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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34319

CONSOLIDATED RAIL CORPORATION --
DECLARATORY ORDER PROCEEDING



AT&T COMMUNICATIONS, INC.'S NOTICE OF COURT ACTION,
STATEMENT OF THE CASE AND SUGGESTION FOR FUTURE PROCEEDINGS

AT&T Communications, Inc. ("AT&T") respectfully submits this Notice of Court Action, Statement of the Case and Suggestion for Future Proceedings.

I. Action by the U.S. District Court of the Eastern District of Pennsylvania

On September 29, 2003, the District Court entered a Memorandum Opinion and Order denying Conrail's motion to dismiss, ruling that it may exercise subject matter jurisdiction over AT&T's claims because "AT&T is not challenging any Conrail action specifically ordered or authorized by the STB." At the same time, on the basis of deference to the Surface Transportation Board, as opposed to its exclusive jurisdiction, the Court referred three specific questions to this Board. All the questions relate to whether some of AT&T's breach of contract claims are preempted under 49 U.S.C. § 11321. A copy of the Court's Memorandum and Order is attached hereto as Exhibit 1.

II. Statement of the Case

A. Procedural History

In 1984, AT&T and Conrail entered into a License Agreement in which AT&T agreed to pay Conrail millions of dollars to license portions of Conrail's railroad right of way for a fiber optic cable system. In exchange, AT&T bargained for a most favored nations ("MFN") Covenant. That is, Conrail promised that AT&T would pay no more for the use of the right of

way than its telecommunications competitors would pay for the use of the right of way. AT&T has paid Conrail over \$200 million in license fees in connection with the License Agreement, and is currently paying Conrail more than \$17 million per year for the right to use this right of way.

AT&T filed a breach of contract complaint against Conrail in the District Court on January 11, 2003, claiming that Conrail has not honored the MFN Covenant. In response, Conrail answered part of the complaint, and filed a Partial Motion to Dismiss for Lack of Subject Matter Jurisdiction or, in the Alternative, for Partial Referral to the Surface Transportation Board and for a Stay Pending Resolution by the Surface Transportation Board.

At the same time, Conrail filed a Petition for Institution of a Declaratory Order Proceeding ("Petition") before the Board. AT&T opposed the Petition. In both its Motion and Petition, Conrail claimed that the District Court lacked subject matter jurisdiction, and the Board has exclusive jurisdiction, over some of AT&T's claims. Conrail asserted that under 49 U.S.C. § 11321, those claims have been preempted by the Board's approval of the CSX/NS/Conrail Transaction in CSX Corp. et al. – Control and Operating Leases/Agreements – Conrail Inc., et al., 3 S.T.B. 109 (1998) (Decision No. 89).

The District Court held a hearing on Conrail's Motion to Dismiss on July 10, 2003. A copy of the transcript of that hearing is attached hereto as Exhibit 2. Conrail's Petition has been fully briefed and pending before the Board since April 2003.

B. The District Court's Opinion

The fundamental premise of Conrail's Motion to Dismiss, as well as its Petition pending before the Board, is that part of AT&T's complaint constitutes an attack on the CSX/NS/Conrail Transaction approved in Decision No. 89 – and this Board's continued ability to implement the Transaction – because any judgment against Conrail requiring Conrail to honor

the MFN Covenant as it relates to contracts entered into after June 1, 1999 (the effective date of the Transaction) would interfere with the division of assets that is at the heart of the Transaction. The District Court flatly rejected this premise.

The Court rebuffed Conrail's assertions that AT&T's claims constitute an attack on the Transaction, ruling instead that AT&T does not in any way seek to undo the Transaction or otherwise hold Conrail liable for transferring its right of way in the Transaction. Recognizing that AT&T "seeks only a reduction in the license fees it pays Conrail" to the extent that post-June 1, 1999 agreements implicate the MFN Covenant, the Court ruled that AT&T's allegations "do not directly implicate the Transaction, nor do they purport to create any direct obstacle to the implementation of the Transaction."

In fact, AT&T is not directly challenging any STB-approved action taken by Conrail.

* * *

Rather, AT&T is challenging the manner in which Conrail has allegedly cloaked itself in Decision No. 89, and used the decision as an excuse for its conduct, *i.e.*, refusing to honor its contractual obligations under the MFN. In other words, Conrail paints itself as a victim of STB-imposed circumstance, left with no choice but to continue to accept AT&T's license fees, while remaining unable to honor its obligations under the MFN. Taken in this light, it is not surprising that AT&T objects to Conrail's conduct as an illegal effort to run with the hare and hunt with the hounds.

Mem. Op. at 16.

On these findings, the Court concluded that "Conrail has failed to persuade the Court that the issues presented by its contractual dispute with AT&T so clearly threaten the Transaction or the STB's ability to effectively manage similar transactions that it is within the STB's exclusive jurisdiction to resolve." Mem. Op. at 17. The Court therefore denied Conrail's motion to dismiss for lack of subject matter jurisdiction.

The Court, however, in deference to the Board's concurrent jurisdiction, and in recognition that AT&T's claims "touch upon" the Transaction in a "de minimis" way (apparently

contention that AT&T's claims related to the post-June 1, 1999 contracts are preempted. *See* Mem. Op. at 5, n. 4. Conrail argued at the July 10 hearing that requiring it to accept a reduced license fee would disrupt the "delicate balance" crafted by the STB in which it "decided to leave some income with Conrail vis-a-vis these fiber optic agreements, so that Conrail could continue to operate." Exhibit 2 at 64: 12-15 and 18-20.³ The District Court did not address the validity of this assertion, but even a brief consideration of it establishes that it mischaracterizes the Board's Decision No. 89 and the record on which that decision was based. Of course, Conrail knows that the STB did not "construct" the Transaction approved in Decision No. 89, but instead reviewed the application as submitted by the parties (which included a description of the proposed Transaction, as well as the Transaction Agreement itself) and determined whether the Transaction as proposed was consistent with the public interest, imposing conditions where it deemed them necessary. *See* Decision No. 89 at 46-48.

As to the record, there is no evidence in Decision No. 89 that the parties to the Transaction told the Board that the payments Conrail was receiving from AT&T or any other right of way licensee were necessary to Conrail's continued post-Transaction operations. On the contrary, the parties told the Board that Conrail's operations would be funded by payments made by CXST and NSR in connection with the assets allocated to NYC and PRR and that if these payments proved insufficient to allow Conrail to satisfy its obligations, CSX and NS would see that the necessary additional funds were provided. *See* Decision No. 89 at 33.

Accordingly, AT&T believes that the Board can simply answer the Court's questions based upon submissions that are before the Board, in conjunction with Decision No. 89 and the District Court's Memorandum Opinion and Order. If, however, the Board believes that it must

³ Indeed, Conrail went so far as to represent to the Court that the Transaction "was basically a hostile takeover *that ended up with the Board figuring out how to do it.*" Exhibit 2 at p. 16 (emphasis added). Conrail also told the Court that it was *required* or *ordered* by the STB to transfer its right of way. *Id.* at pp. 13 and 28.

open a proceeding in order to allow the parties to make further submissions, AT&T requests that the Board establish a schedule for the completion of submissions that gives the Board sufficient time to meet the 90-day deadline set by the District Court. In addition, if Conrail produces evidence in its opening submission that was not before the Board in connection with Decision No. 89, AT&T submits that it is entitled to discovery to test Conrail's evidence before responding with its own brief.⁴

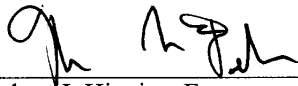
AT&T awaits further direction from the Board.

Date: October 9, 2003

Respectfully submitted,

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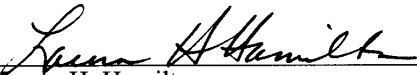
⁴ At a minimum, AT&T would be entitled to discovery concerning what the parties to the Transaction contemplated concerning Conrail's ongoing rights and obligations concerning the fiber optic license agreements it kept as "Retained Assets." This would include all deeds of the pertinent right of way, and all fiber optic license agreements that have been entered into after June 1, 1999 for use of former Conrail right of way. Production of any such agreements will enable AT&T to assess whether it in fact has a damage claim stemming from post-June 1999 contracts. To date, AT&T has not been provided with any such agreements and at this point the parties' dispute over the post-June 1999 contracts is a matter of principle rather than of one based on actual claimed damages.

CERTIFICATE OF SERVICE

I hereby certify that, on October 9, 2003, I caused a copy of the foregoing
*AT&T Communications, Inc. 's Notice of Court Action, Statement of the Case and Suggestions for
Future Proceedings* to be served by first-class mail, postage prepaid, upon the following counsel
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Laura H. Hamilton

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

**AT&T COMMUNICATIONS, INC.,
Plaintiff**

v.

**CONSOLIDATED RAIL
CORPORATION,
Defendant**

**CIVIL ACTION
NO. 03-147**

**ENTERED
SEP 29 2003
CLERK OF COURT**

MEMORANDUM OPINION AND ORDER

RUFE, J.

September 29, 2003

Presently before the Court are (1) Defendant's Partial Motion to Dismiss for Lack of Subject Matter Jurisdiction, or, in the Alternative, for Partial Referral to the Surface Transportation Board, and for a Stay Pending Resolution by the Surface Transportation Board; and (2) Defendant's Motion for a Protective Order. For the reasons set out below, the Court will deny the motion to dismiss; grant the motion to refer; grant in part and deny in part the motion for a stay; and deny the motion for a protective order.

I. BACKGROUND

Plaintiff in this case is AT&T Communications, Inc., a telecommunications equipment and service provider. AT&T is a Delaware corporation with its principal place of business in New Jersey. Defendant is Consolidated Rail Corporation ("Conrail"), a Pennsylvania corporation with its principal place of business in Pennsylvania. Jurisdiction is premised on diversity of citizenship. See 28 U.S.C. § 1332(a). This case was originally before the Honorable Bruce W. Kauffman, who held a hearing on the pending motion to dismiss on July 10, 2003. The case was subsequently transferred to the calendar of the undersigned pursuant to the Eastern District

of Pennsylvania's procedure for random reassignment of cases.

Conrail and AT&T entered into a License Agreement in 1984 permitting AT&T to install fiber optic cable ("FOC") along selected portions of Conrail's right of way in return for license fees. AT&T installed the cable along approximately 2700 miles of Conrail right of way. The License Agreement contains a Most Favored Nations clause ("MFN") that guarantees AT&T will pay no more than its competitors for such limited use of specified right of way covered by the License Agreement.¹ The License Agreement term extends to January 1, 2014. As of the date of the Complaint, AT&T has paid approximately \$200 million in fees, and continues to pay approximately \$17 million in annual fees to Conrail. In the present action, AT&T seeks to enforce Conrail's contractual obligations under the MFN.

The issues presently before the Court arise from Conrail's 1999 merger with CSX Corporation and CSX Transportation, Inc. (collectively, "CSX"), and Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively, "NS"). In 1997, CSX and NS petitioned the Surface Transportation Board (the "STB") for approval of their acquisition of Conrail (the "Transaction"). The STB has exclusive authority to approve, authorize, and supervise railroad

¹ The MFN provides, in relevant part:

CONRAIL covenants and agrees that, in the event it enters into any agreement with a party other than LICENSEE providing for the use by such party of right of way owned or controlled by CONRAIL for the installation of a FOC system between any two points on the Licensed Premises, whether such system is to be installed on the Licensed Premises or parallel to the Licensed Premises, CONRAIL will, at its option, either (i) charge such other party a per mile fee at least equal to the average per mile fee . . . between such two points which LICENSEE is obligated to pay CONRAIL pursuant to this License, or, in the alternative, (ii) reduce its average per mile fee between such two points to LICENSEE to the average per mile fee charged to such other party.

License Agreement ¶11.2, attached to Defendant's Motion at Ex. A.

transactions such as sales, leases, consolidations, and mergers. 49 U.S.C. § 11321.

After providing for the required public notice, comment and hearings on the proposed Transaction Agreement, see 62 Fed. Reg. 39577 (July 23, 1997), in which AT&T did not participate, the STB approved the Transaction Agreement on July 23, 1998. See CSX Corp. and CSX Transp. Inc., Norfolk Southern Corp. and Norfolk Southern Ry. Co. - Control and Operating Leases/Agreements - Conrail Inc. and Consolidated Rail Corp., 3 S.T.B. 196, 1998 STB LEXIS 243 (July 23, 1998) (hereinafter “Decision No. 89”). The STB required that the Transaction include certain conditions, and it is these conditions that gave rise to the instant dispute.

Most significantly, the STB required the creation of two subsidiaries of Conrail: New York Central Lines LLC (“NYC”) and Pennsylvania Lines LLC (“PRR”). Although both new companies are subsidiaries of Conrail, CSX appoints all officers and directors of NYC, and NS appoints all officers and directors of PRR. See id. at *34. The STB also designed a plan for reallocation of Conrail’s assets, which it grouped into three categories. “Allocated Assets” are assets that Conrail transferred to the sole and exclusive ownership of NYC or PRR for operation by CSX and NS. “Shared Assets” are assets that are shared by Conrail, NYC, and PRR. “Retained Assets” are assets retained solely by Conrail. See id. at *34-35.

The “Split Date” for the Transaction was June 1, 1999, at which time Conrail conveyed as Allocated Assets approximately ninety percent of its right of way to NYC and PRR. As a consequence, CSX and NS, respectively, operate the former Conrail railroad lines now owned by NYC and PRR, respectively.² Some of the quitclaim deeds state that the right of way

² Although AT&T claims that as a result of the Transaction Conrail is largely out of the transportation business, Conrail’s general counsel explained to the Court at a July 10, 2003 hearing that Conrail still operates some rail interchanges and yards, and about 1,300 miles of track. N.T. at 43:19-25.

conveyances were “subject to” the AT&T License Agreement and other FOC agreements, see Plaintiff’s Opp. at Ex. 2, while others did not, see Defendant’s Reply at Ex. 1.

In addition to obtaining these rights of way, CSX/NYC and NS/PRR acquired the sole right to enter into additional FOC agreements with third parties on these segments of former Conrail right of way. Although Conrail did not retain any rights to enter into new FOC agreements on divested rights of way after the Split Date, it did retain all existing contracts granting the right to bury FOC along the right of way conveyed to its new subsidiaries. See Transaction Agreement at § 2.2(d), attached to Plaintiff’s Opp. at Ex. 1, p. 29. Thus, the License Agreement with AT&T was a Retained Asset, and Conrail continues to receive from AT&T approximately \$17 million in annual fees under the License Agreement.³

AT&T’s Complaint alleges that Conrail has breached the MFN by entering into contracts with AT&T’s competitors under which those telecommunications companies pay less than AT&T for laying FOC along the right of way covered by the License Agreement. AT&T alleges that Conrail breached its obligations under the MFN both before and after the Split Date. AT&T seeks monetary damages and declaratory relief. Conrail responds on the merits that because post Split-Date it no longer controls the rights of way conveyed to NYC and PRR, and no longer has the right to enter into FOC agreements regarding those rights of way, it has no ability and thus no duty to comply with the MFN. At the same time, it insists that it is entitled to payment of AT&T’s

³ By way of further background, counsel for Conrail noted during the July 10, 2003 hearing that there is currently pending before the STB a petition by NS and CSX to become the direct owners of NYC and PRR, which if approved would further separate them from Conrail. N.T. 19:11-22.

license fees.⁴

AT&T's only specific allegation of a breach of the MFN relates to a 1996 agreement between Conrail and Qwest Communications Corp. ("Qwest"), in which Conrail permitted Qwest to install FOC along its right of way in exchange for Qwest allowing Conrail to use Qwest's cable for railroad operation-related telecommunications purposes, rather than money (the "Qwest Barter Agreement"). Post Split-Date, Conrail has no significant need for Qwest's FOC communications capacity, although NYC and PRR are in fact using portions of it. See N.T. 40:13-24. AT&T protests that it is paying millions of dollars in fees under the License Agreement, while Qwest is paying "virtually no consideration" for use of the same right, and that this arrangement violates the MFN.

II. CONRAIL'S PARTIAL MOTION TO DISMISS/REFER/STAY

Conrail's Motion asks this Court to dismiss portions of the Complaint for lack of subject matter jurisdiction. In the alternative, Conrail moves the Court to refer certain issues to the STB for resolution. Finally, if the Court grants either form of relief, Conrail seeks a stay of the entire action pending resolution of the proceedings before the STB.

With the exception of issues related to the Qwest Barter Agreement, Conrail's motion does not relate to any of AT&T's claims based on contracts that Conrail entered *before* the Split Date. Rather, Conrail argues that AT&T's claims based on *post*-Split-Date contracts implicate

⁴ At the July 10, 2003 hearing, Conrail posited that it is entitled to all of the benefits of the License Agreement, but must bear none of the burdens. Conrail's counsel balked at providing an explanation of Conrail's legal position, insisting that this question goes to the merits of AT&T's claims, which have no bearing on Conrail's motion to dismiss/refer/stay the case. Conrail contends that the merits issues are properly before the STB, not this Court. See discussion *infra*. Near the conclusion of the hearing, Conrail's counsel shed some light on its legal argument: that this arrangement "was part of the delicate balance" constructed by the STB when it approved the Transaction. N.T. 64:18-19.

Decision No. 89, and therefore must be resolved in the first instance by the STB. Specifically,

Conrail's motion seeks to place before the STB three questions, summarized accordingly:

- Whether Decision No. 89 preempts AT&T's claim that Conrail breached the MFN by "disabling itself of the ability to perform its obligations" under the MFN after the Split Date;
- Whether Decision No. 89 preempts AT&T's claims arising from application of the MFN to FOC contracts entered into after the Split Date by CSX/NYC and NS/PRR;
- Whether Decision No. 89 preempts AT&T's claim arising from application of the MFN insofar as post Split-Date ownership and operation of former Conrail right of way by CSX/NYC and NS/PRR renders Conrail's compliance with the MFN commercially impossible or impracticable.

On the same day that it filed its motion to dismiss/refer/stay, February 25, 2003, Conrail filed a petition with the STB seeking resolution of these issues.

In support of its motion, Conrail points to the STB's exclusive jurisdiction over matters that are central to the Transaction, and contends that the STB is the only forum that may decide these issues. AT&T opposes the motion, arguing that this case has nothing to do with federal regulation of railroad mergers, but is merely a commercial contract dispute over money alone, and thus does not fall within the STB's jurisdiction.

A. Conrail's Motion to Dismiss

Conrail moves to dismiss portions of AT&T's Complaint for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1). Motions under Rule 12(b)(1) may challenge jurisdiction based either on the face of the complaint (*i.e.*, a "facial attack") or its existence in fact (*i.e.*, a "factual attack"). See Mortensen v. First Fed. Sav. and Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1997). A factual attack occurs when a party disputes the existence of certain jurisdictional facts

alleged in the complaint. Carpet Group Int'l v. Oriental Rug Imp. Ass'n, Inc., 227 F.3d 62, 69 (3d Cir. 2000). Such is not the case here. Rather, Conrail's motion advances a facial attack, and argues that the Complaint includes allegations not properly before the Court. When considering a facial attack, the Court must accept as true all well-pleaded allegations in the complaint and draw all reasonable inferences in favor of the plaintiff. Gould Elecs. Inc. v. United States, 220 F.3d 169, 176 (3d Cir. 2000).

Conrail argues that the Court lacks subject matter jurisdiction over claims arising from the division of assets authorized by the STB. Under the Interstate Commerce Act ("ICA"), 49 U.S.C. § 11321(a), the STB has "exclusive" authority to approve rail mergers and consolidations. In addition, § 11321(a) exempts such transactions "from the antitrust laws and from all other law . . . as necessary . . . to carry out the transaction."⁵ Conrail contends that some of AT&T's contract claims are preempted under this statutory provision.⁶ Before it may reach this question, however, the Court must confront the issue presented by Conrail's motion: does this Court have jurisdiction to decide the preemption issue, or does jurisdiction over the issue rest exclusively with the STB?

⁵ The statute provides, in pertinent part:

The authority of the Board under this subchapter is exclusive. A rail carrier or corporation participating in or resulting from a transaction approved by or exempted by the Board under this subchapter may carry out the transaction, own and operate property, and exercise control or franchises acquired through the transaction without the approval of a State authority. A rail carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that rail carrier, corporation, or person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction.

49 U.S.C. § 11321(a).

⁶ There is no question that the § 11321(a) exemption "is broad enough to include laws that govern the obligations imposed by contract." Norfolk and Western Ry. Co. v. Am. Train Dispatchers' Assoc., 499 U.S. 117, 129 (1991). AT&T conceded this point at the hearing. N.T. 25:8-13.

Conrail relies primarily on two decisions from the Courts of Appeals in support of its position that the STB has exclusive jurisdiction over disputes that implicate the Transaction.⁷ The first is the Ninth Circuit Court of Appeal's decision in Railway Labor Executives' Ass'n v. Southern Pacific Transportation Co., 7 F.3d 902 (9th Cir. 1993) (hereinafter "Southern Pacific"). There, the Interstate Commerce Commission ("ICC"), as the predecessor to the STB,⁸ approved a merger of several railroad companies. Thereafter, a dispute arose between the railroad and the union over coordinating maintenance operations as part of its implementation of the merger. The railroads sought to arbitrate the dispute under the procedures imposed by the ICC in connection with the merger. Certain railroad unions representing employees of the railroads sought a declaration in federal court that they were not required to arbitrate under those procedures, but rather were entitled to arbitrate under procedures prescribed by the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151 et seq.⁹ The railroads argued that they were exempt from the requirements of the RLA pursuant to the

⁷ In addition to citing federal appellate cases, both parties argue about the significance of the STB's decision in Consolidation Coal Sales Co. v. Consolidated Rail Corp., Fin. D. No. 34169, 2002 STB LEXIS 317 (May 24, 2002) (hereinafter "CCSC"). There, Chief Judge Giles, with the mutual consent of the parties, referred to the STB a contract counterclaim arising out of a dispute over Conrail's obligations under two contracts Conrail had entered in 1991 and 1992. Conrail asserted that it was no longer able to perform certain obligations under the contracts as a result of Decision No. 89, and therefore that the contracts were preempted. The STB agreed. See id. at *11. However, the STB did not address the question presented here: whether a federal district court has jurisdiction to entertain such a claim. Furthermore, that the parties consented to referral to the STB, and that Chief Judge Giles ordered such referral, says nothing about the jurisdictional question.

⁸ The ICC Termination Act of 1995 abolished the Interstate Commerce Commission and transferred its remaining functions to the STB. In addition, it resulted in the renumbering of various provisions of the Interstate Commerce Act. See Union R.R. Co. v. United Steelworkers of Am., 242 F.3d 458, 460 n.1 (3d Cir. 2001) (hereinafter "Steelworkers").

⁹ When the STB approves a railroad transaction, it is required to impose conditions for the protection of existing and future employees from the adverse effects of the transaction. See 49 U.S.C. § 11326 (affected employees are entitled to "a fair arrangement"). In order to comply with this directive, a standard set of protective conditions, known as the New York Dock conditions, were first announced in New York Dock Railway - - Control - - Brooklyn Eastern Dist. Terminal, 360 I.C.C. 60, 84-90, aff'd sub nom. New York Dock Ry. v. United States, 609 F.2d 83 (2d Cir. 1979). These conditions provide, among other things, that in the course of negotiations between a railroad and its employees over how to implement an operational change approved by the STB, *either* party may unilaterally take a dispute to arbitration for a final, binding determination. See Steelworkers, 242 F.3d at 460;

exemption in § 11341 (now § 11321), and moved to dismiss for lack of subject matter jurisdiction. The district court granted the motion, concluding that the ICC had exclusive authority over the matter. See Southern Pac., 7 F.3d at 903-05.

The Ninth Circuit affirmed, and held that the question of whether § 11341 preempted the unions' claims under the RLA must be raised before the ICC (now the STB). Id. at 905-909. The court first looked to Norfolk and Western Railway Co. v. American Train Dispatchers' Ass'n, 499 U.S. 117, 129 (1991) (hereinafter "Dispatchers") in order to discern the Supreme Court's "overall conception of the statutory scheme," which it found "determinative of this case." Southern Pac. 7 F.3d at 906. In Dispatchers, the Supreme Court held that § 11341 may exempt a party, "as necessary to carry out a transaction approved by the [ICC]," from its legal obligations under an existing collective bargaining agreement, and under the RLA. 499 U.S. at 128-134. However, Dispatchers did not resolve which forum - - the ICC or a federal district court - - has jurisdiction to adjudicate the applicability of the § 11341 (now § 11321) exemption.

Looking to Dispatchers and the ICA, the Ninth Circuit reasoned that (1) because the ICA grants to the ICC the exclusive authority to examine, condition and approve proposed railroad mergers, and (2) because Dispatchers makes clear that the ICC has the power to exempt parties to such mergers from any provisions of the RLA by approving that merger, it follows "that where a railroad which has been a party to an ICC-approved merger claims that certain proposed actions are incident to that merger and exempt from RLA procedures under section 11341(a), the ICC has exclusive authority to resolve a challenge to these claims." Southern Pac., 7 F.3d at 906. Turning to the case before it, the Ninth Circuit concluded:

Southern Pac., 7 F.3d at 903-04. By contrast, the RLA provides that changes to collective bargaining agreements may be arbitrated only with the *mutual consent* of both parties. See id. at 904 (citing 45 U.S.C. § 157).

[B]ecause the ICC had exclusive authority to approve the . . . merger and thereby exempt the Railroads from any procedural or substantive law which might otherwise impede that merger, it should have exclusive authority to clarify the scope of its own approval and the corresponding breadth of the section 11341(a) exemption.

Id. The Southern Pacific court found its conclusion was consistent with the objectives that inform the exemption, which is to “promote ‘economy and efficiency in interstate transportation by [removing] the burdens of excessive expenditure.’” Id. (quoting Dispatchers, 499 U.S. at 132). The court recognized that permitting parties to litigate “the scope of an approved merger and the corresponding breadth of the section 11341(a) [exemption] . . . would invite a barrage of collateral challenges to the ICC’s authority.” Id. This, the court concluded, would likely “frustrate and delay the administration of mergers in a way that section 11341(a) was clearly meant to avoid.” Id. at 906-07; see also id. at 906 (“The resolution process for major disputes under the RLA would so delay the proposed transfer of operations that any efficiencies the carriers sought would be defeated.”) (quoting Dispatchers, 499 U.S. at 133). As to the parties before it, the Southern Pacific court concluded that permitting the unions to pursue their case in federal court “may serve to circumvent or frustrate the procedures which have been put in place to efficiently resolve labor disputes which arise in connection - - or allegedly in connection - - with a railroad merger.” Id. at 907.

The second case primarily relied upon is the Third Circuit Court of Appeal’s decision in Union Railroad Co. v. United Steelworkers of America, 242 F.3d 458 (3d Cir. 2001) (hereinafter “Steelworkers”). Steelworkers and Southern Pacific arose under very similar circumstances, and, perhaps not surprisingly, reached the same result. The Third Circuit in Steelworkers addressed “whether a federal district court has subject matter jurisdiction to adjudicate challenges to a collective bargaining agreement, made in connection with a rail merger authorized by the [STB].”

The case arose following a consolidation of rail carriers and other companies. Thereafter, the newly merged railroad sought to consolidate certain clerical work. When negotiations with unionized employees failed, as was the case in Southern Pacific, the unions in Steelworkers claimed that the ensuing dispute over the proposed coordination of clerical workers had to be resolved under RLA procedures, not under the New York Dock procedures, and sought declaratory and injunctive relief to that effect in federal district court. The district court dismissed the claim for lack of subject matter jurisdiction. See id. at 460-62.

The Third Circuit affirmed, and agreed with the railroad that “the STB has exclusive jurisdiction to consider disputes concerning changes to labor agreements which are necessary to implement an STB-authorized consolidation.” Id. at 463. Like the Southern Pacific court, the Steelworkers court noted that the “almost interminable process” associated with RLA negotiations was inconsistent with the ICA’s goals of efficiency and economy in interstate transportation. Id. at 463-65 (citation omitted). It then reviewed two opinions that had addressed the same jurisdictional issue: Southern Pacific, as well as an analogous decision by the Fourth Circuit Court of Appeals in Norfolk & Western Railway v. Brotherhood of Railroad Signalmen, 164 F.3d 847, 855 (4th Cir. 1998) (hereinafter “Signalmen”).

After rejecting the unions’ argument that the language and structure of the ICA makes the § 11321 exemption inapplicable to the merger at hand (an issue not presented in this case), the court emphasized that in the event of a railroad merger “the ICA puts within the exclusive jurisdiction of the STB . . . the relationship between the railroad and its employees,” and mandates that affected employees be protected by a “fair arrangement.” Steelworkers, 242 F.3d at 466 (citing 49 U.S.C. §§ 11324, 11326). “All this demonstrates . . . that ‘to the extent that a transaction subject

to the STB's approval impacts collective bargaining agreements or the relationship between railroads and their employees, the STB has exclusive jurisdiction in the first instance to consider the issues.'" Id. at 467 (quoting Signalmen, 164 F.3d at 855).

The unions urged the Third Circuit to follow the narrower approach adopted by the Seventh Circuit Court of Appeals in Harris v. Union Pacific Railroad, 141 F.3d 740 (7th Cir. 1998) (holding federal district court may resolve civil rights claims against merged railroad because such claims could not have effect of blocking the transaction), but the court found that case distinguishable. See discussion infra. Finally, the Steelworkers court concluded:

[T]he ICA - - in its language and overall statutory design - - reflects Congress's commitment to a national transportation policy that favors the consolidation of railroads. And Congress has decided that such a policy is best pursued by freeing rail consolidations from the burdensome delays and expenditures associated with RLA procedures. Thus, the ICA and RLA are not complementary and co-equal statutory schemes, as the [union] proposes. The RLA must yield to the ICA when it impedes the implementation of a STB-approved consolidation. Moreover, the STB has the exclusive jurisdiction to adjudicate challenges to such an implementation.

242 F.3d at 468.

AT&T counters by distinguishing Southern Pacific and Steelworkers as cases involving Congress's special grant of jurisdiction to the STB to protect the interests of railroad employees, and its limited authority to protect employees affected by a proposed merger transaction. In addition, it relies heavily on the Seventh Circuit Court of Appeals' decision in Harris, 141 F.3d 740, and argues that Harris more resembles the instant matter.¹⁰

¹⁰ AT&T also relies on City of Palestine, Texas v. ICC, 599 F.2d 408 (5th Cir. 1977), but the Eleventh Circuit, following the Fifth Circuit split, expressly concluded that Palestine was not relevant to whether a district court has subject matter jurisdiction to entertain a preemption claim. See Bhd. Ry. Carmen v. CSX Transp., Inc., 855 F.2d 745, 749 (11th Cir. 1988) ("the subject matter jurisdiction of the district court was not at issue [in Palestine], so we do not find [Palestine] to be dispositive of the issue presently before us"). The Court agrees with the Eleventh Circuit's assessment of Palestine.

There, the court considered whether a district court may consider claims brought by two employees against a newly merged railroad, or whether the ICC had exclusive jurisdiction to resolve the claims. Like it did in Southern Pacific and Steelworkers, the ICC gave its assent to the merger subject to the standard New York Dock conditions. However, the ICC also permitted labor and management to negotiate an alternative set of conditions to protect employee interests affected by the merger. The parties reached such an agreement, which provided that up to 300 clerical employees could elect separation benefits in lieu of involuntary transfers or layoffs that would accompany implementation of the merger. Significantly, only employees at work when the agreement was announced were eligible, and employees on leave had to return to work within twenty days in order to be eligible. See Harris, 141 F.3d at 741-42.

Two employees were on maternity leave at the time the agreement was announced, and they did not return to work within twenty days. Their applications for separation benefits were denied and they brought suit, alleging, inter alia, sex discrimination under the federal Pregnancy Discrimination Act. The district court concluded that the ICC's approval of the merger foreclosed the plaintiffs' claims unless the STB (as successor to the ICC) authorized the litigation. See id. at 742.

The Seventh Circuit reversed. While it agreed that the civil rights laws are encompassed by § 11321(a)'s exemption from "all other law," it rejected the Ninth Circuit's approach, as outlined in Southern Pacific, that only the ICC may determine which other laws it is "necessary" to set aside. See id. at 743. It noted that in approving the merger at issue in Harris, the ICC "did not say 'boo'" about the necessity of displacing civil rights laws in order to effectuate the merger, nor did the ICC in permitting an alternative to the New York Dock conditions "invite or

authorize the parties to violate any laws.” Id. The court opined that if, in the course of approving the merger, the ICC “implies (but does not quite say)” that some other law must of necessity yield, “then perhaps a court should refer the subject to the agency under the doctrine of primary jurisdiction.” Id. Where that does not happen, the court concluded, a federal district court has jurisdiction to decide which other laws it is “necessary” to displace. Id. at 743 (citing Burlington N. R.R. v. United Transp. Union, 862 F.2d 1266, 1277-81 (7th Cir. 1988)).

Turning to the facts before it, the Harris court concluded that it was not “necessary” to set aside the civil rights laws in order to let the railroad carry out the transaction, and necessity being the linchpin of the exemption, held that the plaintiffs’ claims were not preempted. Id. at 743-44 (“None of the civil rights laws puts any obstacle in the way of Union Pacific’s acquisition of the Chicago & North Western.”). It then made the following observation about the scope of the STB’s jurisdiction:

On the railroad’s understanding of § 11341(a), the Board is forever in charge of all legal disputes related to a merger. Is the railroad liable to a brakeman injured by failure of a coupler on a car that came from the acquired corporation? Does an easement on any of the carrier’s rights of way survive the merger? Are the employees entitled to a Christmas bonus under the labor agreement? Some of these issues are resolved by arbitration or bargaining, others under state property law or the Safety Appliance Act. . . . But if the Union Pacific were right, everything would be up for grabs. Who can tell which of these laws the Commission might have thought incompatible with the merger?

Id. at 744. Finally, the court concluded that if the STB approves a merger without directly or by necessary implication using its power to supersede other laws, “courts should continue to resolve disputes under generally applicable rules of law.” Id.

AT&T contends that Harris illustrates the limits of the STB’s jurisdiction, and asks the Court to apply the same limited view to this case. Here, it argues, the STB did not say “boo”

about AT&T's License Agreement when it approved the Transaction. Thus, it contends, the Court is well within its jurisdiction to address whether the STB's authorization, as outlined in Decision No. 89, preempts AT&T's contract claims.

On the basis of Southern Pacific and Steelworkers, Conrail argues that some of AT&T's claims fall within the STB's exclusive jurisdiction because they ask this Court to "consider matters that go to the heart of the STB's approval and supervision of the CSX/NS/Conrail Transaction - - and if allowed, that could greatly frustrate the goals of that Transaction." Def. Motion at 10. In doing so, Conrail engages in clear hyperbole regarding a rather close question.

First, it is not at all apparent that AT&T's claims go to the "heart" of the STB's approval and supervision of the Transaction in the same way that the unions' claims did in Southern Pacific or Steelworkers. As those cases emphasize, the "heart" of any STB approval of a consolidation is promoting "economy and efficiency in interstate transportation by the removal of the burdens of excessive expenditure." Dispatchers, 499 U.S. at 132 (quoting Texas v. United States, 292 U.S. 522, 534-35 (1934)). The cases cited by Conrail - - Southern Pacific and Steelworkers - - set out convincingly that when a union challenges the manner in which an STB-authorized transaction is *actually carried out*, such a challenge implicates the STB decision itself, and thus places the dispute within the jurisdiction of the STB. In other words, where a party's claim seeks to affect the *actual implementation* of the transaction, such a claim goes to the heart of the STB's authority to condition and approve the transaction.

Conrail's efforts to analogize Southern Pacific and Steelworkers to the instant matter are ultimately unpersuasive. In fact, AT&T is not directly challenging any STB-approved action taken by Conrail. In Conrail's view, AT&T's breach of contract claim is an attack on the

Transaction *itself*. That might be the case were AT&T claiming that Conrail's transfer of its right of way to PRR and NYC in and of itself gives rise directly to liability, but such is not the case here. Rather, AT&T is challenging the manner in which Conrail has allegedly cloaked itself in Decision No. 89, and used the decision as an excuse for its conduct, *i.e.*, refusing to honor its contractual obligations under the MFN. In other words, Conrail paints itself as a victim of STB-imposed circumstance, left with no choice but to continue to accept AT&T's license fees, while remaining unable to honor its obligations under the MFN. Taken in this light, it is not surprising that AT&T objects to Conrail's conduct as an illegal effort to run with the hare and hunt with the hounds.

Nor do the policy concerns at issue in Southern Pacific and Steelworkers arise in this case. Unlike the plaintiffs' claims in those cases, where the jurisdictional analysis turned so distinctly on the likely threat of "interference with the [STB's] ability to efficiently facilitate mergers," Southern Pac., 7 F.3d at 906, AT&T's claims do not present the same potential threat, either in kind or degree. The plaintiffs in Southern Pacific and Steelworkers sought to avoid the procedures developed by the STB itself in carrying out its statutory mandate to protect affected employees - the New York Dock conditions - in favor of the RLA procedures, which were widely known to produce results in tension with the goals of the ICA as described by the Supreme Court in Dispatchers. 499 U.S. at 132 (ICA was "designed to promote 'economy and efficiency in interstate transportation by the removal of the burdens of excessive expenditure'"); *id.* at 133 ("The resolution process for major disputes under the RLA would so delay the proposed transfer of operations that any efficiencies the carriers sought would be defeated.") (citations omitted). As the Ninth Circuit recognized, this particular dispute between unions and merged railroads would arise "[a]s long as the § [11321(a)] exemption exists." Southern Pac., 7 F.3d at 906. The court reasoned

that allowing such inevitable controversy to proceed through the federal courts would open the floodgates to “a barrage of collateral challenges to the [STB’s] authority which would be likely to frustrate and delay the administration of mergers in a way that section [11321(a)] was clearly meant to avoid.” *Id.* at 906-07. No such similar concerns arise here. As such, Conrail has failed to persuade the Court that the issues presented by its contractual dispute with AT&T so clearly threaten the Transaction or the STB’s ability to effectively manage similar transactions that it is within the STB’s *exclusive* jurisdiction to resolve.

Under Southern Pacific and Steelworkers, it is clear that the Court’s decision on the jurisdictional issue must turn at least in part on the degree to which AT&T’s claims actually challenge the implementation of the STB-approved Transaction. If they do, then the STB must address the question of whether Decision No. 89 preempts such claims in the first instance.¹¹

An examination of the Complaint reveals that AT&T is perhaps overstating the matter when it argues that this case has “nothing to do with federal regulation of railroads or transportation issues.” AT&T’s Opp. at 1. Specifically, AT&T alleges that Conrail has breached its express and implied duties under the License Agreement by:

- c. transferring portions of the MFN [right of way] to its wholly-owned subsidiaries (NYC and Pennsylvania Lines) and then disclaiming any responsibility for subsequent agreements providing for the use of the MFN [right of way] that may violate the MFN Covenant;
- d. transferring portions of the MFN [right of way] to its wholly-owned subsidiaries (NYC and Pennsylvania Lines) and then divesting itself of the ability to perform its obligations under the MFN Covenant;

¹¹ The Court declines to follow the analysis utilized by the Seventh Circuit in Harris, 141 F.3d 740. The Third Circuit’s opinion in Steelworkers suggests this is the appropriate course. *See* 242 F.3d at 466-68 (following the broader approach utilized in Southern Pacific, 7 F.3d 902, and Signalmen, 164 F.3d 847, and finding Harris distinguishable).

Complaint ¶ 39(c)-(d).¹² These allegations on their face do not directly implicate the Transaction, nor do they purport to create any direct obstacle to the implementation of the Transaction. AT&T is not alleging that *because* Conrail transferred portions of its right of way, it is liable to AT&T. Rather, AT&T alleges that Conrail is using the transfers as an excuse to breach the MFN. As counsel for AT&T pointed out at the hearing, it does not seek to undo the Transaction; the only relief it seeks is a reduction in fees as mandated by the MFN. N.T. 63:6-64:3. Therefore, while the Transaction plays some role in AT&T's claim, the degree to which AT&T is challenging the Transaction itself, or the STB's administration of the merger, is *de minimis*.¹³ Accordingly, the Court concludes that it may exercise subject matter jurisdiction over AT&T's claims, and the motion to dismiss is denied.

B. Motion to Refer Certain Issues to the STB

Conrail moves the Court, pursuant to 28 U.S.C. § 1336(b) and the doctrine of primary jurisdiction, to refer certain issues to the STB for resolution. Under the doctrine of primary jurisdiction, a court should refer a matter to an administrative agency for resolution "if it appears

¹² See also Complaint ¶ 4:

Conrail also has breached the MFN Covenant, and repudiated the License Agreement, by transferring to its wholly-owned subsidiaries its interest in some or all of the right of way that is subject to AT&T's license and then disclaiming any further obligation to AT&T with respect to the transferred right of way and disabling itself of the ability to perform its obligations under the MFN Covenant.

¹³ At the hearing on Defendant's Motion, AT&T explained its intended meaning in drafting its allegations. The Court read from paragraph 39(d) of the Complaint, and asked counsel for AT&T, "You don't really mean that, do you?" Counsel responded, "No. But it's an alternative pleading, if the Court please. What we're saying - - and perhaps it isn't artfully said there - - what we're saying is we think Conrail can perform, we think they ought to perform." N.T. 55:9-18. The Court must draw all reasonable inferences in favor of AT&T, and in doing so finds this to be a fair reading of the Complaint. See *Gould Elecs.*, 220 F.3d at 176 (when ruling on a facial attack to court's subject matter jurisdiction, "court must only consider the allegations of the complaint . . . in the light most favorable to the plaintiff"). As explained above, the Court is satisfied that AT&T is not challenging any Conrail actions specifically authorized or ordered by the STB.

that the matter involves technical or policy considerations which are beyond the court's ordinary competence and within the agency's particular field of expertise." MCI Communications Corp. v. Am. Tel. & Tel. Co., 496 F.2d 214, 220 (3d Cir. 1974); see also Puerto Rico Mar. Shipping Auth. v. Valley Freight Sys., Inc., 856 F.2d 546, 549 (3d Cir. 1988) ("[T]he rationale of the doctrine is that the subject matter falls so squarely within the agency's domain that a court should permit the agency to initially resolve the question presented.").

The doctrine serves to "avoid conflict between the courts and an administrative agency arising from either the court's lack of expertise with the subject matter of the agency's regulation or from contradictory rulings by the agency and the court." Id. The Third Circuit has cautioned, however, that courts "should not be too hasty in referring a matter to an agency . . . whenever a controversy remotely involves some issue falling arguably within the domain of the agency's 'expertise.'" MCI Tel. Corp. v. Teleconcepts, Inc., 71 F.3d 1086, 1104 (3d Cir. 1995) (quoting Elkin v. Bell Tel. Co. of Pa., 491 Pa. 123 (1980)). Rather, referral is appropriate only "where the subject matter is within an agency's jurisdiction and where it is a complex matter requiring special competence, with which the judge or jury would not or could not be familiar." Id. Once an issue is referred to an agency under the doctrine of primary jurisdiction, "that agency's determination is binding upon the court and the parties . . . and is not subject to collateral attack in the pending court proceeding." Id. at 1103. See generally Tassy v. Brunswick Hosp. Ctr., Inc., 296 F.3d 65, 67-68 (2d Cir. 2002) (discussing evolution of primary jurisdiction doctrine).

"No fixed formula exists for applying the doctrine of primary jurisdiction." United States v. Western Pac. R.R. Co., 352 U.S. 59, 64 (1956). The Supreme Court has emphasized, however, that the doctrine comes into play when "the reasons for the existence of the doctrine are

present” and when “the purposes its serves will be aided by its application in the particular litigation.” Id. In determining whether the doctrine applies, courts have consistently looked to the twin purposes articulated by the Supreme Court in Western Pacific: (1) “the desirable uniformity which would obtain if initially a specialized agency passed on certain types of administrative questions”; and (2) “the expert and specialized knowledge of the agencies involved.” Id. See, e.g., Chabner v. United of Omaha Life Ins. Co., 225 F.3d 1042, 1051 (9th Cir. 2000); Pejepscot Indus. Park, Inc. v. Maine Centr. R.R. Co., 215 F.3d 195, 205 (1st Cir. 2000); United States v. Any and All Radio Station Transmission Equip., 204 F.3d 658, 664 (6th Cir. 2000); Williams Pipe Line Co. v. Empire Gas Corp., 76 F.3d 1491, 1496 (10th Cir. 1996).

Conrail argues that referral to the STB of the issues presented here is warranted in order to promote uniformity and consistency in the interpretation of Decision No. 89. Moreover, it argues, the STB has special expertise in determining the scope and effect of its decisions, and thus should be afforded an opportunity to decide whether Decision No. 89 preempts AT&T’s claims. Cf. Pennsylvania v. Surface Transp. Bd., 290 F.3d 522, 530 (3d Cir. 2002) (“Where the Board is interpreting and applying conditions it has promulgated pursuant to its statutory authority, its action is accorded the highest deference.”); Nat’l Motor Freight Traffic Ass’n v. ICC, 590 F.2d 1180, 1184 (D.C. Cir. 1978) (“We accord particular deference when, as here, the subject of review is the agency’s interpretation or clarification of its own order.”).

AT&T responds that the Court should not refer this case to the STB because none of its claims require construction of Decision No. 89, and none of its claims require application of the STB’s expertise. Rather, it argues, this is a simple contract dispute over how much money AT&T is required to pay Conrail under the License Agreement.

The Court will grant Conrail's motion to refer the case to the STB. First, as set forth in Part A supra and in the statute itself, the issue of whether the § 11321(a) exemption applies to an STB-authorized transaction is within the agency's jurisdiction. In addition, as the Southern Pacific court recognized, when the STB has the authority to approve a merger in the first place, it should be permitted to "clarify the scope of its own approval and the corresponding breadth of the section [11321] exemption." 7 F.3d at 906.

Second, the STB possesses the expertise necessary to resolve the instant dispute. As Conrail notes, the STB has studied the Transaction; entertained public comment, hearings, and arguments on the Transaction; and memorialized its approval in a lengthy, detailed document.¹⁴ As the Supreme Court has noted, when the issue presented requires a determination "reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable, and such acquaintance is commonly found only in a body of experts," then the issue must go first to those experts. Western Pac., 352 U.S. at 66. Here, those experts reside in the STB. Given its prior investment of resources and intellectual capital in the Transaction, there can be little question that the STB possesses special expertise on whether certain issues would implicate Decision No. 89. The question of whether AT&T's claims are exempted under § 11321 begs this kind of special competence. Thus, the Court will call upon the STB's expertise to determine if AT&T's claims will, as Conrail's counsel put, disrupt the "delicate balance" inherent in Decision No. 89. N.T. 64:19.

Finally, referral is appropriate in order to avoid the danger of inconsistent rulings. As noted above, Conrail filed a petition with the STB on February 25, 2003 seeking a declaratory

¹⁴ The Lexis version of Decision No. 89 consists of approximately 100 pages of single-spaced, twelve-point text. See 1998 STB LEXIS 243.

order regarding the preemptive effect of Decision No. 89. Thus, referral to the STB will enable that agency to adjudicate an issue within its special competence, and will remove the risk of inconsistent rulings from the STB and this Court. The motion to refer is granted.

C. Motion to Stay

Conrail moves the Court for a stay of this entire action pending resolution of its petition before the STB. It argues that a stay will prevent duplicative discovery and conserve judicial resources. AT&T opposes a stay, arguing that the STB proceeding is unlikely to involve any discovery. It contends that in the event discovery becomes necessary before the STB, it suggests that Conrail could renew its stay request. Lastly, it argues that because Conrail seeks to refer only a portion of AT&T's claims to the STB, the balance of the action should proceed in this Court.

The Court discussed the issue of a stay at length in a conference with counsel, and resolution of this aspect of the case needs no elaborate explanation here. The Court will stay a portion of this case pending resolution of those issues referred to the STB.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AT&T COMMUNICATIONS, INC.,
Plaintiff

v.

CONSOLIDATED RAIL
CORPORATION,
Defendant

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CIVIL ACTION
NO. 03-147

ORDER

AND NOW, this 29th day of September, 2003, the Court hereby enters the following rulings:

I. Upon consideration of Defendant's Partial Motion to Dismiss for Lack of Subject Matter Jurisdiction, or, in the Alternative, for Partial Referral to the Surface Transportation Board, and for a Stay Pending Resolution by the Surface Transportation Board [Doc. # 5], Plaintiff's Opposition thereto [Doc. # 14], Defendant's Reply [Doc. # 16], after a July 10, 2003 hearing on the record [Doc. # 28], and for the reasons set forth in the attached Memorandum Opinion, it is hereby **ORDERED** that Defendant's Motion is **GRANTED IN PART** and **DENIED IN PART**. It is specifically **ORDERED** that:

- A. Defendant's Partial Motion to Dismiss is **DENIED**;
- B. Defendant's Motion for Partial Referral is **GRANTED**;
- C. Defendant's Motion to Stay is **GRANTED IN PART** and **DENIED IN PART**.

It is further **ORDERED** that:

- i. The parties are hereby granted leave to conduct discovery regarding all issues arising out of contracts entered between January 1984 and June

1999;

- ii. All discovery relating to contracts entered between June 1999 and the present is hereby **STAYED** pending further Court Order, except to the extent such discovery is requested by the Surface Transportation Board in aid of its determination of the preemption issue.

II. It is further **ORDERED** that the Court hereby **REFERS** to the Surface Transportation

Board the following specific questions:

- A. Whether the Surface Transportation Board's ("STB") Decision approving the CSX/NS/Conrail Transaction ("Decision No. 89") preempts any claim that Conrail breached the MFN clause in the FOC License Agreement by "disabling itself of the ability to perform its obligations" under the MFN clause after the "Split Date" of June 1, 1999.
- B. Whether Decision No. 89 preempts any claim against Conrail arising from the application of the MFN clause in the FOC License Agreement to fiber optic contracts separately entered into by CSX/NYC and NS/PRR, including any subsidiaries of those entities, regarding former Conrail lines after the Split Date.
- C. Whether Decision No. 89 preempts any claim against Conrail arising from the application of the MFN clause in the FOC License Agreement insofar as the ownership and operation of former Conrail right of way by CSX/NYC and NS/PRR after the Split Date renders Conrail's compliance with that clause commercially impossible or impracticable.

The STB shall advise the Court of its answer to these questions within ninety (90) days of the date of this Order, or within such longer time period as the Court may allow upon application of the STB. Plaintiff and Defendant are hereby **ORDERED** to make all reasonable efforts to assist the STB in resolving these questions as expeditiously as possible.

III. Upon consideration of Defendant's Motion for a Protective Order [Doc. # 20], Plaintiff's Memorandum in Opposition thereto [Doc. # 26], and Defendant's Reply [Doc. # 35], it is hereby **ORDERED** that Defendant's Motion is **DENIED**.

It is so **ORDERED**.

BY THE COURT:


CYNTHIA M. RUFÉ, J.

7-10-03.txt

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AT&T COMMUNICATIONS, INC., : CIVIL ACTION NO. 03-0147
Plaintiff :
v. : Philadelphia, Pennsylvania
CONSOLIDATED RAIL : July 10, 2003
CORPORATION, : 11:00 o'clock a.m.
Defendant :
.....

HEARING
BEFORE THE HONORABLE BRUCE W. KAUFFMAN
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

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Transcribed by: Tracey J. Williams, CET

(Proceedings recorded by electronic sound recording;
transcript provided by AAERT-certified transcriber.)

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1 (The following hearing occurred in open court at
2 11:00 o'clock a.m.):

3 THE COURT: Mr. Siembieda -- is that the way to
4 pronounce it?

5 MR. SIEMBIEDA: Yes, your Honor.

6 THE COURT: I want to be sure I pronounce it
7 correctly.

8 MR. SIEMBIEDA: Thank you, your Honor.

9 THE COURT: Are you going to be doing the arguing
10 today?

11 MR. SIEMBIEDA: No, Mr. Higgins from Dickstein
12 Shapiro is going to be doing the argument today, your Honor.

13 THE COURT: Very well. And Mr. Wellington?

14 MR. WELLINGTON: Yes, your Honor.

15 THE COURT: Good morning.

16 MR. WELLINGTON: Good morning.

17 THE COURT: This is AT&T Communications against
18 Consolidated Rail Corporation, 03-CV-147.

19 By order dated May 1, 2003, the Court scheduled oral
20 argument limited to the issues raised in Consolidated Rail
21 Corporation or Conrail's -- I don't know what a partial
22 motion is, but I assume that it's a motion to partially
23 dismiss. I think the partial was --

24 MR. WELLINGTON: I think it's in the wrong side of
25 that, your Honor --

□

1 THE COURT: I think so too.
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2 MR. WELLINGTON: -- I agree with you.

3 THE COURT: I was wondering about that as I was
4 reading it. It's a full motion to do a partial thing?

5 MR. WELLINGTON: For partial relief --

6 THE COURT: Right.

7 MR. WELLINGTON: -- no, for full relief on a partial
8 matter or something.

9 THE COURT: To dismiss for lack of subject matter
10 jurisdiction or, in the alternative, for partial referral to
11 the Surface Transportation Board and for a stay pending
12 resolution by the Surface Transportation Board.

13 This is really, at least we start out with a
14 contract dispute, and my first question to you all, and I
15 suppose it's probably a reflection of my lack of expertise in
16 this area, but I start out as an old-timer thinking that we
17 do have what's known as the sanctity of contracts, and we
18 have a contract here and it just goes against the grain to
19 think that the contract can simply be abrogated without any
20 compensation. And nobody raised -- so far as I know, nobody
21 raised the issue about whether the Government can pass a law
22 that simply abrogates a contract without any compensation,
23 without any consideration, just say, you know, we're going to
24 move ahead with what best suits the transportation entity and
25 forget about AT&T's rights which they had under an existing

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1 contract. I may be way off base in that thinking and --

2 MR. HIGGINS: I'd be happy to bring you closer to
3 the line, your Honor.

4 THE COURT: Okay. Well, since it's the defendant's
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5 partial motion, why don't we hear from the defendant first.

6 MR. WELLINGTON: If I may, your Honor?

7 THE COURT: Of course.

8 MR. WELLINGTON: Thank you.

9 THE COURT: Wherever you're most comfortable, and
10 you have as much time as you want.

11 MR. WELLINGTON: Well, thank you, your Honor.
12 Again, Ralph Wellington for Conrail. At counsel's table is
13 Mr. Rob Jenkins from the Mayer, Brown firm --

14 THE COURT: Welcome, sir.

15 MR. WELLINGTON: -- who has been admitted in this
16 case; and Nancy Winkelman, my partner.

17 THE COURT: This is -- it's a very fascinating
18 question, as far as I'm concerned.

19 MR. WELLINGTON: It is. And I also note that we
20 have summer clerks from both the Blank firm and the Schnader
21 firm, I gather some of whom are going to be meeting with you
22 afterward --

23 THE COURT: I think we may even have some from the
24 Dilworth firm here, I'm not sure.

25 MR. WELLINGTON: Do we have some from the Dilworth

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1 firm? Oh?

2 And then some are going to be meeting with your
3 magistrate judge afterwards, so --

4 THE COURT: And I'm going to have lunch with some of
5 them myself.

6 MR. WELLINGTON: Good.

7 THE COURT: This is summer clerk day, let's hope
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8 they learn something; A, what you should do, and maybe --
9 hopefully not, but maybe some of the things you shouldn't do.

10 MR. WELLINGTON: I'm sure Mr. Higgins will be an
11 example of what you should do and I'll try to avoid the
12 other, your Honor.

13 First of all, I want to respond directly to the
14 concern your Honor just expressed before I even get into the
15 outline of the argument that I wanted to present. There has
16 not been an abrogation of contract here. As we stand here
17 today --

18 THE COURT: well, don't they have a most-favored
19 nation --

20 MR. WELLINGTON: As we stand here today -- yes, your
21 Honor -- as we stand here today, however, AT&T has
22 approximately 2700 miles of fiber optic cable that it's using
23 as part of its nationwide system --

24 THE COURT: Right, and they've paid millions and
25 millions and millions of dollars.

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1 MR. WELLINGTON: -- and they pay for that -- right.
2 So, whether they pay Conrail or someone else, they are going
3 to pay for that right --

4 THE COURT: That's no problem.

5 MR. WELLINGTON: -- and that contract has not been
6 abrogated.

7 THE COURT: well, but the part of the contract, at
8 least they allege that the part of the contract which gives
9 them the most-favored nations --

10 MR. WELLINGTON: There is --
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11 THE COURT: -- position has been or is about to be
12 ignored. Overlooked?

13 MR. WELLINGTON: Part of that contract --

14 THE COURT: Overridden? I don't know.

15 MR. WELLINGTON: -- so we understand the contract,
16 part of that contract -- and, again, this is a 60-page
17 contract which has many -- there is -- many consideration of
18 parties on both sides. The MFN clause is one paragraph of a
19 60-page contract. So, it is not, as this motion -- or as the
20 briefing would seem to imply, it was not the consideration
21 for this contract. The consideration for this contract,
22 fundamentally -- and already I'm doing something I want to
23 avoid doing, which is we're into the merits of this issue
24 already and, as your Honor understands --

25 THE COURT: I understand.

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1 MR. WELLINGTON: -- we don't believe the merits
2 should be discussed here at the moment, we believe those are
3 appropriately before the STB, but I do want to get -- respond
4 to your Honor's concerns and then I'll get to that issue.

5 The fundamental consideration in this contract was
6 2700 miles of our right-of-way for which you pay \$17 million
7 a year. There was a -- there were many provisions on both
8 sides, there is one -- there was an MFN protection in it,
9 which Conrail has acknowledged from the beginning of 1984 and
10 believes that it has honored since 1984. To the extent that
11 Conrail has been relieved by virtue of the STB-approved
12 transaction of the ownership of the right-of-way on which
13 that -- that fiber optic cable continues to exist, it doesn't

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14 own that right-of-way anymore, it was compelled to give it up
15 as part of this transaction. It therefore is unable, as a
16 matter of law and practice, to enforce what the new owners do
17 on that right-of-way and, hence, it can't guarantee that they
18 would not put in a new fiber optic agreement with somebody
19 else that might violate that most-favored-nations clause.

20 THE COURT: Right, but it could pay damages.

21 MR. WELLINGTON: Absolutely not, your Honor, and
22 that's what we need to talk about in the law.

23 THE COURT: Well, I'm not saying that it should, but
24 it could.

25 MR. WELLINGTON: Again, I preface this by saying

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1 that's a merits issue. Now, if it was ultimately found --

2 THE COURT: No, no, no, no, whether or not --

3 MR. WELLINGTON: -- could it pay damages? Yes.

4 THE COURT: Whether or not they should pay damages
5 is a merits issue.

6 MR. WELLINGTON: Yes, it could pay damages.

7 THE COURT: Right.

8 MR. WELLINGTON: That's correct. That's different
9 from should, it could pay damages.

10 THE COURT: Because part of the most-favored-nation
11 clause was that, even if they may not be able to enforce the
12 equal charge, their charge would be reduced to the extent
13 that you were giving someone else -- or anyone was giving
14 someone else a reduced -- charged less than theirs for the
15 use of the fiber optics right-of-way.

16 MR. WELLINGTON: The most-favored-nation clause
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17 gives Conrail at its sole election and option the --

18 THE COURT: Yeah, but if Conrail puts itself in a
19 position where it's impossible to perform one of the
20 alternatives, isn't it responsible to perform at least the
21 other?

22 MR. WELLINGTON: Well, when and if the merits of
23 this are reached at the appropriate forum, that will be a
24 discussion.

25 THE COURT: And let me also put into the equation

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1 here another issue, which I'm sure you'll want to confront,
2 and that is the extent to which -- and this may be an issue
3 of fact that we can't decide here yet -- the extent to which
4 -- concluding, for example, hypothetically, that we should
5 require Conrail to pay damages, how that would affect the
6 transaction and would it affect the transaction, and would it
7 affect the transaction with sufficient materiality to -- even
8 if you're right about the preemption issue -- to be entitled
9 to be covered by the preemption issue, or is it simply one of
10 those contracts that could be performed without affecting
11 adversely the transaction approved by the Surface
12 Transportation Board?

13 MR. WELLINGTON: I'll show you why it couldn't be,
14 your Honor, and then -- again, this is fundamentally issue of
15 merits that we believe the Board needs to be deciding, but
16 the fund -- AT&T's fundamental complaint post-June 1st, 1999,
17 which is all this motion is about, that post-split date, is
18 that Conrail was ordered to convey the right-of-way to two
19 new corporate entities that were created as part of the

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20 transaction. Hence, but for the STB-approved transaction,
21 the very entities who now have that -- have the right-of-way
22 didn't exist and, therefore, this is inherent in a true --
23 inherent as part of that transaction, because but for the
24 transaction we wouldn't be here and those entities that now
25 own the right-of-way over which Conrail does not have the

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1 power to enforce the MFN didn't exist. What AT&T hopes to do
2 is say, well, Conrail, you still have to pay even though the
3 entities created by the STB as part of the transaction --

4 THE COURT: wasn't there in the deed with the New
5 York Central the language, "subject to any agreements for
6 location and use of fiber optic cable conduit and related
7 facilities in, on or along a portion of the premises"?

8 MR. WELLINGTON: In some deeds, your Honor, that
9 language exist, in other deeds -- there are many, many, many
10 deeds and in other deeds it doesn't exist. It's another
11 issue for the Board.

12 THE COURT: why is that an issue for the Board?

13 MR. WELLINGTON: well, let me get to that, if I can,
14 your Honor --

15 THE COURT: Yes, I'm sorry, I --

16 MR. WELLINGTON: -- because it's part of a bigger --

17 THE COURT: I don't mean to interrupt your argument,
18 but I just wanted you to know in advance what my problems
19 were, so you could deal with them in context.

20 MR. WELLINGTON: well, it's part of the issue for
21 the Board, your Honor, because fundamentally the contracts at
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22 issue here between -- excuse me, the license agreement
23 between Conrail and AT&T, that license agreement has been
24 impacted by a Board-approved transaction; no one can dispute

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1 that, AT&T can't, we can't. The question then becomes --

2 THE COURT: It has been impacted because, I'll call
3 them the transferees have concluded that it should be
4 impacted and it doesn't necessarily -- it wouldn't
5 necessarily be impacted, would it? In other words, why
6 couldn't the New York Central and the other transferees
7 simply say, yeah, we're going to continue to abide by the
8 most-favored-nations clause?

9 MR. WELLINGTON: Well, the Board, which has the
10 exclusive jurisdiction given to it by Congress to determine
11 the appropriate competitive and anti-competitive natures of a
12 rail merger --

13 THE COURT: Right.

14 MR. WELLINGTON: -- has concluded that various parts
15 of that right-of-way go to NS, various parts of that right-
16 of-way go to CSX --

17 THE COURT: Right.

18 MR. WELLINGTON: -- that board has set the terms.

19 THE COURT: But the Board never expressly found that
20 the most-favored-nations provision would no longer be
21 effective, did it?

22 MR. WELLINGTON: It hasn't because -- there was no
23 specific holding on that, your Honor, because in fact that
24 was not raised by any party before the Board and, hence, now
25 that it has been raised, as an inherent part of that

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1 transaction it is for the Board to address that and that's
2 all we are saying.

3 THE COURT: Did AT&T have notice of the Board
4 proceeding?

5 MR. WELLINGTON: Absolutely, your Honor, it was a
6 public -- not only is it publicly noticed, as required, but
7 160 other people who had contracts like these and other
8 interests all appeared and testified and had their
9 opportunity to --

10 THE COURT: AT&T didn't appear?

11 MR. WELLINGTON: AT&T did not intervene. And in
12 fact they were in negotiations with Conrail during this whole
13 period of time to renew the license agreement, which they
14 did. So, AT&T was aware of it, they just -- they made
15 whatever decision, they did not intervene to try to protect
16 themselves in ways that they now feel they should, they
17 waited four years afterward and filed this lawsuit.

18 THE COURT: I'm sure they'll have an explanation,
19 but I'll wait, I'll restrain myself and wait.

20 (Laughter.)

21 THE COURT: Go ahead, I'm sorry.

22 MR. WELLINGTON: Your Honor has raised a number --
23 of what will ultimately be appropriate questions on the
24 merits of the impact of that transaction on the MFN. What
25 Conrail's motion, partial motion or motion for partial relief

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1 is about is that we believe fundamentally the law is
2 absolutely clear, both from the statute and from the case
3 law, that that decision is for the Board. And I just want to
4 walk -- I'm going to be briefer than I usually am arguing,
5 your Honor, I hope, and the other thing I'm going to do is
6 I'm probably going to quote from a couple of cases more
7 frequently than I would. But the law is so clear on this
8 that I think if we can just direct your Honor to --

9 THE COURT: I always beware when somebody tells me
10 how clear the law is.

11 MR. WELLINGTON: well, Mr. Higgins might muddy it up
12 a little bit, but I'll try to respond and rely, if I can.

13 First of all, the issue -- again, we've talked a
14 little bit, your Honor and I, about the merits versus the
15 jurisdiction issue and I want to reiterate this again: The
16 Conrail motion does not raise any issue requiring this Court
17 now, in our view, to address the merits of whether AT&T is
18 entitled to recover from Conrail for the MFN violation. Our
19 motion is limited to whether the STB, the Surface
20 Transportation Board, or this Court has jurisdiction to
21 determine whether AT&T's allegations of Conrail liability
22 post-split date are preempted by Decision 89, which
23 authorized that transaction and in fact required the
24 conveyance of the right-of-way, which we're now trying to be
25 held liable for, after that date. Either --

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1 THE COURT: I'm sorry again to interrupt you, but is
2 it your view that that decision necessarily affected AT&T's

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3 rights to enforce its most-favored-nations provision?

4 MR. WELLINGTON: It --

5 THE COURT: I mean, couldn't -- wouldn't -- why
6 wouldn't they have the right to believe that that was one of
7 the contracts that would be recognized and lived up to by
8 Conrail or by Conrail's successor?

9 MR. WELLINGTON: I'll answer the first -- my first
10 answer to your first question, your Honor, is do we believe
11 -- yes, we do believe that the contract, that that contract,
12 the license agreement, has been impacted by the approved
13 transaction. That, again, is a merits issue --

14 THE COURT: Why is it --

15 MR. WELLINGTON: -- for the Board to decide. I'm
16 sorry.

17 THE COURT: Why is it necessarily impacted? I mean,
18 it's impacted to the extent that obviously the new owner of
19 the right-of-way would be performing rather than Conrail, but
20 why is it necessarily impacted in whether or not it will be
21 performed at all by anyone?

22 MR. WELLINGTON: Well, it is impacted because
23 Conrail is incapable as a result of that transaction approved
24 by the Board of in fact assuring compliance with the MFN on
25 the right-of-way that's been transferred, that's why it's

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1 been impacted --

2 THE COURT: Yes, Conrail --

3 MR. WELLINGTON: -- Conrail can't do that.

4 THE COURT: -- Conrail can't, but its successor
5 could.

6 MR. WELLINGTON: Well, it -- maybe, maybe not, your
 7 Honor, I don't know. Those successors are not parties to
 8 this litigation, they have not been sued by AT&T; whether
 9 AT&T can hold them responsible is another issue, but they're
 10 not -- I'm represent Conrail, the only party AT&T has sued,
 11 and Conrail has been rendered incapable of in fact complying
 12 with that because it's had to give that property up, it can't
 13 control the property.

14 THE COURT: Well, Conrail wasn't an innocent
 15 bystander, Conrail chose to make itself incapable of
 16 performing.

17 MR. WELLINGTON: I think, your Honor, if you look--
 18 if you read Decision 89 from the Board, in essence this was a
 19 takeover of Conrail by CSX and NS, and ultimately the Board
 20 made decisions, as it has the exclusive authority to make,
 21 how that takeover was going to happen in a way that preserved
 22 competitive -- the competition of railroads in the Eastern
 23 sector. Conrail, as a result, was ordered to keep some
 24 things, it was ordered to give up 90 percent of its rail
 25 assets, there were certain retained assets and shared assets

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1 the Board decided it needed to leave with Conrail in order to
 2 assure that there was remaining competition, but that was --
 3 this was not a Conrail scheme that was put together, this was
 4 basically a hostile takeover that ended up with the Board
 5 figuring out how to do it.

6 Now, again, all of that, in our view -- and
 7 contracts were affected by those, not just AT&T's, hundreds
 8 of contracts were affected by this transaction. And the

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9 issue -- you know, I think the most pertinent decision here
10 that we need to look at is a decision in Consolidation Coal
11 that the Board decided a year or so ago, which is -- involves
12 another competitive clause in another contract, that was sent
13 down by Chief Judge Giles to the Board in order to get -- for
14 it to determine whether or not the contracts there were
15 impacted. And the -- and let me talk about Consolidation
16 Coal for a moment and then back up to why this case fits
17 within it.

18 In Consolidation Coal, the contract -- there were
19 two contracts at issue there, but the one most similar to
20 this and it's virtually identi -- very similar to this, your
21 Honor, is that -- and I quote from Consolidation Coal --
22 "Conrail" -- there's a contract at issue and the court
23 describes it or the Board describes it, "Conrail would not
24 establish any rates or enter into any contracts involving the
25 line-haul movement of coal to the Baltimore area that placed

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1 Consolidation Coal's terminal at a competitive disadvantage,"
2 paren, "(the competition provision)," paren, unquote.

3 In short, there was a competitive protection clause
4 in the contract like there was an MFN clause here.
5 Consolidation Coal comes to court saying, hey, give us
6 damages, Conrail, because you don't have this -- you know,
7 that clause is -- you took that clause away from us.

8 There was also another contract at issue in that
9 case where it was a take-or-pay, either give us \$4 million of
10 business a year or pay us \$4 million. Once Conrail was --
11 those contracts were removed from Conrail, Consolidation Coal

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12 says, pay us \$4 million a year. Judge Giles, Chief Judge
13 Giles, in consent with the parties, sent that down to the
14 Board. And the Board in that case -- two important holdings,
15 your Honor: "The preemption of all other law extends not
16 only to laws, but also to contracts as necessary to let a
17 person participating in a Board-approved transaction carry
18 out the approved transaction."

19 And then it says, "CCSC contends that preemption of
20 the agreements is not necessary to this CSX-NSCRC transaction
21 and that enforcement of the agreements would not unravel the
22 transaction."

23 That's essentially the argument that AT&T makes
24 here, but the Board goes on: "But the necessity test does
25 not require a finding that the merger could not go forward

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1 without the assignment of the agreements, only that there is
2 a nexus between the parties' assignments of the prior Conrail
3 contracts generally and the effectuation of the benefits
4 intended to result from the transaction. Here the division
5 of Conrail's assets between NS and CSX and the corresponding
6 assignment of Conrail's contractual obligations related to
7 those assets was inherently necessary for the parties to
8 carry out the pro-competitive transaction that we
9 authorized," end quote.

10 That is precisely what happened here. The Board
11 made that decision with respect to this contract, along with
12 many others. The impact of that is for the Board to decide
13 and you -- and the basis of that, you go back to the basic
14 jurisdiction in 48 USC 1331, which your Honor, I know, knows

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15 is -- says that the authority of the Board for mergers is
16 exclusive, and you then start with the Dispatchers case from
17 Justice Kennedy's quote in the U.S. Supreme Court that, you
18 know, making clear that it's exclusive; the Ninth Circuit,
19 which really rendered the first decision following that of
20 the Supreme Court case of import in the Railway Labor
21 Executives, holds that "the ICC," now the STB, "has exclusive
22 authority to challenge claims that certain proposed actions
23 are incident to the merger; the Fourth Circuit in Norfolk and
24 Western followed that; and then the Third Circuit in both
25 Pennsylvania v. the STB and the Union Railroad v. United

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1 Steelworkers of America cited those cases from the Fourth and
2 Ninth Circuit in finding that the Board has exclusive
3 jurisdiction.

4 But what I suggest to the Court as the practical
5 thing to do is -- and let's look at the status of what's
6 happened. This complaint was filed in January of this year,
7 about four years after the transaction was approved by the
8 Board, Conrail filed this motion and on the same day filed a
9 petition with the STB, asking the STB to resolve these
10 issues, that petition is pending and has been fully briefed
11 by both sides. Subsequent to that petition -- this is a
12 matter of public record -- there's a petition before the
13 Board by NS and CSX to become the direct owners of the
14 originally-ordered subsidiaries of Conrail, NYC and PRR, and
15 yesterday the STB ordered that proceeding to go forward. So
16 that in fact, absent some objection, which seems unlikely,
17 the subsidiaries, NYC and PRR, for which -- whose actions

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18 AT&T wants to hold Conrail liable in damages, are in fact
19 going to be separately and completely owned by other
20 corporations, not by Conrail anymore, that's the way this
21 transaction is involving, at least that issue is before the
22 Board to decide, again.

23 So, this Court, in our view, is -- the Board has
24 exclusive jurisdiction to decide the impact of that
25 transaction on the license agreement; Conrail may be right,

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1 it may be wrong about the impact, but that's for the Board to
2 decide. This Court can either dismiss that portion of the
3 case or it can refer, as Chief Judge Giles did, a portion of
4 the case and stay this case until a decision from the Board
5 is rendered on that issue, because there are clearly other
6 issues from 1984 up to 1991 that are clearly before -- as to
7 whether or not Conrail violated that MFN which are
8 appropriately before this Court. And the Court, as other
9 courts have done, could even request that the Board give a
10 status report or respond to the referral within 120 days or
11 something, so that things are not stayed terribly long. But,
12 again, AT&T waited almost four years to bring the case,
13 waiting another four or five months for the Board to decide
14 that portion of it and then having that issue come back to
15 this Court and moving the case forward with the decision of
16 the Board on its exclusive jurisdiction issues in place I
17 think would be both the right thing to do as a matter of law
18 and the most efficient thing to do.

19 With that, I will sit down.

20 THE COURT: well, let me just ask you this. Again,

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21 I'm concerned about the -- although I don't think it's
22 specifically been raised -- the constitutionality of a law
23 that gives a board the right to say, AT&T, the contract that
24 you had and that's been enforced for years is no longer going
25 to be enforced, it's standing in the way of a transaction

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1 that we feel is in the best interest of the public and,
2 therefore, without any compensation or any consideration to
3 you, tough luck. Is that -- am I overstating that?

4 MR. WELLINGTON: Well, your Honor, two responses to
5 it: The statute passed by Congress, 49 Section 13 -- 11 --
6 11321 says, "a rail carrier corporation or person
7 participating in that approved or exempted transaction is
8 exempt from the antitrust laws and from all other law,
9 including state and municipal law."

10 THE COURT: Right, I can understand that.

11 MR. WELLINGTON: In Dispatchers, the Dispatchers
12 case, Justice Kennedy -- actually, it was a 7-to-2 opinion,
13 no one had any problem with the fact that all other law meant
14 all other law --

15 THE COURT: Including contracts?

16 MR. WELLINGTON: Including contracts. And --

17 THE COURT: Well, did anybody raise the issue of
18 whether you could just take and --

19 MR. WELLINGTON: And the Ninth Circuit, the Fourth
20 Circuit, the Third Circuit, the 11th Circuit have interpreted
21 this many times. I think the short answer -- and I can't
22 represent whether anyone has ever raised that -- no court in
23 affirming in fact this exclusive jurisdiction and the power

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24 to abrogate contracts has ever suggested there's a
25 constitutionality issue, your Honor, not the Fourth Circuit,

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1 not the 11th --

2 THE COURT: Maybe I'm way off base, but it just
3 seems to me --

4 MR. WELLINGTON: Well, we've had five circuits
5 affirm the power to do that.

6 THE COURT: That's -- that's -- that's persuasive,
7 but not conclusive, at least --

8 MR. WELLINGTON: And --

9 THE COURT: -- at least in my mind.

10 MR. WELLINGTON: -- and the Supreme Court.

11 THE COURT: I may have to follow what they've done,
12 but --

13 (Laughter.)

14 THE COURT: -- it still gnaws at me to think that--
15 you know, I was brought up to think of -- consider the
16 sanctity of contracts and that you can't just abrogate them
17 without some consideration, without some compensation.

18 MR. WELLINGTON: The -- I think --

19 THE COURT: You can abrogate them, I mean, there's
20 no question about that.

21 MR. WELLINGTON: The due process is that anyone has
22 the power to come into these proceedings and have their
23 rights considered by the Board. And the Board often, as a
24 result, in many of these proceedings has responded to those
25 concerns, issued certain protections. In the labor area

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1 there's an established, you know, process for the termination
2 of employee rights, the need to follow the New York Dock
3 procedures. So, there has been an effort by the Board to
4 respond to issues that are appropriately raised, but at some
5 point the power -- the commerce clause power of the
6 Constitution, which has been delegated for rail-merger
7 purposes to the Surface Transportation Board, has been deemed
8 to have that power and no one -- no court has questioned that
9 so far, your Honor.

10 THE COURT: I should have been the lawyer in the
11 case.

12 (Laughter.)

13 MR. WELLINGTON: Thank you, your Honor.

14 THE COURT: Thank you.

15 Yes, sir?

16 MR. HIGGINS: Thank you, your Honor.

17 THE COURT: Good morning.

18 MR. HIGGINS: Good morning, your Honor, may it
19 please the Court.

20 I have here, if your Honor please, a whole series of
21 prepared remarks, but it seems to me in light of the Court's
22 questions, if you'll permit me, the most efficient way to
23 proceed may well be to go to the Court's questions, which
24 frankly and with all deference to counsel, I don't think were
25 answered in the course of his remarks and I think are

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1 dispositive of the matter before your Honor.

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2 Let me start with the first one, which isn't in the
3 briefs, and that is, what about the constitutionally
4 protected right to contract? What's going on here?

5 THE COURT: That's --

6 MR. HIGGINS: Exactly.

7 THE COURT: -- something that concerns me.

8 MR. HIGGINS: Now, when your Honor says, can you
9 really take away someone's contract rights without
10 compensation? That wasn't briefed before, your Honor. I
11 think the answer to that question, as your Honor does, is no,
12 you can't just take away somebody's contract rights without
13 compensation, if compensation is appropriate. We didn't get
14 to that in this case because it doesn't -- it, frankly, ought
15 not to be raised by the case.

16 It ought not to be raised by the case because we get
17 to the Court's second question, which is, how could you take
18 away any contract rights which people have unless you --
19 without any compensation, how could you take them away at
20 all? And the answer to that, if the Court please, is you can
21 take them away -- putting the compensation question aside
22 now, I'll come back to that -- you can take the rights away,
23 provided you have a very good reason. What's the very good
24 reason? Well, the very good reason has to exist obviously in
25 a statute passed by the Congress and the Congress passed a

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1 statute in this -- that relates to this case. And the
2 portion of the statute on which Conrail relies is Section
3 11321 of what is I guess the Interstate Commerce Act, the
4 Surface Transportation Board Act. But that statute doesn't

5 say you can just obliterate people's contract rights if you
6 feel like it, just because there's some big relationship
7 between the contracts in question and the merger
8 consolidation that's been approved by the Board. It says
9 right on its face, if the Court please, "a rail carrier
10 participating in an approved transaction," like this one, "is
11 exempt from antitrust laws and all other laws," and we would
12 concede that includes contracts, "as necessary to let the
13 rail carrier carry out the approved transaction." Not just
14 for any reason, only if it would pose an obstacle to the
15 approved transaction such that the transportation policy of
16 the United States can't be properly complied with.

17 That brings me to, your Honor -- that led right to
18 your Honor's second question, which was, assuming that
19 Conrail would be required to pay damages -- and I should
20 stress at this point, if your Honor will permit me to
21 digress, the only relief that AT&T seeks in this case is for
22 Conrail to reduce, where appropriate, the fees that it's
23 charging us, the \$17 million a year we've been paying for
24 years, to the extent that our competitors are paying less,
25 and we don't care who's charging them less. I want to make

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1 absolutely clear, we don't challenge any aspect of the STB
2 transaction, we don't challenge the right of Conrail's
3 subsidiaries to enter into any contract they want, we don't
4 claim that no matter what contract they enter into that
5 constitutes a breach for Conrail, that's not the case at all,
6 they can enter any contract they want; it has to be approved
7 by Conrail's owners, who ultimately get the \$17 million, but

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8 they can enter any contract they want. The breach only
9 occurs if Conrail decides that, notwithstanding its promise
10 in the MFN provision, it's not going to reduce the fees that
11 AT&T has to pay.

12 Now, the Court --

13 THE COURT: Well, can Conrail reduce the fees if it
14 no longer owns the right-of-way? I mean, isn't it impossible
15 for them to comply then and perform, at least --

16 MR. HIGGINS: No.

17 THE COURT: -- with regard to some of it?

18 MR. HIGGINS: What it owns, if the Court please, is
19 the license agreement. As part and parcel, as part and
20 parcel of the transaction which was approved by the STB,
21 Conrail said, well, we're going to give a C right-of-way
22 under certain conditions -- and I'd like to come back to
23 those conditions -- but we are going to keep our license
24 agreement with AT&T. It's not surprising, we've paid them
25 \$200 million and we're still paying them 17 million a year.

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1 So they say, you go run the railroad, we'll keep the license
2 agreement with AT&T. They wrote quit claim -- and all we ask
3 -- you say, can they comply, if the Court please? All they
4 have to do is reduce the fees that we're being charged.

5 THE COURT: So, the fees are still being paid to
6 Conrail and not to the successors?

7 MR. HIGGINS: Yes, sir, absolutely, paid to Conrail.

8 And the --

9 THE COURT: Well, stop.

10 Mr. Wellington, I know this is a little out of order
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11 here, but if you're still receiving the license fees and in
12 effect the contract -- the license agreement is still in
13 effect, why is it impossible for you to perform?

14 MR. WELLINGTON: Conrail is receiving the fees on
15 that portion of the right-of-way that was not just NS or not
16 just CSX, but where the cable is on both NS and CSX, and that
17 was part of the pro-competitive decision of the Board not to
18 have that right-of-way given to either of those. So, the
19 order was that Conrail -- I mean, AT&T is continuing to pay
20 for its access to right-of-way, that money is coming to
21 Conrail. Now, why can't Conrail --

22 THE COURT: For 2700 miles of --

23 MR. WELLINGTON: Yes, yes.

24 THE COURT: So, you're still receiving the license
25 fees for 2700 miles?

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1 MR. WELLINGTON: Yes.

2 THE COURT: And that's all AT&T has?

3 MR. WELLINGTON: In essence. I think -- I don't
4 think we're receiving it for all of the 2700 --

5 COUNSEL: Yes, your Honor, yes.

6 MR. WELLINGTON: Okay, thank you. My prior
7 representation was correct.

8 THE COURT: I'm often guilty of oversimplification,
9 but if you're still receiving -- if you're still receiving
10 the payment under the contract of all the license fees for
11 the 2700 miles of fiber optic cable and if the new owners of
12 the right-of-way are -- and these are big ifs, but if they
13 are charging less than what AT&T is paying, then why can't

14 you reduce the amount that AT&T needs to pay you?

15 MR. WELLINGTON: The... we have been ordered to
16 convey that property, we no longer have any power over --

17 THE COURT: Forget whether you have power over what
18 they charge, let's just assume that they willy-nilly, for
19 whatever reason, decide to charge half of what AT&T is paying
20 -- I'm picking a number right out of the air -- but you're
21 still receiving the fees from AT&T, so AT&T and your license
22 agreement is still in effect.

23 MR. WELLINGTON: Correct.

24 THE COURT: AT&T is not paying the new owners --

25 MR. WELLINGTON: Correct.

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1 THE COURT: -- they're paying you?

2 MR. WELLINGTON: Correct.

3 THE COURT: So, why isn't your most-favored-nations
4 provision still in effect?

5 MR. WELLINGTON: Your Honor, it may or may not be,
6 and that's what I've said from the beginning, that is a
7 decision for the Board.

8 THE COURT: Why?

9 MR. WELLINGTON: Because it is -- this contract and
10 this required conveyance, just like in Consolidation Coal, is
11 an inherent part of what the Board ordered. The law is
12 absolutely clear from the cases we've talked about that the
13 board has exclusive jurisdiction to determine the impact of
14 what it has approved and, if the Board makes a mistake, it's
15 appealable.

16 THE COURT: Yeah, but as I'm -- and, again, I've got
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17 to think about this, but -- and I admit a propensity to
18 oversimplify, but it seems to me that what the Board approved
19 was a transfer of the property of the right-of-way but didn't
20 transfer the license agreement that gave Conrail the right to
21 receive the license fees for the 2700 miles of fiber optic
22 cable.

23 MR. WELLINGTON: That's correct.

24 THE COURT: And it seems to me the amount of money
25 that is being paid by AT&T to Conrail is inextricably

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1 intertwined with the most-favored-nations provision if its
2 competitors -- its competitors -- are paying less now to your
3 successors, for whatever reason -- it wasn't part of the
4 transaction approved by the Surface Transportation Board that
5 the new owners would charge less.

6 MR. WELLINGTON: Absolutely, your Honor, and here's
7 the --

8 THE COURT: That's their decision, if they've done,
9 I mean, we don't -- that's not before us at the moment.

10 MR. WELLINGTON: It was part of the Surface
11 Transportation's need to make sure there was competition to
12 assure that the new owners had the right to charge whatever
13 they wanted to, that's part of the --

14 THE COURT: Right, they can charge whatever they
15 want --

16 MR. WELLINGTON: That's --

17 THE COURT: -- however, that might affect Conrail's
18 right to receive the full amount regardless of the most-
19 favored-nations clause.

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20 MR. WELLINGTON: Your Honor, think again about CCSC,
21 the Consolidation Coal, and the similarity here. where
22 Conrail had a contract with Consolidation Coal that obligated
23 it to pay \$4 million a year if it didn't give enough traffic
24 there and obligated it not to divert coal out of that area,
25 those contracts were terminated.

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1 THE COURT: But, see, that contract couldn't be
2 performed, this contract could be performed, as I see it.
3 There's nothing stopping Conrail from performing its part of
4 the license agreement that it retained. It seems to me that,
5 from what I understand, if I understand the facts correctly,
6 Conrail retained the license agreement contract --

7 MR. WELLINGTON: Correct.

8 THE COURT: -- Conrail is continuing to get the full
9 benefit of that contract, but yet -- wants to receive, on the
10 one hand, the full benefit, but doesn't want to perform an
11 aspect of the contract that it fully is able to perform. You
12 can't stop -- I mean, there are certain things that AT&T -- I
13 understand there's alternative relief asked for, which
14 perhaps they can't get because you can't supply it, but you
15 certainly could supply reducing the fees that AT&T is paying
16 if they're able to establish that its competitors are paying
17 less as contemplated by this license agreement, as I see it.

18 MR. WELLINGTON: I want to -- without conceding, I
19 want to assume that for a moment, your Honor, that you're
20 right about that. The issue before your Honor is not whether
21 that is right or wrong, the issue is who decides it.

22 THE COURT: The issue is who should decide it.
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23 MR. WELLINGTON: And, again, let us -- the precise
24 question --
25 THE COURT: But let me ask you something --

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1 MR. WELLINGTON: -- who is to decide?
2 THE COURT: Well, who is to -- but let me ask you a
3 question: Let's assume I decide it, how is that going to
4 affect the transaction, if at all, approved by the Surface
5 Transportation Board? It's not going to -- as I see it, it
6 won't affect the transaction at all. How will it affect it?
7 MR. WELLINGTON: Your Honor, with all due respect,
8 the Court is --
9 THE COURT: Uh-oh, I'm in real trouble now.
10 (Laughter.)
11 THE COURT: Whenever anyone starts a statement, with
12 all due respect --
13 (Laughter.)
14 MR. WELLINGTON: You're in the process of
15 substituting the Court's judgment for the competitive
16 balances that it worked very hard to achieve, the economic
17 balances.
18 THE COURT: Well, AT&T is not in the railroad
19 business, right?
20 MR. WELLINGTON: Neither was Consolidation Coal,
21 your Honor, neither were suppliers, other suppliers.
22 THE COURT: Yeah, but in the Consolidation Coal
23 situation there was no way that they could have continued to
24 perform that contract. But here, it seems to me, it's very
25 simple to continue performing your obliga -- so long as you

1 want to continue getting the full amount of the license fee,
2 why shouldn't you be held responsible for the other
3 obligations?

4 MR. WELLINGTON: It can -- Conrail can continue to
5 fulfill all of the obligations in the sense of the right-of-
6 way is there, I mean -- let me take -- that's not the way --
7 that's not what I wanted to say.

8 Conrail cannot influence the new owners of the
9 right-of-way.

10 THE COURT: What if the new owners said, AT&T, we're
11 going to abrogate your right to use the fiber optic cable
12 right-of-way? Go on. Do you think you would still be
13 entitled to receive the license fee from AT&T?

14 MR. WELLINGTON: No, it would not have -- there
15 would be nothing you would be paying for at that point, your
16 Honor. It's paying for access.

17 THE COURT: Right, it's paying for access to
18 something you don't own.

19 MR. WELLINGTON: That's correct.

20 THE COURT: That's gone.

21 MR. WELLINGTON: And that was a decision the Board
22 made --

23 THE COURT: The Board -- that's gone, I understand
24 that. And the right to control what others are charged for
25 the use of that right-of-way is gone --

1 MR. WELLINGTON: Correct.
2 THE COURT: -- you can't control that.
3 MR. WELLINGTON: Correct.
4 THE COURT: But you can control what you charge
5 AT&T.
6 MR. WELLINGTON: We can control what we charge AT&T.
7 THE COURT: Right. And one of the considerations of
8 what you charge AT&T is what AT&T's competitors are paying
9 for the very same service, as I understand the contract.
10 Isn't that right?
11 MR. WELLINGTON: One of the considerations that the
12 MFN clause had was per-mile fee.
13 THE COURT: Right. So, I mean, why should the MFN
14 clause be invalidated, is there a reason for it? Other than
15 Conrail would love to get -- continue to get the full amount
16 of the license agreement.
17 (Laughter.)
18 MR. WELLINGTON: It may or may not be, your Honor,
19 it may or may not be.
20 THE COURT: Well, is there a reason? What --
21 MR. WELLINGTON: It may or -- the reason is because
22 the contract has been removed from Conrail.
23 THE COURT: No, it hasn't.
24 MR. WELLINGTON: The ability -- let me -- we're
25 going over the same ground, as you know, your Honor -- the

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1 ability of Conrail to enforce the MFN clause has been
2 removed.

3 THE COURT: No, it hasn't, because the alternative
4 was to reduce AT&T's -- the amount that AT&T pays. It's
5 true, you can't -- I assume, for the purpose of this argument
6 at least, that you can't control what the successors charge
7 for the use of the fiber optic cable right-of-way, but you
8 certainly can control what AT&T pays you. And one of the
9 provisions of what AT&T owes to you was that if its
10 competitors were to pay less for the use of the fiber optic
11 cable right-of-way, one of the alternatives would be -- not
12 just that you would raise it or stop it, but that you would
13 lower what they pay.

14 MR. WELLINGTON: And the question --

15 THE COURT: And you can do that.

16 MR. WELLINGTON: And the question is whether the
17 statute that gives the Board exclusive jurisdiction over
18 setting up this transaction preempts that claim by AT&T, that
19 is the question, your Honor.

20 THE COURT: But why would it if it doesn't affect
21 the -- if it doesn't affect the transaction?

22 MR. WELLINGTON: It does affect the transaction,
23 your Honor.

24 THE COURT: How does it affect the transaction?

25 MR. WELLINGTON: It's inherent -- if you, again,

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1 read carefully the language of CCSC --

2 THE COURT: Yeah, I'm slow, so you --

3 MR. WELLINGTON: -- it's an inherent part of this
4 transaction. Again, these two entities --

5 THE COURT: You told me that the most-favored-

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6 nations clause is one of, you know, pages and pages and pages
7 and pages of a contract --

8 MR. WELLINGTON: It's a 60-page license agreement,
9 that's correct.

10 THE COURT: Right. So, you were saying it's not at
11 all critical.

12 MR. WELLINGTON: Oh, I think it's a very important
13 clause, but it's not -- was not the quid pro quo for which
14 AT&T paid \$17 million a year, it paid it for access.

15 THE COURT: Access, yes, but -- but, by the same
16 token, they negotiated and got the right, if its competitors
17 were paying less, to pay less. Isn't that right?

18 MR. WELLINGTON: I'm sorry, your Honor, I just
19 missed that. I apologize.

20 THE COURT: They negotiated and received an
21 assurance that if their competitors were paying less for the
22 use of the same fiber optic cable right-of-way that their
23 rent, so to speak, or their whatever, their license fee or
24 whatever it is, would be reduced proportionately?

25 MR. WELLINGTON: That's what they would hope out of

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1 the -- a little abbreviated, but that's what they would hope,
2 yes.

3 THE COURT: Right.

4 MR. WELLINGTON: Mm-hmm.

5 THE COURT: And, again, I may be oversimplifying,
6 but I don't see how that affects the transaction that was
7 approved by the Surface Transportation Board. I mean, it
8 certainly doesn't affect anything that the successor

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9 companies receive for their license agreements with others
10 for the fiber optic cable right-of-way, they get whatever
11 they want to get, they're perfectly free to do that, right?

12 MR. WELLINGTON: Yes.

13 THE COURT: The only one it affects is Conrail --

14 MR. WELLINGTON: Yes.

15 THE COURT: -- or the only one it could affect is
16 Conrail -- and Conrail made that bargain; it doesn't want to
17 live up to its bargain.

18 MR. WELLINGTON: AT&T and Conrail made that bargain,
19 your Honor, and the issue is does the fact that this
20 conveyance, which no longer permits Conrail to have control
21 over that MFN, permit AT&T, nonetheless, to sue Conrail for
22 it.

23 THE COURT: Well, they shouldn't have to sue.

24 MR. WELLINGTON: In our view, it is --

25 THE COURT: It seems to me that the contract says,

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1 if their competitors are paying less, they should pay less,
2 and if they're continuing -- the relationship continues with
3 Conrail, not with the successors, is that right?

4 MR. HIGGINS: That's exactly right, your Honor. We
5 don't have any -- we aren't quarreling with the successors,
6 we have no complaint about the successors, they can do
7 anything they want. But in a very, very competitive industry
8 we are paying \$17 million a year for this right-of-way and
9 Conrail's own papers show this Court that Quest, a principal
10 competitor, is paying zero.

11 THE COURT: Well, that's for in kind, isn't it?

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12 MR. HIGGINS: That's the point, that's exactly the
13 point. It was a barter contract, you're absolutely right,
14 your Honor, it was a barter contract in which Conrail said,
15 okay, we'll let you lease right-of-way, same as AT&T, instead
16 of taking money from you, we'll take services. Now, there's
17 a dispute between the parties about what the services cost to
18 Quest --

19 THE COURT: Are worth, yes.

20 MR. HIGGINS: -- what they're worth and what they
21 cost to Quest, we'll put that aside for a moment. Conrail
22 says, post-1999, we don't want to pay any attention to that
23 Quest contract. Why? Because Conrail is out of the -- in
24 the main, Conrail is out of the railroad business, they're in
25 the licensing business now, they're out of the railroad

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1 business, so they don't need any services from Quest. So,
2 Quest pays zero, but Quest still has the fiber optic cable
3 lease and it uses that lease to compete with us, and we're
4 paying multi-million dollars every year and being placed at
5 that competitive disadvantage.

6 THE COURT: You don't claim that you can pay
7 nothing?

8 MR. HIGGINS: No, no, we should pay -- our fees
9 should be reduced on the same property as is being leased by
10 our competitors to the same extent. If in fact Quest is
11 paying zero, that's their choice, we should pay zero. If
12 Sprint is paying 90 percent of what we're paying, our fees
13 should be reduced ten percent. And --

14 THE COURT: I can see that, but I think you're

15 overreaching on the Quest thing.

16 MR. HIGGINS: If they pay zero, if your Honor
17 please, I'm not sure how. They're competing against us.

18 Look, we entered this contract in 1984, you know, it
19 was the first contract for leasing fiber optic cable --

20 THE COURT: Is Quest providing services for the
21 successor company?

22 MR. HIGGINS: No, sir, I don't think so, but if they
23 are -- I don't think so, but if they are -- and we've said
24 this in our papers -- they should get credit for that, I
25 agree with that. If they're providing service and spending

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1 any money, whether it's by virtue of barter agreement or in
2 cash, they should get credit for that. All we want is an
3 even playing field, that's what we bargained for.

4 THE COURT: Well, let me ask -- who is recognizing
5 the contract with Quest and permitting them to continue
6 getting free fiber optic cable services?

7 MR. HIGGINS: Because Conrail kept the AT&T license
8 agreement expressly, I mean, in the --

9 THE COURT: Well, let me ask them, why are you --

10 MR. HIGGINS: -- and they kept the Quest agreement.

11 THE COURT: -- why are you giving Quest free
12 services, if you are?

13 MR. WELLINGTON: There was -- the contract between
14 Quest and Conrail was an access -- a capacity-for-access
15 contract and Conrail, as a result of this transaction, has
16 suffered as a result of the Board's decision in essence by
17 removing that right -- Conrail no longer, as a result of its

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18 reduction, has significant need for that capacity.

19 THE COURT: Right. So, why don't you just --

20 MR. WELLINGTON: In fact, one of --

21 THE COURT: -- tell Quest that you're not --

22 MR. WELLINGTON: Well, some of successors in fact

23 are using portions of it.

24 THE COURT: They are? Oh, okay.

25 MR. WELLINGTON: So that has moved on to CSX and NS

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1 for their capacity use.

2 THE COURT: So that becomes a fact question as to
3 how much in effect they're paying?

4 MR. HIGGINS: Yes, your Honor. Whatever it costs
5 Quest, it costs Quest. We would claim that we're entitled to
6 have our fees reduced to whatever that cost is to Quest on
7 that particular piece of property, which I think in Quest's
8 case runs -- runs to several hundred miles.

9 THE COURT: It's not 2700 miles?

10 MR. HIGGINS: No, your Honor, it's not 2700 miles,
11 but I think it may be in the order of five or 600 miles or
12 maybe a quarter of the \$17 million a year. I mean, your
13 Honor has asked --

14 THE COURT: That's still big money.

15 MR. HIGGINS: I agree with your Honor, so does AT&T
16 in this day and age. It used to be the largest corporation
17 in the world, it's not that anymore, if the Court please, and
18 the competitive pressures, as you know just from the front
19 page of the newspapers, have been difficult.

20 THE COURT: I used to own AT&T stock, I confirmed

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21 again this morning that I don't own any AT&T stock.
22 (Laughter.)
23 MR. HIGGINS: I think I'll stay away from that one,
24 your Honor.
25 THE COURT: It used to be that, you know, for your

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1 kids, the safest thing in the world would be to buy AT&T
2 stock.
3 MR. HIGGINS: That's correct.
4 THE COURT: My mother did that or my parents did
5 that for me, but it didn't turn out that way.
6 MR. HIGGINS: If your Honor please, I'm going to
7 dispense with the absolutely prepared remarks that I made,
8 but I would like, around the edges at least, to --
9 THE COURT: well, why don't we -- it seems to me we
10 boiled this down, unless Mr. Wellington can get me back into
11 line here, we boiled it down to a very simple proposition:
12 Conrail kept to itself the license agreement with AT&T, it's
13 getting all the benefits of the license agreement with AT&T;
14 it's true, it cannot control what AT&T is charged -- I'm
15 sorry, what AT&T's competitors are charged for the similar-
16 type services that would be covered by the most-favored-
17 nations clause, but if the fact is that AT&T's competitors
18 are paying less then why shouldn't AT&T pay Conrail less and
19 enforce the most-favored-nations clause?
20 MR. WELLINGTON: Your Honor, again I say, it may or
21 not, but that is a Board decision. And I'll just read you
22 two quotes from cases --
23 THE COURT: Go ahead --

24 MR. WELLINGTON: -- that make it a Board decision.
25 THE COURT: -- I'd like to hear it.

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1 MR. WELLINGTON: The Ninth Circuit, again, on the
2 Railway Labor Executives case, which the Third Circuit has
3 cited as authority here -- as with approval twice, the Ninth
4 Circuit acknowledged that the Supreme Court in Dispatchers
5 didn't decide who should make these determinations. And the
6 Ninth Circuit says, "who is it to decide? It follows from
7 the propositions that where a railroad which has been a party
8 to an ICC-approved merger claims that certain proposed
9 actions are incident to that merger and exempt from" -- in
10 this case it was RLA procedures, but it doesn't matter
11 because they're business and labor -- "the ICC has exclusive
12 authority to resolve a challenge to these claims."

13 THE COURT: Well, let me ask you --

14 MR. WELLINGTON: And then --

15 THE COURT: -- is it correct, is the statement
16 correct that Conrail is no longer in the railroad business?

17 MR. WELLINGTON: No, Conrail --

18 THE COURT: It's not correct or it's not --

19 MR. WELLINGTON: Conrail is in the railroad
20 business, it operates some interchanges, three yards, some
21 other...

22 MR. BRODER: 1300 miles.

23 MR. WELLINGTON: ... 1300 miles of railroad still.
24 I turned to Mr. Broder, who is general counsel for Conrail.
25 So, it is still in the railroad, in a much smaller way than

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1 it was before. And the other --

2 THE COURT: well, let me turn to your colleague then
3 and ask, if Conrail is still in the railroad business --

4 MR. HIGGINS: Yes, your Honor.

5 THE COURT: -- and if the result of this decision
6 would be for Conrail to receive less from AT&T, is that not a
7 matter then for the Board to decide?

8 MR. HIGGINS: No, your Honor. It's not a matter for
9 the Board to decide any more than it would be a matter for
10 the Board to decide whether Conrail ought to pay its electric
11 bill or whether Conrail ought to pay its gas bill. It's a
12 matter for this Court to decide in the first instance -- and
13 let me just spend a second on that. Counsel must have some
14 arguments that he intends to make before the Surface
15 Transportation Board that he wants to keep a secret from the
16 Court for some reason. You keep asking him, well, why can't
17 Conrail comply? How does this affect the transaction? And
18 the only answer I hear to that is, well, that's not for this
19 Court, that's for the Surface Transportation Board. That's
20 not correct. With all deference to counsel, it is
21 Jurisdiction 101, Chapter 1 of "Davis On Administrative Law,"
22 that a court always has, the district court always has
23 jurisdiction to decide its own jurisdiction. United
24 Mineworkers v. Gibbs decided that over 50 years ago, I'll bet
25 there are a half a dozen Supreme Court cases that enunciate

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1 what I think is a very basic proposition. The case is here,
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2 it's not going anywhere else unless this Court decides it
3 should go somewhere else. Obviously, jurisdiction is for
4 your Honor to decide.

5 Your Honor asked at the very outset of this
6 discussion, assuming that Conrail was required to pay
7 damages, how would that affect the transaction with
8 sufficient materiality to require that the contract be
9 preempted? You've gotten no answer to that question. Our
10 contract has nothing to do with railroad operations, it has
11 simply to do with our contractual right to be put on a level
12 playing field with our competitors, as Conrail promised we
13 would be some \$200 million ago in 1984.

14 I want to spend a minute, if I may, your Honor, on
15 Conrail's ability to control what its subsidiaries do.

16 THE COURT: Okay, I'm going to take a five-minute
17 recess before we do that.

18 MR. HIGGINS: Sure.

19 (Court in recess.)

20 MR. HIGGINS: May I have just a minute, your Honor?

21 THE COURT: Sure.

22 MR. HIGGINS: Thank you, sir.

23 (Pause.)

24 THE COURT: I guess the question boils down to,
25 assuming that everything we have said so far is correct, why

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1 is it not the Surface Transportation Board that decides it
2 rather than this Court?

3 MR. HIGGINS: Well, if your Honor please, as I said
4 before, a district court always has jurisdiction to decide

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5 its own jurisdiction, that is United Mineworkers v. Gibbs in
6 the Supreme Court, that is United States v. Ruiz in the
7 Supreme Court, that is Basic Constitutional Law 101.

8 The question is, how does your Honor go about doing
9 that? Is there a reason for your Honor to decide that things
10 are so confusing that you need help? Your Honor doesn't
11 strike me as being the least bit confused with respect to
12 what's going on in this case or what the statute means.

13 THE COURT: My father always used to say, I'm not
14 always right, but I'm never in doubt. So...

15 (Laughter.)

16 MR. HIGGINS: I think my father said something like
17 that to me too, Judge. But, if the Court please, where the
18 Court has in front of it the statute, and the statute is
19 clear and the facts, and the facts seem clear or the facts
20 are such that the Court doesn't feel that it can benefit from
21 any analysis provided by experts in an agency, then the Court
22 should go ahead and decide. What we're saying --

23 THE COURT: Well, it seems to me that because
24 Conrail has retained the benefits of this contract and is in
25 a position to perform its obligations under the contract, at

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1 least in part, some showing should be made as to how an
2 adverse decision would affect adversely the transaction
3 approved by the Surface Transportation Board in order to
4 recognize that the jurisdiction ought to give way to the
5 expertise and the administrative experience and expertise of
6 the Surface Transportation Board, and so far I haven't heard
7 a great deal about that.

8 MR. HIGGINS: Well, your Honor is exactly correct
9 and that's exactly what the Supreme Court said in the
10 Dispatchers case, which counsel referred to, it's the leading
11 case in that area. And in that case at Page 134 -- this is
12 499 US 117 and 134 -- the court said in almost the same words
13 your Honor just used, quote, "The immunity provision," that
14 is this 11321 -- "does not exempt carriers from all law, but
15 rather from all law necessary to carry out an approved
16 transaction."

17 Your Honor keeps asking, well, why can't the
18 transaction go forward just because Conrail has to reduce its
19 fees? The only answer you've gotten to that is, well, that's
20 for the Surface Transportation Board. That's not accurate,
21 if the Court please, it's for this Court. It is not for us
22 to be delayed several years more traipsing off to the Surface
23 Transportation Board when this Court has before it the
24 statute and the fact that were paying a hundred cents on the
25 dollar and receiving far less than that. We had a promise

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1 that we could not only lease the right-of-way, but that we
2 wouldn't wind up being at a competitive disadvantage because
3 our competitors were paying less. Quest, at least, is
4 clearly paying less. We have a right to that and it won't
5 interfere with this transaction whatsoever.

6 Your Honor said, well, yes, but isn't it true that
7 Conrail may make less money, doesn't that have some impact?
8 And I said, kind off the top of my head, well, they would
9 make less money if they had -- they would make more money if
10 they didn't have to pay their electric bill and so forth.

11 One of my colleagues handed me at the break -- reminded me at
12 the break that on Page 13 of our brief we quote a Fifth
13 Circuit case that deals with that precise question and says,
14 "no doubt the merged system would operate more efficiently
15 and free of burdens without the strictures of this
16 agreement," that they wanted to avoid, "but it would operate
17 more efficiently and free of burdens on interstate commerce
18 if it were relieved of its contractual obligations to pay its
19 debts on a bargained-for wage scale."

20 Congress allowed the ICC significant power to
21 effectuate approved transaction, but it did not authorize
22 gratuitous construction of contractual relations, even when
23 it serves the general public interest, when the destruction
24 is irrelevant to the success of the approved transactions.
25 This merger will go forward and the railroads will run as

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1 they were run regardless of the level of fees that Conrail is
2 collecting.

3 But, if your Honor please, I can't leave this
4 argument without -- while, frankly, I don't think it is
5 necessary to your Honor's conclusion, A, that you have
6 jurisdiction and, B, that the case should stay here, I don't
7 want to leave it without at least touching on two points:
8 One, the extent to which Conrail has control, this third
9 party out here who's making all these decisions that may hurt
10 them and make them make less money; and, two, the notice that
11 we had.

12 With respect to the first, it isn't as though
13 Conrail is dealing with some competing railroad. Not only

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14 are the two subsidiaries which through operating agreements
15 can enter into these new fiber optic agreements with our
16 competitors, not only are they subsidiaries of Conrail's, but
17 the contracts have to be approved by the two sole
18 shareholders of Conrail, Norfolk Southern and CSX. They're
19 big boys, they are perfectly capable of deciding whether it's
20 in their financial interest to give discounts to other
21 carriers off what we pay, it may be five cases, it may be ten
22 cases, I have no idea, and then reduce the fees it gets from
23 us and still wind up ahead, that's for them to decide. It's
24 true Conrail doesn't directly control it, I'll tell you how
25 they indirectly control it, but it doesn't make much

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1 difference because the two shareholders of Conrail do control
2 it and they can make their own decisions.

3 Second -- and your Honor asked this very early on
4 and nobody has ever come back to it -- the question I think
5 was, well, didn't the grant of this right-of-way to these
6 subsidiaries, wasn't that -- didn't that somehow take into
7 account this license agreement? The answer to that given to
8 you by counsel was, well, one deed did, but there are lots of
9 deeds. Well, if your Honor please, there are two deeds in
10 this record. There is the deed that we put in the record
11 attached to our motion and that deed said, on Page 3, among
12 other things, that Conrail was deeding the right-of-way" -- I
13 said Page 3, if the Court pleases, Page 2, and I -- is it
14 Exhibit 1 or 2 to our motion?

15 COUNSEL: I believe it is Exhibit 2.

16 MR. HIGGINS: Exhibit 2 to our motion, your Honor,
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17 Page 2.

18 (Pause.)

19 MR. HIGGINS: I would respectfully refer your Honor
20 to the paragraph third up from the bottom, beginning,
21 "Subject to" --

22 THE COURT: "Subject to"?

23 MR. HIGGINS: Yes, sir. And in particular, if the
24 Court please, to the paragraph labeled capital E.

25 THE COURT: Isn't that the one that I quoted from

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1 earlier? Yes.

2 MR. HIGGINS: I think that's right, your Honor.

3 THE COURT: Yes.

4 MR. HIGGINS: And counsel said, well, that's just
5 one deed, there are lots of deeds. And, as I've just said to
6 the Court, well, there's only one other deed before the Court
7 and that's the one that Conrail, presumably after a great
8 deal of research, decided to put before the Court to explain
9 to you that, well, you really didn't have to pay attention to
10 the subject-to clause. But that deed, if the Court please,
11 which is an exhibit to Conrail's reply, has exactly, exactly
12 the same subject-to clause. Now, I don't know if some lawyer
13 didn't read far enough in the deed or what, but deeding the
14 right-of-way subject to the license agreement is language
15 which appears not only in the deed we put before the Court,
16 but also in the deed Conrail put before the Court.

17 Now, their point I think was, well, this deed of
18 right-of-way gave to the subsidiaries explicitly the right to
19 enter into new fiber optic cable agreements. That's true,

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20 but it gave them the right subject to the license agreement.
21 Now, what does that mean? It makes sense, doesn't it, that
22 Conrail would do it subject to the license agreement,
23 otherwise they could get in a lot of trouble. After all,
24 they have obligations to us as well. We can't have people
25 coming in, tearing up cable in a multi-billion-dollar

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1 operation.

2 So, they say it's subject to the license agreement.
3 What does that mean? That means that the person taking the
4 right-of-way, which can lease to other carriers, can't do
5 anything inconsistent with the license agreement, that's what
6 "subject to" means. What does that mean? When Conrail says
7 to you in its papers, we not only don't have any control, we
8 don't even know what's in those agreements. Well, if the
9 recipients of the right-of-way get it subject to the license
10 agreement, doesn't it make sense that if Conrail calls them
11 up and says, I want to see those contracts to see how they
12 implicate my license agreement, that Conrail not only will
13 get them because they're their subsidiaries, but has a legal
14 right to get them? Because they've only deeded the right-of-
15 way subject to the license agreement which we've been talking
16 about here this morning.

17 Now, your Honor also asked -- well, you'd like to
18 hear what we had to say about notice. Your Honor's question
19 to counsel was, did AT&T have notice? You didn't get a
20 direct answer, if the Court please; the answer was, AT&T was
21 aware. Well, that may or may not be, Judge. I guess AT&T
22 could have read the New York Times, I guess they could have

23 some clerk that read the Federal Register everyday. We got
24 no notice of the proceeding, we got no formal notice because
25 there was no issue raised with respect to any of our

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1 contracts. We didn't intervene, if we would have known,
2 because Conrail was keeping the license agreement and was
3 perfectly able to continue performing.

4 So that brings me full circle, if the Court please,
5 back to the question of jurisdiction, and I'll close on this
6 point -- except, obviously, to the extent that the Court has
7 questions. But counsel has said, well, you know, we've got
8 these cases in the Fourth Circuit, in the Ninth Circuit and
9 in the Third Circuit that say that jurisdiction in these
10 matters is for the STB. It's not what those cases say, if
11 the Court please.

12 Let me just talk about the Steelworkers case for a
13 second, in this circuit. In that case, the United States
14 Steelworkers Union filed a counterclaim in a case in the
15 district court and it said, you know, the railroad can't do
16 these things in connection with this merger, it can't change
17 things around, because we've got the Railway Labor Act to
18 protect us. And the district judge considered the statute,
19 considered the law and said, you know what? First of all, I
20 have jurisdiction to decide this -- he doesn't say that in
21 the opinion, but he decides the jurisdictional question, and
22 he decides it on the ground that -- which has been
23 universally affirmed in every one of their cases except
24 Consolidated Coal, which is a different kind of case -- he
25 said, look, if there's one thing that's clear, it's that if

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1 you have a question whether the labor conditions imposed by
2 the Surface Transportation Board and the procedures pursuant
3 to them prevail or whether the Railway Labor Act provisions
4 prevail, that's a question for the Surface Transportation
5 Board, that's been universally held. We don't have that
6 situation here. It's been held by the Surface Transportation
7 Board that there is preemption in most of these cases
8 because, absent the Railway -- absent the labor-protective
9 provision that are imposed by the Board, the courts have
10 said, you know, the Railway Labor Act is going to prevent
11 this transaction from going forward, the mandatory
12 negotiating provisions of that statute and so forth take so
13 much time that we'll never get there, and so it's preempted,
14 we'll go with these labor-protective provisions. Congress
15 has done a good job of protecting the employees, that's what
16 all those cases are about.

17 So, it doesn't help them on jurisdiction who should
18 decide, the district court decided in every one of those
19 cases, and it doesn't help them on the merits because those
20 cases have nothing to do with the merits. Your Honor has
21 correctly analyzed this case: They can perform, they ought
22 to perform and, when they do perform, it will have absolutely
23 no impact, absolutely no impact on the consolidation that was
24 approved by the STB. This notion of sending it over to the
25 STB, with all deference to my learned colleague, is

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1 calculated for one purpose only and that's delay. With all
2 respect, your Honor, we would ask your Honor not to permit
3 that.

4 (Pause.)

5 MR. WELLINGTON: May I have a brief response, your
6 Honor?

7 THE COURT: Of course, but before you do I'd like to
8 ask a question of Mr. Higgins.

9 In the complaint, in Paragraph 39(d), you claim that
10 Conrail has breached its expressed and implied duties under
11 the license agreement by transferring portions of the MFN-ROW
12 to its wholly-owned subsidiaries and then divesting itself of
13 the ability to perform its obligations under the MFN
14 contract. You don't really mean that, do you?

15 MR. HIGGINS: No. But it's an alternative pleading,
16 if the Court please. What we're saying -- and perhaps it
17 isn't artfully said there -- what we're saying is we think
18 Conrail can perform, we think they ought to perform. But if
19 the Court were to accept the proposition that the contract is
20 preempted, then the contract is preempted. If they can't
21 perform, we don't owe them 17 million a year.

22 There are cases, Consolidated Coal is this kind of
23 case, where the whole contract is preempted. Counsel said to
24 you, well, Consolidated -- Conrail in that case owed \$4
25 million a year to Consolidated Coal, but the court said you

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1 don't have to pay that, that's true --

2 THE COURT: Yes, let me ask Mr. Wellington a

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3 question: Do you contend that AT&T continues the obligation
4 to pay 17 million a year?

5 MR. WELLINGTON: Yes.

6 THE COURT: So that --

7 MR. WELLINGTON: Now, subject to the other claims
8 that they have made here that if in fact other existing --
9 any contracts that Conrail has entered into from 1984 to the
10 split date that this Court would find violates the MFN,
11 Conrail still has that obligation, in our view, going forward
12 -- right? We're not contending that. The only question is,
13 are we liable for something that new parties are doing on
14 that right-of-way that we don't have responsibility for or
15 control over?

16 So, we still have MFN obligations for that --
17 anything that we've entered into that continues beyond that
18 split date, and that is appropriate for this Court because
19 that is unrelated to the transaction.

20 THE COURT: You're saying that Conrail has no -- no
21 control over its subsidiaries?

22 MR. WELLINGTON: It has none, your Honor, that's
23 clear. It was set up that way for competitive purposes under
24 the -- in fact Conrail does not appoint the officers or
25 directors and this was a structure set up by -- and one of

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1 the subsidiaries is controlled as an operating entity by
2 Norfolk Southern, the other one is controlled as an operating
3 entity by CSX, Conrail has no authority over either of them.
4 As I mentioned to the Court earlier, there is now a specific
5 petition that the Board is considering --

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6 THE COURT: But your --

7 MR. WELLINGTON: -- they're going to become the
8 specific owners.

9 THE COURT: Your position, though, is that the
10 Surface Transportation Board in effect has the authority to
11 affirm or confirm parts of the contract and abrogate other
12 parts of the contract?

13 MR. WELLINGTON: It does, your Honor.

14 THE COURT: Maintaining the obligation of the other
15 contracting party to pay in full without receiving what it
16 bargained for?

17 MR. WELLINGTON: The Surface Transportation Board
18 has exclusive authority -- again, 11321 -- as necessary,
19 exempt from laws, any other law, necessary to carry out the
20 transaction; hold, maintain, operate property, exercise
21 control over franchises, et cetera, et cetera.

22 THE COURT: Without any consideration?

23 MR. WELLINGTON: Taking the hypothetical the way
24 you've said it, yes. There is -- there's not an absence of
25 consideration here, your Honor. AS I have indicated, AT&T

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1 has 2700 miles of cable for which it is paying.

2 THE COURT: Yes, but it loses its right -- assuming
3 you're correct, it loses its right to its most-favored-
4 nations provision without being compensated for that.

5 MR. WELLINGTON: It loses the ability -- perhaps, if
6 we're right and the Board agrees with us, it loses its
7 ability to hold Conrail responsible in damages for a removal
8 of that contract right by the Board as part of this

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9 transaction from June 1st, 1999 going forward for contracts
10 that other people are entering into. We still know we have
11 the obligation for the MFN clause -- for example, worldcom,
12 worldcom put in their cable in 1990, they're still out there.
13 In 2003, if we are violating that most-favored-nations clause
14 in the worldcom agreement, we're not insulated from that.

15 THE COURT: Did you retain the Worldcom agreement?

16 MR. WELLINGTON: I think we retained all of them as
17 part of the transaction. And this is an important point,
18 your Honor, that --

19 THE COURT: So, what you're saying is only with
20 regard to those license agreements which you did not retain?

21 MR. WELLINGTON: Or if PRR, this new entity that the
22 Board created, enters into a license agreement with Adelphia
23 Communications, we are not liable for that, that's what we're
24 saying, we're not responsible -- we cannot have our
25 continuing agreement with AT&T going forward reduced, in

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1 essence, pay damages to AT&T because an entity we don't
2 control after this Board approved it enters into a contract
3 that somebody says violates the MFN, that's what we say the
4 Board must opine on. We still have all of our obligations
5 going forward under that MFN clause for anything that was in
6 that ground at June 1, 1999, and there are a lot of them, and
7 this Court will decide whether or not we have violated it or
8 not violated it.

9 THE COURT: Okay. Mr. Wellington wanted to say
10 something more.

11 MR. WELLINGTON: I just -- I have -- part of what I

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12 wanted to say I've just said and there's just a couple of
13 other things, your Honor.

14 THE COURT: I need all the help I can get, so keep
15 going.

16 MR. WELLINGTON: Again, the Dispatchers case, I just
17 -- and it's a quote from Dispatchers, Justice Kennedy: This
18 preemption of all other law extends not only to laws, but
19 also to -- excuse me, I misstated that it's a quote, it's a
20 partial quote -- this preemption of all other law extends not
21 only to laws, but also to contracts as necessary to a person
22 participating in a Board-approved 49 USC 1321 transaction to
23 carry out the transaction.

24 In Railway Labor, the Ninth Circuit, again, cited
25 with approval by the Third Circuit twice, who is to decide?

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1 It follows that the IC -- that where a railroad has been a
2 party to an ICC-approved merger, claims that are incident to
3 that merger and exempt from RLA procedures the ICC has
4 exclusive authority.

5 Under the Palestine case, the Fifth Circuit case, by
6 the way, that Mr. Higgins read to you from, it's essentially
7 been rejected by the 11th Circuit, which, as you know, has
8 assumed the responsibilities of the Fifth Circuit. It's a
9 '77 case, it's not been cited by anybody in years and its
10 reasoning was essentially rejected, and we pointed that out
11 in our reply brief.

12 But, your Honor, from CCSC, quote, "the assignment
13 of the agreements to PRR were not shams, they were rather
14 integral parts of a complex transaction that served to

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15 transfer approximately 58 percent of Conrail's assets into
16 the NS rail system. The division of Conrail's assets between
17 NS and CSX, and the corresponding assignment of Conrail's
18 contractual obligations related to those assets, was
19 inherently necessary for the parties to carry out the pro-
20 competitive transaction that we authorized." Your Honor,
21 that language is the Board itself stating that this decision,
22 Decision 89, and the division of Conrail's assets and the
23 assignment of Conrail's contractual obligations, was
24 inherently necessary to carry out this transaction. That
25 makes it, under the Board's own words, your Honor, absolutely

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1 within their exclusive jurisdiction.

2 And, as we suggested, we're not proposing here to
3 delay anything. I suggested that -- I mean, they waited four
4 years to file the case, I suggested that the Court even ask
5 the Board to get back to the Court within that period of
6 time, 120 days or something, which some courts have done.

7 Just the last thing, your Honor, on the deed that
8 Mr. Higgins mentioned. No, I read it all the way through, I
9 didn't stop reading some other place. There's the language
10 that we pointed out in this deed, and there are many others
11 like it, that "the easement and right shall be exercised in a
12 manner which does not interfere with the railroad operations
13 or the safety of the grantee, or grantee's right to grant
14 other such nonexclusive easements or licenses with the
15 premises." In essence, there's a footnote that swallows up
16 that.

17 We just believe it's a jurisdiction issue for the

18 Board, your Honor, and we'll be happy to -- you've already
19 heard my suggestion. Thank you.

20 THE COURT: Thank you.

21 Mr. Higgins?

22 MR. HIGGINS: Well, if your Honor please, I don't
23 want to unduly impose. I would like to spend a second on
24 this quote from --

25 THE COURT: Go ahead.

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1 MR. HIGGINS: -- from Consolidated Coal. The quote
2 says -- and it's absolutely correct, was correctly quoted --
3 that the Surface Transportation Board arrived at the decision
4 it did in the Consolidated Coal case because in that case,
5 unlike this one, Conrail assigned the contract to another
6 company. Conrail didn't assign this lucrative license
7 agreement to anybody, it kept it. And your Honor has your
8 finger right on the nub of the problem, they want to keep all
9 the income, all their rights, and they want to have somebody
10 -- and it doesn't surprise me they think they may have better
11 luck at the Surface Transportation Board -- they want to have
12 somebody decide that they can be let out of their MFN
13 obligations but keep their \$17 million a year. That's just
14 not the way the system works, if the Court please.

15 With respect to the Fourth, Ninth and Third Circuit
16 cases dealing with the Railway Labor Act, I think we've dealt
17 with those in our papers. They deal with the Railway Labor
18 Act, they deal with situations where the courts have found
19 the transaction can't go forward. Your Honor has asked half
20 a dozen times, if Conrail's fees go down, what impact does

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21 that have on the transaction? There isn't any answer to that
22 because there is no impact on the transaction. Yes, they get
23 less money -- yes, they get less money -- but they get less
24 money because they agreed that they wouldn't put us at a
25 competitive disadvantage. And, having paid them some \$200

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1 million with a future obligation of some \$200 million, we're
2 entitled to either have that -- to have that promise kept.

3 One final thing. We don't claim liability based on
4 a contract that's entered into by one of these Conrail
5 subsidiaries. There's nothing that creates liability as a
6 result of those contracts. All we claim is that if our
7 competitors are being paid less, Conrail has to reduce our
8 fees and, if they refuse, that's a breach. That's what we
9 want a remedy for in this case, if the Court please.

10 Thank you, your Honor.

11 THE COURT: And Mr. Wellington says, because we
12 don't control that, therefore, the Board should decide to
13 what extent, if any, that affects the transaction.

14 MR. HIGGINS: To me, if the Court please, that's a
15 non sequitur. I mean, they control how much money they take
16 in --

17 THE COURT: That they control.

18 MR. HIGGINS: -- that they control. They can comply
19 without harming the transaction, that they control. So,
20 where is the authority for the STB to step into the mix? You
21 only have that authority under Dispatchers and all the other
22 cases --

23 THE COURT: Yeah, the question is whether it can be

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24 done without affecting the transaction and --

25 MR. HIGGINS: That's exactly right, your Honor, and

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1 there is no impact on the transaction. As I say, you asked
2 the question a half a dozen times, you haven't gotten an
3 answer because there isn't an answer.

4 THE COURT: I think Mr. Wellington --

5 MR. WELLINGTON: I'll answer. I mean --

6 THE COURT: -- is about to give us the answer.

7 MR. WELLINGTON: -- again, Mr. Higgins keeps asking
8 that question, that was in fact -- that is in fact within the
9 province of the Board. But, fundamentally, the impact is
10 Conrail was a railroad that was required in this transaction
11 to give up 90 percent of its assets basically, it is a tiny
12 operating system since then. The Board, in its decision,
13 decided to leave some income with Conrail vis-a-vis these
14 fiber optic agreements, so that Conrail could continue to
15 operate. Now, to say, well, there's no impact on this
16 carefully balanced transaction if we eliminate \$17 million a
17 year for this -- that supports this railroad is in fact, with
18 all due respect, wrong. And in fact that was part of the
19 delicate balance that the Board decided who got what to keep
20 them all together and to keep Conrail as the insulating
21 entity between these two highly competitive railroads that
22 were trying to become, in the Board's view, an anti-
23 competitive influence in the Northeast.

24 THE COURT: Well, is it your position that the Board
25 would have the jurisdiction to say that if any of the new

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1 subsidiaries make a deal with a competitor of AT&T for less
2 than what AT&T is paying that AT&T should then pay you less?

3 MR. WELLINGTON: I think that's right, yeah. I had
4 to think of the way that -- but, your Honor, yes, because
5 that's -- yes, that's -- you know, like anyone else who was
6 participating during the proceeding in there, raising
7 questions like AT&T is now raising now, yes, that's what the
8 Board can consider. And what the courts have made clear is
9 you can't circumvent the Board and come to Federal court and
10 try to get damage relief.

11 MR. HIGGINS: well, if your Honor please, let me
12 refer to the Harris case in the Seventh Circuit. There
13 wasn't any delicate balance that was achieved by the STB in
14 this case, they never mentioned the license agreement because
15 Conrail was keeping it and because it didn't have anything to
16 do with this combination or merger. Judge Easterbrook, in
17 the colloquial, as he's used to, I guess, in this opinion
18 wrote, one problem with this approach, the delicate balance,
19 so-called delicate balance of the Board, is that the
20 commission did not say boo about this labor agreement. well,
21 this STB didn't say boo about our license agreement. We are
22 in exactly the same kind of situation as the court was in
23 Harris, which is not a case dealing with the Railway Labor
24 Act, and it's a case in which Judge Easterbrook concluded in
25 I think a very sensible paragraph that I commend to this

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1 Court's attention in connection with this issue, he said and
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2 I quote, in the unanimous opinion, "Congress gave the agency
3 the power to supersede other laws, use of that power must be
4 respected, but if the commission or board approves a merger
5 without directly or by necessary implication using this
6 power, courts should continue to resolve disputes under
7 generally applicable rules of law." He found none of the
8 relief requested in that case had anything to do with the
9 combination or merger. The relief we ask for in this case
10 reducing fees has nothing to do with the combination or
11 merger.

12 Thank you, your Honor.

13 THE COURT: Thank you.

14 MR. WELLINGTON: With all due respect, the Harris
15 case involved a post-board-approved transaction, and we
16 pointed that out in our brief, and therefore was -- is of no
17 help to the Court here.

18 Thank you.

19 THE COURT: I'm not looking for additional
20 paperwork, but do either one of you have an overwhelming
21 desire to submit anything else in writing?

22 (Laughter.)

23 MR. WELLINGTON: We would be happy to respond in
24 writing to any question your Honor has or that in any way you
25 think --

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1 THE COURT: No, I'm not --

2 MR. WELLINGTON: -- might be helpful.

3 THE COURT: -- I don't want to provoke it, I just
4 wanted to see if you all wanted it.

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5 MR. WELLINGTON: Your Honor, I don't think in my
6 professional career I've ever turned down an offer from a
7 court to submit something else, so I have to be -- I have to
8 tell you that at the beginning --

9 THE COURT: Well, why don't you all think about it.

10 MR. WELLINGTON: -- but you've raised a number of
11 questions that it might be useful for us to respond to, your
12 Honor, that's -- so I --

13 THE COURT: How much time do you want to consider
14 it?

15 MR. WELLINGTON: Five days?

16 MR. HIGGINS: Whatever is your Honor's pleasure.

17 THE COURT: All right. Why don't you submit
18 anything you want, either side, within ten days, anything
19 that you want to submit, but after that...

20 MR. WELLINGTON: No replies to those, right?

21 THE COURT: Okay.

22 MR. WELLINGTON: Thank you, your Honor.

23 THE COURT: Thank you all, I appreciate your help,
24 it's --

25 MR. HIGGINS: Thank you. And we appreciate your

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1 indulgence, your Honor.

2 THE COURT: Have a good day.

3 COUNSEL: Your Honor, may I just very briefly?

4 THE COURT: Sure.

5 COUNSEL: Just as a status, virtually the discovery
6 with regard to this case has come to a halt because of these
7 motions. We did submit a joint Rule 16 memorandum and...

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