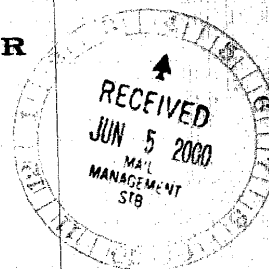


19889
DENNIS G. LYONS
(202) 942-5858

ARNOLD & PORTER

555 TWELFTH STREET, N.W.
WASHINGTON, D.C. 20004-1206

(202) 942-5000
FACSIMILE: (202) 942-5999



June 5, 2000

BY HAND

The Honorable Vernon A. Williams, Secretary
Surface Transportation Board
Office of the Secretary
Case Control Unit
Attn: STB Ex Parte No. 582 (Sub-No. 1)
1925 K Street, NW
Washington, DC 20423-0001

ENTERED
Office of the Secretary
JUN 05 2000
Part of
Public Record

Re: STB Ex Parte No. 582 (Sub-No. 1),
"Major Rail Consolidation Procedures"

Dear Secretary Williams:

Enclosed for filing in the above-referenced matter are an original and 25 copies of the Reply Comments of CSX Corporation and CSX Transportation, Inc., together with a WordPerfect diskette. A certificate of service accompanies the document.

Kindly date-stamp the extra copy of this letter and the Comments, which our messenger is presenting, and return them to the messenger.

If there are any questions concerning this matter, please call the undersigned at (202) 942-5858.

Sincerely yours,

Dennis G. Lyons
Counsel for CSX Corporation and
CSX Transportation, Inc.

rjm
Enclosures
cc: All Parties of Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 582 (Sub-No. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

REPLY COMMENTS OF CSX CORPORATION
AND CSX TRANSPORTATION, INC.

Mark G. Aron
Peter J. Shultz
CSX CORPORATION
One James Center
901 East Cary Street
Richmond, VA 23219
(804) 782-1400

Paul R. Hitchcock
Nicholas S. Yovanovic
CSX TRANSPORTATION, INC.
500 Water Street
Jacksonville, FL 32202
(904) 359-3100

James F. Rill
Mark Schechter
Virginia R. Metallo
Timothy E. Boyle
Ramsey Wilson
HOWREY SIMON
ARNOLD & WHITE, LLP
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 783-0800

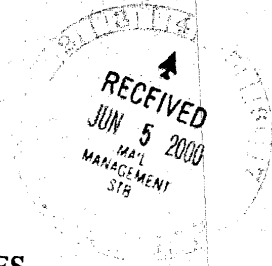
June 5, 2000

Dennis G. Lyons
Leonard H. Becker
Mary Gabrielle Sprague
Claire E. Reade
Sharon L. Taylor
ARNOLD & PORTER
555 Twelfth Street, N.W.
Washington, D.C. 20004-1202
(202) 942-5000

Louis E. Gitomer
BALL JANIK LLP
1445 F Street, N.W.
Washington, D.C. 20005
(202) 638-3307

Ronald M. Johnson
AKIN, GUMP, STRAUSS,
HAUER & FELD, L.L.P.
Suite 400
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 887-4000

*Counsel for CSX Corporation and
CSX Transportation, Inc.*



ENTERED
Office of the Secretary

JUN 05 2000

Part of
Public Record

TABLE OF CONTENTS

	<u>PAGE</u>
INTRODUCTION AND SUMMARY	6
I. THE BENEFITS OF RAILROAD DEREGULATION ARE THREATENED BY PROPOSALS THAT THE BOARD EMPLOY THE MERGER REVIEW PROCESS TO SEEK TO REREGULATE THE INDUSTRY	11
A. Deregulation Under the Staggers Act Undeniably Has Advanced the Public Interest in a Competitive and Efficient Rail System	12
B. The Board Should Not Embrace Proposals Resulting in Reregulation of the Railroad Industry Through Various Forms of Forced Access	15
1. Mandatory Reciprocal Switching/Trackage Rights	22
2. Through Routes, Joint Pricing and Gateways	24
3. Abandonment of the One-Lump Doctrine	28
4. Rate "Protection"	33
II. IF THE BOARD ALTERS THE TERMS OF SHORT-LINE ARRANGEMENTS, IT WILL DISCOURAGE THE CREATION OF ADDITIONAL SHORT LINES	34
III. IMPROVED INTEGRATION PLANNING IS WIDELY SUPPORTED AND APPROPRIATELY ADDRESSES CONCERNS ABOUT RAILROAD MERGER DISRUPTIONS	36
A. The CSX Proposal Provides A Viable And Productive System For The Operation Of The Board's Integration Planning Involvement	38
B. The Current Application Process Does Not Adequately Address Transition Planning	39
C. Capacity and Supply Plans Will Also Permit Expansion and Full Use of Facilities and Rolling Stock	42
D. The Planning Process Must Provide Flexibility	44

IV.	NO RADICAL CHANGES IN DEALING WITH SHIPPER CLAIMS ARE WARRANTED	45
A.	No Comments Justify Turning the Board into a Claims Tribunal	45
B.	CSX's Proposals Are Complementary to the Board's Functions and Should Be Adopted	50
V.	CSX'S BALANCED PROPOSAL FOR DEALING WITH DOWNSTREAM EFFECTS SHOULD BE ADOPTED	52
VI.	CSX'S PROPOSAL FOR HANDLING CROSS BORDER ISSUES IS CONSISTENT WITH LAW AND TREATY OBLIGATIONS AND IMPLEMENTS THE BOARD'S DUTY TO CONSIDER THE PUBLIC INTEREST OF THE UNITED STATES	57
VII.	ISSUES CONCERNING EMPLOYEES	61
A.	Railroad Consolidations Cannot Be Accomplished Under RLA or WJPA Procedures	62
B.	There Is No Basis for Expanding the Protective Period	64
C.	Transfers and Relocations	66
D.	Temporal Limitation on Override of Agreements	67
VIII.	VARIOUS SUBSTANTIVE COMMENTS	69
A.	"Acquisition Premium"	69
B.	Ownership and Directorships of Terminal Carriers	71
C.	Environmental Issues	72
D.	Commuter Issues	73
E.	Two-Year Look-Back on Reciprocal Switching Cancellations	74
F.	Effect of Transaction on Prior Transaction Merger Conditions	76
G.	Effect of Transaction on Prior Transaction Benefits	76
H.	Report on Implementation of Conditions in Prior Transactions	77

IX. VARIOUS PROCEDURAL COMMENTS	78
A. Definition of "Applicant Carriers"	78
B. Confession of Prior Implementation Difficulties	78
C. Disclosure of Settlement Terms	80
D. Smaller Class I Carriers	81
E. Proposals Related to Voting Trusts	82
CONCLUSION.....	83

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 582 (Sub-No. 1)

MAJOR RAIL COMBINATION PROCEDURES

**REPLY COMMENTS OF CSX CORPORATION
AND CSX TRANSPORTATION, INC.**

CSX Corporation ("CSXC") and CSX Transportation, Inc. ("CSXT") (sometimes collectively, "CSX"), respectfully submit their reply comments to the Surface Transportation Board (the "Board") pursuant to the Board's Decision in the above matter, served March 31, 2000.

INTRODUCTION AND SUMMARY

CSX fully supports the Board's call to examine how it should modify its rules to deal with the "end-game" in major rail mergers¹ and the possible formation of two major transcontinental railroads on the North American continent. The Board does well, through the exercise of its foresight, to position itself to perform its statutory responsibilities should it be called upon to review proposed transcontinental rail mergers. A more thoroughgoing examination of transcontinental merger proposals, as proposed in CSX's initial Comments, is clearly necessary. In

¹ The words "merger" and "combination" are used throughout in reference to any of the combinations set forth in 49 U.S.C. § 11323(a)(1) through (5), and are not restricted to statutory "mergers."

particular, identification of the causes of unnecessary service disruptions that might result from a Board-approved merger and the creation of processes to prevent those disruptions in the future are most appropriate. Also needed is suitable consideration of the downstream effects of mergers, given the present state of the rail map, and of cross-border issues.

The Board, however, should not undo, through reregulation, the benefits that have been achieved by free market competition in the rail industry – either in connection with rethinking merger rules or otherwise. The requests by commenters that the Board consider proposals that would turn back the powerful and beneficial forces of deregulation ignore the benefits to the common good brought by free markets. Chief among these proposals to reregulate are comments calling for various forms of forced access as a condition to approval of mergers, unrelated to any showing that such access is necessary to remedy a harm caused by the merger. These proposals would drastically alter the basic efficiencies and economics of railroad networks and discourage needed investments that would be made in a deregulated environment.

* * * * *

Before dealing with the issues raised by the various commenters, and analyzing the Comments that CSX has already made in the light of the comments of others, a word needs to be said concerning the unusual Comments filed on behalf of Canadian National Railway Company (“CN”). Presumably affected by

its position in its litigation with the Board, CN misconstrues not only the nature of this rulemaking proceeding, but the nature of the crisis that led to the Board's hearings in Ex Parte No. 582 during March of this year and in turn to this rulemaking.

CN asks the Board to consider launching a parallel proceeding to the present proceeding, involving an informal study, not generating any rules or deciding any issues, as to whether it would be useful to have two transcontinental U.S. railroads.² CN also sees no reason generally, and certainly not in its own merger case with BNSF, to abandon the "one case at a time" rule.³ These two points in the CN Comments make it plain that CN does not want any bar raised against it, but welcomes a different treatment for the rest of the industry.

The fact of the matter is that the CN/BNSF transaction would create a transcontinental railroad deeply involving the United States. It would unite the BNSF, which has extensive coverage throughout the United States west of the Mississippi, with a carrier which serves all of the transcontinental gateways on the east side of the Mississippi, and which has a route system from Chicago to Detroit and Buffalo and to the Port of Halifax in Canada, an all-weather Atlantic port that

² CN Comments, *Major Rail Consolidation Procedures*, STB Ex Parte No. 582 (Sub-No. 1), May 16, 2000, at 4, 12.

³ *Id.* at 4, 20.

is closer to Europe than any Atlantic port in the United States.⁴ Such a transaction would be the start of the “endgame.”

As noted above, aligned with this proposal for a nonbinding “informational proceeding”⁵ is a CN proposal that apparently stands alone among the more than 100 Comments — a proposal that the Board keep its “one case at a time” rule, except possibly when a merger between a U.S.-based western railroad and a U.S. based eastern railroad is proposed (that is, a combination involving either BNSF or UP on the one hand and CSX or NS on the other).

This is part of CN’s strategy to present its proposed transaction as a sort of extension of the IC transaction, part of “business as usual,” not presenting any likelihood of a transcontinental U.S. railroad that might draw the response of another U.S. transcontinental proposal, and thus bring about the end of the “endgame.” CN seems to say, against all reason, that the endgame has not yet started.⁶

⁴ On top of this, it also has a transcontinental service throughout Canada, which is what CN always speaks of in its filings with the Board, overlooking the fact that it is proposing a true U.S. transcontinental railroad as well.

⁵ *Id.* at 4, 12.

⁶ As part of this “business as usual” approach, CN claims that the first sentence of the Board’s Policy Statement referring to the elimination of excess capacity in the rail system as a primary goal of mergers, which all the other commenters addressing the issue think is obsolete, is still correct. *Id.* at 6.

We know the Board will not be taken in by this.⁷

The Comments of the remaining major U.S. carriers, apart from BNSF (which follows CN all or part of the way on these issues), do not take the same cavalier attitude towards these issues as does CN. Although they have points of differences with CSX's views, they treat the issues responsibly. The Board ought to look to CSX and those railroads to judge the position of the major United States railroads. The Comments of the Association of American Railroads ("AAR"), while sound as far as they go, unfortunately were not able to include a full discussion of these and certain other important issues. The AAR was unable to file any Reply Comments at all.⁸

Our replies to the May 16, 2000 round of comments follow. We deal first with comments that would turn the clock back to pre-Staggers Act days and which generally are not fundamentally merger-related. We thereafter treat certain topics which are genuinely merger-related.

⁷ To top all this off, CN's merger partner, BNSF, wants to have the Board handle its and other merger applications in reduced time – one year from the filing of the Notice of Intent – or between six and nine months of the actual filing of the Application. BNSF Comments, at 5. The issues involved in endgame mergers need more time, not less.

⁸ CSX, jointly with UP and NS, is submitting a Joint Compendium of Prior Railroad Submissions on Forced Access and Bottleneck Rate Issues. These reflect statements made by or on behalf of all major U.S. railroads prior to December 1999. CSX also endorses the Verified Statement of William J. Baumol attached to the Reply Comments of UP.

I. THE BENEFITS OF RAILROAD DEREGULATION ARE THREATENED BY PROPOSALS THAT THE BOARD EMPLOY THE MERGER REVIEW PROCESS TO SEEK TO REREGULATE THE INDUSTRY

Railroad deregulation transformed a moribund industry into an important and vibrant competitive supplier of increasingly complex transportation services to the nation's growing economy. The Board, and its predecessor, through their actions over two decades following passage of the Staggers Act in 1980, have been directly responsible for creating the environment in which competition has flourished, rates have gone down, and the benefits of deregulation have been achieved. The ultimate goal and sustaining principle of the Board ought to be to continue to allow market forces to shape the industry for the overall benefit of railroads and shippers and, most importantly, American consumers.

Efficiencies can be achieved by appropriate mergers, and those efficiencies can benefit shippers in the form of lower rates and enhanced service. The Board's merger regulations ought not, by adoption of reregulatory standards, create hurdles that effectively may preclude an otherwise beneficial transaction. Even if a merger is not effectively barred by threat of reregulation, forced access measures, though they may benefit certain shippers, are, in the final analysis, regulatory handouts and an abuse of the Board's conditioning authority. They will harm shippers overall by impeding the achievement of efficient rail systems that serve the common good. Moreover, the adoption of these reregulatory proposals as prescribed

attachments to mergers, whether or not mergers occur, will inexorably lead to the application of reregulation generally, outside of the merger context.

A. Deregulation Under the Staggers Act Undeniably Has Advanced the Public Interest in a Competitive and Efficient Rail System

The benefits of deregulation in the rail industry, largely facilitated by the Staggers Act, are well documented and extend to all shippers, railroad workers, and carriers.⁹ The legislative history of the Staggers Act reminds us that by 1980 Congress recognized that existing regulation largely had contributed to the capital shortfalls that resulted in the deterioration of the U.S. rail system due to a basic failure to make required reinvestment.¹⁰ The Staggers Act removed regulatory barriers that had prevented railroads from competing in the marketplace on the basis of efficiency. By replacing heavily controlled rates and service with

⁹ See U.S. General Accounting Office, *Railroad Regulation: Changes in Railroad Rates and Service Quality Since 1990* (1999); STB Office Of Economics, *Rail Rates Continue Multi-Year Decline* (February, 1998); Louis Thompson, *U.S. Rails: A World Apart*, J. COM., July 29, 1998, at 7A; Comments of The Association of American Railroads, Verified Statement of Craig F. Rockey, *Major Rail Consolidation Procedures*, STB Ex Parte No. 582 (Sub-No.1), May 16, 2000; Clifford Winston, *U.S. Industry Adjustment to Economic Deregulation*, 3 J. ECON. PERSPECTIVES (1998); James M. MacDonald, *Railroad Deregulation, Innovation, and Competition: Effects of the Staggers Act on Grain Transportation*, 32 J.L. & ECON. 63 (1989).

¹⁰ See STAGGERS RAIL ACT OF 1980, H.R. REP. NO. 96-1035, at 36-41 (1980), reprinted in 1980 U.S.C.C.A.N. 3978, 3981-86.

efficiency-driven competition, the Staggers Act transformed the nearly bankrupt U.S. rail industry into "the world's most cost-effective rail freight service."¹¹

The evidence is clear and substantial that the effect of deregulation has been to increase the carriers' length of haul and productivity, increase volume, and lower prices. From 1980 to 1996, railroad productivity improvement has been impressive: ton-miles per employee has nearly quadrupled.¹² Average haul length, the key driver of cost-efficient operations, has more than tripled since 1981.¹³ Traffic volume from 1980 to 1991 increased 57 percent.¹⁴ Improvements in efficiency have led railroads to reduce operating costs by 60 percent, mostly by enlarging length of haul and increasing density – the true achievement of strategic consolidations.¹⁵ Cost reductions, in turn, have allowed the railroads more effectively to compete with shippers' other transportation alternatives. Better efficiency and productivity have enhanced railroad financial results as operating margins have gone from below four percent in 1981, to better than 16 percent in 1999.¹⁶ Equally as important, these cost savings and improved margins have allowed the railroads to finance the significant capital reinvestment in railroad

¹¹ Thompson, *supra*.

¹² Association of American Railroads ("AAR"), *Railroad Facts 2000*.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ AAR, *Analysis of Class I Railroads, 1980-1995* (1996).

¹⁶ AAR, *Railroad Facts 2000*.

equipment and infrastructure, so vital to the carriers' ability to provide safe and timely service to an ever growing volume of traffic.

The cost savings produced by more efficient, market-driven competition undoubtedly also have been passed on to shippers in the form of lower rates.

According to an STB study, from 1981 to 1996, real freight charges fell 46 percent.¹⁷

The Board has recognized the substantial overall benefits that have derived from deregulation:

As has been true for the nation's rail system as a whole since the Staggers Act, competitive pressures have been sufficient to spur railroads to enhance productivity by adopting efficient operating and management systems, and their costs have gone down each year because of significant productivity gains. Competitive pressures have ensured that the preponderance of those gains have been passed along to shippers in the form of lower rates and better and more responsive service.

Union Pacific Corp.—Control and Merger—Southern Pacific Rail Corp., STB Finance Docket No. 32760, Decision No. 44 (served Aug. 12, 1997), slip op. at 118.

¹⁷ STB, *Rail Rates Continue Multi-Year Decline*, Feb. 1998.

**B. The Board Should Not Embrace Proposals
Resulting in Reregulation of the Railroad Industry
Through Various Forms of Forced Access**

Reregulation through new merger conditions that would burden the merging parties with various forms of forced access, such as mandatory reciprocal switching, trackage rights, and rewriting of agreements creating short lines, will not result in long term benefits to rail carriers or shippers. On the other hand, recognizing that service problems associated with recent mergers are often the result of capacity restraints, new merger regulations that instead require closer scrutiny of the adequacy of the infrastructure of the merging parties, and of their capital resources to enhance that infrastructure, will serve the public interest. CSX has made detailed proposals for these matters in its comments; it favors no substantial new forced access. Comments of CSX, at 11-20.

By disabling carriers from securing their long haul and destroying economies of density, forced access requirements will reduce the efficiencies that can be achieved by mergers, which, in turn, will: (1) decrease the cost savings and enhanced service that would benefit shippers; (2) create disincentives for carriers to explore efficiency enhancing merger options, given that forced access provisions would decrease the efficiency of the railroad's network and drive profitability below levels necessary to facilitate reinvestment in equipment and infrastructure maintenance, repair, and expansion; and (3) without justification or statutory basis,

embroil the Board in costly and inefficient regulation to determine access prices should a merger be proposed.¹⁸

Congress recognized in its enactment of the Staggers Act that "the rail industry is a capital intensive industry which for decades has had inadequate earnings to maintain its plant and facilities at a level necessary to achieve improved services."¹⁹ Deregulation under the Staggers Act has been successful to date in allowing railroads to create more efficient systems that can justify capital reinvestment in their equipment and infrastructure, but continued reinvestment is needed to meet ever increasing shipper demand for rail transportation. It is paramount, therefore, that the Board not adopt a regulatory regime that usurps the market mechanism in determining the appropriate allocation of resources.

Other railroad commenters generally support CSX's position on forced access.²⁰ Those carriers oppose using merger review as an opportunity to grant regulatory concessions to individuals, classes of customers, and other railroads, all at the expense of overall efficiency. Here, even CN notes that forced access in the context of merger review could result in risks with significant unforeseen conse-

¹⁸ Clearly it would be inappropriate to set a flat rate for forced access given the Board's jurisprudence on trackage rights compensation. Dr. Baumol explains the inefficiencies that would result from rates that have been established at inappropriate levels inevitably involved in "one size fits all." V.S. Baumol, at 10.

¹⁹ STAGGERS RAIL ACT OF 1980, H.R. REP. NO. 96-1035, at 95 (1980), reprinted in 1980 U.S.C.C.A.N. 3978, 4039.

²⁰ See, e.g., CP Comments, at 11-13; NS Comments, at 39-46.

quences.²¹ It also shares CSX's position that if forced access by alternative rail carriers were to become a cost of merging, it could deter otherwise efficiency-enhancing mergers.²²

Norfolk Southern ("NS") supports CSX's position on preservation of the "one-lump" doctrine,²³ preservation of case-by-case analysis of three-to-two issues,²⁴ and opposition to mandatory switching.²⁵ Union Pacific ("UP") which makes an unfortunate proposal that could lead to the recrudescence of a scheme like the discredited DT&I conditions, nonetheless "does not share the view of many shippers that end-to-end mergers generally have anticompetitive vertical effects, and [believes that] the Board must retain the basic economic and legal principles that guided the *Bottleneck* decisions."²⁶

BNSF also observes that attempting to fashion non-merger-specific structural changes to competition through merger review is unwise and inequitable.²⁷ It concurs with CSX on issues of avoiding the use of merger review to reevaluate

²¹ CN Comments, at 32.

²² *Id.* at 33.

²³ NS Comments, at 33.

²⁴ *Id.* at 32.

²⁵ *Id.* at 46.

²⁶ UP Comments, at 11. UP also notes that it "does not favor using the Board's jurisdiction over rail mergers to alter the competitive structure of the rail industry other than to address the effects of a merger." *Id.* at 10. CN makes the same point. See CN Comments, at 30.

terminal switching and agrees that the Board should not abandon the one-lump doctrine.²⁸

Besides the economic effects of forced access, the physical effects (which in turn have economic consequences) are counterproductive to merger efficiencies, are likely to exacerbate capacity problems, and may result in, or worsen, operational integration difficulties. Trackage rights and reciprocal switching add additional movements on rail lines, reduce the long haul and density of the line-owning carrier, involve scheduling difficulties, and complicate the task of integration. The start-up of trackage rights does not resemble a tractor-trailer driving onto a freeway ramp and merging into existing traffic. It is a complicated matter involving management cooperation and planning. Training of crews, pilotage at a time when pilots may be short, and scheduling all present difficulties. If the result of granting trackage rights is to substitute two 50-car trains for one 100-car train, a further utilization of capacity nonetheless takes place, as does a weakening of train economics, since crew requirements are the same despite train length and fuel consumption does not increase pro rata with the number of cars. The institution of reciprocal switching where none existed before can have effects on capacity also. The effect on yards of either form of access also must be considered. Moreover,

Footnote continued from previous page

²⁷ BNSF Comments, at 24 and 27.

²⁸ *Id.*

besides economic inefficiencies, widespread forced access brings with it operational inefficiencies – precisely what it is essential to avoid in the wake of a merger.

While there clearly has been a substantial reduction in the number of Class I carriers in the past 20 years, it does not follow that there has been a substantial lessening of the number of carriers accessing particular shippers. As early as the mid-1960s, the Board's predecessor observed that a great number of shippers were then served by a single carrier, and many more by only two.²⁹ To describe the railroad industry as extracting monopoly profits from a group of "captive" shippers ignores the generally low return on investment reported by the industry, and the rarity of "build-ins" to shippers served by a single railroad; the prospect of sharing those "monopoly profits" has not been alluring. The connection between the current rail map on any need for forced access is not established. No merger approval in recent years has tolerated unremedied two-to-one situations.

Those comments that seek to have the Board impose forced access conditions on mergers (or otherwise)³⁰ have failed to consider the profound impact of

²⁹ *Pennsylvania R.R. Co. – Merger – New York Central R.R. Co.*, Report and Order of Hearing Examiners, 327 I.C.C. at 702 (1965).

³⁰ A number of comments seeking such access candidly assert an intent to have such provisions made applicable, across the board, independent of mergers. Comments of NITL, at 12-15; Comments of Consumers United for Rail Equity, at 5-6; Comments of Dow Chemical Co., at 7-8.

their proposals on the dynamic economics of rail networks. In many cases, forced access is being advanced without even a requirement of any nexus to an identified competitive harm caused by the proposed merger.³¹ Their theory essentially is that a merger creates the opportunity for reregulation. It is an opportunity for a government-directed handout. Imposing such forced access conditions whether on mergers or otherwise, however, would be both destructive and contrary to the legal and economic underpinnings of the free market principles mandated by Congress, interpreted by the Courts, and implemented by the Board.

The imposition of forced access by way of conditions on merger transactions, generally and without any connection to specific competitive issues posed by the transaction – instead, simply as an effort to subject a large enterprise in the industry to a new system of access – trenches on the authority of Congress and is at best a legally doubtful exercise of the Board's conditioning powers. It would leave portions of the industry unregulated in this fashion while other parts were, and leave some shippers sharing the benefits – transitory as they might be – of forced access while their competitors do not. Such a discrepancy in shipper treatment would not be the product of a voluntary procompetitive act on the part of private

³¹ See, e.g., Comments of Chemical Manufacturers Association and American Plastics Council, at 3 (acknowledging that their proposal for "access to all captive shippers, rather than just to those whose captivity was created by the merger in question, would be unprecedented"); *id.* at 2-3 (acknowledging that "[m]ergers permitted under the current rules have . . . increas[ed] the efficiency of the rail industry," yet asking for new remedy for captive shippers).

enterprise, like the Shared Assets Areas in the Conrail Split, but the product of a government handout. It appears to be an abuse of the Board's conditioning powers, and a step that could lawfully be taken only by Congress.

Regardless of who might impose such a system, whether Congress or the Board, whether "across the board" or under an assertion of the conditioning power, the outcome would be bad economics. That is the uniform view of the major carriers in the U.S. railroad industry and numerous economists collected in the Joint Compendium of Prior Railroad Submissions on Forced Access and Bottleneck Rate Issues, submitted today jointly by CSX, UP and NS. It is also the conclusion of the Verified Statement of William J. Baumol, attached to UP's Reply Comments.

Dr. Baumol concludes that imposition of forced access, apart from the remediation of specific competitive problems, would result in further erosion of the railroads' persistently inadequate earnings, deterioration of the rail network, and the undermining of service quality and service provision. It would constitute a "subsidy of competitors regardless of their efficiency and a transfer of funds from the railroads to the shipper proponents of forced access. It will be a tilting of the playing field that undermines competition, while having the appearance of promoting it." V.S. Baumol at 2-3.

1. *Mandatory Reciprocal Switching/Trackage Rights*

The comments filed by the National Industrial Transportation League ("NITL") exemplify the general lack of any analysis of the economic consequences of the various forced access proposals. NITL has asked the Board to change its regulations "to permit reciprocal switching within a specified distance of a terminal" as a condition for authorizing a merger, without any showing of competitive abuse, market dominance, rate unreasonableness or service failures.³² This is not the first time, moreover, that the Board has been asked in a similar manner to supplant the Congressional intent expressed in the Staggers Act. In *Midtec Paper Corp. v. United States*, 857 F.2d 1487 (D.C. Cir. 1988), the D.C. Circuit upheld the ICC's decision not to impose forced access (via reciprocal switching) in the application of its competitive access regulations ("CARs"). Under the newly adopted CARs, the requested access must be "necessary to remedy or prevent an act that is contrary to the competition policies of 49 U.S.C. [§] 10101a or is otherwise anti-competitive." *Id.* at 1501. The court endorsed the Commission's observation that the effect of forced reciprocal switching is that the switching carrier "lose[s] the ability to price its portion of the through service in response to the varying demands for different commodities or movements." . . . This result would seem to

³² See NITL Comments, at 13-15.

be in tension, if not outright conflict, with at least one of the competition policies of the Staggers Act: . . . 'to allow, to the maximum extent possible, competition and demand for services to establish reasonable rates for transportation by rail.'" *Id.* (quoting 49 U.S.C. §10101a(1) (1982)). In applying the same principles to terminal trackage rights, the court observed that "competition policy is not a matter of regulators handicapping would-be competitors in order to create an evenly matched contest." *Id.* at 1502.

Were the Board to ignore *Midtec* and the principles of the Staggers Act upon which it was decided, and adopt regulations that would condition mergers on forced access, without a direct nexus to a specific merger-caused competitive harm, those regulations surely would undercut the very efficiencies created by mergers that are in the public interest. That sort of regulatory approach would create disincentives for the carriers to compete efficiently. Unless carriers seeking to merge are permitted to implement systems that allow them to create extended single-system service and route density that will reduce their variable costs and, in turn, pass their cost savings on to shippers in the form of lower rates and thereby attract additional traffic, they will be less inclined to merge.³³ The loss of merger efficiencies as a result of forced access would increase variable costs to the

³³ See, e.g., AAR Comments, Verified Statement of Craig F. Rockey, at 26-27 (discussing economies of density resulting from increased traffic volumes).

merging carriers, thereby reducing their ability to lower rates to shippers and reinvest in equipment and infrastructure.

2. *Through Routes, Joint Pricing and Gateways*

Shippers, including NITL and other commenters, have asked the Board to change its merger regulations to require merging carriers to maintain, in varying degrees, "open gateways" for both routing and rates so that the merger does not eliminate routing options. The proposals generally operate without regard to whether the merger is likely to result in a restriction of competition and ensuing higher rates.³⁴ To adopt such a proposal would be contrary to national policy and precedent. In *Baltimore Gas & Elec. Co. v. United States*, 817 F.2d 108 (D.C. Cir. 1987), the court upheld the ICC's decision to prescribe through routes and joint rates "only to remedy or prevent 'anticompetitive' acts." The Court based its holding on the Commission's finding that

to the extent that recent changes to the joint rate structure reflect inherent or developed advantages one carrier may have over another, such as a shorter or more efficient single line route, they are changes that the Staggers Act

³⁴ See, e.g., NITL Comments, at 15-16; Comments of American Short Line and Regional Railroad Ass'n ("ASLRRA"), at 6-7 (asking Board to "presumptively" condition Class I mergers, requiring, among other things, that the consolidated carrier "maintain competitive joint rates through existing gateways" and "interchange and routing freedom"); Comments of Dow Chemical Co., at 7 (proposing that carriers "maintain open gateways for all major routings" and suggesting that Board require carriers to reopen gateways); Comments of U.S. DOT, at 13-14 (proposing that "all carriers," not just merging carriers, "be required to maintain open gateways").

encourages, as they ultimately produce a more efficient and competitive industry.

Id. at 116 (quoting *Standards for Intramodal Rail Competition*, ICC Ex Parte No. 445 (served July 7, 1983), at 10-11).

The assertions that a proposed merger will create new bottlenecks or extend existing ones, fail to acknowledge that the old routing options that may be eliminated by a proposed merger are replaced by a more competitive routing option — single-line service that is more efficient, economic, and competitive. Mandating blanket route preservation and rate equalization on merging parties yet again would amount to a return to the discredited pre-Staggers DT&I conditions and effect a reinstatement of their pernicious “commercial closing” doctrine. Although a few shippers may realize a perceived short-run benefit in the form of additional choice, experience with DT&I conditions proved that rate and service equalization and extensive routing-preservation requirements are economically detrimental to the entire railroad industry and, ultimately, to all shippers.³⁵

³⁵ Rate equalization requires cross-subsidization of artificially low rates and makes it difficult to adjust rates in accordance with costs. It also prevents railroads with more efficient routings from lowering their rates on those routes and competing more effectively against other modes of transportation. As a result, railroads had a reduced ability to attract capital needed to reinvest in their infrastructure. See, e.g., STAGGERS RAIL ACT OF 1980, H.R. REP. NO. 96-1035, at 36-41 (1980), reprinted in 1980 U.S.C.C.A.N. 3978, 3981-86.

Some commenters offer variations on the rate equalization theme, such as the proposal requiring railroads to offer segment rates that will permit shippers to interchange traffic to another carrier at virtually all points of connection.³⁶ These proposals would reverse the long-haul efficiencies secured since Staggers, and would result in the loss of route density that otherwise would have resulted from the merging parties single-line service. A "bottleneck rate requirement" suffers from a similar malady, holding the efficiency of the system hostage to the precision of rate regulatory proceedings (which is particularly problematic where access is not even designed to solve a proven competitive problem). In any event, there is no assurance that if the rate is set at the "right" level, that rate could sustain the new entrant. Requiring merging carriers generally to provide contracts that will enable shippers to invoke the "contact exception" to the Bottleneck Rule is economically unsound, for similar reasons. It also is a backdoor circumventing the well-reasoned Bottleneck Rule adopted by the Board and approved by the courts, which recognizes the Board's "statutory obligation to protect a bottleneck [carrier's] 'long haul' where it can provide origin to destination service."³⁷

³⁶ See NITL Comments, at 18.

³⁷ See *Central Power & Light Co. v. Southern Pacific Transp. Co.*, STB Nos. 41242 *et al.* (served Dec. 31, 1996), *clarified* (served April 30, 1997), *aff'd sub nom. MidAmerican Energy Co. v. STB*, 169 F.3d 1099 (8th Cir.), *cert. denied*, 120 S. Ct. 372 (1999); *Union Pacific R.R. v. STB*, 202 F.3d 337 (D.C. Cir. 2000).

Very recently, the Board once again recognized that merger proceedings should “not [be] used as vehicles to equalize the competitive position of shippers. While the Board adopts conditions to remedy identified competitive effects in specific cases, such conditions are designed to ameliorate specific merger-related harm, not to simply add more competitors.” *Union Pacific Corp.—Control and Merger—Southern Pacific Rail Corp. [Houston/Gulf Coast Oversight]*, STB Finance Docket No. 32760 (Sub-No. 26), Decision No. 10 (served Dec. 21, 1998), slip op. at 2-3. The Board already has recognized that “an open access regulatory scheme” would undermine the industry’s ability to reinvest in much-needed equipment and infrastructure because it would prevent merging railroads from using differential pricing to recover their large fixed and common costs, and therefore, “is not provided for in the statute the Board currently administers, and thus, in our view, is a matter more appropriately debated in Congress.” *Id.*

In its May 16, 2000 Comments, CSX identified one special aspect in which required maintenance of gateways in transcontinental mergers (as defined in CSX’s earlier Comments) could be consistent with the public interest, at least for a transitional period.³⁸ The requirement to keep gateways open would specifically relate to the well-established transcontinental gateways (Chicago and the

³⁸ Carriers often keep gateways open after mergers, either voluntarily or as a result of settlements, such as the NITL settlement in the *Conrail* case. See STB Finance Docket No. 33388, Decision No. 89 (served July 23, 1998) at 56.

Mississippi River gateways) and to gateways (again, including Chicago) of similar size and performing similar functions on international movements north and south, between Canada and the United States. The gateways would be few in number, and the movements to be kept open would be specific to commodity origin and destination movements that afforded both originating and terminating carriers a long haul and were heavily used in the period prior to the filing of the Notice of Intent. A system for preserving these transcontinental gateways should not be a resurrection of the "commercial closing" doctrine of the late and anticompetitive DT&I conditions, echoed in substance if not in name by a number of commenters.³⁹ At most, the ordinary statutory maximum rate regulation provisions would apply; no anticompetitive equalization of rates or service should be involved.

3. *Abandonment of the One-Lump Doctrine*

Various parties also have proposed to revise the Board's application of the one-lump doctrine, by requiring as a merger condition that trackage rights be granted to another carrier when a railroad that exclusively serves a shipper merges with a railroad that only can provide connecting service. These proposals, in effect, ask the Board to create the unwarranted presumption that: (1) vertical

³⁹ Comments of the Transportation Intermediaries Association, at 7-8; Comments of AG Processing, Inc., at 6-7; Comments of National Grain and Feed Association, at 10-11.

mergers harm competition; and (2) trackage rights should be granted to a non-merging carrier to provide access to the previously exclusively served shipper.⁴⁰

The Board's current treatment of the one-lump doctrine is well grounded in economic theory and has been consistently applied to the railroad industry. See *Western Resources Inc., v. Surface Transportation Board*, 109 F.3d 782 (D.C. Cir. 1997). In *Western Resources*, the Court explained that the theory is based on the economic principle that

[b]ecause a monopolist at the end stage of production is in a position to capture that entire profit, integration backwards upstream, even when accompanied by monopolization of the earlier stages . . . normally does not enable it to raise the profit-maximizing price and thus inflicts no harm on the ultimate customer.

Id. (citing 3 AREEDA & TURNER, ANTITRUST LAW ¶ 725b, at 199). As the Court noted, the Board does not treat the one-lump doctrine as

an absolute, precluding the possibility of adverse effects from vertical integration It regards the theory strong enough to create a presumption of bottleneck maximization of monopoly profits, subject to rebuttal The use of presumptions that capture reality in the general run of cases enables the Commission to do its work efficiently.

⁴⁰ See, e.g., Comments of Dow Chemical Co., at 6 (urging Board to abandon the one-lump "fiction"; "When bottlenecks are extended as the result of a merger, the Board should preserve the premerger interchange point and require the bottleneck carrier to provide a separately challengeable common carrier rate to that point."); NITL Comments, at 9 (asking Board to abandon the one-lump Doctrine and require merging carriers "to submit actual evidence showing that in *past* mergers, the price to 'downstream' shippers has not been affected when the upstream and downstream competitors merge.") (emphasis in original).

Id. at 787-88.

Under the existing application of the one-lump doctrine, a non-merging carrier may qualify for some form of access, if it can establish that, prior to the merger, (1) the benefits of origin competition had been passed on to the exclusively accessed shipper by the destination monopoly carrier, and (2) that the competitive benefits flowing to this shipper will be reduced significantly by the merger. The commenters that favor abandoning the one-lump doctrine offer no competing economic theory or evidence of competitive harm to justify their proposal. In fact, their proposal conflicts both with economic theory and with an important expressed purpose of the Staggers Act, to free the industry from unnecessary regulation. Moreover, forced trackage rights or other forms of forced access in this context would be at odds with the Board's policy of limiting merger conditions to cure only the anticompetitive effects created by the merger. That policy is well founded, and recognizes that forced access "remedies" would significantly undermine the merging carriers' ability to create and maintain their long hauls and route densities. Not only are these results inconsistent with the explicit and implicit purposes of the Staggers Act, they would inhibit the realization of merger-related efficiencies that would be passed on to shippers in the form of lower rates, better service, and reinvestment in equipment and infrastructure — the needed "recapitalization" of a railroad that must be an ongoing process to promote growth and avoid stagnation and decline.

While overlooked by many commenters to achieve radical reregulation of railroad rates, the much narrower issue of the interplay between mergers and the "contract exception" to the rule in the *Bottleneck* decision⁴¹ has been raised by a few commenters.⁴² The exception is based on the statutory exemption of contract rates from rate regulation, and accordingly its application requires the existence of a real contract — not a hypothetical one. The intent of the statutory provisions regarding mergers, and the Board's interpretation of them, to maintain at least existing two-carrier competitive access despite a merger, requires that where there is an existing contract between a carrier operating over a competitive segment of a bottleneck route, maximum rate regulation will be separately applied to the bottleneck segment from the point of the bottleneck to the interchange point with the carrier providing such a contract. Where that situation actually exists at the time of the filing of a Notice of Intent, that state of affairs should be preserved for the life of the contract, whether or not the contracting railroad is involved in the merger, and, at the discretion of the Board, preserved for some limited further period of time.

⁴¹ See n.37, p. 26, above.

⁴² Comments of NITL, at 7-8; Comments of Dow Chemical Co. at 4-5; Joint Comments of Certain Coal Shippers, at 9-10.

Unlike trackage rights,⁴³ contracts and contract movements are not "forever" until the Board authorizes their termination or abandonment. Rail transportation contracts are established through private negotiations; and they end when the result of those negotiations, the contract, says that they end. During the period of the contract on the non-bottleneck segment, maximum rate regulation is applicable to the bottleneck segment. The Board could, in its discretion exercised in a merger condition or on application thereafter, provide for a limited extension (if the contracting railroad is not a party to the merger, with that railroad's consent; if it is a party to the merger, by way of the Board's conditioning powers under 49 U.S.C. § 11324(c)). Thereafter, the contract should be treated as past history, so that the contracting processes of one day will not (as did the interchange policies or carriers under the DT&I conditions) be perpetuated by preserving routings which limit the carriers' ability to achieve their long haul and are no longer efficient.

The Board and its predecessor have implemented a regulatory regime that has achieved a proper balance between valid shipper concerns about unreasonable rates and the achievement of efficient rail systems that benefit shippers overall. The existing regulations allow railroads (and their customers) to achieve the procompetitive benefits of mergers and provide for remedies for demonstrated anticompetitive effects. As such, they allow merging parties to realize the

⁴³ *Cf. Thompson v. Texas Mexican Ry. Co.*, 328 U.S. 134 (1945).

economies of route density and differential pricing to become more efficient providers of better, and less costly single line service to shippers. The existing regulations also allow the railroads to compete on the basis of free market competition as profit maximizing actors that have every incentive to reinvest in infrastructure, expand capacity, reduce rates, and innovate. A return to reregulation in the form of forced access requirements may result in ephemeral short term gains for a few shippers at the expense of the vast majority of shippers and the entire industry. The result would be simply to maintain inefficient competitors at the expense of discouraging carriers from becoming more efficient providers of better rail service.

4. *Rate "Protection"*

Certain commenters, including Edison Electric Institute and Dow Chemical, propose various "rate protection," actually "rate freezing," conditions to be imposed on mergers. These proposals are unvarnished attempts to bring back the "bad old days" of old-fashioned rate regulation of the railroads, and to inhibit flexible pricing. The Staggers Act contains the appropriate measure of maximum rate regulation. Where a rate is above the jurisdictional threshold, it may be challenged on an appropriate showing. Rate increases that do not result in a rate in excess of the jurisdictional threshold should not be subject to challenge; the fact that a merger has occurred involving the carrier making the rate is irrelevant. Generally speaking, end-to-end mergers bring the possibility of economies, and

they often make it possible for shippers that benefit from such movements to have either improved service or lower rates or both. But not all shippers on the lines of carriers participating in such a merger will have new single-line service (they may already have it, or if their present movements are joint-line, may not be affected by the transaction) — and there is no reason why a rate-freeze condition should be applied. The theory of the Staggers Act is to interfere as little as possible with the economics of supply and demand. A rate freeze, as some commentators have proposed, is contrary to the legislative mandate of the Staggers Act and would interfere with the law of supply and demand, and it should not be rashly undertaken.

II. IF THE BOARD ALTERS THE TERMS OF SHORT-LINE ARRANGEMENTS, IT WILL DISCOURAGE THE CREATION OF ADDITIONAL SHORT LINES

Another area where some have sought a form of reregulation of the railroad industry is the effort to undo the terms of past divestitures of shortline rail systems by major rail carriers. Proposals by the ASLRRA for measures such as uniform pricing and the removal of “paper barriers” invite the Board to turn back the regulatory clock and to ignore the economics of rail service. Much of what is said in Part I above is applicable to these proposals. Moreover, altering the terms of past deals would both unfairly penalize past railroad spin-offs *ex post facto*, and discourage any future spin-offs. In addition, removal of so-called paper barriers will impact the economics of rail networks, dilute revenues realized by the Class I

carrier, and ultimately impact decisions as to how to deal with branch lines, potentially adversely affecting service to a large number of shippers.⁴⁴

Broadening access rights by shortlines also further complicates merger integration planning by introducing additional variables. Using the merger review process to launch such complicating factors could largely obviate many of the benefits of merger planning. There is no need for a wholesale review of arrangements made when shortlines were created, and doing so is especially inappropriate as a function of a review of a subsequent merger. Many of the non-railroad commenters did not even see fit to address this issue.⁴⁵ Commenters, such as the U.S. DOT, favor leaving the limitations established at the time of the divestitures of the shortlines ("paper barriers") in place, and avoiding the reregulation of car supply and pricing advocated by ASLRRRA. *See* DOT Comments, at 20-22.⁴⁶

The only appropriate action is to deal with the consequences of the merger on the shortlines, not to make a merger transaction the occasion for the implementation of a wish list of government-granted benefits at the expense of others, or for the implementation of a reregulatory agenda. The Board's approach in the

⁴⁴ Major railroads have a substantial interest in promoting the viability of shortlines as feeder lines, bridge carriers, and for termination and origination services. It would not be in their interests to harm those shortline connections.

⁴⁵ This includes commenters such as NITL, The Society of the Plastics Industry, The Fertilizer Institute, Dow Chemical, Shell Oil Company and numerous others.

⁴⁶ As to the removal of "steel barriers," a euphemism for trackage rights or other means of forced access, see the discussion of forced access in Part I.

Conrail case in preventing the transaction from expanding the "paper barriers" was an appropriate exercise of the Board's conditioning authority. So are proposals to provide more details as to impacts on shortlines that are merger-related and CSX's proposal for prefiling contacts with all connecting short lines, so that merger-related impacts can be identified.

III. IMPROVED INTEGRATION PLANNING IS WIDELY SUPPORTED AND APPROPRIATELY ADDRESSES CONCERNS ABOUT RAILROAD MERGER DISRUPTIONS

The consistent, justified concern that shippers have raised in this proceeding is merger-related service impacts during the implementation phase. No one questions the proposition that some shippers have been adversely impacted in the immediate wake of recent major mergers. Based on the concerns raised in this proceeding, the Board should take affirmative steps to address the integration process. The proper role of the Board is to act affirmatively to avoid problems that might otherwise arise in the implementation of any future mergers.

There is a general consensus among commenting parties that improved integration planning is essential to prevent unnecessary service disruptions. Details about how to improve implementation differ somewhat among commenters, as do views on the appropriate role of the Board in resolving shipper claims, but a full range of commenters agrees to the need for a procedure that provides a more

detailed analysis of the carriers' integration plans in order to foster confidence that the process is well conceived and will be well implemented.⁴⁷

Commenting parties raise two separate issues relating to integration and service. *First*, there is broad consensus supporting the need to devise a planning procedure that will avoid unnecessary disruption. *Second*, there is a more diverse set of views regarding the STB's role in addressing post-implementation effects on shippers in the event that some disruption nonetheless occurs. It is axiomatic that the better the integration planning process, the fewer disruptions will occur. It is in the public interest, therefore, for the Board to require that the carriers describe their plans, and for the Board to monitor the integration process -- even to the point of consultative involvement.

On the other hand, the Board should not attempt to assume a major role in addressing claims for damages in the event of service disruptions. The Board is not well equipped to perform such a function. No commenter has demonstrated that the forums currently available cannot deal effectively with the claims resulting

⁴⁷ In addition to Class I railroads, shippers, other railroads and interested third parties also support the general concept of integration planning. *See, e.g.*, BNSF Comments, at 17; NS Comments, at 19; CP Comments, at 9; UP Comments, at 8; CN Comments, at 13; Comments of Chemical Manufacturers Association and American Plastics Council, at 19; NITL Comments, at 19; DOT Comments, at 7-8; Comments of New York, at 12; Comments of California Public Utility Comm'n, at 6; and Comments of Western Coal Transp. Ass'n, at 5.

from service disruptions. In the future, private insurance and private contract negotiations are likely to play a greater role than litigation in resolving any claims. However, there may be a role for the Board to play, on behalf of smaller shippers, as a mediator of disagreements which are not readily resolved privately between the carrier and the shipper.

A. The CSX Proposal Provides A Viable And Productive System For The Operation Of The Board's Integration Planning Involvement

By adopting procedures that have been proven effective in the context of environmental review and safety integration planning, the CSX consultation proposal promises practical benefits for the Board, shippers, and other railroads affected by the implementation of any integration plan. The CSX proposal requires a detailed filing with an ongoing consultative dialogue between applicants and the Board's staff/consultant designed to identify possible issues that might arise at the outset and as the plan is executed. For shippers, the ability to comment on a concrete plan, knowing that the Board's staff will be monitoring the implementation of the plan, is preserved, and will improve public confidence in the ability of the merging parties to integrate without unnecessary disruptions. The effects of the integration on the operations of other railroads would also be subject to this process. By seeing the merging roads, proposal for integration, nonmerging railroads would be in a better position to make their own plans. The Board's staff will remain engaged in the interactive monitoring process following authorization of the transaction. Finally, in that Post-authorization period, as the NITL commented,

the Board should follow "its own example" in the form of the Conrail Transaction Council⁴⁸ and require the carriers to establish a forum in which the integration process can be constructively discussed. NITL Comments, at 19.

B. The Current Application Process Does Not Adequately Address Transition Planning

Through the Operating Plan, the current merger-review process assesses operational issues from the standpoint of a snapshot of predicted conditions when integration is complete, theoretically three years after the Effective Date, but based on an "impact year" some time well in the past. Although the operating plan provides insight into the "steady stat.." operation of the integrated railroad, it does not describe the process of integration, *i.e.*, the intermediate steps of getting from here to there. The CSX proposal will supplement the "year-three out" snapshot by providing detailed steps and procedures leading up to full implementation.

⁴⁸ The U.S. DOT comments support the use of a Council like the "Conrail Transaction Council" in every major merger case. Among the functions of the Conrail Transaction Council was an interactive dialogue between the carriers involved and the Council, which consisted of a broad representation of shippers and trade associations of affected rail users. Since a period of nine months elapsed between the Effective Date of the Board's approval of the transaction and the effectuation of its integration on "Split Date," and since the Council was organized well in advance of the Split Date, it has been able to perform a valuable function both before and after the Split Date. In a transaction not involving a single-day "flashcut" but rather a phased integration, similar benefits could be obtained along the steps of integration.

There are a host of issues facing merging railroads. Principally, merging parties must make decisions concerning the prioritization and staging of an integration. As just a few examples, railroads must resolve:

- What connections and other track changes will be made first;
- When train and engine employees will be able to operate beyond their historic properties;
- When and how will yard operations be combined;
- When and how the companies will integrate their computer systems that govern the network;
- When and how the companies manage locomotives and cars as one distribution pool;
- When and how changes will be made to blocking patterns; and
- When and how customer service functions will be combined.

These of course are just a very few of the plans that must be made. Because railroads are networks, the answers to these questions and others create ripple effects. These effects can be obviated only through careful, comprehensive planning.

To facilitate the smooth analysis of these issues and their consequent effects, CSX proposes that the merging parties file their plan with their application, and possibly preceded by confidential submission of a preliminary plan (like a Preliminary Environmental Report) a specified number of days prior to the filing of their

merger application.⁴⁹ As filed with the Application, the formal plan will then be subject to comment by parties of record and to an interactive consultation with STB staff and consultants. Refinements to the Plan will come about in response to the Staff's interactive process or in response to formal comments. This process is generally similar to the one already in place for environmental issues. The staff would continue to consult with the Applicants as part of its monitoring function assuming transaction approval, utilizing consultants as necessary. This interactive process will provide both the thoroughness of comprehensive planning with the flexibility to respond as implementation conditions change. The CSX proposal accomplishes both of these objectives while using lessons learned in the industry to avoid specific problems associated with past mergers. Among these are:

- If the implementation is to be implemented in phases, the proposal will ensure that all necessary elements of service provision are in place at the right time by the presentation of critical path analysis and a proposed timetable for each phase;

⁴⁹ Like the environmental process, this consultative process will run on a parallel track to the Board's schedule for the examination of the application. The Integration Plan review is, in CSX's view, a central part of the "public interest" determination which the Board must make, since if the Board cannot find that the applicants have a plan that is likely to avoid major disruption, the Board may be unable to make a finding that the benefits to the public of the transaction outweigh the public costs of bringing the transaction into fruition. So public parties may make comments on the Integration Plan, as they do on the Environmental Statement filed with the Board, either as formal filings in the docket or as informal representations to the Board's staff, as is the case in environmental review by the Board's staff. The use of a mixed formal and consultative proceedings appears to be authorized by 49 U.S.C. § 11324(f). Conforming changes to the Board's regulations might be appropriate.

- The plan will ensure that the integration process is actively monitored and managed by requiring a description of internal management controls, including the identification of objective milestones and managerial reviews prior to moving from one phase to the next;
- The plan will ensure that the merging parties have assessed the need for coordinations of work and work forces. It will also assure that implementing agreements to permit these necessary coordinations are in place at the proper time. It also requires a plan for the timing of reallocation of crews due to expected changes in traffic;
- The plan will ensure that computer system support functions are sufficiently combined to support the integrated operations functions at all times in the process. This will help to avoid problems experienced in past mergers, for example, when companies were unable to verify locations of locomotives because computer systems would not recognize the inputs from the system of the acquired company;
- The plan would provide for testing of information technology and internal controls that will allow use of simulations of data through new computer programs and applications and permit review by knowledgeable managers in consultation with Board staff or consultants;
- The plan would provide for choke point analysis and development of alternative plans that will eliminate the need for real-time engineering around line-of-road, yard, and terminal choke points, specifying alternative routes, and making sure arrangements are in place with other railroads as necessary to achieve these alternatives. These alternative plans would be much like CSX winter contingency plan for Chicago with which the Board is familiar.

C. Capacity and Supply Plans Will Also Permit Expansion and Full Use of Facilities and Rolling Stock

Network capacity and car supplies necessarily change as an integration proceeds. So, too, may demand; albeit less predictably. Capacity and Supply

Plans should be designed to ensure the right steps are taken at the right time. For instance, if the Traffic Study indicates that the merger will likely enhance rail service traffic over a particular line, the Operating Plan may indicate that a capacity expansion will be necessary. The railroad must still determine when to develop that added capacity. The Operating Plan may indicate that double-tracking will be needed between two points. However, the most efficient way to accomplish this may be to do so in advance or in stages. The Capacity Plan should describe what the planned stages will be and how the carrier will handle the projected traffic as the line capacity is increased in stages.

Similarly, an analysis of rolling stock requirements should answer the question: "how much and how soon?" The merged railroad's effort to achieve merger efficiencies confronts it with decisions to make concerning car and locomotive acquisition. Fundamentally, a railroad must decide to what extent it intends to be pro-active (acquiring power and cars in the expectation of traffic) the extent that it needs to be reactive in this process (waiting until traffic materializes). The Rolling Stock Integration Plan should set out the carrier's chosen mix of options, including the purchase of new cars and locomotives, the rebuilding of existing ones, and leasing additional rolling stock. Of course, the plan must also factor in the effects of car and locomotive utilization efficiencies brought on by the merger. The plan should reflect the necessary flexibility to deal efficiently with the ebbs and flows of demand growth through the integration period.

D. The Planning Process Must Provide Flexibility

While all commenters addressing the subject support having "Integration Plans," however styled, form a central part of merger applications from this point forward, there is some difference of opinion as to the binding nature of these plans. Some, exemplified by the Eastern Coal Transportation Association, suggest that the Integration Plans be binding on the applicants and that they may not be changed without an order of the Board.⁵⁰ This strikes CSX as unwise and over-regulatory.

The duty properly to manage the railroads, including properly managing the implementation of a merger, should rest on railroad management, and should not be transferred to the Board. Managerial flexibility will be needed during the period of implementation of a major rail merger. It will inevitably be necessary to make some "midcourse adjustments" in the Integration Plan after the Effective Date of the Board's Decision authorizing a transaction. These should be reported to the Board as part of the Board's oversight procedure, and a dialogue with Board staff may be had about them, but the responsibility for the departures from the Plan

⁵⁰ See Eastern Coal Transportation Association Comments, at 8-10.

(or for the failure to depart from the Plan if circumstances make the Plan a problem rather than a solution) should remain with the railroad's management.⁵¹

IV. NO RADICAL CHANGES IN DEALING WITH SHIPPER CLAIMS ARE WARRANTED

A. No Comments Justify Turning the Board into a Claims Tribunal

Shippers, along with carriers, have a keen interest in avoiding service disruptions, whether caused by merger integration or otherwise. Of course, merger integration generally poses a greater risk of disruption than do operations generally. Nonetheless, the principal solution to disruption-based disputes is to minimize disruptions rather than adjudicate disputes once they occur. Accordingly, the Board most appropriately should direct its rulemaking efforts toward devising a system, as discussed above, that significantly reduces the likelihood and severity of disruptions in the future. The mechanisms already in place effectively can deal with what should be a smaller number of future disruptions attributed to any merger. Thus, CSX and a number of other commenters have proposed to deal with service disruptions largely through foresight and planning rather than with fresh

⁵¹ Some commenters, in like vein, propose a "one size fits all" approach to the administration in advance of merger implementations. *See, e.g., Comments of the National Mining Association*, at 4. CSX endorses a regime in which railroad management engages in defining the appropriate measurements – and then those measurements will be applied to the integration process. This requires management to meet challenges of its own creation, not imposed challenges that management can claim are unrealistic.

claims procedures.⁵² This is so for several reasons. First, many shippers may extract particular contractual protections for service disruptions. As the possibility of these disruptions has become — by now, if not earlier — clearly foreseeable, these contracts properly allow the marketplace to set the terms of rights and duties. Second, no shipper has made a case for why the courts and other adjudicators of conflicts over service contracts or rail service generally are inadequate to protect their interests. Third, courts traditionally deal with contract disputes and are far better equipped than the Board to act as a claims tribunal. In contrast, no other institution has the expertise or jurisdiction to coordinate the planning of the merger integration process as does the Board.

The shippers' comments reflect varying positions on this subject.⁵³ They range from having the Board act as a comprehensive court of claims,⁵⁴ to provisions stripping the carriers of all defenses and leaving only the quantum of damages for adjudication.⁵⁵ Several of these proposals have the unintended

⁵² See, e.g., NS Comments, at 19 and 22; CP Comments, at 9; UP Comments, at 6; BNSF Comments, at 17; CN Comments, at 12-13.

⁵³ Among the various positions taken are a veiled attempt at reinstituting rate regulation (see Comments of Society of the Plastics Industry, at 11-12), allowing alternate carriers to obtain trackage rights (see Comments of Chemical Manufacturers Association and American Plastics Council, at 19), and calls for recovery of economic losses, including consequential damages (see Comments of Edison Electric Institute, at 6-7).

⁵⁴ See, e.g., Comments of U.S. Clay Producer Traffic Association, Inc., at 4.

⁵⁵ See, e.g., Comments of Edison Electric Institute, at 6-7.

potential to wreak havoc on merger integration. Just as good planning can limit disruptive consequences, bad claims measures can destroy what is left of a good plan. For instance, one proposal for dealing with a disruption is for the Board to "permit alternative carriers to provide service relief on either a short-term or long-term basis without the need for elaborate proceedings and hearings concerning the necessity for emergency relief."⁵⁶ Although this proposal ostensibly would allow another carrier to replace one of the merging parties when disruption occurs, the Board's current regulations already supply this relief on a temporary basis in the context of serious service disruptions. See *Expedited Relief for Service Inadequacies*, STB Ex Parte No. 628 (served Dec. 21, 1998) (codified at 49 C.F.R. §§ 1146-1147). Going further would not make the situation better. Indeed, many merger-related service problems in the past have been the result of traffic congestion and granting more trackage rights in the face of such a problem has the potential for only making matters worse.

Some shippers, including Procter & Gamble and others, propose that the Board impose a system of one-sided compulsory arbitration — compulsory on the railroads involved, but not on the shippers — in which an arbitrator would make a binding decision as to whether a carrier should pay reparations to a shipper for substandard performance. In all cases, the shipper is left free to pursue judicial or

⁵⁶ Comments of Chemical Manufacturers Association and American Plastics Council, at 19.

contractual remedies if it wishes to, and so the arbitration procedure would only be launched if the shipper thought it would be better off in that forum than in any other forum available to it.

Many of these proposals involve a "TV judge" sort of jurisprudence, in which all contractual terms are to be ignored. Thus, the fact that a voluntary, agreed-upon rail transportation contract provides for only limited relief for service failures, or denies any relief, is to be ignored, and whatever arrangement that the parties to the contract mutually agreed to as to the extent of liability is to be ignored once the shipper decides to go to arbitration. Under other comments, the whole issue of liability is to be ignored once service falls below a stipulated measurement point,⁵⁷ and the only remaining function of the arbitrator or other decision-maker is to determine the amount of damages to be paid; these comments generally provide no limitations on the kind (consequential? punitive?) or the amount of damages.

Unfortunately, service difficulties arising from mergers have been far from uncommon, and presumably if any railroad shipper in the United States has not directly suffered from them, it has heard about them. What we have in such a case is a situation in which both parties understand that there is a risk and what the risk

⁵⁷ See, e.g., Comments of Committee to Improve American Coal Transportation, at 14; Joint Comments of Certain Coal Shippers, at 13; Comments of the California Public Utilities Commission, at 6.

is. In such situations, commercial experience has established ways of dealing with it as among businesses. They include contractual provisions between the parties, openly negotiated, with the price of the services negotiated in the light of the non-price clauses; tariffs, which a party is free to use or not; insurance by the owner of goods, for which the owner of the goods will pay a premium rather than having its counter-party "insure" the risks itself in whole or in part, or buy its own insurance.

All these proposals by these commenters interrupt and frustrate — granting windfalls — the private ordering that has been worked out commercially and will continue to be worked out between carriers and shippers, given the unfortunate recent high incidence of difficulties in the aftermath of mergers, starting at least as far back as the BN/SF transaction.

The Board should not inject itself into this situation either as judge or as the author of a brand-new system. Even the better-defined and limited version put forward by Union Pacific is not the way to go. The Board should not go down this path at all, whether by promulgating its own rules (as UP and some others suggest) or by launching arbitral remedies, with or without governing rules, with or without Board review, as various commenters would have it.

Some of the suggested systems do involve the Board directly in adjudication, others do not. Those that do not can create a system over which the Board will have little control. Those that involve the Board will pose issues of exhaustion of the Board's limited resources. An example is the proposal of

U.S. Clay Producers Traffic Association, which wants the Board's Administrative Law Judges, skilled as they are (say the Clay Producers) in railroad matters, to adjudicate these claims cases. The Clay Producers overlook the fact that the Board has no Administrative Law Judges and is forced to borrow those normally assigned to other agencies, when it has a specific need for them, such as to resolve discovery disputes in merger cases and similar proceedings.

Many of the proposals seek to permit recovery of economic losses (consequential damages).⁵⁸ These are shortsighted and ignore both the limited economic resources of the carriers and the basics of railroad ratemaking. No transportation company is so well capitalized that it can afford to offer all of its customers a business interruption insurance policy that would cover the full extent of the customer's commercial expectation interest. Such a requirement would require an insurance policy with no limit, something which the current rate structure and usual terms of current commercial agreements do not contemplate.

B. CSX's Proposals Are Complementary to the Board's Functions and Should Be Adopted

To the extent that comments reflect desires of smaller shippers for a larger oversight role by the Board, they express an important concern, but provide the wrong solution. Rather than creating a claims tribunal, the sounder approach to achieving the common goal of avoiding problems, and resolving conflicts when

⁵⁸ See, e.g., Comments of Edison Electric Institute, at 6.

they occur, is the mediation procedure proposed by CSX. *See* Comments of CSX, at 20. The CSX proposal for mediation avoids these difficulties. It makes no radical change in the law and is pointed toward consensual commercial settlements, not litigation, while preserving the shippers' legal rights and respecting private agreements. Railroads, facing competition from other railroads and other transport modes, have the incentive to deal fairly and expeditiously with their customers just as other transportation companies do.

CSX's comment that in the event of a protracted service failure, contract shippers should have the right to escape from their contracts, regardless of what the contracts say, is consistent with our general approach. CSX agrees that there comes a point where it would be in the general interest of the rail network if shippers were free to make other arrangements for the movement of their cargoes, and that should be the case regardless of what their contracts say. It is on that basis that CSX has proposed the regulation changes that were part of its Comments filed May 16. But, as CSX's proposal makes plain, the service difficulties ought to be serious and protracted in order to justify a Board-granted termination of a contract. The suggestions made by shippers, such as Procter & Gamble, that any diminution in any service quality justifies a contract termination is another case of rewriting the contract the parties made without any overriding reason in the public interest to do so.

In the end, the Board should concentrate its rulemaking authority on determining the best way to create the "ounce of prevention" that past mergers indicate is needed. For even if a pound of prevention is necessary, it surely is better for the public overall than a ton of cure.

**V. CSX'S BALANCED PROPOSAL FOR DEALING WITH
DOWNSTREAM EFFECTS SHOULD BE ADOPTED**

With the exception of CN, substantially all the commenters addressing the issue favor the Board's proposal to do away with the "one case at a time" rule and to make a reasonable investigation of the downstream effects of a particular transaction, including combinations that may be triggered by it.

A glance at a rail map will show that the CN/BNSF transaction produces a U.S. transcontinental railroad, not simply a North/South railroad. Many would feel that the fact that its Eastern terminus is in Canada is part of the problem, not a reason why there is no problem. The proposed transaction would, from the day it was consummated, provide single-line service for cargo coming from and going to Europe by ship to Buffalo, Detroit, Chicago, St. Louis, Memphis, New Orleans, Kansas City, major points in Texas, Denver, Salt Lake City, the Great Plains, the Southwest and Northwest, Los Angeles/Long Beach, San Francisco/Oakland, Portland, Seattle, and every other location served not by BNSF. That is a transcontinental railroad. To be sure, in order for the new transcontinental railroad to be absolutely complete, it would require the addition of one of the two major

eastern U.S. railroads, CSX or NS. But CN's Mr. Tellier has said that he is interested in doing that.

There is no reason to have, as CN suggests, a separate informational proceeding to discuss U.S. transcontinental railroads or discuss what having only two large railroads left in the United States or on the North American continent will mean. Those issues have been put on the table by the Board in this proceeding. And, by waiving the "one case at a time" rule, the Board has put them on the table in the CN/BNSF case, if it goes forward. For despite CN's effort to have the Board roll back its waiver of the "one transaction at a time" rule, the issue whether CN/BNSF should be a U.S. transcontinental railroad, the issue whether there should be any U.S. transcontinental railroad, and, indeed the issue whether it is consistent with the public interest for there to be two, should be, and are, on the table in the CN/BNSF case. That is where these issues should be, and they should be there in the case of any merger proposal that leads to the creation or expansion of a transcontinental railroad that affects the commerce of the United States.

A number of parties say that the termination of the rule should only extend to the Board's adoption of a procedural and substantive consolidation of applications which are simultaneously, or nearly simultaneously, filed.⁵⁹ These commenters say that to go beyond that is to engage in "speculation."

⁵⁹ See, e.g., Comments of Wisconsin Central System, at 12-13.

It seems to CSX that while it might have been "speculative" then if the Board's predecessor had done away with the rule in 1980, to have considered a "hypothetical" transaction (a term which commenters use to refer to the transactions that have not been announced), it is not "speculative" to do that now. If a CN/BNSF transaction is approved, it is hardly speculative to believe that there is a likelihood that a "fill-in" acquisition of either NS or CSX might well occur, and that a responsive transaction involving UP and/or CN and/or the Eastern carrier not involved with CN/BNSF might well follow. That would account for all of the six major railroads on the North American continent, and it is hardly "speculation" in any realistic sense.

The transactions to be handled as hypothetical would be relatively few in number; under CSX's proposal, they are limited by the definition of "transcontinental transaction"; and they can be analyzed without speculation and without prying into nonpublic negotiations by nonapplicants.

CN conjures up various horrors, such as the taking of the depositions of the CEOs of carriers which are not applicants and asking them about secret merger discussions.⁶⁰ Once again, CN does not "get it"; the issue is not what combinations are being discussed, but what combinations are objectively likely as responses. The Board should not pry, and should not permit prying, into unannounced

⁶⁰ CN Comments, at 20.

transactions. Only the applicants make themselves open to such investigation by filing their application; the Board should not permit such an examination of anyone else.

Some opponents of going beyond procedural consolidation say that it is difficult to say in advance what the Board will do with the new evidence gained from abolishing the old rule. CN tries to demonstrate this in a lengthy analysis. The fact of the matter is that it may be somewhat unclear in advance precisely what the Board will do with the new evidence, but that is no reason to constrict the rule change and deprive the Board of the evidence. It seems to CSX to be premature to make rules now as to what will be done with the information obtained through the change in the rules. In some cases, it may be possible for the Board to draft relatively specific contingent conditions, contingent upon the approval of specified future combinations.⁶¹ In other cases, it might not be possible to do more than to add, as a "belt-and-suspenders" to the Board's general reservation of oversight, a specific reservation of jurisdiction on a particular issue or topic, perhaps one not limited by the traditional period of years reserved for oversight. The Board can tailor these provisions appropriately as it gains practice in dealing with these

⁶¹ BNSF suggests a sort of "first in time of filing, first in right" rule, apparently not conditioning Merger A contingently with respect to a possible Merger B. Comments of BNSF, at 15. Such a rule is a good one for the Recorder of Deeds, but for a Board charged with protection of the public interest, it seems inadequate and lacking in foresight.

issues. That really looking "downstream" may involve the Board in taking actions which it has not taken before is no ground for not looking and doing what needs to be done.

Unlike the proposal put forward by CN to have an abstract, separate, non-binding proceeding dealing with a reduction of the major North American railroads to two, the proposal to examine likely responses does not involve any sort of "government planning." The Board's action, and CSX's proposal to implement it, will be triggered by a specific transaction — CN/BNSF, if it goes forward, or some other first "endgame" transaction — and will simply explore the likely consequences of that privately proposed transaction and their impact on the public interest.

Other proposals adopt runaway versions of what needs to be shown once downstream effects are to be considered. The Committee to Improve American Coal Transportation takes the view that every conceivable combination consistent with a proposed transaction must be demonstrated to be consistent with the public interest before the lead transaction can be approved. That is a caricature of the Board's intention in proposing a continuation of the abandonment of the old rule. This same commenter makes another procrustean proposal that there should be a three-year moratorium following the consummation of one major merger before another major merger is proposed. While CSX has been a supporter not only of the Board's action in temporarily "closing the window" on major merger applications while the new rules are being thrashed out in this proceeding, and it also

supported a freestanding moratorium given the present state of the industry, CSX does not support a proposal to impose mandatory waiting periods between merger applications. The matter should be left in the Board's hands; it is quite likely that one merger would be appropriate response to another merger and that there would not appear to be any reason to impose a delay in consideration of the second merger, even though it had not been negotiated in time to be consolidated with the first merger.

VI. CSX'S PROPOSAL FOR HANDLING CROSS BORDER ISSUES IS CONSISTENT WITH LAW AND TREATY OBLIGATIONS AND IMPLEMENTS THE BOARD'S DUTY TO CONSIDER THE PUBLIC INTEREST OF THE UNITED STATES

With the principal exception of CN, and to a lesser extent BNSF, the comments on cross-border matters made by those commenters who expressed a view on the subject were generally consistent with CSX's comments.

No one (except possibly CN) appears to be of the view that the Board should not analyze any major or transcontinental transaction that involved carriers having operations outside the United States in the same depth as if the entirety of the proposed operations would take place within the United States. There also did not seem to be any dissent, except such as may have been behind the CN Comments, that the "public interest" that must guide the Board in making its decision is the public interest of the United States.

That consensus, CSX believes, supports the Comments that CSX submitted. Those Comments in large part seek information to be taken into account in the Board's determination of whether the proposed combination would be in the public interest of the United States. The CSX comments seek system-wide information about the operations, merger implementation, financial and other aspects of the combining railroads, and of the proposed combination. A description of foreign law and of possible conflicts with U.S. law is also sought. Cross-border car supply issues are to be put on the table. The possibility that the transaction as presented to the Board may be altered by a sovereign act of a foreign country — an act not within the scope of the Board's plenary powers to dissolve restraints and conditions of any law of the United States or its states or municipalities⁶² — is dealt with in a manner protecting the Board's jurisdiction and powers. The presence of requirements of any sort that impose nationality requirements on employment is to be exposed. Disfavor is expressed with respect to provisions, including contractual provisions, that require carriers operating principally within the United States to have a majority of their directors be of any particular nationality or residence. CSX's suggestions are reasonable. With few if any exceptions, they simply expand the Board's information and permit an examination of issues that clearly

⁶² See 49 U.S.C. § 11321(a).

need to be examined. They are supported by the Comments of DOT and of the U.S. Department of Defense ("DOD").

CN and BNSF seek to lay down a smokescreen obscuring the Board's vision of its authority and of the provisions of relevant treaties to which the United States is a party. Major rail mergers can raise important cross-border issues concerning public safety, the environment, consumer protection, and national security. Contrary to the views expressed to the Board by CN and BNSF, the NAFTA and the World Trade Organization ("WTO") agreements clearly contemplate that agencies like the STB can and should consider such issues. This STB oversight is, in fact, very important, because the NAFTA and the WTO agreements do not discipline private business behavior. Therefore, for example, contrary to BNSF's statements, NAFTA would not prevent private railroads from taking politically convenient actions which affected what customers they served and how they served them, what routes they used, or what limits they placed on the nationality of their board of directors. However, because NAFTA protects the rights of U.S. government authorities, such as the Board, to regulate in the public interest, the Board can consider and deal with these and other important cross-border issues.

CN is also incorrect in suggesting that under NAFTA the Board should defer to trade agencies on cross-border matters. NAFTA and the WTO agreements do not assign responsibility for cross border issues like the ones at issue here to any particular government agencies, such as foreign policy or international trade

agencies, and they do not require any special deference to those agencies in such matters. To the contrary, NAFTA contemplates that a variety of expert U.S., Canadian and Mexican agencies may be involved in handling cross-border issues. For example, Chapter 9 of the NAFTA, which establishes rules for setting NAFTA-consistent government standards and regulations related to goods and services, including rail services, is written with the clear understanding that many different domestic government agencies may be setting these standards.

NAFTA Chapter 9 also confirms that the Board can issue broad regulations and can take highly restrictive action, if required to meet an objective within the Board's statutory jurisdiction. Chapter 9 does not restrict the Board's activities in any manner; it simply requires the Board to ensure that the standards it sets do not discriminate against imported services and that the standards meet "legitimate objectives." "Legitimate objectives" under NAFTA include objectives "such as: (a) safety, (b) protection of human . . . life or health, the environment or consumers, including matters relating to quality and identifiability of . . . services, . . . considering, among other things, where appropriate, fundamental . . . geographical factors, technological or infrastructural factors . . . but does not include the protection of domestic production . . ." (NAFTA Article 915). In other words, the STB is free to review and regulate cross-border rail services to achieve a full array of public interest objectives. Chapter 9 also makes clear that the Board may take very strict measures, including measures which "prohibit the . . . provision of a service

by a service provider of another party that fails to comply with the applicable requirements of those measures" (Article 904(1)).

Furthermore, with respect to defense-related measures, NAFTA Article 2102 specifically provides that NAFTA countries have complete freedom to take measures necessary to protect their national security, and the WTO agreements contain similar provisions. Thus, despite BNSF's veiled hints to the contrary, these international agreements do not require DOD to use specific venues to raise its concerns, nor do they constrain in any fashion the Board's ability to act on the national security issues raised by DOD's comments.

Finally, contrary to CN's comments, NAFTA's investment rules do not complicate the Board's decision-making. These rules simply require the Board to treat Canadian investors and investments at least as well as U.S. investments and investors are treated. This is a simple task in the case of a CN-BNSF consolidation. Any potential Board actions with respect to CN and BNSF automatically would have an equal effect on U.S. and Canadian investors, since CN and BNSF have investors from both countries; indeed, each is understood to have a majority of U.S. stockholders. Thus, NAFTA's investment rules should pose no special concerns for the Board.

VII. ISSUES CONCERNING EMPLOYEES

Various unions filed comments on employee issues. These comments proposed the elimination of "cramdown" and enhancements to the benefits currently

provided under *New York Dock*.⁶³ A detailed response to rail labor's proposals is provided in the Reply Comments of the National Railway Labor Conference ("NRLC"), to which CSXT subscribes. Based on its own recent experience, CSXT offers supplemental comments on four specific union proposals.

A. Railroad Consolidations Cannot Be Accomplished Under RLA or WJPA Procedures

Rail labor argues that changes to collective bargaining agreements necessary to implement railroad consolidations should be accomplished through the major dispute procedures of the Railway Labor Act ("RLA") or the procedures of the Washington Job Protection Agreement ("WJPA"). These proposals are foreclosed, as a matter of law, as explained in the NRLC Comments.

An equally fundamental problem with these proposals is that consolidations will be nearly impossible to achieve without the *New York Dock* arbitration procedures. This is illustrated by the recent Conrail transaction. In order to divide the Conrail work force between CSXT, Norfolk Southern Railway Company ("NSR") and Conrail (as operator of the Shared Assets Areas), the carriers needed to reach

⁶³ Comments were filed by the Rail Labor Division of the Transportation Trades Department ("TTD"), as a group by Transportation Communications International Union ("TCU"), American Train Dispatchers Department, International Association of Machinists and International Brotherhood of Electrical Workers (hereinafter "TCU Comments"), United Transportation Union ("UTU") and Transport Workers Union of America ("TWU").

18 implementing agreements. The process took 14 months from the date of the first implementing agreement to the last implementing agreement.

If the carriers had had to proceed under the RLA, they would have had to serve Section 6 notices on each affected general committee at each carrier. The employees at each carrier are represented by about 13 different unions, each of which had multiple general committees affected by the transaction. This would have required more than a hundred Section 6 notices, even assuming CSXT, NSR and Conrail served joint notices. The railroads would have then proceeded on the lengthy, almost interminable, course of conferences and mediation under the RLA. At the conclusion of bargaining and mediation, the RLA provides no mandatory means of reaching an agreement if one could not be reached, thus jeopardizing the approved transaction. Also, any one of these negotiations could lead to a strike and, ultimately, a nationwide work stoppage.⁶⁴

Given the unique nature of these implementing agreements, the failure to reach an agreement might not be the result of an impasse between the carrier and a union. An impasse can result from disagreements between different unions or different general committees. Indeed, three of the four *New York Dock* implementing agreement arbitrations in the Conrail transaction were necessitated by internal

⁶⁴ Secondary picketing is not prohibited by the RLA. *Burlington N. R.R. Co. v. Brotherhood of Maintenance of Way Employees*, 481 U.S. 429, 447 (1987).

union disputes or issues.⁶⁵ The RLA has no mechanism to resolve these internal union disputes.

Some unions also have contended that consolidations can be accomplished under WJPA. As explained by the NRLC, the WJPA arbitration process is inadequate, because it has no mechanism for assuring a timely resolution. WJPA arbitrations have taken years to complete. As previously mentioned, even with the *New York Dock* procedures, it took approximately 14 months from the first implementing agreement to the last implementing agreement in the Conrail transaction. If the WJPA procedures had to be utilized to obtain the 18 implementing agreements, the transaction still might not be implemented.

B. There Is No Basis for Expanding the Protective Period

The *New York Dock* conditions already guarantee adversely affected employees extraordinarily generous benefits. There is no basis for their enhancement.

Many private employers, union and nonunion, provide benefits to displaced workers. These payments pale in comparison to *New York Dock* benefits. A

⁶⁵ Internal union disputes between general committees required arbitration to reach final implementing agreements for locomotive engineers and yardmasters. While the carriers reached a negotiated implementing agreement with TWU and Brotherhood of Railway Carmen for carmen employees, the failure of TWU to ratify the agreement required arbitration.

national study of severance payment plans by employers from a wide range of industries found that the majority of employers pay severance equivalent to one week of pay for every year of service and set a maximum number of weeks of pay, commonly one year.⁶⁶

Saddling carriers with additional protective costs would inhibit realization of the transportation benefits an approved transaction is intended to achieve. The financial impact of *New York Dock* protection on carriers cannot be overstated. For example, between 1992 and 1996 alone, CSXT paid out \$45 million in *New York Dock* protective payments. During this same period, CSXT made protective payments to 1,958 new *New York Dock* claimants.

Expanding the protective period or benefits imposes additional costs on railroads, which none of their competitors in other transportation modes must bear. Railroads merge in order to become more efficient competitors, principally with trucks. Yet, railroads' competitiveness is hampered whenever they are saddled with costs their competitors do not have. For instance, the funds for enhanced *New York Dock* benefits would not be available for capital expenditures or improvements in service.

⁶⁶ Coopers and Lybrand, Severance Policies and Programs: 1997, reprinted in Ethan Lipsig, Downsizing 1999 Cumulative Supplement (Bureau of National Affairs 1999).

C. Transfers and Relocations

TTD is proposing that employees who would be required to transfer more than 30 miles to hold a position for which they are qualified be given the option of accepting dismissal allowances until they reach retirement age or a separation payment. This proposal would impose unacceptable costs on the consolidation of facilities or operations and defeat many of the efficiencies of consolidations.

One of the typical efficiencies of an approved consolidation is the elimination of duplicative facilities or functions. Such consolidation usually means the closure of one facility and the transfer of work and employees to another facility, often at a distance greater than 30 miles. Under the TTD proposal, the carrier would have to recruit, train and pay new employees, while at the same time it would be paying dismissal allowances and fringe benefits or separation payments to the experienced employees who refused to relocate.

The new employees also would not be as proficient as the experienced employees who refused to relocate. This would be especially problematic at a time when the carrier was implementing the approved transaction. As recent consolidations have shown, they are very complex undertakings. Yet, the very effect of TTD's proposal would be to reduce the number of experienced employees available to the carrier when they are needed the most. As a result of the Conrail transaction, CSXT transferred approximately 209 contract employees. Clearly, if

TTD's proposal had been in effect, CSXT's ability to have sufficient experienced employees would have been negatively affected.

In the Conrail transaction, CSXT needed not only the Conrail employees allocated to CSXT, including those it transferred, but had to hire additional employees. CSXT hired and trained 880 additional train and engine employees. CSXT and NSR also retained many employees who, at the time of the filing of the application, were thought to be surplus. For example, all of the approximately 500 maintenance of way employees who had been projected to be furloughed were retained.

D. Temporal Limitation on Override of Agreements

DOT proposes to limit the override or modification of collective bargaining agreements to the initial implementation of the transaction. DOT at 25-26. The Board's predecessor already has rejected a similar union argument that the *New York Dock* procedures could only be utilized for a limited period after the transaction was approved.⁶⁷

This proposed *New York Dock* modification also is impractical. It is simply not feasible to foresee and implement all coordinations that require modification of

⁶⁷ See *American Train Dispatchers Ass'n v. ICC*, 26 F.3d 1157, 1165 (D.C. Cir. 1994). This Board recently reaffirmed that there was no fixed limit when the *New York Dock* procedures could be invoked in *Carmen III* at 25.

collective bargaining agreements before, or even immediately after, a transaction has been approved by the Board. In the Conrail transaction, many of the unions recognized this fact. They agreed to include procedures in the implementing agreements which govern subsequent coordinations. CSXT has in fact used these procedures to accomplish several subsequent coordinations.

Also, it may be prudent to adjust plans as a transaction is implemented. For example, in the Conrail transaction, CSXT initially proposed to consolidate all crew calling and customer service in Jacksonville. While CSXT has coordinated its crew calling operations, it has deferred the consolidation of customer service. Last year's shutdown of CSXT's headquarters operation because of a hurricane caused this coordination to be re-examined. CSXT would not have the flexibility to reconsider implementation plans under DOT's "use it or lose it" approach.

DOT's proposed change, if accepted, will lead to more disruption in the implementation of a transaction and to more disruption in the lives of employees, by taking from away management the necessary flexibility to carry out coordinations in the manner that best promotes efficiency.

* * * * *

A number of parties make comments that do not fall into the broad categories we have discussed above. We will treat them below, with substantive comments first.

VIII. VARIOUS SUBSTANTIVE COMMENTS⁶⁸

A. "Acquisition Premium"

A number of commenters raise an issue which was thoroughly ventilated in the CSX-NS/Conrail case, asserting that the Board should change its approach to so-called "acquisition premiums."⁶⁹ In effect, these commenters say that even though the Board has favorably passed on the consideration being paid a consolidation, as it has done in every consolidation it approved since the Transportation Act of 1940, if the purchase price reflects an implicit increase in valuation of the assets of one of the two combining carriers, that increase in valuation should not be recognized on the books of the carrier involved for purposes of application of the jurisdictional threshold for maximum rate regulation or for the determination of revenue adequacy. This would be the case even though the increase in value is so recognized under Generally Accepted Accounting Principles ("GAAP").

These issues were thoroughly reviewed in the *Conrail* case only two years ago and a sound decision was reached as to them. If the post-merger accounting under GAAP results in a revision of asset values, the Board, which is charged under statute with using GAAP wherever possible, should permit — and indeed,

⁶⁸ As is often the case, some substantive issues have procedural implications and *vice versa*.

⁶⁹ Comments of NITL, at 18; Comments of Edison Electric Institute, at 6; Joint Comments of Subscribing Coal Shippers, at 24-25; Comments of the Eastern Coal Transportation Association, at 13-14.

require⁷⁰ — the use of GAAP. To do otherwise is to adopt principles that are used in fully regulated businesses, not railroading where there is extensive competition from other modes and where all contract rates and many non-contract rates are free of rate regulation. There is nothing special to transcontinental transactions that would justify changing these rules for them; indeed, they are more likely to involve stock-based “mergers of equals” rather than transactions like the Conrail transaction.

For similar reasons, the suggestion made by a number of commenters that the Board’s very recent decision in *Western Coal Traffic League v. Union Pac. R.R. Co.*, Finance Docket No. 33726, served May 12, 2000, ought to be reversed⁷¹ is ill-advised. A railroad’s costs are its costs, even if they are the costs of the struggle to deal with the problems of merger implementation. While the Board certainly should consider the post-transaction cost estimates of the parties, as tested in the crucible of the application process, and their effect on the combined carriers’ financial condition, there is no reason to treat costs that are involved in railroad operations as being anything other than that.

⁷⁰ The case establishing this principle required railroad to use GAAP in reporting to the Board’s predecessor in post-merger situations where the railroads’ interests would have been served in not following GAAP. The AAR took the Board’s predecessor to court on the issue and lost.

⁷¹ Comments of U.S. Clay Producers Traffic Association, at 5; Comments of Alliant Energy Corporation, at 6-7 n.1; Comments of the Eastern Coal Transportation Association, at 14.

When railroads, through efficiencies, reduce their costs, they do not obtain any "relief" from the Board as a "bonus" for decreasing those costs; in a maximum rate case, their costs would still be their costs, although reduced. If the Board's recent decision were to be reversed and extraordinary cost increases disallowed, extraordinary cost savings should be "disallowed" and added back as well, increasing the jurisdictional threshold. There should be no one-way street here. But consistently following GAAP on the subject, as the Board has done, is appropriate.

The problem of difficulties resulting from merger implementation is a real problem. The real solution to it, as CSX has reiterated above, is to improve implementation so that disruptions will be minimized. The solution does not lie in disallowing the railroads' costs so that shippers may "win" rate cases and funds be transferred from the railroads to the shippers. Such a remedy would only make worse whatever financial harm the railroads suffer as a result of the disruptions.

B. Ownership and Directorships of Terminal Carriers

Wisconsin Central Limited ("WC"), in a unique Comment, says that if the number of owners of terminal switching carriers is further reduced by mergers between existing owners, the Board ought to consider giving smaller carriers operating in the terminal areas (such as itself) ownership in, and/or directorships on the Board of Directors of, the carrier in question. WC's interest obviously is in the specialized carriers operating in the Chicago switching district.

The Chicago terminal carriers dispatch the movements of all carriers under rules, and provide use of their tracks on financial bases for use and service, which are well known. If there are abuses imposed on non-owner carriers by the owning carriers, the Board is not without power to intervene. There appears to be no *a priori* reason, unless specific competition issues are presented, such as those examined and found inapplicable in the Conrail case, to provide for forced additions to the ownership or directorship of terminal switching carriers simply because the number of owners is diminishing. The WC proposal is not appropriate for adoption in the current proceeding.

C. Environmental Issues

Despite the Board's direction in the Advance Notice of Proposed Rulemaking that it does not intend to reopen its environmental rules (49 C.F.R. Part 1105) in this proceeding (65 Fed. Reg. 18023 n.15), a few commenters (including DOT, City of Cleveland, and Mayo Foundation) have proposed various changes to the environmental rules or to the manner in which the Board implements them.

The scope of this rulemaking should not be expanded to include the Board's domestic environmental rules.⁷² Those rules are flexible enough to allow the Board to tailor the environmental review process to the proposed action before it, and many of the environmental approaches that are asserted to be "new" have in

⁷² The comments do not involve the "Cross-Border" environmental issues which prompted comment by CSX in the May 16 filing.

fact been utilized by the Board in prior review proceedings. To the extent that new approaches really are warranted, refinements to the environmental review process for future proposed mergers should be worked out in the context of the scoping process for those mergers.

D. Commuter Issues

A number of passenger rail agencies (Amtrak, Chicago Metra, NJ Transit, and Southern California Regional Rail Authority), the State of Maryland and the American Public Transportation Association ("APTA") submitted comments relating to passenger rail issues. While presenting somewhat different approaches, all urge the Board to state more explicitly that it will weigh adverse impacts on passenger rail services as adverse to the public interest. Passenger rail interests have, of course, been active participants in prior merger proceedings and the Board has thoroughly considered potential impacts on passenger rail service under the present regulations.

A number of commenters also urge the Board to remedy those impacts through the imposition of conditions, either at the time of the decision or through post-merger remedies and dispute resolution procedures in the event of service problems. Indeed, APTA goes so far as to suggest that the Board should grant passenger agencies operating rights over freight lines, apparently unsupported by any contract with the host railroad. With respect to such proposed conditions, however, it has been the Board's consistent policy (based on statutory directive and

sound judgment) to allow infrastructure capacity, compensation, operating control and other issues to be resolved through contractual negotiation between the freight railroad and the passenger agency, and no basis has been presented for changing this policy. Just as this proceeding should not be allowed to call into play the fundamental legal premises of deregulation, this proceeding should similarly not be allowed to call into play the fundamental legal premises underlying the complex relationships between freight railroads and passenger railroads.

In addition, a number of the commenters suggest procedural enhancements to the merger process, either in the form of expanded dialogue with passenger agencies or in the form of more detailed implementation plans relating to passenger service. CSX went to great lengths to negotiate with passenger agencies during the course of the Conrail proceeding, and expects that future merger applicants would do so as well. As CSXT just reported in its June 1 filing in the Conrail oversight proceeding, Finance Docket No. 33388 (Sub No. 91), this dialogue facilitated a transition that resulted in relatively limited adverse impacts on passenger rail operations. (CSXT is presently working with both MARC and Amtrak to resolve the on-time performance problems they have experienced on some lines following the Conrail Split.)

E. Two-Year Look-Back on Reciprocal Switching Cancellations

Kansas City Southern ("KSC") proposes, in effect, that there should be a two-year "look-back" measured from the date of the filing of the Notice of Intent,

with respect to cancellation of reciprocal switching made by either of the applicants. All such cancelled reciprocal switching should presumptively be restored, subject to presumably if the reciprocal switching involved any of the two applicants, the effect of this would be that a two-to-one situation would be declared, and remedied under the Board's usual approach in such cases, although the proposal is not that specific. The terms of the presumption for the restoration of reciprocal switching would be that it would be restored unless it was in the public interest to keep the cancellation.

The cancellation of reciprocal switching is subject to challenge based on an appropriate showing under the Board's intramodel competition rules, found in Part 1144 of 49 C.F.R. If a shipper having access, via reciprocal switching, to a single alternative carrier than the carrier physically serving it was affected by a switching cancellation, the shipper would have to commence a proceeding under those rules. If, on the other hand, the two carriers involved were to propose merger with the switching arrangements in place, the Board would view the situation as a "two-to-one" situation and presumptively would expect that the applicants to remedy it in their application.

In the Conrail case, issues were raised as to whether several cancellations of reciprocal switching by Conrail that occurred at relatively short times prior to the filing of the Notice of Intent were in fact undertaken with a view to a merger transaction. The Board presumptively would have treated them as if they involved

competition ended by a merger if the cancellations were effected in contemplation of a merger. In some of those situations in the Conrail case, the Board afforded no relief, and in others it did, after a careful examination.

That seems to CSX to be the appropriate test to apply, rather than a rigid presumption of a sort that would be virtually irrebuttable. Accordingly, CSX is opposed to this proposal.

F. Effect of Transaction on Prior Transaction Merger Conditions

KCS also proposes that the applicants in a major merger case discuss the effect of their transaction on merger conditions imposed in earlier cases in which any of them were applicants. This appears to be substantially covered in any event by the obligation of the applicants to discuss the competitive impact of the proposed transaction (*see* 49 C.F.R. § 1180.7). The proposal does not seem to be necessary.

G. Effect of Transaction on Prior Transaction Benefits

In a somewhat similar vein, KCS proposes that applicants ought to demonstrate how the present transaction preserves benefits that they claimed were secured in earlier transactions to which they were parties. CSX believes that pertinent information on this subject may in large part be already called for by the various impact information required by the Board's rules, but would not object to the proposal if it were simply intended to show the effect of the current transaction on benefits that arose out of prior transactions. Occasionally, some shippers lose

benefits in a transaction that is perfectly consistent and indeed promotive of the public interest; some shippers in the Conrail matter lost single-line service on certain of the routes that were available to them from the unitary Conrail, while the same shippers and many more gained benefits from new single-line service. The fact that a shipper loses a benefit that might have come to it from a transaction (such as the creation of Conrail) does not mean that a successive transaction is not on balance consistent with the public interest. So the KCS proposal would be appropriate if it were recast as an informational requirement as to the effect of the new transaction on benefits obtained in earlier transactions.

H. Report on Implementation of Conditions in Prior Transactions

Another comment made by KCS provides that the parties should explain how they implemented conditions that were imposed in prior transactions in which they were applicants. As to the implementation of conditions in recent merger transactions, there seems to be little need for such a requirement. Monitoring conditions, and the opening of general oversight proceedings, require a discussion of how the parties to consummated transactions implemented their merger conditions. CSX filed a report a few days ago in Finance Docket No. 33388 (Sub-No. 91) in which it described the implementation of dozens of conditions imposed upon it in the Conrail Transaction. If the Board were to impose something akin to KCS's proposal, it should only be imposed with respect to merger conditions which were not quite old enough to be history (say, over ten years) but as to which there had

been no requirement of reporting implementation of conditions under a public oversight procedure, such as Conrail Sub-No. 91.

IX. VARIOUS PROCEDURAL COMMENTS

A. Definition of "Applicant Carriers"

CN and BNSF make a proposal for a change in the Board's rules to treat carriers that are not within the STB's jurisdiction as not being "applicant carriers." The expressed intent of this proposal is to exclude water carriers and other carriers which may once have been within the Board's jurisdiction but are no longer. CSX sees no difficulty in principle with this, but notes that the wording of the language is such that it would exclude, as an "applicant carrier," carriers by rail that do business entirely outside the United States but are parts of a system, or indeed the major carrier in a system, that is an applicant carrier in the transaction. Clearly such a party should be treated as an applicant carrier, and the language proposed by CN should be changed to refer not to "carriers within the Board's jurisdiction," but to "carriers by rail operating in the United States, Canada or Mexico."

B. Confession of Prior Implementation Difficulties

A number of commenters suggest that carriers proposing to combine include in their application a discussion of prior integration difficulties which they have experienced.⁷³ The purpose of this suggestion seems not to be to suggest that the

⁷³ E.g., Comments of NITL, at 10.

parties in question may have actually learned some lessons on how to avoid and/or deal with such difficulties, but to serve as a "black mark" measure to identify those carriers who have had difficulties in integration in prior mergers.

While it is hard to say that this requirement does any particular harm (other than to provide a source of probably pointless lawyers' debates as to how extensive prior difficulties were), it does not appear that much good can come of it either. Shippers generally have a respectable enough memory of prior merger implementation difficulties, and when BNSF claimed that its own integration transaction was substantially smooth, a number of shippers expressed a contrary recollection of the matter, and the Board has viewed their recollection as accurate. *See* Decision served March 17, 2000, in Ex Parte No. 582, at 4. The important matter, CSX repeats, is in minimizing disruption in the combination under review, not in rehearing what has gone before; though a presentation of how an applicant has learned from prior experience would always be in order.

The DOT has stated that the causes of these failures "remain largely an enigma" and that the circumstances of each failure "have appeared to be unique." Comments of DOT, at 10. This would seem to be an argument against inviting forensic thrust and parry about the extent of prior implementation difficulties, and

in favor of not requiring them to be treated in the application — presumably the shippers would remember anyhow.⁷⁴ So CSX is neutral as to this proposal.

C. Disclosure of Settlement Terms

KCS proposes that all settlement agreements, whenever entered into, that have as their result the failure of a party to object to a transaction, to withdraw objection against a transaction, or to withdraw from a proceeding, be filed with the Board, with all their terms, and be made a matter of record.⁷⁵ It is the case at the present time that such agreements are not submitted to the Board unless (a) they contemplate action which requires the Board's authorization or exemption; (b) a party to the agreement wants to have the Board's enforcement behind the agreement, through the conditioning power or otherwise; (c) the effect of the settlement is to make incorrect a material representation to the Board; or (d) the parties wish voluntarily to reveal their settlement.

The making of settlements in judicial and administrative proceedings is universally regarded as itself being in the public interest, since it involves the private ordering of matters which otherwise might involve a government-imposed disposition. It is, moreover, frequently the case that sensitive commercial arrangements,

⁷⁴ Oddly enough, despite its characterizations of integration difficulties just quoted, DOT supports including a disclosure of those prior difficulties in applications.

⁷⁵ Comments of KCS, at 44-54.

including independent rate-making, haulage fees, and the like, are contained in such agreements. CSX believes that the Board, which has had a policy of fostering private settlements and considerable experience with them, should continue to apply its flexible case-specific approach to this matter.

To facilitate the Board's decision in each instance, the Board might require that where a settlement, as defined in the KCS proposal, has been made and is not to be submitted as part of the public record, that the parties to the settlement and the date of settlement should be reported to the Board.

D. Smaller Class I Carriers

KCS also proposes that it not be included in the list of "endgame" or "major" mergers at which the new rules are aimed. KCS's reasoning is that it is, while a Class I carrier, the smallest of those carriers, and that it is by a quantum leap smaller than the next smallest Class I carrier. CSX believes that CSX's approach on this subject is the appropriate one. A smaller Class I carrier would not in and of itself cause a transaction to be a "transcontinental transaction," the triggering point for most of the new rules proposed by CSX. If KCS's inclusion in a transaction did not create a "transcontinental transaction" (which it could not by itself) and did not augment an already existent transcontinental railroad (which it could), then those new rules would not be applicable to it. CSX believes that that distinction in treatment is an appropriate solution to KCS's concern.

E. Proposals Related to Voting Trusts

The Port Authority of New York and New Jersey seeks a rule that in any case where a voting trust is to be used, the Board should require detailed financial information showing that the proposed transaction would not undermine the ability of the surviving carrier to make necessary infrastructure investments. Presumably if such a showing was not satisfactorily made, the Board would issue an order forbidding the use of the voting trust in question, presumably through a power to suspend the voting trust rules established in an amendment to those rules.⁷⁶ The purpose of the proposal is commendable, but seems to CSX to involve an issue which is best handled in the Merger Application, where the issue can be analyzed in depth by the parties to the case. The expanded plans which are part of the CSX comments will be involved in that exploration. The Board could not make an adequate review of the subject under the time pressures for "clearing" a voting trust that are involved in those cases where a voting trust is used; those cases, by definition, are cases where the stockholder actions involved in the transaction — response to a tender offer or vote on authorizing a merger — are to be carried out quickly. The voting trust regulations have the advantage of working well within the time limits under the Williams Act and its implementing regulations for tender offers, and within the usual processing time for merger proxy statements. They

⁷⁶ A somewhat similar proposal is made by the collective comments of the Ports of Seattle, Tacoma and Everest.

also have the advantage of keeping the Board uncommitted to the transaction, an advantage which the proposal might compromise. Accordingly, CSX does not support the proposal in its present form.

* * * * *

CSX has not undertaken to comment on every proposal made in the far-reaching comments of the over 100 commenters. CSX's silence should not be taken as consent to those proposals. Its general views on some common comments should be clear, however, from the above and from its May 16, 2000, Comments.

CONCLUSION

CSX urges the Board to promulgate proposed regulations for comment as set forth in its original Comments and herein, and to refrain from promulgating proposed regulations for comment that would cause a reregulation of the industry or which are otherwise opposed herein by CSX or in CSX's original Comments.

Mark G. Aron
Peter J. Shudtz
CSX CORPORATION
One James Center
901 East Cary Street
Richmond, VA 23219
(804) 782-1400

Paul R. Hitchcock
Nicholas S. Yovanovic
CSX TRANSPORTATION, INC.
500 Water Street
Jacksonville, FL 32202
(904) 359-3100

James F. Rill
Mark Schechter
Virginia R. Metallo
Timothy E. Boyle
Ramsey Wilson
HOWREY SIMON
ARNOLD & WHITE, LLP
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 783-0800

June 5, 2000

Respectfully submitted.



Dennis G. Lyons
Leonard H. Becker
Mary Gabrielle Sprague
Claire E. Reade
Sharon L. Taylor
ARNOLD & PORTER
555 Twelfth Street, N.W.
Washington, D.C. 20004-1202
(202) 942-5000

Louis E. Gitomer
BALL JANIK LLP
1445 F Street, N.W.
Washington, D.C. 20005
(202) 638-3307

Ronald M. Johnson
AKIN, GUMP, STRAUSS,
HAUER & FELD, L.L.P.
Suite 400
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 887-4000

*Counsel for CSX Corporation and
CSX Transportation, Inc.*

CERTIFICATE OF SERVICE

The undersigned counsel for CSX Corporation and CSX Transportation, Inc. hereby certifies that on this 5th day of June, 2000, a copy of the foregoing "Reply Comments of CSX Corporation and CSX Transportation, Inc.," was served on all parties of record by first-class mail, postage prepaid, or more expedited method.



Dennis G. Lyons
ARNOLD & PORTER
555 Twelfth Street, N.W.
Washington, D.C. 20004-1202
(202) 942-5858

*Counsel for CSX Corporation and
CSX Transportation, Inc.*