STB FD 33388 2-23-98 E 185914

185914

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

Re: STB Finance Docket No. 33388, *CSX Corporation, et al, Norfolk Southern Corporation, et al. -- Control And Operating Leases/Agreements --Conrail Inc., et al.*

Dear Secretary Williams:

Please find enclosed for filing in the above-referenced proceeding an original and twenty-five (25) copies of the Brief on behalf of AK Steel Corporation, which has been designated as AKSC-9 (Highly Confidential Version) and an original and twenty-five (25) copies of the Brief of AK Steel Corporation, which has been designated as AKSC-10 (Public Version). A copy of this filing is also enclosed on a 3.5-inch diskette in WordPerfect 7.0 format.

A copy of the Public Version is being served on all parties of record. If any party desires to receive a copy of the Highly Confidential Version and has signed the Highly Confidential Undertaking, they may obtain a copy of the Highly Confidential Version by contacting Aimee DePew at (202) 371-9500. Copies of both the Public version and the Highly Confidential version are being hand-delivered to Applicant's counsel.

Respectfully submitted,

Frederic L. Wood
Attorney for AK Steel Corporation

ENCLOSURES
0400-020

cc: All Parties of Record

STB FD 33388 2-23-98 E 185913

185913

JSSI - 8

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BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

CSX CORPORATION AND CSX TRANSPORTATION, INC.,
NORFOLK SOUTHERN CORPORATION AND
NORFOLK SOUTHERN RAILWAY COMPANY

— CONTROL AND OPERATING LEASES/AGREEMENTS —

CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION

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BRIEF

submitted on behalf of

JOSEPH SMITH & SONS, INC.

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February 23, 1998

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

CSX CORPORATION AND CSX TRANSPORTATION, INC.,
NORFOLK SOUTHERN CORPORATION AND
NORFOLK SOUTHERN RAILWAY COMPANY

— CONTROL AND OPERATING LEASES/AGREEMENTS —

CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION

BRIEF

submitted on behalf of

JOSEPH SMITH & SONS, INC.

Joseph Smith & Sons, Inc. ("JS&S") hereby submits this Brief in support of its Comments and Request for Conditions (JSSI-5) on the application of CSX Corporation and CSX Transportation, Inc. ("CSX"), Norfolk Southern Corporation and Norfolk Southern Railway Company ("Norfolk Southern"), and Conrail, Inc. and Consolidated Rail Corporation ("Conrail") (collectively referred to as "Applicants") to allow CSX and Norfolk Southern to acquire control of Conrail and to divide the ownership, use and operation of Conrail's assets between them. JS&S seeks to preserve the potential for two carrier access that it has today.

Statement of Facts

JS&S, a scrap metal processor, operates its primary facility at Capital Heights, Maryland. (Verified Statement of Robert Paul Smith, JSSI-5, p. 2) This facility receives direct rail service only from Conrail, although it is bounded by a total of three rail lines. (*Id.*, pp. 2-3) In addition to the Conrail line, which borders the south side of the facility, a CSX line parallels the Conrail line on the South side before crossing Conrail and skirting the eastern border of the Capital Heights facility. (*Id.*, p. 3) Also, Amtrak's Northeast Corridor line runs along the north side of the facility. (*Id.*) Thus, although JS&S is served only by Conrail, it easily could connect with either of the other two lines via a very short build-out.

In fact, JS&S has used the threat of a build-out to CSX as leverage for obtaining competitive transportation rates from Conrail. CSX proposed a build-in to the Capital Heights facility in both 1991 and 1992 at an estimated cost of (*Id.*) The build-in was not constructed because JS&S was able to leverage the threat of a build-in to obtain competitive rates from Conrail That leverage continued to exist until approximately one year ago when the merger plans between Conrail and CSX became public. (*Id.*) Because CSX will acquire the Conrail line after the break-up of Conrail, JS&S will lose its build-out option as competitive leverage.

JS&S also has a second build-in, build-out option to Amtrak's Northeast Corridor line. (*Id.* at 4) In fact, aerial photographs show that there once was a connection to the JS&S facility off of this line that could be reestablished. JS&S has not used this threat as leverage recently because Conrail possesses the operating rights over this line. After this transaction is complete, however, Norfolk Southern will acquire those rights.

JS&S relies upon rail transportation for of its transportation needs at Capital Heights. (*Id.* at 2) Currently, JS&S tenders approximately railcars per week. (*Id.*) Trucks are not an economic alternative for this traffic except for hauls under 150 miles in distance. (*Id.*) Trucks also have lower load capacities, require more paperwork, impede the traffic flow in the facility and require immediate loading and unloading. (*Id.*) No other mode of transport is available at Capital Heights. Therefore, the only competitive leverage that JS&S has over Conrail's rates is its build-out options, which will be eliminated by the proposed transaction.

Argument

JS&S requests the imposition of two very basic conditions upon this transaction. First, JS&S asks the Board to permit Norfolk Southern to serve the Capital Heights facility via a build-in, build-out from the current CSX line, over which Norfolk Southern already has trackage rights under the terms of the transaction. Second, JS&S asks the Board to permit Norfolk Southern to serve the Capital Heights facility via any future interconnection that may be constructed between JS&S and Amtrak's Northeast Corridor line, over which Norfolk Southern will acquire Conrail's existing operating rights. These conditions will preserve the competitive options that are available to JS&S today.

In recent merger proceedings, the Board consistently has protected build-in, build-out options with the same commitment it has given to protecting "2-to-1" points. *See generally, Burlington Northern Inc. and Burlington Northern Railroad Co. -- Control and Merger -- Santa Fe Pacific Corp. and The Atchison, Topeka and Santa Fe Railway Company*, ICC Finance Docket No. 32549 (served Aug. 23. 1995) [*BNSF Control*]; *Union Pacific Corp., et al. -- Control and Merger -- Southern Pacific Rail Corp., et al.*, STB Finance Docket No. 32760, (served Aug. 12, 1996) [*UP/SP Control*]. Just as "2-to-1" shippers have had

access to a second carrier preserved by trackage rights, build-out shippers have had access to the build-out interconnection point preserved by trackage rights. *BNSF Control*, slip op. at 98; *UP/SP Control*, slip op. at 146, 185, 188. The rationale for doing so is quite justified since a build-in, build-out point is a potential "2-to-1" point that enjoys a comparable status because the threat of competition via a build-in can be just as effective as actual competition. *Union Pacific Corp. - Control - Missouri-Kansas-Texas Railroad Co.*, 4 I.C.C.2d 409, 476-77 (1988). Both are forms of horizontal competition.

In the recent *UP/SP Control* decision, the Board went so far as to permit BNSF to build-in to any facility along its trackage rights over UP and SP lines. *UP/SP Control* at 146. The Board no longer even requires a showing of economic or physical viability before imposing a build-in, build-out condition. Rather, it has concluded that such a determination is unnecessary since a build-in, build-out will be constructed only if it truly is both economically and physically viable. *Id.*

Applicants have not challenged a single fact presented by JS&S. *See generally*, CSX/NS-176 at 75-74, 521-22. For example, they do not contend that a build-in from either CSX or Amtrak is not viable or uneconomic. Nor do they dispute that JS&S used a proposed CSX build-in to leverage competitive rates from Conrail. They also have not disputed JS&S' heavy dependence upon rail transportation and the non-competitiveness of other modes. These facts, therefore, must be accepted as true.

Instead, Applicants contend only that JS&S will not suffer any competitive harm as a result of the transaction. *Id.* at 521-22. They base this contention on the fact that CSX will provide reciprocal switching for Norfolk Southern at the Capital Heights facility at rates lower than Conrail currently provides for CSX. This fact, however, will not restore JS&S to its pre-merger competitive position.

Reciprocal switching is not equivalent to direct rail access. A location can be closed to reciprocal switching at any time and/or the switching rates can be increased to anti-competitive levels. The Capital Heights facility will be kept open to reciprocal switches only as a result of the settlement agreement between Applicants and The National Industrial Transportation League. This agreement, however, only obligates the Applicants to provide reciprocal switching at a designated rate for five years, after which CSX will be free to raise the switch rate or close the Capital Heights facility to reciprocal switching altogether. In stark contrast, a build-in option is forever, or at least as long as the build-in carrier or its successor operates over a nearby line, which in all probability will be significantly longer than five years. Also, the exercise and preservation of a build-in option lies with the shipper and the competing carrier, not with the incumbent carrier. Thus, reciprocal switching cannot effectively replace JS&S' lost build-in, build-out option.

Applicants also allege that a condition is unnecessary to protect the build-in, build-out option to Amtrak's Northeast Corridor line. In fact, Applicants state, "the Transaction will not affect JS&S' rights with respect to constructing a connection to the Amtrak line [because] NS will inherit the same operating rights that Conrail has today . . . ." *Id.* at 522. JS&S believes this concession by the Applicants is correct but, in order to avoid uncertainty that could lead to a future and potentially costly dispute, seeks clarification of this fact from the Board in the form of a condition.

When a transaction threatens harm to the public interest, conditions should be imposed if they are operationally feasible, ameliorate or eliminate the harm threatened by the transaction, and they are of greater benefit to the public than they are detrimental to the transaction. *Union Pacific Corp., et al. -- Control -- Missouri Pacific Corp.*, 366 I.C.C. 462, 564 (1982). The conditions sought by

JS&S satisfy all of these factors. Both conditions simply would preserve not only existing competition, but would preserve precisely the same build-ins that exist today. Thus, the conditions clearly are operationally feasible and eliminate the threatened harm.

Applicants have not alleged that the conditions would be detrimental to the transaction because, to do so, would be disingenuous. In fact, both conditions are identical to the build-out condition preserved for Phillips Petroleum Company in *BNSF Control*, slip op. at 98. Like the Phillips build-in carrier, the JS&S build-in carrier, Norfolk Southern, already possesses trackage rights past the interconnection points. Thus, the trackage rights operation itself cannot be considered detrimental. Furthermore, if construction of an interconnection was not detrimental to the *BNSF* transaction, there certainly should be no detriment to the Applicants in this transaction. The public benefit has been definitively established and there appears to be little, if any, detriment to weigh against the requested conditions.

Conclusion

Wherefore, Joseph Smith & Sons, Inc. respectfully requests that the Board impose the following conditions upon the proposed transaction in order to ameliorate the transaction's anticompetitive effects:

1. Permit Norfolk Southern to build-in to JS&S from its trackage rights over the CSX line that runs along the southern and eastern edges of the JS&S Capital Heights, Maryland facility.

2. Permit Norfolk Southern to provide service to the JS&S Capital Heights, Maryland facility via any future interconnection that may be constructed between JS&S and Amtrak's Northeast Corridor line, which runs along the northern edge of the facility.

Respectfully submitted,

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Attorneys for Joseph Smith & Sons, Inc.

February 23, 1998

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing BRIEF OF JOSEPH SMITH & SONS, INC. (REDACTED VERSION) has been caused to be served by first class mail, postage prepaid, on all parties of record in this proceeding this 23rd day of February, 1998 and a copy of the foregoing BRIEF OF JOSEPH SMITH & SONS, INC. (HIGHLY CONFIDENTIAL VERSION) has been caused to be served by hand delivery on the applicants in this proceeding this 23rd day of February, 1998.

Aimee L. DePew

STB FD 33388 2-23-98 E 185905

185905

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Re: STB Finance Docket No. 33388, *CSX Corporation, et al, Norfolk Southern Corporation, et al. -- Control And Operating Leases/Agreements --Conrail Inc., et al.*

Dear Secretary Williams:

Please find enclosed for filing in the above-referenced proceeding an original and twenty-five (25) copies of the Brief of Joseph Smith & Sons Incorporated, which has been designated as JSSI-7 (Highly Confidential version), and an original and twenty-five (25) copies of the Brief of Joseph Smith & Sons Incorporated, which has been designated as JSSI-8 (Public version). A copy of the Highly Confidential version of the filing is also enclosed on a 3.5-inch diskette in WordPerfect 7.0 format.

A copy of the Public version is being served on all parties of record. If any party desires to receive a copy of the Highly Confidential version and has signed the Highly Confidential Undertaking, they may obtain a copy of such version by contacting Aimee DePew at (202) 371-9500. Copies of both the Public version and the Highly Confidential version are being hand-delivered to Applicants' counsel.

A copy of this filing is also enclosed on a 3.5-inch diskette in WordPerfect 7.0 format.

Respectfully submitted,

Jeffrey O. Moreno
Attorneys for Joseph Smith & Sons Incorporated

ENCLOSURES
4899-020

cc: All Parties of Record

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ERIC M. HOCKY

February 23, 1998

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Surface Transportation Board
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E

Re: Finance Docket No. 33388
CSX Corporation and CSX Transportation, Inc.
Norfolk Southern Corporation and
Norfolk Southern Railway Company
--Control and Operating Leases/Agreements--
Conrail Inc. and Consolidated Rail Corporation
BRIEF ON BEHALF OF READING BLUE MOUNTAIN & NORTHERN RAILROAD COMPANY (RBMN-9)

Dear Sir or Madam:

Enclosed for filing in the above referenced proceeding are an original and 25 copies of Brief on Behalf of Reading Blue Mountain & Northern Railroad Company (RBMN-9), along with a diskette containing the document in a format (WordPerfect 6.1) that can be converted into WordPerfect 7.0.

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Kindly time stamp the enclosed extra copy of this letter to indicate receipt and return it to me in the self-addressed envelope provided for your convenience.

Respectfully,

ERIC M. HOCKY

Enclosures

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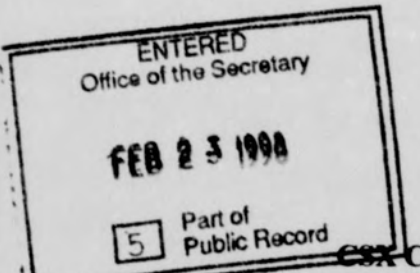
RBMN-9

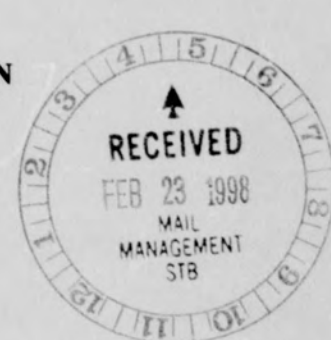


BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 33388

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

**BRIEF ON BEHALF OF
READING BLUE MOUNTAIN & NORTHERN
RAILROAD COMPANY**



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Dated: February 23, 1998

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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 33388

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

**BRIEF ON BEHALF OF
READING BLUE MOUNTAIN & NORTHERN
RAILROAD COMPANY**

This Brief is filed on behalf of Reading Blue Mountain & Northern Railroad Company ("RBMN") in support of its request that any approval of the proposed acquisition of control of Conrail by CSX and NS, and the subsequent division of Conrail's assets by and between, and for the benefit of, CSX and NS,[1] be conditioned upon the following conditions:

(1) that the Purchase and Sale Agreement dated August 19, 1996 (the "Purchase Agreement"), between Conrail and RBMN for the purchase of the Lehigh Division, and the related deed, be amended so as to remove or modify the "penalties" imposed on RBMN for traffic interlined with carriers other than Conrail which effectively preclude RBMN from handling such traffic; and

---

[1] "Conrail" refers to Conrail, Inc. and Consolidated Rail Corporation and their wholly owned subsidiaries. "CSX" refers to CSX Corporation and CSX Transportation, Inc. and their wholly owned subsidiaries . "NS" refers to Norfolk Southern Corporation and Norfolk Southern Railway Company and their wholly owned subsidiaries.

(2) that Delaware & Hudson Railway Company, Inc. ("DHRC") be permitted to access its existing trackage rights from the lines of RBMN in Reading, Pennsylvania, subject to an agreement being reached between DHRC and RBMN to allow DHRC to operate over RBMN's Reading Division.

STATEMENT OF THE CASE

In response to the primary transaction -- the joint acquisition of control of Conrail by NS and CSX, and the subsequent allocation of Conrail's assets -- RBMN filed comments and evidence in support of its contention that the region that it serves will not enjoy the benefits of the transaction, and in fact will be harmed thereby, and that the imposition of the conditions requested by RBMN are necessary to ameliorate the harmful effects of the transaction. RBMN-5. Applicants have opposed the relief sought by RBMN. CSX/NS-176 at 384-388.

STATEMENT OF FACTS

A. Existing Transportation Patterns

RBMN is a Class III railroad that currently operates a "Reading Division" of approximately 176 miles, and a "Lehigh Division" of 104 miles, all of which are located in Pennsylvania. The majority of the lines were purchased from Conrail in two separate purchases -- the Reading Division in 1990, and the Lehigh Division in 1996. Together, RBMN's lines serve

eight counties in northeastern Pennsylvania.[2] Muller V.S. at 1-2.[3] In 1996, RBMN handled approximately 14,000 carloads and had freight revenues of approximately $6,000,000. Muller V.S. at 2.

RBMN's two divisions are physically separated. However, in connection with the purchase of the Lehigh Division, RBMN obtained trackage rights from another short line carrier, C&S Railroad Corporation, which serve to connect the Reading Division and the Lehigh Division at Packerton Junction.[4] Muller V.S. at 2.

The only line haul connection for the Reading Division is with Conrail in Reading. The Lehigh Division connects with Conrail in Lehighton (outside of Allentown) and with DHRC at Taylor Yard (outside of Scranton).[5] All of the lines of Conrail that connect with RBMN are to be allocated to NS; CSX will have no direct access to RBMN or the shippers that it serves.

---

[2] The Counties are Schuylkill, Berks, Northumberland, Columbia Carbon, Lackawanna, Luzerne and Wyoming. For ease of reference, the map that was attached to the Muller V.S. is reproduced at the end of this Brief.

[3] "Muller V.S." refers to the Verified Statement of Andrew M. Muller, Jr. attached to RBMN-5.

[4] The actual connection is currently made over incidental trackage rights granted by Conrail in connection with the Lehigh Division purchase. Conrail has the right to determine which revenue traffic may move under those trackage rights. RBMN is in the process of obtaining rights to nearby property which would allow it to construct a connecting track over property formerly owned by Central Railroad of New Jersey ("CNJ") and would avoid the need for the Conrail trackage rights to connect the Divisions.

[5] The Reading Division also connects with another Class III railroad C&S Railroad ("C&S"); however, C&S's only other connection is also with Conrail. The Lehigh Division also has Class III connections with the Delaware-Lackawanna Railroad ("DL") and with the Luzerne & Susquehanna Railroad ("L&S").

Since the acquisition of the Lehigh Division, RBMN's operations over the Lehigh Division have been part of the "Conrail Express" program. The program was begun by Conrail as an attempt to improve the seamless nature of the service provided between Conrail and its shortline connections. As part of the program, Conrail provides discounts which enable RBMN to reduce the cost of its services to its customers. Muller V.S. at 5-6.

1. *Reading Division*

RBMN serves approximately 45 customers on its Reading Division. The Reading Division is largely dependent on the movement of anthracite coal. Almost 100% of all the anthracite coal mined in the United States originates in the area served by the Reading Division and moves over RBMN. After many years of lean demand, anthracite is now becoming more desirable (especially in certain export markets). RBMN expects to handle approximately 8,000 carloads of anthracite coal in 1997, and more in succeeding years. All of the coal now moves from RBMN to Conrail at Reading for further handling to a variety of customers throughout the United States and Canada, and to Baltimore for export. RBMN participates in the pricing, acts as a line haul carrier in the contracts covering coal moves, and receives an agreed-upon division. Muller V.S. at 3.

RBMN also expects to handle an additional 6,000 carloads of other merchandise on the Reading Division. All of the traffic currently moves through Reading to or from Conrail. On this traffic, RBMN receives allowances from Conrail for its portion of the move. *Id.*

2. Lehigh Division

Although the Lehigh Division connects with DHRC and two shortlines in the Scranton area, RBMN's right to connect from the Lehigh Division with carriers other than Conrail is

severely restricted, and all of its traffic currently moves to and from its Conrail connection at Lehighton. The Lehigh Division is not dependent on the transportation of anthracite coal. Instead, this Division is expected to provide services to approximately 15 shippers in 1997 (the first full year under RBMN control), and to handle approximately 4,000 carloads of miscellaneous types of merchandise. Additionally, RBMN will handle over the Lehigh Division approximately 2,000 carloads of overhead traffic moving between Conrail and the two short lines, LS and DL, at its northern end, for which it is paid a haulage fee by Conrail. Muller V.S. at 4. The Lehigh Division lines also serve as a vital link in DHRC's route structure. DHRC's traffic moves from Buffalo and New England to Scranton, and then over the Lehigh Division to Allentown. From Allentown the traffic moves either east to Oak Island, New Jersey or south through Reading to Philadelphia.[6] The trackage rights fees generate approximately $85,000 per month in income for RBMN. Muller V.S. at 9.

3. Routing Restrictions

As a requirement of the purchase of the Lehigh Division, Conrail required RBMN to agree to pay a substantial penalty for each carload of traffic handled by RBMN to/from or over the Lehigh Division "which could commercially be interchanged with [Conrail]" but is interchanged with a carrier other than Conrail. Muller V.S. at 4. Conrail claims these penalties are merely designed to avoid the "potential that what had been Conrail traffic on the line" will not be diverted. CSX/NS-177 at 190. However, the restrictions do not apply only to traffic that Conrail handled on the line, but rather applies to all traffic that Conrail can "commercially"

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[6] Traffic can also move in the reverse direction.

handle. Moreover, the prohibitive nature of these penalties is shown in the highly confidential appendix submitted together with RBMN's comments. RBMN-5, Appendix HC-2 (comparing RBMN's allowances and the penalties that would apply for handling the traffic with another carrier).

Additionally, Conrail claims the penalties are justifiable because they were part of the negotiated purchase. However, this transaction changes the facts underlying RBMN's acceptance of the restrictions including (a) a positive working relationship with Conrail, (b) the existence of Conrail as a neutral connection to NS and CSX on movements to the south and southeast, and (c) the limited reach of the penalties based on Conrail's market reach.

In the absence of the contractual restrictions, RBMN would be in a position to offer rates directly with DHRC to points in the southeast via DHRC's connections with CSX, and in single-line service with DHRC, to New England and to Canadian points through either Buffalo or Montreal. Such routes northward substantially reduce the circuity of movements that otherwise now move over Conrail to Buffalo through Allentown, Reading, Harrisburg, Pittsburgh, Ashtabula and Erie, or to New England and Montreal through Allentown, Oak Island, New York and Albany. RBMN estimates that routings over DHRC are 250 miles shorter to Buffalo and 50 miles shorter to Albany for service to New England and Montreal. These DHRC routes are also more efficient because they avoid substantially congested Conrail main lines, major reclassification yards, and on the way to Albany, the New York metropolitan area. Applicants' response is that if RBMN-DHRC routes are truly more efficient then they can charge the shipper enough to pay Conrail the penalty amount in addition to the revenue requirements of the carriers participating in the move. CSX/NS-177 at 191. Conrail's justification assumes that RBMN will

be able to obtain a division or allowance from its connecting line haul carrier sufficient to meet its revenue requirements and to pay the penalty to Conrail. To do so, RBMN's allowances would need to crease between 125% and 700% depending on the commodity. *See* RBMN-5, Appendix HC-2. Even if this were possible, the effect on the shipper is that it will not receive the benefits of the more efficient route.

B. Effect of Merger

1. Failure to Reinstate Competition

Restoration of competition in Conrail's service area is one of the primary goals of the transaction. As stated by NS Chairman, President and Chief Executive Officer David R. Goode:

> The agreement [among NS, CSX and Conrail] will result in a rail transaction that is truly unprecedented in the long history of railroad consolidations in terms of its benefits to shippers, the parties and the public. The transaction will ensure that they both remain fully competitive and, at the same time, will open up large and vital areas of the country to rail competition they did not previously have.

Goode V.S., Application, vol. 1 at 331. *See also* Snow V.S., Application, vol. 1 at 314 ("The creation of strong rail-to-rail competition in the northeast is a major public benefit.") Goode, Snow RBMN-5 at 5. However, the northeastern region of Pennsylvania served by RBMN is an area where the Applicants have decided not to reinstitute competition. Prior to the formation of Conrail, rail customers in the region served by RBMN's Lehigh Division enjoyed the benefits of competitive service provided by a number of significant railroads. Muller V.S. at 6. However, the formation of Conrail, and its subsequent cost-cutting have resulted in reductions in service and a Conrail monopoly. Although Applicants justify the transaction in part on undoing the mistakes of the FSP and recreating the competition that was preferred, they do not

reinstitute competition in this region. Instead, NS has been allocated all of the Conrail lines that connect with RBMN.

Ironically, if instead of a joint acquisition NS had acquired all of Conrail, RBMN and its shippers would have been better off. They would still have the same limitations that result from an NS monopoly substituting for a Conrail monopoly. However, when NS was seeking support for its solo bid, it had no problems in offering RBMN the same relief from the penalty provisions as RBMN is requesting now. *See* RBMN-5, Appendix HC-3, ¶ 3. Although Applicants claim that the offer is now irrelevant (CSX/NS-176 at 387), they do not explain how the relationship that will exist between NS and RBMN has changed.

Not only does a competitive alternative line haul access benefit existing shippers, but it helps to attract new businesses to the region. In fact, NS's Vice President-Properties David Alan Cox indicates in his verified statement that "one of the key variables driving the selection of sites for new industries, such as factories, auto assembly plants and steel mini-mills, is the existence of at least two financially strong railroads in the region" and that NS's experience is that "customers want two railroads in any region before they will consider locating there." Application, Vol. 2B at 349, 355. Of course, the converse is also true, that it is very difficult to attract such industries where alternative service cannot be provided. Based on the way the Applicants have carved up the market served by Conrail, leaving NS as the sole outlet for RBMN and the region of Pennsylvania it serves, industries will be attracted to areas other than this region of Pennsylvania. Accordingly, the economy of this region will be adversely affected by the carve-up.

2. *Expansion of Routing Provisions*

NS claims that it will inherit the benefit of the restrictions in the Purchase Agreement. CSX/NS-176 at 384.[7] The substitution of NS as the operator for Conrail, of course, greatly expands the potential scope of the restrictions. (Although Conrail can "commercially handle" traffic off of the Lehigh Division to many points in the northeast and midwest, once the Conrail lines become part of the NS system the potential reach of the restriction expands to additional areas of the midwest, southwest and southeast.) NS has not offered to restrict the application of the restrictions in the Purchase Agreement.

The restrictive provisions of the Purchase Agreement may not be unique to RBMN. However, the scope of this restriction seems to go beyond what is necessary for Conrail to protect the traffic that it was handling over the line, and expands the reach to cover almost all traffic that could ever move over the line. And this would be expanded even further through NS's operation of the line. Applicants argue that the transaction will not expand the effects of the contractual restrictions because RBMN cannot show that there is traffic that is not covered by the restrictions. CSX/NS-176 at 385. However, RBMN believes that Conrail's competitors and shippers are aware of its limited ability to participate in that traffic, and therefore RBMN is not given the opportunity to participate. Muller V.S. at 5.

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[7] The Transaction Agreement focuses more on how transportation contracts will be allocated. *See, e.g.*, Application, Vol. 8B, Transaction Agreement, Section 2.2(c). RBMN believes that, because of the way the applicants have structured this transaction, the penalties which are imposed on traffic that "Conrail/Grantor" can commercially handle, may no longer be applicable since Conrail can no longer handle traffic off of the Lehigh Division. NS cites no support for its contention. This is a matter of state contract and real property law that is not for the Board to determine. If the Board grants the requested conditions, the state law issues will become moot.

3. Loss of Service

There are other harms which may be caused by the merger. Specifically, RBMN now participates in a move of fly ash that originates in Vermont on the New England Central Railroad, and then moves in single-line service over Conrail to Reading for delivery by RBMN to its destination. RBMN expected to handle approximately 1,300 carloads of this traffic in 1997, representing almost $400,000 in freight revenues. (The traffic is expected to increase to almost 1,500 carloads in 1998.) However, because of the allocation of assets between NS and CSX, the Conrail single-line portion of the service will now be split between NS and CSX. It is not known where the interchange point will be, how transit times will be affected, or how NS and CSX will handle the traffic; however, this rail movement could be lost if there are any adverse changes in pricing or handling efficiencies. Muller V.S. at 8-9.

Applicants deny that RBMN will lose this traffic. CSX/NS-176 at 386. However, a review of the Mohan RVS on which this denial is based shows that he concludes the traffic will not be lost because RBMN can handle the traffic together with DHRC. CSX/NS-177 at 428. Of course, without the restrictions discussed above, this would indeed be the case. With an unrestricted DHRC connection, RBMN may be able to preserve serve for its customer.

4. Diversion of Traffic to Congested Lines

RBMN will also be adversely affected by the first CP/NS settlement agreement that was reported by Applicants. Application, Vol. 3B at 121-122. CP (through its subsidiary DHRC) is to be granted trackage rights by NS from Harrisburg to Reading to Philadelphia. The effect of these rights will be to induce DHRC to ship some of the traffic that currently moves on trackage rights over the Lehigh Division between Scranton-Allentown-Reading-Philadelphia to a route

between Scranton-Harrisburg- Reading-Philadelphia. Portions of the route between Harrisburg and Reading will already see substantial increases in train traffic.

Applicants contest whether the Harrisburg-Reading line will be congested after the transaction. While they point to severed segments where train traffic will be reduced, the statistics they cite confirm that other segments (between Harrisburg and Rutherford and between Rutherford and WM Junction) will see increases of 7 to 13 trains per day. CSX/NS-177 at 429.

The estimated effect of this will be to move approximately half of the current DHRC trackage traffic off of the Lehigh Division. In addition to moving traffic onto more congested lines, the shift would reduce RBMN's monthly fees from such traffic from approximately $85,000 per month to $40,000 per month. While service to customers would not directly be affected, the loss of revenues will make it more difficult for RBMN to maintain its tracks, and therefore its service to its on line customers, at the current level.[8]

ARGUMENT

A. Introduction

Conrail was created in 1976 and given a virtual monopoly to provide rail service to the northeastern portion of the United States.[9] In this transaction, two competitors are seeking authority to jointly acquire Conrail, and to divide Conrail's assets and markets between

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[8] While there will be some reduction in the need for maintenance over the line, Conrail deferred so much maintenance that in the initial years RBMN will still need to spend substantial amounts in upgrading and maintaining the lines.

[9] Conrail is the only Class I railroad able to provide service in the region. CSX/NS-176, at 14.

themselves. In allocating Conrail's rail lines, CSX and NS have determined the places where the two of them will jointly offer service, and those areas where each of them will have a monopoly on rail service. The experiences in recent mergers of Class I railroads (BN/SF and UP/SP) have shown that agreements between competitors do not result in efficient competitive rail service and are not necessarily in the public interest. The Board should not rely solely on the judgment of the Applicants to determine where monopoly service is appropriate. Rather the Board should use its broad power to impose conditions where it can be shown that additional rail service would benefit the public interest without disproportionately reducing the benefits of the proposed transaction.

RBMN serves one of the regions where only NS has been allocated access to Conrail's lines, customers and shortline connections. As will be demonstrated, the conditions RBMN has requested address adverse effects of the merger without detracting from the public benefits of the proposed transaction.

B. Statutory Criteria

Since this proceeding involves the merger of two Class I railroads, the Commission is governed by the standards found in 49 U.S.C. §11324. In determining whether the relief requested by RBMN is justified, the board must look at

> (1) the effect of the proposed transaction on the adequacy of transportation to the public; [and]
>
> * * *
>
> (5) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region or in the national rail system.

49 U.S.C. §11324(b). For present purposes, the two are intertwined in that the adequacy of transportation service in the northeastern Pennsylvania region that RBMN serves will depend on the competitive options open to the shipping public post-merger.

When, as part of the Staggers Act, Congress added what is now codified as Section 11324(b)(5) [formerly Section 11344(b)(1)(E)], it intended that the effect of transactions on each section of the region affected be considered, not merely the net effect on the entire region affected by the transaction. The sponsor of that subsection described its objective as follows:

> I am offering an amendment...to specifically direct the Interstate Commerce Commission to consider the question of rail competition whenever making a determination of a railroad merger transaction.
>
> The escalation of rail mergers now taking place in the industry is causing concern among our Nation's farmers and ranchers as well as other shippers. The Interstate Commerce Commission is facing decision on several mergers that would have the effect of eliminating or nearly eliminating rail competition within entire sections of the country. I think it is important, therefore, that the ICC consider the question of competition as a regular part of the process of evaluating whether to allow mergers.

126 Cong. Rec. H8604 (daily ed. Sept. 9, 1980); Remarks of Representative Panetta. The Commission has recognized that a relevant geographic market may be "as small as individual cities and . . . as large as the entire country." *Union Pacific--Control--Missouri Pacific, Western Pacific*, 366 I.C.C. 462, 505 (1982) ("*UP/MP/WP*").

In *UP/MP/WP*, the Commission found that the adoption of the fifth principle "has actually increased the need to identify carefully any anticompetitive effects and to balance those effects against the benefits of the transaction." *Id.* at 502. The Commission also stated:

> The new [rail transportation] policy favoring increased reliance on competition to regulate activities will govern the environment in which the new system will operate. The ability of the railroads to take various actions free of regulatory restraints will make it easier to exert or abuse market power gained as a result of consolidation. For these reasons *we must take even greater care to identify harmful competitive effects and to mitigate those effects where possible*.

Id. (emphasis added).

C. Criteria for Imposing Conditions

Section 11344(c) empowers the Board to impose conditions governing consolidation transactions. In *Union Pacific Corp., et al.-Control-Chicago and Northwestern Trans. Co., et al.*, Finance Docket No. 32133, ICC served March 7, 1995, ("*UP/CNW*"), slip op. at 56-57, the Commission described the prerequisites for the imposition of conditions:

> Criteria for imposing conditions to remedy anti-competitive effects are uncodified but were set out in our *UP/WP/MP* decision, 366 ICC at 562-565. There, we stated that we will not impose conditions on a railroad consolidation unless we find that the consolidation may produce effects harmful to the public interest (such as a significant reduction of competition in an effective market), that the conditions to be imposed will ameliorate or eliminate the harmful effects, that the conditions will be operationally feasible, and that the conditions will produce public benefits (through reduction or elimination of the possible harm) outweighing any reduction to the public benefits produced by the merger.

Slip Op. at 56-57. *See also* 49 C.F.R. §1180.1(d)(1).

While lessening of competition is one harm specifically identified in the Board's general statement of policy and in past Commission decisions, the Board is not limiting to acting only when it finds a reduction in competition. The Board's conditioning power is very broad, and it can be used to impose conditions whenever the Board finds that the public interest would be

benefitted without taking away the benefits of the proposed transaction. *See Union Pacific Corp., et al.--Control and Merger--Southern Pacific Transportation Co., et al.*, Finance Docket No. 32760, Decision No. 44 (served August 12, 1996) ("*UP/SP*") at 144; *Burlington Northern, Inc. et al.--Control and Merger--Santa Fe Pacific Corp., et al.*, Finance Docket No. 32549, Decision No. 38 (served August 23, 1995) ("*BN/SF*") at 55.

In *UP/MP/WP* the Commission distinguished between conditions proposed to protect the interest of a competing carrier from merger impacts and conditions imposed to protect the public from anticompetitive consequences. 366 I.C.C. at 562. Conditions to protect a carrier will be imposed only if the merger threatens its essential services. On the other hand, "[t]he basic consideration for determining whether a need for a public interest condition exists is whether the transaction will have anticompetitive consequences (or threaten other possible harm to the public interest)." *Id.* at 563.

In determining the public interest, the Board is to be guided by the rail transportation policy set forth in 49 U.S.C. §10101. 49 C.F.R. §1180.1(b). *See also BN/SF* at 52. This policy emphasizes ensuring competition among rail carriers, and allowing such competition to control rates and the needs of the public. 49 U.S.C. §10101(1)(4)(5).

The Board should also be mindful of the policies that have developed with respect to short line railroads, encouraging their development and recognizing that they avoid line abandonments and improve service to shippers. *Rail Consolidation Procedures -- Continuance in Control of a Nonconnecting Carrier*, 2 I.C.C.2d 677, 679 (1986). The Commission there went on to state:

> By facilitating acquisitions of lines from larger carriers that might otherwise be abandoned as unprofitable but that can often be operated more efficiently by short-lines, it ensures the development and continuation of a sound rail transportation system to meet public needs, fosters sound conditions in transportation, and encourages efficient rail management.

Id. at 679. The Commission also found that "the shipping public should benefit from the improved services that small locally based short-line carriers can provide." *Housatonic Trans. -- Continuance in Control Exemption -- Danbury Term. R. Co. et al.*, Finance Docket No. 32163 et al., ICC served October 5, 1993, slip op. at 9. Current line acquisition policies are designed to expedite the creation of shortlines by removing regulatory obstacles where feasible. Moreover, the Commission saw its short line policy as one that would enable shippers to maintain access to Class I carriers. "Shippers will benefit by gaining access to GWI's regional rail system and ultimately to *all class I rail carriers serving the Northeast and Canada.*" *Genesee & Wyoming Industries, Inc. -- Continuance in Control Exemption -- Allegheny & Eastern, Inc.*, Finance Docket No. 32149, ICC served October 23, 1992, slip op. at 2 (emphasis added). This policy should not be subordinated to policies designed to facilitate consolidations when both policies can be accommodated without harm to the applicants.

Antitrust laws also help define the concept of the public interest. *See BN/SF* at 52-53. Thus, while the Board does not sit as an antitrust court, it should carefully examine this proposed division of the market between two competitors which in any other context would be an antitrust violation.

Because of the acknowledged uniqueness of this transaction, the Board should apply its powers to the fullest, and consider the public interest in the broadest possible way. RBMN

believes that the following discussion will demonstrate that the conditions RBMN has requested are an appropriate response to adverse effects of the transaction to the public interest, and that the conditions will ameliorate or eliminate these effects. RBMN also believes that its request for conditions is justified as a proper competitive response to the market divisions proposed by the Applicants.[10]

D. Effects of the Proposed Transaction

The public benefits that the Applicants set forth to support the proposed transaction are largely lacking in the region of northeastern Pennsylvania that RBMN serves. There will not be a voluntary reintroduction of competition; rather an NS monopoly will simply substitute for the existing Conrail monopoly. While there may be some extended single line service, there will also be instances where single line service will become joint line service. *See* the discussion of fly ash traffic below. Thus, whatever public benefits may justify the transaction as a whole, they are largely lacking in this region, and should not act as a barrier to the relief RBMN is requesting.

Shippers in the RBMN service area will also be adversely affected by the substitution of NS for Conrail in other ways. As the monopoly carrier in the region, Conrail served as a neutral feeder line to both CSX and NS on movements between the region and the South and

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[10] Once competitive harm is found, the Board must act to remedy or mitigate it. RBMN has requested conditions specifically designed to do so. If the Board believes these are not the appropriate conditions, it has the power (and duty) to impose conditions it can reasonably develop. *Lamoille Valley Railroad Co. v. ICC*, 711 F.2d 295, 322 (1983).

Southeast.[11] With the substitution of NS for Conrail, RBMN's shippers will lose the benefit of a neutral connection to NS and CSX.

As noted previously, the way Applicants have decided to divide Conrail's lines will cause at least one particular move to a shipper on RBMN to be adversely affected. Instead of being handled solely by Conrail between the origin carrier New England Central Railroad and the destination carrier RBMN, the move will now be required to be handled by both CSX and NS. This $400,000 per year move will be jeopardized. A simple way to maintain the traffic, and the way suggested by Applicants' own witness, would be for DHRC to act as the intermediate carrier. Unfortunately, this competitive response is unavailing, since RBMN would need to pay a penalty to NS if it interchanged the traffic with DHRC instead of NS. With the penalty RBMN could not afford to handle the move.

Not only do the penalty provisions of the Purchase Agreement prevent RBMN from making a competitive response to protect the fly ash move, but the transaction will have the effect of expanding the scope of the penalty provisions. These provisions protect and encourage inefficient routings.

The proposed transaction and the settlement between NS and CP/DHRC will have the effect of shifting approximately one-half of DHRC's trackage rights traffic from RBMN's Lehigh Division to a route that will pass through Harrisburg and then over lines of NS that will be seeing significant increases in train traffic. The traffic diversions will also take revenues away

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[11] It served a similar function to the western railroads on movements to and from points west of the Mississippi.

from RBMN and make it more difficult for RBMN to maintain the lines and the level of service to its customers.

E. RBMN's Proposed Response

RBMN has proposed two simple conditions to address the adverse effects of the proposed transaction in the region that it serves.

1. Unrestricted Interchange

An unrestricted interchange with DHRC would reintroduce a measure of rail competition to the region, and with it the benefits that competition brings. Shippers on RBMN will be able to take advantage of shorter, more efficient routes that will allow for single line service and the avoidance of congested lines and yards of Conrail. In particular, the fly ash movement may be preserved.

This unrestricted interchange can be accomplished by modifying the penalty provisions of the Purchase Agreement. In the past, the Commission has been willing to grant relief from contractual restrictions that prevent a carrier from making a competitive response to the transaction. Thus, in *UP/CNW*, the Commission conditioned consolidation approval upon amendment of a restrictive agreement it considered necessary to grant SOO Line a potential competitive response. *UP/CNW*, slip op. at 89-90. Similarly, the Commission granted Grainbelt relief from the expansion of the scope of restrictive provisions found in its contract with one of the applicants. *See BN/SF* at 94. The access rights sought by RBMN will similarly provide it with the opportunity it does not independently have, to make a competitive response to the proposed transaction. Access to DHRC at Scranton will do no more than bring rail competition back to northeastern Pennsylvania.

2. *New Track Access*

RBMN has also asked for a condition that would allow DHRC to access at Reading the trackage rights that it currently has over Conrail. Access at Reading would allow DHRC to route its traffic over RBMN's Lehigh and Reading Divisions, and would eliminate the need for any DHRC traffic to and from Philadelphia to use what will be NS's lines between Harrisburg and Allentown. This would lessen the impact of the increase in train traffic that NS predicts for portions of the line. Preserving the routing over the Lehigh Division would also preserve trackage rights revenues for RBMN which are necessary for it to continue to maintain the Lehigh Division, and to maintain its current level of service to its shippers.

F. *Feasibility*

The proposed conditions will have no adverse impact on the operations as proposed by the Applicants. An interchange between RBMN and DHRC already physically exists, and does not involve any Conrail lines.

Similarly, the proposed access for DHRC at Reading involves only RBMN and DHRC making arrangements for traffic to move over lines owned or operated by RBMN. RBMN already interchanges with Conrail at Reading and no new facilities would be necessary to allow DHRC to have access there. Reading Yard will see a slight decrease in activity, and additional activity should not be a problem. Application, Vol. 3B at 454. Additionally, the proposal will move DHRC traffic off of the heavily used line between Harrisburg and Allentown.

G. *Public Benefits*

The unrestricted access to DHRC will serve to create competition between rail carriers for the shippers served by RBMN. The Applicants go to great lengths to extoll the benefits that such

competition generally will create. *See also* 49 U.S.C. §10101(1), (4),(5). There is no reason to believe that the competition that the requested condition will create will not result in the same public benefits.

Giving DHRC access to its trackage rights at Reading will also result in a public benefit, by moving traffic off of more heavily used lines and out of congested yards. The fees generated will also aid RBMN in maintaining its lines and thus, the level of service that it has been providing to its shippers.

RBMN's attempts to ameliorate the adverse effects of the transaction have support of the public. The Transportation Committee of the Pennsylvania Senate supports the requested conditions. *See* Comments attached to PaHTC-2, at 16. The conditions are also supported by the shippers' association representing the anthracite coal producers that RBMN serves, as well as six other shippers.

Although Applicants oppose RBMN's requests, they do not claim that the proposed conditions would reduce the public benefits of the transaction claimed by Applicants. *See* CSX/NS-176 at 384-388. Moreover, there is no shipper or other public opposition to the requested conditions.

CONCLUSION

For all of the foregoing reasons, RBMN requests that the Board find that RBMN and the region that it serves will be adversely affected by the proposed transaction, and that any order approving the proposed transaction impose the conditions requested by RBMN as a reasonable means of addressing these adverse effects.

Respectfully submitted,

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Dated: February 23, 1998

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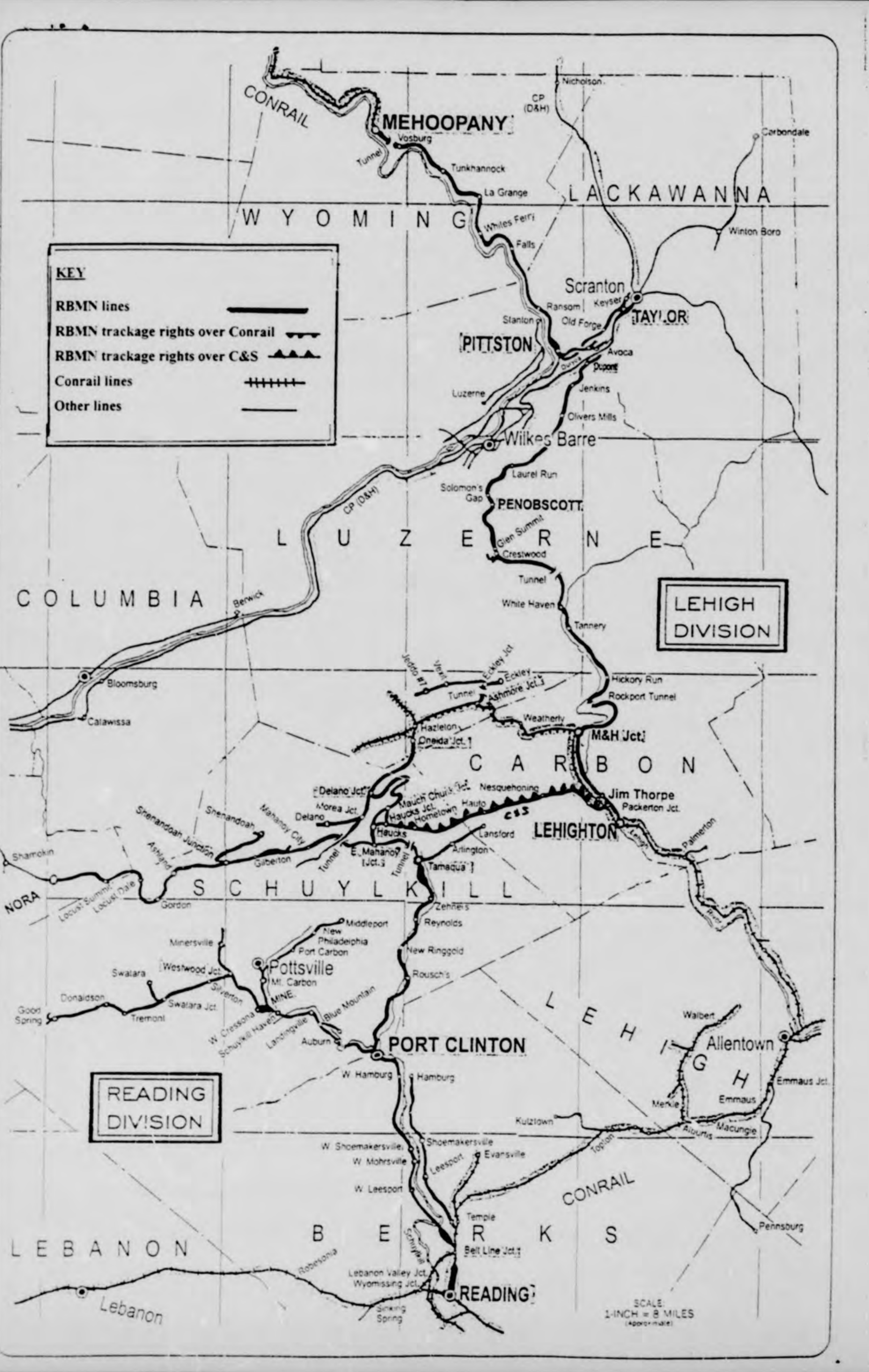
KEY
RBMN lines
RBMN trackage rights over Conrail
RBMN trackage rights over C&S
Conrail lines
Other lines
CONRAIL
MEHOOPANY
Vosburg
Tunnel
Tunkhannock
La Grange
Nicholson
CP (D&H)
Carbondale
LACKAWANNA
WYOMING
Whites Ferry
Falls
Winton Boro
Scranton
Keyser
TAYLOR
Ransom
Stanton
Old Forge
PITTSTON
Avoca
Dupont
Jenkins
Luzerne
Olivers Mills
Wilkes Barre
Laurel Run
Solomon's Gap
PENOBSCOTT
CP (D&H)
LUZERNE
Glen Summit
Crestwood
Tunnel
COLUMBIA
Berwick
White Haven
LEHIGH DIVISION
Tannery
Eckley Jct.
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W. Shoemakersville
Shoemakersville
W. Mohrsville
Leesport
Evansville
Topton
W. Leesport
CONRAIL
Temple
BERKS
Pennsburg
LEBANON
Belt Line Jct.
Robesonia
Lebanon Valley Jct.
Wyomissing Jct.
READING
Lebanon
Sinking Spring
SCALE:
1-INCH = 8 MILES
(Approximate)

CERTIFICATE OF SERVICE

I hereby certify that on this date a copy of the foregoing document was served on the following persons by United States First Class Mail:

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E

Via Hand Delivery
Honorable Vernon A. Williams
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Re: STB Finance Docket No. 33388, *CSX Corporation, et al, Norfolk Southern Corporation, et al. -- Control And Operating Leases/Agreements --Conrail Inc., et al.*

Dear Secretary Williams:

Please find enclosed for filing in the above-referenced proceeding an original and twenty-five (25) copies of the Brief submitted on behalf of The National Industrial Transportation League, U.S. Clay Producers Traffic Association, Inc., The Fertilizer Institute and Indianapolis Power & Light Company, which has been designated as NITL-12, TFI-6, and IP&L-12.

A copy of this filing is also enclosed on a 3.5-inch diskette in WordPerfect 7.0 format.

Respectfully submitted,

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ENCLOSURES
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cc: All Parties of Record

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TFI-6
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BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

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

BRIEF
submitted on behalf of
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE
U.S. CLAY PRODUCERS TRAFFIC ASSOCIATION, INC.
THE FERTILIZER INSTITUTE
and
INDIANAPOLIS POWER & LIGHT COMPANY

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BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

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

BRIEF

submitted on behalf of

THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE
U.S. CLAY PRODUCERS TRAFFIC ASSOCIATION, INC.
THE FERTILIZER INSTITUTE
and
INDIANAPOLIS POWER & LIGHT COMPANY

The National Industrial Transportation League ("League"), The U.S. Clay Producers Traffic Association, Inc., The Fertilizer Institute, and Indianapolis Power & Light Company (hereinafter collectively referred to as "Interested Parties") submit their Brief in this proceeding, in which the Board is considering the application of CSX Corporation and CSX Transportation, Inc. (collectively "CSX"); Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively "NS"); and Conrail, Inc. and Consolidated Rail Corporation (collectively, "Conrail") (collectively, NS, CSX and Conrail are termed

"Applicants"), to authorize acquisition of control of Conrail by CSX and Norfolk Southern Corporation, for the division between them of the use and operation of Conrail's assets, and for various other related matters.

This Brief is focused on a single issue: the effects of the acquisition premium in this proposed transaction, and the actions that these Interested Parties believe this Board should take in order to protect captive shippers from those effects. In general, these parties are concerned that, if the various projections of the carriers for cost savings or revenue gains do not come to pass, the massive cost to NS and CSX of acquiring Conrail may lead to the possibility of rate increases for captive shippers, and will lead under current Board procedures to distortions in the regulatory protections afforded to captive shippers under the statute. For the League, the U.S. Clay Producers, TFI, and IP&L, this matter has been dealt with extensively in their Comments submitted October 21, 1997,[1] and the arguments set forth therein will not be repeated here. However, in their Rebuttal, NS and CSX have advanced certain arguments on this matter that require a response, which is made in this Brief.

I. THE ACQUISITION PREMIUM PAID BY NS AND CSX IN THIS TRANSACTION MAY HAVE SIGNIFICANT ADVERSE EFFECTS UPON CAPTIVE SHIPPERS

The issue of the effects of the acquisition premium in this case is of very substantial importance to shippers. For the purpose of this proceeding, these parties refer to the difference between an asset's value at the time of its purchase

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[1] See NITL-7, pp. 8-10, 15-27, 27-31, and 42-48; and ACE, et al-18. It should be noted that the League has entered into a settlement with NS and CSX on the remaining matters set forth in its October 21 Comments. See NITL Supplement to Comments and Requests for Conditions submitted on behalf of The National Industrial Transportation League on January 13, 1998, and accompanying motion requesting leave to file (NITL-10 AND NITL-11). See also, NITL-13, submitted on February 23, 1998, briefly discussing the issues raised in NITL-11 and other matters.

and the purchase price to be the "acquisition premium," whether the asset's value is established at its market or book value. As noted in the comments filed by various parties on October 21 and as further set forth below, the size of the financial obligations being undertaken by NS and CSX could lead the carriers to fund that financial obligation through increases in the rates being charged to captive shippers. Moreover, the treatment of the acquisition premium by the Board in this case will have a *direct* effect on the ability of the Board to provide the protection that the law affords to captive shippers from rate increases in excess of a reasonable maximum.

There is no doubt that the financial obligations being undertaken by CSX and NS as a result of this transaction are extraordinary. The carriers' purchase of Conrail far exceeds any preexisting measure of the value of that railroad, such as book value or the pre-transaction market value of Conrail's stock. Perhaps more to the point, the acquisition premium in this transaction is far higher than in any previous merger, even the mergers of the former Atchison, Topeka and Santa Fe with the Burlington Northern or the merger of the Southern Pacific with the Union Pacific. See NITL-7, pp. 15-18.

The Applicants propose to pay for this transaction through merger efficiencies and new growth. See, *e.g.*, letter by CSX Executive Vice President John Q. Anderson dated May 8, 1997, Snow Dep. Tr. Ex. 4. Indeed, the carriers have publicly shouldered the risk of recovery of the acquisition premium, as they should: NS Vice President James McClellan, for example, has stated on the record in this proceeding that recovery of the acquisition premium was "a risk NS takes." But, despite the Applicants' best predictions, there is a risk that the projected cost savings and revenue growth will not occur. Yet the acquisition premium assumed by the carriers as a result of this transaction -- largely funded through debt -- will have to be paid.

Indeed, recent history indicates that the risk that the acquisition premium will not be able to be paid for through merger efficiencies and revenue growth is far higher than the carriers would like to admit. Since Comments were submitted in this proceeding on October 21, 1997, shippers and this Board have witnessed the extraordinary position of the Union Pacific in showing a loss of $152 million for the fourth quarter of 1997 (a $381 million swing from 4Q96 results)[2] as a result of the failure of the UP to achieve the revenue gains or the efficiencies projected as a result of its merger.

Moreover, UP continues to take actions to attempt to solve the problems created by that merger that will have a substantially negative effect upon UP's revenue far into the future, such as its agreement with the BNSF announced last week that will give BNSF access to over 70 previously solely-served UP customers and to some $40 million in UP's gross revenue. See, letter filed by UP counsel February 18, 1997 in STB *Service Order No. 1518*, p. 2 ("Granting BNSF the right to serve all shipper facilities on the Houston-Iowa Junction line and appurtenant branches (including the Dayton and Port Arthur branches) will be costly . . . [b]ut UP concluded that this significant commercial concession was warranted by the overriding need to coordinate and improve BNSF and UP operations in the Houston area, including achieving optimally efficient operation of an integrated line between Houston and New Orleans." [emphasis added]) The commercial concession that led UP to grant BNSF access to these customers was the stated and urgent need for joint dispatching in the Houston area: *and the need for that coordinated dispatching was specifically created by, and is a result of, the UP/SP merger and the conditions imposed as a result of that merger.* This is but

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2 Traffic World, February 2, 1998, p. 20.

one real-life example of the risks, costs and entirely unexpected consequences that can accrue in a transaction of this size and scope.

But if there is a risk that the acquisition premium in this transaction can not be paid for through merger efficiencies or revenue growth, there is a third possibility: that it will be paid for through rate increases on captive shippers. In their comments on October 21, 1997, NITL, the Clay Producers, TFI, and IP&L showed that, along with the increase in competition that will result from this transaction in the Shared Asset Areas, there will likely come a diminution in competition in other areas as a result of the loss of competition, such as a result of the reduction in neutral, competitive routings; the loss of competition resulting from the elimination of multi-plant leverage; and the loss of competition resulting from the greater geographic spread of NS and CSX. NITL-7, pp. 27-31. The carriers could turn to any of these sources of increased market power to fund that portion of the debt burden that they have assumed.

But even if the Board would not credit these future increases in market power, some existing captive shippers of NS, CSX and Conrail will be at risk for rate increases, for effects that will ineluctably flow from the regulatory treatment of the acquisition premium in this transaction. For under current agency procedures, the acquisition premium in this transaction will cause distortions in the Board's determination of revenue adequacy and in its determination of the jurisdictional threshold. The first will occur because the acquisition premium will both vastly inflate the carriers' investment base and reduce the carriers' reported net income, thus reducing NS' and CSX's return on investment, which forms the basis of the agency's revenue adequacy standard. The second will occur because the acquisition premium will flow back into all of the accounts for road and property, the variable portion of which will be used in the Uniform Rail Costing System to calculate whether a rate is above or below the jurisdictional

threshold. Under URCS, return on investment is part of "variable" costs. For further detail on these effects, see NITL-7, pp. 23-26.

Both of these distortions will affect the Board's determination of maximum reasonable rates. With respect to the effects on the revenue adequacy determination, this will occur because under the agency's decision in Ex Parte 347 (Sub-No. 2), *Coal Rate Guidelines - Nationwide*, 1 I.C.C.2d 520, 535-536, revenue adequate carriers (such as NS is currently) are under a regulatory constraint on their ability to raise rates, though the exact contours of this constrain have not been defined.

With respect to the jurisdictional threshold, inclusion of the asset-value write-up for regulatory costing purposes will cause the jurisdictional threshold to float upward automatically. Thus, by including the asset-value write-up in the calculation used to determine variable costs, the increased depreciation flowing from the asset-value write-up will cause the variable cost component of property and equipment to increase.

Thus, the variable costs of any movement will be higher than the same movement pre-merger, solely because of the asset-value write-up. What this means is that a variable cost that produced, for example, a 180 percent ratio of revenue to variable cost pre-merger will produce a higher ratio post-merger. But only where the revenues from a particular movement exceed 180 percent of variable costs does the STB have jurisdiction over the freight rate. The effect, then, will be to raise the threshold for regulatory jurisdiction.[3]

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[3] An example may illustrate the point. Suppose that a given rate is $10.00 per ton from origin to destination. Suppose further that the Board's URCS costing system produces variable costs of $5.00 per ton for the movement at issue. Before the acquisition premium is included, the revenue / variable cost ratio is 2.00, well above the jurisdictional threshold. After the acquisition premium is reflected in URCS "variable" costs, the level of those costs on CSX could rise by 15%, and on NS by 24%. See Comments of Atlantic City Electric Company, et al, ACE, et al-18, Exhibit No. 2 (at 33). If one were simply to assume a 20% increase for the hypothetical movement at issue, the URCS's variable costs would rise to $6.00, and the R/VC ratio becomes 167%, well

Captive shippers will bear a direct risk of financial harm from this effect. For one constraint on a carrier's rate to a captive shipper is the threat of regulatory intervention itself. Thus, the very existence of this Board and its regulatory protections may in some instances serve to constrain the rates charged by a carrier to its captive shippers, whether or not this Board is actively called upon to adjudicate a maximum reasonable rate in a specific case or not. Indeed, the clarity and fairness of this Board's regulatory standards are important to shippers for precisely this reason: if the Board's maximum rate standards are clear and fair, then carriers will be constrained from increasing rates beyond the regulatory limit without overt regulatory intervention, because they know that if they do raise rates beyond that limit, they can be called to account before the Board.

But if, by virtue of the acquisition premium, the Board's regulatory jurisdiction floats upward, then carriers' rates to captive shippers will flow upward with it. In other words, if the maximum rate functions of this Board have any practical utility whatsoever, the Board's maximum rate standards will either directly (via administrative litigation) or indirectly (via carriers' and shippers' estimation of those maximum rate standards) constrain at least some rates. And because carriers have every incentive to raise rates to any shipper up to an effective constraint (regulatory or otherwise), then an increase in the

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below 180 percent. The rate could rise to $10.80 before it reached the jurisdictional threshold of 180%.

For a rate at 180% of variable costs, the effective rate "floor" would rise by the same 20% that URCS costs would rise. Thus, in our example, if the variable costs were again $5.00 per ton, and the rate $9.00 per ton, the URCS costs would rise to $6.00 per ton ($5.00 per ton x 20%), and the rate could rise to $10.80 before the 180% threshold of jurisdiction is reached. Thus, the acquisition premium will cause captive shippers' rates to rise without the possibility of regulatory protection unless the Board acts to prevent the acquisition premium from being included in URCS costs for CSX and NS.

jurisdictional threshold must eventually be seen in the rates that captive shippers will bear.

The carriers attempt to deny this effect by arguing that it could occur in only "two narrow circumstances," suggesting that these "narrow circumstances" are unlikely to occur at all. Of course, by conceding that there are circumstances in which these effects could occur, the carriers have effectively conceded the principle of the matter But even their assertions that these circumstances are "narrow" -- and particularly the second of these assertions -- are incorrect.

Specifically, the carriers argue that the regulatory effects stated above can occur only when the stand-alone cost is below the jurisdictional threshold, and then argue that such an event is not likely. See, CSX/NS-176, Appendix A, pp. P-761-762, note 37.

The carriers are flatly wrong. The Applicants' own witness Sansom admitted that SAC rates are often at or below the 180% level (see NITL-7, Sansom Dep. Tr. at 117-120). The Applicants in their Rebuttal have attempted to argue in response that Dr. Sansom is not an expert on rail transportation matters (CSX-NS-176, Appendix A, pp. P-761-762, note 37), but his resume in the UP/SP merger proceeding claimed that he was. See, ISRR-9, filed January 14, 1998, Crowley V.S. at 20, n. 23 (comparing resumes). The Applicants' efforts to discredit their own witness is extraordinary, and suggests that this is a point of great sensitivity to them. The fact is that not only in the *West Texas Utilities* proceeding cited by the Applicants in their Rebuttal, id., but also in at least three other rate proceedings before the ICC or STB, the SAC rate has been below 180 percent of variable costs, and thus the Board or the ICC has set the maximum reasonable rate at the 180 percent level. Therefore, raising the level of variable costs in those instances would have forced the ICC or the Board to set the maximum reasonable rate at a higher level.

In short, the NS' and CSX's attempt to downplay or minimize this problem is simply wrong. Unless the Board acts to prevent these occurrences, captive shippers will be harmed by the effects of this transaction.

II. THE ARGUMENTS RAISED BY THE CARRIERS THAT THE BOARD SHOULD NOT CONSIDER THE EFFECT OF THE ACQUISITION PREMIUM IN THIS PROCEEDING ARE INCORRECT

In their Rebuttal filed on December 15, 1997 in this proceeding, the Applicants have raised a number of arguments in contending that the Board should not consider the effect of the acquisition premium in this proceeding. To the extent that these arguments have not already been addressed by the parties to this Brief in their Comments, they are addressed here.

A. The Dispute Over the Size of the Acquisition Premium Is Not Material to the Board's Consideration of this Issue

These parties are aware that there is a significant disagreement in this record over both the size of and the method of calculating the so-called "acquisition premium," referred to by the Applicants' witness Whitehurst as the "write up of the value of acquired Conrail assets." CSX/NS-177, Vol. 2B, p. P-669.[4] But the size and method of calculating the acquisition premium is not material to the Board's consideration of this matter.

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[4] See CSX/NS-176, p. P-108, fn. 2. NS and CSX assert that certain named parties and their witnesses use the term "acquisition premium" "frequently, variously and inconsistently" to mean the difference between the acquisition cost of Conrail and the historic net book value of Conrail's assets; or the difference between acquisition cost and pre-transaction market share price of Conrail's outstanding publicly traded stock; or the difference between acquisition cost and Conrail's total shareholder equity. But there is no "inconsistency" here. The premiums for revenue adequacy and jurisdictional costing procedures differ because of the differences in the procedures for computing revenue adequacy and the jurisdictional threshold. Acquisition price is used for revenue adequacy whereas fair value is used for jurisdictional threshold purposes.

At its most basic level, it is not material because the facts of the dispute are not finalized. For example, it should be noted that the Applicants have indicated that their witness Whitehurst has made an almost $3 billion error in his calculation of the purchase price for Conrail, and that instead of $17.242 billion (CSX/NS-177, vol. 2B, p. P-668), NS and CSX paid over $20 billion, including assumed liabilities, deferred taxes, and transaction expenses. Thus, at this point, it cannot be known with certainty what the exact amount of the acquisition premium (however it is calculated) will be, and indeed, that amount could change over time as the Applicants' accountants complete their evaluations.

But more fundamentally, arguments over the precise size of the acquisition premium and/or the method of its calculation are not material because all parties are in agreement that NS and CSX have paid a price for Conrail that *far* exceeds either the book value or the pre-transaction market value of Conrail, by many *billions* of dollars. The Applicants themselves note in their rebuttal that the amount paid by NS and CSX for Conrail plus assumed liabilities and transaction fees "substantially exceeds the historic net book value of the road property and equipment assets as recorded on Conrail's books. . . . [footnote omitted]." CSX/NS-176, Appendix A, p. P-737. Thus, the Board must deal with the acquisition premium issue and the effect of that issue on its regulatory authority regardless of whether the premium is calculated to be $9.550 billion (see CSX/NS-176, Appendix A, p. P-737, fn. 4; CSX/NS-177, Vol. 2B, p. P-669 and NITL-7, p. 16), some higher number on the basis of the conceded $3 billion error, or some lower number (see NITL-7, p. 15). But under any conceivable scenario, an acquisition premium does exist, however that premium is calculated; and its magnitude is large enough to materially affect both the carriers' need for revenue compared to their revenue need pre-transaction, as well as the Board's

calculation of revenue adequacy and its evaluation of the jurisdictional threshold for the determination of maximum reasonable rates.

The Board must deal with this issue both because of the legal principles that apply, as well as because it is a matter of sound economic and regulatory policy.

As a legal matter, the courts, including the United States Supreme Court, have uniformly affirmed that market values cannot be used to affect regulatory prices; and some courts have specifically ruled that it is unlawful to include acquisition write-ups in any portion of an investment base used for regulatory purposes. See, *e.g., Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 601 (1944); *Duquesne Light Company, v. Barasch*, 488 U.S. 299 (1989; *Farmers Union Central Exchange v. FERC*, 584 F.2d 408, 420 (D.C. Cir. 1978) *cert denied sub nom. Williams Pipeline Company v. FERC*, 439 U.S. 995 (1978) and other cases cited in NITL-7, p. 26.

This record also reveals the flaws of the treatment proposed by the carriers as a matter of sound economic and regulatory policy. As Dr. Alfred Kahn and Dr. Fred Dunbar, both eminent economists in the matter of regulatory economics, have testified in this case:

> As a matter of both economic and regulatory principle, market values simply cannot be allowed to affect regulatory prices, since that would involve the fatal circularity recognized by the Supreme Court 50 years ago: if a company is allowed to earn a "reasonable" return on whatever price it pays for an asset, that will in turn determine the price it is willing to pay, up to the present discounted value of the future stream of unconstrained monopoly profits. Instead of a regulated price being determined by cost, independently determined, the cost will itself be determined by price, and, in turn, "justify" whatever price maximized profits. No sensible system of regulation can allow such an outcome.

ACE, et al-18, Ex. No. 1). Indeed, the ICC itself has recognized that acquisition premiums do not belong in the investment base and that transportation property

should be recorded for ratemaking purposes according to original cost. Ex Parte 271, *Net Investment - Railroad Rate Base and Rate of Return*, 345 I.C.C. 1494, 1519 (1976).

In fact, the Applicants' principal financial witness, Mr. Whitehurst, has himself testified in the Railroad Accounting Principles Board proceeding that corporate assets such as acquisition premiums and asset write-ups should not be included in variable costs for ratemaking purposes:

> Historical costs should be used for all regulatory purposes since historical costs best meet accounting criteria of verifiability, relevancy and accuracy . . . . Historical costs represent a firm, tested and accurate foundation on which to develop all of the necessary information needed for various regulatory purposes. The use of historical costs in the revenue adequacy calculation is appropriate since the financial community uses an historical cost asset base to evaluate the financial viability of all industries, including railroads . . . .
>
> For maximum rate purposes, if stand-alone costs for a hypothetical new railroad are at issue, a replacement asset value would be used. For detailed costing purposes, it is clear that the actual, historical movement costs should be considered.
>
> [H]istorical costs should be firmly established for determining the capital asset base and related depreciation expense because historical cost best fits all of the requirements related to generally accepted accounting principles, financial community acceptance and common acceptance.

Verified statement of William W. Whitehurst before the Railroad Accounting Principles Board, "In the Matter of Issues and Questions on Railroad Accounting and Costs," March 31, 1986, at 16-19.[5]

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[5] The Board may take official notice of the Whitehurst RAPB testimony under 49 C.F.R. § 1113.10 and 1114.1. Relevant pages are attached.

B. The Carriers' Arguments That the Acquisition Premium Is Not Relevant Because Most Rail Movements Are Not Captive or Because the Premium Must Be Offset by Merger Savings Are Incorrect, and Would Not Justify A Failure to Grant Relief

It is important to note that neither NS and CSX nor any of their witnesses dispute the fact that the acquisition premium in this transaction will *in fact* have a biasing effect upon the Board's calculation of revenue adequacy and the jurisdictional threshold. NS and CSX and their witnesses argue, however, that the fact of this effect is a non-issue because "rates are not set on the basis of regulation but by prevailing market conditions and negotiations" (Kalt Rebuttal Verified Statement (hereafter "R.V.S."), p. 72; see also, CSX/NS-176, pp. P-107 and Appendix A, p. P-740-741, 751), or because the upward-biasing effect of the acquisition premium will be offset by cost-reducing and revenue-enhancing effects of the transaction (CSX-NS 176, p. P 110-111, and Appendix A, pp. 23-27). But neither argument withstands analysis.

First of all, the argument that all rates are set on the basis of market conditions -- that is, there are no rates that are even subject to the Board's jurisdiction -- runs squarely in the face of numerous Board and ICC decisions indicating that certain movements by rail *are* captive, and for these movements, the Congress has granted to the Board regulatory authority to restrain the railroads' market power. There is nothing in this record that suggests that every movement on Conrail, NS, and CSX is subject to effective competition: indeed, there is much to the contrary.

The fact that some rail movements are competitive is irrelevant to the correct methodology for regulating movements that are not competitive: and as long as *any* movements have prices that are actually or even potentially constrained by regulatory action, then the "fatal circularity" problem indicated by

the Supreme Court in *Hope Natural Gas* must apply. If the assets used for such movements are valued by reference to acquisition cost, then "the capitalization of such freed-up market power provides the cost-basis for capturing such freed-up market power in subsequent rate setting." (Kalt R.V.S, p. 71).

The argument that cost savings resulting from the merger should somehow be regarded as an offset to the acquisition premium is still more absurd. First of all, the argument that the acquisition premium should be ignored because of the cost-reducing effects of the transaction assumes that the write-up is precisely equal to the costs savings that will accrue as a result of the merger, a fact that has not been established and indeed cannot be established at all. Moreover, any cost-reducing effects of the transaction would flow through the carriers' accounts in any case, but for the distortionary effect of the acquisition premium.

But more generally, the purpose of regulation is to reflect the price constraints that would occur, even if imperfectly, if the market was competitive. In a competitive market, at least part of the cost savings that would result from a merger is passed on to consumers. In order to be profitable, therefore, a merger in a competitive market must yield savings that, even after part has been passed on to consumers, exceed the acquisition premium paid by the acquiring company. The same principle should apply here: insofar as this transaction results in cost savings on movements whose prices may be constrained by regulation, the regulatory framework should provide for such savings to be shared between shippers and carriers, as would occur in a competitive market.

Reductions in costs as a result of the transaction that accrue to the calculation of "regulatory" costs do *not* justify allowing carriers to write up the value of their assets, any more than they would if cost reductions occurred for some other reason. If the acquisition premium does represent the capitalization of cost savings -- a matter that is not shown on this record, and indeed, is belied

by the bidding process engaged in by NS and CSX for control of Conrail -- then allowing carriers to write up the value of assets to reflect this would ensure that they captured the full extent of any cost saving, regardless of source, rather than passing part on to consumers. This would be contrary to the results expected in a competitive market; contrary to the purposes of regulation; and result in assymmetries between mergers and other cost-reducing events. For example, if the price of fuel fell, under the carriers' argument, in a regulatory setting they should be permitted to write up the value of the fuel to offset the cost reduction, a clearly impermissible result.

C. The Carriers' Argument That Agency Action On The Issue of the Effect of the Acquisition Premium Would Constitute Inappropriate Retroactive Regulation Or Is Otherwise Foreclosed By Board Action In Other Merger Cases Is Flatly Inconsistent With the Board's Rulings In This Case

In their Rebuttal, NS and CSX also argue that making any change in the Board's policies or procedures on this issue would constitute impermissible retroactive relief, and should appropriately be considered, if at all, in a rulemaking or other ex parte proceeding. CSX/NS-176, p. P-110 and Appendix A, p. P-740 and pp. P-752-754). But such a contention flies in the face of what the Board has already ruled in this case. The issue of the acquisition premium and its effect was raised in this proceeding almost immediately after the filing of the Application, and again when the Applicants sought approval of their voting trust to acquire Conrail, in cash, before the Board's final approval of the transaction could be obtained at the end of the proceeding. Decision No. 4, served May 2, 1997, at 3. It was not until after that date that CSX and NS spent most of the money they expended to purchase the remainder of Conrail and place their shares in a Board-approved voting trust. Given the Board's Decision No. 4, the Applicants' "retroactivity" argument is simply wrong: the Applicants cannot

contend that the issue was premature when first raised, but now would be too late to raise it. Moreover, in view of Decision No. 4, the Applicants cannot claim that they acted in "reliance" upon the Board's "longstanding rules and precedent," see CSX/NS-176, Appendix A, p. P-740. It is incumbent upon the Board to follow through on the commitment that it made in Decision No. 4, and to adjudicate this issue now. The carriers' "retroactivity" argument should thus be squarely rejected.

Related to their "retroactivity" argument is the argument that the Board has in past railroad mergers permitted the carriers involved in those mergers to adjust their property accounts to reflect the acquisition cost of the assets involved in the merger. See, CSX/NS-176, Appendix A, p. P-742-743. That argument is unavailing. The issue of the proper treatment of the acquisition cost was not litigated in those cases, because the premium was not nearly as alarmingly significant as in this case, and the resulting effects not nearly as large. Those precedents therefore cannot, and should not, be binding.

D. The Agency's Decision in Ex Parte 483 Does Not Require the Board to Utilize the Acquisition Premium in this Transaction for Revenue Adequacy Purposes, and Does Not Address the Matter of the Use of the Acquisition Premium in Calculating the Jurisdictional Threshold At All

In its decision in Ex Parte 483, *Railroad Revenue Adequacy - 1988 Determination*, 6 I.C.C.2d 933 (1990) *aff'd sub nom Association of American Railroads v. ICC*, 978 F.2d 737 (D.C. Cir. 1992), the Interstate Commerce Commission ruled that acquisition cost should ordinarily be used to determine the revenue adequacy of rail carriers. The carriers in this case rely greatly on that decision, but the text of the decision indicates that the decision itself is significantly less broad than the carriers have argued.

First of all, the decision itself clearly states that, in accepting acquisition cost in determining the revenue adequacy of the BN and the CNW in that case, the agency "do[es] not mean to suggest the sale price of rail assets as a substitute of old book value in every case." The ICC specifically stated that it would be driven by what is the most "reasonable valuation in each particular case." 6 I.C.C.2d at 941. These parties have shown, both in this Brief and in their Comments, why the use of acquisition cost would not be reasonable in this case. NS and CSX attempt to dismiss the ICC's careful limitation on its decision by arguing that the agency was limiting itself to situations in which the acquisition cost might not be appropriate because the purchase price might be below, and not above, book value. See CSX/NS-176, Appendix A, p. P-744. But it is clear from the text of the decision that the agency's reference to situations in which acquisition cost was below book value was illustrative only, and did not and does not limit the agency's discretion here.

Moreover, the agency's decision in Ex Parte 483, by its terms, has nothing to say regarding the use of the acquisition premium in calculating the jurisdictional threshold. It simply makes no sense for a rate that is yesterday within the Board' jurisdiction, to today fall outside of the Board's jurisdiction, not on the basis of any increased costs that are actually experienced by the carriers, such as the increased cost of fuel or labor, but on the basis of the accounting treatment of the purchase price.

III. CONCLUSION

The Board is respectfully requested to condition this transaction as requested by the parties to this Brief in their Comments dated October 21, 1997 and any supplemental comments.

Respectfully submitted,

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February 23, 1998

Certificate of Service

I hereby certify that I have on this 23rd day of February 1998 served a copy of the foregoing Brief on all parties of record, in accordance with the agency's Rules of Practice.

3/31/86

BEFORE THE
RAILROAD ACCOUNTING PRINCIPLES BOARD

In The Matter Of:

ISSUES AND QUESTIONS ON
RAILROAD ACCOUNTING AND COSTS

COMMENTS ON CHAPTER II OF
THE RAILROAD ACCOUNTING PRINCIPLES BOARD
DISCUSSION MEMORANDUM

Submitted On Behalf Of:

AMERICAN BAKERS ASSOCIATION
CONSUMER OWNED POWER COALITION
EASTERN COAL TRANSPORTATION CONFERENCE
EDISON ELECTRIC INSTITUTE
FERTILIZER INSTITUTE
NATIONAL COAL ASSOCIATION
NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE
WESTERN COAL TRAFFIC LEAGUE

Dated: March 31, 1986

VERIFIED STATEMENT OF
WILLIAM W. WHITEHURST, JR.

My name is William W. Whitehurst, Jr. I am an economist and am President of L.E. Peabody & Associates, Inc., an economic consulting firm specializing in rail transportation matters. Our firm's offices are located at 8200 Professional Place, Landover, Maryland 20785. A summary of my professional qualifications is set forth in Appendix A to this Verified Statement.

I. INTRODUCTION

I have been asked by a coalition of shipper organizations[1] to review and comment on the issues and questions regarding railroad accounting and costing that were posed in the Discussion Memorandum (the "DM") issued by the Railroad Accounting Principles Board (the "Board") on January 31, 1986. Specifically, I have been asked to focus on those issues and questions in the context of four of the regulatory purposes to which they pertain: revenue adequacy, maximum rates, the "jurisdictional threshold," and the rail cost adjustment

[1] These shipper organizations, the combined memberships of which total more than 2,000 shippers, are the American Bakers Association, the Consumer Owned Power Coalition, the Eastern Coal Transportation Conference, the Edison Electric Institute, The Fertilizer Institute, the National Coal Association, The National Industrial Transportation League, and the Western Coal Traffic League.

Capital costs are the amounts that a going concern must pay (or set aside for) its investors in return for the use of their money. As such, capital costs are costs of doing business that, like operating costs, must be covered by revenues in the long run if the firm is to survive. For a capital-intensive industry such as the railroad industry, capital costs are a major component of the cost of doing business. The establishment of sound principles to govern their determination is therefore among the most important tasks facing the Board. It is in this area that the Board's "constraints" of accuracy, verifiability and practicality will meet their sternest test.

The use of equity financing leads to difficulties of measurement (since the cost of equity, unlike the cost of debt and preferred stock, cannot be directly observed). Additionally, it raises issues regarding the proper weight of the cost of debt and preferred stock and the cost of equity when a total cost of capital is to be used. And finally, the introduction of deferred taxes, which are in essence interest-free loans from the federal government, must be addressed in some fashion to avoid overstating the actual cost to a railroad of the capital invested in it.

<u>Related Issue 3.1</u>: For each regulatory purpose, should the capital asset base and depreciation expense portion of capital costs be measured on a historical cost or a current cost basis?

Historical costs should be used for all regulatory purposes since historical costs best meet the accounting criteria of verifiability, relevancy and accuracy. In contrast, the concepts and principles underlying the establishment of appropriate

current cost standards are complex and subject to considerable disagreement[4]. It would not be appropriate for an agency such as the Interstate Commerce Commission to grapple with this complex issue. Nor do I think the Board could resolve all of the problems raised in determining "current" costs so as to result in the accurate and verifiable determination of such costs.

Historical costs represent a firm, tested and accurate foundation on which to develop all of the necessary information needed for various regulatory purposes. The use of historical costs in the <u>revenue adequacy</u> calculation is appropriate since the financial community uses an historical cost asset base to evaluate the financial viability of all industries, including railroads, which evaluation directly affects their financing ability and the related cost thereof. For <u>maximum rate</u> purposes, if stand-alone costs for a hypothetical new railroad are at issue, a replacement asset value would be used. For detailed costing purposes, it is clear that the actual, historical movement costs should be considered. As previously noted, for <u>jurisdictional threshold</u> purposes, the Staggers Act mandates use of historical costs. For <u>rail cost adjustment factor</u> purposes, historical costs must also be used in order to maintain consistency with the rest of the accounting process.

As discussed in response to <u>Related Issue 3.2</u>, below, if the railroads' investment bases were to be valued on a current cost basis a <u>real</u> cost of capital return would have to be used in

[4] There are a number of methodologies for determining current costs and various ways of calculating that cost within the same methodology.

order to avoid a double-count of inflationary effects and consequent over-recovery of capital costs. While in theory the current cost/real return approach, if properly applied, should produce the same capital cost recovery (i.e., a cash stream with the same discounted present value) as the preferred historical cost/nominal return approach, it requires two additional analytical steps -- determination of the investment base's current value, and estimation of the real cost of capital -- each of which requires substantial doses of subjective judgment, inevitably leading to substantial disagreements, even among experts. Since the current value/real return analysis must be performed perfectly to yield the same results as are already available directly from the historical cost/nominal return approach, the historical cost/nominal return approach is clearly the preferred alternative.

Branko Terzic, Commissioner on the Wisconsin Public Service Commission, testifying before the Senate Transportation Subcommittee on February 21, 1986, on behalf of the National Association of Regulatory Utility Commissioners (NARUC) indicated that regulatory utility commissions that have experimented with various current cost approaches have discarded them. He stated:

> Fair value type rate bases ha[ve] been discarded in practice by every state commission [where] I have practiced in 20 [years]. You do not need them. Wall Street does not need them.
>
> We regulate electric utilities in Wisconsin on an original cost rate base. We give them the actual debt cost. We give them a return on equity. The result has been in Wisconsin, Wisconsin electric companies are all AAA bond rated. Wisconsin electric company stock is selling at premiums above book value. Wall

> Street feels very good about the Wisconsin Commission and the way in which we regulate, and we do it with a simple, original cost methodology....

In summary, historical costs should be firmly established for determining the capital asset base and related depreciation expense because historical cost best fits all of the requirements related to generally accepted accounting and regulatory principles, financial community acceptance and common acceptance.

In determining the historical investment base of a Class I carrier for revenue adequacy purposes, the ICC currently allows inclusion of assets (other leased lines) which are not owned, but leased by the rail entity and are not included on its balance sheet. Under this ICC practice, railroads are allowed to earn a return on the leased property that they do not own. I recommend that a principle be identified which accounts for property leases following GAAP.

In addition, the present ICC revenue adequacy computation of the investment base makes an adjustment for ICC Property Account 80 - Other Elements of Investment. The purpose of the ICC adjustment is to force the property account portion of the balance sheet to equal the carriers' property valuation records. However, the ICC computation, as presently performed, is inconsistent because it takes into account only the debit portion of Account 80. The asset base should exclude both debits and credits in Account 80.

VERIFICATION

STATE OF MARYLAND)
)   ss:
COUNTY OF CALVERT)

William W. Whitehurst, Jr., being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof and that the same are true as stated.

William W. Whitehurst Jr
William W. Whitehurt, Jr.

Subscribed and sworn
to before me this ______ day
of [illegible], 1986

[illegible]
My Commission Expires July 1, 1986

STB FD 33388 2-23-98 E 185899

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TRANSPORTATION AND INFRASTRUCTURE COMMITTEE
SUBCOMMITTEES:
RAILROADS
SURFACE TRANSPORTATION

REGIONAL WHIP

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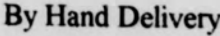
February 23, 1998



By Hand Delivery

Mr. Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street
Washington, D.C. 20423-0001

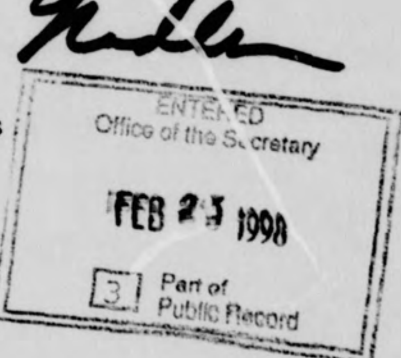
Dear Secretary Williams:

Enclosed for filing please find an original and 25 copies of our (Jerrold Nadler Et. Al.) Brief concerning docket #33388. Additionally you will find a 3.5" disk containing the text of the brief..

If you have any question please feel free to contact me.

Thank you.

Sincerely,



Jerrold Nadler
Member of Congress

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REGIONAL WHIP

Certificate of Service

I, Brett Heimov, certify that on February 23, 1998, I have caused to be served by first-class mail a true and correct copy of the attached brief on all parties that have appeared in STB Finance Docket no. 33388.

Brett Heimov

Dated: February 23, 1998

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BEFORE THE SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

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

INTERVENTION PETITION OF CONGRESSMAN JERROLD NADLER AND 23 OTHER MEMBERS OF CONGRESS FOR INCLUSION OF A CROSS - HARBOR FLOAT OPERATION, THE BAY RIDGE LINE OF THE LONG ISLAND RAILROAD, THE NEW YORK CONNECTING RAILROAD, OAK POINT YARD, HARLEM RIVER YARD, THE NEW YORK TERMINAL PRODUCE MARKET, 65TH STREET YARD AND FRESH POND JUNCTION AND THE TRACKAGE RIGHTS ON THE NORTHEAST CORRIDOR TO A FULL SERVICE JUNCTION WITH THE PROVIDENCE AND WORCESTER RAILROAD, ALL IN THE JOINT FACILITIES RAILROAD AND FOR OPEN ACCESS FOR TRANS-HUDSON INTERMODAL SERVICE ON THE NORTHEAST CORRIDOR PROPOSED BY THE PETITIONERS AS A CONDITION OF THE ACQUISITION REQUESTED

BRIEF OF THE CONGRESSIONAL DELEGATION IN SUPPORT OF THE INTERVENTION PETITION.

Jerrold Nadler, Member of Congress
for the Congressional Delegation

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THE APPLICATION

Norfolk Southern Corp. ("NS"), CSX Transportation Corp. ("CSX") and Conrail apply for Board approval of a transaction in which NS and CSX will acquire the assets of Conrail ("the Application"). If approved, the plan forwarded by the parties would have NS and CSX both operate main rail lines into the New York Metropolitan area in northern New Jersey. Within New Jersey, the terminals and connecting lines within the metropolitan area will be largely transferred to an entity known as the Conrail Shared Assets Operator ("CSAO"), an entity jointly owned by CSX and NS. CSX and NS are to have equal access to all customers on the CSAO and joint use of all terminals thereon, thus providing all New Jersey customers, with few exceptions, with direct access to both long haul services.

However, CSX is to be given sole ownership and operating control of all terminal and main line trackage located within the New York Metropolitan Area in downstate New York and Connecticut. That area includes the City of New York, all of Long Island, Westchester County, and the entire State of Connecticut (hereinafter "the Region"). The Region is currently served via the Hudson Division of Conrail from Conrail's yard at Selkirk, N.Y., which connects in the Bronx with the Northeast Corridor and at Poughkeepsie with the remains of the New Haven's Maybrook line, which reaches New Haven via Danbury. Due to clearance restrictions, conflicts with passenger operations and Conrail's downsizing of terminal facilities within New York City and Connecticut, freight hauling capacity on these lines is limited. CSX has stated that it has no intention of increasing rail service in the Region. See Draft Environmental Impact Statement ("DEIS"), Vol. 3A, at CT-2-3 and Vol. 3B, at NY-15.

OTHER SERVICES IN THE REGION

All other rail service east of New York Harbor in New York State and Connecticut is currently provided by feeder lines. The New York Cross Harbor Railroad ("NYCH") operates a float service across New York Harbor. Its assets are owned both by it and the City of New York. The New York and Atlantic ("NY&A") operates freight service on the New York State-owned Long Island Railroad ("LIRR"), connecting at Bay Ridge, Brooklyn, with the NYCH. Conrail operates freight service from Fresh Pond Jct., Queens, where it connects with the NY&A-LIRR to New Haven, CT. From Pelham Bay Jct., Bronx to New Haven, Conrail operates via trackage rights over Amtrak, Metro-North Commuter Railroad ("Metro-North") and lines owned by the Connecticut Department of Transportation. The Providence and Worcester ("P&W") connects with Conrail at New Haven and serves Eastern Connecticut, Rhode Island and Eastern Massachusetts. The P&W has negotiated trackage rights limited to carriage of construction aggregates in unit trains to run over Conrail lines from New Haven to Fresh Pond.

All rail services combined handle just 2.8% of the interstate freight generated by the New York Metropolitan Region east of the Hudson River. See Exhibit D to the Petition.

CONGRESSIONAL DELEGATION'S DEMANDS

The Congressional Delegation seeks to condition any approval of the Application upon rationalization of the Region's rail system to allow the Applicants to provide efficient and needed services to the public.[1] Specifically, the Congressional Delegation seeks:

1. Extension of the CSAO from Bayonne, N.J. across New York Harbor to Bay Ridge by acquisition of car float and rail facilities owned in part by the City of New York, pursuant to 49 U.S.C. §§10907(c)(1) and 11324(c).

2. Extension of the CSAO from Bay Ridge to Fresh Pond Jct., Queens County, N.Y. by the granting of overhead trackage rights on tracks owned by the State of New York, LIRR, pursuant to 49 U.S.C. §11102 and 11324(c).

3. Transfer to the CSAO of the Conrail line from Fresh Pond Jct., Queens to Pelham Bay, Bronx pursuant to 49 U.S.C. §10907(c)(1).

4. Extension of the CSAO from Oak Point Yard, Bronx County to Harlem River Yard, Bronx pursuant to 49 U.S.C. §§10907(c)(1) and 11324(c).

5. Extension of the CSAO to a point in Connecticut where it may connect directly with the full freight services of the P&W via trackage rights on Amtrak's Northeast Corridor, owned by New York State's Metro-North and by the Connecticut Department of Transportation, pursuant to 49 U.S.C. §§10907(c)(1) and 11324(c).

6. Reserving to Amtrak as the owner or designated operator of the Northeast Corridor, the right to negotiate with any responsible operator, including but not limited to the Applicants, to provide intermodal or other direct freight service on the Northeast Corridor, which service must include but need not be limited to service through the Hudson and East River tunnels of Amtrak, as a specific exception to the exclusivity of any rights to operate on the Corridor granted to the Applicants; and the granting to the State of New York the right to designate a second operator of services on the Hudson Division from Selkirk, N.Y. to Oak Point Yard, Bronx, pursuant to 49 U.S.C. §§10907(c)(1) and 11324(c).

The Congressional Delegation has filed its petition pursuant to 49 U.S.C. §11324(c) to require the Board to condition its approval of the Application on the

[1] The Congressional Delegation's demand has evolved since the filing of the Petition due to the receipt of additional information and by the fact that the State and Municipal authorities have joined in the Petition.

Applicants' accomplishing this rationalization. The Congressional Delegation has also invoked the provisions of 49 U.S.C. §11102 to require joint use of terminal facilities, including main line trackage, owned by the various rail carriers in question, subject to reasonable terms and conditions. Finally, to the extent that this Petition would require the Board to order the sale of rail assets and operating rights from one carrier to another, the Congressional Delegation has invoked the Board's powers under 49 U.S.C. §10907(c)(1). The NY&A and the NYCH, each affected by the Congressional Delegation's Petition, have been duly served and have appeared in this proceeding.

Preliminary Statement

This is a case of first impression. It is the first proposed transaction which seeks to break up a monopoly and replace one carrier with two. Neither the Board nor its predecessor, ICC, has ever been faced with a transaction where two carriers seek to control all of the rail facilities, but refuse to provide adequate service over those facilities, for a region containing ten percent of the nation's population. It is submitted that the transaction violates the Applicants' common carrier obligations under 49 U.S.C. §11101. No such transaction can be in the "public interest." The transaction will cause further deterioration in the Region's air quality and further economic dislocation. The Applicants seek to impose substantial environmental degradation within areas of the Region with large minority populations, which areas are already suffering tremendous rates of disease related to excessive levels of air pollution. Such environmental degradation violates strong public policy and is not in the public interest. The Applicants' plan will result in no material improvement in transportation in the Region which would justify the permanent reduction in transportation options, economic opportunities and environmental quality to be expected.

The relief demanded by the Congressional Delegation is the only way the transaction can be shaped to avoid gross environmental and social-economic harm to the populace of the Region. The relief demanded will also enhance the long term viability of the Applicants. The relief demanded would therefore benefit the public.

FACTS

THE REGION'S RELEVANT CHARACTERISTICS

The entire Region is within an air quality non-attainment area and is the subject of a State Implementation Plan required by the Clean Air Act. See DEIS, Vol. 3B at NY-45-46. But that statement does not even begin to tell the tale. Air quality problems in the Region exceed not only levels of comfort, but levels of safety as well.

Three-fifths of all truck traffic entering or leaving the Region must pass through the Bronx. The Bronx has the highest rates of respiratory disease and related mortality attributable to air quality in the United States. Stephanie Pinto, Executive Director of the Council Health Center in Washington Heights, a neighborhood straddling

the eastern approach to the George Washington Bridge, reviewed a 1993 New York City study of health problems in detail. See Certification of Stephanie Pinto dated 1/12/98, Rebuttal Statements Submitted on Behalf of the Congressional Delegation, at 19. She traced the juxtaposition of areas with tremendous rates of respiratory disease to the major truck routes through the City. She stated:

> It is to be noted that all of these neighborhoods have exceedingly high truck traffic. Central West Harlem, East Harlem and Washington Heights are located in both the Manhattan north/south truck routes, of Amsterdam Avenue, St. Nicholas Avenue, Broadway, First and Second Avenues. Washington Heights and West Harlem are located in or near the east/west routes of the George Washington Bridge, which becomes the Cross Bronx Expressway in the Bronx. In the Bronx, the Cross Bronx Expressway cuts through Morris Heights/Tremont, the Deegan Expressway cuts through Morris Heights and Highbridge, and the Bruckner Expressway (Route I-278 and I-895) cuts through or is near the Mott Haven/Hunts Point neighborhoods in the Bronx.

Pinto Certification, supra, Rebuttal Statements at 19. She then listed the 1993 statistics (the latest figures available) for respiratory disease, neighborhood by neighborhood, along these routes. In each case, the rates of respiratory disease of all kinds exceeded City norms by substantial amounts. Id.

The Petition, at 8, documents the direct link between pollution from trucks and respiratory disease. See, e.g., "Asthma Common and on Rise in the Crowded South Bronx," The New York Times, 9/5/95 (Petition Exh. E); "An Association Between Air Pollution and Mortality in Six US Cities," New England Journal of Medicine, 12/9/93 (Petition Exh. F); "Nitrogen Dioxide From Gas Stoves or Traffic Fumes Raises Risk of Allergy-Induced Asthma Attack," Report of the American Lung Association, 3/20/97 (Petition Exh. F); "American Lung Association Fact Sheet-Outside Air Pollution" (Petition Exh. F). It must be noted in reviewing this material that there are no coal-burning electrical generating plants in the vicinity of the neighborhoods in question; thus, all respiratory problems can be traced, according to this research, to vehicle emissions. The Petition presents evidence that the conditions reviewed in detail by Ms. Pinto have in fact worsened substantially since the 1993 study she relied upon:

> Doctors here and elsewhere talk about an emerging epidemic of asthma in the South Bronx, pointing to hospitalization rates as high as 17.3 per 1,000 people **and death rates as high as 11 per 100,000**. Both rates are **eight times the national average**, and the sample rate among children is 8.3%, twice the rate across the country. (emphasis added)

"Asthma Common and on Rise in the Crowded South Bronx," The New York Times, supra.

The neighborhoods reviewed by Ms. Pinto are all largely populated by minorities. The Bronx is also the poorest county in New York State. The average family income in the Bronx is $19,881, as compared with a national average of $31,241. The unemployment rate in the Bronx is 9.8%, among the highest in the nation; 46.97% of the children in the Bronx live below national poverty levels. See Comments of Jerrold Nadler and 23 other Members of Congress on the Draft Environmental Impact Statement, at 6 (hereinafter "DEIS Comments").

Twenty million people inhabit the Region, all of which is East of the Hudson River. This Region generates 142 million tons of freight per year, 98 million tons of which is rail-appropriate due to the type of freight in question and the distance traveled. See Certification of William B. Galligan dated 1/12/98, Rebuttal Statements at 12. Yet, less than 3% of that is currently travelling by rail. Of all freight entering northern New Jersey, two-thirds is bound for the Region. Petition at 8 The down-state New York portion of the Region alone has the nation's largest domestic product (see DEIS Comments at 3), a domestic product that is equal to that of Australia and New Zealand combined.

THE ORIGIN OF CURRENT CONDITIONS

Numerous studies commissioned by governmental authorities in New York and New England have established that a mass exodus of manufacturing activity immediately followed the termination of rail services to the Region in 1968. Petition at 5-6 and Exhibit A. In that year the Penn Central Railroad was required to take over the New Haven Railroad. It closed the cross harbor rail car float service then operated by the New Haven between its line at Bay Ridge, Brooklyn and the former Pennsylvania RR facilities at Greenville in Bayonne, N.J. At the time they were shut down, these floats had been handling 367 cars per day across New York Harbor. Petition at 4-5. The economic consequences of this loss of rail service were extreme and immediate. Between 1968, when Penn Central took over the car floats and terminated that service, and 1976, the City of New York lost 342,000 manufacturing jobs, one-third of all such jobs existing in the City in 1967. During that same period, the nation saw an 18.7% *increase* in manufacturing-related employment.[2]

No factor can explain the enormity of the City's employment losses among industrial, warehouse, wholesale, harbor and other blue collar workers other than the degradation, and then the termination, of quality rail freight services to the City's freight users, who were, in fact, using those services up to the day they were terminated

---

[2] A.O. Sulzberger Jr., "Job Growth Since 1976 is Mostly in Manhattan," The New York Times, Oct. 6, 1981, p. B3. The loss for all blue collar workers was over 600,000 jobs. The manufacturing job losses are traced in the Bureau of Labor Statistics Data. See Exhibit A to the Petition.

by the carriers. Their only alternative was to ship goods by truck, or move out of the area. New York City's job losses were in marked contrast to the national trend. New York City's losses in such employment have, since these events, generally continued as a multiple of losses anywhere else in the United States, and truck traffic in the same time period has grown dramatically. Indeed, while the Northeast has largely recovered from the job losses of the early 90's, New York's recovery lags way behind. See Petition at 6, Exhibit A. History has, thus, demonstrated that trucks can not support a diverse economy in the Region. Since rail service was withdrawn, blue collar employment has substantially lessened, creating an abnormally white collar economy. Trucks are more expensive than rail service, particularly for commodities which are better suited to rail shipment, such as flour, lumber, plastics, garbage and paper, as a few examples. Users of such commodities which can do so continue to flee the Region. Indeed, The New York Times, due to newsprint delivery problems, is now printed largely in New Jersey.

From shortly after the creation of Conrail in 1976 to date, only one car float operator remained in the harbor, operating the floats from Brooklyn to Greenville. Now the NYCH, that survivor uses the remains of the New York Dock and Bush Terminal railways which once served the Brooklyn waterfront. It handles 10 to 15 cars per day according to Robert Crawford, NYCH President. See CRTS Update No. 07-42 7/23/97 (reprint of a New York Times article), Exhibit A hereto, at p. 2. Due to its chronic under-capitalization, NYCH is dependent on governmental funding for all improvements. It is presently seeking $3.9 million from a $4.75 million improvement program. CRTS Update No. 12-1-3, 12/2/97, Exhibit B hereto. While this is supposed to increase the capacity of the railroad from 35,000 cars per year to 75,000, the railroad's current traffic base is in the hundreds of cars per year and not in the thousands. Therefore, the line cannot realistically be expected to utilize that increased level of capacity. In any case, the operator has only been able to raise $2.5 million so far in a penny-stock offering. See CRTS Update No 02-37, Exhibit C hereto.

NYCH has filed a lawsuit in the Eastern District of New York, claiming that Conrail impermissibly rerouted float-bound traffic via Selkirk by changing shippers' routing instructions on waybills. It also claims that Conrail denied it service at the NYCH's interchanges, and took other actions that were harmful to NYCH's business. See Exhibit A hereto. These predatory practices, it claims, have contributed to its precarious financial condition. NYCH is extremely sensitive to diversions of even small amounts of traffic due to its financial instability. Conrail serves both sides of the Harbor by rail. Yet it has apparently been reluctant to share traffic with NYCH over the float, even though any traffic moving via the float would move to and from the Region via Conrail's long haul services. If the Application is approved, CSX will have even less incentive to treat NYCH fairly since NYCH will connect with both NS and CSX in New Jersey. Thus, it can be expected that CSX, which will have a monopoly over the westbound Selkirk route, will use its control of access to the NYCH from the Bronx and New England to disfavor the viability of that route rather than risk the loss of customers who might choose to utilize NS for the west-side long haul. Without access to such traffic, the NYCH can not survive.

Recent studies by the New York City Economic Development Corporation have determined that the efficient operation of the float service could divert 14.4 million tons of freight from the highway to the rail systems of the Applicants by the year 2020. See Mercer Management Consulting, Intermodal Goods Movement Study, New York City Rail Freight Access, Executive Summary, at IV-4; Galligan Certification, supra, Rebuttal Statements at 14. Roughly 4.2 million tons, or 42,000 cars per year, would use float service immediately if it were realistically available. This is in marked contrast to the approximately 4,500 cars presently being handled by the NYCH annually. These results can not be achieved if the NYCH is effectively blockaded from the Bronx, Westchester and New England traffic by CSX's control of the line from Fresh Pond to Pelham Bay Jct. At present, NYCH is handling only about 10% of the traffic it could handle if properly maintained. It is therefore not providing service to a majority of the shippers which would use the line. Conrail is handling only 2.8% of all freight in the Region. Thus, neither carrier is fulfilling its common carrier obligations.

APPLICANTS' PROPOSAL

In the face of this history, the Applicants deem service by truck an adequate answer to their refusal of service. Indeed, CSX states that it fully intends to continue to limit its service to the Region to Conrail's present one train a day. See DEIS Vol. 3B at NY-15. Applicants state that they intend to increase their market share in the Region by drayage from their New Jersey terminals. By their own estimates, this will place well over 1,000 additional trucks per day on the most congested highways in the nation.[3] These highways run through poor, minority neighborhoods that already have the highest rates of respiratory disease in the nation due to excessive truck traffic. Applicants make no representation that such traffic will create any offsetting public benefit within the Region. Absent revitalized rail freight services, the dependence on trucks is

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[3] The DEIS states that the Applicants will increase truck movements at northern New Jersey intermodal terminals by 670 at Elizabeth/ E-Rail, 100 at Port Side, 354 at Little Ferry, and 156 at South Kearny, for total increase in such traffic of 1,280. See DEIS, Vol. 3B, NJ-14-17. About 68% of all intermodal freight grounded in New Jersey terminals is bound for points in the Region. "The NY/NJ Circumferential Corridor," Report of the Port Authority of NY & NJ, June 1991, at 8 (Petition, Exh. H). Twenty-five percent of this traffic will move in full trailers directly to or from a shipper. As the west of the Hudson market is well served by rail services now, it must be assumed that much of the increase will be for east of the Hudson and that the Applicants will target the traffic which arrives now by truck from points in the south.

About 30,000 trucks per day cross the George Washington Bridge and 20,000 cross the Tappan Zee Bridge (see Exhibit A to DEIS Comments) and about one-third of this total is to or from Westchester and New England. All of this traffic has the option of avoiding the congestion of the Bronx, and most through-traffic from Connecticut and points north does so by using the Tappan Zee and I-287 to move south and west. However, any traffic going to New Jersey rail terminals must use the George Washington Bridge and access routes through the Bronx. Thus, it can be assumed that at least two-fifths of any traffic diverted from truck haulage will be diverted from the Tappan Zee Bridge route to the Bronx, worsening congestion and air quality there.

permanent; thus the environmental and economic consequences will be permanent as well.

PUBLIC BENEFIT FROM THE DELEGATIONS' CONDITIONS

A 1993 study by Transmode Consultants determined that a TOFC shipment delivered to a New York City location from an intermodal terminal located within New York City would cost $109.00 less than a shipment received via double stack service through a New Jersey terminal and then trucked across. This study was commissioned by the NYS Department of Transportation to estimate traffic that would be generated by the proposed Oak Point Link. See Oak Point Link, Freight Market Potential, Task 2 Report, NYS Department of Transportation by Transmode Consultants, 1993 at 2-8; Petition at 11, Exhibit M. The Oak Point Link would allow large rail cars and conventional TOFC to reach the Harlem River Yard and destinations on Long Island, including Brooklyn and Queens. Transmode found that with such a cost advantage, intermodal services terminating east of the Hudson could attract up to 600,000 trailers per year from the highway system, saving shippers roughly $65.4 million annually. Using the estimates more recently derived by Mercer Management, i.e. that 14.4 million tons of freight including, but not limited to, intermodal freight, would be attracted to an improved float service (see Galligan Certification, supra, Rebuttal Statements at 13) shippers east of the Hudson could save over $89 million in shipping costs every year if the Congressional Delegation's conditions are adopted. Also, according to Mercer Management's 1997 report, using the floats would lower the cost of transporting a rail-car load from a typical mid-Atlantic region origin to a destination on geographic Long Island by $5.08 per ton. Id.

Transmode concluded in its Report that the known taxpayer costs of moving a truck from Kearney, N.J. to locations in this area, less the tolls and fees paid by the truck, ranged from $183.23 for the Bronx, to $437.13 for Deer Park, Long Island. See Petition at 14-15, Exhibit N at 5-12. These costs did not include the costs to society from adverse environmental effects, such as the cost of time lost to disease and the cost of treating that disease, all of which are attributable in substantial part to the presence of large numbers of heavy trucks on area roads. Therefore, in addition to the savings to shippers and to the carriers, the savings to the taxpayer from the creation of a comprehensive and efficient rail system would be tremendous. These figures and the conclusions to be derived from them have not been challenged on this record. These facts indicate that the environmental consequences here in issue are substantial.

Also, since all land-fills in the Region must be closed within the next few years, a growing and tremendous volume of municipal solid waste traffic will be moving from the Region, primarily to land-fills in Virginia. Due to unreliability, the floats as presently operated have not been able to attract and hold this traffic. Because the Conrail service via Fresh Pond does not have sufficient capacity to handle this traffic efficiently either, the NY&A has entered into agreements with the Queens Borough President and Metro-North not to handle any such traffic for at least a five-year period. Thus, due to

both Conrail's refusal to provide adequate service and NYCH's inability to do so, virtually all waste traffic generated on Long Island must be handled by highway. Such traffic generated in the Bronx must move south via Selkirk, a detour of over three hundred miles (see Petition at 10), or by truck.

It is apparent that the Application is not designed to, nor will it, provide essential service to New York City, Long Island, Westchester or Connecticut. Despite the historically proven fact that trucks cannot substitute for rail services in this Region due to extraordinary cost and unacceptable environmental consequences, the Applicants' plan relies entirely upon increased drayage from intermodal terminals in New Jersey, primarily through the already over-burdened Bronx and over the George Washington Bridge, as its only means of serving the Region.

ARGUMENT

Point I

THE APPLICATION IS NOT IN THE PUBLIC INTEREST

The plan encompassed by the Application at issue is not in the public interest because it will effectively deny 98 million tons of freight annually access to efficient rail transportation. Not only will this anomaly affect the Region, it will affect the rail market share nation-wide, substantially decreasing the efficiency of the national transportation system. The Application proposes to give CSX a monopoly over all rail lines crossing the Hudson River south of Albany. Norfolk Southern's services are to end west of the River even though their RoadRailer-based intermodal service is the only freight service capable of accessing the Region within the metropolitan area directly by rail, i.e. instead of detouring 300 miles to the Selkirk bridge. While the current, pre-exiting situation is that Conrail has the same monopoly as CSX would have after implementation of the transaction, this situation has not worked well for the Region[4]. Moreover, the transaction must be judged as part of a series of transactions which have had a demonstrably cumulative effect, and it must be evaluated in light of current and future reality.

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[4] In its report on the Conrail crisis of 1981 (Recommendations for Northeast Rail Service, U.S. DOT Federal Railroad Administration 3/31/81) the FRA found that the refusal of the railways to serve the Northeastern Terminal area complicated efforts to improve rail service:

> The reluctance of profitable railroads to accept entrepreneurial responsibility for terminal operations adjacent to the Corridor, between Wilmington, Delaware and the New York-New Jersey port area, has been an impediment to transferring these operations.

The New York metropolitan region, primarily east of the Hudson River, is facing a current crisis in freight handling. Less than 2.8% of all freight is presently shipped by rail; the remaining 97.2% travels by truck. Yet the Region's highway are overcrowded, and there is no room for expansion. Because of the extraordinary number of trucks on the roads, the Region's air quality is among the worst in the nation. Respiratory disease and mortality rates in the Bronx are 8 times national norms. The cost to the public, in addition to the direct costs to the shippers of this extremely inefficient system, is extraordinary. See reference to Transmode Reports, supra.

In 2002 the City's major landfill will close. That will instantly place five million tons of waste in the transportation market. The first vestiges of the loss of landfill capacity are already in transit, with about one million of the 13 million tons of municipal solid waste generated in NYC annually already moving from the Bronx to points in Virginia by rail and truck. About six million tons of waste traffic generated by commercial firms in the City and on Long Island is also moving. None of that traffic, except for a few cars a day from Brooklyn, is moving by rail, due in part to the inability of the NY&A and Conrail to handle the traffic efficiently. Thus, waste traffic will continue to grow and unless the rail system can efficiently handle this traffic it will all travel by truck. The Region is under a federal mandate to bring its air quality into compliance with national standards by 2007.[5]

Despite these public costs and concerns, Conrail has adamantly refused to increase freight service to the Region. In this Application CSX has, incredibility, stated that it will not increase rail freight movements. Rather than attempt to reduce highway use, Applicants admit that they will add 1,000 trucks per day, (at least 40% of which will be entirely new traffic across the Bronx) to the Region's highways in their attempt to capture intermodal market share to New Jersey terminals. This is in addition to the 230,000 trucks of garbage (5 million tons @ 21 tons per truck) that will be completely new traffic in four short years.

This situation is unworkable as the Region's highways simply do not have the capacity to handle more traffic, let alone an increase of this magnitude. The Application is therefore contrary to the public interest. Improving the air quality, and reducing traffic congestion on the Region's highways is required by strong public policy and federal law. The Application would defy achievement of both goals forever.

A common carrier has the obligation to provide service on reasonable request. 49 U.S.C. §11101. Where, as here, a carrier has refused to provide reasonable services, or is unable to do so, the Board has the right and obligation to transfer the transportation assets in question to a responsible operator that can provide such service. 49 U.S.C. §10907 (c)(1).

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[5] Under the Clean Air Act the State of New York must reach compliance with federal standards by 2007. This requires a 3% reduction per year in emissions. One of the goals stated in the Transportation Improvement Plan (Exhibit D hereto) is the reduction of diesel emissions.

Point II

ENVIRONMENTAL CONSIDERATIONS
REQUIRE THE CONDITIONS SOUGHT BY THE
CONGRESSIONAL DELEGATION

Congress made it clear in the National Environmental Policy Act, 42 U.S.C. §4331 et seq., that:

> it is the continuing responsibility of the Federal Government to use all practicable means, [to] -
>
> ...
>
> (2) assure for all Americans safe, healthful, productive and esthetically and culturally pleasing surroundings;
>
> (3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
>
> ...
>
> (5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities.

Id., 42 U.S.C. § 4331 (b). To achieve these goals, Congress "authorizes and directs . . . all agencies of the Federal Government" to consider:

> (C) . . . (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) . . ., and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

42 U.S.C. § 4332. Moreover, the Clean Air Act requires the Board to favor environmentally sound proposals and disfavor those that adversely affect air quality:

> Each department, agency, or instrumentality of the Federal Government having authority to conduct or support any program

with air-quality related transportation consequences shall give priority in the exercise of such authority, ... to the implementation of those portions of plans prepared under this section to achieve and maintain the national primary ambient air quality standard.

42 U.S.C. §7506(d). In addition, Executive Order No. 12898, dated February 11, 1994, requires that:

each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies and activities on minority populations and low-income populations.

The New York State Implementation Plan filed pursuant to the Clean Air Act calls for a reduction in air pollution from motor vehicles of 3% per year. It specifically calls for a reduction in emissions from diesel engines. Relevant portions of this plan are attached as Exhibit D hereto.

Thus, the obligation to assure that a transaction does not adversely affect environmental quality has been superimposed on the Board's general mandate to assure the nation of a sound and efficient transportation system. The State Implementation Plan for the Region calls for a reduction of vehicle traffic, particularly truck traffic.

Section 176(c) of the Clean Air Act, as amended in 1990, provides that, before any transportation project, or plan ("transportation activities") located in air qualities regions designated as "nonattainment areas" or "maintenance areas" can receive federal approval or funding, the transportation activity must be found to conform with the applicable State Implementation Plan.

Sierra Club v. Environmental Protection Agency, ___ F. 3d ___, 1997 WL 679475, (Docket No. 96-1007, D.C.Cir Nov. 4, 1997) (copy attached as Exhibit E). "Congress intended a strict and broad ban on nonconforming activities in all nonattainment areas." Id., at p. 5.

It is respectfully submitted that the Application can not be approved without the modifications demanded by the Congressional Delegation as such action would violate the above cited provisions of law.

Due to the clearance limitations on the Region's highway system, all heavy truck traffic crossing the Hudson River must do so on the George Washington

Bridge or the Tappan Zee Bridge.[6] Every truck generated by the Applicants' pursuit of market share in the Region must pass through the Bronx. Most of the market they will pursue is east of the Hudson, as Conrail's service has been adequate west of the Hudson to date. The Bronx is a minority area where 11 people out of every 100,000 are already dying of respiratory failure related to air pollution every year, eight times national rates. The Application calls for the increased use of trucks. Such a result can not be allowed under applicable law as it violates the SIP which calls for a reduction of truck traffic. The fact that the action would produce a marked negative impact on a minority area, with no resulting public benefit, violates both the letter and the spirit of the Executive Order.

Point III

UNLESS INCLUDED IN THE CSAO THE LINES EAST OF THE RIVER WILL NOT PROVIDE VITAL PUBLIC SERVICES

The Board may require conditions to such acquisition which provide for the protection of the public interest, including the transfer of rail facilities in a manner which is inconsistent with the application before it. See Chicago Milwaukee, St. Paul and Pacific Railroad Company--Reorganization--Acquisition by Grant Trunk Corporation, 2 I.C.C.2d 161, 1984 WL 49400 *32 (1984). While in the past the Board and its predecessor have limited their conditions to correcting problems newly created by the proposed merger, section 10907(c)(1) is designed specifically to address insufficient services -- an existing situation. That section gives the Board jurisdiction and the power to act as the public interest dictates. The Board is not confined in its remedial powers to the nature of the transaction before it where an inconsistent petition invokes another of its statutory powers.

CSX is unlikely to cooperate with NY&A and NYCH to utilize the direct routes between the Region and the middle-Atlantic and southern states, the origin and destination points of 78% of regional freight. This is not a situation unique to CSX but has been a recurring problem where railroads have diverse interests. See, e.g., New Haven Inclusion Cases, 399 U.S 392, 454, 90 S. Ct. 2054 (1970), ("the company would have no economic incentive to provide service..."); CSX Corporation --Control--Chessie System, Inc., 363 I.C.C. 521, WL 14204 *25 (1980) (hereinafter "CSX Merger Case") ("the northern carriers division of revenues is too small to give it any interest in developing the traffic"). Exactly the same justification was given with regard to the creation of NS:

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[6] All tunnels are too low for the 13'6" overhead clearance needed by heavy trucks. The route to the Varrazano Narrows Bridge crosses the Goethels Bridge. The lane width of the Goethals Bridge excludes trucks exceeding 8' in width, which is all heavy trucks. Exhibit A to the DEIS Comments shows the focus of traffic on the George Washington Bridge and its approaches.

The most severe constraint on traffic flow is encountered where the origin or destination point of one rail carrier is located relatively close to its interchange point with another railroad. Since the carrier serving the site near the gateway receives only the short haul of what may be a movement of a considerable distance, its share of a competitive rate may be insufficient to warrant its participation even though the total revenue associated with the movement may be remunerative...

Norfolk Southern Corp--Control--Norfolk and Western Railway Company and Southern Railway Company, 366 I.C.C. 173, 1982 WL 28414 *17(1982)(hereinafter "The NS Merger Case").

By any measure of "public interest," the importance of the cross harbor floats dwarfs anything previously deemed sufficient by the Board, its predecessor or the Courts to require continuation of services by preservation of a line. In prior cases increased road damage in the sum of $2.8 million and other relatively small public costs ($37,000) in increased highway accidents, have been deemed sufficient to justify retaining a line in service through Kansas. See St. Louis Southwestern Railway Co.--Purchase (portion) Chicago Rock Island and Pacific RR. Co. 363 I.C.C. 323, 1980 LEXIS 82, p. 23 (1980). Here public highway and congestion related costs alone of the 1,000 new trucks Applicants project for this Region's roads (Draft Environmental Impact Statement Vol. 3 B p. NJ-13-NJ-17) are a minimum of $183,000 per day, assuming the minimum public costs of trucking found by Transmode in its 1993 report. Petition at 15. To reduce those public costs the Congressional Delegation seeks to ensure a viable competitive route by granting major carriers access to friendly connections. This is precisely the accepted answer to an applicant's natural disinterest in maintaining efficient routes which favor its competitors.

There can be no question on this record that the inclusion in the CSAO of the cross harbor floats and the lines connecting the floats to the feeder lines east of the Harbor up to and including the P & W line, is critical to maintain and improve the cross harbor floats. It is beyond question that those floats constitute a resource with growing importance as traffic patterns continue to shift to the South. It is clear that with the coming flood of municipal solid waste traffic which must soon be handled in this Region, the direct link to the South will also be critical. It is beyond question that continued operation of the floats and the lines in question by multiple carriers, with CSX as the gatekeeper for New England, the Bronx and Westchester, insures that service will not be provided which is adequate to serve the public interest or the shippers who currently would use the line, but can not. With CSX's declaration that it will not increase service to the Region and with Conrail, NYCH and NY&A together handling less than 2.8% of the available traffic, transfer of the entire through operation on the line to the CSAO is mandated under 49 U.S.C. §§10907(c)(1) and 11324(c) .

Point IV

THE BOARD SHOULD CONDITION APPROVAL OF THE APPLICATION UPON THE INCLUSION OF THE LINES SOUGHT BY THE CONGRESSIONAL DELEGATION WITHIN THE CSAO

The States of New York and Connecticut own all of the tracks between Bay Ridge and New Haven, Connecticut here at issue except that owned by Conrail, a party. The City of New York owns the trackage of the NYCH in Brooklyn. These owners seek inclusion of the harbor float system and lines connecting it with the feeder lines east of the Harbor within the CSAO. Such relief is required to serve the public interest and to avoid environmental disaster for the Region.

National transportation policy, as articulated in McLean Trucking Co. v. U.S., 321 U.S. 67, 82-83, 64 S. Ct. 370 (1944):

> demands that all modes of transportation subject to the provisions of the Interstate Commerce Act be so regulated as to "recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers ... all to the end of developing, coordinating and preserving a national transportation system ...adequate to meet the needs of the commerce of the United States . . . .

As reviewed in Point I above, it is respectfully suggested that the Applicants' plan fails to meet these oft-cited criteria and thus is not in the public interest. Pursuant to 49 U.S.C. §11324, the Board must consider the effect of including other rail carriers as proposed by the Congressional Delegation. The criteria set forth in §11324(b) for such consideration which are relevant to this matter are:

> (1) the effect the proposed transaction on the adequacy of transportation to the public;
>
> (2) the effect on the public interest of including or failing to include other rail carriers in the area involved in the proposed transaction.

There can be no question on this record that both cirteria for requiring inclusion are present here.

This is not the first transaction to consider the proper means to preserve adequate rail transportation service in the Region. Indeed, the cumulative effect of the

prior decisions are properly to be considered by the Board in this proceeding. 49 C.F.R. § 1180.1 provides in relevant part:

> (g) Cumulative impacts and cross-over effects. The Board recognizes that events can occur during its consideration of a consolidation that can have an affect on various of the concerned parties. . . . **The proper forum for considering cumulative impacts and crossover effects is in a later proceeding**. In this manner, consideration will be limited to the impacts of transactions which have already been approved and are, therefore, reasonably certain to occur. Furthermore, **the Board will have the benefit of its findings from the prior proceeding to identify more precisely the impacts of that transaction**.
> (emphasis added)

Therefore the history of all prior efforts to rationalize the rail system of the Northeast must be considered in this proceeding as cumulative effects; the direct impact of the Application at issue cannot be judged in a vacuum.

The aggressive disinvestment in the Region by Conrail of the rail plant to be transferred to CSX is inherently inadequate. When the Supreme Court considered the New Haven Inclusion Cases, supra, that company's assets in the Bronx included 160 acres of yard properties. Today, just six medium-sized tracks survive to handle all incoming and outgoing freight cars and to sort cars for all destinations. Yet the Applicants wish the Board to proceed on the fiction that CSX's refusal to serve, a continuation of Conrail's refusal, will be moderated by NS's competition by truck from across the Hudson. Applicants Rebuttal VIII-13-15.

Indeed, other than an increase of 1,000 truck trips a day across the Bronx there is no added service in the Applicants' present plan to moderate the effects of CSX's refusal, including its anticipated refusal, to provide needed services. The Applicants present the theory espoused by Dr. Kalt that CSX will have the incentive to develop a price and service structure to compete with NS truck service by improving CSX all-rail service. Kalt RVS at 16-17. Conrail, however, has not been inspired to such action to date, preferring instead to yield 97% of the largest freight market in the world to its non-rail competitors. It has divested itself of the capacity to serve the Region by rail by selling or leasing most of its property in the Region. Any increase in service via the Hudson line is doubtful at best; the stated refusal of CSX to increase service requires that the request for modifications filed by the State of New York be favorably considered.

All-truck service is not a viable alternative to respond to CSX's refusal to serve, nor to the imminent inability of the NYCH to continue to provide vital services. The inability of the trucking industry to serve this region adequately has been well documented. The Region lost a major portion of its manufacturing activity -- more than 600,000 jobs -- when Penn Central reduced rail service in the area after it acquired the New Haven in 1968 and terminated the very cross harbor float services which the

Congressional Delegation seeks to restore. The highway system upon which the Applicants intend to rely, is already heavily congested and the imposition of additional truck traffic on that system can not be allowed as physically and environmentally unacceptable. See Point II above.

Prior decisions of the Commission, cited by the Applicants as justifying the Board's taking no action here, which narrowly construe the Board's mandate to protect the public interest, are not appropriate. **No case ever presented the Board or its predecessor with a refusal by a rail carrier to serve one-tenth of the nation.** Only the failure of the New Haven Railroad and its inclusion in the Penn-Central merger even approaches the significance of the matter here before the Board. Further, the Board's assumption that conditions to a merger or acquisition "generally tend to reduce the benefits of a consolidation" (Burlington Northern Inc. et al-- Control and Merger--Santa Fe Pacific Corp. et al, 1995 WL 528184, *41 (1995)) is not applicable where, as here, the conditions sought will actually give the Applicants the economic incentive to seek to carry by rail much of the 98 million tons of the Region's freight per year which currently moves by truck. Indeed, under the facts of this case, the ICC's restrictive interpretation of the Interstate Commerce Act is inconsistent with the statutory mandate as interpreted by Denver & R. G. W R. Co. v. U.S., 387 U.S. 485, 492 (1967), where it was stated, "[b]oth the ICC and this Court have read terms such as 'public interest' broadly **to require consideration of all important consequences** including anticompetitive effects." (emphasis added).

The Applicants seem to believe that their Application does not reduce existing competition in the Region, but merely replaces one monopoly which refused to serve the area with another. Therefore, they argue, the Board is divested of authority to impose conditions which will foster improved service. That interpretation of the facts and the statutory mandate is, we submit, incorrect. First, the I.C.C. recognized that possible anitcompetitive effects of a proposed transaction were not the only relevant consideration:

> We do not sit as an anti-trust court ...our statutory obligation under the public interest standard is broader. ...The anticompetitive effects of a proposed consolidation are therefore only one element--although admittedly a significant one--in our analysis of the public interest.

CSX Merger Case, supra, 1980 WL 14204 at * 21.

Moreover, the Applicants plan will produce new anti-competitive effects. With the transfer of Conrail's west of the Hudson lines to both CSX and NS access, competition on those lines will be created for the first time since 1974. Yet, this competition will be stifled for all traffic seeking to cross the river. Only CSX will have the ability to continue service into the northeast corridor, and because it will not own or control the cross harbor rail floats, it will have no incentive to offer that service. It's only all-rail option is to route north through Selkirk - a detour of 150 miles each way. This

inefficient route will not allow it to compete economically with trucks on most southern traffic. As already noted in Point III above, CSX has a strong disincentive to route southbound traffic via the floats, since to do so will give shippers the option to choose to utilize NS once across the river. Thus, the very act of opening competition west of the river while retaining a monopoly east of the river produces an anti-competitive effect for all freight to or from the Region. The most efficient and logical way to restore competition, and therefore better service and transportation options for shippers, is to transfer the cross harbor lines to CSAO. As the Board noted in Santa Fe Southern Pacific Corp.-Control-Southern Pacific Transportation Co., 2 ICC 709, 1986 WL 68625 *41 (1986), where, as here, the applicants seek to control access to a major population center, "possible anticompetitive effects of the proposed merger must therefore be viewed with extreme caution."

Viewing this transaction in context, it is just the most recent episode in a long series of steps whereby the Commission, the Courts and now the Board have attempted to deal with the problems resulting from the failure of the northeastern railway system in the 1960's. The Board should recall the prophetic language of Baltimore & Ohio R. Co. v. U.S., 386 U.S. 372, 392, 87 S. Ct. 1100, 1110 (1967) :

> After all [the Penn-Central merger] is the largest railroad merger in our history and if not handled properly could seriously disrupt and irreparably injure the entire railroad system in the northeastern section of the country- to the great detriment not only of the parties here but to the public convenience and necessity of the entire Nation."

As the result of missteps in this process, one-tenth of the nation is unserved by the railway system and 98 million tons of freight annually are forced onto the highways. That is a cumulative effect which the Board must address. In this specific context the Supreme Court determined that the Applicants must provide:

> convincing evidence that it will serve the national interest and that terms are prescribed so that the congressional objective of a rail system serving the public **more effectively and efficiently** will be carried out. Obviously not every merger or consolidation that may be agreed upon by private interests can pass the statutory tests. [emphasis added]

Penn-Central Merger and N&W Inclusion Cases, 389 U.S. 486, 500, 88 S. Ct. 602 (1968). It is suggested that an application which at best promises to maintain an already unacceptable status quo, and can be reasonably expected further to deteriorate or actually destroy the most efficient route into the Region and worsen environmental conditions, can not be approved. The Congressional Delegation and the owners of the Metro North Railroad, the Long Island Railroad and some of the New York Cross Harbor facilities, have demonstrated that if these assets are not included in the CSAO as part of this proposed transaction, the very existence of these vital operations will be threatened, to the detriment of the public.

The lack of adequate capital by even a profitable carrier is reason for national concern where, as here, that condition of financial weakness threatens the maintenance or improvement of services at or to levels vital to the public interest. The Supreme Court, noting that both the New York Central and the Pennsylvania Railroad were profitable carriers when they sought to merge, stated that, "these profits are not sufficient to put the roads in a position to make **improvements** important to the national interest" (emphasis added). Penn-Central Merger and N&W Inclusion Cases, supra, 389 U.S. at 501, 88 S. Ct. at 609. In the Penn Central case and in the New Haven Inclusion cases the issue was forming a carrier with sufficient financial strength to *improve* as well as to maintain needed services. And there, as here, a vital public service is being rendered by a carrier or carriers which were financially weak. In such cases special attention is required to preserve vital public services. Penn-Central Merger and N&W Inclusion Cases, supra, 389 U.S. at 507 ("in the NH's financial condition, diversion of even a small amount of the Pennsylvania's connecting traffic from the NH to the Central would inflict consequential injury").

It is submitted that the NYCH's traffic share, as well as that of the NY&A, is even more tenuous than the New Haven's was. See, e.g., Exhibit A hereto. Neither has the resources to maintain vital services nor to improve such services to handle the 14.4 million tons of freight available to them, particularly if the proposed transaction is approved. At the request of the Congressional Delegation, with the endorsement of the City of New York and the State of New York, owners of all or part of the NYCH and NY&A, respectively, the Board has the authority under §10907(c)(1) and 11324(c) to order inclusion of these facilities within the lines under the control of the CSAO. as the operation of additional lines is an allowable condition which the Board can order under. Such action is clearly required to maintain adequate transportation service to the public, since the likely failure of these services after the pending transaction will not be in the public interest. 49 U.S.C. §11324(b). While this action will require an award of adequate compensation to the included carriers, the Applicants cannot be heard to complain, since the public interest can not be made subservient to the interests of private individuals, particularly where those individuals are operating , or intend to operate, publicly owned facilities inadequately. As the Supreme Court held:

> It was our intention that the public interest should be served with fairness to all private parties concerned, not that it should be the captive of parties some of whom are understandably engaged in maneuvering solely for the purpose of improving their competitive, strategic, or negotiating positions.

Penn-Central Merger and N&W Inclusion Cases, supra, 389 U.S. at 518. Indeed, the remedy sought by the Congressional Delegation has been previously used by the Board and its predecessor to preserve services vital to the public interest. See, e.g., Santa Fe Southern Pacific Corp.-Control-Southern Pacific Transportation Co., supra, 1986 WL

Today the major example of the effects of Conrail's monopoly is the routing of municipal solid waste from the Bronx to Virginia via Selkirk, even though the route via the car floats would be three hundred miles shorter. That refusal to use the most efficient route has actually precluded the rail transportation of waste for suburban Long Island.

Indeed, where as here, the plan will ultimately close the more efficient route for two-thirds of the rail traffic generated by this major population center, the Board has not only the right but the obligation to act: "If the closed routes that are canceled are more efficient than the alternative routes that remain open, the cancellations are not in the public interest." Chesapeake & Ohio v. U.S, 704 F.2d 373, 377 (7th Cir. 1983). The provision of overhead service by the CSAO to major interchange points with feeder lines serving local industries east of the Hudson, rather than to have cars moving to and from east of river points handled by a series of small operators, is precisely the type of improvement to which the I.C.C. has cited as a public benefit warranting favorable consideration:

> It is generally thought that single-line service has many advantages over joint-line service for both shippers and carriers. Interchange operations can be eliminated, reducing both operating and overhead costs and transit time; transaction costs are reduced; and incentives to provide less than efficient service (arising from per diem charges for railcars, rate divisions, or production externalities) are reduced. Thus, speed, reliability, and handling are enhanced.

CSX Merger Case, supra, 1980 WL 14204 at *24.

The Congressional Delegation participants, in their varied capacities as owners of the assets in question and as custodians of the public welfare, seek the transfer of assets and/or trackage rights to the CSAO, an entity supported by the Applicants, which will be in a position to maximize the public benefit which can be derived from these assets. There is no question that inclusion of these assets in the CSAO presents no operating problems different from those already overcome in New Jersey. The demand that these assets be included in the CSAO should therefore be made a condition of the approval.

Point V

SERVICE ON THE NORTHEAST CORRIDOR SHOULD OPEN TO OTHER RESPONSIBLE OPERATORS.

The Application does not provide for adequate levels of freight service within the Region, east of the Hudson River. This includes service on the Northeast

Corridor beyond New Jersey, and service over the Hudson Division of Conrail to the Bronx and into Connecticut. Those lines are assets which have the capacity to provide improved levels of service.

In addition to the need for efficient float service across New York Harbor, as discussed above, RoadRailer intermodal service is possible through the Hudson and East River tunnels to most points within the Region. Although NS operates a comprehensive system of intermodal trains utilizing such units, it has not sought the right to bring such service through the tunnels in this Application; indeed, this Application would give CSX a monopoly on the east side of the river, effectively preventing NS from doing so. Such service is in the public interest. For all the reasons stated in Argument IV above the public interest requires that the Board reserve to Amtrak, as the owner or designated operator of the Northeast Corridor, the right to negotiate with any responsible operator, including but not limited to the Applicants, to provide intermodal or other direct freight service on the Northeast Corridor, which service must include but need not be limited to service through the Hudson and East River tunnels of Amtrak, as a specific exception to the exclusivity of any rights to operate on the Corridor granted to the Applicants. In addition, and for the same reasons, the Board should grant to the State of New York the right to designate a second operator of services on the Hudson Division from Selkirk, N.Y. to Oak Point Yard, Bronx, pursuant to 49 U.S.C. §§10907(c)(1) and 11324(c).

The Board should reserve the right to grant any responsible operator trackage rights on these lines upon agreement with Amtrak (for the corridor) and with the State of New York (on the Hudson line). The application should be granted only with a condition that the rights of the Applicants on the corridor are not exclusive and that any party may negotiate with Amtrak for operating rights which provide services through New York City as part of any service to be provided.

CONCLUSION

For all the reasons stated above, the cross harbor floats should be transferred to the CSAO and it should be given trackage rights over the line from Bay Ridge, N.Y. to New Haven, Ct. and from Oak Point Yard to Harlem River Yard. As a condition to the transaction, the CSAO should be required to operate these facilities in conjunction with the CSAO operation in New Jersey and on the same terms. Amtrak should be given the right to negotiate with any carrier for the operation of intermodal freight service on the Northeast Corridor so long as part of the service to be offered passes through the Hudson and East River tunnels as an additional condition of the merger. The State of New York should be given trackage rights on the Hudson Division from Selkirk to Oak Point Yard to connect with the CSAO, with the right to select any responsible person to operate, including a class I or II railroad. The Board should retain

jurisdiction to fix compensation should the Applicants and the entities involved be unable to reach agreement.

Dated: New York, N.Y.
February 20, 1998

Respectfully submitted,

Jerrold Nadler, Member of Congress
for the Congressional Delegation

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Exhibit A

ATTACHMENT 1 - p. 1

From: VanHattem, Matt
Subject: CRTS Update #07-42
Date: 7/23/97 Time: 11:34a

CRTS Update #07-42
Wednesday, July 23rd, 1997 at 11:30 EDT

Railroad Says Conrail Restrains Business

By DAVID M. HALBFINGER, New York Times, Tuesday, July 22, 1997

NEW YORK -- A tiny railroad that floats freight cars on barges across New York Harbor, providing the most direct route for railroad traffic between Brooklyn and New Jersey, has accused Conrail, the region's dominant shipper, of trying to force it out of business.

In a complaint filed last month in U.S. District Court in Brooklyn, the barge operator, New York Cross Harbor Railroad Terminal Corp., said Conrail had diverted railroad cars to Conrail's Selkirk yard near Albany, rather than over the Cross Harbor line to the piers in Brooklyn.

The lawsuit alleges restraint of trade, breach of contract and breach of fiduciary duty violations and seeks $901 million in damages.

Robert Libkind, a Conrail spokesman, declined to address the lawsuit's specifics, but said that "Conrail believes the claims are wholly without merit and will vigorously defend itself against them."

The complaint illuminates what city officials and transportation experts have long considered a major flaw in the metropolitan area's infrastructure: the lack of a direct, continuous, freight route from New Jersey to Brooklyn, Queens, Long Island and New
England.

The Cross Harbor is owned by New York Regional Rail Corp., a thinly traded public company. Its chairman, Robert Crawford, said the railroad's revenues have dwindled to about $1.5 million a year from $2.7 million in 1994, largely because of an escalating tug-of-war with Conrail.

Crawford said that Conrail had changed shippers' instructions so that freight was shipped via the Selkirk terminal, a detour that takes up to four or five days, rather than across the harbor, which takes 45 minutes. Crawford said that amounted to a theft of Cross Harbor's customers.

Crawford said that the trouble began in 1993 with a dispute with Conrail over who was responsible for $300,000 worth of railroad car rental charges incurred by a customer shipping sludge out of New York.

Since then, according to the lawsuit, Conrail has withheld that amount as well as hundreds of thousands of dollars also owed to the Cross Harbor line.

ATTACHMENT 1 - P. 2

The lawsuit also says Conrail allowed a key bridge connecting its Jersey City terminal with Conrail's tracks to fail and remain unrepaired, raised the per-day charge for use of a Conrail locomotive from $50 to $350, spread false and damaging information about the Cross Harbor line to its customers and potential investors, and attempted to revoke its lease at Conrail's Greenville Yard in Jersey City.

Crawford said he had tried to negotiate a settlement with Conrail, but was told by executives there that they were barred because of the pending deal in which CSX Corp. and Norfolk Southern Corp. have agreed to acquire Conrail for $10.2 billion.

The Cross Harbor Railroad is one of two such float-barge operators remaining in the country, according to the lawsuit. In the 1940s, as many as 2,000 cars a day moved across New York Harbor on barges. That total dwindled as truck traffic soared. Today, Crawford said, his company moves as few as 10 or 15 railroad cars a day.

The Cross Harbor line, which includes about 12 miles of track, mostly in Brooklyn, was created in 1983 by a group of real estate investors and inherited the car-float operation of the old Penn Central Railroad. In 1989, a group led by Crawford bought the Cross Harbor for about $2 million.

In 1994, it merged with the Bestsellers Group Inc. under the new name of New York Regional Rail Corp.

Exhibit B

— ATTACHMENT 2 - p.1

Matt VanHattem on 12/24/97 09:32:13 AM

To:
cc:
Subject: CRTS Update #12-103

CRTS Update #12-103
Monday, December 22nd, 1997 at 12:30 EST

New Jersey General Assembly Passes 'Rail Freight Initiative' in Support of Railroad's ISTEA Funding Proposal

NEW YORK, Dec. 22nd, 1997 -- New York Regional Rail Corporation (OTC Bulletin Board: NYRR) announced this morning that the New Jersey General Assembly has passed Resolution #AR-169, the "Rail Freight Initiative" in support of the Railroad's funding proposal for $4.75 million.

The Project Request, which was submitted earlier this year to Congress, would pay for the comprehensive rehabilitation of the Railroad's operational facilities on both sides of the Harbor, in addition to the purchase of various railroad equipment. $3.25 million would be used for improvements to its Brooklyn Terminal facilities, and under the plan, $1.5 million would be invested in its Greenville Yard in Jersey City. As a result of these enhancements, rail car capacities will increase from 38,000 to 75,000 rail-cars per/year. Under the prescribed funding formula, the Federal Grant allotment would be $3.8 million and NYRR would provide the remaining 20% or $950,000.

The Resolution calls upon Congress to approve the Railroad's pending Project Request, sponsored by Representatives Jerrold L. Nadler (D.L.-Manhattan, Brooklyn) and Robert Menendez (D.-Jersey City, Bayonne, Perth Amboy). The funding would originate from the Federal I.S.T.E.A. (or Intermodal Surface Transportation Efficiency Act) Program. This Legislation was enacted by Congress in 1991 for the purpose of supporting capital transportation initiatives that demonstrate tangible contributions to the environment, as well as economic development.

Robert R. Crawford, President and Chief Executive Officer of New York Regional Rail said: "We are gratified by this support by the New Jersey General Assembly, and particularly grateful to Deputy Speaker DeCroce for his energetic, effective leadership on this issue. In addition, I would like to thank Representatives Jerrold Nadler of New York and Robert Menendez of New Jersey, for their sponsorship and continuing support for our Project Request in Washington," he said.

"Enhanced float-barging operations to serve this Port District and Harbor Region represents a key ingredient in the overall revitalization and economic resurgence of this downstate region. It is critical that we prepare our infrastructure now in order to meet the challenge of substantially higher volumes of rail-freight traffic subsequent to the Conrail merger. I remain optimistic about our prospects of being awarded this much-needed funding

ATTACHMENT 2 - P. 2

support," he concluded.

New York Regional Rail Corporation operates the New York CrossHarbor Railroad, which is the only marine freight railroad in the New York/New Jersey/Long Island Metropolitan Region, and the only such operation in the Northeastern U.S. The Cross Harbor transports rail-freight by tugboat-propelled float-barges between Brooklyn, N.Y. and Jersey City, N.J., and connects New York and New Jersey with the 'National Rail-Freight Network.' New York Regional Rail Corporation ('NYRR') is actively traded on the OTC Bulletin Board, under the symbol 'NYRR.'

Exhibit C

ATTACHMENT 3 – p. 1

Matt VanHattem on 02/12/98 09:04:47 AM

To:
cc:
Subject: CRTS Update #02-37

Wednesday, February 11th, 1998 at 12:40 EST

New York Regional Rail Prepares for NS & CSX Entrance: Seen as Logical Link to These Major RR's

NEW YORK, Feb. 10th, 1998 – New York Regional Rail's President Robert R. Crawford is pleased to announce that the company recently completed a series of major infrastructure improvements on both its New York and New Jersey rail-freight facilities. These major upgrades will help solidify the companies strategic positions as NYC's "direct link to the national rail freight network." The improvements include the acquisition of new rail equipment as well as track rehabilitation in the Greenville Yard and Bush Terminal Facilities.

This infrastructure financing is the result of a $2.5 million equity financing done through a private placement offering. Mr. Crawford stated that the company is currently in discussions with various financial and investment bankers, as well as joint venture partners.

As he stated recently, "Both the Norfolk Southern Railroad system and CSX Transportation are expected to enter into our metropolitan region in about seven months. This demands that we take the necessary steps now toensure that our region's infrastructure and operations are sufficiently prepared to meet the major challenge and opportunity that this significant increasein freight flows will bring, for both incoming and outgoing freight commodity movements. New York Regional Rail Corporation is moving closer to that mandate, every day.

The company also announces that its Rule 15c211 Report is now available and expects its audited annual statement to be available shortly. Mr. Crawford said "With these documents, along with our Form 10Submission, the company will achieve fully reporting status and will not be effected by the potential changes recently announced and under review by the NASD, which may impact non-reporting OTC Bulletin Board companies."

New York Regional Rail Corporation is the operator of the New York Cross Harbor Railroad -- the only float-barging railroad in the northeastern United States. The Railroad combines truck, rail and marine transportation to run the most streamlined, cost-effective and efficient shipping system available for the movement of freight into and out of New York. Considering that one rail-car carries the bulk equivalent of approximately three to four tractor-trailer truck-loads of material, it is one of the most cost-competitive means of interstate transport available. Serving the downstate metropolitan areas of NY, NJ, LI, CT, Westchester and Rockland Counties, the Railroad connects with the NY&A (formerly the LIRR Freight

ATTACHMENT 3 – page 2

Division) and the South Brooklyn Railway on the New York City side of the Harbor, and by its rail-car barges to and from Greenville Yard Facility in Jersey City, N.J. In Jersey City, with its current connection to Conrail, the Railroad services any railroad destination throughout North America.

New York Regional Rail Corporation ('NYRR') is the operator of the New York Cross Harbor Railroad, and is actively traded on the OTC Bulletin Board, under the Symbol 'NYRR.'

Exhibit D

Transportation Improvement Program

C. SPECIAL CONSIDERATIONS

1. Air Quality/SIP Conformity

The Clean Air Act Amendments (CAAA) signed into law on November 15, 1990 require the states to revise their State Implementation Plans (SIP) to provide for the attainment and maintenance of National Ambient Air Quality Standards (NAAQS) in areas designated not in compliance with those standards, i.e., non-attainment areas.

The New York Metropolitan Area has not yet achieved attainment of national air quality standards for ozone, carbon monoxide (CO) and Particulate Matter (PM-10). New York City, Nassau, and Westchester counties are in moderate nonattainment for CO and had until 1995 to achieve the standard. A revised SIP for CO was submitted exhibiting proof of attainment and awaits EPA approval. New York City, Long Island, (Suffolk & Nassau). Westchester, Rockland and part of Orange counties are in severe nonattainment for ozone and must achieve the standard by 2007. New York County was designated a moderate non-attainment area for PM-10 in January 1994. This new designation required the state to submit a SIP revision by July 1995. A revised SIP for PM-10 was submitted and awaits EPA approval.

The Clean Air Act prohibits the approval, acceptance or funding by the U.S. Department of Transportation (USDOT) of plans, programs and projects that do not conform with the SIP. The conformity rule was promulgated on November 24, 1993. While the requirements of the rule are effective as of December 27, 1993 as a matter of Federal law, the states are required to submit to EPA periodic revisions to their SIP establishing conformity criteria and procedures that are consistent with this rule. The conformity criteria submitted by a state may be more stringent than the Federal rule.

The State must submit a revision to its ozone SIP by January 1998 which demonstrates attainment of the standard by 2007. This is comprised of a 3% per year reduction forecast for both VOC and NOx in combination. The attainment demonstration must include the programs the State will adopt to achieve these reduction milestones. Part of this demonstration will be the creation of an emissions budget which will set allowable emissions levels for source categories for each year between 1998 and 2007.

Consistent with the requirements for SIP revisions, the failure of the State to submit or implement its SIP could result in the imposition of sanctions. One of the sanctions is the loss of highway funds. However, safety projects and transit operating assistance funds are exempt. In addition, several additional types of projects may be approved by the Secretary of Transportation.

The following stems from the 1990 CAAA and ISTEA requirements to coordinate transportation and air quality goals.

-Conformity Determination - adoption and application of procedures to insure that transportation projects conform to the SIP's purpose of eliminating or reducing the severity and number of violations of the NAAQs and achieving expeditious attainment of our standards. The final conformity guidance requires the TIP, as well as the long range transportation plan and certain individual projects to conform with the SIP for the pollutants which contribute to nonattainment. Subject to forthcoming interpretation of the recent regulation regarding conformity, the nonexempt portion of the 1998-2002 TIP must show an overall reduction of Volatile Organic Compounds (VOC), Nitrogen Oxide (NOx) and Carbon Monoxide (CO) emissions. The status of this requirement as it relates to PM-10 is as yet undefined.

-Transportation Control Measures - development, adoption and implementation of measures to provide for attainment of the ozone standards, to offset growth in emissions resulting from growth in vehicle miles traveled (VMT). Measures for ozone attainment require consideration of reducing all Single Occupancy Vehicle(SOV) trips in the City and the greater metropolitan area. Attainment of the Carbon Monoxide standard is expected to be achieved through improvements to vehicles and fuels. Attainment strategies for PM-10 will likely include emissions reductions from diesel-powered vehicles in Manhattan.

-Public Participation and Consultation - this task involves outreach to affected interests (governmental organizations, industry, environmental groups, academics) and the general public to educate people on the need for control measures and to obtain agreement on adoption of measures.

-Congestion Mitigation and Air Quality-the Congestion Mitigation and Air Quality (CMAQ) Program is a funding category in the Intermodal Surface Transportation Efficiency (ISTEA) Act of 1991 that has been formulated to support activities that result in reduced traffic congestion and air pollution. CMAQ funds are especially important in air quality non-attainment areas such as New York City.

The agencies comprising both the NYCTCC and other agencies have developed CMAQ initiatives. Some of these are:

1. Transit Improvements
2. ITS Applications
3. Bike/Ped Network Expansion
4. Freight Improvements

Exhibit E

Citation/Title
1997 WL 679475, Sierra Club v. E.P.A., (C.A.D.C. 1997)

***679475 Sierra Club, Petitioner**
v.
Environmental Protection Agency, et al., Respondents

No. 96-1007.
United States Court of Appeals,
District of Columbia Circuit.
Argued Sept. 29, 1997.
Decided Nov. 4, 1997.

On Petition for Review of an Order of the Environmental Protection Agency.

Howard I. Fox argued the cause for petitioner, with whom Robert E. Yuhnke was on the briefs. William S. Curtiss entered an appearance.

Eileen T. McDonough, Attorney, U.S. Department of Justice, argued the cause for respondents, with whom Lois J. Schiffer, Assistant Attorney General, Sara Schneeberg, Attorney, Environmental Protection Agency, and Peter J. Plocki, Attorney, U.S. Department of Transportation, were on the brief.

Before: EDWARDS, *Chief Judge,* GINSBURG and TATEL, *Circuit Judges.*

EDWARDS, *Chief Judge*:

****1** Section 176(c) of the Clean Air Act, as amended in 1990, provides that, before any transportation project, program, or plan ("transportation activities") located in air quality regions designated as "nonattainment areas" or "maintenance areas" can receive federal approval or funding, the transportation activity must be found to conform with the applicable State Implementation Plan ("SIP") or, if a SIP is not yet available for the region in question, with interim requirements. 42 U.S.C. § 7506(c) (1994 & Supp.1995). Appellant Sierra Club challenges a regulation promulgated by the Administrator of the Environmental Protection Agency ("EPA") providing for a twelve-month grace period during which transportation activities in designated nonattainment areas would be exempt from the transportation conformity requirements. *See* 60 Fed.Reg. 57,179 (1995); *see also* 40 C.F.R. § 51.394(d) (1996).

We hold that the challenged grace period is contrary to the plain meaning of the Clean Air Act. The Clean Air Act categorically mandates that the transportation conformity requirements shall apply to nonattainment and maintenance areas. 42 U.S.C § 7506(c)(5) (Supp.1995). The Act does not provide for any grace periods or other exemptions from the conformity requirements for areas designated as nonattainment areas, nor does it authorize the EPA to create such exemptions. Thus, the grace period unlawfully narrows the Act's strict and broad ban against nonconforming transportation activities.

I. BACKGROUND

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the EPA promulgated amendments to these regulations, including the grace period at issue here:

> *Grace period for new nonattainment areas.* For areas or portions of areas which have been in attainment for either ozone, CO, PM-10, or NO2 since 1990 and are subsequently redesignated to nonattainment for any of these pollutants, the provisions of this subpart shall not apply for such pollutant for 12 months following the date of final designation to nonattainment.

60 Fed.Reg. 57,179, 57,184 (1995) (final agency action amending regulations) (codified at 40 C.F.R. § 51.394(d) (1996)).

Appellant Sierra Club filed a timely petition for review of the grace period provision, arguing that it is contrary to the Clean Air Act. The EPA argues that Congress did not specifically address when newly designated nonattainment areas should become subject to the transportation conformity requirements, leaving this detail to the EPA, and defends the grace period as consistent with the statute and its goals.

II. ANALYSIS

A. *Standing*

The standing of petitioner to pursue this judicial challenge was questioned at oral argument. Petitioner asserts, and the EPA agrees, that petitioner's standing cannot be doubted. We agree.

The transportation conformity requirements constitute a procedural rule under which transportation activities are reviewed to determine whether they conform to an area's SIP. This court recently discussed the three irreducible factors necessary for Article III standing--injury in fact, causation, and redressibility--in the context of procedural-rights cases in *Florida Audubon Soc'y v. Bentsen,* 94 F.3d 658 (D.C.Cir.1996) (en banc). "To demonstrate standing ... a proceduralrights plaintiff must show not only that the defendant's acts omitted some procedural requirement, but also that it is substantially probable that the procedural breach will cause the essential injury to the plaintiff's own interest." *Id.* at 664-65. There is no doubt that the grace period subjects affected parties to the environmental exposures which the regulatory provisions suspended by the grace period seek to limit. It follows that the grace period will cause injury to Sierra Club members residing in newly designated nonattainment areas, and that this injury could be redressed by eliminating the grace period. Accordingly, Sierra Club has standing to petition for review of the grace period.

****3** The Government does not contest Sierra Club's standing. The Government's contention that the grace period will have no *significant* impact, because state regulatory provisions will ultimately minimize the impact of any injuries resulting from the challenged regulation, does not undermine Sierra Club's standing. Even if alternative protective measures might limit the harm

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caused by the relaxation of regulatory provisions, the existence of alternative "protective conditions" does not negate a party's standing to enforce statutorily mandated regulations. *See National Wildlife Fed'n v. Hodel*, 839 F.2d 694, 713 (D.C.Cir.1988) ("[T]he existence of other regulations that impose 'protective conditions,' thereby limiting the possible harm" alleged does not undermine petitioner's standing.). Moreover, Sierra Club members would suffer harm at least until remedial measures offsetting emissions from nonconforming activities were implemented, and this injury alone is sufficient to establish Sierra Club's standing.

B. *Standard of Review*

In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), the Supreme Court set out the now familiar two-step test for reviewing an agency's interpretation of a statute. First, the reviewing court must ask "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. If so, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. If, however, "the statute is silent or ambiguous with respect to the specific issue," the reviewing court must defer to the agency's construction of the statute if it is reasonable. *Id.* at 843.

C. *The Grace Period is Contrary to the Plain Meaning of the Clean Air Act*

This case is controlled by the first step of *Chevron*. In amendments to the Clean Air Act enacted shortly after the EPA published the final rule at issue here, Congress clarified that the transportation conformity requirements apply to nonattainment areas and maintenance areas. Pub.L. No. 104-59, tit. III, § 305(b), 109 Stat. 580 (Nov. 28, 1995) (codified at 42 U.S.C. § 7506(c)(5) (Supp.1995)). In so doing, Congress adopted the EPA's long-standing construction of the conformity requirements. *See EDF v. EPA*, 82 F.3d 451, 454 n. 2 (D.C.Cir.1996). While Congress took care to specify that areas remain subject to the conformity requirements following redesignation from "nonattainment" to "maintenance" status, *see* 42 U.S.C. § 7506(c)(5)(B) (Supp.1995), it did not provide any grace periods or other exemptions for areas redesignated from "attainment" to "nonattainment" status. This cannot be read to imply that the EPA can create such an exemption via administrative rule. Indeed, this court has consistently struck down administrative narrowing of clear statutory mandates. *See, e.g., Sierra Club v. EPA*, 992 F.2d 337, 343-45 (D.C.Cir.1993) (where statute required groundwater monitoring by "facilities potentially receiving ... [certain enumerated] wastes," EPA acted unlawfully when it required monitoring only at *larger* facilities receiving such wastes); *Hercules Inc. v. EPA*, 938 F.2d 276, 279-81 (D.C.Cir.1991) (where governing statute required federal agencies selling real property to notify the purchaser if hazardous waste had been stored on the property, EPA acted unlawfully in limiting notification to situations where the hazardous waste was stored "during the time the property was owned by the United States"). Accordingly, we hold

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for highways in the two areas covered by the consent decree, except for projects required for purposes of safety, mass transit, or air quality improvement. *Id.*, at 884-885. Once again, the Commonwealth appealed, and once again, the Court of Appeals upheld[478 U.S. 552] the District Court's orders. 678 F.2d 470 (CA3), cert. denied, 459 U.S. 969, 103 S.Ct. 298, 74 L.Ed.2d 280 (1982).

Phase VI. After the filing of the consent decree, the city of Pittsburgh and several groups of Pennsylvania legislators attempted to intervene in the litigation. Delaware Valley successfully opposed all of these attempts. *Delaware Valley Citizens Council for Clean Air v. Commonwealth,* 674 F.2d 970 (CA3), stay denied, 458 U.S. 1125, 103 S.Ct. 14, 73 L.Ed.2d 1400 (1982).

Phase VII. As noted above, a portion of the District Court's contempt order prevented the United States Secretary of Transportation from authorizing the expenditure of any federal funds for federal highway projects in Pennsylvania that did not fall into certain categories. In late ***3092** 1982, the United States approved seven projects for funding, certifying that they would either improve safety or improve air quality. These certifications were submitted to both Delaware Valley and the District Court. The court found that five of the projects did not qualify as exemptions under the terms of its prior order, and only approved two proposals for federal funding. *Delaware Valley Citizens Council for Clean Air v. Commonwealth,* 551 F.Supp. 827 (ED Pa.1982).

Phase VIII. On May 3, 1983, the Pennsylvania General Assembly finally passed legislation authorizing the Commonwealth to proceed with implementation of the I/M program, and the Governor signed the bill into law the next day. 75 Pa.Cons.Stat. §§ 4706-4707 (1984). Subsequently, Delaware Valley and the Commonwealth negotiated a new compliance schedule, under which the I/M program would begin by June 1, 1984. The District Court approved of this new schedule, and vacated its earlier contempt sanctions.

Phase IX. This phase includes work done by Delaware Valley in hearings before the Environmental Protection Agency, during which, *inter alia,* the Commonwealth unsuccessfully[478 U.S. 553] sought that agency's approval of an I/M program covering a smaller geographic area. (FN1)

Delaware Valley then sought attorney's fees and costs for the work performed after issuance of the consent decree in 1978. App. 50a-86a. The District Court awarded Delaware Valley $209,813 in attorney's fees and an additional $6,675.03 in costs. 581 F.Supp. 1412, 1433 (ED Pa.1984). To calculate the legal fee award, the District Court first determined:

> "[T]he number of hours reasonably necessary to perform the legal services for which compensation is sought. The reasonable number of hours is then multiplied by a reasonable hourly rate for the attorney providing the services, the latter being based on the court's determination of the attorney's reputation, status and type of activity for which the attorney is

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Citation/Title
106 S.Ct. 3088, Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, (U.S.Pa. 1986)

***3091** Valley's approval, the District Court approved the extension in March 1980.

Phase IV. By February 1981, the Commonwealth still had not published final regulations covering the type of equipment which private garages needed to have in order to become certified inspection stations. The Commonwealth thus asked Delaware Valley to consent to a further postponement of the implementation date to January 1, 1983. The Commonwealth argued that the United States Environmental Protection Agency had recommended a type of emission analyzer different from the one required under the consent decree, but at that time no manufacturer had produced even a prototype of such machinery.

After extensive negotiations over this extension request, the parties failed to reach an agreement. The Commonwealth then filed a motion asking the District Court to grant the second extension and delay the starting date of the I/M program until January 1, 1983. In response, Delaware Valley sought to have the court declare the Commonwealth to be in violation of the consent decree, and requested numerous modifications to the consent decree. On May 20, 1981, the court issued an order finding the Commonwealth in violation of the decree, denying the motion for a further extension, and [478 U.S. 551] denying the modifications submitted by Delaware Valley. App. 25a-28a. On June 16, the court denied the Commonwealth's motion for reconsideration, but approved May 1, 1982, as the new deadline for implementation of the I/M program. *Id.*, at 44a-49a. The Commonwealth appealed both the May 20 and June 16 orders, both of which were affirmed by the Court of Appeals. *Delaware Valley Citizens Council for Clean Air v. Commonwealth,* 674 F.2d 976 (CA3), cert. denied, 459 U.S. 905, 103 S.Ct. 206, 74 L.Ed.2d 165 (1982).

Phase V. Following the District Court's order of June 16, the Pennsylvania General Assembly enacted a statute, H.B. 456, over the Governor's veto, which prohibited the expenditure of state funds by the Executive Branch for the implementation of the I/M program. Act of Oct. 5, 1981, No. 99, 1981 Pa. Laws 4. PennDOT and the remainder of the Executive Branch promptly ceased all activities related to implementing the I/M program, except for publication of the final regulations establishing specifications for the emissions analysis equipment to be used by garage owners wishing to participate as inspection locations. 11 Pa.Bull. 3519 (Oct. 10, 1981).

The Commonwealth moved to stay implementation of the consent decree in light of H.B. 456. Delaware Valley opposed that motion, and sought to have the court declare the Commonwealth in contempt and apply sanctions. The court denied the Commonwealth's motion for a stay and held the Commonwealth in civil contempt. *Delaware Valley Citizens Council for Clean Air v. Commonwealth,* 533 F.Supp. 869 (ED Pa.1982). As a sanction, the court ordered the United States Secretary of Transportation to refrain from approving any projects, or awarding any grants,

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that the grace period impermissibly creates an exception to the unqualified requirement in the statute that the federal government not approve a transportation activity unless that activity has complied with the conformity rules.

**4 Although the statute's plain language is sufficient to support our finding that Congress intended a strict and broad ban on nonconforming activities in all nonattainment areas, it is also instructive to consider some of the well-known reasons underlying Congress's decision to enact the 1990 amendments to the statute. Prior to the 1990 amendments, the Act's transportation conformity requirements were "largely ... ignored by the agencies required to apply [them]." 136 CONG. REC . S16972 (daily ed. Oct. 27, 1990) (statement of Senator Baucus); *see also id.* (explaining that "no transportation plan has ever been disapproved under [section 176(c)], even in cities where mobile source emission growth is a major factor in preventing attainment of the NAAQS"). The initial compliance deadline in the 1970 Act (1975) and the extended deadlines set forth in the 1977 Amendments (1982 and 1987) passed unmet. *See* S. REP. NO . 228, at 10-11 (1989). Recognizing that a large part of this failure was due to the propensity of the federal government to interfere with pollution control measures by approving, funding, or otherwise engaging in federal transportation activities which are inconsistent with applicable SIPs, *see* 136 CONG. REC . S16972 (daily ed. Oct. 27, 1990) (statement of Senator Baucus), Congress strengthened section 176(c) to eliminate noncompliance with the transportation conformity requirements by *conditioning* federal approval and funding of transportation activities in nonattainment and maintenance areas on their *demonstrated* compliance with the transportation conformity requirements. 42 U.S.C. § 7506(c)(1) (1994) (conditioning federal action on transportation activity's demonstrated compliance with the applicable SIP); § 7506(c)(3) (conditioning federal action on a showing that the proposed activity will contribute to emissions reductions where applicable SIP control strategies are not yet in place).

The Government offers three arguments in defense of the challenged regulation. First, the Government asserts that Congress included a similar twelve-month grace period in subsection 176(c)(3)(B)(i), and thus the challenged grace period is not contrary to the Act. *See* 60 Fed.Reg. 57,179, 57,182 (1995); 60 Fed.Reg. 44,790, 44,796 (1995). Second, the Government argues that the challenged regulation is justified by subsection 176(c)(4)(B)(ii), which requires the EPA to determine "the appropriate frequency for making conformity determinations." *See* Respondent's Brief at 18-20. Third, the Government argues that this court's reasoning in *Sierra Club v. EPA,* 719 F.2d 436 (D.C.Cir.1983), authorizes the EPA to promulgate the challenged grace period. *See* 60 Fed.Reg. at 57,182; 60 Fed.Reg. at 44,796. We reject all three justifications.

The Government's first two arguments confuse statutory provisions pertaining to the criteria and procedures for demonstrating *whether transportation activities in fact comply* with the transportation conformity requirements

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withthe issue of *which transportation activities are requiredto comply.* First, the Government construes subsection 176(c)(3)(B)(i) as a twelve-month grace period similar to the challenged grace period. *See* 60 Fed.Reg. at 57,182; 60 Fed.Reg. at 44,796. When read in context, however, it becomes clear that subsection 176(c)(3)(B)(i) does not provide a twelvemonth exemption from the conformity requirements but rather prescribes interim criteria and procedures for demonstrating the compliance of transportation activities in nonattainment and maintenance areas in the absence of an appropriate SIP control strategy. *See* 42 U.S.C. § 7506(c)(3) (1994) (providing interim requirements applicable until an appropriate SIP control strategy is in place); *see also* § 7506(c)(4)(C) (requiring each state to submit "a revision to its [SIP] that includes criteria and procedures for assessing the conformity of any [transportation activity] subject to the conformity requirements"). In contrast, the challenged grace period creates a twelve-month exemption from the transportation conformity requirements. *See* 40 C.F.R. § 51.394(d) (providing that "the provisions of this subpart *shall not apply* ... for 12 months following the date of final designation to nonattainment") (emphasis added). Thus, the so-called "grace-period" in subsection 176(c)(3)(B)(i) in no way resembles the challenged grace period. Even if it did, however, it would not provide authority for the challenged grace period. On the contrary, had Congress provided some exemptions from the conformity requirements but not the particular exemption at issue here, this would militate *against* the validity of creating additional exemptions via administrative rule. *See, e.g., Sierra Club,* 719 F.2d at 453 (D.C.Cir.1983) (when a statute lists several specific exemptions to the general purpose, others should not be implied).

****5** The Government's attempt to rely on subsection 176(c)(4)(B)(ii) also confuses statutory provisions pertaining to the manner of demonstrating conformity with the *applicability* of the conformity requirements. Section 176(c)(4) only authorizes the EPA to prescribe the manner and frequency of determining compliance with section 176, and nothing in this section can be properly construed as authorizing the Agency to exempt transportation activities in some nonattainment areas from the conformity requirements. Subsection 176(c)(4)(A) directs the agency to "promulgate criteria and procedures for demonstrating and assuring conformity"of transportation activities subject to the conformity requirements. 42 U.S.C. § 7506(c)(4)(A) (1994). Subsection 176(c)(4)(B)(ii) further requires the EPA to "address the appropriate frequency for making conformity determinations," provided that such determinations are not "less frequent than every three years." § 7506(c)(4)(B)(ii).

The EPA attempts to support its argument that subsection 176(c)(4)(B)(ii) authorizes the challenged grace period by comparing the grace period at issue here with the "grandfather" provision upheld in *EDF v. EPA,* 82 F.3d 451 (D.C.Cir.1996). However, *EDF* does not support the EPA's argument. The regulations at issue in *EDF* were challenged on the ground that they "exempt from the conformity determination requirements ... [transportation] projects that have undergone recent National Environmental Policy Act (NEPA) analyses ... within the preceding three years." 82 F.3d at 456; *see also* 40 C.F.R. §

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51.394(c)(1) (1994). This court reasoned that, since section 176(c)(4) clearly authorizes the EPA to determine the criteria and procedures for demonstrating conformity as well as the frequency of conformity determinations, the EPA's substitution of NEPA analyses for the newly-promulgated conformity requirements, so long as the NEPA analysis was performed within three years, was a proper exercise of the authority expressly delegated to the EPA by the statute. *Id.* at 456-47.

The transportation activities at issue in *EDF* were in nonattainment areas throughout the relevant period and thus were required to comply with the transportation conformity requirements. Significantly, the *EDF* court noted that the challenged rules "require generally that conformity determinations for covered projects be made before any federal action is taken on them." *Id.* at 456. The only thing that had changed was the specific criteria and procedures used to demonstrate conformity, in that transportation activities which had recently undergone a NEPA analysis were allowed to proceed, using the recent NEPA analysis as a reasonable equivalent to the conformity determination required under section 176(c). By allowing such a substitution, the regulation upheld in *EDF* merely provided a three-year period of repose for a transportation activity which had already undergone an extensive environmental impact review.

****6** In contrast, this case involves the applicability of the Act's transportation conformity requirements following the revision of an area's attainment status. Under the Act, designation of an area as nonattainment triggers the applicability of the transportation conformity requirements. *See* 42 U.S.C. § 7506(c)(5) (Supp.1995). Unlike in *EDF*, the regulation at issue here does not pertain merely to the specific procedures and criteria used to determine compliance or to *how often* an activity must go through a compliance determination process, but rather whether an activity must be found to comply *at all* before it can be approved or funded. Indeed, transportation activities which are exempt from the conformity requirements under the disputed grace period may not have undergone *any* environmental impact review. While the holding in *EDF* rested squarely on the Act's delegation of authority to the EPA to specify the criteria and procedures for determining conformity as well as the frequency of conformity determinations, the Act does not authorize the EPA to limit the applicability of the conformity requirements by exempting some nonattainment areas, even for a limited period of time. Thus, neither the statutory provision at issue in *EDF* nor the Court's reasoning in *EDF* supports EPA's claim of authority to promulgate the regulation challenged here.

The EPA's reliance on this court's reasoning in *Sierra Club v. EPA*, 719 F.2d 436 (D.C.Cir.1983), as authority for the challenged regulation is also without merit. *Sierra Club* involved the EPA's duty to apply retroactively a regulation promulgated to implement a statutory mandate. To resolve this issue, this court applied the same test which we have applied to determine the limits of an agency's power to apply a regulation retroactively. *Id.* at 467. The factors relied on in *Sierra Club* echo the anti-retroactivity principles traditionally considered when evaluating whether legislation should be applied retroactively.

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Cf. Landgraf v. USI Film Products, 511 U.S. 244 (1994) (discussing evolution and application of anti-retroactivity principles).

Unlike *Sierra Club* and the cases on which it relies, however, this case involves an administrative agency's authority to limit the *prospective,* rather than retroactive, application of regulations implementing a statutory mandate. The Government acknowledges that this case differs from *Sierra Club.* 60 Fed.Reg. 57,179, 57,182 (1995). The Government erroneously dismisses the importance of this distinction, however, arguing that the legal analysis articulated in *Sierra Club* "applies equally to grandfathering from new requirements." *Id.* The Government asserts that the anti-retroactivity principles applied in *Sierra Club* justify the challenged grace period because "[i]mmediate application of all conformity requirements ... would seriously prejudice the affected areas, which have relied on their status as attainment areas exempt from conformity and have not previously conducted the analyses necessary for conformity determinations." Respondent's Br. at 23. This is a ridiculous claim. This court has never treated the type of harm alleged by the Government as a sort of "retroactivity" violating any legal standard. *See Direct TV, Inc. v. FCC,* 119 F.3d 816, 826 (D.C.Cir.1997) (rejecting claim that, because petitioner had expended millions of dollars in reliance on prior regulatory scheme, change in regulatory scheme was "secondarily retroactive" as applied to petitioner and that, therefore, anti-retroactivity principles should apply to exempt petitioner from new regulation); *see also Landgraf,* 511 U.S. at 269-70 n. 24 ("Even uncontroversially prospective statutes may unsettle expectations and impose burdens on past conduct[, for example,] a new property tax or zoning regulation may upset the reasonable expectations that prompted those affected to acquire property," but this does not render the application of new laws invalid.).

****7.** The absurdity of the EPA's argument is seen in the fact that the challenged grace period is not limited only to those regulated entities whose expectations arguably were adversely affected by the 1990 amendments to the Act. EPA regulations promulgated in 1993 to implement the 1990 amendments did not include any grace periods for designated nonattainment areas. *See* 58 Fed.Reg. 62,188 (1993). Yet, under the EPA's 1995 amendment to its 1993 regulations, regulated entities that are now fully on notice of the consequences of nonattainment would be given an exemption from conformity requirements in clear defiance of the statute. EPA's attempt to justify this position falls flat.

Sierra Club and the cases on which it relied involved agencies' duty or authority to apply regulations retroactively. In contrast, this case involves an agency's effort to create exemptions from a prospective statutory mandate. Absent a showing of retroactivity, the challenged exemptions must be treated no differently than any other administrative exemption from a categorical statutory mandate, and thus *Sierra Club* is inapposite here. The Government's argument that the line drawn between retrospective and prospective laws can be disregarded where, as here, the exemption from the conformity requirements--termed "grandfathering" by the Government--is limited to a one-year period, *see*

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60 Fed.Reg. at 57,182, is without merit. Although it is certainly within Congress's power to provide such grandfathering provisions, neither administrative agencies nor courts may do so in the absence of clear statutory authority. Nothing in *Sierra Club* suggests the contrary.

III. CONCLUSION

We hold that EPA's proposed grace period exempting designated nonattainment areas from the Clean Air Act's transportation conformity requirements violates the plain terms of the Act and, therefore, is unlawful. Accordingly, the petition for review is granted.

So ordered.

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APL-18

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BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

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

BRIEF OF APL LIMITED

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Dated: February 23, 1998

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APL-18

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BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

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

BRIEF OF APL LIMITED

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

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding, please find an original and twenty-five (25) copies of the Brief of the Cities of East Chicago, Indiana; Hammond, Indiana; Gary, Indiana; and Whiting, Indiana (collectively, The Four City Consortium) (FCC-15). Also enclosed, please find a computer diskette containing the text of this document in WordPerfect 5.1 format.

We have included an extra copy of the filing. Kindly indicate receipt by time-stamping this copy and returning it with our messenger.

Sincerely,

C. Michael Loftus

C. Michael Loftus
An Attorney for the Cities of East Chicago, Indiana; Hammond, Indiana; Gary, Indiana, and Whiting, Indiana (collectively, The Four City Consortium)

Enclosures

cc: All Parties of Record

185895

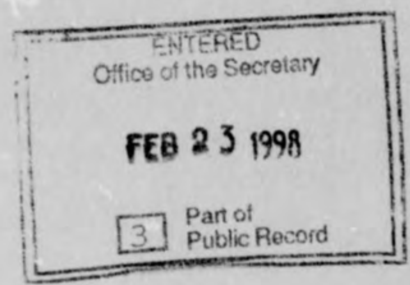
FCC-15

BEFORE THE

SURFACE TRANSPORTATION BOARD

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

BRIEF OF THE CITIES OF EAST CHICAGO, INDIANA; HAMMOND, INDIANA; GARY, INDIANA; AND WHITING, INDIANA (COLLECTIVELY, THE FOUR CITY CONSORTIUM)



THE CITIES OF EAST CHICAGO, INDIANA; HAMMOND, INDIANA; GARY, INDIANA; AND WHITING, INDIANA (COLLECTIVELY, THE FOUR CITY CONSORTIUM)

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Dated: February 23, 1998

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FCC-15

BEFORE THE

SURFACE TRANSPORTATION BOARD

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

BRIEF OF THE CITIES OF EAST CHICAGO, INDIANA; HAMMOND, INDIANA; GARY, INDIANA; AND WHITING, INDIANA (COLLECTIVELY, THE FOUR CITY CONSORTIUM)

Pursuant to the procedural orders issued by the Surface Transportation Board ("STB" or "Board") in this proceeding, the Cities of East Chicago, Indiana; Hammond, Indiana; Gary, Indiana; and Whiting, Indiana (collectively, the "Four City Consortium" the "Consortium" or the "Four Cities") hereby submit this brief with respect to the pending Application by CSX Corporation and its rail affiliates ("CSX") and Norfolk Southern Corporation and its rail affiliates ("NS") (collectively, the "Applicants") for authority to control Conrail Inc. and its rail affiliates ("Conrail").

Since the Application in this matter was filed, there have been two fatal accidents in the Four Cities' region that resulted in three deaths and several injuries. The first occurred on September 15, 1997, and involved an Amtrak train which

struck an 18-wheel gravel truck at an at-grade crossing in Gary, Indiana, killing the truck driver and injuring 11 passengers and one Amtrak employee. See Cervay Environmental V.S. at 17. The second occurred on February 8, 1998 when a NS train struck a pick-up truck at an at-grade crossing in Hammond, Indiana killing two occupants of the vehicle. (See the Four Cities' Supplemental Comments on Draft Environmental Impact Statement (FCC-14) filed on February 23, 1998). Unfortunately, these accidents are all too common an occurrence in Indiana which has the fourth highest incidence of fatalities from railroad crossing accidents in the nation. See Burris Environmental V.S. at 4.

It is sobering but very appropriate to note that the concerns raised by the Four Cities impact most critically on the lives and physical well-being of their citizens who already experience on a daily basis, a tremendous level of exposure to railroad operations through their communities. The Four Cities seek protection from this Board against avoidable incremental impacts of the proposed Conrail transaction on the Four Cities' region and its population.

I.

SUMMARY OF THE FOUR CITIES' POSITION

As set forth in more detail below, the Four City Consortium opposes the proposed acquisition and division of Conrail by CSX and NS unless certain conditions are imposed to ameliorate the adverse impacts of their post-transaction operations in northwestern Indiana. The principal condition sought

would require the re-routing of certain rail traffic from highly congested lines with many rail/highway grade crossings to less congested lines with few at-grade crossings and more grade separations, as well as eliminate the need to restore an inactive rail line to service. The specifics of this condition are described below.

A. The Four City Consortium's Identity and Interest

The Four City Consortium's identity and interest are set forth fully in its Comments and Request for Conditions filed in this proceeding on October 21, 1997 (FCC-9) ("October 21 Comments") and in its Comments on the Draft Environmental Impact Statement filed with the Board's Section of Environmental Analysis ("SEA") on February 2, 1998 (FCC-13) ("EIS Comments"). In brief, the Four City Consortium is an association of the above-named cities located in Lake County in northwestern Indiana, with a combined population of approximately 208,000. This heavily-populated and industrialized region is located directly east of Chicago, Illinois, and is traversed by hundreds of miles of railroad lines operated by Conrail, CSX, NS, and other carriers. Several of the more congested rail lines have a large number of closely-spaced rail/highway grade crossings. The region has recently experienced growth in both rail and highway traffic, and as a result its transportation infrastructure is already approaching gridlock.

The Four City Consortium was organized for the express purpose of evaluating the regional impacts of the proposed

Conrail acquisition and recommending regional solutions to the adverse impacts identified. It is an example of coordinated, regional planning at its best, and as will be set forth in detail below, it has been able to devise a comprehensive, constructive regional solution to the adverse impacts of the Conrail transaction on the residents of northwestern Indiana that is consistent with the Applicants' post-transaction operational plans for this region.

B. The Adverse Impacts of the Proposed Transaction on the Four Cities

The Four Cities' October 21 Comments and EIS Comments outline in detail the serious incremental adverse safety, environmental, and socioeconomic impacts that the Applicants' post-transaction operations, as currently planned, will have on the Four Cities' region. The Four Cities have conducted a thorough review of the Application, the Applicants' Rebuttal, the answers provided by the Applicants to their discovery requests, and the SEA's Draft EIS. They have also conducted their own independent research and analysis of the Conrail transaction. They have concluded that the Applicants' proposed acquisition of Conrail and their post-transaction operating plans will cause the already-intolerable safety and environmental situation in northwestern Indiana to become significantly worse, and will also interfere with important and ongoing regional economic development plans.

The Four Cities have focused primarily on two central post-transaction operational features associated with the Application that would have the worst regional impacts. First, the proposed transaction would result in significant incremental increases in rail traffic over certain rail lines that have numerous rail/highway grade crossings, and in particular the Baltimore and Ohio Chicago Terminal Railroad Company ("BOCT") line between Pine Junction, IN and Calumet Park, IL.[1] Second, CSX intends, at a cost of approximately $13 million, to reconstruct and reinstitute rail service on a long-unused rail line cutting through the heart of Gary. The Conrail transaction will also have a number of other problematic impacts, which are outlined in detail in the Four Cities' October 21 Comments and EIS Comments. However, at a minimum, meaningful steps must be taken to ameliorate these two impacts if the proposed transaction is to meet the Board's public interest standard.

It is impossible to quantify all of the adverse environmental impacts of the Conrail transaction on the Four Cities, and the Consortium has not attempted to do so in its comments. With that said, however, the Consortium has demonstrated that the transaction would result in a 74 percent increase in vehicle crossing delay time alone over existing levels in the Four Cities (with delay time increasing from 204,387 hours to 355,266 hours).

---

[1] The BOCT is a wholly-owned subsidiary of CSX. The BOCT line in question is a part of CSX's route between Willow Creek, IN and Barr Yard which is CSX's principal rail yard in the Chicago area.

(See EIS Comments, Argument at 31-32; Andrew Environmental V.S. at 9).[2] This increase in vehicle delay time will have significant adverse impacts on, among other things, the efficient provision of fire, police, and emergency service; families commuting to/from work and school; the propensity of area motorists to ignore grade crossing protection devices (including, in particular, lowered crossing gates) at significant risk to themselves and their passengers; and the propensity of pedestrians (particularly children) to climb under and through stopped trains. Besides these considerable safety and traffic and transportation system impacts, increases in vehicle delay times would also have substantial air quality, environmental justice, noise, and fuel consumption impacts. All of these impacts are described at length in the Four City Consortium's EIS Comments.

The Four Cities have been able to quantify several of the economic costs resulting from the projected post-transaction increase in Applicants' rail traffic moving through the Four Cities. Burris Environmental V.S. at 6-7. These increased costs, which total $3.4 million per year, are based on four factors: (1) lost productivity resulting from incremental vehicle delays at rail/highway crossings; (2) additional fuel and oil consumption associated with the incremental delays; (3) incremental vehicle exhaust emissions resulting from the incre-

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[2] The verified statements accompanying the Four Cities' October 21 Comments are cited as, e.g., "Burris V.S. at ___." The verified statements accompanying the Four Cities EIS Comments are cited as, e.g., "Andrew Environmental V.S. at ___."

mental delays; and (4) the increase in the number of accidents, injuries, and fatalities likely to occur at rail/highway grade crossings as a result of the increases in rail traffic. Id.

In addition to the above problems and quantifiable costs, the incremental increases in rail traffic moving over rail/highway grade crossings in the Four Cities would also have significant land use and socioeconomic impacts. In particular, the proposed transaction would interfere with important community revitalization projects. These impacts are in great part attributable to the planned restitution of rail service on the portion of the former Pennsylvania Railroad ("PRR") Fort Wayne line between Hobart and Clarke Junction, IN,[3] and are examined in detail in the testimony of Michael L. Cervay, the Director of Planning and Development for the City of Gary, accompanying the Four Cities' EIS comments. In particular, the reinstatement of this line would interfere with the Roosevelt Manor affordable housing project which is scheduled to create dozens of low- and moderate-income homes for area residents. It would also interfere with plans for expansion of the Gary/Chicago Airport (which is critical for the area's economic revitalization), and with plans to restore and develop the Lake Michigan waterfront which spans the entire northern boundary of the Four Cities. Cervay

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[3] The Hobart to Clarke Junction line segment is presently owned by NS and is to be acquired by CSX. This 12-mile line segment, which has 23 grade crossings, is in disrepair and has been out of service for approximately ten years. CSX proposes to rehabilitate this line to provide an alternate route for certain bulk trains that would otherwise operate via CSX's main line through Willow Creek.

Environmental V.S. at 4-16. It is important to mention that the $3.4 million in additional economic costs identified by the Consortium do not take into account the severe disruption of these multi-million dollar regional economic development projects. Burris Environmental V.S. at 7.

C. Adoption of the Four Cities' Alternative Routing Plan would Mitigate Many of the Adverse Impacts of the Proposed Transaction

After undertaking a careful review and analysis of the impacts of the Applicants' proposal on the Four Cities, the Consortium evaluated whether there were practical steps that could be taken to mitigate those impacts. The Four Cities sought to develop an alternative plan for the movement of traffic through the area which would accommodate the Applicants' desire for operational flexibility in moving their projected post-transaction rail traffic through the region, while at the same time mitigating the adverse impacts of these operations on northwestern Indiana. In particular, the Four Cities sought to develop a plan that would meet the following goals:

- To the extent practicable, the plan should concentrate more rail traffic on lines that are grade separated and/or have a lower incidence of rail/highway grade crossings.
- The plan should accommodate the Applicants' planned incremental increases in rail traffic and minimize disruptions to the Applicants' planned post-transaction rail traffic flows through northwestern Indiana.
- The plan should ensure that the economic costs incurred by the Applicants are kept to a minimum.

- The plan should be narrowly focused on ameliorating post-transaction incremental impacts associated with the Conrail transaction, and it should not seek to broadly address existing regional railroad impacts not associated with the transaction.

In developing its mitigation plan, the Four Cities enlisted the support of engineering and economic consultants, and conducted extensive internal reviews of alternatives. The result was the development of an Alternative Routing Plan that accomplishes all of the above goals. Accordingly, the Four City Consortium requests that the Board impose the Alternative Routing Plan as a condition to its approval of the Application in this proceeding.

In brief, the Alternative Routing Plan would alter the Applicants' post-transaction operating plans for northwestern Indiana in two principal respects. First, the plan reroutes some CSX traffic that is projected to move between Willow Creek and Calumet Park from the CSX and BOCT lines via Pine Junction to a parallel route consisting of Conrail's Porter Branch (to be acquired by CSX) between Willow Creek and a proposed new connection with the Indiana Harbor Belt Railroad Company's ("IHB") parallel but elevated (and grade-separated) line near Virginia Street in Gary.[4]

The CSX/BOCT Willow Creek to Calumet Park lines have 27 rail/highway grade crossings, 20 of which are located on the BOCT

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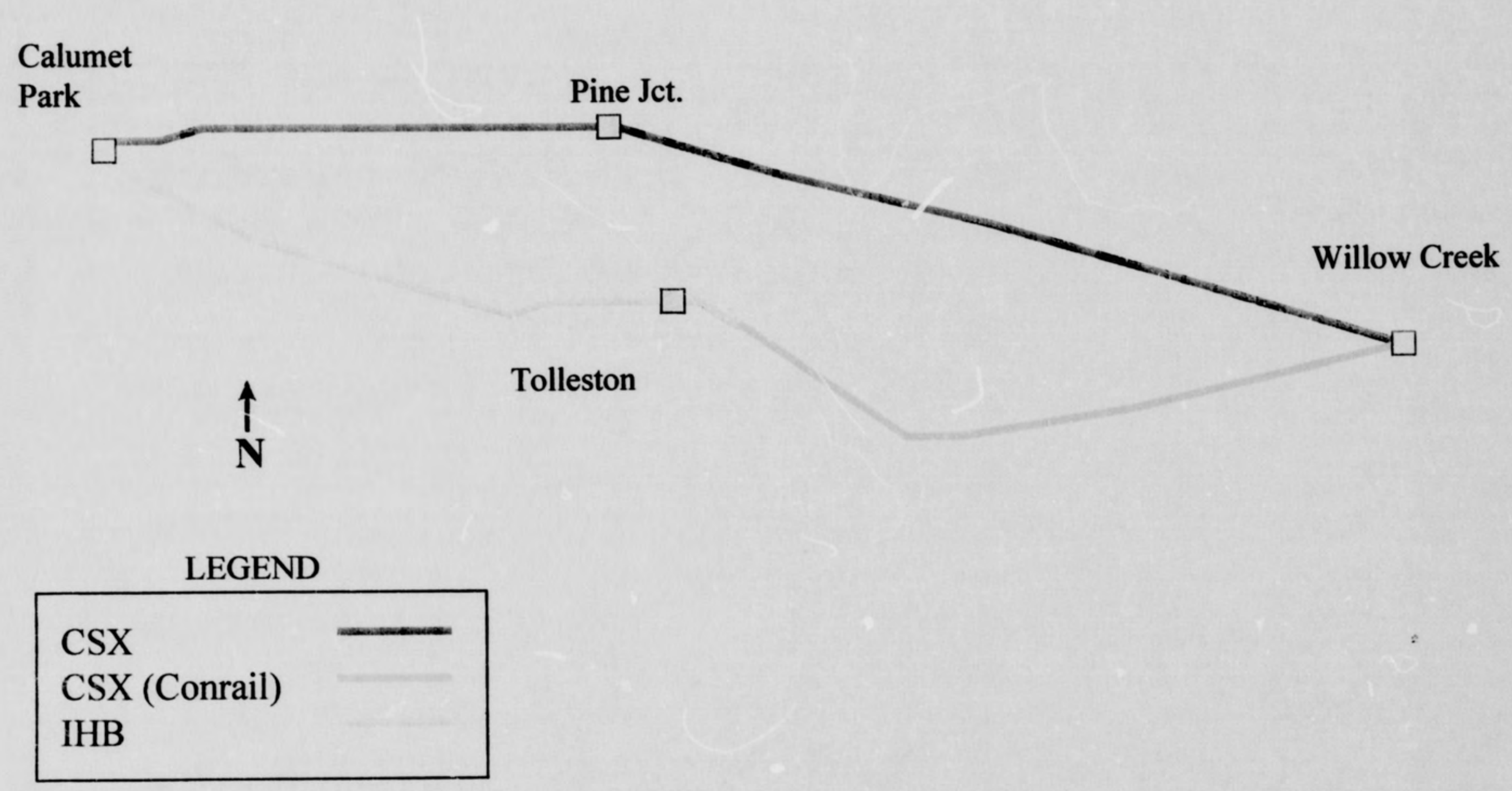
[4] This route is displayed on the schematic on the following page. It is shown in more detail on Exhibit PHB-3 attached to Mr. Burris' Verified Statement in the October 21 Comments.


Calumet Park
Pine Jct.
Willow Creek
Tolleston
N
LEGEND
CSX
CSX (Conrail)
IHB

line between Pine Junction and Calumet Park. CSX's operating plan projects a post-transaction increase of 5.7 trains per day moving over this route (from 27.6 to 33.3 trains per day) compared with the base year (1995) train frequency. The BOCT line passes directly through the congested downtown business districts of East Chicago and Hammond at grade, and it already causes considerable grade crossing vehicle delay and safety problems. The Four Cities' alternative route for this line runs through a less developed area to the south, which has only three at-grade crossings and 13 grade-separated highway crossings. Burris Environmental V.S. at 8-9. This route would take advantage of the $25 million in federal, state and city funds already invested in grade separations on the elevated IHB corridor. Thomas V.S. in FCC-9 at 8.

The second part of the Alternative Routing Plan involves rerouting certain bulk traffic that CSX proposes to move over the currently unused portion of the former PRR line between Hobart and Clarke Junction after that line segment is rehabilitated and restored to service.[5] This traffic is to be rerouted to a parallel route via the NS (former Nickel Plate) line between Hobart and Van Loon, IN, and thence via the Elgin, Joliet and

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[5] As mentioned above, the estimated cost of rehabilitation of the out-of-service portion of the PRR line between Hobart and Clarke Junction is $13 million. Burris Environmental V.S. at 41-42.

Eastern Railway Company ("EJE") between Van Loon and a connection with both the EJE and CSX lakefront lines near Pine Junction.[6]

The 11.' mile portion of the PRR line between Hobart and Clarke Junction has 23 inactive rail/highway grade crossings, many of which are paved over. Burris Environmental V.S. at 9-11. This line segment has been out of service for approximately ten years. As indicated above, the reinstatement of this line would interfere with the City of Gary's Roosevelt Manor housing development project, the expansion plans for the Gary/Chicago Airport, and lakefront development efforts. Reopening 23 grade crossings would create enormous safety problems given that area motorists have long been used to ignoring the possibility of train movements over these crossings.

While the Four Cities' Alternative Routing Plan would substantially mitigate the serious safety, environmental, and socioeconomic impacts of the Applicants' proposal, it would also result in quantifiable annual cost savings to the public and the Applicants of $4.2 million compared with the Applicants' operating plans (with a net present value of $59.3 million over 20 years). Burris Environmental V.S. at 39. The Plan is also an operationally feasible alternative that accommodates the Applicants' proposed incremental increases in rail traffic moving through the Four Cities as well as their desire for operational

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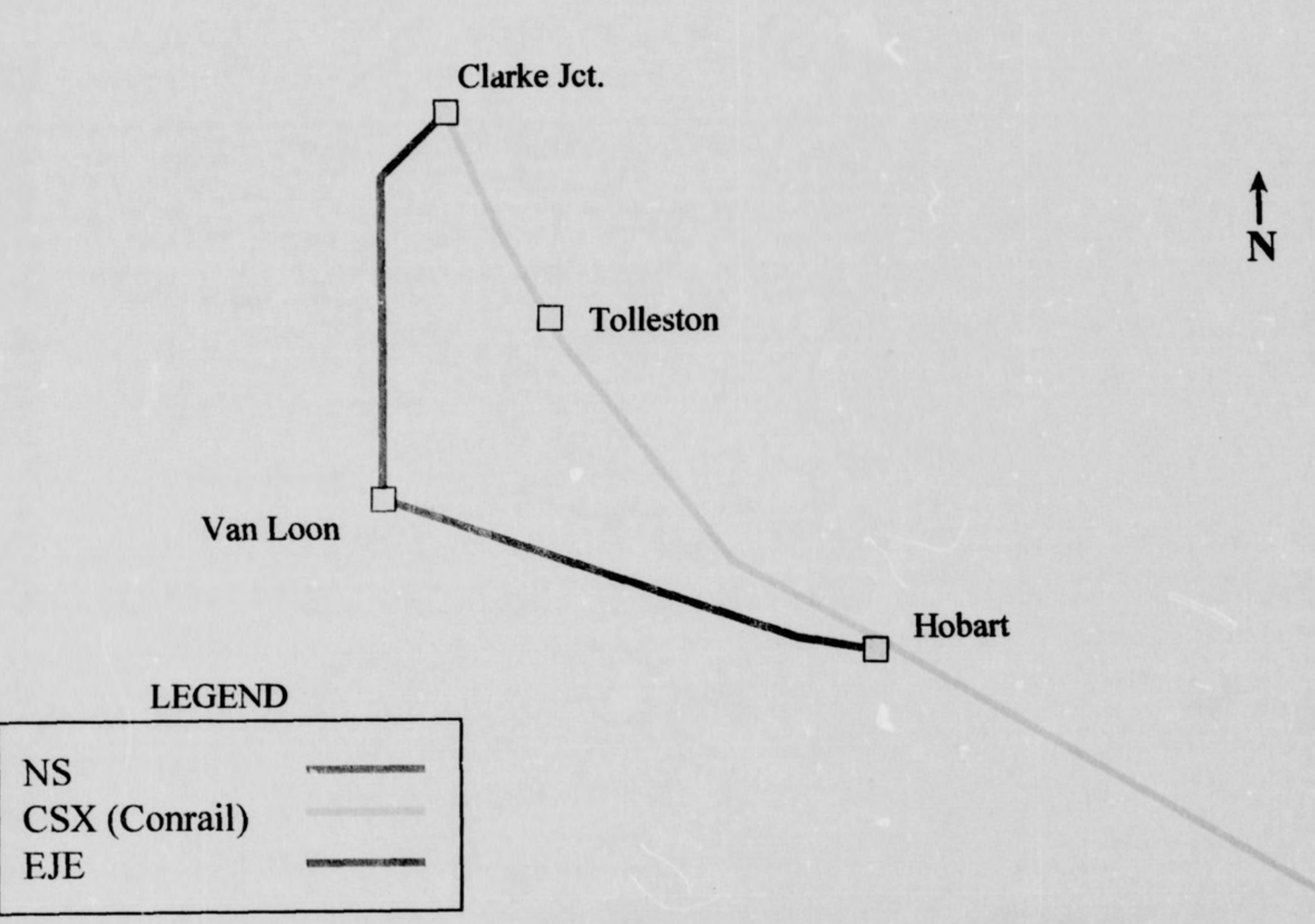
[6] This alternative route is displayed on the schematic on the following page. It is shown in more detail on Exhibit PHB-4 attached to Mr. Burris' Verified Statement in the October 21 Comments.



Clarke Jct.
Tolleston
Van Loon
Hobart
N
LEGEND
NS
CSX (Conrail)
EJE

flexibility. It is also consistent with CSX's proposed counter-clockwise flow of rail traffic to and from Chicago.

The Alternative Routing Plan developed by the Four Cities assumes that both CSX and NS will abide by other important aspects of their post-transaction operating plans. In particular, NS has represented that it plans to reduce the daily average number of train movements over its Nickel Plate line through the Four Cities' region to 11 from the base year (1995) level of 26. The Nickel Plate line crosses many of the same highways and streets crossed by the BOCT line, although some distance to the south, and it also causes severe problems in terms of grade crossing safety and vehicle delays. The Alternative Routing Plan proposes to use some of the capacity released by the reduction from 26 to 11 daily trains for five daily CSX trains that would operate over this line between Hobart and Van Loon. With respect to the portion of the Nickel Plate line west of Van Loon, NS should be held to its representations concerning post-transaction daily train frequencies. This can be accomplished by imposing a cap on the average number of daily train movements on the NS line consistent with the numbers shown in NS's operating plan. Accordingly, the Four City Consortium also requests that the Board impose such a cap as a further condition to its approval of the Application.

D. Four Cities Negotiations with Applicants

The Four Cities note that the Applicants themselves recognize the severity of the impacts of their proposed transaction on the Four Cities' region, as they have been consulting with the Four Cities with respect to post-transaction operations through northwest Indiana since last summer. Negotiations between the parties have been pursued with more rigor in recent months, as a result of the SEA's recommendation in the Draft EIS that the parties meet and attempt to negotiate a "mutually-binding agreement" with respect to the mitigation of post-transaction impacts. The Four City Consortium has met and continues to meet with CSX and NS representatives (and the Indiana Department of Transportation) concerning the development and implementation of a mutually-acceptable solution.

At this time, it remains uncertain whether an agreement can be reached between the parties that would obviate the need for imposition of environmental mitigating conditions by the Board as part of any approval of the proposed transaction. As the Four Cities have indicated in their EIS Comments, the Consortium intends to supplement those comments, as appropriate, upon the conclusion of the discussions with the Applicants.

II.

Applicable Legal Standards

The "single and essential standard of approval" for a proposed railroad merger or control transaction is whether the

transaction is "consistent with the public interest." 49 U.S.C. § 11324(c).[7] See Finance Docket No. 32760, Union Pacific Corporation, et al. -- Control and Merger -- Southern Pacific Rail Corporation, et al., Decision No. 44 (served August 12, 1996) at 50-51 (unpublished)("UP/SP"); Finance Docket No. 32549, Burlington Northern Inc. and Burlington Northern Railroad Company -- Control and Merger -- Santa Fe Pacific Corporation and The Atchison, Topeka and Santa Fe Railway Company, Decision No. 38 (served August 23, 1995) at 50-51 (unpublished)("BN/Santa Fe").

The applicable legal standards are discussed in more detail in the Four Cities' October 21 Comments and in their EIS Comments. In essence, the Board must perform a "balancing test" in determining whether a proposed railroad control transaction is in the public interest. That test calls for the Board to weigh "the potential benefits to applicants and the public against the potential harm to the public." 49 C.F.R. § 1180.1(c).

Even if the Board determines that the overall effect of a proposed merger is in the public interest, the Board still has broad authority to impose conditions on consolidations in order to ameliorate potential adverse effects. 49 U.S.C. § 11344(c).

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[7] Statutory citations are to the ICC Termination Act of 1995 (the "Act"), Pub. L. No. 104-88, 109 Stat. 803 (1995). The current statutory standards applicable to the Board's consideration of the Conrail control transaction are similar to those under the former Interstate Commerce Act, which were set forth at 49 U.S.C. § 11344. The only substantive change is the addition of Subparagraph (5) to new § 11324(B), which requires the Board to consider "whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region or in the national rail system."

The criteria for imposing conditions to remedy anti-competitive effects of a proposed merger were described as follows in BN/ Santa Fe:

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

BN/Santa Fe, supra, at 55-56, citing, UP/MP/WP, 366 I.C.C. at 562-65. See also 49 U.S.C. § 11324(c), which provides that:

> The Board may impose conditions governing the transaction, including the divestiture of parallel tracks or the granting of trackage rights and access to other facilities.

The harm that the proposed division of Conrail would inflict on the Four Cities' region is, to a large degree, environmental in nature. The National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 et seq., together with regulations implemented by the Council on Environmental Quality, 40 C.F.R. Parts 1500-1508, set forth the governing principles for the evaluation of the environmental impacts of any "major Federal action." The Board is the lead agency for ensuring compliance with the environmental laws and regulations.[8]

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[8] The Board's regulations implementing its environmental review obligations are set forth at 49 C.F.R. Part 1105, "Procedures for Implementation of Environmental Laws."

NEPA requires that an Environmental Impact Statement ("EIS") be prepared when a proposed federal action has the potential to affect significantly the quality of the human environment. 42 U.S.C. § 4332(2)(C). In Decision No. 6 (served May 30, 1997), the Board determined that preparation of an EIS was warranted in this case. Id. at 2-3. A Draft EIS was prepared by the Board's SEA and published on December 12, 1997. After reviewing the comments filed by parties (including the Four City Consortium) in response to the Draft EIS, SEA is expected to issue its Final EIS for this proceeding in late May of 1998.

The Board's Notice of Final Scope issued on October 1, 1997, set forth three separate alternatives that it will consider when reviewing the EIS prepared for this case:

> In making its decision in this proceeding, the Board will consider public comments and SEA's environmental analysis contained in the EIS, including any proposed environmental mitigation. The alternatives SEA will consider in the EIS are: (1) approval of the transaction as proposed; (2) disapproval of the proposed transaction in whole (No-Action alternative); and, (3) approval of the proposed transaction with conditions, including environmental mitigation conditions.

Id. at 3.

The Board's standards for setting environmental conditions in rail merger and control cases are consistent with its broad authority to impose conditions in approving such transactions under 49 U.S.C. § 11324(c). Among other things, "the record must support the imposition of the condition at issue,

. . . there must be a sufficient relationship between the condition imposed and the transaction before the agency, and the condition imposed must be reasonable." Id. at 3 n.2.

Finally, in evaluating the environmental-related impacts of a merger application, the Board examines the impacts at all levels, including systemwide and local impacts, and even line-by-line impacts. As stated by the Board, environmental mitigation "addresses impacts on a variety of levels: systemwide, rail corridor-specific, and local . . . . [M]itigation [may be appropriate] for particular rail line segments, rail yards, intermodal facilities, and rail abandonments and construction." UP/SP, supra at 220.[9]

III.

ARGUMENT

The evidence concerning the proposed Conrail control transaction's impacts on the Four Cities establishes that the transaction is not in the public interest absent the imposition of conditions designed to mitigate those impacts. If the Application is approved, the record supports the imposition of the Four Cities' Alternative Routing Plan as the best method of ameliorating the adverse effects of the transaction in a manner

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[9] In their comments on the Draft EIS, both CSX and NS argue that the Board should not impose mitigating conditions for localized adverse environmental impacts if the benefits of the transaction as a whole outweigh such impacts. This position is inconsistent with the Board's broad conditioning power in railroad control cases, which has consistently been exercised to remedy adverse competitive and other impacts of a local nature or affecting but a single shipper.

that will not intrude on the benefits otherwise to be realized. Such action is entirely consistent with the Board's statutory responsibilities in railroad control proceedings.

In both their Rebuttal filing on December 15, 1997, and in their Comments on the Draft EIS filed on February 2, 1998, the Applicants have argued that their post-transaction operations will not adversely impact the Four Cities' region (or, alternatively, that any such impacts are offset by the overall benefits of the transaction). They have also set forth a number of objections to the feasibility of the Four Cities' Alternative Routing Plan, and claimed that it will adversely affect their own operations. The Four Cities will respond to these arguments and also address the Applicants' mistaken assertions concerning the applicable legal standards (including environmental standards) that the Board should apply in evaluating the proposed transaction.

The Applicants' Rebuttal to the Four Cities' October 21 Comments is based largely on the joint testimony of two economic consultants. See Joint Rebuttal Verified Statement of James C. Rooney and T. Stephen O'Connor in CSX/NS-177, Vol 2B at 277-307 ("Rooney/O'Connor V.S."). While these witnesses may be qualified to testify on broad rail structuring issues, the Board must weigh their comments in the context of the voluminous and detailed local-impact testimony submitted by the Four Cities in this proceeding.

The Four Cities have offered a "real world" perspective on the serious local impacts associated with the proposed transaction. The following federal, state, and local public officials, as well as local community groups, planners, and consultants, have submitted written testimony and correspondence to the Board describing the serious regional impacts of the proposed transaction and supporting unanimously the Four Cities' Alternative Routing Plan as an appropriate means of mitigating those impacts:

- The two United States Senators and the United States Representative who represent the Four Cities in the United States Congress;
- Each of the Four Cities' elected Mayors and the heads of each of the Four Cities' Planning Departments;
- Indiana State Senators and State Representatives who represent the Four Cities in the Indiana General Assembly;
- The Northwest Indiana Regional Planning Commission which serves as the Metropolitan Planning Organization for transportation planning for Northwest Indiana;
- A non-profit community development group seeking to bring low- to moderate-income homes to the Four Cities;
- A consultant engineering firm that has performed engineering services in Northwestern Indiana for over 35 years;
- An experienced economic consultant who is intimately familiar with the transportation infrastructure in the region; and
- The Gary/Chicago Airport Authority's long-time engineering consultants.

For the most part, the Applicants have failed to address the evidence that has been submitted by these individuals and groups detailing the serious adverse impacts of the Conrail transaction on the Four Cities.

The Four Cities' EIS Comments submitted in this proceeding also demonstrated that the Draft EIS, as it applies to the Four Cities' region, fails in several respects to meet applicable environmental statutes, orders, and guidelines. This brief does not seek to rehash in detail these critical environmental requirements and the requirement that the Board take appropriate action to mitigate such impacts. In short, however, the Four Cities have demonstrated the following inadequacies of the Draft EIS.

- SEA failed to sufficiently analyze reasonable alternatives, including the Four Cities' Alternative Routing Plan as is required by governing statutes that require the Board to "rigorously explore and objectively evaluate all reasonable alternatives" and to "present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public." See 40 C.F.R. § 1502.14.

- SEA failed to give meaningful consideration to the safety impacts, increased likelihood of crossing accidents, interference with the provision of emergency services, and crossing delay times associated with the transaction.[10]

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[10] As noted above, since the Application was filed, two fatal train/vehicle accidents have occurred at at-grade highway/rail vehicle crossings in the Four Cities, the last occurring only two weeks ago on February 8, 1998, when a train operated by NS struck a vehicle causing the fatality of the two vehicle occupants notwithstanding that the crossing protection devices were working properly.

(continued...)

- SEA failed to analyze the substantial cumulative impacts that the proposed transaction will have on the Four Cities based on the multitude of reasons that they have detailed. CEQ regulations mandate that environmental significance "cannot be avoided by . . . breaking [an action] down into small component parts" and that cumulative impacts require an examination of past, present, and future regional impacts. See Id. at 1508.7 and 1508.27.

- Despite the fact that over 80 percent of the residents of Gary and East Chicago are non-white/minority, and even though governing regulations require that an alternative must be adopted if that alternative "would have less adverse effects on protected populations," SEA failed to consider the Four Cities' Alternative Routing Plan as a potential means of mitigating environmental justice impacts. See Department of Transportation (DOT) Order to Address Environmental Justice in Minority Populations and Low-Income Populations, 62 Fed. Reg. 18377 (Apr. 15, 1997).

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[10](...continued)

The United States General Accounting Office ("GAO") has stated that more than simply installing improved crossing safety devices at rail/highway grade crossings is required to protect against accidents such as these, as the majority of all crossing fatalities in the United States occur at crossings with active protective devices. According to GAO:

> Although installing lights and gates can help to prevent accidents and fatalities, it will not preclude motorists from disregarding warning signals and driving around descended gates. . . . While 35 percent of the railroad crossings in the United States have active warning devices, 50 percent of all crossing fatalities occurred at these locations.

See United States General Accounting Office, Railroad Safety, DOT Faces Challenges in Improving Grade Crossing Safety, Track Inspection Standards, and Passenger Care Safety, at 4 (Statement by Phyllis F. Scheinberg before the Senate Committee on Commerce, Science and Transportation, Feb. 27, 1996) (GAO/T-RCED-96-115). This preferred strategy of minimizing railroad operations over area at-grade crossings, as opposed to simply improving existing warning devices, is exactly what the Four Cities are proposing in their Alternative Routing Plan.

- SEA failed to consider the fact that the proposed reinstatement of rail service on the former PRR line between Hobart and Clarke Junction is not "consistent with existing land use plans" despite the Four Cities' detailed comments on the adverse impact of reinstatement of the line on important housing, airport, and waterfront development plans in the region.
- SEA failed to consider the proposal's conflict with regional programs to mitigate air quality problems in northwest Indiana, which is a nonattainment area under the Clean Air Act; and more specifically, that the Four Cities must take actions to reduce air pollution emissions by at least 15 percent over a six-year period. Meanwhile SEA found no impact despite the fact that the proposed transaction would produce incremental increases in air pollution.

The Four Cities expect that SEA will address these issues in its Final EIS to be issued in late May 1998. However, the Board, who is ultimately responsible for overseeing agency compliance with environmental statutes, must take action to ensure that the serious regional impacts associated with the proposed transaction are meaningfully addressed and that appropriate conditions are implemented to ameliorate those impacts.

In the sections below, the Four Cities will show that the Applicants' arguments opposing mitigation for the Four Cities are contradicted by the evidence and are contrary to the Board's statutory standards for the consideration of railroad control and merger transactions.

A. Applicants' Position on the Scope of Conditions that the Board May Order to Ameliorate Impacts is Mistaken

The Applicants do not deny that serious impacts on the Four Cities will flow from the transaction, and they acknowledge

that the Four Cities' Alternative Routing Plan has certain advantages.[11] However, the Applicants largely dismiss out-of-hand the detailed concerns that have been raised by the Four Cities as insignificant "local impacts" in the grand scheme of the overall transaction. The Applicants' position appears to be that regional or local impacts, no matter what their degree, are alleviated by the systemwide operational and efficiency improvements that would result from the transaction. Specifically, the Applicants' assert that:

> because the Transaction will result in the rerouting of traffic, some line segments and yards will experience increased activity while other line segments and yards will experience decreased activity. It is important that localized environmental effects be viewed in the context of the entire proposal, rather than in piecemeal fashion . . . '[N]ot in my back yard' complaints must not be permitted to overshadow the systemwide benefits of the Transaction.

Applicants' Rebuttal (CSX/NS-176), Vol. 1 at 696, XIX-3.[12] In other words, the Applicants argue that because certain systemwide efficiencies and environmental benefits will result from the transaction, and because they believe that these benefits on the whole outweigh any adverse localized impacts, no local impacts warrant mitigation.

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[11] See, e.g., Rooney/O'Connor V.S. at 8 (stating that "[t]he possibility of an elevated [grade separated] line is intriguing as a long-term alternative, and might be the focus of a joint relocation planning study").

[12] See also CSX Comments on the Draft EIS, at 27 (asserting that "the non-environmental benefits of the Transaction are the benchmark against which local impacts and their appropriate remediation, if any, are to be measured.")

In its October 21 Comments and EIS Comments, the Four City Consortium has demonstrated the serious regional impacts on northwestern Indiana that are likely to result from the Conrail transaction. While these impacts may be insignificant from the viewpoint of the Applicants, they are very real and consequential for the Four Cities and their residents.

As noted above in the legal analysis section, the Board is required to examine proposed rail merger transactions not just on a systemwide basis, but also on a regional, local, and rail-line-by-rail-line basis. In prior rail merger cases, the Board has not hesitated to impose conditions -- both competitive and environmental -- to ameliorate a proposed transaction's adverse consequences on a single shipper or on a single community. The Applicants' position on ameliorative conditions simply ignores this fact.

For example, in its recent UP/SP merger decision, the Board acknowledged certain SEA conclusions with respect to predicted systemwide environmental benefits that would flow from the Union Pacific/Southern Pacific merger transaction. As the Board stated:

> As a result of its investigation, SEA concluded that the merger would result in several environmental benefits, including a systemwide net reduction of 35 million gallons of diesel fuel consumption (based on 1994 figures) from rail operations and truck-to-rail operations, systemwide improvements to air quality from reduced fuel use, and a reduction in long-haul truck miles, highway congestion and maintenance, and motor vehicle accidents.

UP/SP at 219. Even with these significant systemwide environmental benefits, however, the Board imposed environmental mitigation designed to ameliorate localized impacts. In particular, for two separate cities impacted by the proposed transaction, the Board ordered a moratorium to be placed on any increase in traffic movements over certain rail line segments.[13] The Board also ordered certain mitigation studies to be conducted, noting that "[t]he sole purpose of the mitigation studies will be to arrive at specifically tailored mitigation plans that will ensure that localized environmental issues unique to these two communities are effectively addressed." Id. at 221.[14]

In its Comments on the Draft EIS in this proceeding, CSX acknowledges the Board's imposition of environmental mitigating conditions to ameliorate the localized impacts on the Cities of Reno and Wichita, but attempts to distinguish the UP/SP case from this one on the ground that only an Environmental Assessment ("EA") was prepared for UP/SP, rather than an EIS.
CSX Comments on the Draft EIS at 20-21.[15] CSX cites no statuto-

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[13] The cities involved were Reno, Nevada and Wichita, Kansas. Id. at 220-223.

[14] On February 11, 1998, the SEA issued a Final Mitigation Plan which recommended the adoption of tailored mitigation measures for the City of Reno in addition to those previously adopted by the Board. The recommended measures pertain to grade crossing congestion and safety -- the same issues that are of primary concern to the Four Cities.

[15] CSX also sees a distinction between the UP/SP case and this one because in UP/SP, the conditions were imposed to modify the applicants' operating plans pending implementation of final mitigation measures for Reno and Wichita. This purported dis-
(continued...)

ry provision, regulation, or precedent for this purported distinction (and, indeed, there is none). Moreover, the distinction makes no sense.

CSX's argument, in essence, appears to be that the Board has greater authority to impose conditions intended to mitigate localized environmental impacts when an EA is prepared than it does when an EIS is prepared. This argument stands logic on its head. An EIS is prepared when a proposed transaction has greater potential for adverse environmental effects, not less. Indeed, the very purpose of NEPA and the EIS process is to ensure that federal agencies investigate all implicated environmental issues and take action to ensure that significant impacts are ameliorated. The CEQ's governing guidelines are unequivocal on this point:

> NEPA's purpose is not to generate paperwork--even excellent paperwork--but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.

See 40 C.F.R. § 1500.1(c).

In sum, NEPA's purpose is to protect the environment, and not (as the Applicants would like it to be) to protect significant actions that would harm the environment. There is neither a legal nor a logical basis for the Applicants' bizarre

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[15](...continued) tinction is puzzling, because the Four Cities are not seeking interim conditions here. Rather, they seek permanent conditions designed to mitigate identified adverse environmental impacts on their region resulting from the proposed transaction.

position that the Board can do less to mitigate environmental impacts when it prepares an EIS than when it prepares an EA.

B. The Four Cities' Alternative Routing Plan is Operationally Feasible and Will Preserve the Applicants' Desired Operating Flexibility

CSX's and NS' post-transaction operating plans are intended to achieve maximum operational flexibility in moving traffic to and from the Chicago terminal area. Each carrier's goal is to keep this terminal fluid, and one of the principal means of achieving this goal is the ability to use alternate routes to move traffic across northern Indiana. The Four Cities' Alternative Routing Plan is entirely consistent with this goal.

1. CSX's Counterclockwise Plan for Traffic Moving to and from Chicago Would be Preserved

The Applicants assert that the Consortium's Alternative Routing Plan would interfere with CSX's proposed "counterclockwise policy" for train movements to and from Chicago. Rooney/O'Connor V.S at 11. The Applicants also argue that the Plan would impair CSX's ability to perform efficient interchanges with other carriers in the Chicago area. Id. Neither assertion is correct.

The Alternative Routing Plan is in fact consistent both with CSX's intended counterclockwise traffic flow and with its intended use of the Conrail Porter Branch, which will be primarily for eastbound movements. Under the Plan, the CSX/BOCT Willow Creek to Calumet Park line via Pine Junction would be used primarily for westbound traffic, and the grade-separated IHB line

would be used primarily for eastbound movements from Calumet Park to a connection with the Conrail Porter Branch east of Tolleston, and thence via the Porter Branch back to Willow Creek. As stated in the Four Cities' October 21 Comments, "[t]his will effectively result in paired mainline tracks, each with traffic moving primarily in a single and opposite direction." Burris V.S. at 6-7.

Moreover, the Applicants have not indicated how the Alternative Routing Plan would interfere with any interchanges of traffic with other carriers at Chicago. The Plan has been carefully designed to enable CSX to reach Calumet Park and Barr yard via both the Porter Branch/IHB and the BOCT line. Trains using the PRR Fort Wayne line will still be able to reach the CSX, Conrail (NS) and EJE lakefront lines, as well as the Porter Branch via the new connection already approved at Tolleston. The interchange issue is simply a red herring.

2. The Alternative Routing Plan Preserves CSX's Routing Flexibility

In their Rebuttal, the Applicants raise a number of objections to the specifics of the Four Cities' Alternative Routing Plan. For example, they assert that of the 17 eastbound CSX trains to be routed over the IHB/Porter Branch line under the Four Cities' proposal, only 11 could feasibly be routed via the IHB/Porter Branch, and nine of these should use the more efficient routing via the Belt Railway Company of Chicago ("BRC") through Rock Island Junction in preference to the IHB line. Rooney/O'Connor V.S. at 7.

Thus, CSX itself acknowledges that at least 11 eastbound trains could be rerouted as proposed in the Alternative Routing Plan. CSX does not address the possibility of routing more westbound trains via the porter Branch/IHB or via the lakefront line. In this regard, the Four Cities wish to emphasize that the Alternative Routing Plan is not intended to be inflexible or carved in stone. The Plan's purpose is merely to shift as much rail traffic as possible from the BOCT line between Pine Junction and Calumet Park to other routes having a higher proportion of rail/highway grade separations. So long as this objective is achieved, CSX would be free to route eastbound trains (or westbound trains, for that matter) via either the IHB/Porter Branch or via Rock Island Junction and CSX's lakefront line. Either routing would facilitate the removal of trains from the BOCT line which is the primary objective of this aspect of the FCC plan.[16]

With respect to the trains that CSX proposes to route via the presently out-of-service Hobart to Clarke Junction line, CSX has indicated that one of its primary reasons for acquiring the former PRR Fort Wayne line is to "provide a fully adequate alternative route for any train in case of emergency or congestion of the mainline [via Willow Creek]." Rooney/O'Connor V.S.

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[16] There are also other ways to achieve the intended result. For example, the average total number of daily train movements over the BOCT line between Pine Junction and Calumet Park could be capped at the pre-acquisition level (27.6), with a curfew on train movements over this line during the morning and evening periods of heaviest vehicle use of the line's many closely-spaced grade crossings (6:00-9:30 AM and 3:00-6:30 PM).

at 22. CSX claims that the Four Cities' plan would interfere with this operational flexibility; require CSX to negotiate additional time slots for operations over NS and EJE; and require the involvement of two additional train dispatchers -- thus removing the efficiencies of single-line service. Id. at 10. However, after the Conrail transaction is consummated CSX will already have three routes to and from Chicago. These include the lakefront line between Willow Creek and Rock Island Junction, the CSX/BOCT line from Willow Creek to Barr Yard via Pine Junction and Calumet Park, and the Conrail Porter Branch combined with the IHB between Willow Creek and Calumet Park. Assuming CSX requires yet a fourth route, the Four Cities' Alternative Routing Plan provides an alternative that enables CSX to use the PRR line between Fort Wayne and Hobart and other feasible alternatives west of Hobart.[17]

CSX objects to having to use trackage rights between Hobart and the lakefront. However, the CSX and NS operating plans indicate a plethora of post-transaction reciprocal operating rights at many locations. This will certainly keep both carriers honest. Moreover, CSX apparently has no problem in operating over trackage dispatched by another carrier where such operations otherwise suit its purposes -- e.g., the Monongahela joint service area (to be controlled by NS), the IHB lines (to be

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[17] The primary alternative is trackage rights over the NS and EJE between Hobart and the lakefront via Van Loon. Another possible alternative is to use the NS Nickel Plate line to Osborn, and thence northward via the IHB to Michigan Avenue Yard and the lakefront.

controlled by the "independently managed and operated" IHB), and the Northeast Corridor (controlled by Amtrak).

CSX's operating plan projects moving only five trains per day on the PRR line, primarily to and from the lakefront steel mills which are served by IHB or the EJE. To the extent these trains are terminated by IHB, they could efficiently move via Willow Creek and thence over the Conrail Porter Branch and the IHB to the latter's Michigan Avenue Yard -- thereby eliminating the need for use of the NS or EJE and additional dispatchers. For traffic terminating at the U. S. Steel Gary Works, that mill is served by the EJE so its dispatcher is already involved. Thus, the only additional dispatcher needed for this traffic is an NS dispatcher. Two additional dispatchers (NS and EJE) would be needed only for grain or other bulk trains that would need to reach the CSX lakefront line enroute to or from Rock Island Junction.

3. The Four Cities' Plan Would Not Disrupt NS' Midwest-Southeast Service Route

NS asserts that the Four Cities' proposed rerouting of CSX traffic from the PRR Hobart-Clarke Junction line to the portion of NS's Nickel Plate line from Hobart to Van Loon (and thence over the EJE between Van Loon and the lakefront) would disrupt NS' operations over its principal route between Chicago and the southeast.[18] Specifically, NS claims that the routing

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[18] In their October 21 Comments, the Four Cities indicated that a connection would have to be built between the NS and EJE lines at Van Loon. Further investigation has revealed that a (continued...)

of additional traffic onto the Nickel Plate line would aggravate congestion problems and threaten NS' ability to maintain time-sensitive schedules. Moon Rebuttal V.S. in CSX-177 (Vol. 2A) at 10-11; NS Comments on Draft EIS at 5-5 to 5-6.

This claim is contradicted by NS's own operating plan, which shows a reduction in the number of daily train movements over the Nickel Plate line by 15 trains per day (from the base year level of 26 trains per day to 11 trains per day post-acquisition). Burris Environmental V.S. at 14. The Four Cities' rerouting of five trains per day over the 9.6-mile segment of this line between Hobart and Van Loon will still permit a reduction of ten trains per day from the current level even on that segment. NS's claim of aggravating congestion thus is obviously specious.

4. The Alternative Routing Plan Mitigates Many Regional Problems Otherwise Associated with the Transaction

In their Rebuttal filing, the Applicants assert that the Four Cities' Alternative Routing Plan would harm other nearby communities because the total number of rail/highway grade crossings involving all line segments in the area would remain the same. _See_ Orrison Rebuttal V.S. in CSX/NS-177 (Vol. 2A) at 34. However, the real issue at stake for the Four Cities is the effect of the Consortium's Alternative Routing Plan on the heavily-used contiguous grade crossings on the most severely-

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[18] ...continued)
connection between the two railroads in fact already exists at this location. Burris Environmental V.S. at 45.

impacted line segments. By shifting 17 daily trains from the BOCT Pine Junction-Calumet Park line to the IHB/Porter Branch, which is largely grade-separated, the Four Cities' plan would alleviate problems at the most heavily-impacted crossings while minimizing the impact of increased train movements on other lines. The Alternative Routing plan is a cooperative effort, and its benefits are not identical for every community. However, the communities in northwestern Indiana have banded together and recommended this plan as the best means of balancing the Conrail transaction's impacts on the region against the railroads' operational needs.

A good example of this is the Four Cities' proposed alternative to restoration of the inactive PRR Hobart-Clarke Junction line to service. Reducing the number of daily trains using the portion of the NS Nickel Plate line between Hobart and Van Loon by ten (as proposed by the Four Cities) rather than by fifteen (under the NS operating plan) is certainly preferable to reopening 23 rail/highway grade crossings on the former PRR line between Hobart and Clarke Junction. The Four Cities believe that, on balance, reopening the PRR line, which has been inactive for approximately ten years, creates greater safety concerns than reducing the rail traffic on a portion of the Nickel Plate line by ten rather than fifteen daily trains.

The Applicants also assert that the FCC plan results in use of 75 rail/highway grade crossings compared with the 73 crossings that would be used for moving the same traffic under

the CSX and NS operating plans. However, the critical issue is not the number of crossings alone, but rather a combination of the number of crossings and the number of trains and vehicles using the crossings. The FCC plan contemplates 1,074 rail/highway crossing occurrences each day compared with 1,313 rail/highway crossings per day based on the CSX plan. Burris Environmental V.S. at 17. (This is a difference of over 7,000 occurrences on a monthly basis.) Moreover, as the Four Cities have demonstrated, their Alternative Routing Plan results in a net reduction in quantifiable public and railroad costs of $4.2 million annually. Burris Environmental V.S. at 39-49.[19] In addition, other significant socioeconomic, environmental justice and other quality-of-life impacts, which for the most part are not quantifiable, would also be ameliorated under the Four Cities' Plan.

C. The Four Cities' Alternative Routing Plan is Necessary to Mitigate the Impacts of Post-Transaction Operations on the CSX/BOCT Line

The Applicants have challenged several of the Four Cities' documented impacts of post-transaction operations on the BOCT line between Pine Junction and Calumet Park, as well as the benefits of the Consortium's Alternative Routing Plan for those movements. These are addressed, in turn, below.

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[19] These costs include productivity costs, fuel and oil costs, emissions costs, accident costs, mileage related operating costs, and a return on investment in the foregone capital expenditures for line rehabilitation and construction that otherwise would be required under the Applicants' operating plans. Id.

1. The Train Speeds Used in the Four Cities' Traffic Delay Study are Fully Supported by the Evidence

In their Rebuttal filing, the Applicants challenged the Four Cities' traffic delay analysis and resulting calculation of costs/benefits on the ground that they improperly assumed train speeds of 25 MPH on the BOCT Pine Junction to Calumet Park Line, rather than the 40 MPH post-transaction maximum authorized train speed proposed in CSX's Operating Plan. The BOCT line currently has a 35 MPH maximum timetable speed but a lower effective maximum operating speed. CSX plans to upgrade this line from FRA Class II to Class III, which will increase the maximum timetable speed to 40 MPH. It argues that the maximum authorized train speed should be used to calculate grade crossing delay times. Rooney/O'Connor V.S. at 6-7; see, also, Burris Environmental V.S. at 21-22.

The recent service crisis being experienced by the Union Pacific Railroad in the western United States demonstrates that the Board should consider very carefully and critically unsupported statements made by applicants in a merger proceeding predicting post-transaction operational improvements. Here, CSX's train speed assumptions fail to consider the fundamental railroad operating axiom that actual average freight train speeds rarely come close to meeting maximum timetable speeds. This is particularly true for a relatively short line such as the BOCT line in a densely populated area with numerous rail/rail and rail/highway grade crossings. While CSX's plans to upgrade the BOCT line from Class II to Class III will increase the timetable

speed limit, this does not mean that actual train operating speeds will increase appreciably.

The Four Cities' EIS Comments review this issue at length and demonstrate clearly that the Applicants' assumptions as to post-transaction train speeds over this line are patently wrong, for several reasons. Burris Environmental V.S. at 19-22; Andrew Environmental V.S. at 13-16. First, three independent sources indicate an average actual train speed for this line far lower than either its maximum timetable speed of 35 MPH or the 25 MPH train speed used in the Four Cities' original traffic delay study.[20]

Second, the BOCT line has numerous railroad grade crossings and interlockers which greatly slow down operations. The 6-mile segment of this line in Indiana is crossed at grade by seven rail lines, including both the NS and IHB at State Line Tower on the west edge of Hammond, the Chicago South Shore in Hammond, the IHB in two locations in East Chicago, and the EJE in East Chicago. CSX does not control dispatching over any of these crossings, and in many instances either the other railroad's trains have priority or trains are dispatched on a first come, first served basis. This train priority situation will not change post-transaction. Burris Environmental V.S. at 21. Any CSX train that stops on the BOCT line to permit another railroad's train to cross must decelerate to a stop and then ac-

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[20] The actual average train speed for this line, according to CSXT's own records, is 12.0 MPH. Burris Environmental V.S. at 20.

celerate from a stop to running speed. Because of this process of stopping and starting, the actual train speeds on this line will always be far lower than the maximum authorized speed.

This is confirmed by the Consortium's study of crossing delays conducted in September, 1997. That study included 18 observations of trains stopped at crossings between Clark Road and Calumet Avenue, which are all located on the BOCT Pine Junction to Calumet Park line segment. Expansion of these 18 observations to represent total stopped trains during a one-week period yields 112 stopped trains at the observed crossing locations per week. This equates to 16 stopped trains per day or 58 percent of the 27.6 trains per day moving on this line during the base year. Burris Environmental V.S. at 21.

Third, the upgrading of the BOCT line is intended primarily to increase capacity, not to increase speeds. CSX also proposes to increase the average train weight for trains on this segment from 4,070 gross tons per train to 5,324 gross tons per train, an increase of 31 percent. The Applicants' planned use of longer, heavier trains will require more time for deceleration and acceleration for each stop. Combined with the frequent stops occasioned by the numerous rail crossings of this line, this will prevent CSX from increasing average operating speeds to any significant extent. Id. at 22.

Examination of documents obtained from CSX during discovery confirm the reasonableness of this conclusion. For example, the CSX Blue Island Junction to 75th Street line segment

which has a 40 MPH maximum timetable speed, has an actual average train speed of only 12.0 MPH. Similarly, the CSX Willow Creek to Pine Junction line segment, which for all but two miles has a 60 MPH maximum timetable speed limit for freight trains, has an actual average train speed of only 24.5 MPH. Id. at 21.

Taking all of these factors into account, the Four Cities have re-estimated post-transaction average actual train speeds for the BOCT line of 13.2 miles per hour, or approximately one-third of the proposed maximum timetable speed and 10 percent above current average train speeds. See Andrew Environmental V.S. at 13-14. Using actual rather than maximum train speeds, the delay impact is even greater than that determined in the Four Cities' original delay study (as reflected in their October 21 Comments).[21]

2. Even Minimal Increases in Train Movements Over the BOCT Line are Problematic

In their Rebuttal, the Applicants assert that under CSX's proposed operating plan only two additional trains would use the BOCT line between the critical hours of 6:00 AM and 6:00 PM, which means that the increase in rail traffic volume on this line is not significant. Rooney/O'Connor V.S. at 7. These assertions are misguided; they overlook the serious safety and environmental hazards caused by any increase in the frequency of

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[21] Based on these additional evaluations of train speeds made since the filing of the Four Cities' October 21 Comments, the Consortium adjusted its vehicle delay calculations appropriately. The revised results were submitted as part of the EIS Comments. Andrew Environmental V.S. at 3, 9-18.

train movements on this line as set forth in the testimony of the City Planners from each of the Four Cities. See, e.g., Gordon V.S. in FCC-9 at 4-6. The situation on the BOCT line is such that any increase in train traffic would make an already bad situation worse. Meanwhile, the Four Cities' Alternative Routing Plan would result in a net reduction in the number of trains using this line.

Additionally, the Applicants have failed to consider that the transaction will result in a substantial increase in the average length of trains using the BOCT line. This increase applies across the board, which means that there will be additional vehicle delay time even disregarding the increase in train frequency.[22] Moreover, as indicated above, longer and heavier trains require additional time to accelerate and decelerate.

3. The Cost of Restoring the Elevated IHB Line is Clearly Justified

The Applicants assert that the elevated IHB line is in very poor condition east of Ivanhoe (where it presently connects with the Conrail Porter Branch) and that the Four Cities have underestimated the cost of restoring it to service. Rooney/O'Connor V.S. at 24-26. However, the Four Cities have demonstrated that the cost of restoring this line to service is justified by the additional grade-separated highway crossings compared

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[22] The average number of cars per train and the average length of trains using this line will increase from 66.5 cars and 4,192 feet to 87 cars and 5,490 feet, respectively. This increase of approximately 1,300 feet per train will cause the delay time at-grade crossings to increase throughout the day. Burris Environmental V.S. at 24-26; Andrew Environmental V.S. at 11-12.

with the parallel Porter Branch between Ivanhoe and Virginia Street/Gary (the location of the Four Cities' proposed new connection between the two lines).

The Four Cities' plan reduces the number of grade crossings between Willow Creek and Calumet Park from 27 (using the CSX/BOCT lines via Pine Junction) to 15 (using the IHB/Porter Branch). If the Porter Branch were used rather than the upgraded IHB line between Virginia Street (Gary) and Ivanhoe, the number of grade crossings would increase from 15 to 23.

The Four Cities have estimated the cost of rehabilitation of the IHB between Chase Street and Virginia Street to equal $1.60 million. CSX has claimed that an additional $2.7 million is required to rehabilitate the line between Chase Street and Ivanhoe, for a total cost of $4.3 million. Even assuming that the Applicants' claimed additional investment figure is correct, the Four Cities' Alternative Routing Plan still results in a net reduction of $2.7 million in quantifiable annual costs compared with those that would be incurred under CSX's planned operations between Willow Creek and Calumet Park. Burris Environmental V.S. at 43.

Finally, Applicants have indicated that the increased use of the IHB would add to its operating costs because of increased trackage rights fees and payments that would be incurred by CSX. Rooney/O'Connor V.S. at 24. However, CSX's operating plan contemplates a substantial increase in CSX's use of the IHB independent of the Four Cities' Plan -- which indi-

cates that this is not really a problem. As Messrs. Rooney and O'Connor acknowledge, CSX will be credited with 25.5% of any increased IHB usage fees due to its ownership position in the IHB. (The issue of trackage rights payments will be discussed in more detail below).

D. The Four Cities' Alternative Routing Plan is Necessary to Mitigate the Impacts of Reinstatement of the PRR Line

The Applicants have also challenged several aspects of the Four Cities' proposal that, rather than restoring the inactive segment of the PRR Fort Wayne line between Hobart and Clarke Junction to service, CSX should instead route bulk trains using a combination of the NS Nickel Plate line and the EJE via Van Loon.

1. The CSX Proposal to Reinstate the Hobart to Clarke Junction Line Segment is Neither Economically nor Environmentally Justified

Under CSX's operating plan, the PRR Fort Wayne line is intended as an emergency option for traffic moving along the CSX lakefront line and as a route for slower bulk traffic moving to and from Chicago. CSX's plan projects that an average of five daily trains will move over this line after CSX acquires it and restores it to service.

Using CSX's own data, the Four Cities have estimated that the cost of rehabilitating the 11.7-mile out-of-service portion of the PRR between Hobart and Clarke Junction to FRA Class 3 standards permitting a maximum train speed of 40 MPH is approximately $13 million. Burris Environmental V.S. at 41-42. Even putting aside the problems that reactivation of this line

and its 23 rail/highway grade crossings would cause for the Four Cities, one must question the wisdom of spending this kind of money for the level of traffic involved given the alternatives that are available to CSX. When the adverse environmental and socioeconomic consequences of restoring this line to service are taken into consideration,[23] the wisdom of CSX's proposal becomes even more suspect. The Four Cities' Alternative Routing Plan would enable CSX to obtain the benefits of having the Fort Wayne line available both for bulk train movements and as a fourth alternate route to and from Chicago, while avoiding the necessity for a $13 million capital expenditure.

CSX's operating plan and its Rebuttal evidence completely ignore the substantial negative impact that restoration of service on the Hobart to Clarke Junction line segment will have on the economic development of the Four Cities' region. Restoration of service of this line will undermine a low-income housing project in Gary,[24] prevent expansion of the Gary/Chicago Airport, and interfere with development of the Lake Michigan waterfront. The planned restoration of the line will thereby inhibit the area's ongoing efforts to achieve economic viability.

The Four Cities have quantified a net reduction in economic costs using their Alternative Routing Plan for CSX traffic that would otherwise use the Hobart-Clarke Junction line

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[23] See Cervay Environmental V.S. at 4-16.

[24] As discussed in the Four Cities' EIS Comments, these impacts would violate applicable environmental justice standards. See Argument at 47-52, in particular, p. 51.

of approximately $1.7 million compared with the costs associated with CSX's operating plan. The traffic delay study and other cost calculations for this aspect of the Alternative Routing plan are similar to those for the IHB/Porter Branch alternative to the BOCT line. Andrew Environmental V.S. at 15-16; Burris Environmental V.S. at 22-24, 44-49.

2. CSX's Use of the EJE to Reach the Lakefront Will Not Disrupt the Applicants' Lakefront Operations

The Applicants assert that the Four Cities' Alternative Routing Plan for the Hobart to Clarke Junction traffic will require a disruptive connection between the EJE and CSX's lakefront line near Pine Junction. Purportedly, this connection would have to be at grade and therefore would require an at-grade crossing of Conrail's busy Chicago to Toledo mainline (to be acquired by NS). Rooney/O'Connor V.S. at 9-11; Moon V.S. at 11; NS Comments on Draft EIS at 5-6.

These objections are completely meritless. The EJE line from Van Loon uses an overhead bridge to cross over the Conrail and CSX lakefront lines to reach its own lakefront line near Pine Junction. A grade-separated connection in fact already exists between the EJE's lakefront line and CSX's Curtis Yard (which is located on the south, or opposite, side of the Conrail and CSX lakefront lines). This connection uses the same EJE overhead bridge used to access EJE's own lakefront line, which means that CSX trains using the EJE can access CSX's Curtis Yard without having to cross either the Conrail or the CSX lakefront

line at grade. Burris Environmental V.S. at 46. Indeed, this is the same connection that EJE currently utilizes to interchange traffic with CSX. Id. Therefore, there should be very little disruption of either CSX's or NS's lakefront mainline traffic.

Additionally, the Applicants assert that the movement of coal and coke trains over the EJE elevated line will require the use of locomotive helper service to pull the trains over the elevated grade at a cost of $825,000 annually. However, EJE personnel report that no such assistance is necessary for the movement of NS coal and coke trains that move currently over the elevated portion of the EJE line. Id. at 45 n.22.

Finally, the Applicants contend that the Four Cities' alternative to reinstituting service on the PRR line would require NS to continue to use its Wabash Spur to serve the Indiana Sugar Works plant in Gary, and that this, too, would disrupt operations on the lakefront line. However, NS's plan to use the PRR line northwest of Tolleston in serving the Indiana Sugar Works would also require the use of the lakefront line, so this line will have to accommodate the Indiana Sugar Works traffic no matter which alternative is used.[25]

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[25] There is another alternative that would enable NS to serve the Indiana Sugar Works without using either the Wabash Spur or the PRR line. NS will have trackage rights over the Conrail Porter Branch, which it already plans to use to reach the PRR line via the new connection at Tolleston. Rather than using the PRR line and a series of reverse moves to reach the Indiana Sugar Works via the Wabash Spur, a direct connection could be built from the Porter Branch to the Indiana Sugar Works. The Wabash Spur is used only to serve this shipper, so this alternative would enable the Wabash Spur (as well as the parallel PRR (continued...)

3. The Four Cities' Proposed Trackage Rights Fees and Mileage Payments are Accurate

The Applicants assert that the Four Cities have understated the trackage rights payments that CSX would have to make to NS and EJE for use of their facilities. They also assert that the Four Cities' proposed routing is longer than if the PRR line were used exclusively, and does not account sufficiently for increased costs associated with mileage payments to shippers using private equipment. Rooney/O'Connor V.S. at 10. However, the Four Cities' trackage rights payment utilized in the comparative cost calculations was based on the very same fee for bulk traffic negotiated between BNSF and UP for the trackage rights granted in the UP/SP merger proceeding. These rates should be presumptively reasonable in this context and CSX has not demonstrated good reason to conclude they are not reasonable. Burris Environmental V.S. at 49. Additionally, given the reciprocal trackage rights being granted by CSX and NS to each other, acceptable fees for CSX movement over NS lines should certainly be anticipated.

With regard to increased mileage payments to shippers, the mileage difference between the Four Cities' routing plan and the Applicants' plan is insignificant, amounting to approximately four extra miles. Moreover, CSX has indicated that post-transaction shipments over the PRR line will consist primarily of coal

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[25] (...continued)
line) to be removed to create room for the proposed expansion of the Gary/Chicago Airport.

and coke shipments that move in railroad-provided cars for which no mileage payments are required. To the extent that other bulk-commodity traffic moves over the alternative route, it would move at least in part in railroad-provided cars. Id.

IV.

PROTECTIVE CONDITIONS ARE NECESSARY TO ALLEVIATE THE IMPACTS OF INCREMENTAL INCREASES IN RAIL TRAFFIC IN THE FOUR CITIES

The Four Cities have demonstrated that the Applicants' planned incremental increases in rail traffic moving across the Four Cities' region will result in substantial adverse impacts on the area. As proposed, the Conrail Transaction will threaten the safety of the traveling public, the area's already difficult and fragile environmental situation, and the ability of the region to accomplish planned socioeconomic improvements. These cumulative impacts on the Four Cities are outlined in detail in the Four Cities' October 21 Comments and EIS Comments. The Four Cities have also answered each and every one of the Applicants' objections to their Alternative Routing Plan. They have demonstrated that their Plan is operationally feasible, would provide for the efficient movement of traffic through northwest Indiana, would mitigate the worst of the transaction's adverse impacts on the region, and would produce substantial economic savings, both to the Applicants and to the public, compared with the Applicants' operating plans.

The Four Cities recognize that despite its substantial impacts on their region, the Board may find that, overall, the

proposed Conrail transaction is in the public interest and should be approved. If so, the Four Cities request that the following protective conditions be imposed as a means of mitigating the transaction's adverse impacts on northwestern Indiana:

1. The Four City Consortium's Alternative Routing Plan shall be adopted by the Applicants in at least the following particulars:

   (a) CSX shall re-route its traffic off of the BOCT Line between Calumet Park and Pine Junction in at least sufficient numbers so that no more than 27.6 trains per day on a monthly average basis traverse this line segment. To the extent possible, trains re-routed off the BOCT line shall move over the grade-separated Conrail Porter Branch/IHB line via Ivanhoe and Tolleston.

   (b) The 11.7-mile Hobart to Clarke Junction segment of the PRR Fort Wayne line shall not be rehabilitated and restored to service. Applicants will either (i) utilize the alternative routing proposed by the Four Cities for trains that were projected to move over this line, or (ii) utilize such other routing as they may find operationally preferable so long as they consult with the Four Cities and obtain their concurrence.

2. No more than 16 trains per day on a monthly average basis will be operated over the NS Nickel Plate line between Hobart and Van Loon and no more than 11 trains per day will be operated over the NS Nickel Plate line between Van Loon and Burnham Yard in Chicago, in the absence of mutual agreement between NS and the Four City Consortium.

3. The Applicants will work cooperatively with the Four City Consortium to develop additional plans to mitigate the impact of the Conrail transaction on northwestern Indiana. Such cooperation will include applying for state and federal funding for the purpose of facilitating the maximum utilization of grade-separated corridors, and working with the City of Gary to facilitate the future expansion of the Gary/Chicago Airport.

4. CSX and NS will provide reports to the Four City Consortium on at least a quarterly basis containing sufficient information to confirm compliance with these conditions.

5. The Board will impose oversight for a period of five years to ensure the Applicants' compliance with these conditions.

IV.

CONCLUSION

For the reasons set forth herein and in the Four City Consortium's October 21 Comments and EIS Comments, the Consortium requests the Board to impose the conditions described above if it decides to approve the Application in this proceeding. Such conditions are necessary to mitigate the substantial environmental, safety, and socioeconomic impacts of the Conrail transaction on the Four Cities' region.

Respectfully submitted,

THE CITIES OF EAST CHICAGO, INDIANA; HAMMOND, INDIANA; GARY, INDIANA; AND WHITING, INDIANA (COLLECTIVELY, THE FOUR CITY CONSORTIUM)

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Dated: February 23, 1998

CERTIFICATE OF SERVICE

I hereby certify that I have this 23rd day of February, 1998, served copies of the foregoing Brief of the Cities of East Chicago, Indiana; Hammond, Indiana; Gary, Indiana; and Whiting, Indiana (collectively, The Four City Consortium) by hand upon Applicants' counsel:

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and upon all other Parties of Record in Finance Docket No. 33388.

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--CONTROL AND OPERATING LEASES/AGREEMENTS--
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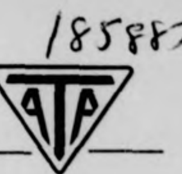

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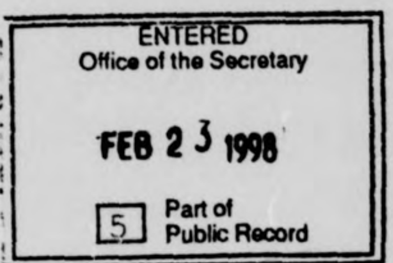
February 23, 1998

VIA MESSENGER



Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, NW
Washington, DC 20423-0001

Re: Finance Docket No. 33388, CSX Corporation et al.-- Control and Operating Leases/Agreements -- Conrail Inc. and Consolidated Rail Corp.

Dear Mr. Williams:

Enclosed are a duly signed original and twenty-five copies of the Brief of the American Trucking Associations, Inc. along with a 3.5 inch floppy diskette in WordPerfect format.

Please date stamp the File Copy of this pleading and return it with the messenger in the enclosed self-addressed envelope.

Sincerely yours,

Kenneth E. Siegel
Counsel for
American Trucking Associations, Inc.

Enclosures

185887

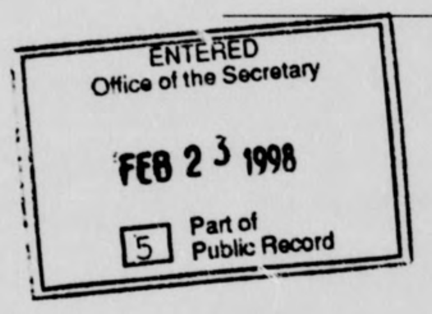
BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

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

RAILROAD CONTROL APPLICATION

BRIEF OF THE AMERICAN TRUCKING ASSOCIATIONS, INC.



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FEBRUARY 23, 1998

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

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

BRIEF OF AMERICAN TRUCKING ASSOCIATIONS, INC.

The American Trucking Associations. (hereafter "ATA") hereby submits this Brief in the above-captioned proceeding pursuant to the order of the Surface Transportation Board, served May 20, 1997 (Decision No. 6), setting forth the briefing and procedural schedule. This Brief is in support of the Comments of ATA in this matter, filed on October 21, 1997 (ATA-6). Throughout this proceeding, ATA has consistently expressed concerns in three general areas:

- Protection of the public interest in highway safety by requiring the acquiring rail carriers to better maintain the intermodal equipment which will be under their control.
- Protection of competition in intermodal operations in the territories affected by the acquisitions including; including: protection for independent motor carriers against discrimination in rates and services favoring rail-affiliated entities or others; and competitive access to the rail lines subject to this acquisition.
- Need for better government oversight so as to ensure efficiency in operations by reducing the number of delays and defaults in rail intermodal

operations arising from rail accidents occurring at rail/highway grade crossings and elsewhere.

In support of these concerns, ATA filed detailed Comments proposing specific ways to address each problem. Regrettably, and to the detriment of public safety and competition, Applicants have rejected ATA's proposals.[1] Because Applicants consistently misconstrued ATA's proposals, they have provided no relevant evidence to contradict ATA's arguments.

Accordingly, we urge the Board to recognize the importance of the safety and competitive concerns that ATA described. ATA's proposals are consistent with the Rail Transportation Policy, which Congress has delegated to the Board to implement. 49 U.S.C. § 10101. Furthermore, the Board is entitled to act under the law governing acquisition of control of a rail carrier, including the requirements to consider the public interest and competition in "the national rail system." 49 U.S.C. §11324. Thus the Board has the legal authority and responsibility to implement ATA's proposals.

THE DANGER OF THE INCREASED USAGE OF RAIL CONTROLLED HIGHWAY EQUIPMENT

ATA has requested that Board require Applicants to ensure the roadworthiness of all intermodal equipment prior to releasing the equipment to a motor carrier for highway use. ATA-6 at 3. The increased reliance on intermodal shipments contemplated by the Applicants – and the safety problems that would result – pose a significant threat to all highway users.

As explained in ATA's Comments, under current intermodal transportation regulations railroads are not responsible for condition of the equipment – the trailer, chassis,

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[1] See CSX/NS-176 at pages 36, 113-124, 466-470, 716-717.

or container -- they provide to a motor carrier. The motor carrier has no realistic opportunity to inspect or maintain this equipment yet is it held responsible for its condition on the highways.

Applicants have claimed that this Transaction would result in the diversion of 1,000,000 trucks off the highways. However, as pointed out in ATA's Comments – and not disputed by the railroads -- these trucks will simply be diverted to other more highly congested urban roads in the form of intermodal truck movements. The serious safety problems associated with this increase constitute a serious threat to all highway users.

Therefore, ATA has proposed, in light of the increased emphasis on intermodal shipments resulting from this Transaction, that Applicants simply be responsible for the condition of the equipment they tender to motor carriers. Motor carriers would remain responsible for equipment on the highways, but would receive equipment at the intermodal terminal in better maintained, safer condition.

Applicants rejected this pro-safety idea by asserting the safety of such equipment is not a problem They also argued that even if it is a problem, there are other ways to address it such as action by other agencies. CSX/NS-176 at 466. They pointed out correctly that ATA is seeking to resolve this problem on other fronts, including a rulemaking at the Federal Highway Administration ("FHWA").

While it is true that FHWA or Congress could at some point in the future act to alleviate this problem, the Board is ideally situated to act now in regards to this Transaction. It is well within the Board's authority to deal with a predictable safety consequence of this Transaction – the result of an increased number of intermodal shipments. The Board not only has jurisdiction under the national Rail Transportation Policy to impose the requested requirement, but the obligation to ensure the operation of "transportation facilities and

equipment without detriment to the public health and safety." 49 U.S.C. § 10101(8). Furthermore, the Board is entrusted "to oversee the modes of transportation . . . to promote safe, adequate, economical, and efficient transportation" (emphasis added). 49 U.S.C. § 13101(a)(1)(B).

ATA's proposal asks only that the party which is in control of the equipment prior to its highway use and which is in a position to adequately inspect and maintain the equipment should be responsible for performing these functions. Applicants completely misconstrue ATA's request (and current law) when they assert that ATA's proposal "would run directly counter to the rules of another federal agency" (FHWA). To the contrary, as Applicants themselves note, FHWA regulations govern vehicles "on the highway" and ATA does not propose to change this. CSX/NS-176 at 466. Rather, ATA requests that the responsibility to maintain intermodal equipment in the intermodal yard be expressly placed on those who control the equipment – in this case the Applicants.

Accordingly, ATA urges the Board to act on this important safety issue.

APPLICANTS SHOULD BE REQUIRED TO UPGRADE HIGHWAY GRADE CROSSINGS

ATA has requested that Applicants be required to make a financial and operational commitment to improve or remove the many hazardous highway grade crossings along the Conrail lines. As explained in ATA's Comments, accidents occurring at highway grade crossings are a major safety problem, with many thousands of deaths and injuries each year. ATA-6 at 6.

Applicants do not dispute th grade crossings are a major safety problem, but simply assert that the problem is ge ing better. CSX/NS-176 at 716-717. They also do not

dispute that the Transaction will lead to an increased number of grade crossing accidents. Id.

Yet Applicants reject any comprehensive steps to address these facts. ATA proposed a number of specific safety measures that should be considered by the Board.[2] The severe problems associated with the UP/SP merger demonstrate beyond question that safety issues regarding mergers must be given the closest scrutiny. The Board should reject Applicants' cavalier attitude toward these critical public safety issues and implement ATA's proposals.

APPLICANTS SHOULD BE PROHIBITED FROM BACK SOLICITATION AND OTHER ANTI-COMPETITIVE PRACTICES

ATA has requested that Applicants be prohibited from back solicitation and other anti-competitive practices. As explained in ATA's comments, Applicants have initiated a practice of requiring motor carriers which are purchasing intermodal transportation, especially smaller motor carriers, to provide the supplier railroad with the name of the motor carrier's customers. If the name is not provided, the railroad refuses to accept the trailer or container offered by the motor carrier. Since the motor carrier usually has no other option and will have even fewer options after the completion of this acquisition with respect to the availability of rail service, it must comply with the railroad's unreasonable requirements.

The only conceivable purpose for Applicants to require this information is to obtain the name of the motor carrier's customer for the purpose of back solicitation. While the Applicants deny this, they fail to articulate any other legitimate purpose for such a

[2] A)An 800 number and identifier requirement should be placed at all crossings; B)Crossings must have better grading, better markings, and more effective warning devices; C) Emergency

requirement other than some general "right to know." CSX/NS-176 at 469. This claim that they have a right to know who the shipper is does not ring true when the motor carrier is the party tendering the intermodal shipment (trailer or container) to the railroad. In that case, the motor carrier is the railroad's customer. The railroad has no privity of contract with the carrier's customer and no legitimate need to know its name.

Further, ATA does not argue, as Applicant's claim, that back solicitation has already occurred. CSX/NS-176 at 469. Rather, again lacking any other legitimate purpose, there would be an increasing danger that the railroads will use this information to back solicit customers as consolidation in the rail freight industry continues.

Most ominously, Applicants have declined to even pledge that they will not initiate such a practice. This calls into question Applicants true intentions. If they are not contemplating such a practice, they should not be opposed to a condition which prohibits it.

Accordingly, the Board should require, as a condition to this Transaction, that such anti-competitive practices are prohibited.

APPLICANTS SHOULD BE PROHIBITED FROM DISCRIMINATING AGAINST MOTOR CARRIERS WITH RESPECT TO PRICES AND SERVICES.

ATA has requested that that Board take steps to ensure that the Applicants practice neither channel management ("discrimination") or retaliation towards non-affiliated motor carriers or Intermodal Management Companies ("IMC's") and that all motor carriers and IMC's are provided reasonable, non-discriminatory rates and services, including specifically prohibiting such practices as part of the condition for approval of the application. ATA-6 at 9.

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communication devices should be installed at all crossings.

As explained in ATA's Comments, railroads wholesale their intermodal services using a number of different marketing channels. The process by which railroads market their intermodal services are commonly referred to as "channels." The channels are distinct as to the party through which the service is sold, the service itself, and the ownership of the equipment used. Motor carriers need protection from the railroads potential use of unfair service offerings and pricing practices which unreasonably favor one channel over another, i.e., discrimination. Such a practice would be contrary to "promot[ing] intermodal transportation." 49 U.S.C. § 13101(2)(K).

Applicants argue in response that because such discrimination has not already occurred that there is no need for protection against the possibility that it will occur. CSX/NS-176 at 468. Ironically Applicants argue in this merger proceeding that "competition" will prevent such discrimination from occurring. To the contrary, the increasing consolidation in the rail freight industry guarantees that this danger will only increase.

Therefore, it is disappointing that Applicants oppose a prohibition on something they say never happens. Furthermore, they decline to even pledge that they will not resort to such practices in the future. As discussed above, this raises doubts as to Applicant's true intentions in regard to such practices. We urge to Board to consider this when evaluating this important proposal to protect competition.

ENSURE COMPETITION AND SERVICE

ATA has urged the Board to ensure that the pro-competitive benefits of the Transaction are realized. Only by taking extra steps to protect and expand competition can the gains in service and pitfalls of monopoly be avoided. Accordingly, ATA has

proposed that "open access" and other competitive solutions should be studied and implemented to ensure competition.[3]

Applicants have responded that this request is "beyond the scope of this proceeding." CSX/NS-176 at 470. However the issue of competition is at the core of this proceeding and must be considered. 49 U.S.C. § 11324(b)(5). It is not necessary to this point to recount the cost that Union Pacific meltdown has imposed on the economy in the last year. Yet this disaster could be replicated if bold steps such as "open access" are not given serious consideration.

SUMMARY AND CONCLUSIONS

In its Comments, ATA stated that "the proposed acquisition and division of the Conrail system may provide as great a benefit to the shipping public as the Applicants assert or it may result in a worse service and safety disaster than industry and the public now face as a result of the ICC/Board's rush to approve the Union Pacific mergers and acquisitions." It is now up to the Board to carefully examine all proposals such as ATA's that promote greater safety and competition, the outcome of which will determine which scenario comes to pass.

ATA hopes that lessons have been learned from past mergers and the current actions of the Applicants with respect to their apparent lack of concern for highway safety and anti-competitive practices. ATA urges the Surface Transportation Board to impose on these

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[3] ATA notes that the Board has, at Congressional request, initiated a proceeding to Review Rail Access and Competition Issues, see Ex Parte No. 575, Notice issued February 20, 1998. ATA urges the Board not to make a final determination with regards to this Transaction until the Ex Parte No. 575 study is completed and the findings and recommendations incorporated herein.

Applicants the conditions which we have proposed above to correct existing problems and abuses in these areas and protect against greater problems in the future.

Respectfully submitted,

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Associations, Inc.

February 23, 1998

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23rd day of February, 1998, I caused a true and correct copy of the above and within BRIEF OF AMERICAN TRUCKING ASSOCIATIONS, INC. was served upon the following counsel by facsimile:

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and by first-class mail, postage prepaid, upon all other parties on the Service List.

James F. Peterson