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Public Record

August 8, 2006

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Room 700
Washington, D. C. 20423

217247 FEE RECEIVED
AUG - 8 2006
SURFACE
TRANSPORTATION BOARD

RE: Finance Docket No. 34909, *CSX Transportation, Inc., Norfolk Southern
Railway Company, and Consolidated Rail Corporation—Joint Use and Operation
Exemption*

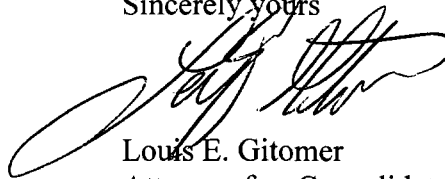
Dear Secretary Williams:

Enclosed are the original and 10 copies of a Petition for Exemption, a check for the filing fee of \$7,900, and a CD containing the Petition.

Please time and date stamp the additional copy of this letter, and the Petition and return them with our messenger. Thank you for your assistance.

If you have any questions please call or email me.

Sincerely yours



Louis E. Gitomer
Attorney for: Consolidated Rail Corporation

Enclosures

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BEFORE THE

SURFACE TRANSPORTATION BOARD

Finance Docket No. 34909

217247

CSX TRANSPORTATION, INC., NORFOLK SOUTHERN RAILWAY COMPANY,
AND CONSOLIDATED RAIL CORPORATION—JOINT USE AND OPERATION
EXEMPTION

PETITION FOR EXEMPTION

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Dated: August 8, 2006

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SURFACE
TRANSPORTATION BOARD

BEFORE THE
SURFACE TRANSPORTATION BOARD



Finance Docket No. 34909

CSX TRANSPORTATION, INC., NORFOLK SOUTHERN RAILWAY COMPANY,
AND CONSOLIDATED RAIL CORPORATION—JOINT USE AND OPERATION
EXEMPTION

PETITION FOR EXEMPTION

CSX Transportation, Inc. (“CSXT”), Norfolk Southern Railway Company (“NSR”), and Consolidated Rail Corporation (“Conrail”) (collectively “Petitioners”) petition the Surface Transportation Board (the “Board”), under 49 U.S.C. § 10502 and 49 CFR Part 1121, for an exemption from 49 U.S.C. §§ 11323-11325 for CSXT, NSR, and Conrail to provide for the joint use and joint rail freight operations over 7.69 miles of abandoned rail line generally between the Conrail Chemical Coast Line and points on Staten Island (fully described in Exhibit A and on the Map in Exhibit B and referred to herein as the “Line”), which was acquired by the New York City Economic Development Corporation (“NYCEDC”) and the Port Authority of New York and New Jersey (the “Port Authority”). Petitioners are concurrently filing a Notice of Modified Certificate of Public Convenience and Necessity to operate the Line (the “2006 Modified Certificate”).¹ This Petition seeks an exemption so that Petitioners can jointly use and operate the Line.

¹ Notice of Modified Certificate of Public Convenience and Necessity to operate the line in Finance Docket No. 34908, *CSX Transportation, Inc., Norfolk Southern Railway Company, and Consolidated Rail Corporation—Modified Certificate of Public*

Through the 2006 Modified Certificate, Petitioners are seeking the right to operate over the Line owned by NYCEDC and the Port Authority. The 2006 Modified Certificate sought in Finance Docket No. 34908 will replace that covered by Finance Docket No. 34473, *CSX Transportation, Inc., Norfolk Southern Railway Company, and Consolidated Rail Corporation – Modified Rail Certificate*, served March 19, 2004 (“*2004 Modified Certificate*”).

This Petition for Exemption fulfills the Petitioners’ commitment, made in its February 18, 2004 Notice of Public Convenience and Necessity filed in Finance Docket 34473 to “submit a petition seeking: (1) an exemption pursuant to 49 U.S.C. 10502 from the approval requirements of 49 U.S.C. 11323 to permit the parties to implement the operations described in the modified certificate in a manner described in the [then yet-to-be-negotiated operating] agreement; (2) a prior determination that the authority granted by the Board pursuant to the petition will automatically expire upon the termination of the modified certificate[;] and (3) a determination that the grant of authority under 49 U.S.C. 11323 will not give Conrail any ratemaking, interchange, or other common carrier authority that it currently lacks.” *See 2004 Modified Certificate*, slip op. at 3 n. 4. No rail operations have been performed pursuant to the *2004 Modified Certificate*. In addition to the requests just set forth, Petitioners request that the Board act in an expedited manner on this Petition to enable operations to begin no later than October 1, 2006.

Convenience and Necessity–Staten Island, New York and New Jersey. The parties have substantially completed the referenced operating agreement.

SUMMARY

Conrail is jointly controlled by CSX Corporation (“CSX”) and Norfolk Southern Corporation (“NSC”).² CSX controls CSXT and NSC controls NSR. CSXT and NSR are Class I railroads. Conrail is a Class III railroad. The Conrail, CSXT, and NSR systems and operations are fully described in *Conrail Control*. The Line is accessed through the North Jersey Shared Asset Area that was approved in *Conrail Control*.

Petitioners anticipate entering into an Operating Agreement (the “Operating Agreement”) with the NYCEDC to obtain the right to operate over two abandoned line segments of the Staten Island Railway Corporation (“SIRR”) that were acquired by NYCEDC and the Port Authority.³ To obtain the authority necessary to operate under the Operating Agreement, Petitioners have concurrently filed the new 2006 Modified Certificate pursuant to 49 C.F.R. 1150 Subpart C attaching and covering the Operating Agreement.

The two line segments are: (a) the North Shore Line between the end of track at MP 4.6 at Union Avenue east of Arlington Yard, Richmond County, NY and MP 7.4, via the Chemical Coast Connector, at the proposed point of switch at the connection between the Chemical Coast Connector and Conrail’s Chemical Coast Line in Union County, NJ,

² *CSX Corp. et al.—Control—Conrail Inc. et al.*, 3 S.T.B. 196 (1998) (“*Conrail Control*”).

³ In *Staten Island Railway Corporation—Abandonment Exemption*, ICC Docket No. AB-263 (Sub-No. 2X) (ICC Served July 3, 1990), the abandonment by SIRR was exempted for the so-called Travis Branch entirely on Staten Island, NY between milepost 0.00 at Arlington Yard and milepost 3.65. In *Staten Island Railway Corporation—Abandonment*, ICC Docket No. AB-263 (Sub-No. 3) (ICC Served December 5, 1991), the SIRR was authorized to abandon two line segments: (1) between milepost 3.8 at John Street east of Arlington Yard, Richmond County, NY, and milepost 12.09, at or near Cranford Junction, Union County, NJ; and (2) between milepost 0.00 at or near Port Ivory,

a distance of 2.8 miles; and (b) the “Travis Branch” between MP 0.00, Arlington Yard Station and MP 4.41 in Richmond County, NY, a distance of 4.41 miles (collectively referred to as the “Line”). Included within the North Shore Line segment are all the tracks in Arlington Yard together with lead tracks on both the east and west ends of the yard, the so-called Wye Connector that provides a direct connection to the Travis Branch from the North Shore Line and a track designated as the Travis Lead that provides a connection to and from the Travis Branch to the east end of Arlington Yard. A map depicting the entire railroad as described above is attached hereto as Exhibit B.

Whereas the Operating Agreement will provide for and govern access to the Line by CSX, NSR and Conrail, a second agreement – the Joint Use Operating Agreement for Staten Island, New York that will be dated as of October 1, 2006 by and among Conrail, CSXT, and NSR (the “Staten Island Joint Use Agreement”) – will govern the joint use and operations by CSXT, NSR and Conrail. *See* Exhibit C. The Staten Island Joint Use Agreement provides that the Line shall be operated and maintained by Conrail and used by or for the exclusive benefit of CSXT and NSR, and that NSR and CSXT shall each have full and equal rights to use the Line to provide competitive rail freight transportation services to, from and between all places along the Line. The Petitioners intend that, should the right of any of the Petitioners to have access to the Line be terminated, the right of all of the Petitioners to have access is terminated, and the Board’s authorization pursuant to this Petition also shall automatically terminate.

Richmond County, NY and milepost 0.94 at the end of the line near Howland Hook, Richmond County, NY. Both abandonments have been consummated.

Petitioners have the exclusive right to manage operations with respect to the Line. Petitioners shall use the Line (a) to the extent necessary to perform their duties and obligations under the Operating Agreement, (b) to operate Unit Trains over the Line and to provide other rail services to railroads using the Line and (c) to have non-exclusive use of the Line to serve shippers on the Line, including new customers not currently served by the Line.

Pursuant to the Operating Agreement, the Petitioners will be responsible for the performance of carload switching, dispatching, clearing derailments, establishing a safety program and emergency response and recovery program, security services they deem necessary and desirable, and hiring, training and supervising personnel necessary to perform the duties and obligations under the Operating Agreement or engage subcontractors. Petitioners will be responsible for the maintenance of the Line and the Arthur Kill Lift Bridge ("AKLB"). Petitioners will control the AKLB. Routine maintenance on the Line will be performed by Conrail, program maintenance will be performed by CSXT, NSR or others under contract.

CSXT and NSR will independently market and solicit traffic to and from the Line, and will independently establish rates and rail transportation contracts for service to and from the Line. Conrail will have no marketing functions and will not make rates or enter into transportation contracts with customers. Conrail will not have any ratemaking, interchange or other common carrier authority as a result of the Operating Agreement that it currently lacks as a result of *Conrail Control*.

There are only three primary traffic flows anticipated over the Line consisting of:

(a) intermodal traffic moving in blocks assembled by the Howland Hook Marine

Terminal/Port Ivory operator moving to and from Arlington Yard (“Howland Hook Traffic”); (b) containerized municipal solid waste trains assembled by the Fresh Kills facility operator to and from the Fresh Kills facility (“Fresh Kills Traffic”); and (c) mixed merchandise (including aggregates and paper products) moving to and from two potential customers located on the Travis Branch (“Travis Branch Traffic”) that may, in the future, construct rail connections from their facilities to the Travis Branch in order to receive direct rail service.

As currently planned, Conrail will move the Howland Hook Traffic and the Travis Branch Traffic between Staten Island and the North Jersey Shared Asset Area for line haul movement via NSR and CSXT. Conrail will switch the Travis Branch Traffic directly from the relevant customer’s facilities, if and when it develops, between Staten Island and the North Jersey Shared Asset Area for line haul movement via NSR and CSXT. Conrail will dispatch the Line.

NSR and/or CSXT at a future time will likely provide service to the Fresh Kills Traffic and the Howland Hook traffic directly, as that traffic is expected to move in unit train volumes.

Coordination of the operations of the Petitioners over the Line is provided for in the Staten Island Joint Use Agreement. The Staten Island Joint Use Agreement also determines the responsibilities that each of the Petitioners must fulfill in operating over the Line and the coordination of those operations, as well as the maintenance, dispatching, liability and other factors incident to operating the Line.

JURISDICTION

The “[a]cquisition by a rail carrier of ... joint use of, a railroad line (and terminals incident to it) ... operated by another rail carrier” may be carried out only with the approval and authorization of the Board. 49 U.S.C. §11323(a)(6).

Pursuant to the expected Operating Agreement, Conrail, CSXT and NSR will each acquire the right to jointly use the Line from NYCEDC and the Port Authority. Pursuant to the executed Staten Island Joint Use Agreement, attached, the Petitioners have agreed how responsibilities and obligations of the joint use of the Line will be carried out by CSXT, Conrail, and NSR.

Petitioners do not operate over the Line individually or jointly now. Indeed, there is no rail service over the Line at the present time, nor has there been rail service over the Line for more than 15 years. Petitioners will be reinstituting service over the Line to provide rail service that has been absent for years. The right of all of the Petitioners to operate over the Line pursuant to the Operating Agreement will terminate with the termination of the right for any of the Petitioners to operate over the Line, and will be subject to the terms of the Operating Agreement and 49 C.F.R. §1150.24.⁴

The last time rail service was provided over the Line, it was provided solely by the SIRR. Under the Staten Island Joint Use Agreement, competitive rail service will be provided by CSXT and NSR, including via Conrail.

⁴ Unlike access for the provision of freight rail service obtained through a sale, lease, trackage rights or other similar vehicles, access for the provision of freight rail service “are exempted from 49 U.S.C. 10901 and 10903 which are the statutory requirements governing the start up and termination of operations.” 49 C.F.R. §1150.22.

Operation over the Line will be a new operation for Petitioners. The Staten Island Joint Use Agreement is necessary for Petitioners to manage, operate, maintain, invest in, share costs, and assume liability for the Line. All three Petitioners will be able to operate over the Line under the Staten Island Joint Use Agreement. The Staten Island Joint Use Agreement does not address the competitive marketing and pricing that CSXT and NSR will individually offer except to provide that CSXT and NSR will separately market and price rail service over the Line.

Even though CSX and NSC jointly control Conrail, *Conrail Control* did not approve operations over the Line, as none of the agreements at issue in that proceeding covered operations over the Line. The operations over the SIRR will be conducted under the provisions of the Staten Island Joint Use Agreement and pursuant to the authority described in the 2006 Modified Certificate. However, operations over the Line will be handled in much the same manner as the operations over the Shared Assets Areas are conducted under *Conrail Control*.

CSXT and NSR are not commonly controlled. They are seeking to physically jointly operate over the Line, but will compete with each other to serve the shippers on the Line. Based on the three railroads seeking to operate over the Line and the reactivation of the Line as a line of railroad, the proposed transaction falls within the jurisdiction of the Board under 49 U.S.C. §11323(a)(6).

REQUEST FOR EXPEDITED HANDLING

Based on ongoing and long term negotiations with NYCEDC and the Port Authority, Petitioners have been advised by NYCEDC that the Line should be ready for rail service to commence on or about October 1, 2006. Although Petitioners expect the

2006 Modified Certificate to be effective on October 1, 2006 (*See* 49 C.F.R.

§1150.23(a)), Petitioners' ability to operate pursuant to the terms of the Staten Island Joint Use Agreement is essential to the smooth and efficient yet competitive operation of the Line. Therefore, in order to meet the desires of NYCEDC and the Port Authority that operations begin on or about October 1, 2006, and in order for the operations begin in an efficient and smooth manner, Petitioners respectfully request that the Board expeditiously act on this petition so that any decision of the Board will be effective no later than October 1, 2006.

Petitioners have been advised by NYCEDC and the Port Authority that no opposition to this Petition is anticipated. Petitioners are also not aware of any party that would oppose the proposed Petition. However, in the event that a party seeks to comment on the proposed transaction, Petitioners propose the following schedule:

August 8	Petition filed.
August 18	Federal Register Notice published.
September 7	Comments due.
September 11	Replies due.
October 1	Decision effective on date of service.

Petitioners recognize that they are proposing a truncated schedule. To assist any potential parties, Petitioners and NYCEDC have decided to provide unredacted versions of the relevant agreements are included. Moreover, NYCEDC has requested that Petitioners be able to commence operation on October 1, 2006, to a facility that has been rebuilt using public funds in order to provide a necessary service to this portion of New York City.

Petitioners expect NYCEDC shortly to file with the Board supporting this Petition and the request for expedited handling.

THE PROPOSED TRANSACTION

CSXT, NSR, and Conrail propose to operate jointly over the Line. Petitioners have entered the Operating Agreement with NYCEDC and the Port Authority in order to obtain the right to operate the Line. CSXT, NSR, and Conrail have concurrently filed the 2006 Modified Certificate to obtain the necessary authority to operate the Line. NSR, CSXT, and Conrail will enter the Staten Island Joint Use Agreement to govern the operations over the Line.

Conrail shall be responsible for safely and efficiently operating, controlling and managing the use of the Line, impartially as between CSXT and NSR in order to achieve the lowest cost of the safe and efficient operation, use and maintenance of the Line. Conrail shall perform all of its obligations under the Staten Island Joint Use Agreement on an impartial and non-discriminatory basis as between CSXT and NSR, giving no preference to either of them in providing switching and yard services, in the control of train dispatching over the Line.

CSXT and NSR shall each have full operating rights to operate its own trains and equipment, at their own expense, over the Line, and to use all of the Line in connection with the operation of such trains or equipment, for the following purposes: (a) movement over the Line between a geographical location off the Line and one of the railroad's facilities or a jointly-operated facility on the Line; (b) movement between a geographical location off the Line and local industries which are on the Line; (c) movement between one of the railroad's facilities or jointly-operated facilities which are on the Line and local

industries which are on the Line; (d) movement, handling, pick-up, set off, switching, transfer and interchange of railcars, blocks of railcars or trains to, from or at local industries, one of the railroad's facilities or jointly-operated facilities, in connection with movements described above; and (e) such other purpose as may be agreed upon by Conrail, CSXT and NSR.

LABOR

Petitioners are proposing to jointly use a railroad line, a transaction subject to the Board's jurisdiction under 49 U.S.C. §11323(a)(6). Since two Class I railroads are involved, the Board must impose labor protective conditions pursuant to 49 U.S.C. §11326.

Petitioners will be operating over a rail line that is not currently being operated. CSXT, Conrail, and NSR will be operating over the Line pursuant to the Operating Agreement, and the operation of the Line will be governed by the Staten Island Joint Use Agreement. There will not be an integration of employees or positions. There will be no merger of work forces. Work on the Line will be new work for the employees of each of the Petitioners.

The joint use of the Line by CSXT, NSR, and Conrail will not result in a reduction in the number of railroad operating employees on the railroads. Indeed, the new operation and additional traffic may result in an increase in employment for railroad employees.

Petitioners request that the Board impose the protective conditions of *Norfolk and Western Ry. Co.—Trackage Rights—BN*, 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Ry., Inc.—Lease and Operate*, 360 I.C.C. 653 (1980) because no railroad employees

will provide for operations over the Line before operations commence under the 2006 Modified Certificate; there will not be an integration of forces maintaining, dispatching or operating the Line; Petitioners will not own the Line; Conrail will maintain, dispatch, and operate the Line; employees working on the Line will be subject to management only by their existing employers; CSXT and NSR will operate over the Line; and there are no railroad employees of NYCEDC and the Port Authority, the owners of the Line, to be protected.

ENVIRONMENTAL AND HISTORIC

This transaction does not require the filing of a Safety Integration Plan, an Environmental Assessment, or a Historic Report.

The joint use and reactivation of rail service of a relatively short railroad line by two Class I railroads and one Class III railroad is not the type of transaction that requires the filing of a Safety Integration Plan. 49 C.F.R. §1180.8(a)(1). The proposed transaction is not a major transaction. It does not involve the merger or control of at least two Class I railroads. See 49 U.S.C. §11324(b) and 49 C.F.R. §1180.2(a). Hence, there is no need for the development and filing of a Safety Integration Plan.

Neither environmental documentation nor a Historic Report is required under the exception in 49 CFR § 1105.6(c)(4). The Petitioners will be reactivating rail service over a previously used rail line. Petitioners expect to divert traffic from the highways to rail in the congested New York City area as a result of the proposed transaction. Also, the transaction will not result in an action that requires environmental documentation, such as the abandonment or construction of a rail line.

The transportation of ozone depleting materials (such as nitrogen oxide and freon) is not contemplated. *See* 49 CFR § 1105.7(e)(4) and (5).

Petitioners do not own the Line. The Line is owned by NYCEDC and the Port Authority. Petitioners do not have the ability to salvage the Line and remove the structures from the Line. Petitioners are seeking exemption of there joint use of the Line only, and therefore should not be required to file an Historic Report. *See* 49 C.F.R. §1105.8(b)(3).

Therefore, it is not necessary for NSR, CSXT, and Conrail to submit a Safety Integration Plan, an Environmental Assessment, or a Historic Report as part of this Petition for Exemption.

This action will not significantly affect either the quality of the human environment or energy conservation.

ARGUMENT

A. THE PROPOSED TRANSACTION SHOULD BE EXEMPTED FROM THE PRIOR APPROVAL REQUIREMENTS OF 49 U.S.C. §§ 11323-25.

The joint operation of the Line by CSXT, NSR, and Conrail is subject to prior review and authorization by the Board pursuant to 49 U.S.C. §11323(a)(6).

Pursuant to 49 U.S.C. §10502, however, the Board must exempt a transaction from regulation when it finds that: (1) regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. §10101; and (2) either: (a) the transaction is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

The legislative history of Section 10502 reveals a clear Congressional intent that the Board should liberally use its exemption authority to free certain transactions from the administrative and financial costs associated with continued regulation. In enacting the Staggers Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, Congress encouraged the Board's predecessor to liberally use the expanded exemption authority under former Section 10505:

The policy underlying this provision is that while Congress has been able to identify broad areas of commerce where reduced regulation is clearly warranted, the Commission is more capable through the administrative process of examining specific regulatory provisions and practices not yet addressed by Congress to determine where they can be deregulated consistent with the policies of Congress. The conferees expect that, consistent with the policies of this Act, the Commission will pursue partial and complete exemption from remaining regulation.

H.R. Rep. No. 1430, 96th Cong. 2d Sess. 105 (1980). *See also Exemption From Regulation -- Boxcar Traffic*, 367 I.C.C. 424, 428 (1983), *vacated and remanded on other grounds, Brae Corp. v. United States*, 740 F.2d 1023 (D.C. Cir. 1984) (the “*Boxcar Exemption*”). Congress reaffirmed this policy in the conference report accompanying the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, which re-enacted the rail exemption provisions as Section 10502. H.R. Rep. No. 422, 104th Cong., 1st Sess. 168-69 (1995).

The proposed transaction does not involve the merger or control of at least two Class I rail carriers. Therefore, absent an exemption, the proposed transaction would be subject to Board review under the standards set forth in 49 U.S.C. §11324(d). Section 11324(d) provides that the Board “shall approve” the transaction unless it finds both that:

(1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and

(2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

49 U.S.C. §11324(d).

In transactions subject to Section 11324(d), the primary focus is on the probable competitive effects of the proposed transaction. *See, e.g., Canadian Pacific Ltd., and Soo Line R.R. - Control - Davenport, Rock Island & North Western Ry.*, ICC Finance Docket No. 32579 (ICC served February 10, 1995), at 5; *Wilmington Term. RR, Inc.--Pur. & Lease--CSX Transp., Inc.*, 6 I.C.C. 2d 799, 803 (1990), *pet. for review denied sub nom. Railway Labor Executives Ass'n v. ICC*, 930 F.2d 511 (6th Cir. 1991). The public interest factors are considered only where significant anticompetitive effects are found. *Id.*

A finding of competitive harm under Section 11324(d)(1) must be grounded on a showing that any adverse competitive effects are both “likely” and “substantial.” *Wisc. Central Transportation Corporation, Et Al.*, 9 I.C.C.2d 233, 238 (1992). Examples of adverse competitive impacts that would trigger the balancing of the public interest factors under Section 11324(d)(2) “would be the likelihood of significantly higher rates or significantly worsened service, or the likelihood of a combination of the two.” *Blackstone Cap. Partners--Cont. Exempt.--CNW Corp. Et Al.*, 5 I.C.C.2d 1015, 1019 (1989). Even if such showings were made, the proposed transaction may not be disapproved unless the anticompetitive effects of the proposed transaction outweigh the public interest factors. *See CSX Corp., CSX Transportation, Inc. and Carrollton R.R. --*

Control -- Transkentucky Transportation R.R., ICC Finance Docket No. 31991 (ICC served April 15, 1991), at 2.

Rail carrier transactions do not result in harm to competition unless they create or enhance the ability of the involved carriers to exercise market power. The Board and its predecessor have defined market power as the ability of a carrier profitably to increase rates above competitive levels or to reduce the quality of service for a significant period of time without losing traffic to competing carriers or other sources. *See, e.g., CSX Corp. – Control – American Commercial Lines*, 2 I.C.C.2d 490, 515 (1984), *pet. for review denied sub nom. Crounse Corp. v. ICC*, 781 F.2d 1176 (6th Cir.), *cert. denied*, 479 U.S. 890 (1986). In addition, only competitive harm that is directly and causally related to a proposed transaction – and not pre-existing conditions – are considered by the Board in determining whether a transaction will lessen competition. *Burlington Northern, et al. – Merger – Santa Fe Pacific, et al.*, 10 I.C.C. 2d 661, 728 (1995) (“*BNSF Control*”); *Conrail Control*, at 246.

In assessing the competitive effects of a proposed transaction, the first step is analyzing the existing rail network “with particular attention to whether the transaction is primarily parallel – combining routes between the same points – or end-to-end – combining routes that may serve some of the same points but generally serve separate, if neighboring, parts of the country.” *BNSF Control*, at 725. Here, CSX, NSR, and Conrail are extending their service to a new territory that currently has no rail service. When that territory did have rail service, it was served by only one railroad. CSXT and NSR will compete to serve the shippers on the Line.

In *Conrail Control*, at 247-248, the Board viewed the new direct competition between CSXT and NSR in the shared asset areas as a substantial increase in competition and a public benefit. The proposed transaction goes beyond *Conrail Control* in that it is also introducing rail competition between CSXT and NSR where no direct rail service has existed for some time.

The fact that the proposed transaction is pro-competitive is consistent with the traditional competition analysis followed by the Board and its predecessor agency. The product market is usually defined as transportation of freight. *Union Pacific—Control—Missouri Pacific; Western Pacific*, 366 I.C.C. 459, 504 (1982). The relevant geographic market is usually defined as the area in which providers of a particular product operate and to which purchasers can turn for such services. *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961). In the proposed transaction, CSXT and NSR will compete over the Line to provide rail transportation service to and from the Line. NSR and CSXT will have equal access to the Line and will have the option to provide service directly or through Conrail. In addition, marketing and pricing will be handled separately and individually by CSXT and NSR. Not only is there no competitive harm arising from the joint use and competitive marketing of the Line, the proposed transaction will result in competition between NSR and CSXT on the Line.

The proposed transaction clearly meets the criteria of Section 11324(d). Therefore, the proposed transaction also meets the criteria of Section 10502, as discussed below.

1. The Application of 49 U.S.C. §11323(a)(6) Is Not Necessary To Carry Out The Rail Transportation Policy.

Detailed scrutiny of this transaction is not necessary to carry out the rail transportation policy. As previously noted, absent an exemption, the primary substantive issue the Board would need to address is the effect of the proposed transaction on competition.

CSXT and NSR will compete over the Line, thereby allowing, “to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail.” See 49 U.S.C. §10101(1).

The purpose of the Staten Island Joint Use Agreement is “to promote a safe and efficient rail transportation system.” See 49 U.S.C. §10101(3).

The reactivation of service over the Line and competition between NSR and CSXT will “ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense.” See 49 U.S.C. §10101(4).

By CSXT and NSR competing for the business over the Line, the proposed transaction will “foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes.” See 49 U.S.C. §10101(5).

The purpose of the Staten Island Joint Use Agreement is the reintroduction of the operation of “transportation facilities and equipment without detriment to the public health and safety” (See 49 U.S.C. §10101(8)) by allocating the responsibilities and liabilities for the operations between Petitioners.

Finally, the Board’s granting of this petition will “provide for the expeditious handling and resolution of” this proceeding, see 49 U.S.C. §10101(15), and will “reduce

regulatory barriers to entry into ... the industry.” (See 49 U.S.C. §10101(7)). Requiring the filing of an application would serve no useful purpose in this proceeding. As the information in this Petition unquestionably demonstrates, the proposed transaction readily satisfies the requirements of Section 11324(d), which, absent the granting of the exemption, would govern this transaction. As previously noted, under Section 11324(d), the Board must approve a proposed transaction unless it finds there is likely to be a substantial lessening of competition and the anticompetitive effects outweigh the public benefits. Petitioners’ joint use of the Line will not result in any, much less in a substantial, lessening of competition. Consequently, if this transaction were brought before the Board in a full application proceeding, the Board would be required to approve the transaction.⁵

Other aspects of the rail transportation policy are not adversely affected.

2. The Proposed Transaction Will Not Result In An Abuse of Market Power

It follows from the conclusion that there will be no competitive harm as the result of the proposed transaction and that the proposed transaction will not subject shippers to an abuse of market power.

There is no rail service over the Line today, and has been none for about 15 years. Petitioners have been selected by NYCEDC and the Port Authority to reactivate operations over the Line after NYCEDC and the Port Authority have rebuilt the Line. The last time there was rail service on the Line, it was provided by one railroad. Under the Operating Agreement and the Staten Island Joint Use Agreement, two Class I

⁵ In addition, the public has been on notice of the initiation of exactly the service anticipated since 2004. *See*, the Modified Certificate, served March 19, 2004.

railroads and one Class III railroad will operate over the Line. CSXT and NSR, the two Class I railroads, will compete to provide service to the shippers on the Line. NSR and CSXT will each individually have the option of directly serving shippers on the Line or having that service performed by Conrail, whichever is more efficient. Shippers will have the option of receiving full service from either CSXT or NSR. The ability of NSR and CSXT individually to serve each shipper on the Line will prevent an abuse of market power.

3. The Proposed Transaction Is Of Limited Scope

Because regulation is not needed to protect shippers from abuse of market power, the Board need not address whether the proposed transaction is of limited scope. See *Illinois Commerce Commission v. ICC*, 819 F.2d 311, 314 (D.C. Cir. 1987). However, this transaction involves only a 7.6-mile rail line, in one city (New York) and in one state (New York). The proposed transaction is of limited scope.

CONCLUSION

Petitioners have demonstrated in this Petition that the proposed joint use and joint operation of the Line will: (1) reintroduce rail service to locations not receiving rail service today, and (2) not result in any competitive harm. The proposed transaction fosters the transportation policy, will not result in the abuse of market power, and is of limited scope. Petitioners therefore request that the Board: (1) grant an exemption pursuant to 49 U.S.C. §10502 from the approval requirements of 49 U.S.C. §11323 to permit the Petitioners to implement the operations permitted by the Operating Agreement in a manner described in the Staten Island Joint Use Agreement; (2) determine that the authority granted by this petition will automatically expire upon the termination of the

2006 Modified Certificate; and (3) determine that the exemption from 49 U.S.C. §11323 under 49 U.S.C. §10502 will not give Conrail any ratemaking, interchange, or other common carrier authority that it currently lacks.

Finally, for the reasons set out above, Petitioners have shown that the requested expedited relief is appropriate and necessary.

PRAYER FOR RELIEF

For the reasons provided herein, CSXT, NSR and Conrail pray that the Board grant their request for expedited action and grant the Petition for Exemption effective no later than October 1, 2006.

Respectfully submitted,



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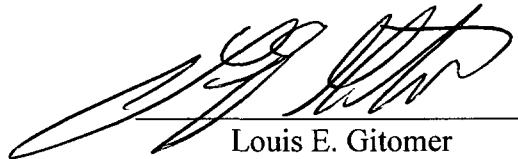
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Dated: August 8, 2006

CERTIFICATE OF SERVICE

I hereby certify that on August 8, 2006, I have caused the Petition for Exemption in Finance Docket 34909, *CSX Transportation, Inc., Norfolk Southern Railway Company, and Consolidated Rail Corporation—Joint Use and Operation Exemption* to be served by first class mail, postage pre-paid on the Secretary of the United States Department of Transportation, the Attorney General of the United States, the Federal Trade Commission, and the Governors, Public Service Commissions, and Departments of Transportation of New York and New Jersey, Charles A. Spitulnik, Esq., Kaplan, Kirsch & Rockwell, 1050 Connecticut Avenue, NW, 10th Floor, Washington, DC 20036, Alex Menendez, Esq., McLeod Watkinson & Miller, One Massachusetts Avenue, NW, Suite 800, Washington, DC 20001, and Paul M. Donovan, LaRoe, Winn Moerman & Donovan, 4135 Parkglenn Court, NW, Washington, DC 20007.



Louis E. Gitomer
August 8, 2006

EXHIBIT A-DESCRIPTION OF LINE

The Line shall consist of the rail line segments and rail facilities described below in A and B:

A. Rail Line Segments:

The SIRR is defined as the following two line segments: (a) the North Shore Line between the end of track at MP 4.6 at Union Avenue east of Arlington Yard, Richmond County, NY and MP 7.4, via the Chemical Coast Connector, at the proposed point of switch at the connection between the Chemical Coast Connector and Conrail's Chemical Coast Line in Union County, NJ, a distance of 2.8 miles; and (b) the "Travis Branch" between MP 0.00, Arlington Yard Station and MP 4.41 in Richmond County, NY, a distance of 4.41 miles (collectively referred to as "the SIRR Lines").

Included within the North Shore Line segment are all the tracks in Arlington Yard together with lead tracks on both the east and west ends of the yard, the so-called Wye Connector that provides a direct connection to the Travis Branch from the North Shore Line and a track designated as the Travis Lead that provides a connection to and from the Travis Branch to the east end of Arlington Yard. A map depicting the entire railroad as described above is attached hereto as Exhibit B.

B. Line: The following segments or components of the proposed Line are described in more detail below:

(i) "CHEMICAL COAST LINE CONNECTOR" or "CCC" means the segment of the Line indicated on the diagram attached hereto as Exhibit B consisting of a new single track rail alignment approximately 3,760 feet long measured from the point of switch of a new turnout connecting the Line to the Chemical Coast Line, south and then east to the west approach span of the AKLB. The new junction point consists of a number 15 turnout and a new signal interlocking (designated CP-11) remotely operated by Conrail. The CCC alignment then curves to the east on a 7° - 30' curve and passes under Bayway Avenue. The curve brings the new rail alignment parallel to the existing alignment towards the Arthur Kill. A new three span bridge carries both the new and existing track alignment over First Street South. 160 feet east of that bridge another new four span bridge carries the railroad over a rail spur and Front Street South. On this bridge, a number 15 turnout connects the new rail alignment to the existing. This is an interlocked turnout with signals that also function to protect eastward train movements to the AKLB.

(ii) "ARTHUR KILL LIFT BRIDGE" or "AKLB" means the lift bridge segment of the Line indicated on the diagram attached hereto as Exhibit B, located just north of the Goethals Bridge, at the southern end of the Intermodal Terminal. The structure is a vertical lift bridge carrying a single railroad track

between Staten Island and New Jersey at a vertical clearance of 31 feet with the span in the closed (lowered) position. The span is normally kept in the open (raised) position, which provides a vertical clearance of 135 feet above mean high water for marine traffic.

(iii) “WEST LEAD TRACK” means that track indicated on the diagram attached hereto as Exhibit B extending eastward from the AKLB as single track for 536 feet to a new number 10 right hand turnout that splits the line into two tracks: the west lead on the north and the running track on the south. This segment is on an earthen embankment and downgrade to the east from the AKLB towards Arlington Yard. The two tracks pass over the existing truck entrance to the Intermodal Terminal on a new two span concrete bridge. The two tracks cross over Bridge Creek and Western Avenue on a two span, open deck, steel bridge. The total distance of the West Lead Track from the AKLB to the Western Avenue (under grade) bridge is 3,528 feet.

(iv) “ARLINGTON YARD” means the main railyard indicated on the diagram attached hereto as Exhibit B, extending from the Western Avenue (under grade) bridge to the South Avenue overhead bridge, a distance of 4,500 feet. Arlington Yard is designed as a 10-track facility with all 10 tracks connected on both ends. Three of the tracks extend into the next segment to the east, the East Lead Track. The west-end of Arlington Yard includes two sets of crossovers to allow all yard tracks to be accessed by the two tracks coming into the yard from the AKLB. There is also a connection to the Wye Connector and two short stub end tracks that can be used for locomotive storage/servicing and a RIP track (Repair In Place) for car repairs and miscellaneous storage. The east end includes a connection from the Travis Branch and the group of shorter tracks (5 – 9) and a crossover from Track 4 to Track 3. Tracks 2, 3 and 4 continue east under South Avenue overhead bridge and are described below in “EAST LEAD TRACK”. Arlington Yard also contains an access road from Western Avenue, a narrow perimeter road for maintenance and emergency access and a yard lighting system to allow operation 24 hours per day.

(v) “EAST LEAD TRACK” means three track extensions of Tracks 2, 3 and 4 in Arlington Yard from the South Avenue overhead bridge to the Union Avenue overhead bridge, a distance of 2,260 feet. The northerly track (Track 2) would usually function as a switching lead for the east end of the yard where trains could be pulled back from the various tracks and then moved west onto the lead track into the Intermodal Terminal. Tracks 3 and 4 are extensions of the tracks in the main Arlington Yard and provide for receiving and departing trains longer than would fit on a track in the main Arlington Yard.

(vi) “TRAVIS BRANCH” means the segment of the Line indicated on the diagram attached hereto as Exhibit B that is a single track line that diverges southwest from Arlington Yard, crosses the Goethals Bridge highway and parallel service roads on three ballasted deck bridges, then over Bridge Creek on a three-

span, open, deck plate girder bridge and descends into the GATX Corporation (“GATX”) site. The alignment then curves to the south, comes tangent and continues south across areas of marsh with some adjacent areas filled and occupied by various uses. At the north end of this tangent is a new two span, concrete, ballasted deck bridge. Just north of that bridge is a rebuilt private grade crossing, River Road, which leads to a Con Ed substation and a gated entrance to the GATX site.

Further south in the middle of the long tangent is a new, three span, concrete, ballasted deck bridge over Saw Mill Creek. Further south, to the west of the Travis Branch is a new track to the VanBro facility. Just south of VanBro the tracks curve to the west and cross South Avenue at grade. Immediately south of South Avenue are two double-ended sidings about 1,300 feet long. South of the two sidings, the Travis Branch crosses under Meredith Avenue and then passes over a new two span concrete ballasted deck bridge.

The Travis Branch then curves west and then north to south traversing the old AKP rail yard. The extension then traverses the Visy Paper (NY), Inc. (“Visy”) container board mill property, crosses Victory Boulevard at grade, and vacant land owned by Consolidated Edison (“ConEd”). A significant segment of the alignment on ConEd consists of a seven-degree curve to the east turning the proposed alignment from a north/south axis to an east/west axis. This aligns with the Transfer Station rail car loading area on the SI Transfer Station site to the east of ConEd. Most of the rail alignment on ConEd consists of a two-track right of way supported on a new embankment up to six to eight feet high. A new twin, 10’ x 10’ concrete box culvert carries the rail line over a tidal creek at the ConEd/SI Transfer Station property line.

(vii) “WYE CONNECTOR” means the connector segment of the Rail Facilities indicated on the diagram attached hereto as Exhibit B providing a direct connection from the Travis Branch to the North Shore Line in a direction towards the Arthur Kill Lift Bridge. The Wye Connector is a 1,492 foot long curving track with a turnout at each end; one on the running track from the AKLB and one on the Travis Branch.

EXHIBIT B-MAP

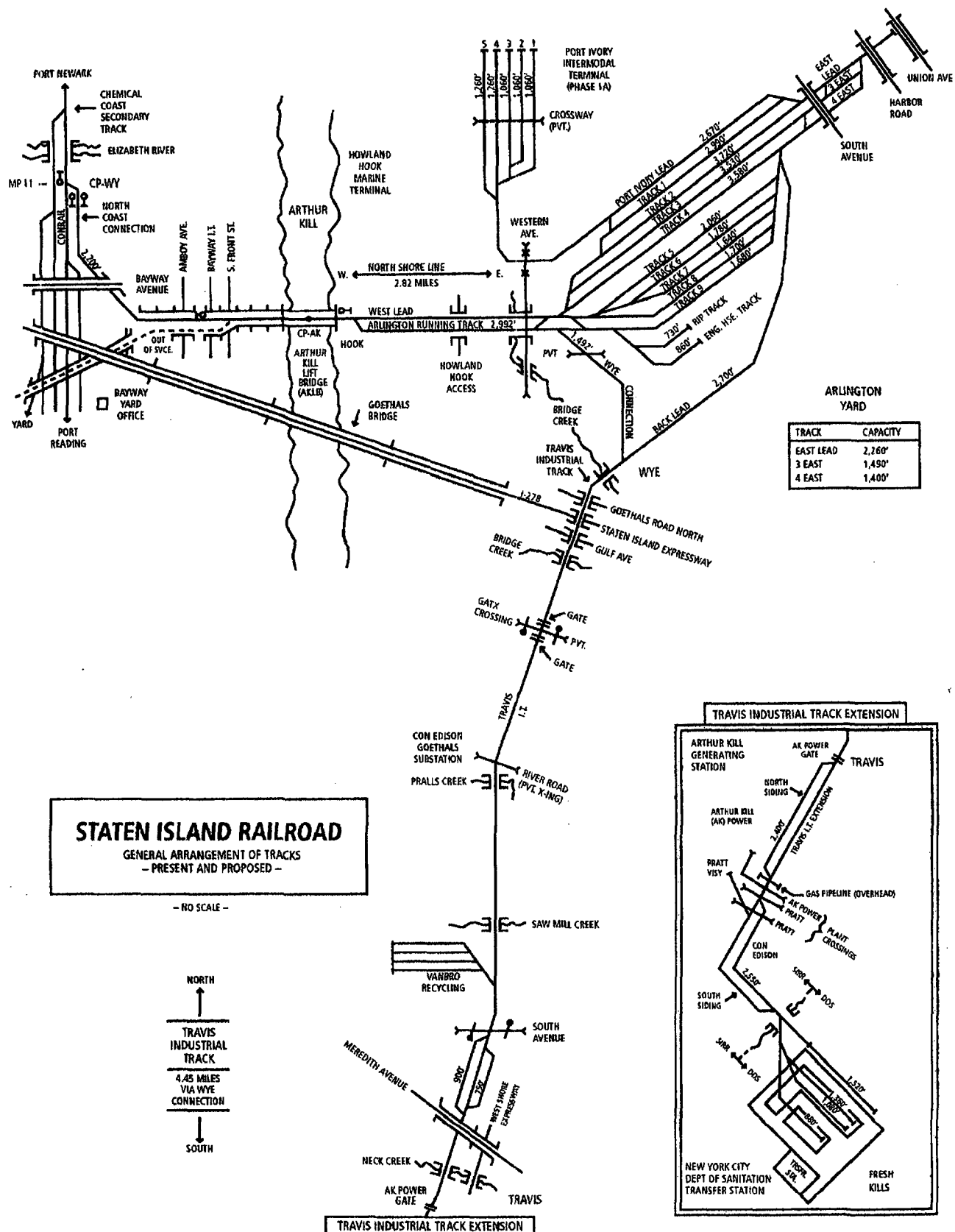


EXHIBIT C-STATEN ISLAND JOINT USE OPERATING AGREEMENT

JOINT USE

OPERATING AGREEMENT

FOR

STATEN ISLAND, NEW YORK

Dated as of _____ 1, 2006

By and Among

CONSOLIDATED RAIL CORPORATION,

CSX TRANSPORTATION, INC. and

NORFOLK SOUTHERN RAILWAY COMPANY

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**JOINT USE
OPERATING AGREEMENT
FOR
STATEN ISLAND, NEW YORK**

This JOINT USE OPERATING AGREEMENT ("Agreement") dated as of _____, 2006, is by and among Consolidated Rail Corporation ("CRC"), CSX Transportation, Inc. ("CSXT") and Norfolk Southern Railway Company ("NSR").

WITNESSETH

WHEREAS, all capitalized terms in this Agreement have the respective meanings set forth in *Section 1*; and

WHEREAS, CSXT, NS and CRC filed a notice of Modified Certificate of Public Convenience and Necessity to operate over certain portions of the abandoned track of the former Staten Island Railway Corporation (Staten Island Rights or "SIR") with the Surface Transportation Board ("STB") on July 28, 2006; and

WHEREAS, CSX owns all of the common stock of and controls CSXT, NSC owns all of the common stock of and controls NSR, and CSX and NSC jointly control CRC; and

WHEREAS, CSXT, NSR and CRC desire that the SIR shall be operated and maintained by CRC and used by or for the exclusive benefit of CSXT and NSR, and that CSXT and NSR shall each have full and equal rights to use the SIR to provide competitive railway freight transportation services to, from and between all places within the SIR.

NOW, THEREFORE, in consideration of the premises, covenants and agreements set forth herein, and for other good and valuable consideration, the receipt and sufficiency of which is acknowledged, CRC, CSXT and NSR hereby agree as follows:

Section 1. Definitions. For purposes of this Agreement, the following terms have the following meanings:

- (a) "AAR" means the Association of American Railroads.
- (b) "Accounting Plan" means the plan of accounting adopted pursuant to

Section 9(a).

(c) “Action” means any action, claim, suit, arbitration, inquiry, subpoena, discovery request, proceeding or investigation by or before any Governmental Entity.

(d) “Adjacent Improvement” means a capital improvement, such as a spur, which provides access to customers and local industries and which (i) is on property which is not part of the SIR and (ii) will be directly (without intermediate connection to another railroad) attached to trackage included within the SIR

(e) “Bill” means a bill delivered by CRC to an Operator pursuant to *Section 9(e)*.

(f) “Billing Month” means the calendar month for which information is shown on a Usage Statement.

(g) “Board of Managers” means any Board of Managers which may be appointed by the CRC Board pursuant to *Section 2(a)(ii)*.

(h) “Budgeted Capital Expenditures” means capital expenditures included on a Capital Expenditure Budget which has been approved by the CRC Board.

(i) “Capital Expenditures Budget” means a written budget specifying proposed capital expenditures to be made by CRC with respect to SIR for the periods of time specified in such budget, and the proposed sources of the capital required to make such expenditures.

(j) “Capital Expenditure Statement” means a statement delivered by CRC pursuant to *Section 9(d)*.

(k) “CRC Administrative Office” means administrative office of CRC located at Philadelphia, Pennsylvania, or at such other place designated by CRC in a notice it delivers to CSXT and NSR.

(l) “CRC Board” means the Board of Directors of CRC.

(m) “CRC Train” means a train operated by CRC and performing services pursuant to *Sections 3(c) or (d)*.

(n) “CRC Train Usage Percentage” means for an Operator for a particular time period, the percentage obtained by multiplying 100 by the quotient obtained by dividing (i) the total number of loaded and empty Railcars in the account of such Operator in CRC Trains, by (ii) the total number of loaded and empty Railcars in the accounts of both Operators in CRC Trains, during such time period.

(o) “CSX” means CSX Corporation.

(p) [Intentionally omitted.]

(q) “Damage(s)” means all assessments, fines, losses, damages, liabilities, and costs and expenses related thereto, including, without limitation, interest, penalties and attorneys' and consultants' fees and also expressly including, without limitation, all liabilities arising after the effective date hereof under the Federal Employers Liability Act, as amended, and environmental laws.

(r) “Dispute Letter” means a letter delivered by an Operator pursuant to *Section 9(g)(i)*.

(s) “Excluded Taxes” means: (A) all Taxes based, in whole or in part, on net income or gross income (including, without limitation, any minimum tax) of CRC or which are in substitution for, or relieve CRC from, any Tax based upon or measured by CRC's net income or gross income, together with any interest, penalties, additions to tax or additional amounts that may become payable in respect thereof; (B) business and occupation taxes, and gross receipts taxes (unless in the nature of a sales tax) of CRC and Taxes based upon the equity interests of CRC; and (C) interest, fines and penalties to the extent due to the acts or omissions of CRC in connection with such Excluded Taxes.

(t) “Expense Statement” means a statement delivered by CRC pursuant to *Section 9(c)*.

(u) “GAAP” at any time means generally accepted accounting principles in effect at such time.

(v) “General Manager” means the chief executive officer of CRC.

(w) “Governmental Entity” means any federal, state, local or foreign court, administrative agency or commission or other governmental or regulatory authority or commission or any arbitration tribunal.

(x) [Intentionally omitted.]

(y) “Jointly-Operated Facility” means a facility or yard which is operated by or for a rail carrier and one or more other rail carriers.

(z) [Intentionally omitted.]

(aa) [Intentionally omitted.]

(bb) “Liabilities” means any and all debts, liabilities and obligations of any kind whatsoever, whether or not accrued, contingent or reflected on a balance sheet, known or unknown, absolute, determined, determinable or otherwise, including, without limitation, those arising under any law, rule, regulation, action, order or consent decree of any

Governmental Entity or any judgment in any Action of any kind or award of any arbitrator of any kind and those arising under any contract.

(cc) “Nonseverable Improvement” means a capital improvement which is integral to the operation of the SIR and is not readily removable.

(dd) “NSC” means Norfolk Southern Corporation.

(ee) [Intentionally omitted.]

(ff) [Intentionally omitted.]

(gg) “Operating Budget” means a written budget specifying estimated operating revenues and expenses and working capital requirements of CRC with respect to the SIR for the periods of time specified in such budget.

(hh) “Operating Plan” means the plan for road train and local train schedules and classifications and related operating protocols for the SIR as may be agreed to, and modified from time to time, by CRC, CSXT and NSR.

(ii) “Operator” means either CSXT or NSR.

(jj) “Operator Consequential Damages” means consequential, indirect, incidental or other similar damage, injury or loss to an Operator.

(kk) “Operator's Expense Percentage” means for an Operator the percentage obtained by multiplying 100 by the quotient obtained by dividing (i) the total Reimbursable Expenses (except for Interest Rental, Taxes, insurance costs and any other CRC expenses not apportioned between the Operators on a usage basis) payable by such Operator for a particular period, by (ii) the total Reimbursable Expenses (except for Interest Rental, Taxes, insurance costs and any other CRC expenses not apportioned between the Operators on a usage basis) payable by both Operators for such period.

(ll) “Operator's Facility” means a present, expanded or new facility or yard which is owned or controlled exclusively by an Operator.

(mm) “Operator Train” means a train operated by an Operator and performing services in accordance with *Sections 3(a)* and *3(c)*.

(nn) “Person” means any individual, corporation, association, partnership (general or limited), joint venture, trust, estate, limited liability company or other legal entity or organization.

(oo) “Program Maintenance” means scheduled renewal of track, signals, structures and other fixed facilities performed by system or production gangs assembled to accomplish a specific task or tasks.

(pp) "Program Maintenance Proposal" means a written proposal prepared by CRC, CSXT or NSR which describes specific Program Maintenance which the preparer of such proposal believes is necessary or desirable to maintain the SIR in a safe operating condition to permit or facilitate (i) the performance by CRC of its services pursuant to this Agreement, or (ii) the use of SIR by the Operators, and which specifies a budget for such Program Maintenance.

(qq) [Intentionally omitted.]

(rr) "Railcar" means, except as otherwise provided in the Accounting Plan, each railroad freight car, locomotive, caboose or other equipment (including RoadRailer® or comparable bimodal freight hauling equipment in the account of either Operator) furnished in substitution of railroad equipment, loaded or empty, which an Operator originates, terminates, switches or moves on or overhead to any point on the SIR, except that (i) a single standard flat car not exceeding 96 feet in length (excluding articulated flat cars) shall count as a single Railcar, (ii) freight rail cars consisting of articulated units bearing AAR Car Type Codes "Q" and "S" shall count as multiple Railcars based on the second (numeric) digit of the Car Type Code for such articulated units (by way of example, a car consisting of AAR Car Type Code "S566" would be counted as five Railcars) (or corresponding car type codes and digits if the AAR Car Type Codes should be modified at any time during the term of this Agreement), and (iii) a single unit of RoadRailer® equipment (or comparable bimodal freight hauling equipment in the account of either Operator) shall count as one-half (1/2) of a Railcar.

(ss) "Reimbursable Expenses" means the expenses shown on an Expense Statement, minus the revenues, if any, shown on such Expense Statement.

(tt) "Renewal Term" means the term of extension of this Agreement under *Section 14*.

(uu) "RoadRailer®" means bimodal freight hauling equipment manufactured by or under license from "RoadRailer®", a division of Wabash National Corporation, and capable of movement over the highway when pulled by a tractor and on the rails using locomotive power.

(vv) "Routine Maintenance" means day-to-day repairs to track, signals, structures and other fixed facilities that are not part of Program Maintenance.

(ww) "Severable Improvement" means a capital improvement which is not a Nonseverable Improvement.

(xx) "Staten Island Rights" means all tracks, lands, easements, rights of way, structures, facilities, appurtenances and rights related thereto, which CRC has the right to operate over pursuant to that certain Operating Agreement between New York City Economic Development Corporation and CSX Transportation, Inc., Norfolk Southern Railway Company and Consolidated Rail Corporation dated as of _____, 2006 ("SIOA").

(yy) [Intentionally omitted.]

(zz) “STB” means the Surface Transportation Board or, if there shall be no Surface Transportation Board, any federal agency which is charged with the function of approving combinations by rail carriers or persons controlling them, or of other arrangements between rail carriers, and granting exemptions from other laws with respect thereto or regulating other specific functions with respect to the context in which such term is employed or any successor entity thereof.

(aaa) “Switching and Yard Services” means the service of classifying and assembling trains for the account of an Operator in Jointly-Operated Facilities; movement of loaded or empty Railcars between yards and local industries; and switching trains and Railcars at yards, terminals and local industries.

(bbb) “Tax” or “Taxes” means taxes of any kind, levies or other similar assessments, customs, duties, imposts, charges or fees, including, without limitation, income taxes, gross receipts, ad valorem, excise, real or personal property, sales, use, payroll, withholding, unemployment, transfer and gains taxes or other governmental taxes imposed by or payable to the United States, or any state, local or foreign government or subdivision thereof, and in each instance such term shall include any interest, penalties or additions to tax attributable to such Tax or Taxes.

(ccc) “Temporary Services” means services provided by CSXT or NSR employees in the operation, maintenance or repair of any of the SIR on an emergency basis with the prior approval of the General Manager or senior CRC employee who is directly responsible for the operation or maintenance of such SIR.

(ddd) [Intentionally omitted.]

(eee) [Intentionally omitted.]

(fff) “Total Train Usage Percentage” means for an Operator for a particular time period, the percentage obtained by multiplying 100 by the quotient obtained by dividing (i) the sum of the total number of loaded and empty Railcars in the account of such Operator in CRC Trains and the total number of loaded and empty Railcars in the account of such Operator in Operator Trains, by (ii) the sum of the total number of loaded and empty Railcars in the accounts of both Operators in CRC Trains and the total number of loaded and empty Railcars in the accounts of both Operators in Operator Trains, during such period.

(ggg) [Intentionally omitted.]

(hhh) “Usage Statement” means a statement delivered by CRC pursuant to *Section 9(b)*.

(iii) “USOA” means the uniform system of accounts prescribed for class I

railroads by the STB or any successor federal agency that shall succeed to the functions of the STB in prescribing uniform systems of accounts for rail carriers; *provided*, that if there shall be no STB and no such federal agency, USOA shall mean such system of accounts as is generally maintained by rail carriers consistent with GAAP as applied in the rail industry.

Section 2. Management.

(a) CRC Board.

(i) The CRC Board shall manage the SIR.

(ii) The CRC Board may appoint a Board of Managers, a committee, a CRC officer or other persons to have such duties and authority with respect to the SIR as may be assigned to them from time to time by the CRC Board.

(iii) Any Board of Managers appointed by the CRC Board shall be comprised of an equal number of individuals (and their successors) nominated by CSXT and nominated by NSR.

(iv) The CRC Board shall remove from any Board of Managers (A) at the direction of CSXT, any person who was nominated by CSXT, and (B) at the direction of NSR, any person who was nominated by NSR.

(b) General Manager.

(i) The General Manager shall not at any time have been an employee of CSXT or NSR or any of their affiliates unless otherwise agreed to by both Operators, and shall be appointed by the CRC Board.

(ii) The General Manager shall manage and supervise the operation, maintenance and use of the SIR in accordance with directives and policies of the CRC Board and this Agreement, subject to the authority of the CRC Board, and through such CRC superintendents and other CRC executives as are appointed by the General Manager with the approval of the CRC Board. The General Manager shall report to the CRC Board. The General Manager shall perform his or her responsibilities on an impartial and nondiscriminatory basis as between CSXT and NSR.

(iii) The General Manager may be removed from office prior to the expiration of his or her term at any time by a majority of the CRC Board for any reason or for no reason. Upon the written request of CSXT or NSR to the CRC Board, the General Manager shall also be removed from office prior to the expiration of his or her term for serious misconduct, which shall mean conduct that would make it unreasonable to retain the General Manager, including but not limited to conduct such as (A) violation of applicable alcohol or drug use policies, (B) fraud, (C) embezzlement or other act of dishonesty against CRC, CSXT or NSR or any of their

customers or suppliers, (D) activities willfully undertaken by the General Manager which reflect adversely upon the reputation of CRC, CSXT or NSR, (E) refusal to perform or substantial neglect of the responsibilities assigned to the General Manager, (F) failure to perform his or her responsibilities on an impartial and non-discriminatory basis as between CSXT and NSR after 45 days' written notice from an Operator describing such failure, (G) any violation of any law or rule or regulation of any Governmental Entity which results in serious adverse consequences to CRC, CSXT or NSR, or (H) any material violation of any directive or policy of the CRC Board or any statutory or common law duty of loyalty to CRC. If a majority of the CRC Board in response to such a request of CSXT or NSR fails to direct the removal of the General Manager, the dispute may be submitted by either Operator for resolution by binding arbitration pursuant to *Section 13*, provided, however, that in any such arbitration to resolve a dispute under this *Section 2(b)(iii)*, the hearing shall commence no later than 30 days following the appointment of the arbitrator and the award shall be rendered no later than 30 days following the completion of the hearing.

(c) *Employees.* The General Manager and all persons who operate and maintain the SIR shall be employees of CRC, except for CSXT or NSR employees who provide Temporary Services and employees of Operators or independent contractors which provide services pursuant to contracts or arrangements in accordance with *Section 2(f)*.

(d) *CRC Responsibilities.* CRC shall be responsible for safely and efficiently operating, controlling and managing the use of the SIR, impartially as between CSXT and NSR in accordance with directives and policies of the CRC Board, and with responsible business practices which are consistent with those used by CSXT and NSR in the operation of their businesses, and are designed to achieve the lowest cost of the safe and efficient operation, use and maintenance of the SIR.

(e) *Impartiality.* CRC shall perform all of its obligations pursuant to this Agreement on an impartial and non-discriminatory basis as between CSXT and NSR, giving no preference to either of them in providing Switching and Yard Services, in the control of train dispatching over the SIR or in any other way whatsoever.

(f) *Independent Contractors.* CRC may, at least to the extent it may do so immediately prior to the date of this Agreement, procure the use of equipment or facilities owned by independent contractors, or services provided by independent contractors (using their own employees), with respect to the operation, maintenance and use of the SIR, including, without limitation, accounting, computer and other administrative services, and the furnishing of equipment and mechanical services. For purposes of this *Section 2(f)*, independent contractors may include CSXT or NSR.

Section 3. Operations.

(a) *Operator's Rights.* CRC hereby grants to each Operator full operating rights to operate its own trains (staffed by a road crew) and equipment, with its own crews and equipment and at its own expense, over any and all tracks included in the SIR, and to use all of

the SIR in connection with the operation of such trains or equipment, for the following purposes:

- (i) [Intentionally omitted];
 - (ii) Movement by such Operator of trains (staffed by a road crew) between a geographical location outside the SIR and an Operator's Facility or a Jointly-Operated Facility which is within the SIR;
 - (iii) Movement by such Operator of trains (staffed by a road crew) between a geographical location outside the SIR and local industries which are within the SIR;
 - (iv) [Intentionally omitted];
 - (v) Movement, handling, pick-up, set off, switching, transfer and interchange of Railcars, blocks of Railcars or trains (staffed by a road crew) to, from or at local industries, Operator's Facilities or Jointly-Operated Facilities, in connection with movements described in *Sections 3(a)(ii) and (iii)*, to the extent provided for in the Operating Plan agreed to and modified by the parties from time to time; and
 - (vi) Such other purpose as may be agreed upon by CRC, CSXT and NSR.
- (b) *Use.* The crews of each train operated by an Operator on the SIR shall be qualified under and shall comply with applicable laws and regulations as well as the safety and operating rules of CRC.
- (c) [Intentionally omitted.]
- (d) *Switching and Yard Services.*
- (i) At the request of and as agent for each Operator, CRC shall perform Switching and Yard Services required by such Operator within the SIR, including without limitation any such services which such Operator may be responsible for performing or having performed for a shipper or other Person.
 - (ii) Except as otherwise provided in *Section 3(a)*, and other than within an Operator's facility, neither Operator shall with its own equipment or with its own crews perform any Switching and Yard Service within the SIR for itself or for any other Person.
- (e) *Operating Protocols.* From time to time, NSR, CSXT and CRC may mutually establish SIR Operating Plans, General Dispatching Guidelines, Car Movement Guidelines, Switching/Blocking Requirements and other operating protocols and rules concerning operations within the SIR, for the purpose of assuring timely train operations,

fluid movement of all railcars, equal and impartial handling of Operators' trains and railcars, minimization in the number of empty cars in the SIR, and overall operating efficiency in the SIR. Any such Operating Protocols agreed upon by NSR, CSXT and CRC will be set forth as Exhibit A to this Agreement. The Operating Protocols may be modified only upon mutual agreement of all parties.

(f) *Freight Traffic To Remain in Account of Each Operator.* Switching and Yard Services and other services performed by CRC for either Operator under this Agreement shall be performed as agent for, and for the account of, such Operator. All freight traffic and Railcars handled within the SIR, including traffic and Railcars handled by CSXT or NSR pursuant to *Sections 3(a) and 3(c)*, and traffic and Railcars handled by CRC pursuant to *Sections 3(c) and 3(d)*, shall at all times remain in the waybill, car hire and revenue accounts of either CSXT or NSR.

(g) *Rates, Routes and Divisions.* Each Operator shall have exclusive and independent authority to establish all rates, charges, service terms, routes and divisions, and to collect all freight revenues, relating to freight traffic transported for its account to, from and within the SIR. CRC shall not participate or appear in any rates, routes or divisions relating to any freight traffic whatsoever to, from and within the SIR, and shall not be entitled to or responsible for any freight charges relating to such freight traffic. CRC shall not quote or establish any rate or service terms applicable to freight transportation services to, from and within the SIR, enter into transportation contracts with any Person (other than an Operator) for freight transportation services to, from and within the SIR, or undertake to perform any for-hire transportation services directly, in its own name or for its own account for any Person (other than an Operator). The transfer or exchange of freight traffic between CSXT and CRC, and between NSR and CRC, within the SIR shall not constitute an interchange of freight traffic or freight rail cars for purposes of determining rates, routes, divisions or interline settlements relating to any such freight traffic.

(h) *Shipper Bills.* Neither Operator shall inform the other or CRC of any rates or charges to shippers to which such Operator provides freight transportation services in the SIR, and no copies of any shipper bill of lading or waybill shall be given by such Operator to the other or to CRC except to the extent that such documents are exchanged between rail carriers in the usual course of interline shipments and documenting.

(i) *Service Responsibility.* Each Operator shall at all times be solely responsible for obtaining, supplying and routing Railcars other than locomotives, for all Railcar ownership costs (including per-diem charges and mileage allowances) and for providing service to its shippers within the SIR pursuant to its transportation contracts or other prices with its shippers, including interline accounting, and all car hire and demurrage or detention charges associated with Railcars in its account within the SIR.

(j) *Dispatching.* CRC shall, from local locations or a location agreed upon by CSXT and NSR, control the dispatching, scheduling and movement of, and Switching and Yard Services for, all trains (including Operator Trains and CRC Trains) over the SIR without any discrimination at any time in favor of or against either Operator, but in

accordance with written policies and priorities for categories of freight, type of Railcar, size of train and train destinations established from time to time by the General Manager and approved by the CRC Board to achieve the maximum efficiency and lowest aggregate SIR costs of CRC and the Operators.

(k) *Railcar Weighing.* All Railcars for the account of an Operator which originate or terminate on the SIR and which require weighing shall be weighed by and at the expense of such Operator or its customer, and at no cost to CRC.

(l) *Freight Claims.* The Operators shall agree among themselves on the most fair, practical and efficient arrangements for handling and administering freight loss and damage claims with the intent that (i) each Operator shall be responsible for losses occurring to lading either in its possession or in the possession of CRC for the account of such Operator, and (ii) the Operators shall follow relevant AAR rules and formulas in provided for the allocation of losses which are either undetermined origin or in Railcars handled in interline service by or for the account of both Operators.

(m) *Freight Car Repairs.* If any Railcars are bad ordered while on the SIR and must be set out from a CRC Train or Operator Train, CRC shall promptly return such Railcars to the Operator in whose account such Railcars reside in accordance with such Operator's instructions. CRC shall furnish, at such Operator's expense, required labor and material to perform, and shall perform, light repairs on such bad ordered Railcars as necessary to make such Railcars legal and safe for movement. CRC shall bill such Operator for the costs of such light repairs in accordance with the Field and Office Manuals of the AAR Interchange Rules in effect at the time such repairs are performed. CRC shall bill directly to and collect from the applicable Operator charges for repair items that, under the AAR Interchange Rules, are the responsibility of the Railcar owner and/or the handling line carriers. Each Operator may rebill charges for repair items that are the responsibility of the Railcar owner and/or the handling line carriers. If any such bad ordered Railcar cannot be made legal and safe for movement by the performance of light repairs, CRC shall, at such Operator's expense, arrange for appropriate removal of the affected Railcar in accordance with such Operator's instructions.

(n) *Train Services.* Actual costs incurred by CRC to provide special services (other than services otherwise provided for in this Agreement) at the request of an Operator with respect to trains, locomotives and Railcars for the account of such Operator, shall be paid by such Operator to CRC, provided that the costs and terms of similar special services rendered to each Operator shall be without discrimination between Operators as to cost and terms, giving due allowance to any differences in the costs of providing such services.

(o) *Wrecking Service.* Wrecking service or wrecking train service required in connection with services contemplated by this Agreement shall be provided by CRC (or its designee) as promptly as possible.

(p) *Admission of Third Parties.* Notwithstanding any other provision in this

Agreement, no party may permit any Person (other than a party hereto) to have access to, operate over or use the SIR without the prior approval of all parties, which approval may be given or refused in the sole discretion of each party.

Section 4. Equipment and Properties.

(a) *Procurement.* CRC shall procure, operate and maintain all equipment, real property rights and improvements thereon which are reasonably required for (i) CRC to operate the SIR, and (ii) the Operators to move trains over the SIR, in each case in accordance with this Agreement.

(b) *Contribution of Locomotives by Operators.* Upon reasonable request by the General Manager, the Operators shall furnish to CRC, through full-service lease or other mutually satisfactory arrangements, locomotives reasonably required by CRC for the performance of its obligations under this Agreement. The respective obligations of each Operator to furnish such locomotives shall be based, insofar as reasonably practicable, upon the Operator's CRC Train Usage Percentage during the calendar month preceding such request for the SIR in which such locomotives are needed by CRC. It is the parties' intention that (i) the arrangements pursuant to which such locomotives are furnished by either Operator to CRC shall provide that heavy maintenance, repair and overhaul shall be the responsibility of such Operator, (ii) locomotives furnished by either Operator to CRC may, in order to permit maintenance, repair and overhaul of such locomotive units, be exchanged for other locomotive units furnished by such Operator, and (iii) the respective obligations of each Operator to furnish such locomotives upon request by the General Manager shall be adjusted on at least a monthly or more frequent basis.

(c) *Locomotive Service and Repairs.* At the request of an Operator, CRC shall furnish required labor and material to perform, and shall perform, fueling and servicing of any Operator's locomotive, as well as light repairs on any Operator's locomotive as necessary to make such locomotive legal and safe for movement CRC shall bill such Operator (or other owner of such locomotive) for the costs of such fueling, servicing and light repairs in accordance with industry practice in effect at the time such fueling, services or repairs are performed. If any such locomotive cannot be made safe for movement by the performance of light repairs, CRC shall, at the expense of such Operator (or other owner of such locomotive), arrange for appropriate removal of such locomotive in accordance with such Operator's instructions.

Section 5. Maintenance.

(a) *Routine Maintenance.*

(i) CRC shall be responsible for Routine Maintenance when necessary or desirable to maintain the SIR in a safe operating condition, and to permit and facilitate (A) the performance by CRC of its obligations pursuant to this Agreement, (B) the use of the SIR by the Operators in accordance with this Agreement and (C) the SIOA.

(ii) CSXT or NSR, directly or through their respective affiliates, may perform the work which CRC is obligated to perform under the SIOA when (A) CRC does not possess the skills needed for such work, (B) CRC lacks the necessary employees to do such work in a timely fashion, or (C) CRC does not possess the equipment needed to do such work. CRC and the party performing the work shall agree to a reasonable fee for such work prior to performance. CRC, CSXT and NSR may agree to have additional work performed either by CSXT, NSR or their affiliates.

(b) *CRC Program Maintenance.*

(i) The General Manager shall prepare and submit to the CRC Board a Program Maintenance plan concurrently with the submission of an Operating Budget and the Capital Expenditure Budget to the CRC Board.

(ii) Any of CRC, CSXT or NSR may at any time deliver a Program Maintenance Proposal to the other two of them and to the General Manager and each member of the CRC Board.

(iii) The CRC Board shall either (A) approve any or all of such Program Maintenance Proposals and plan with such changes as it deems appropriate, include the costs thereof in a pending or amended Capital Expenditure Budget, and direct the General Manager to cause the maintenance described in approved Program Maintenance Proposals or plan to be performed in accordance with *Sections 5(b)(iv) and (v)*, or (B) disapprove any or all of such Program Maintenance Proposals or plan.

(iv) Program Maintenance shall be the responsibility of CSXT and NSR pursuant to contracts or arrangements with CRC, and CRC shall not perform Program Maintenance, but may contract with others to do so when availability or cost make the use of others the appropriate business decision.

(v) CRC shall select, to perform each Program Maintenance project or program, the Operator which CRC reasonably determines will perform such project or program at the least cost to CRC consistent with safe and efficient operations, and taking into account scheduling considerations, based on written proposals submitted by each Operator.

(c) *Maintenance Standards.* Unless otherwise authorized by the CRC Board, the General Manager shall prepare and submit to the CRC Board proposals (including the Program Maintenance plan submitted pursuant to *Section 5(b)*) for the performance of such Routine Maintenance and Program Maintenance as is reasonably necessary to keep and maintain the SIR substantially in their condition as of the date of this Agreement and in accord with the SIOA. If the CRC Board fails either to approve or disapprove by majority vote any such proposal within 45 days after it was submitted to the CRC Board, the disagreement over the propriety or need for any of the Routine Maintenance or Program Maintenance included in such proposal may be submitted by either Operator for resolution by

binding arbitration pursuant to *Section 13*.

Section 6. Capital Improvements. Except as provided in *Section 5*, all capital improvements involving the SIR shall be governed by the following provisions:

(a) *Proposed Projects.* Either Operator, CRC or the General Manager may propose to the CRC Board from time to time capital improvement projects. Each such project shall be reviewed by the CRC Board, which may approve or disapprove by majority vote, or fail to approve, such projects.

(b) *CRC Board Approved Projects.* Either of two options for initial funding and reimbursement by the Operators may be determined by the CRC Board at the time it approves a particular project. In the event the CRC Board does not specify the method of initial funding and reimbursement in the resolution authorizing the project, then Option One described below shall be the method of such funding and reimbursement.

(i) Option One: Each Operator shall be responsible for an equal share of the initial budgeted funding of each capital improvement project which has been approved by the CRC Board and is included in an approved Capital Expenditure Budget, except as provided in *Section 6(c)*. A final accounting shall be made to adjust the initial budgeted funding to the actual project cost as specified in the Accounting Plan.

(ii) Option Two: CRC shall provide the funding for the proposed capital improvement project, except as provided in *Section 6(c)*.

The options for the method of reimbursement are set forth in *Section 9(e)(ii)*.

(c) *Nonseverable Improvement Projects.*

(i) At the written request of an Operator delivered to the other, each Operator shall, within 45 days of the delivery of such request, submit to an arbitrator in accordance with *Section 13* a written proposal with respect to a Nonseverable Improvement project which was neither approved nor disapproved by majority vote by the CRC Board within 45 days after such project was proposed to the CRC Board (A) describing any changes which such Operator proposes be made to such project and specifying a schedule, budget and allocations between the Operators of initial capital costs of such Nonseverable Improvement, or (B) proposing that it not be made.

(ii) The arbitrator receiving the proposals referred to in *Section 6(c)(i)* (A) shall consider (1) the degree, if any, to which the construction, operation and use of such Nonseverable Improvement would impair or interfere with the use of the SIR by CRC or either Operator, or conflict with any pending capital improvements included in an approved Capital Expenditure Budget, and (2) the budget and allocations between the Operators of initial capital costs of such Nonseverable Improvement as proposed by each Operator, and (B) shall determine

within 45 days of such receipt which of such proposals shall be implemented, or that such Nonseverable Improvement shall not be made, and the CRC Board shall approve any proposal which such arbitrator determines shall be implemented.

(d) *Severable Improvement Projects.*

(i) Each Operator shall have the unilateral right to construct and exclusively fund any Severable Improvement which was not approved by the CRC Board.

(ii) Each Severable Improvement funded exclusively by an Operator shall be used exclusively by that Operator, which shall be solely responsible for maintaining such Severable Improvement at its own expense, until such time that the other Operator gives written notice that it desires also to use such Severable Improvement, stating the amount which such other Operator is prepared to pay to the Operator which initially funded such Severable Improvement for the right to use such Severable Improvement.

(iii) If the Operators are unable to agree on the amount of such payment within 45 days after the notice referred to in *Section 6(d)(ii)* was given, then at the written request of an Operator delivered to the other after 45 days but before 60 days after such notice was given, each Operator shall, within 15 days of the delivery of such request, submit to an arbitrator in accordance with *Section 13* a written statement setting forth the proposed payment by the second Operator, and the arbitrator shall within 45 days of such receipt determine which of such proposed amounts shall apply, which shall be binding on both Operators and paid promptly.

(iv) Such Severable Improvement shall become a Nonseverable Improvement at the time such second Operator pays the amount so determined and, thereafter, maintenance and other costs associated with the operation of such Improvement shall be apportioned between the Operators as provided in this Agreement.

(e) *Capital Improvements on the SIR.* Upon completion, all capital improvements approved by the CRC Board and all Nonseverable Improvements shall become part of the SIR, subject to all provisions of this Agreement, free and clear of all Operator items.

(f) *Title to Severable Improvements.* Except as provided by the SIOA, each Operator shall retain title to all Severable Improvements exclusively funded by such Operator. At any time during the term of this Agreement, an Operator may remove (at its sole expense) any Severable Improvement which it exclusively funded, provided that such Operator has repaired (at its sole expense) any damage to the SIR caused by such removal and has restored the SIR substantially to its condition at the time such Severable Improvements were made. In the event an Operator shall not have removed any Severable Improvement to which the Operator shall have title prior to the expiration or termination of this Agreement, title to such Severable Improvement shall vest in CRC, free and clear of all

Operator liens, upon such expiration or termination.

(g) *Noninterference.* The construction, operation and use of Severable Improvements by an Operator shall not impair or interfere with the use of the SIR by CRC or the other Operator, nor shall any Severable Improvement conflict with any pending capital improvements included in an approved Capital Expenditure Budget.

(h) *Switch Connections.* CRC shall, upon the written request of one or both Operators, provide for switch and turnout connections from SIR tracks to a private sidetrack owned by a shipper or other Person, if such request:

(i) includes the commitment of the Operator or both Operators making such request, or

(ii) is accompanied by a written undertaking from such shipper or other Person,

in each case satisfactory to CRC, to pay to CRC all costs incurred from time to time by CRC to provide for such switch and turnout connections within 30 days after it delivers a bill for such costs to such Operator, Operators, shipper or other Person.

(i) *Adjacent Improvements.*

(i) In the event an Operator constructs, acquires or funds the cost of an Adjacent Improvement (whether or not such Adjacent Improvement is ultimately owned by such Operator), the other Operator shall be entitled to share usage of such Adjacent Improvement by giving written notice stating the amount which such other Operator is prepared to pay to the first Operator for such right. If the Operators are unable to agree on the amount of such payment within 45 days after such notice was given, then at the written request of an Operator delivered to the other after 45 days but before 60 days after such notice was given, the matter shall be submitted for resolution by binding arbitration pursuant to *Section 13* and the provisions of *Section 6(d)(iii)* shall apply to determine the amount of such payment.

(ii) After the second Operator pays the amount so determined, if the first Operator owns or has a property interest in the Adjacent Improvement, the provisions of this *Section 6* shall be applied as if such improvement were a Nonseverable Improvement. If a shipper or another Person unrelated to the first Operator owns such Adjacent Improvement, the second Operator shall be entitled to share fully the rights of the first Operator in connection with such Adjacent Improvement in consideration of the initial payment.

Section 7. Accounting.

(a) *Books of Record and Account.* CRC shall keep proper books of record and account, in which full and correct entries shall be made of all CRC transactions, costs,

expenses and revenues in accordance with GAAP and the USOA, as modified by the Accounting Plan. All expense and revenue transactions related to the SIR shall be readily identifiable by distinct accounting codes.

(b) *Financial Statements.* CRC shall deliver to each Operator (i) within 30 days after the end of each calendar month, a summary income statement and a summary balance sheet showing as of the last day of and for such calendar month, major categories of CRC revenue, expense, assets and liabilities, (ii) within 30 days after the last day of each CRC fiscal quarter, interim financial statements as of and for the fiscal quarter ended on such day, similar to statements described in Rule 10-01 of Regulation S-X under the Securities Exchange Act of 1934, as amended, as modified by the Accounting Plan, and (iii) within 30 days after the last day of each CRC fiscal year, statements of income and cash flow and a balance sheet as of and for the fiscal year ended on such day, prepared in accordance with GAAP and USOA, as modified by the Accounting Plan.

Section 8. Costs and Budgets.

(a) *CRC Costs.* CRC shall pay (and, except for Excluded Taxes, CSXT and NSR shall, pursuant to *Section 9*, reimburse CRC for) all of the costs and expenses to operate and maintain the SIR, including but not limited to all Taxes and assessments, licenses, permits and any other governmental authorizations required to own, operate and maintain the SIR, the principal of and interest and premium, if any, on, and all other costs of, its indebtedness and all other costs of its capital.

(b) *Employee Cost Reimbursement.* CRC shall reimburse CSXT and NSR for the wages, *pro rata* portion of fringe benefits, other direct employment costs (including additives) and other actual employee-related costs of any CSXT or NSR employee, respectively, who provides Temporary Services.

(c) Capital Expenditure Budget.

(i) The General Manager shall prepare and submit to each member of the CRC Board at least 30 days prior to the beginning of each CRC fiscal year, a Capital Expenditure Budget for such fiscal year, specifying for such year the schedule of Program Maintenance and SIR capital improvements to be performed and constructed for the benefit of both Operators during such fiscal year and the months therein during which such expenditures are proposed to be made, for approval, or modification and approval, by the CRC Board.

(ii) The General Manager shall not permit any capital expenditure to be made by CRC, CSXT or NSR except in accordance with the Capital Expenditure Budget in effect from time to time, Severable Improvements exclusively funded by an Operator and emergency capital expenditures made (A) to preserve, or to mitigate a serious diminution in, the value and usefulness of a SIR to CRC, CSXT and NSR, or (B) to prevent or mitigate a serious disruption in the operation and use of the SIR by or for CRC, CSXT or NSR.

(iii) Any Capital Expenditure Budget may be amended in writing at any time by the CRC Board.

(d) *Operating Budget.*

(i) The General Manager shall prepare and submit to each member of the CRC Board at least 30 days prior to the beginning of each fiscal year of CRC, an Operating Budget for such fiscal year showing the budget amounts of revenues and expenses for each month during such fiscal year, for approval, or modification and approval, by the CRC Board.

(ii) The General Manager shall use all reasonable efforts to prevent CRC expenses with respect to the SIR for a period from exceeding the amounts shown on the Operating Budget for such period.

(iii) The General Manager shall give prompt written notice to each member of the CRC Board of any actual or, in the judgment of the General Manager, probable, material change in the revenues, expenses or working capital requirements shown on the Operating Budget for any period.

(iv) Any Operating Budget may be amended in writing at any time by the CRC Board.

Section 9. Cost Sharing.

(a) *Accounting Plan.* The parties shall develop and implement a written plan of accounting containing a detailed description, by category of cost and location, of the costs associated with the management and operation of the Shared Assets Area and the method by which such costs shall be fairly and properly apportioned among the parties. Such plan of accounting may include separate accounting and sharing of costs, and shall conform to the following general principles:

(i) [Intentionally omitted.]

(ii) Locomotive ownership, lease, fueling, light repair and servicing costs incurred by CRC within the SIR (except costs incurred by CRC and charged directly to an Operator pursuant to *Section 4(c)*) shall be apportioned between the Operators on the basis of the CRC Train Usage Percentages;

(iii) Crew compensation and other crew costs incurred by CRC within the SIR with respect to CRC Trains shall be apportioned between the Operators on the basis of the CRC Train Usage Percentages;

(iv) General and administrative, supervisory and overhead expenses incurred by CRC within the SIR or for functions related to the SIR shall be

apportioned between the Operators on the basis of the CRC Train Usage Percentages;

(v) Dispatching and train control costs (including, without limitation, labor, equipment, materials and maintenance expenses) incurred by CRC with respect to the SIR shall be apportioned between the Operators on the basis of the CRC Train Usage Percentages;

(vi) [Intentionally omitted.]

(vii) Damage paid by CRC pursuant to *Section 11(c)* shall be apportioned between the Operators in accordance with *Section 11(b)*;

(viii) All other costs incurred by CRC with respect to the SIR (except Taxes and insurance) shall be apportioned between the Operators on the basis of the Total Train Usage Percentages;

(ix) Taxes (other than Excluded Taxes) incurred by CRC with respect to the SIR shall be apportioned between the Operators on the basis of the Operator's Expense Percentages for the period to which such Taxes relate; and

(x) Insurance costs incurred by CRC with respect to the SIR shall be apportioned between the Operators on the basis of the Operator's Expense Percentages for the period to which such insurance costs relate.

If the parties are unable to agree on the terms and provisions of the Accounting Plan, such disagreement may be submitted by either Operator for resolution by binding arbitration pursuant to *Section 13*.

(b) *Usage Statement.* CRC shall deliver to each Operator prior to the last day of each calendar month, a written statement showing for the prior Billing Month:

(i) the total number of loaded and empty Railcars in the account of each Operator in CRC Trains which performed Switching and Yard Services or operated directly between customer facilities in the SIR;

(ii) the total number of loaded and empty Railcars moved by or for such Operator in Operator Trains which operated overhead or directly to Jointly-Operated Facilities, Operators' Facilities or customer facilities in the SIR ;

(iii) the calculation of the CRC Train Usage Percentage and the Total Train Usage Percentage for each Operator for the SIR ,

and (A) all Railcars in a train shall be deemed to be on the SIR when the first or last Railcar of such train is on the SIR and (B) each time that a Railcar is removed from or added to a train in the SIR shall constitute a separate movement of such Railcar.

(c) *Expense Statement.* Concurrently with the delivery of each Usage Statement to the Operators, CRC shall deliver to the Operators a statement showing (1) the expenses incurred by CRC to operate and maintain the SIR during the Billing Month, (ii) the revenues, if any, derived by CRC from the operation of the SIR during such Billing Month, and (iii) the Reimbursable Expenses for such Billing Month, in each case computed in accordance with GAAP and the USOA, as modified by the Accounting Plan. In addition, pursuant to the SIOA, CRC is required to pay New York Economic Development Corporation a per car and per container fee in consideration of the right to operate the SIR each month. Each of CSXT and NS shall provide CRC each month a statement of loaded railcars and containers shipped to/from the SIRR in such a manner and in such form as to permit CRC to pay NYEDC in accordance with the SIOA. CRC shall then bill CSXT and NS, individually, to be reimbursed for such payments due under the SIOA to the NYEDC each month.

(d) *Capital Expenditure Statement.* Concurrently with the delivery of each Usage Statement to the Operators, CRC shall deliver to the Operators a statement showing the estimated Budgeted Capital Expenditures for the calendar month immediately succeeding the calendar month in which such statement is delivered.

(e) *Bills.* Concurrently with the delivery to the Operators of a Usage Statement for a Billing Month, CRC shall deliver to each Operator a bill (a "Bill") showing for such Billing Month:

(i) one hundred and two percent (102%) of the amount of each Reimbursable Expense apportioned to such Operator for such Billing Month under the Accounting Plan;

(ii) With respect to Budgeted Capital Expenditures approved by the CRC Board:

(A) If Option One, as described in *Section 6(b)*, is used for the initial funding of the particular capital improvement project, then one-twelfth (1/12) of fifty percent (50%) of the annual amount of the Budgeted Capital Expenditures for the particular capital improvement project; or

(B) If Option Two is used for the initial funding of the particular capital improvement project, then one hundred and two percent (102%) of fifty percent (50%) of the monthly book depreciation for the particular capital improvement project.

(iii) the monthly reimbursement owed to CRC by CSXT and NSR for payments due under the SIOA to the NYEDC.

(f) *Payment.* Each Operator shall pay to CRC the amount shown on each Bill as being payable by such Operator, on or before the 30th day after the date of such Bill regardless of whether or not such Operator disputes the accuracy of any amount or

calculation shown on such Bill. (Are we ok with 60 days?)

(g) *Disputed Bills.*

(i) Any dispute by an Operator of the accuracy of any amount or calculation shown on any Bill shall be described and specified in reasonable detail in a Dispute Letter from such Operator to CRC and the other Operator within two years after the date of such Bill.

(ii) Any amounts or calculations shown on any Bill which are not disputed in accordance with *Section 9(g)(i)* shall conclusively be deemed to be accurate and shall be binding on each Operator and CRC.

(iii) CRC and both Operators shall promptly endeavor to resolve the disputes described in each Dispute Letter, and if they fail to agree to a resolution of such disputes within 60 days of the delivery of such Dispute Letter to CRC, then the firm of independent public accountants which has been engaged as auditors for CRC shall be engaged to resolve such disputes in accordance with GAAP and the USOA, as modified by the Accounting Plan, and the written resolution of such disputes signed by such accounting firm shall be binding on each Operator and CRC.

(iv) Any adjustments to Bills which result from the resolution of Dispute Letter disputes shall be reflected as charges or credits on the first Bills delivered by CRC to the Operators after such disputes have been resolved.

(v) The fees in connection with the resolution of any Dispute Letter disputes of the accounting firm which has been engaged as auditor for CRC shall be paid fifty percent (50%) by CSXT and fifty percent (50%) by NSR.

Section 10. Access. CRC shall give to each Operator during normal CRC Administrative Office business hours, access to inspect and make copies of any and all books of record and accounts relating to this Agreement, all of which shall be maintained by CRC at the CRC Administrative Office.

Section 11. Liability. Except as otherwise provided in *Section 3(l) (Freight Claims)* and *Section 11(g) (Substance Abuse Exceptions)*, the responsibility between and among CRC, CSXT and NSR for all Damage arising out of, incidental to or occurring in connection with this Agreement shall be apportioned without consideration of fault or negligence of any kind or degree in accordance with the remaining provisions of this *Section 11*. The provisions of this *Section 11* are intended to inure only to the benefit of the parties hereto and their corporate successors and affiliates, and not to create any benefits for any third parties.

(a) *Operators' Sole Responsibility.* Except as otherwise provided in *Section 11(g) (Substance Abuse Exceptions)*, each Operator shall assume and bear all

responsibility for Damage to its own trains, locomotives and equipment, to Railcars and lading in its possession or being handled for its account, for the death of or injury to its own employees and for a portion of the liability arising out of *Section 11.4* or *Section 18.1* of the SIOA for incidents involving its own trains, locomotives, equipment, Railcars and lading in its possession or being handled for its account measured by a ratio of: (i) the locomotives and Railcars in its possession or being handled for its account involved in the incident giving rise to such liability ("NSR Equipment" OR "CSXT Equipment," as the case may be, as the numerator) to (ii) the total number of locomotives and Railcars involved in the incident giving rise to such liability (as the denominator).

(b) *Operators' Joint Responsibility.*

(i) *Damages Borne Equally.* Except as otherwise provided in (1) *Section 11(a) (Operators' Sole Responsibility)*, (2) *Section 11(c)(i) (CRC Damages Generally)*, (3) *Section 11(c)(ii)(B) (No Reallocation for Insurance)*, (4) *Section 11(f) (Specified Level Damages)*, and (5) *Section 11(g) (Substance Abuse Exceptions)*, and subject to *Section 11(c)(ii)(A) (Net of Insurance)*, responsibility for all Damage shall be borne equally by the Operators, with each being liable for one-half (1/2) of the Damage.

(ii) [Intentionally omitted.]

(iii) Except as otherwise provided in (1) *Section 11(a) (Operators' Sole Responsibility)*, (2) *Section 11(c)(i) (CRC Damages Generally)*, (3) *Section 11(c)(ii)(B) (No Reallocation for Insurance)*, and (4) *Section 11(g) (Substance Abuse Exceptions)* and subject to *Section 11(c)(ii)(A) (Net of Insurance)*, all Damage shall be apportioned between the Operators in proportion to their respective Total Train Usage Percentages on the SIR for the 12 calendar month period immediately preceding the incident giving rise to such Damage.

(c) *CRC Responsibility – Allocation and Insurance.*

(i) *CRC Damages Generally.* Except as otherwise provided in this *Section 11(c)*, all Damages incurred by CRC shall be CRC expenses, allocated as provided in *Section 11(b) (Operators' Joint Responsibility)*, and included in Expense Statements charged to the Operators.

(ii) (A) *Net of Insurance.*

(1) Except with regard to Damages allocated pursuant to *Section 11(a)*, notwithstanding any other provision in this Agreement (but subject to *Section 11(c)(ii)(B) (No Reallocation for Insurance)*) all Damages (including without limitation, loss or destruction of, or damage to, CRC's own property) charged to the Operators, under the Expense Statements or otherwise, shall be net of any CRC insurance. It is the intent of the parties (a) for CRC to look first to any

insurance proceeds available to it before attempting to recover any such Damages from the Operators and (b) for the Operators' obligation to make direct payment to CRC not to include any obligation to make direct payment for any Damages covered by insurance procured by or on behalf of CRC.

(2) If and to the extent that CRC is an insured under, or otherwise provided coverage under, an insurance policy or policies each of which provides coverage for both CRC and one Operator but not the other Operator, and regardless of whether two or more of these policies shall be in existence or have different deductible-retention amounts and/or limits of recovery, then the amount of insurance proceeds deemed "available" under *Section 11(c)(ii)(A)(1)* to which CRC shall look before either Operator shall have any obligation for direct payment shall, as to each Operator, be the maximum available limit of the insurance providing coverage for both that Operator and CRC.

(B) *No Reallocation for Insurance.* When part of the apportioned Damage will be satisfied from insurance coverage under this *Section 11(c)*, and part paid directly by the Operator, the insured portion of the Damage shall be apportioned among or between CRC and the Operators (and consequently between or among their insurers) in the same manner and amounts as it would have been apportioned if the loss were not net of insurance. If any such allocation results in one party hereto suffering a greater uninsured loss than the other(s) because of differing deductibles or self-retentions, that difference in coverage shall not be a basis for any reapportionment or reallocation of Damage.

(d) *Process.* Each Operator shall be responsible for the payment, handling, administration and disposition of all Damage for which it bears exclusive responsibility under *Section 11(a) (Operators' Sole Responsibility)*, and both Operators shall have joint responsibility for the payment, handling, administration and disposition of all Damage for which they are jointly responsible under *Section 11(b) (Operators' Joint Responsibility)* and *Section 11(c) (CRC Responsibility - Allocation and Insurance)*. In assigning joint responsibility to both Operators, it is not the intent of this Agreement that the Operators will actually act jointly, but rather that the Operators will agree between themselves on the most practical and efficient arrangements for handling, administering, and disposing of Damage for which they bear joint responsibility, with the objective of eliminating unnecessary duplication of effort and minimizing overall costs.

(e) *Indemnification.* Each party to this Agreement covenants and agrees to (i) fully indemnify and save harmless the other parties to this Agreement from and against any payments which are the responsibility of such party under this Agreement, and all expenses, including attorneys' fees and expenses and other expenses of any court or regulatory proceeding, incurred by such other parties in defending any claim that they are liable for such payments, and (ii) defend such other parties against such claims with counsel selected by such party and

reasonably acceptable to such other parties.

(f) Notwithstanding anything to the contrary in Sections 11(a), (b) and (c), above, when any damage to or destruction of the environment, including without limitation land, air, water, wildlife, and vegetation, occurs with NSR Equipment and/or CSXT Equipment involved, then, as between themselves, the Parties agree that (i) NSR shall be solely responsible for any damage or destruction to the environment or to third parties which results solely from a substance transported in NSR Equipment from which there was a release, (ii) CSXT shall be solely responsible for any damage or destruction to the environment and to third parties which results solely from a substance transported in CSXT Equipment from which there was a release, and (iii) NSR and CSXT shall be responsible, in proportion to the total number of pieces of Equipment of each of NSR and CSXT from which there was a release, for any damage or destruction to the environment or to third parties which results solely from one or more substances transported in both NSR Equipment and CSXT Equipment from which there was a release.

(g) *Substance Abuse Exceptions.* Each Operator shall assume and bear all responsibility for Damage to the extent caused by acts or omissions of any of its employees while under the influence of drugs or alcohol, and *Section 11(b)(Operators' Joint Responsibility)* shall not apply to any such Damage.

(h) [Intentionally omitted.]

(i) *Damages.* As used in this *Section 11* only, the term "Damage(s)" shall exclude:

(i) Operator Consequential Damages arising out of incidents giving rise to such Damages that involve an Operator's own trains, locomotives, equipment, Railcars and lading in said Operator's possession or being handled for its account (which are always borne by such Operator which sustained them); and

(ii) any claim by any party, in its own right, against any other party for exemplary or punitive damages, but not for allocation under this *Section 11* of exemplary or punitive damages claimed against that party by a third person not a party hereto.

With regard to exemplary and punitive Damages the parties acknowledge and agree that, with regard to the subject of this Agreement, the intent and agreement of the parties is that no party shall bring or recover any claim for exemplary or punitive damages, in its own right, against any other party, but that any party will allocate, in accordance with this *Section 11*, exemplary or punitive Damages from any claim against it by a third person not a party hereto.

Section 12. No Partnership. Nothing in this Agreement shall be construed to establish a partnership or joint venture between or among CRC, CSXT or NSR or any of their affiliates or associates.

Section 13. Arbitration. Any dispute, controversy or claim (or any failure by the parties to agree on a matter as to which this Agreement expressly or implicitly contemplates subsequent agreement by the parties, except for matters left to the sole discretion of a party) arising out of or relating to this Agreement, or the breach, termination or validity hereof, shall be finally settled through binding arbitration by a panel of three, disinterested arbitrators in accordance with the Commercial Arbitrator Rules of the American Arbitration Association. The arbitrators shall be jointly selected by the parties but, if the parties do not agree on a panel of arbitrators within 30 days after demand for arbitration is made by a party, they shall request that the entire panel of arbitrators be designated by the American Arbitration Association. A decision and award of a majority of the panel of arbitrators shall be final, binding and conclusive upon the parties. Each party to the arbitration shall pay the compensation, costs, fees and expenses of its own witnesses, experts and counsel. The compensation and any costs and expenses of the arbitrators shall be borne equally by the parties. The arbitrators shall have the power to require the performance of acts found to be required by this Agreement, and to require the cessation or nonperformance of acts found to be prohibited by this Agreement. The arbitrators shall not have the power to award consequential or punitive damages. Judgment upon the award rendered may be entered in any court having jurisdiction thereof, which court may award appropriate relief at law or in equity. All proceedings relating to any such arbitration, and all testimony, written submissions and award, of the arbitrators therein, shall be private and confidential as among the parties, and shall not be disclosed to any other Person, except as required by law and except as reasonably necessary to prosecute or defend any judicial action to enforce, vacate or modify such arbitration award.

Section 14. Term. This Agreement shall become effective as of the date first above written and shall remain in effect until the termination date of the SIOA.

Section 15. Force Majeure. The obligations, other than payment obligations, of the parties to this Agreement shall be subject to force majeure (which shall include strikes, riots, floods, accidents, Acts of God, and other causes or circumstances beyond the control of the party claiming such force majeure as an excuse for non-performance), but only as long as, and to the extent that, such force majeure shall prevent performance of such obligations.

Section 16. Entire Agreement. This Agreement and the SIOA constitute the entire agreement and supersede all other prior agreements and understandings, both written and oral, among the parties with respect to the subject matter hereof.

Section 17. Amendment and Waiver. Any amendment to this Agreement must be in writing and executed and delivered by CRC, CSXT and NSR, subject to any jurisdiction of the STB. Any waiver of any term or provision of this Agreement must be in writing and executed and delivered by the party entitled to enforcement of such term or provision.

Section 18. Severability. If any term, provision, covenant or restriction of this Agreement is held by a court of competent jurisdiction or other authority to be invalid, void, unenforceable or against its regulatory policy, such provision is intended to be ineffective only

to the most limited extent possible in such context and the remainder of the terms, provisions, covenants and restrictions of this Agreement shall remain in full force and effect and shall in no way be affected, impaired or invalidated.

(a) *Entitlement to Certain Remedies.* Each party acknowledges and agrees that the other parties would be irreparably damaged in the event any of the provisions of this Agreement were not performed by it in accordance with their specific terms or were otherwise breached. It is accordingly agreed that each party shall be entitled to an injunction or injunctions to prevent breaches of such provisions and to specifically enforce such provisions, in addition to any other remedy to which such party may be entitled, at law or in equity.

(b) *Preclusion of Certain Remedies.* In no event shall any party be liable to the other parties for any consequential, indirect, incidental, punitive or other similar damages including, but not limited to, lost profits for any breach or default, or any act or omission arising out of or in any way relating to this Agreement, under any form or theory of action whatsoever, whether in contract, tort or otherwise. The foregoing is not intended to alter or limit the allocation of responsibility for Damage as provided in *Section 11*.

Section 20. Interpretation. This Agreement was drafted jointly by CSXT and NSR, each of which was advised by its own counsel and other advisors concerning all of the terms and provisions hereof, accordingly, any ambiguity herein should not be construed in favor of or against any of them.

Section 21. Headings. Headings of Sections and paragraphs in this Agreement are for reference purposes only and shall not affect in any way the meaning or interpretation of any term or provision of this Agreement.

Section 22. Parties. This Agreement shall inure to the benefit of and be binding upon CRC, CSXT and NSR and any successor of any of them by operation of law, and any assignee agreed to by them in accordance with *Section 23*, and nothing in this Agreement is intended or shall be construed to give any other Person any legal or equitable right, remedy or claim under or with respect to this Agreement or any term or provision hereof.

Section 23. Assignment.

(a) *Limitation.* Except as provided in *Section 23(b)*, neither this Agreement (including the documents and instruments referred to herein) nor any of the rights, interests or obligations hereunder, shall be assigned by any party, including by operation of law, without the prior written consent of the other parties (except to a controlled subsidiary), which consent may be given or refused in the sole discretion of each party.

(b) *Successor.* Any party without the consent of the other parties may assign all of its rights and obligations under this Agreement only to any successor in the event of a merger, consolidation, sale of all or substantially all its assets (but only if such sale

includes all routes and lines owned by such party to access the SIR), if such assignee executes and delivers to the other parties hereto an agreement reasonably satisfactory in form and substance to such other party under which such assignee, which is reasonably satisfactory to the other party, assumes and agrees to perform and discharge all the obligations and liabilities of the assigning party; *provided* that any such assignment shall not relieve the assigning party from the performance and discharge of such obligations and liabilities.

Section 24. Notices. Any notice given by CRC, CSXT or NSR to the others under this Agreement shall be deemed delivered on the date sent by registered mail, or by such other means as they may agree, and shall be addressed to them as follows:

(A) If to CSXT:

Executive Vice President and Chief Operating Officer
CSX Transportation, Inc.
500 Water Street, J120
Jacksonville, Florida 32202

(B) If to NSR:

Senior Vice President Operations
Norfolk Southern Railway Company
Three Commercial Place
Norfolk, Virginia 23510-2191

(C) If to CRC:

President and Chief Operating Officer
Consolidated Rail Corporation
2001 Market Street, 8th Floor
Two Commerce Square
Philadelphia, Pennsylvania 19103-7044

And each of them may from time to time change its address in this *Section 24* by written notice delivered to the others.

Section 25. Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the Commonwealth of Virginia, without regard to principles of conflicts of laws.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed in counterparts by their duly authorized officials as of the day first above written.

CSX TRANSPORTATION, INC.

By: _____

Title: _____

NORFOLK SOUTHERN RAILWAY COMPANY

By: _____

Title: _____

CONSOLIDATED RAIL CORPORATION

By: _____

Title: _____