrail  
17 together today are going to be very difficult to  
18 untangle and sever and divide up. They have to be  
19 divided three ways. There's the NS portion, there's  
20 a CSX portion, and there's the residual Conrail  
21 portion. Of course compounding that job is the fact  
22 that NS and CSX are rivals.

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1 Dividing up a major rail system has never  
2 been done before. We think it is going to be quite  
3 messy. If the planing for the cutover isn't done  
4 right, it's shippers who are going to pay the price in  
5 the form of service disruptions. We think the  
6 potential for service disruptions as great as those  
7 we're seeing in the west is there.

8 Now to their credit, the applicants have  
9 pledged to have the necessary information systems and  
10 labor agreements in place prior to beginning  
11 operations. They made those commitments in their  
12 depositions. They have repeated them in the NIT  
13 League agreement. We welcome those commitments. But  
14 those commitments aren't enough in our view.

15 After NS and CSX certify to the Board that  
16 those elements are in place, we believe there should  
17 be an expedited period, we say 15 days, to allow  
18 public comment, and further 15 days for the Board to  
19 accept or reject the certifications that these  
20 elements are in place.

21 We view it as preferable for the Board to  
22 take this short period to ensure that the elements are

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1 really in place than for shippers to endure months or  
2 years of disruption afterwards. Just as one example,  
3 if CSX and NS say that all necessary labor agreements  
4 are in place and a union comes in and says well,  
5 number one is not in place or number two, we think  
6 it's necessary and nothing has been done at all, it is  
7 better to get that on the table before NS and CSX  
8 attempt to begin operations.

9 In an ideal world, we could just take NS  
10 and CSX's word that all these things are in place.  
11 But the whole purpose of this proceeding of course is  
12 to verify what the applicants have said about their  
13 claimed benefits. So let's allow the 30 days for  
14 verification to be as certain as we can that the  
15 cutover to restructured service is going to be done  
16 right. If it's not, again, everyone including CMA's  
17 and SPI's members are going to pay for that. They are  
18 going to pay far more than the interest costs of the  
19 extra 30 days, even at \$2 million a day.

20 I would refer you to the conditions under  
21 heading A in our attachment 1 to our brief entitled  
22 "Pre-implementation Conditions" for the details of



1 what we have proposed.

2 The second set of issues I want to address  
3 are those relating to post-implementation,  
4 particularly in the shared asset areas, and  
5 particularly the north Jersey area. Obviously the  
6 shared asset areas carry some benefits. We have never  
7 denied that. But that tells only part of the story.

8 One of the reasons NS and CSX decided to  
9 create the areas is not only because they both wanted  
10 to be in those markets, but because there weren't  
11 enough tracks to divide up the tracks. Conrail had  
12 spent years consolidating the tracks and the yards in  
13 those areas to fit a single railroad's operations.  
14 Now we are going to have a situation in which NS and  
15 CSX both have to be in those areas. They are going to  
16 run their trains into those areas. They are also  
17 going to have residual Conrail there doing the  
18 switching operations. So there will be three carriers  
19 instead of one.

20 Even today there is chronic congestion in  
21 the vicinity of the Oak Island terminal. That would  
22 become worse as Oak Island becomes a major interchange

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1 point between NS and CSX, and as I mentioned, as CSX  
2 and NS begin to run their own trains in and out and  
3 through the shared asset areas.

4 Unfortunately, the best record evidence we  
5 have of whether if the operations are going to be able  
6 to work is the operating plan that NS and CSX filed in  
7 response to Decision 44. You may recall that Port  
8 Authority hired an expert to look at that plan. He  
9 said, this is pretty close to a direct quote, that if  
10 this plan were implemented it would result in  
11 operational paralysis in a matter of weeks.

12 We recognize that the Port Authority has  
13 settled with the applicants, but nothing in the  
14 settlement changes that record testimony. It's still  
15 the best record evidence about, at least from the  
16 shippers' side, about what might happen there in the  
17 New Jersey area.

18 We also think that management of the  
19 shared asset areas is going to be contentious and not  
20 necessarily in the best interest of shippers. The  
21 infrastructure in New Jersey is very tight. So it's  
22 going to be very important to NS and CSX how that

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1 infrastructure is expanded. What may be good for NS  
2 may be by definition bad for CSX. So the two  
3 railroads are going to be in perpetual deadlock, we  
4 fear. Even with the provision for arbitration, the  
5 management of the SAAs is going to be very cumbersome.

6 Unfortunately again, we fear it's going to  
7 be the shippers who are going to be caught between the  
8 rock and the hard place when NS and CSX can't agree.  
9 To the extent they can't agree and the infrastructure  
10 is not improved on a basis that it needs to be,  
11 shippers will suffer.

12 While CMA and SPI have requested among  
13 their pre-implementation conditions that the necessary  
14 management protocols for the shared asset areas be in  
15 place, we think realistically those aren't going to  
16 prevent problems and that the Board, if the  
17 transaction is approved, is going to have to devote  
18 very considerable attention during the oversight phase  
19 to the shared asset area operations.

20 Another big issue for CMA and SPI in the  
21 SAAs is the responsibility of NS and CSX for the  
22 handling of traffic by Conrail. Specifically, what

1 about the catastrophic situation in which Conrail is  
2 handling a car and there's a spill of hazardous  
3 materials.

4 We would request a condition B-1, which  
5 again is in attachment 1 to our brief, and I'll quote  
6 it. Recognizing that Conrail will operate the SAAs as  
7 an agent, NS and CSX each must be fully responsible  
8 and liable for its shipments to, from, and within the  
9 SAAs.

10 NS and CSX have said in their application  
11 and in discovery that they rather than Conrail are  
12 going to be the only common carriers, that all traffic  
13 in the SAAs is going to be handled under either an NS  
14 or CSX weigh bill. Yet they have given inclusive  
15 answers when we have asked them well doesn't that mean  
16 you are going to take responsibility for what Conrail  
17 does for you.

18 Given those inclusive and unsatisfactory  
19 answers, we would ask the Board if it approves the  
20 transaction, to adopt the condition B-1, which I just  
21 quoted.

22 I am now going to introduce Tom Schick,

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1 you is going to present the balance of the argument.

2 Good luck, Tom, in one minute.

3 MR. SCHICK: Madam Chairman, I may ask  
4 your indulgence for an extra minute or two.

5 CHAIRMAN MORGAN: You have it.

6 MR. SCHICK: Thank you. Good afternoon.  
7 We see a variety of other problems in this  
8 transaction. I will touch on them only very briefly.

9 First, many chemical and plastic shippers  
10 will lose single line service. Their current routes  
11 and movements will be split between NS and CSX. The  
12 agreement with the NIT League freezes rates for that  
13 traffic, but only where 50 cars or more were shipped  
14 between a specific origin and specific destination.  
15 Many other shippers who have widely distributed  
16 traffic patterns such as chemicals and plastics  
17 shippers, may not meet that 50 car threshold. These  
18 shippers would be disadvantaged by losing single  
19 system service and would probably be among those who  
20 would face rate increases as well.

21 We believe that in order to prevent both  
22 worse service and likely higher rates for those

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1 shippers, the Board should impose a rate freeze on  
2 this limited category of traffic that would lose  
3 single line service on Conrail.

4 As an alternative, you could extend the  
5 freeze as provided in the NIT League agreement so it  
6 would apply to shippers moving at least 50 cars from  
7 an origin through a point that becomes an interchange  
8 between NS and CSX after the breakup of Conrail.

9 Next, we are concerned that NS and CSX  
10 will attempt to reroute traffic, coming up from the  
11 Gulf Coast and moving to the Northeast. Today this  
12 airline traffic moves overwhelmingly through Illinois  
13 gateways. We fear that NS and CSX will attempt to  
14 move it instead through southern gateways, Memphis and  
15 New Orleans, for example. As we explained in our  
16 comments, this would give a longer haul to the eastern  
17 carriers, but likely result in higher rates for  
18 shippers. You ask why would the airline rates be  
19 higher. The answer is that the originating western  
20 carriers are likely to attempt to maintain their  
21 current revenue on what would become for them shorter  
22 hauls, while the eastern carriers would charge more

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1 for what become longer hauls.

2 We are not asking for anything like the DT  
3 and I conditions. We are simply asking that the major  
4 Illinois gateways that are used by chemical and  
5 plastics shippers be maintained on a commercially  
6 competitive basis. We don't want to try to define  
7 those terms precisely. We would leave it to you to  
8 hear evidence from shippers that gateways that they  
9 have relied on have as a commercial matter become  
10 closed by rate increases or by service curtailments.

11 We have also requested certain conditions  
12 related to reciprocal switching. We remain concerned  
13 that the NIT League settlement preserves reciprocal  
14 switching that Conrail provides to Norfolk Southern  
15 and to CSX, but not vice versa. This threatens to  
16 create two-to-one points in the future.

17 We have learned that ARCO Chemical has  
18 reached a settlement of its concerns in this regard,  
19 but with other shippers facing that situation, we urge  
20 you to extend the reciprocal switching relief as in  
21 our condition (C) (2) (a), so it would apply uniformly  
22 to all shippers regardless of where they are located

1 on these three railroads.

2 We are also concerned about the likelihood  
3 that service handled by Conrail under contracts will  
4 deteriorate after the carve up of Conrail. The  
5 applicants propose to reroute traffic according to  
6 their own desires. As DOT noted this morning,  
7 shippers should be the ones with the option to select  
8 service by NS or by CSX under those contracts or to  
9 terminate and renegotiate.

10 In the NIT League agreement, there is a  
11 cumbersome arbitration system to resolve complaints  
12 that contract service has deteriorated. We ask that  
13 you impose our condition (b)(4). We are confident  
14 that the applicants could even have implemented that  
15 condition in an orderly manner already if they had  
16 chosen to work with the shippers.

17 We are concerned as well that by their own  
18 admissions there will be problems if there's not  
19 faultless execution of this transaction.

20 The final point in our comment is that if  
21 you do approve the transaction, we believe five years  
22 of oversight will be crucial. This is what was

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1 imposed in UP/SP. This is an even more complex  
2 transaction. Details of the process and the elements  
3 are set forth in (c) (4) and (c) (5) in our conditions.

4 Thank you very much. Mr. Stone, Mr.  
5 Bercovici and I will answer any questions about that.

6 CHAIRMAN MORGAN: So you don't have a --

7 MR. BERCOVICI: I don't have a prepared  
8 statement.

9 CHAIRMAN MORGAN: Okay. Thank you.

10 Let me just start with you, Mr. DiMichael.  
11 We have heard a lot of discussion today about  
12 abrogation of contracts. Of course part of the NIT  
13 League agreement addresses the transition period  
14 relative to contracts and the arbitration process as  
15 well.

16 The NIT League's position I presume, given  
17 the NIT League agreement, is that the abrogation of  
18 contracts as requested by the applicants is something  
19 that you support?

20 MR. DIMICHAEL: Well we believe that with  
21 the NIT League agreement, with the settlement  
22 agreement and the section in the settlement agreement

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1 dealing with that, it is a reasonable compromise and  
2 would take care of the most serious concerns.

3 Obviously the settlement agreement was a  
4 compromise agreement. I think it's fair to say that  
5 everyone was moving toward a central position. We  
6 believe that the position that we have gotten to in  
7 that agreement is a reasonable resolution of that.

8 CHAIRMAN MORGAN: The second question  
9 relates to the council that is also part of the NIT  
10 League agreement. Am I correct that this council has  
11 been meeting on a regular basis already and has a  
12 broad membership of shippers and carriers?

13 MR. DIMICHAEL: Yes. That is true. There  
14 has been two meetings, two formal meetings of the  
15 council so far. There is a third meeting coming up  
16 this Tuesday, upcoming Tuesday. Agenda topics have  
17 ranged everything from shared asset areas to MIS  
18 systems to the contract question. There has been a  
19 subcommittee designated to work up recommendations for  
20 reporting requirements. There has been a summary of  
21 shared asset area operations developed.

22 The council has it right now I think a

1 pretty broad fair cross section of shipper groups,  
2 electric utility groups, iron and steel, scrap metals,  
3 coal. So things have been going along we think fairly  
4 well on that.

5 CHAIRMAN MORGAN: What is the membership  
6 by numbers on the council, roughly?

7 MR. DIMICHAEL: I am trying to think. It  
8 must be probably about a dozen shipper groups right  
9 now and then the carriers, NS and CSX and substantial  
10 people, and at the last meeting Conrail itself sent  
11 representatives.

12 CHAIRMAN MORGAN: Now one of the things  
13 that I understand is part of the council's  
14 responsibilities if we approve the merger with the NIT  
15 League agreement associated with that, that the  
16 council will set up what I guess I would call  
17 monitoring standards for judging how the  
18 implementation is going. Am I correct?

19 MR. DIMICHAEL: Well, what is happening is  
20 that we are developing reporting standards now. The  
21 idea will be to submit those to the Board for its  
22 consideration. The council, by the terms of the

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1 settlement agreement, is not intended and will not  
2 supplant the Board. Obviously the reporting issues  
3 are things within the Board's jurisdiction.

4 But these things we thought would be areas  
5 where through the council shippers and carriers could  
6 get together to discuss what types of reporting is  
7 needed and would be convenient way of developing  
8 recommendations for the Board's consideration.

9 CHAIRMAN MORGAN: Thank you.

10 Mr. McBride, relative to the RCAF proposal  
11 that you have, now what exactly are we talking about  
12 in terms of application? Obviously under the NIT  
13 League agreement there are certain provisions that  
14 involve the RCAF. Is that what you are referring to?

15 MR. MCBRIDE: That and any other captive  
16 shipper protection remedies you might adopt. If I may  
17 remind you, first of all in the NIT League agreement  
18 and in the applicants own proposal there are proposals  
19 about things like trackage rights, trackage rights  
20 fees. We would argue the RCAF adjusted has to be used  
21 for those.

22 We did agree in the spirit of compromise



1 in the settlement that we did enter into just  
2 yesterday, and as evidenced by a letter I filed this  
3 morning with the Secretary, that because the  
4 applicants had reduced the switching charges  
5 substantially, switching charges not the trackage  
6 rights fees in the NIT League agreement, that we would  
7 not insist on the RCAF adjusted for those reduced  
8 switching charges.

9 But in any other application of the RCAF  
10 under captive shipper protections, we would insist on  
11 what the law requires. So if I may, for example,  
12 refer you back to what Dr. Kahn recommended.

13 Dr. Kahn recommended by way of captive  
14 shipper protection, which is the sort of thing that  
15 Mr. DiMichael said the NIT League endorses today when  
16 he referred to Dr. Kahn's testimony. Dr. Kahn  
17 indicated that the concept of the shared asset area or  
18 equal access, as he referred to it, should be applied.  
19 Or in the alternative, that the Board should adopt  
20 bottleneck rate jurisdiction for these carriers to  
21 deal with those captive shipper problems on a  
22 structural basis.

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1 But if you are not inclined to do either  
2 one of those, he could think of no other remedy to  
3 protect the captive shippers but to put on a rate cap.  
4 He is not one who advocates first and foremost rate  
5 caps. As you know, he is a deregulator. He is a  
6 structural economist. But if you don't adopt the  
7 structural remedies and you do adopt a rate cap, then  
8 you have to confront the question of what index do you  
9 use. We suggest that the only lawful index you can  
10 use is the RCAF adjusted for productivity.

11 So it is in that sort of process, when you  
12 go through and decide what remedies, if any, to adopt  
13 for captive shipper protection, that the RCAF adjusted  
14 issue may or may not come up.

15 CHAIRMAN MORGAN: Thank you.

16 Mr. Stone, let me, and if anyone else  
17 wants to chime in as well, but a couple of things that  
18 come out of your testimony. First of all, you have  
19 made several specific suggestions for conditions which  
20 I guess I characterize as adding to the NIT League if  
21 we were to approve the merger, adding to the NIT  
22 League agreement providing for specific implementation

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1 certification, more oversight and some conditions in  
2 the shared asset areas. You mentioned interchange and  
3 reciprocal switching as kind of an addition to some of  
4 the provisions in the NIT League agreement. Does that  
5 sort of summarize, and I know I'm taking several pages  
6 worth of conditions and --

7 MR. SCHICK: Yes and no. They could be,  
8 one format could be to add them, as you say. That's  
9 not how they came up. Obviously these conditions were  
10 proposed in October and discussed with the railroads  
11 prior to the NIT League agreement.

12 So we were not intending that they should  
13 be an addition. We didn't even know about the NIT  
14 League agreement at the time we developed those 14  
15 conditions. They are still on four sheets for you.  
16 But that would be another way I suppose to implement  
17 them certainly.

18 CHAIRMAN MORGAN: Just so that I put it in  
19 the proper perspective relative to the NIT League  
20 agreement.

21 MR. STONE: But if I could just add.

22 CHAIRMAN MORGAN: Sure.

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1 MR. STONE: Some of our conditions are so  
2 inconsistent with the NIT League agreement that they  
3 would have to be essentially replacing NIT League  
4 provisions wholesale.

5 CHAIRMAN MORGAN: Right.

6 Talk for a minute about contracts. I  
7 asked Mr. DiMichael about the position of the NIT  
8 League relative to abrogating the contracts. I think  
9 you all have a different view of that, which is that  
10 we should not override the non-assignability clauses.  
11 Furthermore that in the shared asset areas there be  
12 more of an open competitive activity as it relates to  
13 contracts. Have I got that right?

14 MR. SCHICK: Yes. And in the shared asset  
15 area, it was primarily where it would arise because as  
16 everyone has been saying throughout the day, where  
17 there is only one railroad succeeding the Conrail,  
18 it's not that much of an issue.

19 Our proposal would have a shipper's choice  
20 for a test period and also for a reopener. The non-  
21 assignability clauses came up in a different manner.  
22 We commented last week or two weeks ago when the issue



1 came up about some additional evidence around that  
2 issue. But certainly we feel that the shippers have  
3 bargained for a non-assignability clause. They should  
4 also have the right to that form of protection. It's  
5 an alternative perhaps for many of the people to what  
6 we have proposed, but we weren't looking at the  
7 contracts. We were looking at kind of a uniform  
8 remedy for everyone.

9 I would assume that the predominance of  
10 the contracts are alleged to have these conditions.  
11 So that would be another way to get that kind of  
12 protection in addition to what we have proposed.

13 CHAIRMAN MORGAN: We heard earlier that  
14 one of the concerns in this whole area of the  
15 contracts is implementation in this transition period.  
16 If the merger was approved, how would the railroads  
17 and the shippers handle the transition period relative  
18 to the contracts and the movements under those  
19 contracts.

20 Now you all are concerned about service if  
21 we approve this merger. I presume that you are not  
22 concerned about service as it relates to not

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1 abrogating the non-assignability provisions in the  
2 contracts.

3 MR. STONE: Well, contracts are one of the  
4 forms of assets that NS and CSX are going to have to  
5 divide up. It is a complicated business to divide all  
6 that up, but we see no reason why NS and CSX can't  
7 begin that process as soon as they take control.  
8 Apparently they or their experts have already seen the  
9 contracts. They have submitted some evidence on that.  
10 So we think with planing there should be no reason  
11 that there is going to be operational chaos because of  
12 some inability of NS and CSX to divide up the contract  
13 responsibilities.

14 MR. BERCOVICI: If I can just add to that,  
15 Chairman Morgan. The applicants have asked for the  
16 opportunity if the transaction gets favorable  
17 dispensation next Monday at the voting conference to  
18 begin looking at those contracts promptly. It is in  
19 the shippers' best interests to have their freight  
20 moved smoothly and without interruption once the split  
21 date comes. So the shippers will be working very  
22 vigorously with the carriers, with Norfolk Southern

1 and CSX, the Conrail residual people as applicable, to  
2 identify moves that would be subject to this reopening  
3 and to work with them to make sure that they have  
4 provisions in place, rate and routing provisions for  
5 the traffic to continue to move.

6 So I think that that is another provision  
7 that will help keep this so-called chaos from  
8 occurring.

9 MR. STONE: Just one observation from the  
10 record. The NS and CSX operating plans that were  
11 submitted with the application have no knowledge of  
12 the Conrail contracts. So it seems somewhat anomalous  
13 to say that there would be operational chaos because  
14 all of a sudden they find out what the contracts are  
15 and are scrambling to try to respond to the shippers  
16 where they are already going to be I suppose  
17 scrambling to deal with the contracts after they can  
18 first glimpse them after taking control of Conrail.

19 CHAIRMAN MORGAN: Now I also hear that the  
20 concerns that you have about operations if the merger  
21 were approved focuses primarily on the shared asset  
22 areas. I also hear your concern there being one of

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1 infrastructure in the shared asset areas. Is that the  
2 concern?

3 MR. STONE: That's a prime example of an  
4 operating problem. I don't want to get too far off on  
5 other possibilities, but clearly when you are  
6 splitting up the Conrail system you have less routing  
7 flexibility, the same thing Mr. Lyons acknowledged  
8 this morning. That could lead to bottlenecks after  
9 the split that don't exist before the split.

10 But yes, the shared asset area  
11 infrastructure is our main concern in New Jersey.  
12 It's a very tightly configured system. It's a very  
13 highly developed densely populated area. It's  
14 difficult to reconfigure that system, although it can  
15 be done. It probably needs to be done.

16 CHAIRMAN MORGAN: You heard the railroads  
17 earlier discuss some of their plans in this regard.  
18 Did that give you any comfort?

19 MR. STONE: I guess I would just repeat  
20 briefly our concern about the management of the SAA  
21 and the likely disputes that are going to arise about  
22 which capital improvements should be made when, given

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1 that what may be good for NS may be bad for CSX by  
2 definition.

3 CHAIRMAN MORGAN: Just one last question  
4 which is that under any scenario here, you clearly  
5 want a lot of monitoring.

6 MR. SCHICK: Yes.

7 CHAIRMAN MORGAN: That's a safe whatever  
8 we want to call it. If this merger is approved, you  
9 definitely want monitoring.

10 MR. SCHICK: Yes.

11 CHAIRMAN MORGAN: Thank you.

12 VICE CHAIRMAN OWEN: Is there anything  
13 left?

14 MR. MCBRIDE: Acquisition premiums.

15 VICE CHAIRMAN OWEN: It's an interesting  
16 point though that the fact that no contracts have been  
17 looked at as of yet. Am I right on that assumption?

18 MR. BERCOVICI: That's what we understand.

19 VICE CHAIRMAN OWEN: And so no contracts  
20 have been looked at at this point in time. Then we're  
21 going into a shared asset situation. I can understand  
22 where your concern might be there that once you start

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1 splitting those contracts up and then trying to parcel  
2 out the power and so forth and trying to get it to  
3 function, but will it be gridlock and will it be a  
4 bottleneck. I think that's why we have been talking  
5 to the railroads about going slow and making certain  
6 that they have at least all of the contracts aligned  
7 up first and do those things properly and one at a  
8 time, not rush into it.

9 MR. STONE: Vice Chairman Owen, the  
10 contracts will probably have to be parceled out anyway  
11 in this sense. Most contracts are multi-point  
12 contracts, not all but most. So they are probably  
13 going to be, most of the contracts, part of the  
14 contract can only be performed by NS post-transaction.  
15 Part of it can only be performed by CSX.

16 Then there's this part which is, we think,  
17 probably a small percentage where the contract  
18 provides for movement from an open origin to an open  
19 destination. That's the only part that CSX and NS are  
20 arguing today they should have absolute control over.  
21 In reality, we think those are the minority of the  
22 contract movements.

1                   So there would have to be some sorting out  
2                   anyway. The only issue is what about that part of the  
3                   contracts where there's movement between open points.

4                   VICE CHAIRMAN OWEN: Okay, I'm optimistic  
5                   that, if it does go forward, that we would have some  
6                   type of a reaction immediately from everybody involved  
7                   in this process if we should consider to move this  
8                   thing forward.

9                   I would like to go back, if I could, to  
10                  the other side of the table over here with the guy  
11                  with the funny tie.

12                  MR. McBRIDE: I was afraid you wouldn't  
13                  recognize me.

14                  CHAIRMAN MORGAN: Same one you always  
15                  wear.

16                  (Laughter.)

17                  CHAIRMAN MORGAN: Watch these things.

18                  VICE CHAIRMAN OWEN: I would like to have  
19                  a little bit of clarification on the NIT League  
20                  agreement here in the Board approval or lack of  
21                  approval and so forth.

22                  It goes to -- reading down through here,

1 Section 3 further provides that the parties, through  
2 the NIT League agreement, will ask the Board to  
3 approve the creation of a council, the exchange of  
4 information, the process provided for addressing  
5 shipper implementation and service concerns, and the  
6 allocation of transportation contracts under Section  
7 2(c).

8 Section 3(f) also provides that, in the  
9 absence of such approval by the Board, CSX and NS  
10 shall not be obliged to take any action which, in  
11 their sole judgement, might create liability under the  
12 anti-trust laws.

13 I was just looking for the approval or  
14 disapproval there and the relationship to the Board as  
15 such.

16 MR. DiMICHAEL: Well, Vice Chairman, there  
17 are several things in here that will involve Board  
18 action either fairly soon or eventually.

19 For example, Chairman Morgan, you asked  
20 about the reporting process. Reporting is to the  
21 Board, and so the reporting -- in a sense, the draft  
22 of the reporting or the recommendations for the



1 reporting that are being developed now under another  
2 section of the agreement is said that they will be  
3 submitted to the Board.

4 And so the Board itself would then need to  
5 say that, you know, these are the kinds of things we  
6 think are a good idea. They've been developed, and  
7 the Board would presumably get input from a whole  
8 variety of people.

9 So there are things in here that would  
10 require, to at least some extent, some Board action.  
11 And all this Section 3(f) is really saying is, to the  
12 extent that there are those things, we would ask the  
13 Board to take action at that time.

14 MR. McBRIDE: If I may just add, Vice  
15 Chairman Owen, one of the major reasons why the  
16 Fertilizer Institute wanted to enter into an agreement  
17 with the Applicants was because of this provision and  
18 the existence of the council.

19 We see this as a real positive aspect of  
20 this as opposed to what happened in UP/SP. This is a  
21 mechanism to try to take these issues back and deal  
22 with them privately and work them out. But with the

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1 hook that, if need be, we have the Board to enforce  
2 what's been agreed to on an expedited basis.

3 Shippers want to work with the carriers to  
4 make this go smoothly. This is the mechanism to do  
5 that.

6 VICE CHAIRMAN OWEN: I think this would be  
7 an excellent program whether the merger goes forward  
8 or not for you to have -- for the long range program.

9 MR. DiMICHAEL: I would just --

10 VICE CHAIRMAN OWEN: And try to include  
11 the other people in it also.

12 MR. DiMICHAEL: I would just mention that  
13 really, for a number of years now in fact, the NIT  
14 League has had -- scheduled periodic meetings with  
15 individual carriers and with the rail industry. The  
16 League certainly believes that that kind of exchange  
17 is very, very necessary.

18 It was especially thought to be prudent  
19 and useful to have a more formalized thing here that  
20 would involve even, you know, other groups. And, to  
21 the extent that there is any group so far that would  
22 like to become involve in the council, I'm sure that

1 we'd be interested in hearing from them.

2 VICE CHAIRMAN OWEN: Thank you.

3 CHAIRMAN MORGAN: Are you all -- the  
4 Chemical and Plastics folks, are you on this council  
5 right now?

6 MR. BERCOVICI: We are not participating  
7 at this time.

8 CHAIRMAN MORGAN: Anything else?

9 VICE CHAIRMAN OWEN: I have no other  
10 questions.

11 Thank you very much.

12 CHAIRMAN MORGAN: Thank you all very much.

13 Okay, we'll go next to specific shipper  
14 interests.

15 AK Steel Corporation, Frederic Wood; ASHTA  
16 Chemical, Inajo David Chappell. I think I probably  
17 messed that name up. Eastman Kodak Company, Byron  
18 Olson; Joseph Smith & Sons, Jeffrey Moreno; Millennium  
19 Petrochemicals, Michael Ferro.

20 And hopefully we have enough chairs.

21 Citizen Gas and Coke Utility, F. Ronalds  
22 Walker.

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1 Now whose name did I mess up?

2 MS. CHAPPELL: Inajo Davis Chappell.

3 CHAIRMAN MORGAN: Inajo Davis Chappell.

4 MS. CHAPPELL: That's correct.

5 CHAIRMAN MORGAN: Thank you. I apologize  
6 in advance.

7 MS. CHAPPELL: No problem, Madame Chair.

8 CHAIRMAN MORGAN: With 50 people today,  
9 I'm bound to get one wrong at least.

10 MS. CHAPPELL: No problem.

11 CHAIRMAN MORGAN: Mr. Wood, if you'd like  
12 to begin.

13 MR. WOOD: Thank you, Chairman Morgan.

14 May it please the Board, the relief sought  
15 by AK Steel in this proceeding is essential to the  
16 maintenance of existing rail competition for the  
17 transportation of iron ore and other bulk commodities  
18 to and from the Toledo docks on Lake Erie in  
19 Northwestern Ohio.

20 Since 1946, Conrail and CSX and their  
21 predecessors have jointly owned and had the right to  
22 operate jointly the facilities at the Lake Front Dock

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1 and Railroad Terminal Company.

2 As stated in the Applicants' rebuttal, the  
3 Applicants now propose that Norfolk Southern acquire  
4 only Conrail's operating rights at the Toledo docks.  
5 However, they are still proposing that Conrail's 50%  
6 ownership interest in Lake Front Dock under the  
7 related application in the Sub No. 26 proceeding be  
8 transferred to CSX which already owns the other 50%.

9 On February 18th of this year, after the  
10 record in this proceeding was closed, NS entered into  
11 a settlement agreement with certain Toledo area  
12 governmental interests.

13 In that agreement, NS promised that it  
14 will aggressively market Toledo docks in the same  
15 manner it markets other Lake Erie ports for the  
16 movement of waterborne coal, ore and other traffic  
17 moving to, from or via Lake Erie.

18 But this promise will be of no  
19 significance unless Conrail's 50% ownership interest  
20 in Lake Front Dock is transferred to NS. When the  
21 agreements that give Conrail operational access to the  
22 Toledo docks expire, NS will have no interest in or

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1 leverage to obtain renewal of the operating rights  
2 obtained from CSX by Conrail.

3 In his deposition, Mr. Goode, Chairman of  
4 the NS, explained that one of NS's principles of  
5 balance competition meant that, and I quote,  
6 "competitors need to make a commitment to owning lines  
7 and terminals, and that competition requires  
8 investment in order to establish the base for it."

9 Mr. Goode has it exactly right. Conrail  
10 obtained access rights to the Toledo docks over the  
11 years precisely because it had an ownership stake in  
12 the rail lines and terminal facilities.

13 Unless NS has an ownership interest in the  
14 Toledo docks, it will not be able to obtain  
15 continuation or renewal of the access rights,  
16 particularly when two of the most agreements expire in  
17 the near future.

18 Then shippers like AK Steel will not be  
19 able to seek or obtain a competitive service from NS  
20 over the Toledo docks.

21 Beginning in October of 1996, we have  
22 heard much about NS principles of balance competition.

1 Recently, we haven't heard much about them. We  
2 certainly didn't hear anything about them this  
3 morning.

4 But Mr. Goode did say in his deposition in  
5 September last year that NS still advocates those  
6 principles, and that it would be fair to say that the  
7 implementation of these principles would be in the  
8 public interest.

9 One way to ensure the implementation of  
10 these principles and to ensure balanced competition at  
11 the Toledo docks would be for the Board to deny the  
12 related application and condition the main transaction  
13 on the transfer to NS of Conrail's 50% ownership  
14 interest in Lake Front Dock and Railroad Terminal.

15 In addition, Applicants admit that  
16 preserving NS access under the various Conrail  
17 agreements to the Toledo docks will require further  
18 agreements and other arrangements. None have been  
19 presented to the parties for review or to the Board  
20 for approval.

21 In the UP/SP case where a similar  
22 situation existed, the Board explicitly required the

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1 Applicants there to honor all amendments and  
2 modifications of the various agreements made on the  
3 record.

4 Such action is also required here. Both  
5 of these steps are essential to carry out the Board's  
6 well established policy of protecting shippers like AK  
7 Steel that have competitive choices available today  
8 from lots of those alternatives now or in the future  
9 as a result of a rail acquisition.

10 I want to thank the Board for the  
11 opportunity to appear today, and I'll be happy to  
12 answer any questions that you might have.

13 CHAIRMAN MORGAN: I think what we'll do is  
14 just keep moving down. Now I want to make sure you  
15 have a place to sit while someone else is speaking is  
16 the key.

17 MR. WOOD: Plenty of room in the front  
18 row.

19 Thank you.

20 CHAIRMAN MORGAN: Ms. Chappell.

21 MS. CHAPPELL: Good afternoon, Chairman,  
22 Vice Chair.

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1 Consistent with the Ohio Attorney  
2 General's Office, the Ohio Rail Development Commission  
3 and the Public Utilities Commission of Ohio, ASHTA has  
4 asked this Board to impose conditions on the proposed  
5 acquisition that would serve the public interest.

6 Specifically, a reciprocal switching or  
7 other competitive access arrangement between NS and  
8 CSX in Ashtabula, Ohio will reduce the number of times  
9 hazardous cargo is shipped to and from Ashtabula and  
10 in and about the Ashtabula area.

11 Reciprocal switching or other competitive  
12 access remedy will reduce the volume of HAZMAT  
13 transported back and forth from Cleveland to Ashtabula  
14 and to Buffalo. Ultimately, these conditions will  
15 benefit the public by promoting rail efficiency as  
16 well as environmental health and safety in Ashtabula,  
17 Ohio.

18 In the final EIS, the SEA recognized that  
19 there are increases in HAZMAT transport along the CSX  
20 rail line segments, as well as the NS rail line  
21 segments. Although it opines that, with respect to  
22 the CSX rail line segments, there's a minimal 10%

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1 increase such that key route mitigation is not  
2 warranted.

3 With respect to the NS rail segments, the  
4 SEA acknowledged a 225% increase in HAZMAT traffic.

5 Our concern is that this Board must look  
6 to the total impact to the Ashtabula community. We  
7 are looking at a 235% increase in HAZMAT traffic  
8 impacting our entire area.

9 The approach taken and suggested by -- to  
10 the Board by the SEA is unduly narrow, and the  
11 potential safety risks associated with increased  
12 HAZMAT transport are not adequately addressed.

13 The SEA concedes that it did not look at  
14 the effects a reciprocal switching agreement might  
15 have with respect to mitigation in this area, and we  
16 would ask that the Board conduct such an analysis  
17 before reaching a decision on this issue.

18 Additionally, the Board must impose  
19 reciprocal switching or other competitive access  
20 remedy on the Applicants because conditions overall  
21 will reduce the inefficient transport of chemical  
22 products in the area.

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1           As it currently stands and is proposed by  
2           the Applicants, hazardous chemical materials are being  
3           routed in a circuitous manner.     Although the  
4           Applicants claim that no one seriously disputes  
5           efficiency with respect to the total transaction,  
6           obviously ASHTA does dispute the efficiency argument  
7           as it relates to Ashtabula, Ohio.

8           Product that our company ships to southern  
9           and western destinations is first being routed  
10          northeast to Buffalo, then back through Ashtabula to  
11          southern and western destinations.

12          Given the additional rail traffic expected  
13          in the Ashtabula area post transaction, the Board is  
14          justified in imposing reciprocal switching or other  
15          access requirements in our area.

16          Imposition of a switching requirement at  
17          the west yard in Ashtabula, Ohio will allow ASHTA to  
18          route directly more than one-third of the hazardous  
19          material product it ships annually.

20          Under the standards set forth in the UP/SP  
21          merger, the Burlington Northern and other cases,  
22          environmental effects are properly considered by this

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1 Board as a part of the public interest determination.  
2 And public interest considerations in Ashtabula, Ohio  
3 clearly and substantially outweigh any claimed benefit  
4 of the proposed transaction in our community.

5 In this case, a switching arrangement is  
6 practical and feasible. Imposition of such a  
7 condition would not burden the Applicants, nor this  
8 transaction. And this morning we heard them speak  
9 about conditions that would impair the transaction and  
10 impede the transaction.

11 The condition that we pose, a reciprocal  
12 switching agreement or other access at the west yard,  
13 is not, not a burden. If you have the handout that  
14 I've provided, you can see that there is already  
15 existing switching facilities at two locations in the  
16 Ashtabula area: one at the west yard and one at a  
17 rail interconnect near the Gary and Fitch Streets.

18 Use of these existing switches would  
19 promote safety, reduce congestion and rail traffic in  
20 Ashtabula and would allow for chemical products to be  
21 routed in a more efficient and direct manner.

22 With respect to the economic and the

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1 merits issues, we've provided this Board with analysis  
2 of the competitive harm we believe we would suffer as  
3 a result of the transaction, and several people have  
4 touched on it today.

5 ASHTA will suffer an obvious economic  
6 hardship in instances post transaction where rerouting  
7 of single line products become two line or multiple  
8 product movements. The proposed transaction will  
9 eliminate a number of direct routes for our company  
10 and create the need for multi-line movements of our  
11 chemical product.

12 The change in product line movement will  
13 result in increased freight rates for us and a  
14 potential loss of customers in areas where transaction  
15 costs cannot be absorbed. Also, we expect that ASHTA  
16 will incur enormous costs in correcting logistical  
17 inefficiencies that will impede its ability to compete  
18 in the chemical industry.

19 This Board does not err in imposing a  
20 condition on the Applicants that would require  
21 reciprocal switching or other access at the west yard  
22 or at the Gary and Fitch Street rail interconnect

1 given the need to redress the harm to ASHTA and to  
2 further the public interest in Ashtabula, Ohio.

3 I understand that I need to bring my  
4 remarks to a close.

5 Our feeling is that the public will  
6 benefit if access is mandated so that chemical product  
7 is routed directly. ASHTA has not been able to get  
8 CSX or NS to the table.

9 Contrary to what you've heard today with  
10 respect to the outreach, we have not been able to sit  
11 down with the Applicants to discuss a way that might  
12 benefit all of us in coming up with a solution to this  
13 problem.

14 We do have confidence, however, that this  
15 Board is capable of balancing all of the interests and  
16 in drawing the appropriate lines as to the appropriate  
17 conditions that need to be imposed on this  
18 transaction.

19 Statutory standards require that the  
20 transaction be consistent with the public interest.  
21 Competitive logistical efficiency and environmental  
22 considerations all require that this Board condition

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1 the transaction on reciprocal switching or other  
2 access at the west yard or at the Gary and Fitch  
3 Street rail interconnect in Ashtabula, Ohio.

4 Common sense also dictates this result.

5 I thank you for your time.

6 CHAIRMAN MORGAN: Thank you.

7 Mr. Olson.

8 MR. OLSON: Chairman Morgan, Vice Chairman  
9 Owen, good afternoon.

10 My name is Byron Olson. I represent  
11 Eastman Kodak in this proceeding as transportation  
12 counsel.

13 Kodak has three concerns that I'd like to  
14 call the Board's attention to today. But before  
15 delineating these concerns, let me say that Kodak  
16 supports the application so long as these concerns are  
17 satisfactorily addressed.

18 Indeed, my 30 years in the railroad  
19 industry and my involvement in a number of mergers has  
20 led me to the conclusion that this is what should have  
21 happened in 1968 instead of the Penn Central merger.

22 There are two unique aspects to this

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1 proceeding. The first is that it could be the last  
2 merger of this magnitude to occur in North America,  
3 although one should never say never.

4 The second is that it's not a merger at  
5 all, but rather an acquisition inseparation. And  
6 that's why Kodak supports the basic concept. We take  
7 the assertions of the Applicants seriously; that they  
8 mean to bring competition back to Conrail territory.

9 We think that's commendable, and we hope  
10 that it proves to be the case, particularly with  
11 respect to shared and joint access areas important to  
12 Kodak. But there are some disturbing indications that  
13 cause us to question the good faith of these  
14 assertions, and that's the subject of our concerns  
15 which I'll summarize.

16 First, we urge that the Board do nothing  
17 to modify consent to assignment clauses in existing  
18 Conrail transportation contracts. These clauses were  
19 specifically bargained for at arms length between the  
20 parties. They are legitimate, private agreements, and  
21 we see no reason or justification to tamper with them  
22 in the context of this proceeding.

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1           Second, we urge that the rights of short  
2 line carriers to participate in routes serving Kodak  
3 not be impaired. And third, we urge that the Board  
4 take steps, if necessary, to assure equality as  
5 between CSX and Norfolk Southern in the Monongahela  
6 coal fields formerly served by the Monongahela  
7 Railroad, the so-called MGA territory.

8           And to provide the Board some perspective,  
9 Kodak is indeed a significant user of coal  
10 transportation by Conrail to the tune of some 800,000  
11 tons a year. And Kodak's been happy with Conrail's  
12 performance under its existing coal transportation  
13 contract and, indeed, is happy generally with its  
14 relationship with Conrail.

15           Kodak, like all rail shippers, needs a  
16 railroad that will make commitments and keep them.  
17 But let me talk a bit more about the background of  
18 this present contract so that you can understand our  
19 position on the assignment clause issue.

20           Kodak negotiated its present contract with  
21 Conrail in 1992. It is a ten year contract and will  
22 not expire until the year 2002. One of the clauses

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1 that is in the contract, but only as a result of  
2 negotiation by Kodak, is a consent to assignment  
3 clause that reads in part as follows:

4 "This contract is not assignable in whole  
5 or in part by one party without the prior, written  
6 consent of the other parties."

7 That's fairly simple. Conrail resisted  
8 incorporating this provision into the contract, but  
9 finally agreed. Whatever Conrail's policy toward  
10 these clauses generally in their contract rate making,  
11 all Kodak knew is that it wanted this provision in its  
12 contract, and Conrail finally agreed to it.

13 After all, it's a ten year contract.  
14 That's a long time in this business.

15 Well, in the context of 1991 and '92 when  
16 this negotiation was going on, there was a competitive  
17 alternative of sorts available for Kodak's coal  
18 movements, which generally come from the MGA fields to  
19 Rochester, New York.

20 But, by the mid '90s, Kodak was dealing  
21 with a monopoly. Conrail had taken over the  
22 Monongahela Railroad by that time and controlled all

1 or most of the origin mines. And, of course, they had  
2 a route all the way to the destination in Rochester.

3 Thus, Kodak had made the best deal it  
4 could at the time. We urge that the Board not let  
5 competitive access to again be lost as a result of  
6 actions taken in this case.

7 In any event, the future shape of the  
8 eastern railroad system was, by no means, permanently  
9 in place at that time. Norfolk Southern had already  
10 made clear its interest in acquiring Conrail.

11 And, of course, the post World War II  
12 history of the railroad system in Northeastern United  
13 States had been one of continuous turmoil, doubt and  
14 uncertainty. All of this history provided Kodak with  
15 ample reason to keep its options open in the event of  
16 yet another major eastern rail system reshuffle.

17 This proceeding today is proof that that  
18 reshuffling has arrived, and it also shows why Kodak  
19 bargained for this clause in the event that  
20 competition might return. And it appears from the  
21 application that that is indeed what will happen.

22 Time does not permit me to address why

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1 Section 11321(a) of the act neither mandates nor  
2 permits tampering with these contracts, but clearly it  
3 was not intended for that purpose.

4 I'd be glad to answer questions on that  
5 subject.

6 Finally, let me say that, unlike most  
7 parties represented here today, Kodak is not asking  
8 the Board -- if I might finish my -- is not asking the  
9 Board to do anything.

10 Rather, we are asking the Board to refrain  
11 from taking any action in response to that portion of  
12 Applicants' prayer for relief which seeks to nullify  
13 and invalidate consent to assignment clauses.

14 All we ask is that you just leave it alone  
15 and let the intent of the contracting parties be  
16 preserved.

17 Thank you for the privilege of addressing  
18 the Board.

19 CHAIRMAN MORGAN: Thank you.

20 Mr. Moreno.

21 MR. MORENO: Good afternoon, Chairman  
22 Morgan and Vice Chairman Owen.

1 My name is Jeff Moreno, and I'm here today  
2 on behalf of Joseph Smith & Sons.

3 Joseph Smith & Sons is a scrap metal  
4 recycler located in our own backyard in Capital  
5 Heights, Maryland. It has come to the board to seek  
6 two conditions to be imposed upon this transaction.

7 Each condition would protect the build out  
8 and interconnection option that Joseph Smith & Sons  
9 has today.

10 Joseph Smith & Sons' Capital Heights,  
11 Maryland facility is bordered on three sides by three  
12 different railroads. The facility is served solely by  
13 Conrail today which operates a line on the southern  
14 border.

15 In addition to Conrail, CSX also operates  
16 a line that parallels Conrail's line on the south, and  
17 also borders the Joseph Smith & Sons property on the  
18 east side of the property. And finally, Amtrak's  
19 northeast corridor line creates the northern border of  
20 the Capital Heights facility.

21 Joseph Smith & Sons has potential  
22 interconnections with both CSX and with the Amtrak

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1 line. Twice in the early 90's, CSX approached Joseph  
2 Smith & Sons about a build out proposal that would  
3 traverse a distance of not more than 100 yards.

4 The build out proposal ultimately was not  
5 constructed because Conrail, in response, lowered its  
6 rates and the build out was unnecessary to create  
7 competition.

8 In addition, Joseph Smith & Sons actually  
9 once had a connection with the Amtrak line. That  
10 connection was removed at some time in the past, at  
11 which we've been unable to determine.

12 What Joseph Smith & Sons seeks to do with  
13 its conditions is preserve its build out and  
14 interconnection options with both the CSX and the  
15 Amtrak lines. Post merger, CSX will acquire Conrail's  
16 line that serves the Capital Heights facility.

17 As a result of this, there will no longer  
18 be a build out option from the current CSX line --  
19 such a build out would be pointless. Fortunately,  
20 however, Norfolk Southern has been granted trackage  
21 rights over this very same CSX line as part of this  
22 merger transaction.

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1                   In addition, Norfolk Southern will succeed  
2 to Conrail's trackage rights on the Amtrak line.  
3 Joseph Smith & Sons asked the STB to impose conditions  
4 that would preserve each of these build out and  
5 interconnection options.

6                   The Applicants, namely CSX and Conrail,  
7 have not disputed either of these facts -- any of  
8 these facts. Rather, what they have done is assert  
9 that these conditions are unnecessary to protect and  
10 preserve Joseph Smith & Sons' current competitive  
11 position.

12                  And the reason they say the conditions are  
13 unnecessary is because the NIT League settlement  
14 agreement imposes a five year reciprocal switching  
15 obligation upon CSX to keep the facility open to  
16 reciprocal switching for Norfolk Southern.

17                  Now while Joseph Smith & Sons applaud this  
18 settlement agreement, this agreement does not preserve  
19 its current competitive situation. The reciprocal  
20 switching agreement is only for a five year period,  
21 after which CSX will be free to either raise the  
22 reciprocal switching rate to uneconomic levels or



1 terminate reciprocal switching all together.

2 Only continuation of the build out threat  
3 will give Joseph Smith & Sons its competitive leverage  
4 that it currently has beyond the five year reciprocal  
5 switching period.

6 As for the Amtrak interconnection, the  
7 Applicants state only that Norfolk Southern will  
8 assume the same rights that Conrail currently has on  
9 the Amtrak northeast corridor.

10 Joseph Smith & Sons agrees with this  
11 statement and believes that, if the statement is true,  
12 Norfolk Southern will have the ability to provide  
13 service to Joseph Smith & Sons via an interconnection  
14 on the Amtrak trackage rights.

15 Joseph Smith & Sons seeks only to confirm  
16 this fact by asking the Board to impose a condition  
17 that would eliminate any doubt over this question and  
18 eliminate the potential for any future dispute that  
19 might arise.

20 Now a number of parties have come before  
21 the Board and will come before the Board talking about  
22 the unique situation of this merger at justifying

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1 their request for conditions. Joseph Smith & Sons is  
2 not in that position.

3 The facts that Joseph Smith & Sons  
4 presents here are identical to facts that this Board  
5 addressed in both the BN/Santa Fe and the UP/SP  
6 mergers. And if this Board follows that precedent, it  
7 should grant the conditions that have been requested  
8 by Joseph Smith & Sons.

9 Whereas the CSX reference to reciprocal  
10 switching would only provide a solution for five  
11 years, the build out option and conditions would  
12 provide a solution forever for Joseph Smith & Sons.

13 Therefore, Joseph Smith & Sons ask that  
14 you impose their requested conditions and preserve  
15 their existing build out options.

16 Thank you.

17 CHAIRMAN MORGAN: Thank you.

18 Mr. Ferro.

19 MR. FERRO: Chairman Morgan and Vice  
20 Chairman Owen, good afternoon.

21 Before I begin, I'd like to advise the  
22 Board of a development which has taken place since

1 Millennium Petrochemicals filed its comments in this  
2 proceeding and which are not part of the record.

3 On December 1st, 1997, Millennium  
4 Petrochemicals contributed its oliphants and polymers  
5 business to Equistar Chemicals, LP, which is a joint  
6 venture between Millennium Petrochemicals, Liondel  
7 Chemicals and Occidental Chemical Corporation.

8 Among the assets contributed to Equistar  
9 is a polymers regional distribution center in  
10 Finderne, New Jersey, which is the subject of our  
11 comments.

12 Today the name over the door, so to speak,  
13 is Equistar; but otherwise, all the facts that we have  
14 in our comment NPI2 remain the same.

15 I bring this development to the Board's  
16 attention so that you are not confused when I say  
17 Equistar and you're expecting Millennium  
18 Petrochemical, because the interests of Equistar and  
19 Millennium Petrochemicals in this docket are  
20 interchangeable and coincident.

21 The concern I bring to the Board's  
22 attention is simple, and the solution that we propose

1 is straightforward. Our Fenderne RDC is a linchpin in  
2 a polymer distribution network for New England and the  
3 Mid Atlantic.

4 This regional distribution facility  
5 transload plastic pellets from covered hopper cars  
6 into bulk hopper trailers or bags and boxes for truck  
7 shipment to customers whose locations or needs  
8 preclude the shipment of hopper cars.

9 This facility has had to adapt to many  
10 operational difficulties. Yet, Conrail has learned  
11 how to juggle hopper cars amongst the RDC, the  
12 marshalling yard and the overflow storage yards so  
13 that loaded hopper cars are delivered and empty hopper  
14 cars are removed in a timely manner.

15 The Applicants' respective operating plans  
16 will require the coordination of at least two, and  
17 sometimes three, separate entities to move hopper cars  
18 into and out of the Fenderne RDC.

19 This coordination will be necessary  
20 because all three elements currently used by Conrail  
21 are to be scattered amongst the Applicants' and the  
22 Conrail shared asset operation. The Applicants'



1 operation plans only generally address getting  
2 Equistar's hopper cars to and from Manville yard.

3 There is no detail on how these hopper  
4 cars are to get from Manville yard to Fenderne RDC or  
5 which entity or entities will have that  
6 responsibility.

7 The Applicants, particularly the NS, argue  
8 that their operating plans are already adequate to  
9 address Equistar's concerns. They state that the  
10 Fenderne RDC will continue to enjoy single line  
11 service with the NS which it enjoys with Conrail  
12 today.

13 They claim Equistar is mistaken in its  
14 assumption that the Fenderne RDC must be switched and  
15 interchanged using Manville yard as Conrail now does  
16 today. Applicants then attempt to obfuscate the issue  
17 by inferring that any economic disadvantage that  
18 Equistar suffers as a result of their operating plans  
19 will be offset by some benefit derived at its Newark,  
20 New Jersey facility under their operating plans.

21 We find that Applicants' arguments against  
22 inclusion of the Fenderne RDC in the North Jersey

1 shared asset area unpersuasive, and we trust that the  
2 Board will likewise find these arguments unpersuasive.

3 Conrail currently controls all the assets  
4 that are to be allocated amongst the Applicants and  
5 the CSAO. Time and experience have shown that the  
6 current arrangement utilizing Manville yard for  
7 marshalling hopper cars in Boundbrook and South  
8 Plainfield for temporary storage to be the most  
9 efficient.

10 Despite the peculiar operating conditions  
11 at Fenderne RDC, the current arrangement has worked,  
12 and has worked efficiently, for the past decade. Any  
13 offsetting benefit to Equistar from elsewhere in the  
14 new system -- by bringing that, the Applicants miss  
15 the point entirely.

16 Even if we assume, for the sake of  
17 argument, that Equistar will gain some offsetting  
18 economic benefit elsewhere in the new system,  
19 Applicants seem to ignore how any degradation of  
20 service to the Fenderne RDC will affect Equistar's  
21 customers.

22 Equistar's experience from the rail

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1 problems in the Gulf Coast is that our customers will  
2 blame us for late shipments even if they are aware  
3 that the root cause of the problem lies with the  
4 railroads.

5 One of the reasons that our customers in  
6 the New England and Mid Atlantic region are happy and  
7 loyal is because of the timely and dependable service  
8 they receive from the Fenderne RDC.

9 Yet, Rock D'Amio, who operates the  
10 Fenderne RDC for Equistar, has thoroughly reviewed the  
11 Applicants' operating plans and he has serious  
12 reservations about his ability to function at the  
13 current level of service if those plans are  
14 implemented.

15 The straightforward solution that we  
16 propose is to include Equistar's Fenderne RDC in the  
17 North Jersey shared asset area. The Applicants  
18 propose that the CSAO operate the North Jersey shared  
19 asset area as a neutral switching and dispatching  
20 agent for both Applicants.

21 The CSAO will operate Manville yard for  
22 the CSX and the South Plainfield yard which is to be

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1 in the shared asset area. If Fenderne were moved  
2 within the shared asset area, all three elements  
3 presently used by Conrail to deliver and pick up cars  
4 at Fenderne would continue to be operated by Conrail,  
5 such an arrangement where it closely mirrors the  
6 status quo than what is proposed in the -- than the  
7 Applicants.

8 I can crystalize in conclusion the relief  
9 that we ask. The Applicants ask us to accept two  
10 birds in the bush. We ask the Board to make them keep  
11 -- let us keep the bird in hand.

12 CHAIRMAN MORGAN: Thank you.

13 Mr. Walker.

14 MR. WALKER: Chairman Morgan and Vice  
15 Chairman Owen, I am Ron Walker.

16 Citizens Gas and Coke Utility is a public  
17 municipal trust which provides gas service to the  
18 citizens in Indianapolis in which rail ships about  
19 900,000 tons of coal a year to manufacture  
20 metallurgical coke.

21 I am pleased to tell you that, earlier  
22 this morning, Citizens and CSX reached an agreement;

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1 and, as a result, we are going to ask the Board  
2 formally in writing and, of course, now ask to  
3 withdraw all our requests to impose conditions.

4 Thank you very much.

5 CHAIRMAN MORGAN: You're excused.

6 (Laughter.)

7 Okay, let me just ask a question of each  
8 of you just to make sure I get your position.

9 Let me start with you, Mr. Wood. You  
10 found a chair.

11 My understanding, Mr. Wood, is that both  
12 of the Applicants have indicated that they are  
13 prepared to serve Toledo, as you request. You seem to  
14 be saying though that you're not sure how that will  
15 work and what the specifics of that arrangement would  
16 be.

17 Is that, in essence, what you're --

18 MR. WOOD: The Applicants' rebuttal  
19 statement, Chairman Morgan, that was filed in December  
20 does indicate that the -- although there was some  
21 uncertainty when the original application was filed,  
22 that Norfolk Southern will apparently -- or it is, as

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1 they put it, it is their intention that Norfolk  
2 Southern succeed to whatever operating rights Conrail  
3 has today to operate on and serve the Lake Front Dock,  
4 including the Lake Front Dock Perco Ironwork facility  
5 which is used by AK Steel's traffic.

6 What we're not certain about is precisely  
7 what implementing agreements or, as they put it in the  
8 rebuttal statement, other arrangements are going to be  
9 put in place to implement that statement of intention.

10 And all we asked for was a clear  
11 requirement as was done in the UP/SP proceeding where  
12 such representations were made on the record about  
13 accommodating concerns that were raised that the Board  
14 explicitly direct, as part of the decision, the  
15 Applicants to put those arrangements in place.

16 And I trust that clarifies your question?

17 CHAIRMAN MORGAN: Yes, thank you; that's  
18 perfect.

19 Ms. Chappell.

20 MS. CHAPPELL: Yes.

21 CHAIRMAN MORGAN: The way I understand  
22 your position, you are looking for more direct routing

1 because you carry hazardous materials and you feel  
2 that the more direct routing would be safer.

3 Is that --

4 MS. CHAPPELL: We think, Madame Chair,  
5 there are a number of hats this Board can basically  
6 hang its -- number of hooks the Board can hang its hat  
7 on in terms of granting our relief.

8 We believe that reciprocal switching would  
9 obviously produce a HAZMAT reduction, a reduction in  
10 traffic rails, relieve congestion in the area, would  
11 reduce HAZMAT transport in the area.

12 We are, just as a number of other parties,  
13 a captive shipper. Conrail has had a monopoly in our  
14 area for a number of years and, in effect, is handing  
15 that over to CSX. If, in fact, the byproduct of this  
16 Board's acting in the public interest in promoting  
17 competition in Ashtabula, Ohio is that we improve our  
18 position, we think then that's all well and okay.

19 I mean, I know that -- I anticipate the  
20 Applicants' objection in that, you know, we will no  
21 longer have the status quo in Ashtabula; and somehow,  
22 if you grant our relief, ASHTA will be improving its

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1 position.

2 But we believe that the public interest  
3 considerations require -- not only because of the  
4 environmental impact, but the economic harm that we  
5 suffer in a number of other areas -- that are relief  
6 be granted.

7 And our relief, frankly, is not going to  
8 cost anybody a lot of money. The switching facilities  
9 are there. And we're willing to pay a reasonable  
10 switching fee, so we think that this condition is  
11 something that can be done without unduly burdening  
12 the transaction.

13 CHAIRMAN MORGAN: Thank you.

14 VICE CHAIRMAN OWEN: Have you talked to  
15 the participants?

16 MS. CHAPPELL: Meaning the Applicants?

17 VICE CHAIRMAN OWEN: The Applicants, yes.

18 MS. CHAPPELL: We've tried on a number of  
19 occasions to engage them in discussion. We've invited  
20 them to the table before the October filing when we  
21 first got wind of it. I know company representatives  
22 attempted to try to talk to the folks both at CSX and



1 NS.

2 I, frankly, am aware also the issue had  
3 been raised with Conrail representatives as well. And  
4 so we have no choice but to ask this Board for relief.  
5 We don't seem to be getting anywhere.

6 VICE CHAIRMAN OWEN: Seems reasonable.

7 MS. CHAPPELL: Thank you. We think so.

8 CHAIRMAN MORGAN: Mr. Olson, --

9 MR. OLSON: Yes, Chairman Morgan.

10 CHAIRMAN MORGAN: -- I guess, to  
11 summarize, you made several points in your testimony,  
12 but clearly one of your main focuses is this issue of  
13 not abrogating non-assignability clauses in contracts.

14 Is that a good summary of your concern?

15 MR. OLSON: That's correct.

16 The Applicants have said they're bringing  
17 competition back. And, by preserving these clauses,  
18 we will -- Kodak will be -- have the opportunity to  
19 test them on that. Because, as we see the  
20 application, there will once again be two competitive  
21 routes to bring Kodak's coal from the Monongahela  
22 fields to Rochester.

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1           So all we're saying is, if you're serious  
2           about restoring competition, fine; just leave the  
3           clause in effect and we'll be free then to talk to the  
4           competitive alternative.

5           We're not terribly concerned with who  
6           decides to take over the Conrail contract. We expect  
7           one of the Applicants will do it. It will probably be  
8           CSX because they serve both the origin and the  
9           destination.

10          NS could participate, but in conjunction  
11          with a short line connection into Rochester. So we're  
12          not concerned about who decides to take over the Kodak  
13          contract. All we want is the right to immediately sit  
14          down with the other alternative and start talking  
15          rates and service to them.

16          CHAIRMAN MORGAN: Mr. Ferro, it seems to  
17          me that we have -- what you've discussed really are  
18          operational concerns relative to switching outside the  
19          shared asset area.

20          Is that --

21          MR. FERRO: That's correct.

22          CHAIRMAN MORGAN: That's your main

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1 concern. And that commitments have been made in a  
2 general way, but you don't feel that you've had enough  
3 details as to how your service is going to be handled?

4 MR. FERRO: Well, we have thoroughly  
5 combed over the Applicants' operating plans and their  
6 revised operation plan for the North Jersey shared  
7 asset -- or the North Jersey area, and we weren't  
8 satisfied.

9 And we went back to the Applicants and  
10 said, you know, give us some more detail. On several  
11 occasions, we've asked them to sit down with us and  
12 explain how this is going to work.

13 We've basically been told that we would be  
14 adequately served; that we were mistaken if we assumed  
15 that we had to be served out of Manville yard the same  
16 way that Conrail does it today; that they would  
17 probably switch that service over to a local crew  
18 operating out of Allentown, which is 56 miles away.

19 One of the peculiarities about our  
20 situation that we outlined in our comment is that  
21 boundary line for the shared asset area falls six  
22 miles or one stop to our east at Boundbrook. We are

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1 on a terminal line for the Rariton Valley line.

2 There's no industry to the west of us. So  
3 when they drew the line, we just happened to fall  
4 outside. And the Applicants have been very reluctant  
5 to either include us as an omission somehow or to give  
6 us details as to how we are going to get the same  
7 level of service.

8 Because this location, as is set forward  
9 in our comments, has some very peculiar operating  
10 parameters. It has very small yards, its yards are  
11 bisected by the two main lines of New Jersey Transit.  
12 So therefore, you need somebody who knows how to  
13 switch the cars in and out in order that we do not  
14 suffer any service problems.

15 And we think that the Conrail residual,  
16 the CSAO, would be the ones that would have that  
17 experience.

18 CHAIRMAN MORGAN: Thank you.

19 Mr. Moreno, I'm still trying to  
20 understand. Seems to me that, given the Amtrak  
21 settlement that you discussed, that you still have a  
22 build out opportunity, is that right, that exists?



1 MR. MORENO: We have two --

2 CHAIRMAN MORGAN: I mean, obviously the  
3 names have changed here a little bit in terms of who  
4 has what line, but a build out opportunity still  
5 exists?

6 MR. MORENO: Are you referring to the  
7 Amtrak line?

8 CHAIRMAN MORGAN: Right.

9 MR. MORENO: Potentially it's been  
10 unclear. The Applicants have not made any clear  
11 statement one way or the other. All it says is we  
12 will -- that Norfolk Southern will succeed to the same  
13 rights as Conrail.

14 We're just looking for a clear  
15 understanding that Joseph Smith & Sons can get service  
16 from Conrail over the Amtrak build out.

17 But we also feel we need to preserve the  
18 CSX build out opportunity because there could be  
19 operational issues operating over the Amtrak line that  
20 don't exist with the CSX line. And that's where CSX  
21 was offering a competitive threat directly prior to  
22 this merger.

1                   So we're seeking to preserve both build  
2 out options here.

3                   CHAIRMAN MORGAN: Well, are you asking for  
4 more than what you have today?

5                   MR. MORENO: No, we have the ability to  
6 connect to the Norfolk Southern line today -- excuse  
7 me, the Amtrak line today, and to the CSX line today.  
8 And we're asking that you simply preserve our right to  
9 connect to both of those lines.

10                  They will simply have different service  
11 providers now.

12                  CHAIRMAN MORGAN: Thank you.

13                  VICE CHAIRMAN OWEN: I'd like to go back  
14 to the gentleman over here with Kodak.

15                  Now if you have a non-assignable contract  
16 here and then they parcel it out between NS and CSX,  
17 then, under the NIT League agreement, if I'm not  
18 mistaken, then after six months, if you're unhappy,  
19 you can go some other place.

20                  But, by and large, you have a competitive  
21 situation here, do you not?

22                  MR. OLSON: Well, we don't see the NIT

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1 League settlement as addressing the competitive  
2 opportunity we think we'll be entitled to after the --  
3 if this application is approved. The NIT League --

4 VICE CHAIRMAN OWEN: Were you entitled to  
5 a competitive opportunity before this came about?

6 MR. OLSON: No, but they're selling this  
7 to the Board on the basis of we're bringing back  
8 competition to Conrail territory. And we're just  
9 saying fine, don't try to take -- give it with one  
10 hand and take it away with another.

11 The fact is that the consent to assignment  
12 clause is there for just that specific purpose.  
13 They're going to -- we think there are going to be two  
14 routes again available as we once had several years  
15 ago.

16 I think I'm getting away from your  
17 question. Can we refocus on that?

18 VICE CHAIRMAN OWEN: Yes.

19 MR. OLSON: What was your question?

20 VICE CHAIRMAN OWEN: I just thought you  
21 were counting here on the basis that basically you had  
22 a competitive situation here that they're going to

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1 divide up the contracts.

2 Okay. So they'll take -- one of them will  
3 take yours. And so after a period of six months, if  
4 you're unhappy for some lack of service, or something  
5 like that, then you can go to the other one and see  
6 what you can get there, or go to arbitration.

7 MR. OLSEN: We're not --

8 VICE CHAIRMAN OWEN: But --

9 MR. OLSEN: Oh, excuse me.

10 VICE CHAIRMAN OWEN: Which gives you more  
11 than what you've got now, is what I'm saying.

12 MR. OLSEN: No, I don't agree. The NIT  
13 League settlement doesn't address our concerns. We  
14 assumed that whoever takes over the Kodak contract  
15 will do as good a job as Conrail is now doing in terms  
16 of service. We want the opportunity to talk to the  
17 competitive -- the new competitive opportunities about  
18 rates, and we don't want to wait six months to do that  
19 or a year or have to prove that service is bad.

20 See, the NIT League settlement only  
21 permits relief if you can prove service deficiencies.  
22 We're not so concerned about that we think we should

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1 have -- because of our clause, our assignment clause,  
2 our content to assignment clause, we should have the  
3 opportunity to talk to competitive -- whatever new  
4 competitive alternatives come along, as a result of an  
5 assignment.

6 VICE CHAIRMAN OWEN: What I just said,  
7 though, was you're looking to better the situation  
8 that you had with Conrail, because with Conrail you  
9 just had one -- one carrier there and you had no way  
10 to go and negotiate a lower rate. They had good  
11 service, so if you get good service with CSX from the  
12 same rate you had with Conrail, but then you want  
13 more. Now you must go to CNS and see if I can drive  
14 them down another dollar a pound, or whatever it might  
15 be.

16 I know where you're coming from -- shaking  
17 a Christmas tree.

18 (Laughter.)

19 MR. OLSEN: Vice Chairman Owen, I remind  
20 you -- I remind you that these -- this clause, as well  
21 as the rest of the contract, was arrived at through  
22 arms length negotiations. It was not handed over as

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1 a gratuity by Conrail, and it was in the context of a  
2 very volatile and continually changing eastern  
3 railroad situation. So we think we bargained for  
4 this, and we should have the right to make use of it.

5 VICE CHAIRMAN OWEN: Okay. Good. That's  
6 good.

7 I have no other questions.

8 CHAIRMAN MORGAN: Okay. Thank you all  
9 very much.

10 Next we will move to a coal panel --  
11 Centerior Energy Corporation, First Energy Corp.,  
12 Christopher Mills; Consumers Energy Company, Kelvin  
13 Dowd; Eighty-Four Mining Company, Marty Bercovici;  
14 Niagara Mohawk Power Corporation, John Maser; Orange  
15 and Rockland Utilities, John Cutler; American Electric  
16 Power Service Corporation, Michael McBride.

17 Now, do we have enough chairs?

18 MR. MILLS: Chairman Morgan, Vice Chairman  
19 Owen, I'm Chris Mills, and I represent First Energy  
20 Corporation, which is the successor to Centerior  
21 Energy Corporation.

22 CHAIRMAN MORGAN: I saw it bracketed. I

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1 wasn't exactly sure where we were in the transition  
2 period here.

3 MR. MILLS: Well, Centerior no longer  
4 exists, so it's now --

5 CHAIRMAN MORGAN: Oh, okay.

6 MR. MILLS: -- First Energy, and hopefully  
7 I'll remember that.

8 First Energy provides electric service in  
9 Ohio. Its interest in this proceeding relates to  
10 three power plants it owns or operates in the  
11 Cleveland area.

12 If the Board approves the Conrail  
13 transaction as it's proposed, CSX will acquire the  
14 east-west Conrail line between Cleveland and  
15 Ashtabula, Ohio, as shown on the schematic in red  
16 color and blue color, denoting that it will be  
17 acquired by CSX. This line serves the three power  
18 plants in the Cleveland area -- the East Lake, Lake  
19 Shore, and Ashtabula Generating Stations.

20 The transfer of this line to CSX will  
21 convert the single-line Conrail route that is used to  
22 transport about 40 percent of the coal burned at these

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1 plants to a less efficient NS/CSX joint route. In  
2 addition, all three of these plants in the Cleveland  
3 area will become captive at destination to CSX.

4 This is going to cause competitive harm to  
5 First Energy by making it more difficult to compete  
6 with other utilities who are receiving new access to  
7 two railroads at both origin and destination, which  
8 was all the transaction. First Energy has proposed a  
9 trackage rights condition that would remedy all of the  
10 harm caused by the transaction. That is the trackage  
11 rights proposal shown on the schematic.

12 The other Conrail lines that are used to  
13 transport coal to these three Cleveland area power  
14 plants are the vertical green lines shown on the  
15 schematic, and green denotes that they're going to be  
16 acquired by NS as a result of this transaction.

17 The line on the left is the line from the  
18 coal-producing region in southeastern Ohio that goes  
19 up to Collinwood where it connects with this line.  
20 And the green line on the right is the Conrail line  
21 from the MGA-producing region you're heard about in  
22 southwestern Pennsylvania. It's also being acquired



1 by NS.

2 You'll notice there is also a blue line on  
3 the right side, and that is a single-line CSX route  
4 from the MGA region, because CSX is also getting  
5 access to that region.

6 Almost all of the coal burned at First  
7 Energy's Cleveland area plants comes from these two  
8 coal-producing regions, which are now served by  
9 Conrail. Both regions will continue to be the primary  
10 coal sources for these plants in the future. Because  
11 NS is not being granted access to any shippers on the  
12 Conrail line, the east-west line in red that serves  
13 these three plants, the present single-line Conrail  
14 routes from both the Ohio and the MGA origins will  
15 become joint routes.

16 The trackage rights conditions sought by  
17 First Energy would preserve the present single-line  
18 route from the southeastern Ohio coal origins by  
19 enabling NS to transport coal from these origins all  
20 the way to the plants. And by enabling NS to compete  
21 directly with CSX, the condition would also prevent  
22 First Energy from suffering competitive harm as a

1 result of a merger.

2 The competitive harm results from two  
3 factors. First, CSX's destination monopoly will  
4 enable it to control First Energy's coal sourcing  
5 options, and it will do this by favoring its much  
6 longer single-line haul from the MGA origins.

7 CSX can do this by adjusting its division  
8 of revenue for the short destination segment of joint  
9 movements with NS from the southeastern Ohio origins  
10 so as to ensure that the delivered cost of coal from  
11 the MGA region is always slightly lower than the  
12 delivered cost of coal from southeastern Ohio, and  
13 that's regardless of the level of its own single-line  
14 rate from the MGA mines. It can do the same thing  
15 with respect to a possible joint movement from the MGA  
16 origin as well.

17 Conrail, by contrast, has no incentive to  
18 do this because it has a relatively long single-line  
19 haul from both origin districts, and it's relatively  
20 indifferent as to which origin they come from -- the  
21 coal comes from.

22 Second, First Energy will be disadvantaged

1 in competing for off-system power sales compared to  
2 several of its competitors who also use coal from the  
3 MGA region in particular, which is an important source  
4 of coal for compliance with phase 2 of the Clean Air  
5 Act. These competitors include Detroit Edison on the  
6 west and PECO Energy on the east. Detroit Edison is  
7 located in the Detroit shared assets area, and PECO  
8 Energy is located in the Philadelphia/South Jersey  
9 shared assets area.

10 This means that both of these utilities  
11 will have new competitive two-carrier service  
12 available for the origin and the destination power  
13 plants, so they can expect lower delivered fuel costs  
14 than First Energy, which will continue to be captive  
15 to one carrier at destination.

16 As everyone has recognized, the Conrail  
17 transaction is unprecedented. The CSX and NS have  
18 agreed to carve up Conrail in a way that intentionally  
19 extends new two-carrier competition to some shippers  
20 but not to others. They have argued they do not need  
21 to do this for their transaction to pass muster under  
22 the Board's precedence, but they seek to have their

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1 cake and eat it, too, because they also tout the  
2 additional competition as one of the major benefits  
3 that justifies approval of the transaction.

4 So having voluntarily opened the door to  
5 additional rail competition for some shippers where it  
6 suits their own purposes, they should not be allowed  
7 to close that same door to other shippers who will be  
8 disadvantaged by their action.

9 The trackage rights conditions sought by  
10 First Energy is operationally feasible. The  
11 applicants have not denied it. The applicants have  
12 also conceded that First Energy will suffer  
13 competitive harm, and their solution is a settlement  
14 agreement they have entered into with one of First  
15 Energy's major coal producers, Ohio Valley Coal  
16 Company. That settlement agreement is highly  
17 confidential, and I can't go into it. The reasons why  
18 it does not protect First Energy are explained in our  
19 brief, pages 14 to 24, and I refer the Board to those  
20 pages.

21 Thank you.

22 CHAIRMAN MORGAN: Thank you.



1 Mr. Dowd?

2 MR. DOWD: May it please the Board,  
3 Consumers Energy Company submits that approval of this  
4 transaction should be denied, absent the imposition of  
5 at least two conditions. First, the exclusion of the  
6 multi-billion dollar acquisition premium from the  
7 applicants' cost basis for regulatory purposes. And,  
8 second, the imposition of an oversight condition that  
9 assures an effective forum for the enforcement not  
10 only of conditions imposed by the Board but of the  
11 applicants' covenant in the complex agreements that  
12 memorialize the transaction.

13 Those are explained in our comments and in  
14 our brief. Allowing the applicants to write up the  
15 value of Conrail's assets for regulatory purposes will  
16 not serve any of the goals of the national rail  
17 transportation policy, and, in fact, is at odds with  
18 the standards applied to other regulated industries.

19 Such a writeup would have only one clear  
20 regulatory effect. It would artificially raise the  
21 threshold for maximum rate relief for the relatively  
22 limited class of shippers that are subject to rail

1 market dominance. Consumers Energy Company's base  
2 load Campbell station, which is captive to CSX,  
3 potentially one of those sites.

4 By one measure, as Consumers showed in its  
5 evidence, inclusion of the acquisition premium would  
6 raise the jurisdictional threshold on a typical CSX  
7 coal movement by over 15 percent, and, on a comparable  
8 Norfolk Southern movement, by over 24 percent. The  
9 end result is higher rates on captive traffic,  
10 effectively a guaranteed shipper subsidy for the  
11 applicants' tender offer battle. And that, we submit,  
12 fails the Board's public interest balancing test and  
13 should not be permitted.

14 And the balance of my time I will devote  
15 to a second issue that is of importance to Consumers,  
16 and that is the need for effective oversight. In  
17 particular, I refer to the continued serious  
18 uncertainty surrounding the applicants' intentions  
19 with respect to Section 2.2(c) of their transaction  
20 agreement governing the allocation of Conrail  
21 contracts.

22 This schematic depicts current alternate

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1 routings from one of Consumers' principal coal sources  
2 to its Karn Weadock facility near Essexville,  
3 Michigan. The deep concern over the dominance that  
4 CSX generally holds over Consumers' coal movements,  
5 and the resulting higher costs and inconsistent  
6 service, led Consumers to assemble and contract for a  
7 three-carrier haul via Conrail, the Grand Trunk  
8 Western, and the Central Michigan Railroad, in an  
9 effort to exert at least some competitive pressure on  
10 CSX.

11 Now, the applicants plan to allocate the  
12 Conrail line from the origin to Columbus to Norfolk  
13 Southern, and the shorter segment from Columbus to  
14 Toledo to CSX. NS and CSX also each have their own  
15 lines between Columbus and Toledo.

16 Now, the applicants have pledged to  
17 respect and assume all existing Conrail transportation  
18 contracts, and recently confirmed that they would make  
19 no attempt to circumvent the participation of the  
20 Grand Trunk and the Central Michigan. But despite  
21 repeated requests from Consumers, they have refused to  
22 confirm that Norfolk Southern will take over the

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1 Conrail portion of the Conrail contract.

2 And, in fact, CSX has suggested, or CSX  
3 representatives have suggested that CSX might do it,  
4 by virtue of the fact that they could serve both the  
5 Fola Mine and the Essexville facility. Now, this is  
6 of critical importance to Consumers because the sole  
7 reason for the contract's existence is to set up some  
8 sort of alternative to CSX.

9 Now, ours is a situation that is not  
10 squarely covered in Section 2.2(c), and the carriers  
11 have claimed flexibility to allocate our traffic as  
12 they see fit. But 2.2(c) does state that Conrail  
13 contracts are to be allocated "in a manner to achieve  
14 reliability and proper service to the customers." And  
15 they recognize "the importance of assuring that the  
16 acquisition of Conrail does not create shipping  
17 disruptions for Conrail customers."

18 Well, nothing could be more disruptive for  
19 Consumers than for the applicants to be permitted to  
20 allocate this contract in a manner which frustrates  
21 its fundamental purpose. Such an action also would be  
22 anti-competitive, nullifying the only reasonable

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1 alternative to CSX for movements to Essexville.

2 Now, in our supplemental filing on  
3 May 26th, we asked that the Board condition any  
4 approval of this transaction on NS's assumption of  
5 Conrail's portion of our contract. We reiterate that  
6 request today. Alternatively, though, we would  
7 endorse the remedies suggested by the Department of  
8 Transportation, which would give Consumers Energy the  
9 right to choose which carrier would take over the  
10 Conrail portion.

11 And, in addition, we respectfully submit  
12 that the Board should impose an oversight condition  
13 that specifically affords a forum for claims. But  
14 applicants' after-the-fact implementation of their  
15 plan, they violate the transaction terms now before  
16 the Board, or the mandates of the public interest.  
17 The assignment of our Conrail contract to CSX would be  
18 a prime example of such a violation.

19 I thank the Board.

20 CHAIRMAN MORGAN: Thank you.

21 Mr. Bercovici?

22 MR. BERCOVICI: Chairman Morgan, Vice

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1 Chairman Owen, I'm going to have some slides.

2 This morning you heard about Eighty-Four  
3 Mining Company. Now you'll hear from Eighty-Four  
4 Mining Company, which we submit is in a unique  
5 position in this proceeding.

6 Mine 84 operates in a distinct subset of  
7 the coal mining industry, producing at a high Btu  
8 content and medium sulphur coal. Yet the six mines  
9 with which it competes in southwestern Pennsylvania  
10 and northern West Virginia all draw from the  
11 Pittsburgh seam. Mine 84, acquired by its present  
12 ownership in 1992, and subsequently expanded, is the  
13 second largest producer of this Pittsburgh seam coal.

14 The seven mines and virtually all of the  
15 utility customers for this quality of coal today are  
16 served by Conrail. In dividing Conrail's territory,  
17 as you can see from the map, CSX and NS have agreed to  
18 joint access to the six mines which are the  
19 competitors of Mine 84 located on the lines of the  
20 former Monongahela Railway. They tout this as a  
21 benefit of the division of Conrail.

22 Mine 84 is relegated to the stepchild

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1 status of Cinderella in this proceeding, having been  
2 subject to exclusive service by Norfolk Southern.  
3 From the standpoint of the customers of Pittsburgh  
4 seam coal, the division of Conrail gives about 20  
5 percent of that market exclusively to CSX, 22 percent  
6 to Norfolk Southern, and 58 percent subject to dual  
7 access.

8 The realities of transportation pricing,  
9 as conceded by applicants' witnesses, since CSX will  
10 be able to source the same quality of coal and single-  
11 line service, Mine 84 effectively will be foreclosed  
12 from that 20 percent of the market share going to CSX.  
13 And it will be significantly disadvantaged in the 58  
14 percent shared market area.

15 Additionally, CSX and NS have agreed to  
16 jointly share in any extension of the former  
17 Monongahela railway lines, thus extending dual service  
18 to the already-identified Berkshire coal field and  
19 possibly other future competitors of Mine 84.

20 These facts are not in dispute.  
21 Responsive Norfolk Southern to Mine 84's plea for  
22 relief is that Mine 84 will gain benefits from single-

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1 line access to the NS system, including access to new  
2 markets. In fact, the market for Pittsburgh seam coal  
3 is in Conrail territory, and NS offers Mine 84 no new  
4 and no compensating market opportunities.

5 This is surely demonstrated in the  
6 deposition of NS's vice president for coal marketing,  
7 which is associated with our brief. And if there were  
8 any benefits, those same opportunities also will  
9 accrue to each of Mine 84's competitors, and those  
10 competitors also will gain the advantage of any  
11 single-line access to the CSX system.

12 The claimed benefits accordingly would  
13 serve -- would actually serve to exacerbate the market  
14 foreclosure and market disadvantage resulting from  
15 this transaction.

16 NS having provided no substantive counter  
17 to Mine 84's concerns, Mr. Allen this morning posed  
18 the question to you, "If you attempt to correct this  
19 inequity, where do you stop?" Chairman Morgan, Vice  
20 Chairman Owen, I can't give you a formula for where  
21 you stop. Your job is to determine the public  
22 interest --

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1 CHAIRMAN MORGAN: To figure that out.

2 MR. BERCOVICI: -- in the transaction.

3 (Laughter.)

4 But I will say that similar situation --  
5 or an analogous situation arose in the BN/SF case  
6 regarding Bungee Corporation. And the ICC in that  
7 case said typically -- typically, the agency does not  
8 seek to equalize opportunities between competitors.  
9 That situation, however, entailed an extension to a  
10 competitor through a settlement with another railroad,  
11 not a division, not a direct output of the  
12 transaction. And this certainly is not the typical  
13 situation.

14 As I said at the beginning, Mine 84 is  
15 truly unique. While others may experience some  
16 disadvantage due to competitors gaining access to both  
17 CNS -- CSX and NS, while they retain single carrier  
18 service, not one other party has demonstrated that all  
19 of its competitors will gain such access, and it will  
20 be subject to foreclosure and disadvantage in more  
21 than 75 percent of its markets.

22 Moreover, in no other case does this

1 prejudice occur due to applicants having carefully,  
2 but with no stated criteria and no alternative  
3 objective, extended dual service to a portion of a  
4 discrete competitive market while excluding one of the  
5 major market participants, simply because it is  
6 located on a branch line.

7 The remedy sought by Mine 84 is simple and  
8 fully consistent with the transaction. We seek the  
9 small trackage right amount for CSX or for NS to  
10 provide switching of Mine 84 traffic to CSX either at  
11 the southern junction, West Brownsville, or the  
12 northern junction shown off the map, Homestead.  
13 Applicants have raised no objection that either remedy  
14 is not practical or feasible.

15 Chairman Morgan, Vice Chairman Owen,  
16 Mine 84 asks no more than NS asked when it challenged  
17 the merger agreement between CSX and Conrail.

18 If you can indulge me for another moment  
19 or two, Chairman. After four months of complaining  
20 about the unfair market division from the Conrail-CSX  
21 combination, NS, after taking this position when it  
22 was subject to merger impact by CSX and Conrail, now

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1 tells you it is beyond the scope of the Board's  
2 authority or sound public policy in a free market  
3 economy to attempt to equalize transportation  
4 alternatives to shippers.

5 On the other hand, while telling you,  
6 contrary to the testimony of their economic witness,  
7 that Mine 84 does not suffer competitive harm, they  
8 want you to immunize them from antitrust immunity for  
9 their market division. These positions pose some very  
10 fundamental questions.

11 In concluding, let me pose two. First, is  
12 there no harm to Mine 84; and, thus, no basis for  
13 immunity? Or is there some harm in the justification  
14 for granting immunity? Secondly, is it solely the  
15 province of the railroads to determine winners and  
16 losers among their customers? Or is it the  
17 responsibility of this Board to protect the public  
18 interest and assure that there are no adverse effects  
19 in the total transportation market?

20 Like the stepchild Cinderella sought the  
21 matching slipper, Mine 84 is looking for you to come  
22 forward with a matching switch engine -- the one

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1 reading CSX -- so that it can participate in the same  
2 arena as its direct competitors.

3 Thank you for your time.

4 CHAIRMAN MORGAN: Thank you. We needed a  
5 little levity at this hour.

6 (Laughter.)

7 Thank you.

8 MR. BERCOVICI: Thank you.

9 CHAIRMAN MORGAN: Mr. Maser?

10 MR. MASER: Good afternoon. Chairman  
11 Morgan, Vice Chairman Owen, may it please the Board,  
12 I appear today on behalf of Niagara Mohawk Power  
13 Corporation in this important proceeding. Niagara  
14 Mohawk's position in this proceeding is a substantial  
15 one because it is very concerned about the competitive  
16 harm that two of its electric coal-fired generating  
17 facilities would experience as a direct result of this  
18 transaction as proposed.

19 Now, to remedy this competitive harm,  
20 Niagara Mohawk has joined in the request for  
21 conditions that have been advanced by the Erie Niagara  
22 Rail Steering Committee, of which Niagara Mohawk is a



1 member. Those conditions will be addressed later  
2 today on behalf of the Steering Committee, and I will  
3 not repeat them at this time.

4 Alternatively, Niagara Mohawk has  
5 requested individual trackage rights for the benefit  
6 of its two facilities, and these are the Huntley  
7 station, which is located in Tonawanda, New York, a  
8 few miles north of Buffalo, and the Dunkirk station,  
9 which is located southwest of Buffalo, all in western  
10 New York in the Niagara frontier region.

11 The trackage rights that we have requested  
12 would permit Norfolk Southern direct access to these  
13 facilities over the lines of CSX, which will be  
14 acquiring them from Conrail, and CSX will be the  
15 carrier providing direct rail service to the facility.  
16 However, as I say, we request trackage rights for  
17 Norfolk Southern.

18 Now, the applicants do not dispute the  
19 operational feasibility of the conditions that the  
20 Niagara Mohawk has requested individually, or that the  
21 Erie Niagara Rail Steering Committee has requested  
22 from this Board. What the applicants do argue,

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1       however, is simply this: that since Niagara Mohawk  
2       stations are solely served by Conrail today, and will  
3       be solely served by CSX post-transaction, that Niagara  
4       Mohawk has suffered no competitive relief. To them,  
5       and particularly to CSX, it is a simple proposition.

6               Now, I generally agree that simplicity is  
7       a good thing, and that we should seek simplicity, but  
8       we should always suspect it. And that maxim applies  
9       with a vengeance here, because CSX is doing much more  
10      than merely stepping into the shoes of Conrail.

11             What is happening here is that this unique  
12      transaction is causing direct competitive harm to  
13      Niagara Mohawk's Dunkirk and Huntley stations, and, as  
14      I say, directly caused by this application itself, and  
15      that is because of the creation of shared asset areas  
16      in the Detroit area and in the South  
17      Jersey/Philadelphia area where competing utilities to  
18      Niagara Mohawk stations are located.

19             Detroit Edison's two facilities in the  
20      Detroit shared assets areas propose the Trenton  
21      Channel station and the River Russe station are direct  
22      competitors with Niagara Mohawk. Similarly, there are

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1 four competing utilities in the South  
2 Jersey/Philadelphia area as well.

3 Now, those facilities will be receiving  
4 direct head-to-head competition from both Norfolk  
5 Southern and CSX. Niagara Mohawk's facilities, on the  
6 other hand, would remain captive to CSX after the  
7 transaction. To us, and the record amply supports  
8 this, the need for protective conditions is clear.

9 Now, the applicants do say, in addition,  
10 they argue, that because Niagara Mohawk's stations do  
11 have the limited vessel option available to them, that  
12 there is no competitive harm here, and that Niagara  
13 Mohawk is not entitled to any relief. However, I want  
14 to emphasize and underline the limited nature of this  
15 vessel option to these stations.

16 The vessel option is limited by weather  
17 conditions on Lake Erie where the Dunkirk station is  
18 located, and on -- at the Huntley station on the  
19 Niagara River. Those weather conditions, particularly  
20 in the wintertime, are very severe ice conditions,  
21 particularly on the Niagara River, and the shipping  
22 season is short and it's unpredictable as to when it's

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1 going to open and close. That's always a concern.

2 There are vessel availability constraints.  
3 And with respect to the Huntley station, located on  
4 the Niagara River, there are constraints imposed by  
5 the Black Rock lock, such as vessel size restrictions  
6 and opening and closing dates.

7 So that vessel option is simply a limited  
8 option, and the fact remains that Niagara Mohawk's  
9 facilities will remain captive to CSX, as they are to  
10 Conrail today, for the majority of their shipments.  
11 And those vessel options have not caused any  
12 competitive constraints on rail rates to the stations  
13 as our evidence shows.

14 So, in closing, let me stress this. We  
15 have shown, we believe, that the competitive harm to  
16 Niagara Mohawk station is the direct result of the  
17 transaction as proposed by the applicants, because of  
18 the creation of the shared asset areas and the direct  
19 competition that competitive utilities will be  
20 obtaining post-transaction. Therefore, we are  
21 entitled to relief, we submit most respectfully.

22 In addition, the applicants have touted

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1 this as a unique transaction, a pro-competitive  
2 transaction. We agree that it is to a limited extent,  
3 but it needs to be expanded to include the other  
4 competing facilities that are going to be  
5 competitively injured. And we respectfully urge the  
6 Board to grant the conditions imposed by the Rail  
7 Steering Committee or by Niagara Mohawk individually.

8 Thank you very much, and I'd be happy to  
9 answer any questions you may have.

10 CHAIRMAN MORGAN: Thank you.

11 Mr. Cutler?

12 MR. CUTLER: Good afternoon. I'm John  
13 Cutler. I'm appearing for Orange and Rockland  
14 Utilities, Inc.

15 Orange and Rockland's coal-fired Levitt  
16 plant, located on the Hudson River about 45 miles  
17 north of North York, is captive to Conrail today and  
18 will be captive to CSX in the future, if the  
19 applicants' proposal is granted.

20 Orange and Rockland does not ask that the  
21 proposal be disapproved. We do think, however, it can  
22 and should be improved. We have two main concerns.

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1           Orange and Rockland's first concern is  
2 service problems. A UP-type meltdown, or even  
3 localized service problems, could lead to a shutdown  
4 at the Levitt plant.

5           The Applicants have two responses. The  
6 first is trust us; the second is use barges. No doubt  
7 the Applicants are working hard to avoid a recurrence  
8 of the UP disaster. But that's not good enough,  
9 particularly given the vulnerability of Levitt.

10           Space constraints make the -- mean the  
11 coal stockpile is very small: 18 days supply of coal.  
12 In addition, Conrail's Hudson River line barely has  
13 the capacity it needs today. The Applicants project  
14 a 20% increase in traffic over the line.

15           The barge option doesn't exist. There are  
16 no barge unloading facilities at the Levitt plant and  
17 no reason to construct them. For environmental  
18 reasons, the Levitt plant must burn very low sulphur,  
19 super compliance coal.

20           Orange and Rockland knows of no sources  
21 served by barge.

22           Our second concern involves reduced

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1 competition. Since Conrail doesn't serve mines that  
2 can produce super compliance coal in the volumes  
3 required at the Levitt plant, Orange and Rockland has  
4 enjoyed the benefits of competition on two levels.

5 First, the mines have competed to supply  
6 the best coal at the best price. Second, CSX and NS  
7 competed to carry the coal from the mines to their  
8 interchange points with Conrail. After Levitt becomes  
9 captive to CSX, competition from Norfolk Southern and  
10 from Norfolk Southern served mines will be  
11 neutralized.

12 In response, the Applicants say origin  
13 competition is a myth, citing the one lump theory.  
14 They know better since they, themselves, competed to  
15 serve that coal. In any event, the one lump theory  
16 ignores competition among coal suppliers as opposed to  
17 coal transporters.

18 There is a better way of addressing both  
19 of Orange and Rockland's concerns. Trackage rights  
20 for Norfolk Southern over the last 45 miles between  
21 the Levitt plant and the northern New Jersey rail  
22 yards will enable Orange and Rockland to respond

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1 effectively to any service problems in CSX.

2 It will also preserve the benefits of the  
3 competition Orange and Rockland now enjoys.

4 We recognize that ICC policy in past  
5 merger cases was to deny trackage rights in cases like  
6 this one. However, that policy rested not on the  
7 statute, but rather on the ICC's belief that merger  
8 conditioning power should be exercised sparingly.

9 The policy at the time was to preserve,  
10 but never to promote, competition. That policy is no  
11 longer sound. The act permits the Board to take a  
12 more active role, and there is good reason for it to  
13 do so.

14 In the last year -- in recent years,  
15 Congress, the Federal Communications Commission and  
16 FERC have all moved to promote new competition in the  
17 electric utility, the telecommunications and the  
18 natural gas industry.

19 In the last few weeks, this Board has  
20 moved in Ex Parte 575, Ex Parte 628, and in the  
21 reopened UP/SP merger proceeding to modify prior  
22 policies in recognition that they have done too little

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1 to promote competition as an alternative to  
2 regulation.

3 The Board has broad conditioning power in  
4 merger proceedings that it can't exercise in any other  
5 forum. It can promote competition in proceedings like  
6 this one that it can't promote -- it can take steps in  
7 a proceeding like this that it can't take in 628 or  
8 575.

9 If the Board won't exercise that power  
10 now, when will it do so?

11 The public interest concept is not a  
12 static concept. It changes over time. As it is  
13 understood today, the public interest requires a new  
14 approach to pro-competitive merger conditions.

15 Now that the Board is putting the  
16 finishing touches on the railroad map of the Eastern  
17 United States, the trackage rights requested by Orange  
18 and Rockland should be granted.

19 The theme of the Applicants this morning  
20 was don't change the old policies. It's perfectly  
21 understandable; the old policies have been good for  
22 the railroad industry.

1                   However -- and Mr. Allen gave you two  
2 other reasons: pro competitive merger conditions  
3 deter mergers, and there's a slippery slope.

4                   And as far as the first of these reasons  
5 is concerned, we submit that pro competitive merger  
6 conditions mean better mergers, not fewer mergers.  
7 And in any event, how many mergers are left?

8                   Railroad consolidation in the United  
9 States is almost at the end of the possible line. As  
10 for the slippery slope argument, that sounds very much  
11 like saying don't go out and do something good because  
12 you might have to do more of it.

13                   We're confident that the Board can figure  
14 out ways to limit pro competitive merger conditions  
15 appropriately, probably on the basis of walking before  
16 you run, testing the benefits of pro competitive  
17 merger conditions in this proceeding on at least a  
18 small scale, and then building on experience gained  
19 through those conditions.

20                   Thank you very much.

21                   CHAIRMAN MORGAN: Thank you.

22                   Mr. McBride.

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1 MR. McBRIDE: Thank you again, Madame  
2 Chairman and Mr. Vice Chairman.

3 It's late in the afternoon, so I have a  
4 simple problem and a simple fix for you.

5 American Electric Power is served by two  
6 railroads at its cardinal plant today, and they are  
7 Conrail and the Wheeling in Lake Erie. NS will take  
8 the Conrail line. We have no problem with that.

9 Our concern is the same that you heard  
10 from Senator DeWine and that WNLE has expressed in its  
11 response to the application, and that is that Wheeling  
12 and Lake Erie may go bankrupt as a result of this  
13 transaction.

14 If that should occur, the cardinal plant  
15 will be a two to one facility and, under your  
16 precedence, would be entitled to relief. And so all  
17 we ask is that you adopt a conditional protective  
18 provision that, if Wheeling and Lake Erie is unable to  
19 serve AEP's cardinal plant, CSX would be required to  
20 do so with unrestricted access to the plant.

21 Mr. Snow resisted being required to do so  
22 when I asked him about this in the deposition, so we

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1 couldn't work it out and I had to ask you to order  
2 that.

3 Now, turns out that he apparently didn't  
4 know, and neither did his counsel until after the case  
5 was briefed, that CSX also has access to the plant  
6 today; but it's restricted, as it turns out, to only  
7 low sulphur coal which is not the only kind of fuel  
8 used at the plant.

9 So we need a provision that CSX would have  
10 unrestricted access to AEP's cardinal plant if the  
11 Wheeling and Lake Erie cannot serve it. CSX would be  
12 obliged to provide this service, and NS would be  
13 obliged to permit that access under the same terms as  
14 exist today in the WNLE Conrail agreement now in  
15 effect.

16 We're not asking for anything different  
17 than we have today. We're simply trying to preserve  
18 the access that WNLE has in CSX, which would be the  
19 only other railroad around.

20 Now, the Applicants say we can also get  
21 coal at the cardinal plant by barge, but I say so  
22 what. First of all, the Ohio River has a tendency to

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1 freeze in the winter, so it's not always an available  
2 mode.

3 But secondly, there is no authority in  
4 your precedence, none, that a railroad merger or  
5 acquisition may cause the loss of one of two rail  
6 carriers serving a plant if the plant can also be  
7 served by another mode.

8 You have not even considered that in past  
9 mergers such as BN/Santa Fe or UP/SP. And it is  
10 inappropriate that a shipper could lose one of its two  
11 rail carrier options because of a transaction such as  
12 this and yet be entitled to no relief.

13 Yet, that is Applicants' position, and we  
14 ask you simply to preserve the rail options -- the two  
15 rail options that the cardinal plant has today in an  
16 unrestricted fashion.

17 Thank you very much.

18 CHAIRMAN MORGAN: Thank you.

19 Well, let me just -- while you're  
20 standing, --

21 MR. McBRIDE: Sure.

22 CHAIRMAN MORGAN: -- the key to your

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1 concern is the viability of the Wheeling and Lake  
2 Erie.

3 MR. McBRIDE: That's absolutely right.

4 CHAIRMAN MORGAN: If we take care of the  
5 viability of Wheeling and Lake Erie, then you're taken  
6 care of. Is that --

7 MR. McBRIDE: That's correct.

8 CHAIRMAN MORGAN: -- a pretty good  
9 summary?

10 MR. McBRIDE: That is exactly right.

11 CHAIRMAN MORGAN: You may sit down now.

12 (Laughter.)

13 Mr. Cutler.

14 MR. CUTLER: Yes.

15 CHAIRMAN MORGAN: And you don't need to  
16 stand necessarily.

17 One of the things you discussed was  
18 service congestion in this east of the Hudson area.

19 MR. CUTLER: Yes.

20 CHAIRMAN MORGAN: And that's one of the  
21 things, obviously, that we are dealing with in this  
22 proceeding is this issue of adding options east of the

1 Hudson.

2 What do you think that congestion -- well,  
3 go ahead.

4 MR. CUTLER: My only point was going to be  
5 that the Levitt plant is actually on the west side of  
6 the Hudson River, so we are not really --

7 CHAIRMAN MORGAN: But you're still  
8 concerned about congestion?

9 MR. CUTLER: Absolutely.

10 CHAIRMAN MORGAN: And what is your  
11 suggestion on fixing that?

12 MR. CUTLER: Well, the trackage rights  
13 option is obviously one solution to the congestion  
14 problem in the sense that, if CSX gets jammed up, we  
15 have NS as a back up. But the other request in the  
16 comments that Orange and Rockland has filed in this  
17 proceeding is for monitoring of the situation and  
18 oversight.

19 Something along the lines of what you have  
20 recently done in UP/SP would certainly be something to  
21 keep in reserve.

22 CHAIRMAN MORGAN: Okay.

1                   Mr. Maser, relative to your competitive  
2 situation today, are you asking for something more  
3 than you have today?

4                   MR. DOWD: No, we are not indeed, Your  
5 Honor.

6                   What we are asking for is to prevent  
7 competitive harm that would otherwise occur as a  
8 direct result of the transaction as proposed. Because  
9 what would be occurring here would be that Niagara  
10 Mohawk, Huntley and Dunkirk stations would be  
11 competitively disadvantaged vis-à-vis competing  
12 utilities in other shared asset areas as proposed.

13                   The Detroit shared asset area, Detroit  
14 Edison's facilities there -- for example, the Dunkirk  
15 and Huntley stations would be in the position to  
16 compete with the Detroit Edison to serve power to the  
17 Ontario Hydro facility which is in the market to take  
18 additional coal because, as the record indicates,  
19 Ontario Hydro has laid up seven nuclear facilities;  
20 and therefore, there's increased coal movements and  
21 energy requirements to that facility.

22                   That is one competitive situation, among



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06/03/98

FD#33388

361-420

1 others. But there are also four competing utilities  
2 in the south Jersey/Philadelphia area that will also  
3 be getting direct head to head competition post  
4 transaction while Niagara Mohawk would not; and  
5 therefore, it's going to place us in a competitive  
6 disadvantage in what is really an increasingly  
7 competitive utility -- electric utility marketplace

8 With the mandates of the restructuring  
9 that's going on, federal and state requirements, it's  
10 a very increasingly competitive situation, and we  
11 would be competitive injured. So we are not asking  
12 for any additional benefits.

13 I always say all we want is a fair  
14 advantage, but we're not even asking for that here.  
15 We just don't want to be unfairly disadvantaged.

16 CHAIRMAN MORGAN: Mr. Bercovici, how far  
17 is 84 Mining from the MGA?

18 MR. BERCOVICI: It's about 32 miles,  
19 Chairman Morgan, from the mine through the branch line  
20 down the Mon, which is the main north-south line to  
21 West Brownsville. And it's about the same distance  
22 north to the junction with CSX at Homestead.

1 Compared to what we heard this morning was  
2 about 190 miles of trackage rights in the Monongahela  
3 that have been granted to CSX.

4 CHAIRMAN MORGAN: Okay.

5 Mr. Dowd, regarding the issue of  
6 abrogation of contracts that we've been discussing all  
7 day, I presume that your position is to not override  
8 non-assignability provisions.

9 Is that --

10 MR. DOWD: Well, in the case of the  
11 Consumer's contract that I mentioned, Consumers does  
12 not have --

13 CHAIRMAN MORGAN: You do not have?

14 MR. DOWD: -- any objection to Norfolk  
15 Southern assuming Conrail's obligations under that  
16 contract. And indeed, we believe that that's what's  
17 required under the transaction agreement.

18 Insofar as the override of assignability  
19 generally, our position is that you need to be guided  
20 by the statute which talks about being exempt from  
21 other law to the extent necessary.

22 And we would suggest that the wholesale

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1       abrogation of contracts would be excessive in light of  
2       the statute; that there needs to be some -- a more  
3       direct connection drawn between particular contracts  
4       and the elements of the transaction before a finding  
5       could be made that abrogation was necessary.

6               But as to the Carn Weadock contract with  
7       Conrail, Consumers doesn't object to its assumption by  
8       Norfolk Southern.

9               CHAIRMAN MORGAN: And Mr. Mills, I presume  
10       from your testimony that the interline relief  
11       provisions that are included in the NIT League  
12       agreement to accommodate single line to joint line  
13       situations is not enough for your situation?

14              MR. MILLS: That's correct, Chairman  
15       Morgan. I think --

16              CHAIRMAN MORGAN: And why is that?

17              MR. MILLS: Well, the concern here is that  
18       a -- not only that a single line route would be  
19       converted to a joint line route, but that CSX will  
20       have another single line route from another region  
21       which will enable it to foreclose the joint line  
22       route, which is a somewhat unique situation.



1                   That's one of the two concerns that First  
2                   Energy has.

3                   CHAIRMAN MORGAN:   Okay, thank you.

4                   VICE CHAIRMAN OWEN:   I just have a couple  
5                   of comments here regarding the Pittsburgh coal.   Seems  
6                   like there's about three of you involved in that here,  
7                   a couple of you burning it and one of you supplying  
8                   it.

9                   MR. BERCOVICI:     There are seven mines  
10                  operated by four companies.

11                  VICE CHAIRMAN OWEN:   I'm just talking  
12                  about right here at this table.

13                  MR. BERCOVICI:   There are several --

14                  VICE CHAIRMAN OWEN:   Oh, more of you than  
15                  that?

16                  MR. BERCOVICI:   Niagara Mohawk is --

17                  VICE CHAIRMAN OWEN:   Yeah, one, two,  
18                  three.

19                  MR. MILLS:   First Energy can burn it.

20                  VICE CHAIRMAN OWEN:   Okay.

21                  MR. MASER:   We have burned it and would  
22                  like to have the opportunity to continue to burn it.

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1 Actually, we're losing single line service to that as  
2 a result of this transaction, which is another concern  
3 to us.

4 And we support Mine 84 in this proceeding.

5 VICE CHAIRMAN OWEN: And you keep alluding  
6 to the fact that you may lose WNLE as one of your  
7 carriers there. Is that what I've heard somebody say?

8 MR. McBRIDE: That's the concern of  
9 American Electric Power. And they have a responsive  
10 application before you saying exactly that.

11 VICE CHAIRMAN OWEN: I can't comment on  
12 that. It was just -- in fact, all of this was tying  
13 together and trying to say okay, if one railroad goes,  
14 one short line goes here, then we've got a serious  
15 problem.

16 We're anticipating a lot of things that  
17 really haven't happened, so I think we probably should  
18 wait a little bit longer until --

19 MR. McBRIDE: Well, that was why I made my  
20 proposal as a conditional protective condition. If  
21 they don't go under, then my condition wouldn't apply;  
22 and that's why I answered the Chairman as forthrightly

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1 as I did.

2 If you protect Wheeling and Lake Erie,  
3 then we don't have a problem. I just don't know how  
4 the two of you, with all the problems you have on your  
5 plate, can assure anybody of anything.

6 VICE CHAIRMAN OWEN: We have no problems.

7 (Laughter.)

8 CHAIRMAN MORGAN: Where did you get that  
9 idea?

10 (Laughter.)

11 MR. McBRIDE: Good, but you're not a  
12 miracle worker.

13 CHAIRMAN MORGAN: You'd be surprised.

14 VICE CHAIRMAN OWEN: I have no other  
15 questions.

16 Thank you very much.

17 CHAIRMAN MORGAN: Thank you all.

18 Our next panel includes passenger and  
19 commuter interests. We first will hear from Arthur  
20 Gazetti representing the American Public Transit  
21 Association; Kevin Sheys representing Northern  
22 Virginia Transportation Commission & Potomac and

1 Rappahannock Transportation Commission; and finally,  
2 Walter Zullig, Jr. representing Metro-North Commuter  
3 Railroad.

4 And hopefully I got those names right.

5 MR. GAZETTI: Very good.

6 CHAIRMAN MORGAN: Please proceed.

7 MR. GAZETTI: Good evening, Chairman  
8 Morgan and Vice Chairman Owen.

9 I am Mark Gazetti appearing for the  
10 American Public Transit Association. APTA represents  
11 public transit providers serving over 90% of the  
12 public transit riders in America.

13 As you know, the transaction under STB's  
14 consideration includes rail corridors heavily utilized  
15 by rapid transit, commuter rail and intercity rail  
16 service. These passenger operations are critical to  
17 millions of people every day.

18 The three freight railroads involved in  
19 this action each have existing operating agreements  
20 with these passenger railroads. The Applicants have  
21 resolved merger related issues with some of the  
22 affected rail passenger providers.

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1 Other providers, including some you will  
2 hear from today, have issues critical to the traveling  
3 public which have yet to be addressed. My comments  
4 will not deal with the specifics of any of these  
5 cases, but will emphasize an ongoing public interest  
6 in rail passengers that needs to be formally  
7 acknowledged.

8 I wish to make five recommendations.  
9 First, I call attention to the fact that, in many  
10 instances, the proposed merger will result in  
11 increased freight traffic on existing lines.

12 Where increased freight traffic occurs on  
13 lines also used for passenger traffic, conflicts  
14 between freight and passenger service are likely to  
15 increase. Scheduling and dispatching procedures are  
16 critical.

17 As a condition for approval, APTA requests  
18 that STB require assurances from the Applicants that  
19 the ability of rail passenger providers to provide  
20 reliable and high quality service will not be  
21 undermined by the effects of consolidation.

22 Second, I point out that, across the

1 nation, there are a large number of new start rail  
2 projects under active consideration addressing  
3 regional goals for economic development and growth or  
4 to find low cost solutions to congestion problems and  
5 support broader national economic and environmental  
6 goals.

7 Unfortunately, achieving the access  
8 agreements necessary for rail passenger service is  
9 becoming increasingly difficult. A forum is lacking  
10 to consider public interest issues which may become  
11 present.

12 APTA urges STB to use the pending  
13 transaction as an opportunity to define an ongoing  
14 process that will allow for negotiation of fair and  
15 reasonable operating rights agreements with fair and  
16 reasonable compensation to CSX and Norfolk Southern.

17 This should include a process for  
18 resolving any disputes.

19 Third, it is important that STB provide a  
20 means to resolve disputes beyond the three year time  
21 frame as others have requested. The oversight period  
22 should be extended to five years or longer.

1 Fourth, we note that CSX, Norfolk Southern  
2 and Amtrak recently agreed that, as part of this  
3 continuing oversight, STB should require quarterly  
4 reports in regard to on time performance.

5 Perhaps it makes sense to extend this same  
6 condition to other passenger rail operators where  
7 dispatching is controlled by freight carriers, not  
8 merely to Amtrak.

9 Fifth, work force reductions from the  
10 proposed merger will result in additional railroad  
11 retirement payments by taxpayer supported commuter  
12 railroads. APTA requests that STB include conditions  
13 on the acquisition requiring CSX and NS to fund any  
14 negative financial impacts of the merger upon  
15 passenger railroads' contribution to railroad  
16 retirement.

17 Approval of the merger with these five  
18 conditions will help ensure the continuation of  
19 essential rail passenger service throughout the  
20 mammoth consolidation before you.

21 I have kept my oral remarks brief, but  
22 have a written statement which I have summarized that

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1 I would like to submit for the record.

2 Thank you for the privilege to appear  
3 before you. As we run our trains on time, I will  
4 finish my statement just on time.

5 CHAIRMAN MORGAN: Thank you. That's a  
6 good ad.

7 Mr. Sheys.

8 MR. SHEYS: Thank you.

9 I'll try to come as close as the freight  
10 railroads to --

11 CHAIRMAN MORGAN: Yes, you have a heavy  
12 burden.

13 MR. SHEYS: My name is Kevin Sheys. I am  
14 counsel for Virginia Railway Express.

15 VRE operates 24 weekday commuter trains  
16 serving communities in the heavily congested I-95 and  
17 I-66 corridors linking the fast growing Virginia  
18 bedroom communities with major employment centers in  
19 Virginia and D.C., and connecting with all the other  
20 parts of the critical passenger transportation network  
21 of this region including the metro, rail and bus  
22 system.



1 VRE operates on the line between  
2 Fredericksburg and D.C., which is shown in red on this  
3 map; and the line between Manassas and D.C., which is  
4 shown in blue.

5 The Conrail takeover will have a  
6 significant impact on VRE operations because it will  
7 have a substantial -- it will involve a substantial  
8 increase in freight traffic on the lines where VRE  
9 operates.

10 VRE has requested the imposition of  
11 several important and carefully tailored conditions  
12 that would give VRE a reasonable chance to preserve  
13 its current service after the Conrail takeover.

14 VRE is not trying to use this merger as an  
15 opportunity to enhance its service. To the contrary,  
16 without the conditions, VRE service will not operate  
17 on time or even close; will deteriorate until it  
18 becomes untenable and then will fail.

19 From the standpoint of passenger rail, the  
20 Fredericksburg line into D.C. is the hot spot of this  
21 merger. If you look at all the lines involved in this  
22 merger, if you look at any of those lines that have

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1 any significant passenger traffic, the Fredericksburg  
2 line has, by far, the greatest increase in freight  
3 traffic.

4 You have seven new trains on the  
5 Fredericksburg line between Fredericksburg and  
6 Alexandria, and 12 new trains on the line between  
7 Alexandria and Washington. And that's pretty hard to  
8 see right now.

9 This is actually for my next point.

10 The line between Alexandria and D.C. is  
11 the funnel through which all of the new freight trains  
12 to or from either of these lines must pass. The CSX  
13 operating plan was prepared without consideration of  
14 the presence of VRE trains.

15 And I'm not saying that because we have  
16 hurt feelings or making a subjective statement. They  
17 literally did not include a consideration of the  
18 existence of the 24 VRE trains when they did their  
19 operating plan.

20 When we asked them about this in  
21 deposition, they explained that they plan to deal with  
22 VRE through proper scheduling. However, the freight

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1 train schedules later made available showed that most  
2 of the new trains were scheduled during the morning  
3 and evening VRE rush hour periods.

4 Five of the seven new trains on the  
5 Fredericksburg line to Alexandria are during the rush  
6 hour periods. And they actually moved an existing  
7 train from outside the rush hour period to inside the  
8 rush hour period.

9 CSX did not look at VRE's trains in the  
10 operating plan, and they did not schedule with VRE  
11 trains in mind. CSX has not accounted for VRE at all.  
12 And they, frankly, have no way of knowing whether the  
13 VRE trains will run anywhere near on time.

14 Unfortunately, VRE knows that they will  
15 not.

16 VRE's request for conditions included a  
17 streamlined capacity analysis of the entire  
18 Fredericksburg line. It identified all the congestion  
19 points. CSX's rebuttal streamlined the capacity of  
20 the line between Alexandria and Virginia, seven of the  
21 50 miles -- the best seven of the 50 miles.

22 Their streamlined analysis of the part

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1 that's shown in red on this map in no way supports  
2 their assertion that the whole line has sufficient  
3 capacity.

4 Another important point here is that I'm  
5 talking about CSX's failure to show on paper how the  
6 trains are going to run on time. And as we all now  
7 know, real operations are much more difficult.

8 One brief point on the FEIS before I wrap  
9 up. The FEIS, which does not recommend transportation  
10 system mitigation for this line, is fatally flawed  
11 because it repeatedly states the erroneous fact that  
12 VRE has dispatching priority under the Rail Passenger  
13 Service Act.

14 VRE has no such dispatching priority.  
15 Overall, the conditions VRE seek would allow on  
16 operations reasonable schedule adherence. And on  
17 capital improvements, the conditions relate to VRE  
18 paying only for what VRE uses and being able to use  
19 post merger what they paid for pre merger.

20 The standard has been repeated. And to  
21 shorten my statements, I won't repeat it. But the  
22 standard for this Board and this merger, the adequacy

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1 of transportation to the public clearly includes VRE.  
2 It includes the people who ride the VRE trains and the  
3 people who drive on the roads of Northern Virginia and  
4 D.C., I-95, I-66, through the mixing bowl in  
5 Springfield, across the 14th and Teddy Roosevelt  
6 Bridges.

7 It's all right outside. And maybe later,  
8 after -- we can roll these up and we can watch the  
9 congestion stack up.

10 Thank you for listening.

11 CHAIRMAN MORGAN: Thank you very much.

12 Mr. Zullig.

13 MR. ZULLIG: Thank you.

14 Chairman Morgan, Vice Chairman Owen, good  
15 evening.

16 My name is Walter Zullig. I represent the  
17 Metro North Railroad. We are the second largest  
18 commuter railroad in the United States and are a unit  
19 of New York State's Metropolitan Transportation  
20 Authority.

21 This case is unprecedented. And one of  
22 the unprecedented aspects of it is the potential for

1 serious adverse impact on commuter railroad service.  
2 Now, I am here to discuss one particular problem at  
3 one location which is of serious concern to us.

4 One of the Conrail lines which will be  
5 transferred to Norfolk Southern is the southern route  
6 which extends from Northern New Jersey to Buffalo New  
7 York. The first 30 miles of that route from Hoboken  
8 to Suffern, New York is owned by NJ Transit.

9 And our concern here is with the next 66  
10 miles, which is the section from Suffern to Port  
11 Jervis. That section is owned by Conrail, dispatched  
12 by NJ Transit, and handles Conrail freight trains as  
13 well as Metro North passenger trains.

14 We had reached agreement with Conrail for  
15 the purchase of this line, and unfortunately we were  
16 not able to consummate that or get it reduced to  
17 writing because of the pendency of this proceeding.

18 Now, we pointed out in our testimony and  
19 in our brief that both the number of passengers and  
20 the number of passenger trains on this line has been  
21 increasing; that the territory served is projected to  
22 be the fastest growing county in the MTA district over

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1 the next ten years; and that there will be a need for  
2 additional passenger trains when the Secaucus transfer  
3 station, which is now under construction in the New  
4 Jersey Meadows, opens in the year 2002.

5 Now, conversely, until very recently, the  
6 number of freight trains on this line had been  
7 declining, and we think that was why Conrail was  
8 willing to sell it to us. The control application  
9 states that this line will see significant traffic  
10 increases, but is utterly silent as to any plan for  
11 capital improvements in this territory.

12 Now, conversely, Metro North's evidence  
13 showed that an expense of \$85 million dollar -- sorry,  
14 \$88 million dollars is needed for right of way  
15 improvements including installation of some 48 miles  
16 of welded rail, complete replacement of the signal  
17 system, burial of the track side pole line, and under  
18 grade bridge improvements.

19 We also showed that an exceedingly large  
20 additional capital investment, which we estimate to be  
21 about \$104 million dollars, will be needed to support  
22 long term future improvements to passenger service

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1 through the year 2020.

2 Those improvements will include additional  
3 double track sections and installation of passing  
4 sidings -- additional passing sidings, as well as  
5 station and parking enhancements.

6 Now what has been Norfolk Southern's  
7 response to this? Well, they did not depose our  
8 witnesses. Their rebuttal testimony on this point  
9 consists of about one page from a former official of  
10 the Southern Pacific Railroad who states an unfounded  
11 conclusion that this line segment has more than ample  
12 capacity to accommodate the projected increase in  
13 freight traffic as well as the existing level of  
14 passenger traffic.

15 It says nothing about the future passenger  
16 traffic. So the evidence presented by the Applicants,  
17 in our opinion, simply ignores the problems that we  
18 have raised.

19 Now if Norfolk Southern takes title to the  
20 line and does not make these improvements, the future  
21 of our commuter service to this part of New York State  
22 will be in jeopardy. Conversely, Norfolk Southern may



1 recognize -- may come to recognize the need for these  
2 improvements and ask that Metro North pay for them or  
3 for a large portion of them which would be related to  
4 passenger service.

5 That leads to another dilemma. How does  
6 a publicly funded agency use state and possibly  
7 federal funds to invest in long term improvements to  
8 a line of railroad which it can be -- which it has no  
9 long term interest in -- no long term ownership  
10 interest?

11 We have a trackage rights agreement that  
12 runs for about five more years, after which we have no  
13 agreement. It was primarily our concern over the need  
14 for the capital improvements which led us to begin the  
15 property negotiations with Conrail.

16 And those discussions were proceeding, and  
17 there is no question but that a contract of sale would  
18 have been reached with Conrail were it not for the  
19 filing of this application.

20 Therefore, as a direct result of this  
21 control application, Metro North has been unable to  
22 acquire the line and has no legal basis to make the

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1 necessary long term capital improvements. It will be  
2 difficult to operate the present level of passenger  
3 trains and virtually impossible to provide the  
4 enhanced passenger service presently planned without  
5 those capital improvements.

6 And despite the best of intentions on the  
7 part of all concerned, it is inevitable that passenger  
8 trains will encounter freight train delay in the  
9 absence of very, very careful dispatching and  
10 implementation of these capital improvements.

11 These issues are not extraordinarily  
12 complicated. And, quite frankly, we just do not  
13 understand why Norfolk Southern has not addressed  
14 them.

15 In any event, at this point, Metro North  
16 does respectfully request that the Board impose a  
17 condition requiring that Norfolk Southern convey the  
18 Suffern to Port Jervis line segment to Metro North at  
19 the purchase price which had been agreed upon with  
20 Conrail.

21 In the event that the Board does not see  
22 fit to impose that condition, we would ask at least

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1 that we be given a long term lease of the line to  
2 justify the capital improvements. And we also would  
3 ask that dispatching of the line be retained with NJ  
4 Transit as is at present.

5 Norfolk Southern has stated that it does  
6 not plan to change the dispatching, so they should  
7 have no objection to that condition.

8 In conclusion, our condition will in no  
9 way impair this transaction. In fact, it would give  
10 Norfolk Southern some additional money, so we're at a  
11 loss to understand their resistance.

12 Thank you.

13 CHAIRMAN MORGAN: Thank you.

14 Mr. Gazetti, you are supportive of an  
15 oversight for five years --

16 MR. GAZETTI: Yes.

17 CHAIRMAN MORGAN: -- obviously focusing on  
18 passenger issues. And you also are supportive of  
19 reporting that would reflect the on time performance.  
20 And I presume that if we were to approve the merger  
21 and did have oversight, that this reporting would be  
22 part of the oversight --

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1 MR. GAZETTI: That's right.

2 CHAIRMAN MORGAN: -- to us. Is that --  
3 now, do we have -- I mean, is there on time  
4 performance reporting going on elsewhere? I mean, I  
5 presume that the local level and so forth --

6 MR. GAZETTI: There is, but it ties into  
7 the oversight principle. And as I have been reading  
8 the many things that have been coming through as a  
9 part of your record, Amtrak's recent agreement, as  
10 part of this merger, has a, you know, condition that  
11 on time reports on time performance will be submitted,  
12 you know, to STB for review giving Amtrak the  
13 opportunity to comment from their perspective if they  
14 concur.

15 And it would seem to make sense that  
16 similar reports exist for other passenger providers as  
17 part of the oversight.

18 CHAIRMAN MORGAN: Thank you.

19 Mr. Sheys, have you all been in discussion  
20 with CSX about some of these issues? I mean, my  
21 impression was that these issues were being discussed.

22 MR. SHEYS: Well, I don't have to worry



1 about disclosing many details because there aren't  
2 many. We provided full A to Z draft proposals to both  
3 railroads in October or November of last year.

4 We've had a couple of good meetings,  
5 general discussions between now and then. We have not  
6 had a response to the contract proposals. We have had  
7 a letter from each of the railroads not responding to  
8 the comments, raising some other points that certainly  
9 will be discussed or would have been discussed.

10 But no, we have not had any nuts and bolts  
11 discussions.

12 CHAIRMAN MORGAN: Now presumably you have  
13 a contract in place between the parties that addresses  
14 things such as performance and capacity investments  
15 and so forth?

16 MR. SHEYS: That is right, and the  
17 contracts were provided -- a mark up of the contracts  
18 with our proposed conditions were provided with our  
19 response of application. And it's -- you know, we  
20 gave every word we wanted.

21 CHAIRMAN MORGAN: So are you suggesting  
22 that we somehow get into these contracts in some way?

1 Is that --

2 MR. SHEYS: I think that you can look at  
3 the contracts. The Board has ample authority to  
4 structure conditions in any way it sees fit. We think  
5 our conditions are very practical because they're very  
6 specific and they define narrow tailoring.

7 We don't tell you that we want on time  
8 performance guarantees. We tell you that we want  
9 their increased compensation from VRE to be based upon  
10 a percentage of on time performance that's measurable.

11 I see it in a way as getting into  
12 contracts; but, in another way, you could look at what  
13 we wrote in the contract, you could lift the language,  
14 you could make it conditions. You might have to draw  
15 broader language if you departed from the contract  
16 language that we provided.

17 Our effort was to be as specific as  
18 possible.

19 CHAIRMAN MORGAN: Mr. Zullig, you are  
20 suggesting, with respect to this segment that you're  
21 concerned about, either divestiture of some sort or a  
22 lease -- long term lease?

1 MR. ZULLIG: Yes.

2 CHAIRMAN MORGAN: Now what authority do  
3 you feel that we have to direct one of those things?

4 MR. ZULLIG: Well, I would say in the  
5 public interest that is the primary criteria under the  
6 statute. And here we have a very compelling public  
7 interest situation involving serious consequences to  
8 an established and expanding railroad passenger  
9 service.

10 And I would say that you have very broad  
11 authority in the public interest to do this.

12 CHAIRMAN MORGAN: Thank you.

13 Vice Chairman.

14 VICE CHAIRMAN OWEN: Yes, thank you.

15 Mr. Sheys, I have a footnote here on one  
16 of the pages. It says, for example, in decision  
17 number 33 served September 17, 1997, we required  
18 Virginia Railway Express, if it expects its conditions  
19 to be granted, to submit evidence about the  
20 feasibility of the proposed operations and whether  
21 they will interfere with freight operations that are  
22 conducted over the routes.

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1 VRE, however, failed to submit that  
2 evidence. And so I'm just wondering if you knew  
3 anything about that.

4 MR. SHEYS: What was the date?

5 VICE CHAIRMAN OWEN: Pardon?

6 MR. SHEYS: Mr. Vice Chairman, what was  
7 the date of the decision?

8 VICE CHAIRMAN OWEN: September 17, 1997,  
9 and it was pertaining to this particular case right  
10 here, was it not?

11 MR. SHEYS: Well, I don't -- that was  
12 before the submission of the response of applications,  
13 right? Help me with the dates here.

14 I'm not sure that that decision related to  
15 case in chief.

16 VICE CHAIRMAN OWEN: We were just asking  
17 if you wanted to participate or you wanted us to  
18 consider your problem, then you should submit  
19 something, and nothing was submitted. That's what I  
20 was getting at.

21 And I guess one other point I just -- I  
22 hear the frustration coming from you, but I brought



1 together the Southern California Metro Link people out  
2 in California since I live out there, and the  
3 Burlington Northern/Santa Fe people and UP/SP people.

4 First time they had ever sat down at a  
5 board room table together and chatted about the common  
6 problems, whether the need to run a triple line or,  
7 you know, third line here or do this or that.

8 I said, you know, you folks got to sit  
9 down more often together and talk about your common  
10 problems. Because the freight railroads, by and  
11 large, on the lines, they've got to service their  
12 customers and you hear their shippers in here  
13 complaining all the time.

14 And then you want to run on those lines to  
15 a great degree or parallel to them or some of your own  
16 lines you own maybe. And somehow or the other, you've  
17 got to sit down at a board room table and continue the  
18 dialogue because traffic is going to continue to build  
19 on passenger and freight.

20 And somehow we're going to have to work it  
21 out. And it's not to work it out to come in here and  
22 get us to impose conditions on those folks or on you.

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1 Now, we can do that, and we can re-regulate the  
2 industry and bankrupt everything, you know, from  
3 passenger to freight if that's what people want.

4 But I think we need more dialogue out  
5 there between you guys. I don't know, I just -- I  
6 sense your frustration. A couple of you were very  
7 frustrated when you were standing up here.

8 MR. ZULLIG: May I say something on that,  
9 Vice Chairman Owen?

10 VICE CHAIRMAN OWEN: Yes, go ahead.

11 MR. ZULLIG: We have sat down with Norfolk  
12 Southern and we've been on inspection trains and so on  
13 and had very nice dialogue. But on this issue, and as  
14 recently as about a month ago, I myself reached out  
15 again and the person I spoke with, their  
16 representative, ran it upstairs and then came back  
17 down and said no, there is no point --

18 VICE CHAIRMAN OWEN: Maybe there's not  
19 enough money on the table. You know, it's economics  
20 that drives all of these things. I don't know. And  
21 I know it's difficult for you guys to get money from  
22 where you're coming from.

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1 MR. ZULLIG: Unfortunately, we thought we  
2 had a deal with Conrail for a certain amount of money  
3 and it seems to have gone away.

4 VICE CHAIRMAN OWEN: Well, I want to see  
5 the passenger service grow, but I don't know how to do  
6 it as far as what you're talking about here. I say  
7 well, get you both in a room, lock you up and don't  
8 let you come out until you come to some agreement.

9 I think that will do it.

10 MR. SHEYS: Well, I guess I would -- I  
11 have two brief comments. First of all, if I gave you  
12 the impression that we haven't been talking, that was  
13 wrong. We have been talking. What I meant to say,  
14 what I tried to say, is that we haven't gotten to the  
15 nuts and bolts issues.

16 There have been a lot of meetings, and  
17 it's only fair for me to say that.

18 Secondly, I want to be clear. We are not  
19 trying to expand our service. We're not trying to  
20 meet with them to sit down to figure out how to add  
21 trains. We're trying to see how we can get the  
22 current trains to run at or near on schedule.

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1                   It's not an expansion thing. We already  
2 write big checks to the railroads, and we're trying to  
3 make sure that the trains we have run reasonably on  
4 time for those big checks.

5                   MR. GAZETTI: I'd also like to interject,  
6 if I could. Public transit authorities generally have  
7 imminent domain powers, you know, to do the projects  
8 they need to do across the country in the vein of  
9 public interest.

10                  However, with railroads, that power is  
11 lacking. Railroads come under the interstate  
12 authority of the STB, and that is the one exception to  
13 the imminent domain powers we have. In our  
14 negotiations with railroads -- and I've worked for a  
15 couple transit authorities along the way -- there is  
16 not sufficient leverage.

17                  I mean, the public interest is often not  
18 taken into account, and there's on public forum in  
19 which that public interest can be considered.

20                  VICE CHAIRMAN OWEN: Well, it's very  
21 difficult to equate between freight and passenger and  
22 come to a reasonable balance there.

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1 MR. GAZETTI: Not all the time. Many  
2 people have successfully negotiated good agreements.  
3 If it can be done sometimes, let's try to see if it  
4 can be done all the time.

5 VICE CHAIRMAN OWEN: Well, I wish you  
6 luck.

7 MR. GAZETTI: Well, hopefully you can help  
8 us.

9 VICE CHAIRMAN OWEN: Okay.

10 Thank you very much. I have no other  
11 comments or questions.

12 CHAIRMAN MORGAN: Thank you all.

13 I think what we're going to do is take a  
14 30 minute break. And this will be the last break of  
15 the day. And, of course, some people have already  
16 taken their break, I see. We need a break.

17 But let me just advise everybody that the  
18 20th Street entrance, which is the entrance you've  
19 been using, will close at 7:00. So get in here for  
20 the remainder. But if you go out of the building,  
21 then you will not be able to get back in after 7:00.

22 You may not want to get back in after

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1 7:00. I don't know. But anyway, be back in 30  
2 minutes.

3 (Whereupon, the foregoing matter went off  
4 the record at 5:51 p.m. and went back on  
5 the record at 6:30 p.m.)

6 SECRETARY WILLIAMS: The hearing will  
7 resume immediately. Please be seated and come to  
8 order.

9 CHAIRMAN MORGAN: Okay, let's get started.  
10 We have a panel with a lot of people on it titled  
11 "Other Railroads." What I think I'm going to do is  
12 try to split it up.

13 First we'll hear from Myles Tobin,  
14 Illinois Central Railroad; Karl Morell, Ann Arbor  
15 Railroad; Karl Morell, New England Central Railroad;  
16 William Sippel, Bessemer & Lake Erie; Edward  
17 Rodriguez, Housatonic Railroad Company.

18 Now let's take those five first and then  
19 we'll do the second five next.

20 Mr. Tobin.

21 MR. TOBIN: Good evening, Chairman Morgan,  
22 Vice Chairman Owen.

1 I'll talk about one issue, CSX's  
2 operational choke hold over IC and the anti-  
3 competitive effects of that as it relates to the  
4 merger. If time permits, I'll discuss the maintenance  
5 of access to efficient routings and efficient  
6 gateways.

7 A lot of folks have said that past is  
8 prologue, and I think, in the context of this merger,  
9 we need to look at the debacle going on in the west  
10 and understand that there are a lot of shippers out  
11 there who are real upset about the absence of  
12 effective shipper routing options, effective service  
13 options.

14 So, frankly, here we are. We are that  
15 service option for the east in the event that there  
16 are issues associated with this merger in terms of  
17 service or competitive routing. We've often been  
18 referred to as "the little railroad that could," and  
19 we can so long as we're allowed to.

20 But if CSX prevents us from doing so,  
21 we're not going to be able to. And that brings me to  
22 the subject to Leewood to Alwin on the subject of this

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1 evening's argument. Leewood to Alwin is a two mile  
2 stretch of railroad in Memphis. IC operates over it  
3 on trackage rights with CSX.

4 And I've got a little illustration there  
5 of -- we're pressed a little for time.

6 CHAIRMAN MORGAN: I wasn't going to say a  
7 thing, but you started to laugh, so --

8 MR. TOBIN: Well, certainly it's humorous;  
9 but although a humorous picture, frankly it's got a  
10 pretty serious message because it depicts exactly the  
11 problem we've got.

12 Memphis Leewood to Alwin particular is the  
13 throe to the Illinois Central system. It's the tail  
14 of the CSX system, and they've literally got their  
15 tail around our throat and are squeezing pretty hard.

16 It is going to get a lot worse as this  
17 merger goes forward because, right now, they've got no  
18 particular incentive to squeeze; they're just doing it  
19 either through an inadvertence, ineptitude, or  
20 whatever.

21 But the access to the Conrail territory is  
22 going to motivate them -- incentivize them, if you

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1 will, to make sure that our trains continue to be  
2 delayed as they are being now. That's the issue that  
3 Leewood to Alwin relates to insofar as the merger is  
4 concerned.

5 You'll see that we operate from New  
6 Orleans to Chicago. We are one of the major service  
7 providers into the Conrail territory from the  
8 southwest going up to the northeast into Conrail.

9 We do it via either Memphis or New Orleans  
10 up to Effingham, which is the dotted line up there  
11 which is sort of red. That line is currently a  
12 Conrail line; will be owned by CSX after this merger  
13 is approved, if it in fact is approved.

14 You'll see just above that what's called  
15 -- it's a little blurry, but it's called the New  
16 Talono connection. That's the connection that NS is  
17 building to IC to provide competitive routing service  
18 to Conrail territories via NS.

19 CSX will be incentivized, we believe, now  
20 that it will have access to the Conrail territory to  
21 continue the Leewood/Alwin delays to the detriment of  
22 the IC/NS routing.

1           Understand that we move 100,000 cars a  
2           year to and from Conrail. BN uses us as its primary  
3           service provider from the territory that it got  
4           trackage rights on, the UP, for access to the  
5           northeast.

6           They have put us in their application as  
7           the efficient route that they were going to utilize to  
8           get the Conrail territory.

9           With the combination of the New Talono  
10          connection, we believe that we'll be able to provide  
11          efficient service to Conrail territory via NS. And  
12          certainly we're agreeable to working with CSX if they  
13          want to work with us.

14          But the concern that we've got is they are  
15          really making our lives miserable at Leewood to Alwin  
16          and will have an incentive to do that in the future.  
17          I've been up here before, and I've discussed with you  
18          the IC efficiencies, and you need to understand our  
19          problem in the context of those efficiencies.

20          As you know, we're the most efficient  
21          railroad in the United States. Our operating ratio is  
22          the best, bar none, of any Class I, and it's been so

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1 for as long as I can remember. We have been one of  
2 the safest railroads in the United States.

3 We've won eight Harriman Awards in a row,  
4 four silver, four gold, and we're trying to strive to  
5 make it all gold for as long as we can do so.

6 But our ability to compete, our ability to  
7 provide service depends on our ability to use  
8 innovative operation techniques like scheduled  
9 service. Our trains get from point A to point B on  
10 time, every time, if at all possible.

11 Our shippers can depend on us to get the  
12 trains there. We don't wait until cars come to move  
13 a train. We move them like airlines move them, better  
14 than airlines move them. They get to -- they move  
15 from New Orleans to Chicago just as fast as they can  
16 -- scheduled service.

17 Turn around service, part and parcel of  
18 scheduled service. Our crews, instead of going to the  
19 hinterlands and sleeping in motels, they meet in the  
20 middle and then switch trains and go back to their  
21 home terminal.

22 They sleep in their own beds at night.

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1 That allows -- reduces fatigue, improves employee  
2 morale, and has been just a wonderful asset on our  
3 system and asset for our crews.

4 But all that is totally dependent on  
5 predictability of service, predictability of  
6 operations. CSX systematic delays have wreaked havoc  
7 on our scheduled service, have wreaked havoc on our  
8 turn around service.

9 In 1996, they moved their Memphis  
10 dispatching to Jacksonville. Since then, they've  
11 forgotten about this line. You can't get their  
12 dispatchers. You call them, they don't answer. They  
13 answer, they don't give you clearance.

14 In combination, they park trains on the  
15 line. They park trains out of the Leewood yard that  
16 just sit on the line for hours at a time. They park  
17 whole trains on the line. CSX dispatchers give us the  
18 clearance, we get up to Leewood, there's a CSX train  
19 there, we're sitting there.

20 And this is affecting, on a routine basis,  
21 train after train after train on the Illinois Central  
22 system. And it's a cascading effect because we



1 operate 20 trains a day over Leewood to Alwin. And  
2 once one is delayed for an hour or two or three, the  
3 rest are going to be delayed, and it just truly wreaks  
4 havoc with our service.

5 In order to compete effectively with CSX,  
6 IC needs to maximize its service and operating  
7 innovations. Control of Leewood to Alwin by CSX  
8 adversely impacts that and prevents us from operating  
9 competitively with the restructuring of rail  
10 transportation in the east.

11 Now they will tell you tomorrow, they  
12 being CSX, will say that this is a preexisting  
13 problem. But because -- well, they're delaying our  
14 trains now, so what -- it's not a merger related  
15 problem.

16 What the delays show you is that they've  
17 got the power to delay our trains, and that power is  
18 real and substantial. But the merger related aspect  
19 of it, as I indicted to you earlier, is that, for the  
20 first time, they have access to Conrail territory.

21 They have the ability and desire to  
22 compete with us, and therefore the motivation and

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1 incentive to continue to delay our trains.

2 They will also tell you that we've asked  
3 for purchase and dispatching authority on this line.  
4 They will tell you that well, this line is important  
5 to CSX as well, and so why should the IC get it.  
6 That's bunk.

7 This is the throat of our system. This is  
8 a backwater for them.

9 If I can just go for a couple more  
10 seconds.

11 We operate 76% of the traffic on this  
12 line. This is our main line system. In their  
13 operating plan, they anticipate maybe a 2% increase on  
14 overall traffic on this line. So -- and if it was so  
15 important to them, they wouldn't be parking coal  
16 trains for days at a time and our trains for hours at  
17 a time.

18 This is our through route. This is a  
19 backwater for them. Why should we dispatch as opposed  
20 to CSX? They will tell you, you know, do unto others.  
21 If we do it to IC, they're going to do it to us.

22 We are absolutely committed to neutral

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1        dispatching on this line. And if you don't believe  
2        it's because of altruism, it's because of it's in our  
3        interest to do so. It's in our interest to do because  
4        we have the majority of traffic on this line.

5                This is our through route. We need to  
6        keep trains moving on this line hour after hour after  
7        hour. It's in our incentive to -- it's in our  
8        interest to do so.

9                Beyond that, six of the ten current  
10       operating trains between -- of CSX on this line  
11       operate to us. Four of them are trains to and from  
12       IC; two are trains that operate on IC track. It's in  
13       our interest to get those trains moving.

14               They're our business. If they sit on the  
15       line, then our service continues to be screwed up.  
16       CSX doesn't have a comparable interest for the 20  
17       trains a day that we've got moving over that line.

18               If you believe though that -- and CSX will  
19       probably spend some time on this tomorrow telling you  
20       well, you know, you can't rely on IC. If you truly  
21       believe that we can't provide neutral dispatching on  
22       this line, then we've got a plan B for you, if you

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1 will.

2 And that plan B is okay, don't sell us the  
3 line, don't give us sole dispatching authority; order  
4 CSX and IC to hire a neutral, joint employee  
5 dispatcher to sit at Memphis and dispatch this line  
6 because this is the number one operating problem in  
7 the Illinois Central and we need to get it resolved.

8 They will also tell you that IC has an  
9 alternate route through Memphis. And the bottom line  
10 is, we do not. We did formerly have a line that was  
11 -- is on land owned by the City of Memphis right  
12 through basically -- it looks like right outside.

13 It's right through downtown Memphis --  
14 sports complexes, concerts, pedestrians everywhere, 12  
15 crossings in a mile. And Memphis said we're not  
16 renewing your lease because we don't want you on this  
17 line. It's nuts.

18 We cut a deal with them, say hey, we don't  
19 use the river front line very much now, we use it for  
20 Amtrak, just a couple of intermodal trains. Let's  
21 just continue using the Amtrak, let's just continue  
22 the emergency basis for these intermodal trains.

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1 But we'll -- we've got 98% of our traffic  
2 on Leewood to Alwin, we'll move the other 2%. So if  
3 CSX tells you tomorrow that there's an alternate line,  
4 there is no alternate line.

5 I appreciate your indulgence. Let me just  
6 leave you with one final thought.

7 You chastised -- or it was reported that  
8 you chastised shippers in the CSX -- oh, I'm sorry, in  
9 the UP/SP proceeding for not stepping up to the plate,  
10 for not coming forward and telling you in the context  
11 of this merger that there's a problem that needs to be  
12 dealt with.

13 Well, as you will see in our filing,  
14 shippers from all varieties of commodities, all areas  
15 of the country have come forward and have said there  
16 are problems that need to be fixed. You can look at  
17 the -- in the chemicals area, BASF out of New Jersey;  
18 Diamond Shamrock, Fina out of Texas; Huntsman, the  
19 largest private chemical company in the United States  
20 out of Texas; Whitgo, Mississippi Chemical.

21 Those companies combined have \$25 billion  
22 dollars in sales annually. International Paper, the

1 largest paper producer in the world; Crown Vantage out  
2 of Oakland, California; Georgia Pacific; Stone  
3 Container.

4 In the coal area, Kerr-McGee; in  
5 intermodal, Consolidated Freightways out of Menlo  
6 Park, California; Bay Area Piggyback out of Walnut  
7 Creek, California.

8 All of these shippers and a host of others  
9 more have come together to tell you there are problems  
10 in the context of Leewood to Alwin and the context of  
11 the efficient gateway issue which we have raised.  
12 Those problems need to be solved.

13 They have stepped up to the plate and  
14 they're asking you to do so as well.

15 Thanks for your indulgence.

16 CHAIRMAN MORGAN: Thank you.

17 I guess we can put the lights back on. I  
18 need all the light I can get.

19 Mr. Morell, you can -- I think you have  
20 two parties here that you want to speak on behalf of,  
21 so you have the floor for a little bit.

22 MR. MORELL: Thank you.

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1 Good evening, Madame Chairman, Vice  
2 Chairman Owen.

3 Ann Arbor Railroad thanks you for this  
4 opportunity to appear here today and address its  
5 concerns over the proposed transaction which are  
6 twofold. First, the loss of essential services on the  
7 Ann Arbor rail system; and second, the loss of rail  
8 competition in Toledo to Chicago rail corridor.

9 Ann Arbor is a short line railroad  
10 operating over approximately 46 miles of main line  
11 track between Ann Arbor, Michigan and Toledo, Ohio.  
12 All of Ann Arbor's traffic consists of overhead or  
13 interline traffic.

14 As is the case with most short line  
15 railroads, Ann Arbor's economic survival depends on  
16 its ability to provide efficient and economic  
17 switching services for its customers to the connecting  
18 Class I carriers.

19 Despite its small size and limited  
20 financial resources, Ann Arbor has fully participated  
21 in this proceeding because it believes its own  
22 survival and the competition rail options for is

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1 shippers are at stake.

2 Ann Arbor has estimated that it stands to  
3 lose over \$3 million dollars, or about 42% of its  
4 annual gross revenues as a result of the proposed  
5 transaction.

6 The disagreement in this proceeding  
7 between Ann Arbor and the Applicants is not whether  
8 Ann Arbor will lose any revenues, but rather the  
9 degree of those losses and whether Ann Arbor is  
10 entitled to any remedies.

11 Ann Arbor's projected revenue losses  
12 consist of three elements. First, Ann Arbor will lose  
13 approximately \$800,000 a year in annual trackage  
14 rights fees which it currently earns from NS. There  
15 is little dispute that Ann Arbor will lose these fees.

16 NS has conceded that Ann Arbor will lose  
17 virtually all of the fees since NS will acquire a more  
18 direct route between Toledo and Detroit and will use  
19 the Ann Arbor route only for, as NS put it, "some  
20 niche traffic."

21 Ann Arbor also stands to lose about one-  
22 half million dollars in annual revenues that earns

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1 from a three carrier haul of sand from Yuma, Michigan  
2 to Cleveland, Ohio. With CSX gaining direct access to  
3 the receiver of this sand traffic in Cleveland, CSX  
4 will have the ability to divert this traffic either to  
5 a two carrier haul from the current origin, or a  
6 single line haul from western Michigan where CSX  
7 directly serves shippers of sand.

8 Applicants' contention that the current  
9 three carrier haul involving Ann Arbor will remain  
10 competitive with CSX's new routing flies in the face  
11 of their very extensive evidence that they've  
12 introduced in this proceeding which -- by which they  
13 intended to demonstrate the advantages and benefits of  
14 reducing interchanges and single lines service.

15 The third category of losses that Ann  
16 Arbor stands -- excuse me.

17 The third category of losses consist of  
18 approximately \$1.7 million dollars in revenue that Ann  
19 Arbor derives from automotive traffic in Myelin and in  
20 Toledo. The Myelin traffic originates on the NS line  
21 and moves to Louisville and Chicago.

22 NS does not contest that this traffic will

1 be diverted from Ann Arbor after the proposed  
2 transaction. It simply claims that the diversion  
3 should not be attributed to this transaction because  
4 NS can divert that traffic today.

5 NS's contention, however, ignores two  
6 fundamental facts. First, the current routing over  
7 the Ann Arbor is more direct and efficient than the  
8 other alternatives that exist today.

9 Second, Ann Arbor will acquire  
10 substantially more direct routes to the destinations  
11 which will make Ann Arbor's participation in this  
12 traffic unnecessary.

13 Ann Arbor therefore believes that the  
14 diversions of this traffic are directly attributable  
15 to this transaction. The automotive traffic -- excuse  
16 me. The Toledo automotive traffic is switched by Ann  
17 Arbor to Conrail for line hauls to Chicago or to NS  
18 for line hauls to Winston-Salem and Atlanta.

19 In its rebuttal filing, Ann Arbor pointed  
20 out that shortly before NS filed its reply in this  
21 proceeding, Ann Arbor was successful in negotiating a  
22 multi-year contract with Chrysler Corporation to

1 perform switching services in Toledo.

2 In its reply, NS chose to ignore the  
3 contract and essentially conceded the variability of  
4 the Toledo traffic, but again claimed that the  
5 diversions were not related to the proposed  
6 transaction.

7 On brief, NS has switched course and now  
8 claims that the traffic cannot be diverted because of  
9 the contract. Ann Arbor continues to be concerned  
10 about the potential loss of the Toledo traffic for  
11 three reasons.

12 First, the contract Ann Arbor was able to  
13 negotiate may simply have delayed some of the  
14 projected revenue losses; it has not avoided them.

15 Second, even if Ann Arbor is able to  
16 protect its Toledo automotive traffic for the duration  
17 of the contract, Ann Arbor still stands to lose one  
18 and a half million dollars or about 20% of its annual  
19 revenues.

20 The third and most important reason  
21 involves certain aspects of the contract which Ann  
22 Arbor deems highly confidential and are addressed in

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1 its brief.

2 In brief, since my time is almost up, I'd  
3 like to just quickly address Ann Arbor's second  
4 concern which is the loss of competition in the  
5 Toledo, Chicago rail corridor.

6 Applicants claim that there is an  
7 alternative route to the three routes which NS will  
8 acquire post transaction, which is the CSX route.  
9 Applicants' claim -- sole claim that this alternative  
10 route is competitive is because it involves -- or it  
11 has security -- small security.

12 Applicants have totally failed to rebut  
13 Ann Arbor's evidence that there are operational  
14 constraints and that there are time delays on the CSX  
15 line.

16 Thank you.

17 CHAIRMAN MORGAN: Now you're speaking on  
18 behalf of New England Central?

19 MR. MORELL: Yes.

20 Again, I would like to thank you on behalf  
21 of New England Central for this opportunity to address  
22 the issues that are of great concern to New England



1 Central in this proceeding.

2 In its responsive application and  
3 subsequent filings, New England Central demonstrated  
4 that the proposed transaction, if approved without  
5 appropriate conditions, will eliminate essential  
6 services on the New England Central rail system and  
7 significantly reduce competition in the New England  
8 area.

9 Other parties participating in this  
10 proceeding have echoed this same concern. In my  
11 remaining time, I would like to just briefly address  
12 the six issues CSX has raised in response to New  
13 England Central's responsive application.

14 First, CSX claims that New England Central  
15 failed to substantiate the projected \$8 million  
16 dollars in revenue losses. Applicants themselves,  
17 however, have projected revenue losses for the New  
18 England Central of \$1.6 million.

19 Even these smaller losses conceded by  
20 Applicants would have significant adverse effects on  
21 New England Central's ability to provide services to  
22 its customers. The Board's predecessor recognized

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1 that the rail lines operated by New England Central  
2 have a history of unprofitable operations.

3 Between 1984 and 1993, New England's  
4 predecessor reported positive income in only one year  
5 and accumulated a total of \$17 million dollars in  
6 operating losses. CSX has acknowledged that its  
7 diversion analysis for small carriers could  
8 significantly understate diversion impacts.

9 This is particularly true in situations  
10 where the traffic is diverted -- where the traffic  
11 diverted is transloaded and moves by truck to the  
12 ultimate destination.

13 About 50% of New England Central's car  
14 load consists of lumber and forest products. Because  
15 of the way this traffic is marketed throughout the  
16 northeast, New England Central projects that all or  
17 virtually all of this traffic will be diverted to CSX  
18 and NS.

19 A significant portion of New England  
20 Central's forest product traffic originates in western  
21 Canada and northwest regions of the United States and  
22 moves in joint line and multi-line services to

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1 distribution centers on the New England Central.

2 From these distribution centers, the  
3 products are trucked throughout the northeast. With  
4 CSX's and NS's direct access to producers of forest  
5 products in the southeast United States, they will be  
6 able to use single line service to the northeast to  
7 displace forest products currently moving via the New  
8 England Central.

9 Also, with the agreements Applicants have  
10 reached with CN and CP, NS and CSX will be able to  
11 redirect some of New England Central's forest product  
12 traffic moving from Canada.

13 While CSX and NS dispute New England  
14 Central's diversion projects, they, at the same time,  
15 significantly -- they, at the same time, project  
16 significantly increased forest product traffic moving  
17 over their lines to the areas that are now served by  
18 New England Central's distributors.

19 For example, CSX projects that it will  
20 gain over \$111 million dollars in revenues from  
21 increased pulp and paper traffic, and over \$41 million  
22 dollars in revenues from increased lumber and wood

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1 products as a result of the proposed transaction.

2 CSX highlights the new single line access  
3 it will gain to the northeast which, according to CSX,  
4 will facilitate the movement of lumber and paper  
5 products from the south.

6 This Board is being asked to accept the  
7 benefits of this traffic shifts to CSX and NS, but to  
8 ignore the harm that these shifts will cause to the  
9 New England Central.

10 Second, CSX claims that New England  
11 Central does not provide any essential services. As  
12 the record demonstrates, New England Central handles  
13 a diverse range of commodities such as coal, cement,  
14 grain and others which cannot economically or  
15 efficiently be handled by truck over considerable  
16 distances.

17 CSX itself points to two New England  
18 Central customers -- two of New England's largest  
19 customers that are rail dependent: a shipper fly ash  
20 and a shipper of copper. The essential services  
21 performed by New England Central are further confirmed  
22 by the State of Vermont in its filings in this

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1 proceeding.

2 CSX also contends that New England  
3 Central's requested conditions to connect with its  
4 affiliate, the Connecticut Southern, is somehow  
5 contrary to a representation that RailTex made in 1996  
6 when the control of the Connecticut Southern -- when  
7 it represented that the control of the Connecticut  
8 Southern was not part of a series of anticipated  
9 transactions which would connect the two carriers.

10 The short answer to this contention is  
11 that if RailTex had known in 1996 that CSX and NS were  
12 about to enter into a bidding war for Conrail, RailTex  
13 would have been much better served investing in  
14 Conrail stock than acquiring the Connecticut Southern.

15 Fourth, in an attempt to portray New  
16 England Central as over reaching, CSX states that the  
17 requested trackage rights would expand New England  
18 Central lines about 75%. New England Central is not  
19 seeking to serve any new customers.

20 It is simply seeking access to other  
21 connections.

22 Fifth, CSX claims that New England Central

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1 has failed to show that the requested conditions will  
2 remedy any harm since the projections we have made  
3 are, in the words of CSX, "sheer speculation."

4 If, as CSX suggests, New England Central  
5 would not be able to generate any additional traffic  
6 from its requested conditions, why is CSX opposing the  
7 responsive application?

8 The final matter I intended to address was  
9 the issue of the competitive harm in the New England  
10 area. Since that's being addressed by a number of the  
11 other parties in this proceeding and in the interest  
12 of time, I will just join in those comments.

13 Thank you.

14 CHAIRMAN MORGAN: Thank you very much.

15 Mr. Sippel.

16 MR. SIPPEL: Chairman Morgan and Vice  
17 Chairman Owen, good evening.

18 I am William Sippel. I am representing  
19 the Bessemer & Lake Erie Railway Company.

20 I am pleased to advise the Board that,  
21 this afternoon, the Transtar Railroads, the Bessemer  
22 & Lake Erie Railway, and the Elgin, Joliet and Eastern

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1 Railway reached a settlement agreement with CSXT.

2 Accordingly, the Bessemer & Lake Erie  
3 withdraws its opposition to the proposed transaction  
4 and requests leave to withdraw its responsive  
5 application in this proceeding.

6 Its sister railroad, the EJ&E, has also  
7 reached a settlement with CSX. Although negotiations  
8 with NS are continuing, EJ&E is confident that an  
9 agreement can be reached.

10 Accordingly, Transtar and EJ&E withdraw  
11 their request for conditions otherwise relating to the  
12 primary application and request leave to withdraw  
13 their names from their responsive application filed in  
14 this proceeding relating to the Indiana Harbor Belt  
15 Railroad.

16 The withdrawal of Transtar and EJ&E from  
17 that responsive application does not result in the  
18 withdrawal of that application. That responsive  
19 application is a joint application. I&M Rail Link  
20 remains a party to that application, and that  
21 application therefore remains pending before the Board  
22 and will be argued later in this schedule.

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1 I am pleased to return the remainder of my  
2 oral argument time for the Bessemer back to the Board.

3 Thank you.

4 CHAIRMAN MORGAN: Thank you.

5 As I said to someone else, you're excused.

6 Mr. Rodriguez.

7 MR. RODRIGUEZ: Thank you.

8 Good evening. I'm Edward Rodriguez and I  
9 represent Housatonic Railroad. I plan to address this  
10 evening the haulage conditions requested by Housatonic  
11 Railroad.

12 Housatonic Railroad operates in western  
13 Massachusetts and Connecticut and eastern New York.  
14 It serves a portion of the east of Hudson market and,  
15 through truck transfer, is an alternative service  
16 route to New York City.

17 HRRC customers generally compete within a  
18 market area encompassing Connecticut, Massachusetts,  
19 eastern New York and the New Jersey shared asset area.  
20 Currently, Housatonic interchanges all of its traffic  
21 with Conrail at Pittsfield, Massachusetts.

22 After the transaction, it will interchange



1 all of its traffic with CSX at Pittsfield.

2 Applicants would have you believe that no  
3 material changes to Housatonic and its customers will  
4 occur as a result of their transaction. However,  
5 there will be important changes which result in  
6 transaction related harms.

7 Housatonic and its customers now have  
8 neutral, direct access to all Conrail points and  
9 neutral access to southern, western and Canadian  
10 gateways. After the transaction, Housatonic will have  
11 direct access to less than one-half of the present  
12 Conrail territory, and its access to gateways through  
13 CSX will lose its neutrality.

14 Housatonic customers have already begun to  
15 experience the consequences of this change. A  
16 customer trying to finalize a traffic movement to a  
17 central Pennsylvania receiver is encountering  
18 difficulty because of anticipated increased  
19 transportation costs due to the introduction of a  
20 third carrier, NS, in the route.

21 Another customer that wants to ship  
22 plastic onto Housatonic for distribution reports that

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1 concern about the lack of neutral access to NS may  
2 rule out a location on Housatonic.

3 The relationship between Conrail and  
4 Housatonic is a partnership. Housatonic and its  
5 customers depend upon this partnership to successfully  
6 compete in the market.

7 Conrail fulfills its partnership  
8 obligations by striving to ensure that Housatonic  
9 customers and stations are not rate disadvantaged  
10 relative to competing Conrail served stations.  
11 Conrail and Housatonic do not compete with each other.

12 Applicants, however, will not be partners  
13 with Housatonic. They will be competitors with  
14 Housatonic and with each other. One of their stated  
15 goals in their application is to divert traffic from  
16 other railroads.

17 The change in control of the Conrail  
18 property from a partner to competitors therefore  
19 causes additional transaction related harms. Not only  
20 will the Conrail property be controlled by two  
21 competitors, but Housatonic will have direct access to  
22 only one.

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1           As captives to CSX, Housatonic customers  
2           can expect to face higher transportation costs than  
3           their competitors and higher costs than they now  
4           experience. Compounding the harm is the unique  
5           geographic location of Housatonic's lines.

6           As the map indicates, Housatonic is  
7           situated just east of the Hudson River. The Hudson  
8           River has been used by Applicants as a wall to  
9           competition separating the areas of northeast rail  
10          competition, which exists west of the river, from the  
11          noncompetitive area east of it.

12          In the case of Housatonic, as the map  
13          shows, the boundary is a mere few miles away. While  
14          CSX will have a monopoly east of the river, NS will  
15          compete in the Albany area; the Maybrook, Beacon, New  
16          York area; and in the North Jersey shared asset area.

17          Rail customers in those areas will  
18          experience rail competition and lower transportation  
19          costs, further disadvantaging HRRC customers who  
20          compete in that market. As a reload operator and rail  
21          customer, Housatonic's own lumber distribution  
22          facility serves the east of Hudson market, but also



1 sends more than 50% of its trucks to New York and New  
2 Jersey points west of the Hudson.

3 The Housatonic reload center and its  
4 customers will also be harmed. These concerns have  
5 been expressed to the Board by existing Housatonic  
6 customers, by the Coalition of Northeastern Governors,  
7 all four United States senators from Connecticut and  
8 Massachusetts, and they are the principal concerns  
9 raised by the State of New York and the New York City  
10 Economic Development Corporation who will address you  
11 shortly.

12 Housatonic does not seek to be protected  
13 from this new competition, but to be permitted to  
14 participate in it by means of a haulage arrangement  
15 over CSX primarily between Pittsfield and the Albany  
16 area for interchange with other carriers there -- NS,  
17 CSX, CP, ST -- and also between Pittsfield and Palmer,  
18 Massachusetts for interchange with other carriers.

19 The relief requested would ameliorate the  
20 harm to Housatonic's customers by preserving direct  
21 rail access to all lines formerly owned by Conrail and  
22 by fostering neutral access to gateways. It will

1 allow Housatonic's customers to continue to compete  
2 with firms west of the Hudson River, and it would  
3 advance public policy.

4 The haulage remedy is operationally  
5 feasible. Applicants have not claimed otherwise. The  
6 haulage remedy is non-intrusive and would not harm  
7 Applicants in any measurable or material way, nor  
8 interfere with a legitimate stated benefit sought to  
9 be achieved by the transaction.

10 Applicants have not claimed that they  
11 would be harmed in any way.

12 On the other hand, failure to grant the  
13 relief would dramatically change the service  
14 Housatonic offers its customers and allow the  
15 transaction to impose substantial harm on Housatonic  
16 Railroad and its customers.

17 The haulage rights condition is narrowly  
18 tailored to remedy that harm by preserving  
19 Housatonic's customer status quo without disturbing  
20 the benefits of the transaction.

21 Thank you for your time and patience.

22 CHAIRMAN MORGAN: Thank you.

1 Let me start with you, Mr. Tobin.

2 You've discussed the Memphis gateway.  
3 Now, aside from IC and CSX, who else is in the Memphis  
4 gateway -- who is served in that area? I mean,  
5 obviously it's pretty important to you clearly given  
6 what you've said.

7 MR. TOBIN: We have UP in there and NS is  
8 also in the Memphis gateway.

9 CHAIRMAN MORGAN: But your main -- the  
10 concerns that you've raised are mainly with CSX and  
11 their handling of your traffic through?

12 MR. TOBIN: Well, it's strictly an  
13 operating problem. One of the issues that we did talk  
14 about was the efficient routing via efficient  
15 gateways, and that's a separate issue. But the bottom  
16 line is, that is our main line. We operate over CSX  
17 trackage rights there.

18 There wasn't a problem really until 1996  
19 until they moved their dispatching center to  
20 Jacksonville. You've heard in other context, in other  
21 mergers that sometimes centralize dispatching far away  
22 is a good idea; sometimes it's not a good idea.

1           There are areas where you need localized  
2       dispatching, and this is one of those areas. It was,  
3       up until this merger, strictly an operating problem.  
4       Now it's a competitive problem because, you know, even  
5       with the difficulties that they were causing us, we  
6       still were moping along providing as good a service as  
7       we could to Conrail territory.

8           Now they will have access to that Conrail  
9       territory and have the incentive and the motivation to  
10      continue those delays and exacerbate them.

11           CHAIRMAN MORGAN: And have you been in  
12      discussions with them about these issues?

13           MR. TOBIN: You know, you would think we  
14      could have resolved something like this. It shouldn't  
15      be that big a deal. I personally have been in  
16      discussions with them in the context of a merger  
17      settlement, and they haven't given us the time of day  
18      on this issue.

19           Beyond that, just as an operating matter,  
20      John McPherson, our president, has talked to Pete  
21      Carpenter, CSXT's president. Hunter Harrison, when he  
22      was still with IC, talked to those folks at the train

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1 master level, at the supervisor level, at the general  
2 manager level.

3 We've talked to everyone we can talk to  
4 and the problem continues to crop up. You know,  
5 they'll address it for a day, maybe it will get better  
6 for a day or two or three.

7 You know, you would think, in the context  
8 of this merger, that they would at least advise their  
9 guys to be on their best behavior while the merger is  
10 going on and then screw us afterwards, but they're  
11 still doing it.

12 (Laughter.)

13 When we were writing the briefs, there was  
14 -- right in the middle of just right around the  
15 rebuttal, there was a ten or 12 hour delay and our  
16 trains were stacked up from Memphis to New Orleans.  
17 It just continues to be a problem.

18 We do delay reports on a monthly basis.  
19 Every day there are more and more delays. You know,  
20 CSX is a good management and NS is a good management,  
21 and I don't want to cast dispersions on them, but they  
22 can't seem to get their act together on this as an

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1 operational issue.

2 And now it's more than an operational  
3 issue; it's a competitive issue. And it's something  
4 that needs to be remedied in the context of this  
5 merger.

6 CHAIRMAN MORGAN: Now am I right that you  
7 did cut some sort of deal with NS?

8 MR. TOBIN: On the efficient gateways  
9 aspect, you know. Real briefly, everyone here  
10 realizes there are not a lot of Class I's left in the  
11 United States anymore and they're going to be -- there  
12 probably, as of Monday, there will be one less.

13 When our shippers saw that, they came to  
14 us and said look, you know, we've got some routes to  
15 Conrail territory, let's see what we can do to  
16 preserve them. We went to NS and we went to CSX and  
17 we proposed -- look, let's do a deal on statement of  
18 principles.

19 All we want you to commit to us is on our  
20 on line originating terminating traffic; you'll commit  
21 to market competitive joint rates when we -- when the  
22 service is efficient or when we can provide a

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1 competitive package to these shippers.

2 On overhead traffic, you'll just provide  
3 reasonable rates. That's all you got to say. We'll  
4 do an agreement. Just have some statement of  
5 principles in agreement form. NS said yeah, that  
6 sounds fine to us, signed up, we were done.

7 CSX said reasonable rates, market  
8 competitive rates, joint line rates? I don't think  
9 so. So that's why we're here is our fear that --  
10 their unwillingness to sign what I thought was pretty  
11 much of a milk/toast agreement is -- does not bode  
12 well for the shipping public.

13 CHAIRMAN MORGAN: And the relief you're  
14 asking for is transfer of a line and/or dispatching  
15 relief, is that --

16 MR. TOBIN: The preferable relief is  
17 purchase of the line and dispatching. Certainly the  
18 key is the dispatching control of it, but it generally  
19 follows that it's better if one carrier has both.

20 CHAIRMAN MORGAN: Thank you.

21 VICE CHAIRMAN OWEN: Could I follow on  
22 that?

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1           Mr. Tobin, please, would anything be  
2       construed by CSX -- with the most recent talks with CN  
3       and KCS, would that have any impact upon the -- of  
4       traffic running through there, excess traffic you  
5       might be running through there at a later date?

6           MR. TOBIN: Well, there hasn't been any  
7       talks recently about this particular topic as CSX and  
8       CN have been talking about other operational issues  
9       that they have. At least I'm led to believe that  
10      they've been talking.

11           As far as the later date goes, you know,  
12      IC is, at the moment, a stand alone railroad that the  
13      traffic that we bring to Conrail territory is via a  
14      competitive service option and obviously we'll hope  
15      that there will be more traffic down the road.

16           But the real key is here that we do  
17      provide the competitive service now to Conrail  
18      territory and we want to continue to provide it.

19           VICE CHAIRMAN OWEN: Now then how would  
20      you handle neutral dispatching if you didn't own the  
21      line and you had a neutral dispatcher just for that  
22      particular portion of a line?

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1 MR. TOBIN: Well, there are really two  
2 ways to do it. One way is to use our centralized  
3 dispatching control in Homewood. The reason why that  
4 would be preferable to CSX is because this is  
5 literally the throat of our system.

6 It's a backwater to them, and they frankly  
7 don't pay a lot of attention to it. We've got a heck  
8 of a lot of our trains running through this system, so  
9 it would be a primary focus.

10 If you felt uncomfortable with that, you  
11 know, a tower operator operationally is a little bit  
12 more expensive than doing centralized dispatching; but  
13 this is such an important link in our system that that  
14 would be an alternate that we would do if need be is  
15 have a guy there dispatching those trains because  
16 there are a heck of a lot of them.

17 VICE CHAIRMAN OWEN: I have no other  
18 questions.

19 CHAIRMAN MORGAN: Thank you.

20 Let me move to you, Mr. Morell.

21 Regarding the Ann Arbor first, your  
22 argument is loss of essential services. And obviously

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1 there's differing figures on the record about how much  
2 traffic is actually being diverted and so forth, but  
3 that's the argument is that you will be harmed and  
4 there will be a loss of essential services, --

5 MR. MORELL: That's correct.

6 CHAIRMAN MORGAN: -- is that correct?

7 Now, the State of -- I believe it's the  
8 State of Ohio has suggested help for you by way of a  
9 connection with the Wheeling and Lake Erie in the  
10 Toledo area.

11 Are you aware of that proposal?

12 MR. MORELL: Yes, I am, Madame Chairman.

13 CHAIRMAN MORGAN: And how do you feel  
14 about that proposal?

15 MR. MORELL: Well, certainly it would be  
16 of some benefit, but it's certainly not going to give  
17 Ann Arbor the additional revenues it needs to continue  
18 operating if it loses all the revenues that it  
19 projects. It will be some help, no doubt about it;  
20 but it's not the total solution.

21 CHAIRMAN MORGAN: Now this Chrysler  
22 contract which also is of concern to Ann Arbor in

1 terms of performance, as I understand it, --

2 MR. MORELL: That's correct.

3 CHAIRMAN MORGAN: -- the concern is that,  
4 if the merger is approved, that the -- somehow the  
5 performance of that contract will be hurt by the  
6 different routing.

7 Is that accurate?

8 MR. MORELL: This is somewhat of a  
9 sensitive topic, Madame Chairman. My client hasn't  
10 really authorized me to say very much on it. The  
11 problem with it is Ann Arbor was able to enter into  
12 this contract. It's a highly confidential contract.

13 There are termination provisions in it  
14 which my client does not want me to discuss in front  
15 of NS and CSX for quite obvious reasons. Ann Arbor's  
16 concern is that, post transaction, CSX and/or NS will  
17 be able to -- through certain mechanism, be able to  
18 induce the termination of that contract whereby then  
19 Ann Arbor stands to lose all of that traffic.

20 CHAIRMAN MORGAN: And, of course, this is  
21 an issue that has been discussed in documents, so I'm  
22 not raising something that has not already been

1 discussed.

2 But in terms of the changed environment,  
3 if you will, if we approve the merger, as I understand  
4 it, you feel -- or Ann Arbor feels that it has  
5 friendly connections now that it would not have post  
6 merger, is that --

7 MR. MORELL: That's exactly correct,  
8 Madame Chairman.

9 The major difference is today Ann Arbor --  
10 most of Ann Arbor's interline traffic, automotive  
11 traffic is with Conrail. It has a friendly connection  
12 with Conrail. It connects at two places with Conrail.  
13 And particularly for routes to Chicago, Conrail, like  
14 I say, has been a friendly connection.

15 Ann Arbor also interchanges traffic with  
16 NS. Post transaction, however, NS is going to take  
17 over essentially Conrail's automotive business in the  
18 Toledo area. It will become much more of a competitor  
19 with Ann Arbor.

20 Ann Arbor does not believe that NS will be  
21 as cooperative as Conrail is today.

22 CHAIRMAN MORGAN: Okay, now let me move to



1 New England Central.

2 Again, traffic diversion, loss of  
3 essential services?

4 MR. MORELL: That's correct, Madame  
5 Chairman.

6 CHAIRMAN MORGAN: Now in terms of other  
7 deals that have been cut -- and again, some of these  
8 deals are public and we don't have all of the details,  
9 but I'm going to ask you this question anyway.

10 NS has cut a deal with Gillford, and you  
11 do connect with Gillford, I believe?

12 MR. MORELL: That's correct, Madame  
13 Chairman.

14 CHAIRMAN MORGAN: Do you have any idea how  
15 you would fit into that scenario?

16 MR. MORELL: New England Central doesn't  
17 really believe it's going to benefit much at all from  
18 that arrangement. Again, the traffic that New England  
19 Central stands to lose, it's not going to be able to  
20 preserve with that arrangement.

21 New England Central has somewhat of a  
22 unique situation. It's not your typical traffic

1 diversions. About 50% of its traffic, which is forest  
2 products traffic, moves mainly from Canadian  
3 northwestern sources to the New England Central  
4 system.

5 From there, it's transloaded substantial  
6 distances. It goes to New York. Some of it moves all  
7 the way to Pennsylvania.

8 This is the traffic that NS and CSX will  
9 easily be able to divert. The movements from the  
10 southeast -- they have direct line service. They have  
11 single-line service. They said they were going to  
12 move the traffic up. They've told you that they're  
13 going to move all of this additional traffic. Well,  
14 people aren't going to consume more lumber. It's  
15 going to shift from somewhere, and the shift is from  
16 the New England Central.

17 The Guildford arrangement doesn't do  
18 anything for us in terms of preserving that traffic or  
19 giving us additional traffic. It may, to some extent,  
20 increase competition in the New England area. From a  
21 competitive standpoint, it's certainly an improvement.  
22 But from an essential service case for New England

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1 Central, it really does not do much, Madam Chairman.

2 CHAIRMAN MORGAN: And in terms of the  
3 issue of competition east of the Hudson, how is that  
4 going to -- how would that help your situation? I  
5 mean, I presume that New England Central would like to  
6 be that competition east of the Hudson. That would be  
7 one approach. But if you're not, if someone else  
8 happens to be, how would that affect you one way or  
9 the other?

10 MR. MORELL: That's correct, Madam  
11 Chairman. I mean, obviously, New England Central does  
12 not -- does not come here and propose to be the  
13 competitive solution east of the Hudson. Its case is  
14 essentially twofold. One is the loss of essential  
15 services. The remedy that we chose -- we looked at --  
16 to see how New England Central could recoup some of  
17 those losses was to get trackage rights primarily to  
18 Albany. We've also sought down to New York.

19 But it's mainly to connect with its  
20 subsidiary -- the CSO -- which would -- we project  
21 would generate about \$2 million additional revenues  
22 for the New England Central by just allowing us the

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1 short connection to the affiliate. It's not a long  
2 distance. By giving us access to Albany, we get  
3 access to all of the other carriers.

4 The competition argument we have made --  
5 we have joined in -- because we're in New England we  
6 joined in with most of the other parties who are still  
7 here claiming that this transaction will result in  
8 reduction in competition in the New England area. We  
9 agree with that argument. We have joined in it. We  
10 are not suggesting we are the solution. We have just  
11 suggested that if we get that access to Albany, we  
12 will solve some of those competitive problems.

13 CHAIRMAN MORGAN: But --

14 MR. MORELL: In other words -- excuse me.

15 CHAIRMAN MORGAN: But the competition is  
16 reduced because you don't have the friendly  
17 connections that you used to have? Is that the basis  
18 of that --

19 MR. MORELL: It's --

20 CHAIRMAN MORGAN: I mean, we've heard a  
21 lot about this merger being, you know, pro-  
22 competitive.



1 MR. MORELL: Exactly.

2 CHAIRMAN MORGAN: And --

3 MR. MORELL: Well, it's essentially a  
4 twofold argument, Madam Chairman. It's one -- and  
5 we're not the only ones making it. It's very similar  
6 to New York and other arguments that we've made. One  
7 is, is today Conrail -- Conrail has a monopoly up  
8 there, but Conrail is a friendly connection to many of  
9 the destinations where traffic moves from New England  
10 Central or from other locations.

11 Conrail is sort of an intermediate  
12 carrier. If a shipper on New England Central, or some  
13 other short line that connected with us or other  
14 railroads in New England Central, wants to ship to a  
15 destination in the southeast, it has to deal with  
16 Conrail certainly. But it has the ability to  
17 negotiate with NS and CSX.

18 Once CSX takes over New England, it will  
19 be the sole Class 1 carrier there. CSX will have no  
20 incentive whatsoever to give the shipper a decent or  
21 economic rate to connect with NS. It's going to want  
22 to keep that traffic on its system. So it's the loss

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1 of Conrail as an intermediate connection that -- that  
2 is one of the harms.

3 The second harm -- and, again, this is  
4 addressed by several other people. It has been  
5 addressed earlier today -- and that is that shippers  
6 on New England Central and nearby areas today compete  
7 with other shippers that are in the competitive access  
8 areas. They are going to be at a distinct  
9 disadvantage.

10 Applicants have stated that the service  
11 and the rate -- the service is going to improve; the  
12 rates are going to go down for those shippers in the  
13 competitive access areas. The fear of the shippers in  
14 New England is as their rates go down, New England's  
15 rates will go up. As the service improves in the  
16 competitive access areas, the service may deteriorate  
17 in other areas.

18 And so again, Madam Chairman, it's  
19 basically a two-part argument, and we're not the only  
20 ones making it.

21 CHAIRMAN MORGAN: Okay.

22 And, Mr. Rodriguez, just let me make sure

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1 I understand what you're arguing. Are you arguing  
2 that you are at a competitive disadvantage relative to  
3 other areas post-merger and that that is the relief  
4 that your -- that is why you're seeking relief?

5 MR. RODRIGUEZ: Well, that's part of our  
6 argument, Madam Chairman. We're arguing that, first  
7 of all, we are at a competitive disadvantage. Well,  
8 first of all, we are being deprived of direct access  
9 to over half of the Conrail territory, in that to go  
10 there will require a three-line movement and we're  
11 going to lose current and prospective business as a  
12 result of that.

13 Second, we're arguing that we're losing  
14 Conrail as a neutral intermediate carrier. It's the  
15 argument Mr. Morell was discussing a moment ago, but  
16 not only to southern connections, but also to western  
17 connections.

18 Like New England Central, about 80 percent  
19 of our business is in forest products. And we  
20 anticipate a natural tendency for southern connections  
21 to be favored, southern CSX connections to be favored  
22 over western connections as well.

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1           The third argument that we make is that  
2           our -- we are right at the dividing line between the  
3           competitive zone and the non-competitive zone. Our  
4           customers compete with industry in the North Jersey  
5           shared asset area. In fact, our own railroad-owned  
6           lumber distribution facility competes in the shared  
7           asset zone. Over 50 percent of the trucking is east  
8           of -- is west of the Hudson River.

9           We believe, because applicants have said  
10          so, that rates in the shared asset zone and the other  
11          competitive areas around Albany, around Maybrook, New  
12          York, right at our doorstep, are going to go down  
13          because there is competition there. As a result of  
14          that, our customers will be disadvantaged. And as a  
15          result of that, rail traffic will be diminished.

16          And, finally, we believe -- I guess  
17          there's a fourth prong to it. We believe that NS and  
18          CSX will be competitors to Housatonic Railroad for our  
19          carload business. And we believe that, first, because  
20          we know that they're going to compete with others more  
21          vigorously.

22          We know that NS can't get access to us, so

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1 they're going to compete by trying to get our business  
2 through -- to our customers through drayage, and  
3 otherwise, and they've stated that one of their goals  
4 is to divert traffic from other railroads. So we're  
5 fearful of that as well.

6 All we're trying to do is preserve the  
7 access that we now have -- neutral access to other  
8 connections -- and in a very unobtrusive manner,  
9 despite having CSX haul our traffic basically to  
10 Albany, and we also are asking for haulage in the  
11 other direction to New England Central and Palmer and  
12 Springfield terminal in Springfield.

13 But the Albany connection is the crucial  
14 one because that gives us access to Springfield  
15 terminal CP and NS, either directly or through CP or  
16 through ST.

17 CHAIRMAN MORGAN: Thank you.

18 MR. RODRIGUEZ: Thank you, Madam.

19 CHAIRMAN MORGAN: Questions?

20 VICE CHAIRMAN OWEN: It's fascinating  
21 listening to this because if I recall correctly,  
22 Conrail was, in the words of an awful lot of the

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1 people in the audience, arrogant, very high priced,  
2 and yet they were somewhat steady to deal with at  
3 times. And now I hear this CSX and NS is going to be  
4 so bad, and yet they're bringing competition and  
5 everything.

6 And I know that they may take some traffic  
7 away from you, but I'm just saying, now wait a minute  
8 here. We've been hearing this complaint for a long  
9 time about Conrail, and now all of a sudden we're  
10 hearing complaints about people that you really  
11 haven't even met, or you haven't even had a  
12 relationship with.

13 And I would hope that we can help you in  
14 some of these minor ~~ways~~ that -- as we identify some  
15 of these problems here. But I just wonder if we're  
16 kind of coming down here kind of portraying a picture  
17 that may not be there yet. I don't know. It does  
18 disturb me that we've heard two different stories here  
19 in the last -- I've only been here three and a half  
20 years, but I have heard an awful lot of shippers  
21 complain about Conrail. Some have said they were  
22 driven out of business. Some short lines tell you

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1 horror stories about them. And now the --

2 MR. RODRIGUEZ: Well, I --

3 VICE CHAIRMAN OWEN: I'm just trying to  
4 sort it out and read all of the documents here and  
5 say, okay --

6 MR. RODRIGUEZ: Well, I've heard --

7 VICE CHAIRMAN OWEN: -- who's telling the  
8 truth?

9 MR. RODRIGUEZ: I've heard some of those  
10 stories as well, but it hasn't been our experience.  
11 Our relationship with Conrail has had a glitch or two  
12 along the way, but generally it has been very good.  
13 They have been a partner.

14 Now, maybe it arises out of the particular  
15 circumstances of our relationship with them and our  
16 line sale agreement with them. But they could put us  
17 out of business in a heartbeat by simply diverting  
18 traffic, which they could do. I mean, they operate  
19 competing facilities to ours, and all they have to do  
20 is put lower rates to them and they could put us out  
21 of business. But they've been even-handed, they've  
22 been a benevolent monopolist, an even-handed

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1 monopolist.

2 If CSX or NS were acquiring -- if either  
3 one of those were acquiring the entire Conrail  
4 franchise, there would be other problems, but we  
5 wouldn't be here today with this complaint, and --

6 VICE CHAIRMAN OWEN: There would be people  
7 screaming all over the place.

8 MR. RODRIGUEZ: Indeed, there would. But  
9 we wouldn't be screaming at least on this grounds.  
10 But we believe that our relationship with Conrail is  
11 such that they have a fiduciary duty to treat us in a  
12 certain way as a partner because of the way our  
13 relationship has developed.

14 And we know, because we've been told by  
15 CSX, that they're not going to treat us that way, and  
16 we view the applicants as one applicant. I mean, it's  
17 CSX and NS. We can't look at them really separately.  
18 We have to look at them together, and the applicant is  
19 clearly going to be a competitor.

20 But all -- and that's great, and  
21 competition is great. And they're bringing  
22 competition, and that's wonderful. But we need to be



1     able to participate in that competition, and it's not  
2     very hard to let us do it. All we need is to get to  
3     Albany through haulage on some reasonable basis and  
4     bring competition a little bit east of the Hudson  
5     River.

6             VICE CHAIRMAN OWEN: I hope we can help  
7     you some way. I'm in favor of the short lines.

8             But anyway, that was all I have to say.  
9     Thank you.

10            MR. RODRIGUEZ: Thank you. I appreciate  
11     it.

12            CHAIRMAN MORGAN: Thank you all.

13            Let's go to the second half of this group  
14     -- Levin Sheys for Livonia, Avon & Lakeville Railroad  
15     Corporation; Charles Spitulnik, Philadelphia Belt Line  
16     Railroad Company; Eric Hocky, Reading, Blue Mountain &  
17     Northern Railroad Company; Mark Sidman, New York &  
18     Atlantic Railway; and William Mullins, Gateway Western  
19     Railway Company.

20            Mr. Sheys?

21            MR. SHEYS: Thank you. The Livonia,  
22     Avon & Lakeville Railroad is a short line that owns

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1 and operates the line between Genesee Junction Yard,  
2 which is just south of Rochester, New York, and  
3 Lakeville, New York, which is about 30 miles south of  
4 Rochester.

5 In 1997, the LAL was named Short Line  
6 Railroad of the Year by Railway Age Magazine. LAL  
7 seeks elimination of a paper barrier, or firewall,  
8 between itself and the Rochester and Southern  
9 Railroad. The firewall is located in Genesee Junction  
10 Yard, which, as I said, is the northern end point of  
11 the LAL.

12 I'd like to direct your attention to the  
13 top of the map shown. When the LAL was formed, it  
14 made an effort -- unsuccessful -- to buy the Erie  
15 Lackawanna line between Avon and Caledonia. The goal  
16 was to reach the B&O. This was not to be, and instead  
17 the USRA decided to have Conrail serve Avon from  
18 Rochester, inserting a firewall between the LAL and  
19 the Erie Lackawanna. The EL line on the north side of  
20 the firewall was later abandoned.

21 Now, if you could direct your attention to  
22 the bottom half of the map -- in '96, the LAL bought

1 Conrail's line between Avon and Genesee Junction yard.  
2 LAL did not buy that line for the 300 carloads, but  
3 because it was in such deplorable condition that the  
4 LAL's very existence was threatened. Not buying and  
5 rebuilding that line would have meant cutting the  
6 railroad off from the rest of the general railroad  
7 system. Thus, in 1996, the firewall was moved a few  
8 miles to the north.

9 I'd like to put up a diagram of the  
10 Genesee Junction firewall as it exists today for the  
11 balance of my comments.

12 Rochester and Southern and LAL both  
13 operate in Genesee Junction Yard, but neither has the  
14 right to interchange traffic with the other.  
15 Rochester and Southern connects with the southern Tier  
16 Line, which is going to NS. So what LAL wants is  
17 elimination of the paper barrier between it and the  
18 Rochester and Southern so it can offer its shippers  
19 access to NS.

20 LAL has identified three merger-related  
21 harms; any one of which would justify removal of this  
22 firewall. First, and perhaps most importantly, LAL

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1 will suffer the diversion of resources from its  
2 captive market to the competitive markets recreated by  
3 this merger. The applicants cite as a primary benefit  
4 of this merger the opening of competitive markets.

5 While CSX and NS are busy fighting for the  
6 business of the shippers in these reopened markets,  
7 shippers in captive markets, such as those served by  
8 LAL, will be left wanting. The customers who have the  
9 options will get the attention of CSX. They will, as  
10 Mr. Lyons said this morning, eat cake.

11 LAL shippers will be left wanting --  
12 wanting maintenance of interchange facilities;  
13 adequate locomotive, power, and crews; good car  
14 supply; wanting marketing personnel and systems; to  
15 provide quick rate quotes and service terms to  
16 customers; wanting customer service personnel to deal  
17 with car tracing, damage claims, billing, revenue  
18 settlement, and other real-world issues that are at  
19 the heart of railroad customer service.

20 Second, certain LAL traffic currently  
21 moving essentially in single-line service between LAL  
22 to short line and Conrail will be converted to LAL-

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1 CSX-NS joint line service. And this is not just any  
2 joint line service; this is joint line service between  
3 arch rivals.

4 Third, LAL also will lose Conrail as a  
5 neutral gateway, and I'm going to leave that to my  
6 brief.

7 So what we have is we have harms in this  
8 merger that the firewall will eliminate, and  
9 elimination of the firewall is an operational no-  
10 brainer. Both of the railroads are already in the  
11 yard.

12 One other point I'd like you to consider.  
13 The firewall that LAL wants taken out was created by  
14 the USRA to prop up a fledgling Conrail. The  
15 applicants now concede that the congressionally  
16 mandated goal of competition was sacrificed in  
17 creating Conrail, and ask the Board's approval to  
18 rectify that mistake with "the most pro-competitive  
19 restructuring in railroad history."

20 Here, the Board is being asked to approve  
21 the dismantling of Conrail, and LAL thinks it is only  
22 fair that in doing so the Board should also dismantle

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1 the firewall created at the formation of Conrail.

2 Thank you for listening.

3 CHAIRMAN MORGAN: Thank you.

4 Mr. Spitulnik?

5 MR. SPITULNIK: Thank you, Chairman  
6 Morgan, Vice Chairman Owen.

7 Good evening. My name is Charles  
8 Spitulnik, and I'm here today representing the  
9 Philadelphia Belt Line Railroad Company. My music is  
10 outside.

11 (Laughter.)

12 The Belt Line's request of this Board in  
13 this proceeding is for a specific affirmation of an  
14 existing right. We don't seek any new rights. We  
15 don't seek rights for any new carriers to get access  
16 to any new tracks. And we don't seek to expand the  
17 rights that we already have.

18 Our request is limited to seeking an order  
19 from this Board that confirms that approval of this  
20 transaction does not limit, preempt, or otherwise  
21 affect the continuing validity and viability of the  
22 Belt Line principle. To foreclose any possibility of

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1 an argument in the future, from CSX, Norfolk Southern,  
2 or Conrail, that the Board's approval of this  
3 transaction and the shared assets operating agreement  
4 preempts the Belt Line principle and preempts the Belt  
5 Line and its shippers' rights under the South  
6 Philadelphia agreement, and under the Belt Line  
7 principle, we seek affirmation here that this  
8 transaction effects no such preemption.

9 Why do we need this affirmation? Because  
10 the applicants' shared assets operating agreement  
11 appears, on its face, to give them an argument that  
12 they can ignore their obligations to comply with the  
13 Belt Line principle which is embodied in the South  
14 Philadelphia agreement.

15 The Belt Line is a Class 3 railroad  
16 chartered by the city of Philadelphia in 1890. It was  
17 chartered by the city to guarantee equal access to the  
18 waterfront in Philadelphia to all railroads that reach  
19 the Philadelphia market. The principle of equal  
20 access to its facilities has been the guiding light  
21 that has guided the Belt Line's operations since that  
22 time.

1           In 1914, pursuant to another ordinance of  
2           the city, all of the railroads that reach the  
3           Philadelphia market, including the B&O and the  
4           Pennsylvania Railroad -- two of the many predecessors  
5           to two of the applicants in this proceeding -- signed  
6           on to the South Philadelphia agreement.

7           Despite obstructions in its right-of-way,  
8           and despite efforts by Conrail to prevent the shippers  
9           on the Belt Line north from having equal access to all  
10          carriers serving the city of Philadelphia, the company  
11          has continued to operate with the Belt Line principle  
12          as its guide. This transaction threatens yet again  
13          the Belt Line's ability to continue fulfilling the  
14          mandate imposed by the city's ordinance and by its duty  
15          to the shippers who have located on the Belt Line's  
16          properties.

17          The shared assets operating area concept  
18          appears on its face to introduce an element of  
19          competition into the Philadelphia market where none  
20          has existed for many years due to Conrail's virtually  
21          exclusive grasp on rail transportation within that  
22          city. I suspect, Vice Chairman Owen, that some of the

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1 horror stories that you've heard about Conrail have  
2 come out of the mouths of the shippers on the Belt  
3 Line's facility.

4           However, with respect to the Belt Line,  
5 the agreement between Norfolk Southern and CSX to form  
6 this shared assets operating area demonstrates that  
7 the new owners of Conrail have every intention to  
8 exclude other carriers from the access to the Belt  
9 Line north facilities that lies at the Belt Line  
10 principle. The Belt Line North property is included  
11 with the shared assets operating area, and the  
12 agreement specifically says that no party can have  
13 access to, or operate over, or use any shared asset  
14 without the prior approval of CSX and Norfolk  
15 Southern.

16           What if a shipper on the Belt Line North  
17 wants to get access to CP at Philadelphia? What if  
18 the Belt Line North shipper wants to take advantage of  
19 -- or to reach Amtrak's facilities, to take advantage  
20 of the new Amtrak express authority that the Board has  
21 recently confirmed in a recent decision?

22           What if another carrier reaches an

1 agreement to reach Philadelphia and the shipper on the  
2 Belt Line North wants to have the ability to have its  
3 outgoing product or its incoming raw materials moved  
4 on that shipper? How will this happen in a way that's  
5 consistent with the Belt Line principle under the  
6 shared assets operating agreement?

7 Remember, the South Philadelphia agreement  
8 that confirmed the existence of the Belt Line  
9 principle in 1914 was based on a give and take between  
10 the carriers that signed on to that agreement. Each  
11 of them gave up some rights and assumed some  
12 obligations in exchange for guaranteeing equal access  
13 to the Belt Line's facilities that lies at the heart  
14 of that agreement.

15 Denying shippers the right to have equal  
16 access to all lines reaching the city would undo the  
17 bargain that is embodied in that agreement and the  
18 Belt line principle that it confirms.

19 The Belt Line is not asking this Board to  
20 allow other carriers to use Conrail's tracks, and it  
21 is not asking for an extension of any carrier's right  
22 to have physical access to the Belt Line. All we ask

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1 here is for confirmation that nothing -- nothing in  
2 the proposed transaction limits or preempts the  
3 application of the Belt Line principle, and that  
4 Conrail, CSX, and Norfolk Southern, in accordance with  
5 that principle, cannot assess discriminatory switch  
6 charges to bring traffic to or from the Belt Line  
7 properties or from any other carrier that reaches the  
8 Philadelphia market.

9 This affirmation of the Belt Line  
10 principle is consistent with the public interest. It  
11 will have no adverse effect on the applicants' ability  
12 to implement their transaction. It will impose no  
13 operating burden but will preserve the competitive  
14 rail transportation options of Belt Line shippers.

15 There is ample reason to grant the relief  
16 the Belt Line seeks here, and the Belt Line  
17 respectfully asks this Board to condition its approval  
18 of the proposed transaction with a specific  
19 affirmation of the continuing viability of the Belt  
20 Line principle.

21 Thank you very much.

22 CHAIRMAN MORGAN: Thank you.

1 Mr. Hocky?

2 MR. HOCKY: Chairman Morgan, Vice Chairman  
3 Owen, my name is Eric Hocky. I'm here today  
4 representing Reading, Blue Mountain & Northern  
5 Railroad Company, a Class 3 railroad operating through  
6 eight counties in northeast Pennsylvania -- around  
7 Reading and between Allentown and Scranton.

8 Two-hundred sixty of its 280 miles of rail  
9 lines have been purchased from Conrail. To justify  
10 this transaction, applicants claim that there will be  
11 enormous public benefits that will be created through  
12 the reintroduction of two-carrier competition in the  
13 northeastern United States and through the extended  
14 single-line service they will be able to offer.

15 And in considering whether to approve the  
16 transaction as a whole, the Board must, of course,  
17 look at the overall benefits being created. However,  
18 in considering conditions that have been requested,  
19 the Board should look at whether the claimed benefits  
20 are present in the region for whose benefit the  
21 condition is sought.

22 I'm going to focus this evening on one of



1 the two conditions sought by Reading, Blue Mountain,  
2 without meaning to diminish the importance of the  
3 other. The condition I'll focus on tonight is the  
4 removal of the contractual restrictions on Reading,  
5 Blue Mountain's ability to interchange with carriers  
6 other than Conrail or its successor.

7 The region served by Reading, Blue  
8 Mountain will not see any voluntary reintroduction of  
9 competition. Instead, an NS monopoly will substitute  
10 for the existing Conrail monopoly. Not only will  
11 there not be renewed competition, but the transaction  
12 will, instead, result in competitive harms. Reading,  
13 Blue Mountain shippers will lose the neutral  
14 connection that Conrail provided to NS and CSX.

15 They will also lose the single-line  
16 service that Conrail could offer throughout the  
17 northeast, in particular to New England and Montreal,  
18 where Conrail's lines are being allocated to CSX.

19 In our papers, we cite one example of the  
20 type of harm that can be expected by setting the  
21 specific movement of fly ash that moves currently in  
22 Conrail's single-line service from the New England

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1 Central to the Reading, Blue Mountain. If the  
2 transaction is approved, the Conrail portion of the  
3 line will be split between NS and CSX. The move is  
4 both price- and time-sensitive, and Reading, Blue  
5 Mountain believes the move will be adversely affected  
6 and probably lost.

7 I would like to simplify the Board's  
8 analysis of this proposed condition by pointing to a  
9 single page in this voluminous record that we believe  
10 demonstrates the appropriateness of the relief  
11 requested. NS's response to this particular claim is  
12 that they don't think that the move will be lost. NS  
13 asserts -- and I'll give you the pages -- page 428 of  
14 CSX/NS 177 -- and that's their witness, Mr. Mohan, he  
15 says Reading, Blue Mountain has the ability to remedy  
16 the situation and preserve the move because, "This  
17 movement can be made via New England Central, Canadian  
18 Pacific, Green Mountain Gateway Routing, using CP's  
19 effective commercial access to the RBMN."

20 Reading, Blue Mountain agrees that this  
21 routing would do the trick, but disagrees that CP has  
22 effective commercial access to Reading, Blue Mountain.

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1 This, of course, would change if the Board were to  
2 grant the relief requested and remove the restrictions  
3 RBMN has on interchanging with CPD&H or any carrier  
4 other than Conrail.

5 Removal of the restrictions would also  
6 restore to Reading, Blue Mountain shippers a neutral  
7 connection to CSX through CPD&H's existing rights to  
8 Philadelphia. This is precisely the type of situation  
9 in which relief has been granted in past transactions.  
10 In the cases of the Soo Line and the UP/CNW merger,  
11 and Grain Belt in the BN/Santa Fe merger, when  
12 contractual provisions restricted a carrier from  
13 responding to the harmful effects of the transaction,  
14 the Commission relieved the carrier from the  
15 restrictions.

16 Now, removal of this barrier does not take  
17 away any of the public benefits of the transaction.  
18 Even if NS would lose a little bit of revenue, that  
19 is, indeed, only a private benefit to NS. But it  
20 gives the benefit of competition to the shippers,  
21 which is the very justification that the applicants  
22 use to justify their entire case.

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1                   On any existing traffic diverted, it's not  
2 even necessarily true that Reading, Blue Mountain will  
3 receive any private benefit. It will only still  
4 receive an allowance from CPD&H or a division, and  
5 there's no guarantee that that will be any higher than  
6 what it gets now. It's merely seeking to preserve for  
7 its shippers the opportunities as they currently have.

8                   Because of the acknowledged uniqueness and  
9 unprecedented nature of this transaction, the Board  
10 should apply its condition powers to the fullest, and  
11 consider public interest in the broadest way possible.  
12 In this case, the Board can and should relieve  
13 Reading, Blue Mountain from the contractual  
14 restrictions that prevent it from responding to the  
15 harmful effects of the transaction.

16                   Thank you.

17                   CHAIRMAN MORGAN: Thank you.

18                   Mr. Sidman?

19                   MR. SIDMAN: Chairman Morgan, Vice  
20 Chairman Owen, my name is Mark Sidman. I'm appearing  
21 here today on behalf of the New York & Atlantic  
22 Railway. The New York & Atlantic is the freight

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1 operator on the lines of the busiest commuter railroad  
2 in the country -- the Long Island Railroad.

3 In 1996, in a competitive bid process, the  
4 Long Island awarded New York & Atlantic a 20-year  
5 exclusive freight franchise. Its train operations  
6 must be coordinated award the 4,000 passenger trains  
7 per week operated by the Long Island. In New York &  
8 Atlantic's 257-mile system, all but approximately 14  
9 miles are used for both passenger and freight  
10 operations.

11 The 11-mile Bay Ridge branch, which is the  
12 subject of my comments today, is the most significant  
13 of the freight-only segments. It is identified in  
14 blue hashing on the map before you.

15 New York & Atlantic's participation in  
16 this proceeding has been limited to opposing a request  
17 for conditions filed by a delegation of legislators  
18 led by New York Congressman Jerrold Nadler. The  
19 delegation proposes that approval of the primary  
20 application be conditioned on geographic expansion of  
21 the shared assets carrier to include operations east  
22 of the Hudson.

1           It requests that New York & Atlantic be  
2 required to provide the shared assets carrier with  
3 trackage rights over its Bay Ridge branch.

4           The delegation identifies two statutory  
5 provisions in support of its proposal regarding New  
6 York & Atlantic. One, the general power of the Board  
7 under Section 11324(c), to impose conditions on merger  
8 and consolidation transactions; and, two, the power to  
9 impose terminal trackage rights pursuant to Section  
10 11102.

11           The use of the general conditioning power  
12 in this context has been addressed in detail by the  
13 primary applicants. I will focus my comments today on  
14 the delegation's reliance on the terminal trackage  
15 rights provision. The delegation's filings in this  
16 proceeding contain no evidence whatsoever concerning  
17 the three statutory criteria that must be met before  
18 the Board exercises its power under Section 11102.

19           Those criteria are, one, that the line in  
20 question be a terminal facility or a main line a  
21 reasonable distance outside of a terminal facility;  
22 two, that use of the line in question for trackage

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1 rights is practicable and in the public interest; and,  
2 three, that the proposed trackage rights will not  
3 substantially impair the ability of the owning carrier  
4 to use the line for its own business.

5 The delegation did not submit any evidence  
6 to show that trackage rights are practicable on the  
7 Bay Ridge branch. In fact, the line has severe  
8 physical limitations that render it impracticable for  
9 such use. It is single track from end to end. It is  
10 not equipped with signals, nor is it dispatched. It  
11 has only one 15-car siding. Its condition permits  
12 maximum speeds of only 10 miles per hour.

13 The line is currently used only by the New  
14 York & Atlantic, and it was used only by the Long  
15 Island prior to New York & Atlantic's takeover of  
16 freight operations. Unlike other situations in which  
17 the Board has imposed terminal trackage rights, this  
18 is not a case that involves a line that currently  
19 supports multiple carrier operations, nor is it a case  
20 in which the track in question is in a yard or has  
21 obvious excess capacity.

22 The only evidence in the record shows that

1 the Bay Ridge branch is not suitable for joint use.

2 As to the statutory criteria that the  
3 proposed trackage rights not substantially impair the  
4 ability of the owner and carrier to use the line for  
5 its own business, the delegation is likewise silent.  
6 But the reality is is that the Bay Ridge branch is the  
7 only significant freight-only segment on New York &  
8 Atlantic's entire system.

9 It provides New York & Atlantic with its  
10 sole unrestricted access to the railroad's interchange  
11 points at Fresh Pond and Bush Junction. This is  
12 crucial because New York & Atlantic is subject to  
13 highly restrictive operating windows on the lines that  
14 it shares with the Long Island.

15 As a result, the Bay Ridge branch is one  
16 of the few places where New York & Atlantic has the  
17 operational flexibility to provide the type of service  
18 that will enable it to grow its business. It would  
19 work a substantial burden on the carrier to be forced  
20 to share that only unrestricted line with a third  
21 party.

22 The delegation's complete failure to

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1 address the statutory prerequisites to the imposition  
2 of terminal trackage rights is fatal to its attempt to  
3 turn the Bay Ridge branch into a multiple carrier  
4 line. The delegation did not file an application in  
5 these proceedings, and it has not met its burden of  
6 proof. New York & Atlantic respectfully requests that  
7 the Board deny the delegation's request for conditions  
8 insofar as it affects the Bay Ridge branch.

9 Thank you.

10 CHAIRMAN MORGAN: Thank you.

11 Mr. Mullins?

12 MR. MULLINS: Chairman Morgan and Vice  
13 Chairman Owen, my name is William Mullins. I'm with  
14 the firm of Troutman Sanders, and I represent Gateway  
15 Western Railway Company, which is a wholly-owned  
16 subsidiary of the Kansas City Southern.

17 Gateway's concerns are simple. There are  
18 two terminal trackage rights agreements between  
19 Conrail and Gateway -- trackage rights agreements that  
20 were voluntarily negotiated and involved terminal  
21 trackage in the east St. Louis area. Both of these  
22 agreements contain anti-assignment clauses, which

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1 prohibit Conrail from assigning these agreements to  
2 any other party without Gateway's consent.

3 In disregard of these contractual  
4 provisions, Conrail is proposing to assign these  
5 agreements to CSX over Gateway's objections. As  
6 authority for forcing such an assignment over  
7 Gateway's objection, CSX has requested the Board  
8 invoke Section 11321(a) to override the anti-  
9 assignment provisions of these agreements.

10 Gateway does not take issue with the  
11 Board's clear authority to override provisions of  
12 contracts. But it is important to note that such  
13 authority only applies when it is necessary to  
14 override a law or contract, such a trackage rights  
15 agreement, in order to carry out a transaction  
16 approved by the Board.

17 In determining whether an override is  
18 necessary, the Board has required previous merger  
19 applicants to exhaust other remedies first before  
20 invoking the Board's powers under Section 11321. In  
21 particular, the Board has held that an override cannot  
22 be considered necessary if a terminal trackage rights

1 remedy is available under Section 11102(a), which it  
2 is in this instance.

3 CSX should have first attempted to  
4 negotiate this issue with Gateway. Gateway offered to  
5 do so, but CSX showed no willingness to resolve  
6 Gateway's concerns about assignment. If negotiations  
7 had failed, CSX should have then filed a terminal  
8 trackage rights application, which they did not do.

9 Accordingly, CSX has not shown necessity  
10 and cannot simply rely on the general authority of  
11 Section 11321 to obtain access to Gateway's east St.  
12 Louis track. Furthermore, even if CSX could rely  
13 solely on the general authority of Section 11321, CSX  
14 has proffered absolutely no evidence to establish the  
15 necessity of overriding the anti-assignment clauses in  
16 Gateway's contracts.

17 The D.C. Court of Appeals has held that to  
18 satisfy the necessity test, a party must show, at the  
19 very least, that the modification of the contract in  
20 question is necessary to secure the public some  
21 transportation benefit flowing from the underlying  
22 transaction. CSX has made no such showing, while

1 Gateway has shown it will be harmed if CSX operates  
2 over its tracks.

3 In conclusion, because applicants of CSX,  
4 in particular, have ignored the legal requirements for  
5 an assignment of Conrail's trackage rights over  
6 Gateway's facilities, the Board should deny CSX's  
7 request for relief as it relates to Gateway.

8 Thank you.

9 CHAIRMAN MORGAN: Thank you.

10 Okay. Let me just see if I've got  
11 everybody's position. I think it's pretty clear.

12 First of all, Mr. Sheys, the key is the  
13 firewall. Get rid of the --

14 MR. SHEYS: Correct.

15 CHAIRMAN MORGAN: -- firewall; you're  
16 taken care of. Is that --

17 MR. SHEYS: That's correct.

18 CHAIRMAN MORGAN: -- a pretty good  
19 summary?

20 Mr. Spitulnik, you are concerned the Belt  
21 Line principle will get somehow inadvertently  
22 overridden? So you don't want --

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1 MR. SPITULNIK: Preempted, but that's  
2 correct. 11321 seems to have been a big issue here  
3 today. That's correct.

4 CHAIRMAN MORGAN: So you don't want that  
5 to happen?

6 MR. SPITULNIK: Exactly correct.

7 CHAIRMAN MORGAN: By inadvertence or  
8 otherwise.

9 MR. SPITULNIK: Or otherwise.

10 CHAIRMAN MORGAN: Mr. Hocky, your concern  
11 is paper barriers --

12 MR. HOCKY: Yes.

13 CHAIRMAN MORGAN: -- and the removal of  
14 that restriction. And I don't know -- you probably  
15 are aware that in another proceeding we have directed  
16 the smaller railroads and the larger railroads to meet  
17 and discuss short line issues such as paper barriers.

18 MR. HOCKY: Yes. And I understand, at  
19 least as of last Friday, that there was no agreement,  
20 and that the --

21 CHAIRMAN MORGAN: Right.

22 MR. HOCKY: -- Short Line Association and

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1 that the AAR may be submitting separate proposals on  
2 that. And we're not -- in this case, we're focused  
3 more on a particular barrier as opposed to paper  
4 barriers --

5 CHAIRMAN MORGAN: Barriers in general.

6 MR. HOCKY: -- generically, which will e  
7 addressed in 575.

8 CHAIRMAN MORGAN: And then, Mr. Sidman,  
9 you are obviously opposed to the east of the Hudson  
10 solution that would involve the line that you operate.

11 MR. SIDMAN: That's correct.

12 CHAIRMAN MORGAN: And then, Mr. Mullins,  
13 you do not want an override of the trackage rights or  
14 the terminal arrangement that exists today.

15 MR. MULLINS: That's correct.

16 CHAIRMAN MORGAN: Does that -- okay.  
17 Thank you.

18 VICE CHAIRMAN OWEN: I thought you did an  
19 excellent job.

20 (Laughter.)

21 I thought you did an excellent job of  
22 summarizing. I was going to compliment Mr. Mullins on

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1 his numbers today, that he had them all down pat.

2 MR. MULLINS: Well, than you. I  
3 appreciate that. I had a lot of time today to think  
4 about those.

5 (Laughter.)

6 CHAIRMAN MORGAN: And it took me, what, a  
7 minute to --

8 (Laughter.)

9 VICE CHAIRMAN OWEN: No, I have no other  
10 questions of them. I'm fairly comfortable with it.

11 CHAIRMAN MORGAN: Thank you all very much.

12 Next we will move to the panel of  
13 representatives from New Jersey and New York. First  
14 of all, State of New York, William Slover; Charles  
15 Spitulnik, with the New York City Economic Development  
16 Corporation; John Maser for Erie-Niagara Rail Steering  
17 Committee; Doug Midiff --

18 MR. MIDKIFF: Midkiff.

19 CHAIRMAN MORGAN: -- Midkiff. Well,  
20 that's -- the K is not there on my sheet, so --

21 MR. MIDKIFF: Is that right? Just like  
22 Midriff only it's a K instead of the R.

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1 CHAIRMAN MORGAN: Okay. Well, Midkiff, I  
2 got it. Genesee Transportation Council, and then Paul  
3 Lamboley, with Southern Tier West Regional Planning  
4 and Development Board.

5 And I see Congressman Nadler has joined us  
6 again. We must have a good shown down here.

7 (Laughter.)

8 MR. SLOVER: May it please the Board, my  
9 name is William Slover, and I'm appearing here this  
10 evening on behalf of the people from the State of New  
11 York. They are acting through the State Department of  
12 Transportation.

13 New York has been an active participant in  
14 these proceedings. We have presented or sponsored  
15 over 15 witnesses, and collectively we oppose the  
16 transaction which the applicants propose, unless it is  
17 conditioned by six specific conditions which we  
18 outline in our pleadings.

19 The two most important and crucial  
20 conditions to the State of New York are the so-called  
21 pro-competitive conditions -- namely, conditions which  
22 will reintroduce competition into two of the state's

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1 most important regions, namely the New York City area  
2 east of the Hudson River, between Brooklyn, New York,  
3 and Albany, and the Buffalo, New York, area.

4 Now, at the table here are regional  
5 counsel for each of these constituencies, and I don't  
6 intend to overlap or go into their territories. I'll  
7 leave the details to those people.

8 But there is a common issue which  
9 underlies all of the pro-competitive requests, and  
10 especially the requests of the State of New York. And  
11 that is the dispute between the state and the  
12 applicants as to whether this agency has the authority  
13 and/or the obligation to impose the conditions that we  
14 seek.

15 We all agree, basically, that the public  
16 interest is the determinant factor, but that's the end  
17 of the agreement. We disagree on what the public  
18 interest/obligation requires and authorizes you to do.  
19 The state takes a broad view of the public interest.  
20 We go back to the Supreme Court cases as early as  
21 1910, and the Old Rock Island case, where Chief  
22 Justice Hughes said that the public interest is the

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1       broadest delegation that the Congress can give. And  
2       it is given to this agency because you have to deal  
3       with broad and complex problems.

4               And so the public interest standard is  
5       about as broad a one as the Congress can grant, and  
6       there are really few, if any, restrictions recorded on  
7       the public interest standard.

8               Now, we have heard that this is a unique  
9       transaction, and we believe that in this particular  
10      transaction the public interest has to be illuminated  
11      by the rail transportation policy which is set forth  
12      in the statute. And that policy, which the Board  
13      visited in the UP/SP, 15 ingredients, and I believe  
14      there you noted that, taken as a whole, those  
15      ingredients are pro-competitive.

16              So we think that the policy of the  
17      Congress, while at one time favoring consolidations of  
18      railroads, it is now extraordinarily pro-competitive.

19              And, finally, applicants themselves, or at  
20      least one applicant, has a principle of balanced  
21      competition, and one of those principles is that every  
22      major transportation market ought to have two large

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1 railroads serving it. So we believe that there is  
2 full and ample justification and authority to impose  
3 these pro-competitive conditions.

4 Now, on the other hand, the applicants  
5 take a more narrow view. They assert in their  
6 evidence, and in their testimonies, that no -- I  
7 believe they say the fundamental point is that no  
8 company, in any industry, would go out as they have,  
9 make an investment, bring new competition, if some  
10 government agency could come along and require them to  
11 extend that competition to other customers. And  
12 that's basically their position. It's at 122 of their  
13 rebuttal, and it was, I think, fairly well stated this  
14 morning.

15 Now, the State of New York submits that  
16 the fundamental flaw in that position is that the  
17 railroads are not any company in any industry. They  
18 are a unique industry which is infused with the public  
19 interest, and they are given certificates of public  
20 convenience and necessity which insulate them from  
21 competition. They are immune from the antitrust laws.  
22 That's why they are here before you.

1           They are also insulated from many state  
2           and federal laws. Those are very real and important  
3           privileges that they get for operating in the railroad  
4           industry.

5           Conversely, unlike other companies and  
6           other industries, they have an obligation to the  
7           public interest. And in this instance, we feel that  
8           that obligation clearly requires them to extend  
9           competitive service to the area east of the Hudson  
10          River and to the Buffalo area, based upon the public  
11          interest standard.

12          Now, the state has -- as I say, is  
13          supporting the east of the Hudson trackage rights, and  
14          it's supporting the extension of the shared asset area  
15          to Buffalo or, alternatively, reciprocal switching  
16          rights throughout the Buffalo area. The one or two  
17          other points which will not be covered here by the  
18          other panel members are -- one is passengers.

19          Hundreds of thousands of people a day take  
20          the trains in New York. The record shows that New  
21          York has invested over a billion dollars in railroad  
22          facilities in the state; \$600 million of that is cash.

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1 And the great bulk of it is dedicated towards the  
2 movement of people.

3 And we are terribly concerned over the  
4 implications of the petitioning of Conrail and feel  
5 very strongly that the three-year oversight provision,  
6 which the carriers are willing to do, is totally  
7 inadequate when it comes to the passenger interest in  
8 New York. And, therefore, we are seeking a 10-year  
9 oversight provision. We believe that the movement of  
10 people in and through the State of New York is of  
11 sufficient importance that the public interest  
12 requires a 10-year oversight provision.

13 And, finally, for the same reasons, New  
14 York, as our pleadings reveal, came to the rescue of  
15 the railroads many years ago when the Reagan  
16 administration was doubtful about Conrail, when the  
17 Penn Central was going bankrupt, the State of New York  
18 stood up at a time when New York City itself was  
19 suffering great financial problems and no one would  
20 come to the New York City's rescue. But the state put  
21 a great deal of money into the railroads in the state,  
22 and we feel very strongly that we -- albeit not

1 stockholders in Conrail, we are certainly stakeholders  
2 in Conrail.

3 And so when someone comes along and pays  
4 the price that they paid for Conrail, and if they are  
5 not able to realize their ambitions to grow the  
6 business, New York continues to largely remain  
7 captive. While we may be captive to two railroads  
8 instead of one, we are still captive; and, therefore,  
9 we are greatly concerned about the premium, the  
10 acquisition premium, and we are concerned that it  
11 might be collected from the captured shippers of the  
12 State of New York.

13 So, for that reason, we join those parties  
14 who ask the Board to prevent the railroads from  
15 recording these assets at these escalated values for  
16 the purposes of captive shipper ratemaking and the  
17 jurisdictional threshold.

18 I thank you. It's been a long day.  
19 You've been very patient. Thanks a lot.

20 CHAIRMAN MORGAN: Thank you.

21 Mr. Spitulnik?

22 MR. SPITULNIK: Good evening again. I