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SURFACE TRANSPORTATION BOARD

Finance Docket No. 36522

NORFOLK SOUTHERN RAILWAY COMPANY
—PETITION FOR DECLARATORY ORDER

CSXT's Opening Statement

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1. Introduction and Summary

This case presents a straightforward question for the Surface Transportation Board ("STB" or the "Board"): Can Norfolk Southern Railway Company ("NSR") assert a statutory antitrust immunity for exercising Board-authorized control over Norfolk & Portsmouth Beltline Railroad Company ("NPBL") when NSR never asked for authority to control NPBL and the Board's predecessor never authorized such control? The answer, clearly, is no.

This question arises from a referral to the Board from the U.S. District Court for the Eastern District of Virginia (the "Court") in a lawsuit brought by CSX Transportation, Inc. ("CSXT") against NSR and NPBL. In that lawsuit, CSXT alleges – among other things – that NSR has violated the federal antitrust and state anti-conspiracy laws and breached contract obligations by acting in conspiracy with NPBL in a decades-long scheme to exclude CSXT from on-dock rail access at Norfolk International Terminals ("NIT") in Norfolk, one of the most important port terminals on the Eastern Seaboard. As a result of this conspiracy, rail shippers have been deprived of competitive rail service at a critical physical junction point in the international economy.

NPBL is a terminal railroad. It was created in the late 19th century, when eight railroads came together to establish a terminal railroad that would provide NPBL's owners with equal access to terminal facilities in the Portsmouth and Norfolk, Virginia areas. Over the years, consolidation of railroads in the East has resulted in two owners of NPBL: NSR, a 57% owner, and CSXT, a 43% owner. Notwithstanding the consolidation of ownership, the founding principle of NPBL as a vehicle for non-discriminatory access by the terminal railroad's owners to Norfolk terminal facilities has never changed.

One of the terminal facilities served by NPBL is NIT. NPBL reaches NIT using trackage rights on NSR tracks. Over several years, as access to NIT became increasingly valuable to railroads competing for intermodal freight, NSR – through its own actions and in conspiracy with NPBL – took various actions, including increasing the NPBL switch rate, all designed to prevent CSXT from using NPBL to compete with NSR for freight at NIT, giving rise to CSXT's claims in the Court.

Faced with CSXT's claims related to its decades-long anticompetitive conduct, NSR has pursued numerous approaches, sometimes contradictory, to avoid the consequences of its anticompetitive conduct. Though it was not its initial defense, NSR has now latched onto the notion that it is immune from CSXT's claims because the Board's predecessor, the Interstate Commerce Commission ("ICC" or "Commission"), granted NSR authority[1] to "control" NPBL under the Interstate Commerce Act ("ICA").[2] NSR argues that the ICC

[1] This Opening Statement refers broadly to ICC/STB "authority" as including both an ICC/STB grant of an application for control authority and an exemption from the otherwise applicable application requirements.

[2] The ICA was substantially amended by the ICC Termination Act of 1995 ("ICCTA") and codified at subtitle IV of title 49 of the U.S. Code. The statutory provisions relevant to this case and discussed in this Opening Statement are referred to collectively herein as the "ICA,"

authorized it to control NPBL in 1982, despite the fact that NSR never asked for, never provided evidence justifying, and never obtained authority to control NPBL. By asserting antitrust immunity for the exercise of control authority that it never justified or obtained, NSR would have the Board retroactively bless its anticompetitive conduct and give it a blank check for future anticompetitive behavior at one of the nation's largest and most crucial port terminals.

In response to NSR's belated immunity argument, CSXT explained to the Court that NSR never asked for or obtained the necessary predicate authority to control NPBL, and that NSR had never addressed the relevant public interest and competitive criteria that the ICC/STB would need to analyze in order to grant such control authority. The Court acknowledged the lack of any evidence that the ICC/STB had ever authorized NSR to control NPBL. It also noted that CSXT's "concern about coordination purportedly designed to harm [CSXT] is especially acute in light of the fact that [NPBL] is, by design, a separate corporate entity with a mission of operating for the collective good of all owner railways." Op. and Order at 17-18, *CSX Transp. Inc. v. Norfolk S. Ry. Co.*, No. 2:18cv530 (E.D. Va. May 18, 2021), ECF No. 395 [hereinafter Opinion and Order], attached hereto as Exhibit A. However, citing the Board's primary jurisdiction over issues involving the scope of Board (and ICC) orders, the Court referred the following questions to the Board:

> Did the 1982 consolidation, whereby [NSR] acquired an indirect 57 percent interest in [NPBL], involve the ICC/STB granting [NSR] "approval" to control [NPBL], and if so, did such authorized "control" render it necessary for antitrust and/or state conspiracy

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and have not substantively changed during the period of time in which the ICC/STB proceedings discussed herein occurred.

> laws to yield, whether because [NPBL] was then deemed a "franchise" of [NSR], or for any other reason?

Id. at 29.

CSXT presents the evidence in this Opening Statement demonstrating that NSR's predecessors never asked for, never justified, and never obtained authority to control NPBL, and therefore that NSR never obtained antitrust immunity for exercising control authority that the ICC/STB never granted. The statute is crystal clear that a railroad seeking to control another railroad must ask the Board (previously the Commission) for control authority and cannot assert control over another railroad until such authority is granted. *See* 49 U.S.C. § 11323. Once the Board has authorized control over another railroad, the ICA further provides, at 49 U.S.C. § 11321(a), an exemption from the antitrust laws and all other law to the extent necessary to exercise the control acquired through the transaction. But the predicate for such immunity is the request for and grant of control authority, which NSR never requested and never obtained.

Congress had good reason to structure the ICA so as to require an express request for control authority and a specific grant of authority by the Board. The Board is exclusively responsible for authorizing railroad combinations, and it is required first to determine whether such consolidations are in the public interest. The Board can exercise this statutory responsibility only if authorization is expressly requested, information is submitted by the parties seeking control authority that will allow the Board to assess the public interest factors (most important, the effects of a combination on competition), the public is informed of the proposed consolidation so that interested parties can comment on it, and the Board expressly concludes that the control

authority is consistent with the public interest. When this process is carried out, antitrust and other laws are overridden to the extent necessary for the control authority granted by the Board through this deliberate process to be exercised without interference. But control authority cannot be inferred, particularly in cases involving a terminal railroad like NPBL whose charter requires equal treatment of all owners – it must be requested, evaluated and decided upon.

In 1980, NSR's predecessor asked for authority to control two railroad systems – the Norfolk and Western Railway Company ("NW") and its subsidiary companies and Southern Railway Company ("SRC") and its consolidated system companies. NPBL was not controlled by either NW or SRC and it was not part of the railroad systems of NW or SRC. Indeed, the applicants expressly stated that they were *not* seeking authority to control independent railroads like NPBL in which NW or SRC held an ownership interest but that were not already controlled by NW or SRC.

Consistent with this express representation that control authority was not being sought for subsidiaries like NPBL, the application never listed NPBL as a railroad over which control authority was sought, the applicants never submitted any relevant information about NPBL other than ownership share information, and the application contains absolutely no analysis or discussion of the potential impact of asserting control over a terminal railroad like NPBL that was obligated, by its very charter, to act equally in the interests of its owners. Similarly, the ICC's decision authorizing control specifically listed the railroads and subsidiaries over which control was authorized and did not include NPBL on any of those lists. The ICC's decision included a lengthy

discussion of competitive impacts of the proposed transaction, including a specific discussion of impacts in the Norfolk, Virginia area, and the decision does not contain a single reference to NPBL.

A railroad cannot obtain authority to control a terminal railroad that was created as a neutral vehicle for accessing terminal facilities in a critical port area without a single word indicating that such authority was being requested (or granted) and without a single word of explanation of the impact of such control. Other applicants seeking ICC/STB authority for consolidations of two railroad systems that would result in the concentration of ownership interest in a terminal railroad have recognized this by seeking control authority and, where necessary, have agreed to conditions to mitigate potential anti-competitive impacts of the transaction. In such cases, where competitive effects were specifically examined and authority was specifically granted to exercise control over a terminal railroad, the antitrust laws would need to yield as necessary to carry out the Board authorization.

But NSR never asked for authority to control NPBL, the ICC/STB never examined any competitive effects of the exercise by NSR of unilateral control over NPBL and made a decision thereon, and NSR therefore never obtained immunity from antitrust or other law that comes from being granted control authority. If the ICC/STB had considered whether to grant NSR control authority over NPBL, the agency could have mitigated any potential anti-competitive effects of such NSR control by imposing conditions on its approval – just as the agency did in other similar major control cases involving control over a terminal railroad. By claiming that NSR gained control authority over NPBL through the 1982 transaction, NSR's position is that – despite never

asking the ICC for control authority or providing the facts to enable that assessment – NSR nevertheless emerged from the proceeding with uncircumscribed control over NPBL and the broadest immunity possible from antitrust laws that would otherwise govern NSR's conduct with respect to NPBL.

The Board should not allow NSR to evade ICC/STB scrutiny of the competitive implications of its control of NPBL by failing ever to ask for control authority, and then belatedly attempt to cloak itself in ICA immunity after CSXT rightfully complained about NSR's transparently illegal and anti-competitive actions in coordination with NPBL.

2. Background

2.1 NPBL is a terminal railroad created to provide its owners with access to terminal facilities in Norfolk.

Relevant background regarding NPBL is set forth in CSXT's complaint, attached hereto as Exhibit B. NPBL is a terminal switching railroad in Hampton Roads, Virginia. NPBL was founded by eight railroads in 1896 "for the mutual benefit of each [of the railroads] in the interchange of business." Compl. at para. 1, *CSX*, No. 2:18cv530 (E.D. Va. Oct. 4, 2018), ECF No. 1 [hereinafter Complaint]. Over the years, the consolidation of the original member railroads has resulted in the current ownership structure involving only two owners. NPBL is currently owned 57% by NSR and 43% by CSXT.[3]

[3] As described further below, Norfolk Southern Corporation ("NSC") acquired indirect ownership of 57% of the stock of NPBL in 1982 when NSC acquired 100% of the stock of SRC) and N&W. *Norfolk S. Corp.—Control—Norfolk & W. Ry. Co. & Southern Ry. Co.*, 366 I.C.C. 173 (1982). Then in 1992, SRC acquired direct control of N&W and indirect ownership of 57% of the stock of NPBL. *Southern Ry. Co.—Control—Norfolk & W. Ry. Co.*, FD 31791, et al. (I.C.C. served Jan. 14, 1991). Finally, in 1998, SRC (which had changed its name to NSR) and N&W merged, resulting in NSR's direct ownership of 57% of the stock of NPBL. *Norfolk S. Ry. Co.—Merger Exemption—Norfolk & W. Ry. Co.*, FD 33648 (ICC served Aug. 31, 1998).

However, during this consolidation period, no single owner of NPBL ever asked for unilateral authority to control NPBL or to over-ride the "mutual benefit" foundation of NPBL.

NPBL's Operating Agreement – then and now – provides that each railroad will have "equal representation" in NPBL, and that each must "co-operate cordially in encouraging the business of the [NPBL]." *Id.* at para. 17-18. Under the Operating Agreement, NPBL's purpose is to interchange railcars for its owners, meaning that NPBL receives cars from NSR or CSXT and delivers them to locations on its tracks, or vice versa.

One location for which NPBL provides switching services is NIT, the largest marine terminal in Virginia and one of the most important terminals for international intermodal cargo on the East Coast.[4] NSR has access to on-dock rail at NIT over its own tracks, and NPBL has on-dock access at NIT via trackage rights over NSR's tracks. Pl.'s CSX Transp. Inc.'s Consolidated Opp'n to Defendants' Motions for Summary Judgment at para. 7–8, *CSX*, No. 2:18cv530 (E.D. Va. May 3, 2021), ECF No. 328 [hereinafter CSX's Consolidated Opposition]. While CSXT does not have a rail line that accesses NIT directly, CSXT can – theoretically – access the NIT though switching services provided by NPBL. But CSXT has been precluded from such access for intermodal traffic by NSR's and NPBL's anticompetitive conduct.

[4] A map of the area is attached as Exhibit B to CSXT's complaint, which is attached hereto as Exhibit B. NIT consists of 567 acres and has the capacity to handle 1,220,00 containers per year. *See generally* Virginia Port Authority, *Norfolk International Terminals (NIT)*, https://www.portofvirginia.com/facilities/norfolk-international-terminals-nit/.

2.2 NSR and NPBL have unlawfully conspired to block CSXT's access to NIT.

For well over a decade, CSXT has sought to use NPBL to access NIT, consistent with the purpose for which NPBL was created. But CSXT has been thwarted at every step by NSR's and NPBL's manipulation of NPBL's rates and practices. After years of trying unsuccessfully to get NPBL to offer economical switch rates and movements for its service to NIT and being thwarted by NSR and NPBL, CSXT ultimately decided to challenge NSR's unlawful conduct, including its conspiracy with NPBL, in a lawsuit in the U.S. District Court for the Eastern District of Virginia.

In that lawsuit, CSXT describes the decades-long effort by NSR, on its own and in combination with NPBL, to exclude CSXT from on-dock rail access at NIT, a critical entry point through which almost all major ocean carriers move international intermodal traffic. NSR and NPBL have so far succeeded, resulting in NSR charging supracompetitive prices to ocean carriers who rely on NIT and inflicting hundreds of millions of dollars in harm to CSXT in the form of lost business. NSR's market share at NIT is approximately 90%, Complaint at para. 52, and NSR has maintained its monopoly at NIT and excluded CSXT through every means at its disposal.

NIT has been rapidly expanding and increasing its revenues in recent years due to increased maritime shipping. Most recently, the Virginia Port Authority announced that it would use a $20 million federal grant to reconfigure and double the size of the on-dock rail yard at NIT, which can currently handle 368,000 containers annually.[5] The Virginia Port Authority

[5] Virginia Port Authority, *Port Secures Federal Transportation Grant to Expand Rail Capacity*, https://www.portofvirginia.com/who-we-are/newsroom/port-secures-federal-transportation-grant-to-expand-rail-capacity/.

has indicated that the growing port would benefit from multiple rail carriers being able to access NIT because it would allow more volume to be moved at competitive prices. *Id.* at para. 4. Because Defendants have blocked CSXT's access to on-dock rail, CSXT must use trucks to move each container arriving at NIT individually to a rail terminal, where the container is then loaded onto a rail car—an expensive and inefficient process called "drayage." CSX's Consolidated Opposition at para. 82–83.

The evidence of NSR's unlawful conduct is described in detail in CSXT's filings at the Court, based on extensive discovery conducted in that lawsuit. In addition to the Complaint attached hereto as Exhibit B, attached hereto as Exhibit C is CSXT's Consolidated Opposition to Defendants' Motions for Summary Judgment, filed on May 3, 2021, which details the facts and issues in the lawsuit. The Court's referral decision contains a concise summary of CSXT's claims. *See, e.g.,* Opinion and Order at 2. NSR's and NPBL's actions include:

- In 2008, NSR conspired with NPBL to agree to discontinue rail service and terminate access rights to a line segment between NS Junction at MP 1.40 and Carolina Junction at MP 2.30 that would have allowed efficient NPBL service between NIT and CSXT tracks, if NS/NPBL would have provided a reasonable switch rate to CSXT.
- In 2009, NSR conspired with NPBL, over CSXT's objection, to increase NPBL's switching rate for intermodal service to levels far above rates for comparable service charged by other short-line railroads.
- In 2010, NSR conspired with NPBL to reject a CSXT proposal with guaranteed NPBL revenue/profits for run-through intermodal service to NIT that would have allowed CSXT to compete for NIT traffic on a comparable basis with NSR.
- In 2015, the only year in which CSXT has been able to move any intermodal traffic by rail to or from NIT, NSR used its control over

the dispatching of traffic over the trackage rights line segment to dramatically impede the movement of CSXT's traffic at significant expense to CSXT.

- In 2018, NSR conspired with NPBL to reject changes proposed by CSXT in NPBL switching rates with guaranteed revenues that would have enabled CSXT to compete for NIT intermodal traffic.
- Also in 2018, NSR conspired with NPBL to reject changes proposed by CSXT in the governance structure of NPBL that would ensure that NPBL decisions would be made in the interest of NPBL (including the addition of independent board members and an independent committee for determining rates) and all of its owners rather than in the interests of NSR.

NSR has even sought to use the Board to advance its efforts to exclude CSXT from effective access to NIT. In connection with the conspiracy described in the Court filings, NSR filed a petition with the Board on September 13, 2018, requesting that the Board institute a proceeding to increase compensation due to NSR from NPBL for its use of trackage rights over NSR's lines accessing NIT. *See Norfolk S. Ry. Co.—Pet. to Set Trackage Rights Comp.—Norfolk & Portsmouth Belt Line R.R. Co.*, FD 36223 (STB served Dec. 19, 2019).

At no point prior to NSR's belated attempt to use its purported control of NPBL as a shield for CSX's lawsuit did NSR claim that it was justified in taking any of the actions listed above because of some purported control authority over NPBL. In conflict with NSR's claim that the ICC/STB authorized NSR to control NPBL, NPBL actually opposed NSR's petition. On July 25, 2019, the Board granted CSXT's petition that the Board hold the trackage rights compensation proceeding in abeyance pending resolution of CSXT's lawsuit.

2.3 NSR has never obtained ICC or STB authority to control NPBL.

NSR repeatedly conspired with NPBL management and board members to advance NSR's own commercial interests rather than the interests of NPBL as an independent switching railroad created to provide effective access to Norfolk terminal facilities for its owners. But NSR never obtained authority to control NPBL and thereby jettison the terminal railroad objectives of NPBL. Indeed, the record of the 1982 merger proceeding shows that NSR's predecessor acquired a 57% ownership interest in NPBL in 1982 *based on an express representation that it did not intend to control NPBL.*

2.3.1 In 1980, NSR's predecessors NW and SRC petitioned the ICC to exclude non-controlled subsidiaries like NPBL from a forthcoming control application.

Proceedings at the ICC and the Board involving railroad mergers have been among the most data-intensive and complex proceedings before the agency. As a result, in many of the larger merger proceedings over the years, the first step in the application process is the filing of waiver requests that attempt to define the scope of the application and obtain a waiver of burdensome information requirements that might not be needed given the scope of the application.

Consistent with this practice, on July 24, 1980, NW) and SRC – two of NPBL's owners at the time – filed a petition with the ICC seeking waiver and clarification of the ICC's railroad consolidation procedures regarding a forthcoming application in Finance Docket No. 29430 by NWS Enterprises, Inc. ("NWS")[6] to acquire control of NW and SRC and their specifically identified

[6] NWS later changed its name to Norfolk Southern Corporation ("NSC") in 1981. 366 I.C.C. at 173 n.2.

consolidated system companies. *NWS Enterprises, Inc.— Control—Norfolk & W. Ry. Co.*, FD 29430, Pet. of Norfolk & W. Ry. Co. & Southern Ry. Co. Seeking Waiver & Clarification of the R.R. Consol. Procedures (49 C.F.R. Part 1111) (filed July 24, 1980) [hereinafter Petition]. The Petition is attached hereto as Exhibit D. Two aspects of the waiver petition, and the ICC's response, are important to the current proceeding.

First, the petitioners sought to reduce the information that would be submitted in support of the application. They explained that the request for control authority was limited to the NW and SRC *systems*, which consisted of NW and SRC along with the subsidiaries that each company already controlled. The Petition stated that SRC "is a Class I railroad and also controls three Class III railroads, and numerous terminal and other railroad companies" listed in Appendix A to the Petition, *id.* at 4, and that NW "controls five Class III railroads, one terminal company, and other non-operating railroad companies" listed in Appendix B to the Petition, *id.* at 6. NPBL is not listed in either Appendix. Given that the scope of the application covered only these systems, the petitioners requested that SRC's information be limited to the SRC consolidated system (which did not include NPBL) and that NW's information would be limited to NW itself. The petitioners also requested clarification that the term "applicant" used in the ICC regulations would apply only to NW, SRC, the new holding company NWS, and Delaware and Hudson Company ("D&H")[7] – and not to any subsidiaries of NW or SRC.

Second, the Petition noted that, in addition to the consolidated system subsidiary companies that were listed in Appendices A and B:

[7] The stock of D&H was held by a wholly-owned subsidiary of NW, but D&H was operated separate from the NW system.

> [B]oth NW and SRC have interests in certain railroad companies which are operated independently of the NW or SRC systems. NW and SRC hold 50 percent or less of the stock of such companies, do not now exercise control over them, and *have no intention of exercising control over any such companies after the control transaction is approved*.

Id. at 11-12 (emphasis added). NPBL was one of these non-consolidated subsidiaries. At the time, both NW and SRC owned minority shares of NPBL, did not control NPBL and did not treat NPBL as part of their consolidated systems (as indicated by the fact that NPBL was not listed in either Appendix A or B). Petitioners agreed to identify their ownership in such companies in the application, but since the petitioners did not seek to control these entities, they stated that "bringing into this proceeding data concerning these carriers . . . would serve no useful purpose and would substantially burden the record." *Id.* at 12.

The ICC approved the Petition in a decision served on October 1, 1980, attached hereto as Exhibit E. *NWS Enterprises, Inc.—Control—Norfolk & W. Ry. Co.*, 45 Fed. Reg. 66911 (1980). The ICC allowed the SRC to submit data on a consolidated system-wide basis (not including NPBL) because the ICC had long accepted "system reporting and accounting by SRC and its consolidated companies," and the ICC allowed NW to limit its data reporting to NW and not its controlled system companies (which did not include NPBL) because each controlled subsidiary "is a separate corporate entity, but the rail operations are effectively controlled by NW." 45 Fed. Reg. at 66912.

As to the non-consolidated subsidiaries (like NPBL), the ICC noted that the applicants "have no intention of exercising control over these companies if the proposed transaction is approved." *Id.*. Therefore, "it would serve no useful purpose to produce detailed information for these companies," other than to

identify those subsidiaries on the required charts of corporate ownership. *Id*. The ICC further agreed "that the term 'applicant', as used in our regulations, does not encompass such non-controlled carriers." *Id.*

2.3.2 The 1980 NWS application did not seek control authority over NPBL and contained no substantive information about NPBL or the effect of a change in control over NPBL.

On December 4, 1980, NWS, NW, SRC, and D&H filed an application requesting authority for NWS to acquire control of NW and the subsidiary companies that were part of the NW system and of SRC and its consolidated system companies (the "Application"). Volume 2 of the Application is attached hereto as Exhibit F.

Applicants never indicated that they were seeking authority to control NPBL. Consistent with the Petition, the Application focused on the NW and SRC systems – *i.e.*, the consolidated group of subsidiaries that were already operated as a system by NW and SRC – and it did not discuss independent railroads like NPBL that were not part of the existing NW and SRC *systems*.

As required by the Board's rules,[8] the Application included a corporate chart attached as Appendix 2 listing all of the railroads in which NW and SRC had an ownership interest. These included the system railroads of NW and SRC that NWS would control after obtaining ICC approval, as well as independent railroad companies that SRC and NW did not control and as to which NW and SRC had told the ICC they had "no intention of exercising control over . . . after the control transaction is approved." Petition at 11-12. As

[8] *See* 49 C.F.R. § 1111.1(c)(7) (1980) (applicants must disclose "the measure of control of ownership, if any, now exercised by applicant over any carrier subject to the act"); *id.* § 1111.1(c)(10) (1980) ("if applicant owns securities of a carrier corporation . . ., the name of the corporation, a description of the securities, . . . and the percentage of total ownership").

required by the regulations, the chart was a simple alphabetical listing of all companies in which NW and SRC had any ownership interest. *See NWS Enterprises, Inc.—Control—Norfolk & W. Ry. Co.*, FD 29430, Volume 2 of Application at 74–91 (filed Dec. 4, 1980). NPBL is included, along with the information that NW owned 28.57%, SRC owned 14.29%, and a wholly-owned SRC subsidiary owned 14.28%, for a total of 57.14%. *Id.* at 83.

The Application contained no discussion of the corporate charter of NPBL, the "mutual benefits" foundation of NPBL as a terminal railroad, the potential impact of control over a terminal railroad like NPBL by the consolidated NW/SRC system, the potential effect on competition of exercising unilateral control over NPBL, the impact of allowing NSR to treat NPBL as a member of NSR's corporate family, or any other aspect of a fundamental change in the focus of a terminal railroad from an entity serving multiple owners without discrimination to an entity supposedly controlled unilaterally by a single owner. Since the applicants had made it clear that they did not seek control authority over NPBL, they had no reason to submit such information, and they did not submit it.

Applicants' representation that they did not intend to control independent railroads in which NW and SRC individually held non-controlling ownership interests was consistent with the overall structure of the transaction. Applicants told the ICC that they intended NWS/NSC to consolidate control of the NW and SRC systems, but that the two systems would continue to be operated separately. Applicants noted that:

> Under our plan, we will have a corporate structure which both provides a vehicle for unified planning — the holding company — and preserves a framework — the two roads — for decentralized operations. Specifically, the two carriers will maintain their

> separate corporate identities, most employees will remain at their present locations and there will be no disruption of their operations or impairment of their ability to continue to provide good service to shippers occasioned by unplanned efforts at coordination.

NWS Enterprises, Inc.—Control—Norfolk & W. Ry. Co., FD 29430, Application, Verified Statement of Robert B. Claytor at 4 (filed Dec. 4, 1980), attached hereto as Exhibit G.[9]

Since neither NW nor SRC already controlled independent railroads – like NPBL – in which they each held a minority ownership interest, and since NW and SRC would continue to be operated separately, there was no reason to expect the combination of NW and SRC to have any effect on the control or operations of such railroads. NW and SRC would continue to exercise whatever governance powers they previously had regarding such non-controlled companies independent of one another. As they expressly represented to the ICC in the Petition, they had "no intention of exercising control over any such companies after the control transaction is approved." The ICC was entitled to rely on their representation, and clearly did so, as described below.

In addition, the Application made it clear that the operational and competitive analysis of the transaction was only focused on the system companies of NW and SRC, not independent railroads in which NW and SRC held individual non-controlling interests such as NPBL. In addition to the applicants' clear statement that NWS would only control NW and SRC

[9] The ICC acknowledged in its decision that, while certain back-office functions were to be "centralized in the holding company," NW and SRC were to "continue as active railroad entities responsible for daily operations under common policies set by [NCS]." 366 I.C.C. at 214. In the 1990 NSR internal reorganization / control proceeding discussed above, SRC told the ICC that it wanted to directly control NW and reorganize the NSR corporate structure in order to facilitate single system accounting and achieve other operational efficiencies. SRC Notice of Exemption at 4–5.

consolidated system companies, all of the economic and competitive analysis set forth in the application discusses NW and SRC on a system basis, and does not differentiate between individual NW and SRC consolidated system companies or substantively address, outside of the ownership information in the corporate charts, any of the independent, non-controlled railroad companies in which NW and SRC held interests such as NPBL.

For example, the Verified Statement of Richard J. Barber included with the Application, attached hereto as Exhibit H, includes an in-depth competitive analysis of the combination of the NW and SRC systems. Mr. Barber presented the important analysis of competitive effects that is at the center of any merger proceeding. Indeed, Mr. Barber specifically discussed competition issues at the Norfolk gateway. But nowhere in this discussion of Norfolk or anywhere else in the Barber statement is NPBL even mentioned. Nor does Mr. Barber discuss the reduction in service in Norfolk from three carriers (an independent NPBL, NW, and SRC) to one carrier (NSC controlling NPBL, NW, and SRC). Consistent with the scope of the Application, all of the discussion of competition focused on NW, SRC, and the subsidiaries that those companies already controlled. There was no discussion at all about the effects of acquiring control over a railroad like NPBL that was not already controlled by the applicants.

As another example, applicants included with the operating plan submitted with the Application a discussion of the Norfolk terminal area as one of the "common point consolidations" between the NW and SRC systems. *NWS Enterprises, Inc.—Control—Norfolk & W. Ry. Co.*, FD 29430, Application, Operating Plan at 183-87 (filed Dec. 4, 1980), attached hereto as Exhibit I.

Applicants described how NW and SRC would consolidate certain operations and personnel in the Norfolk area. *Id.* Applicants stated that:

> Interchange between the consolidated roads and [Virginia and Maryland Railroad Company] and [NPBL] will be handled by consolidated yard crews in the same manner as NW interchange is now handled with those carriers.

Id. at 187. The reference to interchange between "the consolidated roads" (*i.e.,* NW/SRC) and NPBL reflects the distinction made throughout the Application between the controlled subsidiaries of NW and SRC (that would, post-transaction, be commonly controlled) and other companies, like NPBL, that were and would continue to be independent of the newly combined NW and SRC.

If applicants had intended for NWS to control NPBL after the transaction, they would have been required to include in the relevant portions of their Application a discussion of the operational and competitive impact of such control and how such control would be consistent with the terminal railroad charter of NPBL. This would have given the ICC an opportunity to evaluate the impact of such a change in control and would have given third parties, such as CSXT, an opportunity to comment. Not surprisingly given these omissions and the treatment of NPBL as an independent railroad, no third-party commenters addressed the impact of control by NWS of NPBL. It was not part of the Application because control was not being sought over NPBL.

2.3.3 The ICC did not even mention NPBL in its 1981 and 1982 decisions, let alone authorize NWS to control NPBL.

On January 2, 1981, the ICC issued a decision accepting the Application for consideration. *NWS Enterprises; Application to Control Norfolk & W. Ry. Co. & Southern Ry. Co.*, 46 Fed. Reg. 173 (1981), attached hereto as Exhibit J. The ICC's description of the transaction tracks closely the approach proposed by applicants in the Petition and the Application for NWS/NSC to control the NW and SRC system railroads. The ICC noted that the "proposed transaction involves the acquisition of control, through stock ownership of NW and its subsidiary companies and of [SRC] and its consolidated system companies, by NWS, a newly incorporated non-carrier holding company." 46 Fed. Reg. at 174. The ICC listed the "rail carrier subsidiaries of NW and the [SRC] consolidated system carriers" in an appendix to the decision, and that list did not include NPBL or other independent railroad companies in which NW and SRC each held non-controlling interests. *See id.* at 176.

On March 19, 1982, the ICC issued a decision granting the Application. *Norfolk S. Corp.—Control—Norfolk & W. Ry. Co. & Southern Ry. Co.*, 366 I.C.C. 173 (1982). The ICC noted again that the Application sought authority "for [NSC] to acquire control through stock ownership of NW and its subsidiary companies, and of [SRC] and its consolidated companies." *Id.* at 177. In a footnote to that sentence, the ICC noted that "[t]he affiliated companies of NW and [SRC] are set forth in appendix A." *Id.* at 177 n.3. Again, the NW and SRC system companies listed in Appendix A to the ICC approval decision did not include NPBL. *Id.* at 255–57.

The ICC approval decision does not differentiate between individual NW and SRC consolidated system companies for any substantive reason, and the

decision does not discuss at all any of the non-consolidated system independent railroads in which NW and SRC held an interest. Indeed, the ICC's approval decision does not contain a single reference to NPBL, let alone any substantive analysis of the competitive impact of control of NPBL by NWS/NSC.

Consequently, the ICC approval decision discusses and treats the transaction from a competition perspective as a combination of the NW and SRC consolidated railroad systems. *See id.* at 215–29 (discussing competitive issues related to the transaction in terms of NW and SRC systems). The decision discusses the "common point consolidation" of the NW and SRC systems at Norfolk, as described in the Application operating plan and summarized above in Section 2.3.2. *See id.* at 205. As with the Application, the decision never mentions NPBL in the context of its analysis of the competitive impacts of the transaction on the Norfolk terminal area or the competitive impacts of the transaction in any other geographic region or part of the transportation market.

2.3.4 Subsequent ICC/STB authorizations of corporate reorganizations of NSR and its predecessors do not mention NPBL.

While the question referred by the Court only refers to the 1982 ICC decision approving common control of NW and SRC, it is also clear that neither NSR nor its predecessors have ever requested or obtained ICC/STB authority to control NPBL in later proceedings. NPBL is never mentioned in later ICC and STB decisions authorizing corporate reorganization of NSR and its predecessors through control and merger transactions.

In 1990, SRC invoked a class exemption to obtain required ICC authority for SRC to control NW and rail carriers controlled by NW. *See*

Southern Ry. Co.—Control—Norfolk & W. Ry. Co., FD 31791, et al., Notice of Exemption (filed Dec. 14, 1990) [hereinafter SRC Notice of Exemption], attached hereto as Exhibit K. The transaction reorganized the NSR corporate structure and allowed SRC to exercise control of NW and NW's rail carrier subsidiaries.

Citing the ICC's 1982 NW/SRC control decision (which did not list NPBL as a carrier to be controlled by NSC), the SRC notice of exemption states that NSC "controls through stock ownership numerous rail carriers operated as a single rail system extending throughout the southeastern and midwestern United States." *Id.* at 3. SRC also asserted that "[t]he transaction involves only rail carrier subsidiaries of NS Corp. already commonly controlled and operated as part of a corporate family." *Id.* at 7. In connection with the reorganization, SRC also changed its name to the current NSR. The SRC notice says nothing about NPBL.

In 1998, NSR invoked a class exemption to merge NW into NSR. *Norfolk S. Ry. Co.—Merger Exemption—Norfolk & W. Ry. Co.*, FD 33648, Notice of Exemption (filed Aug. 13, 1998), attached hereto as Exhibit L. Again, the NSR notice of exemption did not mention NPBL.

3. Argument

Because neither the ICC nor the STB has ever approved a transaction allowing NSR or its predecessors to control NPBL, the ICA cannot and does not immunize NSR from any otherwise applicable antitrust laws or other federal or state laws with respect to NSR's dealings with NPBL. If a railroad fails to seek or obtain required authorization to control another railroad, as here, there can be no immunity from antitrust and other laws because the

predicate of ICC/STB approval has not been met. NSR cannot hide behind a control authorization that it never obtained. If NSR were to obtain antitrust immunity for actions to control NPBL, it could continue to monopolize the NIT, at harm to competition and shippers—all based on an ICC/STB authority that NSR never asked for, that the ICC/STB never examined, and that was never granted.

3.1 NSR has never obtained ICC or STB authority to control NPBL.

3.1.1 The ICA requires that the ICC/STB affirmatively approve certain control transactions.

As relevant here, the ICA provides that prior STB approval and authorization is required for (1) acquisition of control of a rail carrier by any number of rail carriers, and (2) acquisition of control of at least two rail carriers by a person that is not a rail carrier. 49 U.S.C. §§ 11323(a)(3), (4). These current ICA requirements were substantially similar at the time of the NW/SRC control proceeding. *See* 49 U.S.C. §§ 11343(a)(3), (4) (1980).

Not only must the ICC/STB expressly authorize the acquisition of control, that authority is subject to statutory requirements that can only be satisfied based on extensive analysis of information relevant to the exercise of control. In particular, the ICA requires the STB to approve and authorize a control transaction "when it finds the transaction is consistent with the public interest." 49 U.S.C. § 11324(c). For "major" transactions such as the NW/SRC control proceeding, the ICA requires the STB to consider at least five factors, including "the effect of the proposed transaction on the adequacy of transportation to the public," "the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed

transaction," and "whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region or in the national rail system." *Id.* §§ 11324(b)(1), (2), (5). These same statutory standards applied to the ICC's consideration of the NW/SRC control application. *See* 366 I.C.C. at 189–93; 49 U.S.C. §§ 11344(c), (b)(2), (b)(5) (1980).

In order to allow the ICC to apply these statutory standards and analyze a proposed transaction, the ICC's rules required applicants for a major control transaction such as the NW/SRC transaction to include voluminous information about the current and proposed operations and finances of relevant railroads. *See* 49 C.F.R. Part 1111, Subpart A (1980). These included corporate charters and organizational documents, annual reports, relevant stockholder and director resolutions, employee impact information, environmental matters and energy consumption information, revenue carload interchange data, freight car fleet information, revenue freight traffic data, commodity group revenue data, traffic studies, operating plans, corporate balance sheets, income statements, and other materials. *See id.*

3.1.2 NSR and its predecessors did not seek or obtain ICC/STB authority to control NPBL in 1982 or at any time thereafter.

The facts set forth above in Sections 2.2 and 2.3 establish that NSR and its predecessors have never requested or obtained authority from the ICC or the STB to control NPBL, and that neither the ICC nor the STB has ever considered whether NSR's control of NPBL – a terminal switching railroad formed to provide access for all of its owners – would be consistent with the statutory standards that the ICC/STB must evaluate to approve such control.

In summary:

- The appendices to the Petition listing the subsidiaries that would be the subject of the Application for control authority did not identify NPBL as a subsidiary over which control was sought.

- Petitioners specifically represented that they "have **no intention of exercising control** over" companies, like NPBL, that were not currently controlled by NW or SRC. Petition at 11-12 (emphasis added).

- In granting the Petition, the ICC stated that "it would serve no useful purpose to produce detailed information for these companies" that were not currently controlled by NW or SRC, noting Applicants' representation that they did not intend to control such companies. 45 Fed. Reg. at 66912.

- Consistent with the Petition, the Application sought authority for common control over NW, SRC, and controlled subsidiaries that were part of their respective systems. NPBL was not part of either NW's or SRC's system.

- The Application did not include any information that would be needed for the ICC to apply its statutory standards in order to evaluate NWS/NSC control of NPBL.

- The only information in the Application about NPBL was contained in a chart that listed the NW and SRC ownership interest in other companies whether or not those companies would be subject to common control post-transaction.

- The Application does not contain a single word about the potential impact of unilateral control over NPBL in light of its "mutual benefits" charter.

- The Application contains an extensive discussion of the impact of the proposed transaction on competition and operations in Norfolk and never once indicates that governance of the belt line railroad serving Norfolk – NPBL – might change.

- The competitive analysis submitted in support of the Application does not contain a single reference to NPBL.

- The ICC decision accepting the Application for consideration, and the ICC decision approving the Application lists in appendices the NW and SRC system companies over which NWS/NSC was granted control. Those lists did not include NPBL.

- The ICC's decisions accepting and approving the Application do not contain a single reference to NPBL.
- The ICC's decision approving the Application contains a detailed discussion of the impact of the transaction in the Norfolk area, and it does not even mention the existence of NPBL or the possibility that control over NPBL might change as a result of the transaction.
- In subsequent ICC/STB authorizations of corporate reorganizations of NSR and its predecessors, applicants never mention NPBL. Indeed, applicants in those transactions used class exemptions that could only lawfully be invoked if the transactions would have no competitive effects.
- In the trackage rights compensation proceeding recently brought by NSR before the Board, NPBL (supposedly controlled by NSR) opposed NSR's attempt to increase trackage rights fees.

3.1.3 The case law establishes the obvious principle that control over a terminal railroad must be explicitly requested, evaluated based on evidence submitted, and expressly authorized by the Board.

The essential character of a terminal railroad like NPBL is that it is supposed to serve the interests of each of its owners and not to be run unilaterally to serve the interests of a single owner. Therefore, it is not surprising that when a single owner of a terminal railroad seeks to exercise unilateral control over a terminal railroad, the proposed change of control is the subject of deliberate analysis by the Board. That analysis can only be carried out where the party seeking control over a terminal railroad expressly requests it and submits information that will allow the Board to evaluate its competitive effects.

In fact, the case law shows that in other ICC/STB control proceedings that would result in applicants obtaining control of a terminal railroad like NPBL that serves as a neutral switcher for multiple railroad owners, the applicants have expressly sought control authority from the ICC/STB, and the

agency has conducted an examination of competitive effects of such a change in control. Such analysis is particularly important given that the Board has often concluded that control over the terminal railroad, if not conditioned or limited, could have anticompetitive results.

For example, in *Union Pac. Corp., et al.—Control—Mo.-Kan.-Tex. R.R. Co, et al.*, 4 I.C.C.2d 409 (1988), decided six years after the NW/SRC decision, Union Pacific ("UP") sought ICC authority to control the Missouri-Kansas-Texas Railroad Company ("MKT"). At the time, ownership of the Texas City Terminal Railway Company ("TCT") was divided equally amongst UP, MKT, and The Atchison, Topeka and Santa Fe Railway Company ("ATSF"). *Id.* at 477. TCT provided switching and terminal services to the five railroads that serve Texas City: UP, MKT, ATSF, and two other railroads. Because UP's acquisition of MKT would have resulted in UP's ownership of two-thirds of the stock of TCT, UP filed a related petition for exemption seeking authority to control TCT. *Id.* at 483–84. The ICC noted:

> Majority control of TCT by UP, where presently no railroad owns more than a one-third interest, represents a significant qualitative change in ownership. It clearly raises the potential for manipulation of TCT in the interests of the majority owner, whereas now discrimination against non-owning railroads would involve the much more difficult action of collusion among three railroads.

Id. at 478. The ICC ultimately conditioned its approval of the UP/MKT consolidation on applicants mitigating the potential competitive effects of the change in control.

Similarly, in *Burlington Northern et al.—Control & Merger—Santa Fe Pacific et al. (BN/Santa Fe),* 10 I.C.C.2d 661 (1995), applicants sought ICC authority for the merger of Burlington Northern Railroad Company ("BN") and

The Atchison, Topeka and Santa Fe Railway Company ("Santa Fe"). At the time, BN, Santa Fe, and Missouri Pacific Railroad Company ("MP") each held a one-third stock interest in The Wichita Union Terminal Railway Company ("WUTR"), a class III terminal railroad. *See id.* at 673. Applicants sought ICC approval for control of WUTR in a related petition for exemption. *See BN/Santa Fe*, *Decision No. 3*, FD 32549, 1994 WL 533631, at *1-2 (ICC served Oct. 3, 1994).

Given the potential impact on competition of unilateral control over a terminal railroad, the ICC directed Applicants to submit additional information about WUTR. *See BN/Santa Fe*, *Decision No. 5*, FD 32549, 1994 WL 631539, at *4 (ICC served Nov. 10, 1994). The ICC explained that while it had granted Applicants' request to waive its regulations at 49 C.F.R. § 1180.3(b) and would not consider WUTR an "applicant carrier," the ICC needed additional information about WUTR to conduct its market analysis because it was "concerned about railroads which have interests in [WUTR]." *Id.* Ultimately, in its decision approving the BNSF merger, the ICC granted Applicants' petition for exemption to control WUTR. *See BN/Santa Fe*, 10 I.C.C.2d at 796.

The UP/MKT and BN/Santa Fe decisions show that the ICC/STB has recognized that the consolidation of ownership interests in a neutral switching carrier as a result of a larger control proceeding could have significant competitive impacts. The applicants in each of those proceedings properly raised the issue and sought control authority of the terminal/switching carrier. Third parties had an opportunity to comment and the Board had an opportunity to assess the competitive effects of the proposed acquisition of

control and, where necessary, impose conditions that would mitigate the risk of anti-competitive conduct related to control of the terminal carriers.

In contrast to these cases, the applicants in the NW/SRC control proceeding specifically told the ICC that NWS/NSC *would not control* NPBL and other similarly situated companies after the transaction. Because of that representation, third-party commenters such as CSXT – as minority owner of NPBL, the party that would have been most impacted by NWS/NSC control – never commented on the competitive ramifications of NWS/NSC control over NPBL. Nor did other stakeholders in the Norfolk area potentially affected by unilateral control by NSR over NPBL have an opportunity to comment. And based on the applicants' representation, the ICC never evaluated the competitive implications of a change from the then-existing governance structure of NPBL to a unilaterally controlled terminal railroad. In short, the ICC never approved NSC's control of NPBL.

NSR cannot now argue that NWS/NSC control of NPBL was somehow created out of thin air, especially when NSR made the strategic and express decision not to seek that control in its 1982 application. Other major consolidation applicants and the ICC/STB have acknowledged that if unilateral control over a terminal carrier is sought in a larger transaction, control authority must be affirmatively sought and competitive issues must be investigated and potentially mitigated.

3.2 Since the ICC/STB never authorized NSR to control NPBL, the ICA cannot and does not immunize NSR from CSXT's claims.

Immunity under 49 U.S.C. § 11321 is available only to the extent it arises out of a specific grant of control authority by the ICC/STB and only to

the extent that immunity is necessary to implement the control authority that was granted. There was never a grant of authority to NSR to control NPBL, so there is no basis for asserting antitrust immunity for any actions by NSR to control NPBL.

3.2.1 Immunity under section 11321 to control another railroad must be linked to a specific grant of control authority.

Under the statutory scheme that regulates railroads, the ICC/STB have long been exclusively responsible for determining when railroads can combine and when they can control one another. "Congress has vested with the STB, 'the exclusive authority to examine, condition, and approve proposed mergers and consolidations.'" *CSX Transp., Inc. v. Transp.-Commc'ns Int'l Union*, 413 F. Supp. 2d 553, 562 (D. Md. 2006) (quoting *Norfolk & W. Ry. Co. v. Am. Train Dispatchers Ass'n*, 499 U.S. 117, 119 (1991)).

Congress further provided that this exclusive authority must follow specific standards, including an assessment of competitive effects. As explained above, for the ICC/STB to comply with these statutory requirements, applicants for agency authorization of control over another railroad must affirmatively ask the STB for the required control authority, the applicant must submit the (often very extensive) information needed to assess the statutory factors, and the ICC/STB must explicitly approve (potentially with conditions) the proposed control transactions.

This exclusive authority to authorize railroad combinations could be undermined if other legal regimes or authorities were able to interfere with decisions of the ICC/STB approving railroad control transactions. Therefore, as a corollary to this exclusive authority over railroad combinations, the ICA

provides immunity from otherwise applicable law as necessary to allow persons to carry out transactions approved by the ICC/STB:

> A rail carrier or corporation participating in or resulting from *a transaction approved by or exempted by the Board* under [§§ 11323-25] 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) (emphasis added).[10]

Under this legal regime, immunity conferred by § 11321 only arises out of a specific grant of authority by the ICC/STB, which itself must be expressly requested and evaluated. If a railroad seeks to control another railroad, it can obtain immunity under § 11321 for exercising that control only if it expressly requests control authority and obtains that authority through a specific order of the agency. This legal principle seems obvious on its face and it is supported by the case law.

For example, in *Sunoco Energy Dev. Co. v. Burlington N., Inc.*, 483 F.Supp. 119 (D. Wyo. 1980), a federal district court was faced with determining whether the ICA immunized two railroads from an antitrust claim arising out of a contract entered into by those two railroads that had never been approved by the ICC. The court found that "[i]f the Commission had already given final approval of the agreement in question here, then there would be no doubt that

[10] Prior to 1995, this statutory provision was codified in substantially similar form at 49 U.S.C. § 11341, and before 1978 at 49 U.S.C. § 5(12). For ease of reference, this Opening Statement refers only to § 11321.

the Commission's jurisdiction . . . would be exclusive." *Id.* at 125. But because the necessary predicate to § 11321 immunity – ICC approval – had not been achieved, the court held that the antitrust laws were not displaced by the ICA, and that the plaintiff's suit could proceed. *Id.* at 128. Since the ICC had never granted its approval of the agreement, which it could do only after evaluating its impacts, there was no basis for over-riding the antitrust laws as applied to the agreement.

The statute itself contains a further limitation on the scope of immunity. Immunity under section 11321 is available only "as necessary to let that rail carrier, corporation, or person carry out the transaction, . . . and exercise control or franchises acquired through the transaction." *Id.* at 127. The Supreme Court has held that the exemption from other legal obligations is available only where "an ICC-approved transaction requires abrogation" of such obligations. *Train Dispatchers Ass'n*, 499 U.S. at 132–33. The predicate, of course, is the specific grant of authority by the agency. If a railroad is not specifically authorized to control another railroad, exemption from antitrust and other laws is not "necessary to . . . exercise control or franchises acquired through the transaction." *Id.* at 127. There is no control authority to be exercised and no franchise to be controlled.

3.2.2 NSR was never granted authority to control NPBL so there is no immunity from claims arising out of NSR's exercise of control over NPBL.

As explained above, the ICC/STB never authorized NSR or its predecessors to control NPBL, NSR never asked the ICC/STB to authorize control over NPBL, and the ICC/STB never had the opportunity to evaluate the impact of unilateral control over NPBL. Since there has never been an

ICC/STB authorization for NSR to control NPBL, there is no immunity that could possibly flow from a specific order of the ICC/STB authorizing control. It clearly is not necessary to over-ride the antitrust laws to permit NSR to implement control authority that it never received.

Nor does immunity flow from the 1982 decision in which the ICC authorized NSC to control NW, SRC and the subsidiaries that were already controlled by NW and SRC, as listed in Appendix A to the ICC decision. As explained above, the ICC did *not* authorize NSC to control other subsidiaries, like NPBL, that were not already controlled by NW or SRC. In fact, the authority that the ICC granted in that decision for common control of NW and SRC was based on an express representation by the applicants that they were *not* going to control the subsidiaries like NPBL that were not already controlled by NW or SRC. Antitrust immunity under section 11321 is clearly not needed to implement an ICC/STB authority (*i.e.*, to control NPBL) that the Applicants expressly stated that they were not seeking.

NW and SRC each owned a 28.57% interest in NPBL. Therefore, a consequence of the 1982 decision was that NSC, as a holding company that would own NW and SRC, acquired a combined 57% indirect interest in NPBL. But the ICC never authorized NSR's predecessor to use the separate interests of NW and SRC as a unified block to control NPBL and to treat NPBL as though it was part of the NSR family of controlled companies. The authority to treat NPBL as part of a single NSR family of companies could only have been obtained through a specific request for control authority and based on a specific analysis by the ICC of the competitive effects (and other public interest factors) of such control. NSR never obtained that authority. Therefore, NSR was

always subject to the antitrust laws in its dealings with the independent NPBL. As alleged by CSXT in the federal court lawsuit, NSR violated those antitrust and other laws when, among other things, NSR conspired with NPBL and treated NPBL as an extension of NSR's own interests, to the detriment of the public interest, customers, CSXT, and NPBL itself.

4. Conclusion

The answer to the question referred by the Court is clear: the 1982 NW/SRC consolidation did not involve the ICC granting NSR's predecessor authority to control NPBL, and it is not necessary to displace CSXT's claims in order to allow NSR to carry out the NW/SRC consolidation. The text of the applicants' submissions, the process requirements in the ICC's rules, and the text of the ICC's decisions all clearly demonstrate that, with respect to NPBL, no control authority was sought, no control authority was reviewed, and no control authority was granted. Moreover, NSR and its predecessors never obtained ICC/STB authority at any later date to control NPBL. As a result, NSR cannot claim a statutory immunity from CSXT's court claims. The STB should reject NSR's post-hoc and self-serving effort to rewrite history and the ICC's own decision to give NSR a blank check to illegally monopolize NIT and stifle competition with CSX.

Respectfully submitted,

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Dated: September 23, 2021

CERTIFICATE OF SERVICE

I certify that I have, on September 23, 2021, served copies of CSXT's Opening Statement upon all parties of record in this proceeding, by electronic mail.

/s/ Sally Mordi
Sally Mordi
Attorney for CSX Transportation, Inc.

Before the
SURFACE TRANSPORTATION BOARD

Finance Docket No. 36522

NORFOLK SOUTHERN RAILWAY COMPANY
—PETITION FOR DECLARATORY ORDER

EXHIBIT A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

CSX TRANSPORTATION, INC.,
individually and on behalf of NORFOLK & PORTSMOUTH BELT LINE RAILROAD COMPANY,

Plaintiff,

v. **Civil No. 2:18cv530**

NORFOLK SOUTHERN RAILWAY COMPANY, and

NORFOLK & PORTSMOUTH BELT LINE RAILWAY COMPANY,

Defendants.

OPINION AND ORDER

This matter is before the Court on a motion to dismiss/motion for judgment on the pleadings/motion to refer filed by Defendant Norfolk Southern Railway Company ("NSR") prior to the close of discovery (and prior to the lengthy COVID-19 stay previously imposed in this case). ECF No. 115. As of the date of this Opinion and Order, discovery is now closed and summary judgment motions were recently filed by NSR and Norfolk & Portsmouth Belt Line Railway Company ("Belt Line"). A jury trial is currently scheduled to begin on July 13, 2021, although under this Court's COVID-19 operating procedures (which permitted the resumption of civil jury trials on May 3, 2021), regardless of the outcome of the instant motion, such trial date would be subject to further

continuance if there is not an available retrofitted courtroom to allow the Court to keep jurors socially distanced throughout all stages of the jury trial process.

The relevant background of the case is set forth in greater detail in this Court's September 9, 2019 Opinion and Order. ECF No. 66. In short, Plaintiff CSX Transportation, Inc. ("CSX") alleges that Defendants NSR and Belt Line committed federal antitrust violations, state law conspiracy offenses, and contractual breaches associated with the manner in which Belt Line, a company jointly owned by NSR and CSX, was operated. For the reasons set forth below, NSR's motion is **DENIED in part**, and **GRANTED in part,** as the Court refers one disputed issue to the U.S. Surface Transportation Board ("STB").

I. Background

NSR's motion challenges the jurisdiction of this Court, seeks judgment on the pleadings based on a claim of immunity, or alternative to both requests, asks this Court to refer two issues to the STB. It should be noted at the outset that: (1) both Belt Line and NSR previously filed timely motions to dismiss in this case, ECF Nos. 27, 34; (2) Belt Line's prior motion advanced a related, though not identical, challenge to this Court's jurisdiction, with such earlier-in-time challenge deemed "meritless" by this Court, ECF No. 66, at 20; (3) NSR did not previously challenge this Court's jurisdiction or otherwise raise

an immunity defense—to the contrary, NSR previously acknowledged its inability to reach "some averments in the Complaint as to the federal antitrust claims," ECF No. 35, at 3, and conceded jurisdiction over such claims, ECF No. 69 ¶ 11; and (4) NSR did not previously request a transfer to the STB for the purposes of addressing an immunity defense or determining a reasonable "switching rate" for use of Belt Line's tracks.

NSR now asserts that it is immune from federal antitrust laws and state conspiracy laws with respect to its relationship with Belt Line not because of any recent developments in the case, or new facts learned during discovery, but rather, on the ground that NSR has been immune from such claims for decades based on a railway consolidation/merger occurring in 1982. While this Court again finds that it has jurisdiction over this case, and has reservations regarding the validity of such immunity defense, the Court will refer the immunity issue to the STB in light of its expertise regarding the process and scope of railroad company mergers.

II. Jurisdictional Challenge

NSR first contends that this Court lacks jurisdiction over this case and thus seeks dismissal under Rule 12(b)(1). Because a Rule 12(b)(1) motion can be filed at any time, NSR contends that its motion, filed long after this Court denied the original round of Rule 12(b) motions, is timely.

In support of its jurisdictional challenge, NSR argues, among other things, that the parties' dispute arises out of a railway consolidation/merger, and that the STB, formerly the Interstate Commerce Commission ("ICC"): (1) has exclusive authority to approve mergers between rail carriers; and (2) that carriers participating in an approved merger are "exempt" from antitrust laws and other laws "as necessary to . . . carry out the transaction." ECF No. 116, at 8 (emphasis omitted); accord 49 U.S.C. § 11321(a).[1] While the Court agrees with NSR's recitation of the law, the STB's exclusive authority over rail carrier mergers implicates the doctrine of "primary jurisdiction," which—despite its name—is not "jurisdictional." Importantly, "[d]espite what the term [primary jurisdiction] may imply, [it] does not speak to the jurisdictional power of the federal courts. It simply structures the proceedings as a matter of judicial discretion, so as to engender an orderly and sensible coordination of the work of agencies and courts." Envt'l Tech. Council v. Sierra Club, 98 F.3d 774, 789 n.24 (4th Cir. 1996) (second and third alterations in original); see Stevens v. Bos. Sci. Corp., 152 F. Supp. 3d 527, 533 (S.D.W. Va. 2016) (explaining that the name of such doctrine "is a misnomer"). The doctrine is applicable when a claim cognizable in federal court "requires the resolution of issues

[1] 49 U.S.C. § 11321 was previously codified at 49 U.S.C. § 11341.

which, under a regulatory scheme, have been placed within the special competence of an administrative body," thus causing a district court to suspend the judicial process "pending referral of [specific] issues to the administrative body for its views." United States v. W. Pac. R.R. Co., 352 U.S. 59, 64 (1956); see Mulberry Hills Dev. Corp. v. United States, 772 F. Supp. 1553, 1561 (D. Md. 1991) (explaining that a district court should "refrain from exercising its judicial power so that an agency particularly equipped to address issues and charged with regulatory duties within its expertise may perform its functions").

Here, notwithstanding NSR's arguments to the contrary, this Court has jurisdiction over the federal antitrust claims in this case, and has supplemental jurisdiction over the related state law claims. NSR's Rule 12(b)(1) motion to dismiss for lack of jurisdiction is therefore **DENIED**.

III. Rule 12(c) Dismissal or STB Referral - Immunity

NSR next argues that this Court should dismiss this matter on the pleadings pursuant to Rule 12(c) based on NSR's statutory immunity. Plaintiff challenges the timeliness of such argument, contending that NSR's argument seeking dismissal: (1) should have been advanced as a Rule 12(b)(6) motion and was filed many months after the 12(b)(6) deadline; (2) contradicts NSR's prior jurisdictional position; (3) duplicates Belt Line's prior failed

jurisdictional challenge, thereby conflicting with the "law of the case"; and (4) is unripe to the extent it separately asserts that certain potential remedies would invade the province of the STB's exclusive jurisdiction. ECF No. 131, at 2-4. NSR and Belt Line each counter that NSR's arguments in support of dismissal differ from Belt Line's prior arguments in that they rely on a different statutory provision (49 U.S.C. § 11321), ECF Nos. 132, 138, with NSR again noting that jurisdiction can be challenged at any time.

First, to the extent NSR argues that its Rule 12(c) motion to dismiss is timely and/or meritorious based on jurisdictional grounds, the Court rejects such claim without further analysis for the same reasons set forth above. Second, as outlined below, to the extent NSR is seeking a Rule 12(c) dismissal, or alternatively, referral to the STB based on § 11321(a) immunity, the Court finds that although such claim was "delayed," it is not fatally untimely, and while dismissal is not appropriate, the request for referral to the STB on the immunity issue has merit. Third, to the extent NSR seeks a referral to the STB for a rate setting determination, such request is denied at this time for the same reasons this Court previously concluded that it has authority to grant monetary and injunctive relief in this case.

A. Timeliness of Motion

As to the timeliness of the immunity defense, CSX accurately highlights the fact that NSR's pending motion was filed during

discovery and several months after the original round of Rule 12(b) motions was resolved by the Court. NSR fails to demonstrate why it did not raise such immunity defense earlier in the case,[2] or why it appeared to previously concede that it had no valid basis to challenge the federal antitrust claims at that stage of the case. The delayed timing of NSR's immunity claim is especially notable because the defense is predicated on a merger that has at all times been within NSR's knowledge.

Notwithstanding NSR's delay, NSR appears correct both that CSX's complaint does not include the facts on which NSR bases its immunity defense[3] and that the motion, filed sufficiently in advance of the scheduled trial date, is timely under Rule 12(c). See Fed. R. Civ. P. 12(c) ("After the pleadings are closed--but early enough not to delay trial--a party may move for judgment on the pleadings."); Fed. R. Civ. P. 12(h)(2) (indicating that failure

[2] While NSR's Answer advances three affirmative defenses mentioning "immunity," none of these three theories is predicated on § 11321(a). ECF No. 69. CSX does not squarely assert a pleading error in response to the pending Rule 12(c) motion, although CSX does contend that NSR's motion has little relation to its answer. See ECF No. 131, at 3.

[3] The complaint broadly references "mergers and acquisitions" over many decades involving multiple railways, ECF No. 1 ¶¶ 2, 21; however, it does not appear to discuss the 1982 merger, the ICC/STB's approval of it, or the fact that as of 1989, two of the three railway companies with an ownership interest in Belt Line were affiliates under common ownership due to the 1982 merger. NSR's answer filled in the necessary facts regarding the 1982 merger and 1989 common ownership. ECF No. 69 ¶ 2. In fact, long prior to the filing of the answer, NSR reported such facts to the Court in its brief in support of its original dismissal motion, to include citing the STB's consolidation ruling. Norfolk S. Corp.—Control—Norfolk & W. Ry. Co. & S. Ry. Co., 366 I.C.C. 171 (1982). Accordingly, it appears that NSR could have asked the Court to take judicial notice of the consolidation and argued its immunity defense at the outset of this case.

to state a claim can be raised in a Rule 12(c) motion or even at trial); see also 5C Wright & Miller, Federal Practice and Procedure § 1368 (3d ed. Apr. 2021 update) ("[C]ourts typically will construe . . . a late Rule 12(b) motion, or a Rule 12(b) motion that implicates affirmative defenses, as if it were brought under Rule 12(c).").[4] Similarly, NSR's request seeking a stay and referral to the STB, while delayed, is not "untimely" under any applicable rule or practice argued by CSX.[5]

In the absence of a procedural bar to NSR's motion to dismiss or refer, the Court addresses the merits of such motion, further noting that this Court clearly has the authority (and potentially the obligation) to refer appropriate matters to the STB. Although the COVID-19 pandemic and associated stays requested by the parties—followed by the continued effects of the pandemic on Court

[4] The most relevant non-public evidence in support of NSR's dismissal/referral motion appears to be the consolidation/merger application that NSR attached as an exhibit to such motion. ECF No. 116-5. CSX does not challenge this exhibit as a matter that is not integral to the pleadings, nor is its authenticity challenged. Accordingly, there does not appear to be a procedural obstacle to considering such document in conjunction with NSR's motion. Goines v. Valley Cmty. Servs. Bd., 822 F.3d 159, 166 (4th Cir. 2016). Moreover, even if there is such an obstacle in conjunction with NSR's Rule 12(c) request for dismissal, the Court is unaware of any similar obstacle to the extent that NSR seeks referral to the STB.

[5] Under the doctrine of "primary jurisdiction," the Court has the authority to make its own discretionary determination to refer a matter to the STB in order to "promot[e] proper relationships between the courts and administrative agencies." W. Pac. R.R. Co., 352 U.S. at 63; see Stevens, 152 F. Supp. 3d at 534 (explaining that the Court can "invoke the doctrine [of primary jurisdiction] sua sponte"). Therefore, even though the doctrine of primary jurisdiction may be "waivable" in certain circumstances, CSX Transp., Inc. v. Transp.-Commc'ns Int'l Union, 413 F. Supp. 2d 553, 564 (D. Md. 2006), this Court also has discretion to consider a referral to the STB with or without a motion from the parties.

operations and litigation in this District—have delayed the Court's resolution of NSR's motion, as explained below, the Court nevertheless finds that the best course is to temporarily stay this federal action pending referral of the immunity issue to the STB as such issue is potentially dispositive of nearly all claims for relief.

B. Merits of Dismissal/Referral

1. Factual Background

Briefly reciting the most relevant facts associated with the 1982 consolidation/merger that forms the basis of NSR's immunity defense, in December of 1980, NWS Enterprises, Inc. ("NWS") filed an application with the ICC to control two existing railways, Norfolk and Western Railway Company ("NW") and Southern Railway Company ("SR"). ECF No. 116-5. Shortly thereafter, the ICC filed a notice in the Federal Register describing the transaction as involving "the acquisition of control, through stock ownership of NW and its subsidiary companies and of SR and its consolidated system companies, by NWS, a newly incorporated non-carrier holding company." NWS Enters.; Application To Control Norfolk & W. Ry. Co. and S. Ry. Co., 46 FR 173-02, at 174, 1981 WL 109712 (Jan. 2, 1981) (emphases added). "The rail carrier subsidiaries of NW and the SR consolidated system carriers are set forth in the appendix" of the notice, with the appendix listing nearly fifty subsidiaries. Id. at 176. Notably absent from such list of subsidiaries is

defendant Belt Line. The acquisition by the newly formed holding company was not technically considered a "merger," although "certain operating efficiencies among the carriers" were proposed, and the carriers that would be owned by NWS would "continue to operate . . . over the lines described [in the notice], subject to certain abandonments and coordinated operations described in the application." Id. (emphasis added). No coordination with respect to Belt Line was mentioned in the application.

Approximately a year later, the STB published a lengthy decision authorizing Norfolk Southern Corporation ("NSC")[6] to acquire "control . . . of Norfolk and Western Railway Company and its subsidiary companies and of Southern Railway Company and its consolidated companies . . . subject to conditions." Norfolk S. Corp.—Control—Norfolk & W. Ry. Co. & S. Ry. Co., 366 I.C.C. 173, 173, 1982 WL 28414 (1982). Such decision again listed the numerous NW and SR subsidiary companies, which again did not include Belt Line, and further approved "[a]cquisition of a line of railroad and of certain trackage rights incorporated in the primary application." Id. at 173, 255-57. No mention was made of NSC acquiring control over Belt Line or the trackage rights controlled by Belt Line. The decision did, however, note the statutory

[6] It appears that the holding company being created to "control" both NW and SR was initially going to be NWS, but was ultimately named NSC. NSC is NSR's predecessor.

polices of "recent rail reform legislation," which included an emphasis on the retention of competition. Id. at 190.

The Rule 12(c) record suggests that, after the 1982 consolidation, the Belt Line partnership continued to operate under its plan of shared governance, with Belt Line's Board of Directors continuing to be appointed by CSX, NW, and SR. ECF No. 1-3. In 1989, CSX, NW, and SR signed an agreement to modify the number of directors appointed by each company such that NW and SR (both owned by NSC) would collectively appoint three directors, with the parties also agreeing that no other provision of the 1897 Belt Line Agreement would be amended, altered, or affected.[7]

2. Discussion

"Congress has vested with the STB, 'the exclusive authority to examine, condition, and approve proposed mergers and consolidations.'" CSX Transp., Inc. v. Transp.-Commc'ns Int'l Union, 413 F. Supp. 2d 553, 562 (D. Md. 2006) (quoting Norfolk & W. Ry. Co. v. Am. Train Dispatchers Ass'n, 499 U.S. 117, 119 (1991)). Critical to the instant dispute, the Interstate Commerce

[7] According to the parties, NW and SR merged in 1990, and the number of Belt Line board members was amended again at some point after such merger. While not critical to the Court's analysis, the Court notes for context that it appears from public records that the 1990 merger occurred pursuant to the "corporate family" exemption such that STB approval of such merger was not required, with the STB reporting in early 1991 that a notice of exemption had been filed, further indicating that such transaction would "not result in . . . a change in the competitive balance with carriers outside the corporate family." 56 Fed. Reg. 1541-03, 1991 WL 310251 (Jan. 15, 1991). It was at that time that the newly merged company was renamed "Norfolk Southern Railway [C]ompany." Id.

Act provides that "[a] rail carrier, corporation, or person participating in [an] approved . . . 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, . . . and exercise control or franchises acquired through the transaction." 49 U.S.C. § 11321(a) (emphases added). "The purpose of this provision, and the exemption from antitrust and other laws that it provides, is to ensure that efforts to merge and consolidate are not obstructed, and that merger efficiencies can be achieved." CSX Transp., Inc., 413 F. Supp. 2d at 562-63 (emphases added) (citing Train Dispatchers Ass'n, 499 U.S. at 133). The Supreme Court has held that the exemption from "all other law" extends to cover "any obstacle imposed by law," including certain contracts, as long as "an ICC-approved transaction requires abrogation" of such obligations. Train Dispatchers Ass'n, 499 U.S. at 132-33.

While the Supreme Court has not expressly defined the contours of "necessity" in this context, a district court in this circuit has squarely addressed the issue, explaining as follows:

> The preclusive powers of the [Interstate Commerce Act] are not unlimited. As the Supreme Court noted in Train Dispatchers, exemption from other laws is only allowed when it is "necessary to carry out an ICC-approved transaction." 499 U.S. at 132–33 (emphasis added). . . .
>
> Although the Supreme Court did not define the term "necessary" in Train Dispatchers, the ICC has stated

> that the ICA super[s]edes other law where there otherwise will be an impediment to the merger. CSX Corp.—Control—Chessie Sys., Inc., and Seaboard Coast Line Indus., Inc., 8 I.C.C. 2d 715, 721–22, 1992 WL 206172 (1992) ("[T]he necessity predicate is satisfied by a finding that some 'law' (whether antitrust, RLA, or a collective bargaining agreement formed pursuant to the RLA) is an impediment to the approved transaction. In other words, the necessity predicate assures that the exemption is no broader than the barrier which would otherwise stand in the way of implementation.").

CSX Transp., Inc., 413 F. Supp. 2d at 568-69. The district court went on to highlight the fact that the plaintiff in that case failed to demonstrate that a post-merger dispute over where certain railroad clerical work was to be performed was a "critical factor" that could "impede" a long since final merger, finding that "at some point, the STB's purview over a merger must end." Id. at 569. On appeal, the Fourth Circuit expressed its agreement, stating in a footnote that "[t]he amount of time that has passed since the approved transaction was successfully completed militates against our finding that the STB would have jurisdiction" over a labor dispute that can be traced back to the merger, noting that the STB's "predecessor, the ICC, as well as the Seventh Circuit, has indicated that the STB's jurisdiction over legal disputes related to a merger should not extend indefinitely." CSX Transp., Inc. v. Transp. Commc'ns Int'l Union, 480 F.3d 678, 685 n.5 (4th Cir. 2007) (citing Del. & Hudson Ry. Co.-Lease & Trackage Rts. Exemption–Springfield Terminal Ry. Co., 8 I.C.C. 2d 839, 845,

1992 WL 46807 (1992); Harris v. Union Pac. R.R., 141 F.3d 740, 744 (7th Cir. 1998)).

The Seventh Circuit's opinion in Harris is instructive regarding the breadth of authority appropriately ceded to the STB when post-merger disputes arise in situations where the ICC approved a merger but said nothing, and implied nothing, about it being "necessary" for a certain law, contract, or other "obstacle" to the merger to be set aside as a barrier to the merger. Harris, 141 F.3d at 743–44. The Seventh Circuit explained:

> If the Commission says that it is "necessary" for some law to give way, then we review its decision to determine whether it was arbitrary, capricious, or an abuse of discretion. If the Commission implies (but does not quite say) that some other law had to yield, then perhaps a court should refer the subject to the agency under the doctrine of primary jurisdiction. See Railway Labor Executives' Ass'n v. United States, 987 F.2d 806, 815 (D.C. Cir. 1993). But if the agency says nothing, a post-merger dispute is resolved under generally applicable laws. We added in Burlington Northern that "necessary", like "all", should be taken seriously. Only laws that would block the transaction give way. . . .
>
> 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. See Norfolk & Western Ry. v. Hiles, 516 U.S. 400 (1996). 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?

Harris, 141 F.3d at 743–44 (emphasis added). While Harris and the 2006/2007 CSX case are instructive, those cases consider the necessity requirement in the context of ensuring the absence of an obstacle to "carry[ing] out the transaction," as contrasted with the portion of § 11321(a) addressing the need to "exercise control or franchises acquired through the transaction."

Here, the record clearly reveals that the ICC/STB said nothing about setting aside any state or federal law as an impediment to the 1982 consolidation with respect to Belt Line,[8] and in fact, said nothing about Belt Line in any respect. Notably, as CSX argues, Belt Line is not included on the lengthy list of subsidiary companies in the appendix to the public notice that would be controlled by NSW/NSC if the consolidation was approved. The record further suggests that the 1982 consolidation "applicants" never asked the ICC/STB to authorize "control" over Belt Line,[9] with the proposed consolidation plan stating as follows:

[8] NSR does not argue in its motion that, post-consolidation, it should also be freed from its contractual obligations set forth in the 1897 Belt Line Agreement. This may be because the contract was re-ratified after 1982, or it may be because NSR recognizes that setting aside the contract is not "necessary" to the success of the merger. See City of Palestine v. United States, 559 F.2d 408, 415 (5th Cir. 1977) ("Congress allowed the ICC significant power to effectuate approved transactions, but it did not authorize gratuitous destruction of contractual relations even when it serves the general public interest when the destruction is irrelevant to the success of approved transactions.") (emphasis added). Regardless of the reason, such issue is not before this Court.

[9] Belt Line was listed by the applicants in an appendix to the application as an entity that NW, SR, and an SR subsidiary each held an ownership interest in, with the collection of these interests totaling to 57.14

(1) The proposed transaction involves Interstate Commerce Commission (Commission) authorization under Section 11343 et seq. of the Interstate Commerce Act (49 U.S.C. § 11343 et seq.) for NWS Enterprises, Inc. (NWS), a newly-incorporated non-carrier holding company, to acquire control through stock ownership of Norfolk and Western Railway Company (NW) and its subsidiary carrier companies, and of Southern Railway Company (Southern) and its consolidated system companies (collectively SR).

(2) As a result of the proposed transaction, NWS will also acquire indirect control through stock ownership of all subsidiaries of NW and Southern, including Southern Region Motor Transport, Inc. (SRMT), a motor carrier subsidiary of a wholly owned rail carrier subsidiary of Southern.

(3) By this application NWS is seeking Commission authorization under § 11343 to acquire control of NW and SR.

(4) The proposed transaction involves the acquisition of control through stock ownership of Norfolk and Western Railway Company and its subsidiary companies, and of Southern Railway Company and its consolidated system companies, by NWS Enterprises, Inc., a newly-incorporated non-carrier holding company.

(5) Applicants respectfully submit that the transactions proposed herein are in full accordance . . . with the statutory criteria set forth in the Interstate Commerce Act (49 U.S.C. §§ 11343-11347) . . . [and] Applicants respectfully request that the Commission make the following findings with respect thereto:

In Finance Docket No. 29430 (Sub-No. 1), that the following transactions are within the scope of 49 U.S.C. § 11343; are consistent with the public interest; reflect terms and conditions which are just and

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percent. ECF No. 116-5, at 77. The seventeen-page chart that included Belt Line among over 150 other companies was provided to the ICC in response to a regulatory requirement that the applicants list the "measure of control or ownership exercised by Applicants over other carriers," ECF No. 116-5, at 77. It was not, therefore, a chart listing entities that NSC requested control over as part of the transaction. While such chart was not a "request" for control, it appears to illustrate that majority stock ownership of Belt Line would result from consolidation.

> reasonable . . . and will have no adverse impact upon, but rather will enhance competition among rail carriers in the affected region:
>
> > [●] acquisition by NWS Enterprises, Inc., of control of Norfolk and Western Railway Company and its carrier subsidiaries, and of Southern Railway Company and its consolidated system companies . . . .

ECF No. 116-5, at 4-5, 15, 19, 35-36 (emphases added). The second item listed above appears significant to the Court as it indicates that NWS/NSC provided an express notice that it would acquire "indirect control" over a motor carrier "as a result" of the proposed transaction, and it discussed such "control" and the further permissions that were required. NSR does not highlight any similar reference in the application stating that NWS/NSC was seeking approval of "indirect control" over Belt Line because the combination of stock held by three different NSW/NSC subsidiaries would, post-consolidation, amount to more than a 50 percent ownership interest in Belt Line.[10]

The above facts, as interpreted by the Court, provide support for CSX's position that it is appropriate to draw a distinction between a transaction that led to NSR amassing a slight majority ownership position in Belt Line (a cooperative partnership formed to serve the interests of all owners), and a transaction involving

[10] The detailed STB authorization ruling broadly indicates that the STB considered the anticompetitive effects of the consolidation, Norfolk S. Corp.—Control, 366 I.C.C. at 190-91, 227-29; however, there is no indication, one way or the other, that Belt Line was part of such analysis.

the STB "approving" NSR to control Belt Line such that NSR was immune from antitrust/conspiracy law, thus freeing NSR (at least under such laws) to leverage its ownership of NW and SR in a coordinated effort to harm CSX. The concern about coordination purportedly designed to harm CSX is especially acute in light of the fact that Belt Line is, by design, a separate corporate entity with a mission of operating for the collective good of all owner railways.[11]

The consolidation documents before the Court[12] therefore suggest that the STB did not "announce" that NSC would control Belt Line, and it certainly did not announce that NSC was exempt from federal antitrust laws or state conspiracy laws. However, as to the latter point, the STB and federal courts have repeatedly held that § 11321 is not predicated on the agency "announcing that a particular exemption is necessary"; rather, the immunity

[11] As discussed in the Court's prior Opinion and Order, ECF No. 66, at 3-4, the 1897 Belt Line Agreement was originally executed by eight different railroad companies, ECF No. 1-1. "[E]ach of the Companies . . . desire[d] to secure the construction of a Belt Line Railroad" in Virginia "for the mutual benefit of each in the interchange of business" with all companies agreeing that it was "for the best interest of all" that the Belt Line Railroad "be constructed, maintained and operated under a separate organization in which all are to be equally interested and each to have an equal representation." ECF No. 1-1, at 3 (emphases added). The written agreement further provided that the named companies "will co-operate cordially in encouraging the business of the [newly formed] Railroad Company, for which it is constructed." Id. at 6 (emphasis added). Thus, there may not be the same "necessity" to control Belt Line as compared to a "typical" subsidiary beholden to the majority owner.

[12] The Court has only been provided "Volume 2/2A" from the consolidation application.

exemption is "self-executing." Consol. Coal Sales Co. v. Consol. Rail Corp., 2002 STB Lexis 317, at *9-10 (S.T.B. May 23, 2002) (quoting ICC v. Locomotive Eng'rs, 482 U.S. 270, 298 (1987) (Stevens, J., concurring)); see Soo Line R.R. Co. v. Consol. Rail Corp., No. 2:17cv106, 2018 WL 1566816, at *7 (N.D. Ind. Mar. 29, 2018) ("The statute makes the exemption self-executing whenever necessary to carry out an STB-approved transaction."); CSX Corp.—Control—Chessie Sys., 8 I.C.C. 2d at 723 n.12 (same).

While CSX acknowledges that the STB "approved" a transaction that resulted in NSC amassing a 57 percent ownership interest in Belt Line and obtaining the right to appoint the majority of Belt Line's Board of Directors, CSX argues that such occurrence is not the same as the STB approving "control." In this Court's view, the strongest support for such argument is that NSW/NSC did not request "control" over Belt Line in its application, the STB did not announce that Belt Line would be controlled in the public "notice" of the application, nor did the STB announce that such control was authorized in its approval. While the Court acknowledges that the STB need not "announce" that the self-executing immunity exemption applies to a specific merger transaction, this Court is unaware of any STB decision or other precedent suggesting that STB notices do not even need to identify the companies over which control is being requested and authorized. Cf. 49 U.S.C. § 11344(a) (1982) (indicating that an application

for control requires the Commission to "notify those carriers" involved in the proposed transaction).[13]

Notwithstanding CSX's facially strong position regarding the absence of evidence of STB authorization of "control," CSX's position appears weakest when it argues that 57 percent ownership coupled with the ability to dominate the board of directors does not constitute "control" under STB precedent. While the parties agree that the concept of "control" is fact-based and varies with the circumstances, NSR effectively highlights CSX's inability to point to any ICC/STB decision finding that majority stock ownership coupled with an ability to appoint more than half of a board of directors can be interpreted as anything other than "control" over a subsidiary railway. ECF No. 138, at 9-10. Although addressing a slightly different issue, this Court has located a previous STB ruling that is relevant to the instant dispute. In CSX's favor, the STB's analysis confirms that other facts relevant to "control" still must be analyzed on a case-by-case basis even when a railway owns more than half of the stock of another railway. In NSR's favor, the STB's analysis appears to put significant emphasis on the ability to control the board of another railway. See Brotherhood of Ry. & Airline Clerks v. Burlington N. Inc., 671

[13] The "Historical and Revision" notes to 49 U.S.C. § 11344 indicate that subsection (a) was revised prior to 1982 to eliminate the need to also notify the applicant "since the applicant is on notice by filing the application." Section 11344 has been replaced by 49 U.S.C. § 11324.

F.2d 1085, 1090 (8th Cir. 1982) (recounting the respondents' arguments that "terminal and switching railroads are not subject to control by any one carrier, but are more properly viewed as 'partnerships' in which no one partner has the ability to control the destiny of the corporation" and that "the inherent nature of the companies and of the service they provide makes control by any one carrier impossible," but remanding such issue to the STB based on an incomplete record); Burlington N., Inc.—Control & Merger—St. Louis-San Francisco Ry. Co., 366 I.C.C. 862, 866 & Appx. C, 1983 WL 28006 (1983) (finding, on limited remand, that: (1) Burlington Northern did not control various terminal and switching companies in which it owned less than, or exactly, a 50 percent interest and had an inability to dominate the board of directors; but (2) a "switching railway" and a "bridge railway" in which Burlington Northern held "an ownership interest in excess of 50 percent," and had an ability to dominate the board, among other facts demonstrating integration, were "under the direct control and management" of Burlington Northern); cf. 49 U.S.C. § 10102(3) ("'[C]ontrol', when referring to a relationship between persons, includes actual control, legal control, and the power to exercise control, through or by (A) common directors, officers, stockholders, a voting trust, or a holding or investment company, or (B) any other means."); Union Pac. Corp., Union Pac. R.R. Co. & Mo. Pac. R.R. Co.—Control—Chicago & N. W. Holdings Corp. &

Chicago & N. W. Transp. Co., 9 I.C.C. 2d 939, 947 (I.C.C. Sept. 17, 1993) ("In determining whether one person controls another, the Commission has rejected any arbitrary formula based upon percentage of stock ownership, and instead, [has] looked to a number of additional factors, including distribution of the remaining stock, the ability to elect directors and otherwise control or influence decision-making machinery, and the existence of management, marketing, operating and financial ties.").

In light of all of the above, this Court finds that the STB is the proper authority to clarify the contours of the 1982 consolidation at issue in this case. The Court acknowledges the apparent uniqueness of remanding an issue to the STB four decades after a railway consolidation was finalized. However, the alternative is for this Court to re-evaluate the details of the very same forty-year-old railway merger and determine what was requested, noticed, and approved by the ICC/STB during the administrative consolidation process. While precedent makes clear that the STB should generally not retain jurisdiction many years after a merger is complete with respect to new contracts, new factual developments, or new legal disputes that are tangentially related to a long-finalized merger, CSX Transp., Inc., 480 F.3d at 685 n.5; Harris, 141 F.3d at 744,[14] the dispute in this case is

[14] But see CSX Corp.-Control-Chessie Sys., 8 I.C.C. 2d at 724 n.14 (noting that, in appropriate circumstances, "operational changes" made eight years

distinguishable from the labor dispute cases cited by CSX that are based on changing operations after a merger is completed. Here, there is not a new legal dispute tangential to the merger, but a dispute germane to the consolidation itself, with the genesis of the dispute grounded in the ICC/STB merger procedure and an associated factual dispute regarding the scope of what was actually approved/authorized by the ICC/STB in 1982. See Envt'l Tech. Council, 98 F.3d at 789 (noting that the purpose of the primary jurisdiction doctrine is "taking advantage of agency expertise and referring issues of fact not within the conventional experience of judges or cases which require the exercise of administrative discretion"); Ry. Lab. Execs.' Ass'n v. S. Pac. Transp. Co., 7 F.3d 902, 906 (9th Cir. 1993) (indicating that the ICC "should have exclusive authority to clarify the scope of its own approval and the corresponding breadth of the section 11341(a) exemption"); AT&T Commc'ns, Inc. v. Consol. Rail Corp., 285 F. Supp. 2d 649, 662 (E.D. Pa. 2003) (denying a dismissal motion, but granting a motion to stay a portion of the case and refer an issue to the STB because: (1) "the issue of whether the § 11321(a) exemption applies to an STB-authorized transaction is within the agency's jurisdiction"; and (2) "the STB possesses the expertise necessary to resolve" the dispute because "the STB has studied the

after a "Commission-approved merger" were causally tied to the merger itself).

Transaction; entertained public comment, hearings, and arguments on the Transaction; and memorialized its approval in a lengthy, detailed document"); cf. CSX Corp.-Control-Chessie Sys., 8 I.C.C. 2d at 722–23 ("The appropriate tribunal to determine whether the proposed change in the status quo is directly related to and grows out of, or flows from, a specifically authorized principal transaction is this Commission, or the arbitrator acting pursuant to the Commission's authority."). Referring back to the analysis in Harris, if, as NSR asserts, the STB did approve NSC's "control" over Belt Line in 1982, such approval at least "implie[d] (but d[id] not quite say) that [antitrust/conspiracy] law[s] had to yield," thereby rendering it appropriate for this Court to "refer the subject to the agency under the doctrine of primary jurisdiction." Harris, 141 F.3d at 743.

In addition to the open question regarding authorization of "control," the Court notes the lack of precedent/administrative guidance with respect to the parties' competing positions as to whether it was "necessary" for NSR to be freed from antitrust and conspiracy laws based on the railway consolidation at issue in this case. In CSX's favor, the large-scale consolidation approved in 1982 appeared to have nothing to do with Belt Line such that NSC's need to secure "control" over Belt Line uninhibited by antitrust/conspiracy laws was not necessary to achieve the efficiencies of consolidation. See CSX Transp., Inc., 413 F. Supp.

2d at 562-63 ("The purpose of [§ 11321(a)], and the exemption from antitrust and other laws that it provides, is to ensure that efforts to merge and consolidate are not obstructed, and that merger efficiencies can be achieved.") (emphases added); CSX Corp.—Control—Chessie Sys., 8 I.C.C. 2d at 721 ("[T]he 'necessity' predicate is satisfied by a finding that some 'law' . . . is an impediment to the approved transaction."). Moreover, it appears from the current record that Belt Line may have successfully operated as a collective/partnership for years after the consolidation, further suggesting that it was not "necessary" to allow NSR to dominate Belt Line in the same way that a parent company often controls a "typical" subsidiary. However, on the other side of the equation, if, post-consolidation, the STB classifies Belt Line as a "franchise" acquired through the transaction, and if NSC "acquiring" Belt Line was in fact "approved" by the STB in 1982, then it is arguably "necessary" under the scheme implemented by Congress and the STB to permit NSC/NSR to exercise its majority control over its newly acquired subsidiary free from the confines of antitrust or state conspiracy law. See 49 U.S.C. § 11321(a).[15] In light of such conflicting

[15] The scope of the statutory phrase "control or franchises" is a matter that would benefit greatly from a consistent application as would occur through consideration by the STB in the first instance, as contrasted with a district-by-district evaluation by judges less familiar with the controlling regulatory scheme. See Advamtel, LLC v. Sprint Commc'ns Co., L.P., 125 F. Supp. 2d 800, 804 (E.D. Va. 2001) (indicating that, "[a]s an aid" to determine whether the doctrine of primary jurisdiction applies, the

defensible positions regarding a matter squarely within the STB's expertise, referral to the STB is not only appropriate but arguably necessary.

Summarizing the above, NSR's motion to dismiss the antitrust and state conspiracy claims with prejudice is **DENIED**, but in light of the STB's primary jurisdiction, NSR's motion for a stay pending transfer of a single question to the STB regarding the applicability of § 11321(a) immunity is **GRANTED**.[16]

IV. Rule 12(c) Dismissal or STB Referral - Remedies

Belt Line's original Rule 12(b) motion sought dismissal, in part, based on this Court's purported lack of jurisdiction to award certain damages, ECF No. 28, at 11, and NSR's current motion seeks dismissal and/or referral to the STB of certain matters relevant to damages based largely on the same theory, ECF No. 116, at 15-22. Considering the timing of such motion, and considering the

court should consider, among other things, whether the issue "involves technical or policy considerations within the agency's particular field of expertise" and whether "there exists a substantial danger of inconsistent rulings," so as to "promote[] a uniform development of law and policy in the areas where Congress has delegated to an administrative agency the authority to develop and establish national rules").

[16] A stay is appropriate notwithstanding the late stage of this case because the STB's decision impacts the validity of a majority of the claims for relief in this case. Additionally, as argued by NSR, it appears that CSX could have pursued a legal challenge to the reasonableness of the Belt Line switching rate in a proceeding before the STB for almost ten years before it filed suit, as the currently-in-place switching rate was established in 2009 and disputed by CSX as early as 2010. As discovery is complete and summary judgment briefing was just completed, the Court will be in a position to address dispositive issues and expeditiously schedule a trial after the STB resolves the lone issue referred to it by this Court.

fact that such a determination is relevant to, but not controlling of, certain damages and/or the injunctive relief sought in this case, NSR's request is **DENIED** at this time. First, the Court agrees with CSX that the motion seeking dismissal/referral could have been brought at the time NSR filed its initial Rule 12(b)(6) motion, but as explained above, such motion is not fatally untimely. Second, NSR's request for dismissal/referral appears somewhat duplicative of arguments in Belt Line's earlier dismissal motion that have already been rejected by this Court. See ECF No. 66, at 21-25. Third, contrary to NSR's assertions, CSX's claims for relief do not appear to "begin and end" with a determination of whether the "switching rate" charged by Belt Line is "reasonable." Finally, a separate rate-setting proceeding before the STB has already been initiated, and the STB proceeding is currently stayed pending this Court's resolution of the antitrust and conspiracy claims at issue in this case, with the STB fully aware of the current litigation. NSR's motion fails to demonstrate the need for this Court to force the determination of a "reasonable rate" back to the STB at this time. Notably, the STB setting a new reasonable switching rate to be in place going forward will not resolve the contract, conspiracy, and antitrust claims pending in this case, id. at 24, which center on whether anticompetitive and collusive conduct in the past led to an artificially inflated switching rate designed to block NSR's competitors from accessing

Norfolk International Terminal by rail. Similarly, NSR fails at this time to demonstrate that an STB re-evaluation of the reasonableness of the current switching rate would dictate what remedies are appropriate in this case and/or resolve whether antitrust or conspiratorial actions designed to harm CSX proximately caused the establishment of such switching rate.[17]

This Court, of course, has every intention of ensuring that the monetary or injunctive remedies secured in this case (if any) are within this Court's authority to award, and nothing in this Court's ruling precludes the Court from seeking further input from the STB at a later time should it be deemed necessary to determine damages. The Court's decision not to refer the determination of a "reasonable" switching rate to the STB at this time is not tantamount to a finding that this Court has the authority to decide such a rate or to award CSX trackage rights. Such decision is also not an indication of how this Court will rule on NSR's recently-filed, and still unripe, motion in limine seeking to exclude evidence and argument suggesting that Belt Line's switching rate is "unreasonable" or "excessive." ECF No. 329. Rather, CSX alleges in this lawsuit that NSR and/or Belt Line committed federal and state law violations, and well as contractual breaches, by conspiring to manipulate a privately determined

[17] The current switching rate was established in 2009 without input from the STB, and CSX asserts that the establishment of such rate, and the maintenance of such rate over time, was the product of unlawful collusion.

switching rate for the purpose of harming CSX, and the Court finds, consistent with its earlier ruling, that determining liability, as well as at least some remedies associated with the alleged liability, falls within this Court's authority.

V. Conclusion

For the reasons outlined above: (1) NSR's motion to dismiss on jurisdictional grounds is **DENIED;** (2) NSR's motion to dismiss the antitrust and state conspiracy claims with prejudice is **DENIED**; (3) NSR's motion to refer to the STB a determination of a reasonable "switching rate" is **DENIED** at this time; and (4) in light of the STB's primary jurisdiction, NSR's motion for a stay pending transfer of the immunity dispute to the STB is **GRANTED**. The following discrete question is **REFERRED** to the STB:

> Did the 1982 consolidation, whereby NSC acquired an indirect 57 percent interest in Belt Line, involve the ICC/STB granting NSC "approval" to control Belt Line, and if so, did such authorized "control" render it necessary for antitrust and/or state conspiracy laws to yield, whether because Belt Line was then deemed a "franchise" of NSC, or for any other reason?

After the STB rules, this Court will expeditiously resolve all remaining summary judgment issues, to include the breach of contract claim that is outside the referral to the STB. In the interim, the instant case will be **STAYED**.[18] The trial date is

[18] The stay does not preclude counsel from coordinating with each other, and the Magistrate Judge assigned to this case (to the extent the Magistrate Judge determines it to be appropriate) to seek a resolution of any pending sealing motions.

hereby released, and counsel are instructed to contact the undersigned judge's calendar clerk to schedule a new trial date as soon as the STB issues its ruling.

The Clerk is **DIRECTED** to forward a copy of this Opinion and Order to all counsel of record and to the U.S. Surface Transportation Board.

IT IS SO ORDERED.

/s/
Mark S. Davis
CHIEF UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
May 18, 2021

Before the
SURFACE TRANSPORTATION BOARD

Finance Docket No. 36522

NORFOLK SOUTHERN RAILWAY COMPANY
—PETITION FOR DECLARATORY ORDER

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

CSX TRANSPORTATION, INC.,
individually and on behalf of NORFOLK
& PORTSMOUTH BELT LINE
RAILROAD COMPANY,

Plaintiff,

v. Civil Action No. 2:18cv530

NORFOLK SOUTHERN RAILWAY
COMPANY, NORFOLK & PORTSMOUTH
BELT LINE RAILROAD COMPANY,
JERRY HALL, THOMAS HURLBUT,
PHILIP MERILLI, and CANNON MOSS,

Defendants.
_____/

COMPLAINT

Plaintiff CSX Transportation, Inc. ("CSXT"), individually and on behalf of Norfolk & Portsmouth Belt Line Railroad Company ("NPBL"), by counsel, files this Complaint against Defendants Norfolk Southern Railway Company ("NS"), NPBL, Jerry Hall, Thomas Hurlbut, Philip Merilli, and Cannon Moss as follows:

NATURE OF THE ACTION

1. The NPBL is a terminal switching railroad operating in the cities of Norfolk, Portsmouth, and Chesapeake, Virginia. It was formed in 1896 by a collection of railroads, who entered into an agreement "for the mutual benefit of each

in the interchange of business" to build and operate a belt line railway connecting various tracks of the eight railroads in Hampton Roads that would enable the interchange of cars among the railroads and connection to the port, among other facilities. In building and operating the NPBL, the founders sought to ensure that all railroads would have ready access to industries and ports which would ensure competition for transportation services. Toward that end, rail service to the Norfolk International Terminals ("NIT") was opened in 1917.

2. As a result of mergers and acquisitions among the original eight railroads, by the end of the twentieth century the number of NPBL members had decreased to three. In the late 1980's, the then-remaining three shareholders of NPBL—CSXT, Norfolk and Western Railway Company, and Southern Railway Company—agreed to reapportion the amount of amount of board seats associated with each shareholder. Critically, this reapportionment did not result in any single shareholder possessing majority control of the board, and indeed no single shareholder at that time owned a majority of the shares. After this reappointment, however, Norfolk and Western Railway Company and Southern Railway Company merged, with the result being that the new company, NS, owning 57% of the shares of NPBL, as compared to CSXT's 43%. For at least the past ten years, NS has inserted former NS employees in all management positions of the NPBL and current or former NS employees in four of the six NPBL Board of Directors voting positions

and one non-voting director. NS and these directors and the NPBL management they put in place have conspired to operate the NPBL in order to benefit NS at the expense of the profitability and viability of the NPBL, and to harm NS's competitor CSXT.

3. NS and the NPBL's conspiracy to operate the NPBL to pursue illegitimate ends is nowhere more vividly demonstrated than at the NIT, the largest international shipping terminal in Virginia. Only two entities have the ability to access NIT by rail: NPBL and NS. Currently, NPBL must utilize NS tracks in order to reach NIT. NS and the NPBL have used the NPBL as a chess piece to establish and maintain NS's monopolistic control over intermodal transportation[1] in and out of NIT by making it practically impossible for any other rail carriers to provide intermodal rail service to NIT. This has kept out competitors, but it has come at the expense of NPBL's own interests. NS and NPBL have acted in concert to have NPBL demand a rate designed to exclude competition in the relevant market, dispose of NPBL's key rail assets, and take other actions contrary to NPBL's business interests. Though NIT has been rapidly expanding and increasing its revenues in recent years due to increased shipping, NPBL's revenues have tellingly remained flat or decreased.

[1] Intermodal is the use of two modes of freight, such as ship and rail, to transport goods from shipper to consignee.

4. The Virginia Port Authority ("VPA") has indicated that the growing port would benefit from multiple rail carriers being able to access NIT because it would allow more volume to be moved at competitive prices. And yet, at this point, competitors such as CSXT are practically precluded from using the NPBL to connect to NIT because the rate set by NPBL's board, in concert with NS, is prohibitively expensive and because NS refuses to allow NPBL to handle intermodal trains over its tracks on a regular basis. The only modern example in which CSXT actually utilized NPBL to connect to NIT occurred in 2015 when, due to closures of other ports around the country, the NIT was inundated with excess containers and because of demands from its customers, CSXT was forced to pay the high rate charged by the NBPL. This was the briefest of windows in which CSXT could feasibly pay these rates because the other port closures caused all costs associated with ocean shipping to temporarily skyrocket. Under normal business conditions, the NPBL's rate and its operating procedures effectively preclude competitor access to NIT.

5. CSXT wants to compete on fair terms at NIT, but has been unable to do so. This condition exists despite the fact that the NPBL was created for the very purpose of fostering cooperative access for railroad carriers. CSXT's recent proposal to NPBL to set a competitive rate and improve its services—including by volunteering the use of CSXT's own engines and fuel to perform NPBL's services—was summarily quashed by NPBL's board and management despite the projections

that CSXT's proposal would have substantially increased NPBL's business and revenues.

6. NS's actions have resulted in the loss of existing and prospective intermodal business for CSXT. It has also harmed the market by foreclosing competition for intermodal transportation servicing NIT. And it has reduced revenue and income to the NPBL, which earns revenue and income by charging fees for interchange of trains and the use of its track.

PARTIES

7. CSXT is a Class I railroad operating in the Eastern United States and Canada. CSXT is headquartered in Jacksonville, Florida and is incorporated under Virginia law. It brings this suit on its own behalf and also in a derivative capacity as a shareholder of NPBL.

8. NS is also a Class I railroad operating in the Eastern United States and Canada. NS is headquartered in Norfolk, Virginia and is incorporated under Virginia law.

9. The NPBL is a Class III terminal switching railroad. It is headquartered in Chesapeake, Virginia, and is incorporated under Virginia law.

10. Individual Defendants Jerry Hall, Thomas Hurlbut, Philip Merilli, and Cannon Moss are voting members of the NPBL Board of Directors, who, *inter alia*, participated in the rejection of CSXT's most recent service proposal. Hall, Hurlbut,

and Merilli are also employees of NS. Moss is a former employee of NS and has been the President and General Manager of NPBL since 2011. The Individual Defendants are named as party defendants in Count VI only, but the conduct of the Individual Defendants is relevant to the other counts of the Complaint.

JURISDICTION AND VENUE

11. This Court has subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1331 because CSXT's claims against Defendants arise under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, and therefore raise federal questions.

12. The Court has supplemental jurisdiction over all state law claims under 28 U.S.C. § 1367(a).

13. This Court has personal jurisdiction over the Defendants because they are residents of Virginia, regularly conduct business in Virginia, and/or caused injury by acts in Virginia.

14. Pursuant to 28 U.S.C. § 1391(b), venue is proper in this Court because a substantial part of the events giving rise to this dispute occurred within this District.

FACTUAL ALLEGATIONS

The Purpose and Structure of the NPBL

15. In 1896, eight railroads, including CSXT and NS's predecessors in interest, joined together to form the NPBL in order to provide an efficient means of interchanging the traffic of its owners between their lines and various marine

terminals and industries located along the NPBL's tracks. In 1897, they signed the NPBL Operating Agreement, attached hereto as Exhibit A. The joint agreement between the railroads was designed to ensure that all railroads would have ready access to NIT, which would ensure competition for transportation services.

16. The NPBL Operating Agreement, as amended, governs the ownership and operation of the NPBL, and it creates and establishes various duties and obligations between and among the shareholders.

17. In order to advance the purpose for which the NPBL was formed, the original shareholder companies, the predecessors of the current shareholders and parties to the NPBL Operating Agreement, expressly agreed therein that the NPBL would be a "separate organization in which all [railroads] are to be equally interested and each to have an equal representation." Ex. A at 1. The shareholders agreed that it is in the best interest of all that each shareholder company have "equal representation" in the organization; and accordingly the Operating Agreement provides that each shareholder "shall have one representative on the Board" of the NPBL. *Id.* at 1–2.

18. The Operating Agreement further provides that each shareholder must "co-operate cordially in encouraging the business of the [NPBL] for which it is constructed." *Id.* at 4. Under the Operating Agreement, the NPBL anticipates that its shareholders will deliver to the NPBL all cars to be delivered to customers that

they cannot serve directly. *Id.* CSX thus has an expectation that the NPBL will provide it with an efficient means of interchanging its traffic including, without limitation, to and from the NIT. *Id.* at 6 (referencing "the intent" that the NPBL "shall perform the service for which it was built and said Company be directly responsible for the competent and efficient discharge of its every obligation to the parties hereto").

19. Further, under the NPBL Operating Agreement, the members of the NPBL Board of Directors are obligated to vote for "such resolutions, by-laws or other proceedings as may be necessary to carry into effect the agreements made in" the NPBL Operating Agreement. *Id.* at 6.

20. The NPBL currently operates over 26 miles of track in and around the Hampton Roads area of Virginia. A map of the NPBL and the tracks owned by other railroads in the area is attached hereto as Exhibit B. Crucially, the NPBL provides a means of access to the largest port in Virginia and one of the largest ports on the Eastern Seaboard, NIT. For any rail carrier other than NS, the only way to access NIT by rail is via NBPL. Being accessible by deep-draft ships and operating some of the world's largest cranes, NIT is uniquely positioned to handle some of the largest ships in the world. Yet NS, together with NPBL, through NPBL directors and managers, has essentially blocked access to this large and growing port facility for anyone but itself.

The Supplemental Agreement

21. As a result of mergers and acquisitions among the original eight railroads, by the end of the twentieth century the number of NPBL members had decreased to three. By 1989, the number of shareholder railroads owning the NPBL had declined to three—CSXT, Norfolk and Western Railway Company ("NW") and Southern Railway Company ("SR").

22. In a Supplemental Agreement dated March 1, 1989, attached hereto as Exhibit C, the three railroads agreed that CSXT was afforded the right to appoint two representatives to the NPBL Board of Directors, and the other two companies, NW and SR, collectively between them were afforded the right to appoint three representatives to the NPBL Board. Ex. C ¶ 1. The Supplemental Agreement further provided that other than the single sentence of the Operating Agreement specifically referenced, "[n]othing herein shall be deemed to amend, alter, or affect any other provision of the NPBL Agreement." *Id.* ¶ 2.

23. The following year, NW and SR merged to form the single company now known as Norfolk Southern Railway Company. The merger of those two companies left NS and CSXT as the only remaining shareholders of the NPBL. As a result, NS owns 57% of NPBL, and CSXT owns 43%. Per the NPBL By-Laws, which have been effect in their current form since 1996, attached hereto as Exhibit

D, NS has appointed four voting members to the NPBL Board of Directors and CSXT has appointed two.

24. NPBL, a distinct corporation under Virginia law, remains an independent entity from its two remaining shareholders, NS and CSXT. It operates according to its own bylaws and with its own management and Board of Directors. The railroads and NPBL lack economic integration, and the interests of NPBL can diverge from its railroad shareholders where higher prices mean higher revenue for NS but more cost for NPBL. The conspiracy described below between NPBL and NS thus joined together separate decision-makers pursuing separate economic interests, depriving the marketplace of independent centers of decision-making.

NPBL's Deteriorating Financial Condition

25. Rather than abide by the original purposes of the Operating Agreement, including the requirement to cordially cooperate in encouraging the business of NPBL, NS and the management of the NPBL conspired to operate the NPBL to harm CSXT and the market, even at the expense of the NPBL's own business interests.

26. The NPBL Board of Directors currently consists of six voting members and one non-voting member. Three of those voting positions are filled with current NS employees designated by NS to serve as NPBL Directors: Defendants Hall, Hurlbut, and Merilli.

27. Another voting position is held by the NPBL President, Cannon Moss, a former NS employee who in 2011 was nominated at NS's direction and elected by vote of NS's shares, and over CSXT's objection. Defendant Moss's predecessor, David Stinson, was also a former NS employee and returned to work at NS after his tenure as NPBL President. Donna Coleman, the current non-voting member of the Board of Directors and Vice President of NPBL, is also a former employee of NS. In addition, Bill O'Brien, the current Terminal Superintendent of NPBL, is also a former employee of NS.

28. NS also has other connections with the management of the NPBL. The management of NPBL all have NS email addresses, which they use to conduct the business of the NPBL.

29. For at least 12 years, every President and VP of NPBL was a former NS employee.

30. All of the individual Defendants have independent personal stakes in furthering NS's interests as Directors of NPBL, such as the expectation of future employment with NS and the expectation of future remuneration from NS.

31. Collectively, Defendant Moss, in his capacity as a Director, along with Defendants Hall, Hurlbut, and Merilli constitute the four "Individual Defendants."

32. NS in conspiracy with the NPBL, and through the Individual Defendants, have operated the NPBL as a vehicle for advancing NS's interests at the

expense of their contractual duties to CSXT. The Individual Defendants, in advancing NS's interests regardless of the impact on NPBL, have further violated their fiduciary duties to NPBL. Management of NPBL conspired with NS to harm CSXT and grow NS's market power.

33. The NPBL's operating revenue is derived principally from switch operations, and is largely dependent upon the switch services being provided to the shareholders' companies, who in turn pay for those services.

34. Defendants have caused the NPBL to establish and maintain unreasonably high rates for its switch services for intermodal freight. The current line haul switch rate is dramatically higher than rates for comparable services charged by other short line railroads. This rate was adopted by the Individual Defendants and/or their predecessors in 2009, over the objection of the other NPBL board members.

35. The rates charged by the NPBL and other anticompetitive restrictions on CSXT's use of the NPBL have effectively foreclosed CSXT from moving containers to or from NIT on the NPBL. Meanwhile, NS is able to access NIT directly via its own rail connections.

36. The Defendants' actions as to NPBL are adversely affecting commerce in Hampton Roads and Virginia. The VPA has expressly requested that NPBL "facilitate dual [rail] access [by CSXT and NS] for handling containers at NIT,"

because NPBL's current failure to provide "proper access to NIT by CSX puts Virginia at a competitive disadvantage." Indeed, the Defendants' activity is raising prices charged to shippers and, ultimately consumers, because NS has shut out the only other company who could compete to provide intermodal services.

37. In part as a result of its excessive line haul switch rate, the NPBL's overall financial performance has been declining over the past several years and continues to deteriorate. NPBL's revenue has essentially been flat or down over the past several years, including in 2017. And, the bottom line revenue of NPBL is deceptive, however, because much of NPBL's revenue in recent years has been generated from the sale of real estate. Rail car volume has been essentially flat for years, and decreased in 2017. Current car volume on the NPBL as a whole is heavily dependent on a single customer (not at NIT) engaged in a single line of business. No new sources of substantial and recurring business have been added in recent years, nor do any appear to be planned. No excess cash flow is being generated that could be used for capital expenditures for maintenance, upgrades, or expansion.

The Individual Defendants' Repeated Failures to Act in the Best Interest of the NPBL and to Abide by the NPBL Operating Agreement

38. In advance of the April 18, 2018 NPBL Board and stockholders meetings, CSXT presented a Service Proposal that would have significantly and rapidly increased the NPBL's revenue and operating income by nearly doubling the

volume of cars that the NPBL moves annually. A copy of the Service Proposal is attached hereto as Exhibit E.

39. The Service Proposal, which included a proposed substantially lowered switch rate per car, as well as a guarantee of a minimum annual volume of CSXT moving 18,000 cars to or from NIT, would have generated annually approximately $1,440,000 in incremental revenue and potentially $660,000 in incremental operating income for the NPBL. The Service Proposal would have provided the NPBL with a consistent, long-term and substantial stream of much-needed additional income, and should have generated new revenue opportunities for the NPBL.

40. Rather than engage in any discussions to advance that proposal and secure those financial benefits, the Individual Defendants and NPBL Management erected baseless and pretextual barriers to the NPBL without even considering or responding substantively to, much less adopting, the Service Proposal. The Individual Defendants refused to even form an independent committee to evaluate it or allow a formal vote, and thus effectively rejected it. Notably, at the April 18, 2018 Board and shareholder meetings, the Individual Defendants parroted the same pretextual reasons for denying the request as offered by NS in its responses to CSXT's Service Proposal.

41. Additionally, in response to CSXT's proposal, Defendant Moss revealed that they were considering entering into a new agreement, ostensibly between the NPBL and NS, that effectively would impose a substantial increase in charges paid to NS for NPBL's usage of its rights of access to NS's track, which would, in turn, reduce the profitability of intermodal service for NPBL while ultimately raising the rates charged to NPBL customers. Regardless of what the appropriate charge should be, the timing of this interest by NBPL in finalizing a new deal between NS and NPBL is highly suspicious and consistent with Defendants' other ploys using the NPBL to keep CSXT from servicing the NIT.

42. By rejecting the Service Proposal, Defendants' actions have prevented NPBL from providing switch services necessary for CSXT to move intermodal containers by rail to and from NIT, thereby depriving CSXT of an efficient means of serving NIT, which in turn has impaired CSXT's business interests and prevented it from using the NPBL's services to and from NIT, causing the attendant loss in revenue and income to NPBL.

43. NPBL's lost income from not providing the proposed service to CSXT in turn impairs NPBL's ability to finance and make capital investments in its infrastructure necessary to preserve and grow the railroad's business and serve its shareholders in the manner required by the Operating Agreement, and effectively

blocks the NPBL from providing a second ("dual") means of access by rail to NIT (in addition to service by NS itself), as expressly requested by the VPA.

44. Defendants' imposition of unreasonable and anticompetitive rates harms everyone (including NPBL, CSXT, freight shippers, and other competitors) except NS. Notably, NS itself has been able to avoid having to pay the unreasonable and anti-competitive NPBL rates set by the Individual Defendants for intermodal rail service because NS owns and operates over the sole rail line that connects to NIT, the same line that NPBL operates over to access NIT.

45. This is not the first time that the Individual Defendants have, in conspiracy with NS and the NPBL, misused NPBL as a tool to serve NS's own interests.

46. As one example, in response to a CSXT service proposal in 2010, NPBL refused to accept CSXT's offer to provide CSXT locomotives and free fuel to move cars for NPBL over the NPBL routes under any terms or circumstances (including without charge to NPBL for use of the locomotives or fuel), while permitting locomotives owned by NS to do so and causing NPBL to lease or contract with NS for use of NS's locomotives without competitive bidding.

47. In 2008, NPBL took the necessary actions to commence the sale of productive NPBL property in Norfolk and an attempted sale in Portsmouth, and the termination of NPBL's access rights over NS tracks used for the proper delivery of

services that NPBL is obligated to provide to its shareholders (including the consent to NS's removal of a "diamond" key to NPBL providing adequate, reasonable, efficient and predictable access to NIT). The sale of property in Norfolk had the potential to further constrain NPBL's connection to NIT. The sale of property in Portsmouth, had it been successful, would have effectively limited CSXT's access to its own intermodal yard in Portsmouth. The removal of the "diamond" has resulted in having to move NPBL trains into NS's Portlock yard, where further movement of those NPBL trains is controlled and constrained by NS and NS's own trains, and then reversing the NPBL trains out of that yard to move to or from NIT.

48. Through those same acts and practices, and others, the Individual Defendants and/or their predecessors have violated their fiduciary obligations to act in the best interests of the NPBL and, by conspiring with them to do so, NS has violated its contractual obligations to CSXT, including but not limited to its obligation to "encourage[e] the business of the [NPBL]."

Relevant Markets

49. The relevant geographic market is the intermodal port facilities of Hampton Roads, Virginia. The Hampton Roads metropolitan area has three ports through which freight travels, Portsmouth Marine Terminal ("PMT"), Virginia International Gateway ("VIG"), and NIT. But, with very limited exceptions, PMT has not handled intermodal freight since 2011 and is not expected to going forward.

Ports outside of the Hampton Roads metropolitan area face significant barriers to competing with the Hampton Roads' ports. In particular, the distance between the port complexes on the East Coast effectively prevent such port complex from acting as viable potential competitors. For example, the closest port complex to the south of Hampton Roads is Charleston, South Carolina, more than 430 miles away. And the closest port complex to the north of Hampton Roads is Baltimore, Maryland, more than 230 miles away. Shippers choose which port complex to use based on geographic considerations—where the freight is coming from and headed.

50. Freight transportation by rail in and out of the Hampton Roads' ports constitutes a distinct service market under the antitrust laws. Rail transportation is the only method that can achieve the level of throughput required for major shippers of freight. Indeed, major customers refuse to contract with carriers who cannot provide rail transportation in and out of the Hampton Roads' ports. Moreover, the market for freight transportation by rail in and out of the Hampton Roads ports is characterized by high barriers to entry. Development of rail connections requires significant capital investment and engineering. As such, there is no significant cross-elasticity of demand or reasonably interchangeable alternatives for freight transportation by rail in and out of the Hampton Roads' ports.

Defendants' Anti-Competitive Actions to Achieve Dominance of Freight Transportation by Rail In and Out of the Hampton Roads' Ports

51. NS and the NPBL have used the NPBL as a chess piece to establish and maintain monopolistic control over intermodal transportation in and out of the Hampton Roads' ports.

52. NS has monopoly power or a dangerous probability of achieving monopoly power in the relevant market described above. NS is one of the nation's largest railroads, operating in 22 states. In the relevant market, NS's market share exceeds 70%. For the NIT, NS's market share is approximately 90%. NS has the ability to control prices for intermodal transportation and exclude competition. It benefits from a significant barrier to entry into the market for intermodal transportation in and out of Hampton Roads ports, namely the lack of accessible rail routes for competitors that are not owned by NS to the NIT.

53. NS did not secure or maintain its monopoly power in Hampton Roads by virtue of its ingenuity or other salutary competitive behavior. Rather, it has continually and deliberately engaged in a pattern of anticompetitive conduct that has eliminated or prevented competition.

54. Among other anticompetitive acts, NS, in conspiracy with the Individual Defendants and NPBL, has caused the NPBL to reject, without any reasonable, meaningful and lawful consideration or negotiation, CSXT's Service Proposal, thereby effectively denying CSXT access to NIT by rail in competition with NS.

55. When CSXT was forced to pay the NPBL's rates in 2015, due to closures of other ports around the country, NS directly, and through the NPBL, prioritized NS's shipping needs over those of CSXT. NS failed to allow, in a reasonable and timely manner, the movement of cars delivered to NPBL by CSXT, sacrificing NPBL's own profits from the business CSXT would otherwise deliver.

56. NS conspiring with NPBL, by and through the Individual Defendants, have discriminated against CSXT by refusing to allow NPBL to use CSXT's fully fueled locomotives to access NIT, requiring only NS-owned or supplied locomotives to be used by or on NPBL.

57. NS conspiring with NPBL, by and through the Individual Defendants, have set (and maintained) NPBL's switch rates at levels designed to exclude competition in the relevant market, thereby dramatically raising CSXT's costs to serve intermodal rail customers, and diminishing the amounts of freight moved, and related revenues earned by NPBL.

58. NS conspiring with NPBL, by and through the Individual Defendants, and/or their predecessors, mandated NPBL consent to the termination of its access rights to the track between NS Juncture and Carolina Juncture, *i.e.*, the "diamond" and connecting track (with NS then removing that track), and mandated NPBL cease and desist from requesting the reinstatement of the diamond, connecting track and related operating rights, all of which has severely impaired, and continues to severely

impair, NPBL's ability to efficiently and predictably provide CSXT with rail access to NIT.

59. In response to CSXT's Service Proposal, NS and NPBL, by and through the Individual Defendants, threatened to enter into an agreement that would increase dramatically the charges that NPBL would pay for access to NS's track. This would have further raised the rate charged to NPBL's customers. This threat to increase rates was an attempt to pressure CSXT into abandoning its Service Proposal.

60. NS and NPBL, by and through the Individual Defendants, have taken these and other actions with the intent and effect of denying CSXT and other competitors the ability to compete with NS to provide freight rail transportation in and out of the shipping ports in the Norfolk area.

61. These acts are contrary to the independent profit-maximizing self-interest of NS and the NPBL, as they increased costs and reduced revenue for NPBL, of which NS is a majority owner.

62. Rather than try to compete on the merits, Defendants, through this willful exclusionary conduct, have acted to acquire and wield power over price and to exclude competition, and thus to monopolize (and attempt to monopolize) intermodal transportation in and out of Hampton Roads' ports.

63. Defendants' actions were within the flow of, and substantially affected, interstate and international commerce. Defendants also used instrumentalities of

interstate or foreign commerce (or both). And their activities have had a direct, substantial, and reasonably foreseeable effect on interstate and international commerce.

Harm to CSXT and Competition

64. The result of Defendants' actions has been a loss in existing and prospective business for CSXT and, in turn, for the NPBL. Defendants, conspiring together, have pushed CSXT out of the market for intermodal transportation though NIT.

65. In addition, Defendants' actions have harmed competition for intermodal transportation in and out of Hampton Roads' ports, with customers paying substantially higher prices for that transportation via rail service provided by NS, than they would absent Defendants' anticompetitive conduct.

66. Defendants' actions have also resulted in reduced choice among shippers for intermodal options from Hampton Roads' ports.

The Individual Defendants' Refusal to Remedy Defects in the NPBL's Current Corporate Governance Structure

67. CSXT also proposed, both before and at the April 2018 NPBL Board and shareholders' meetings, several remedial actions to address defects in NPBL's current corporate governance structure. A copy of the proposal is attached hereto as Exhibit F.

68. Those remedial actions would have 1) allowed for equal representation of NPBL shareholders on NPBL's Board; 2) added independent directors to a Board that currently has none; 3) mitigated NS's improper influence over the NPBL Board and management, which NS has used to its sole advantage and to cause NPBL and the Individual Defendants, together with NS, to violate fiduciary, contractual and statutory duties; and 4) ultimately allowed the NPBL to operate as a "separate organization," as required by the NPBL Operating Agreement.

69. Among other things, CSXT proposed that each shareholder designate only one individual for election as a director; that the shareholders elect four independent directors to the NPBL Board; and that the Board and shareholders implement a plan for an orderly transition to independent management.

70. At the April 2018 meetings, CSXT's shareholder representative asked the NPBL Board to adopt CSXT's proposals, and made a motion that the shareholders proceed to elect only one director designated by each shareholder and elect four independent directors.

71. Prior to the meetings, CSXT also identified and proposed to NS eight candidates for election as independent directors to fill the remaining four positions on the NPBL Board.

72. The Individual Defendants rejected CSXT's governance proposal in its entirety, voted against CSXT's motion, refused to nominate (much less elect) any

independent directors, and instead insisted upon, and NS voted to approve, a slate that included four (interested) directors designated by NS (three current NS employees, Defendant Cannon Moss, and Donna Coleman (as a non-voting director)) and only two directors designated by CSXT.

73. The Individual Defendants have not offered any legitimate and valid reasons for their refusal to take any steps to remedy the NPBL's corporate governance failures, despite the fact that their position is contrary to the NPBL Operating Agreement and Virginia law barring interested director transactions, Va. Code § 13.1-691, and means that NPBL can no longer effectively operate as a corporation where NS and CSXT are at loggerheads and recent proposals to benefit NPBL are rejected out of hand.

74. Instead, the Individual Defendants have merely parroted NS's self-serving and invalid argument that the changes CSXT proposed are "unnecessary."

75. NS has conspired with NPBL, through the NPBL Board, management, and operation of the railroad, to exclude CSXT from the market.

76. The Individual Defendants, in combination with NS, have acted in violation of the law and in breach of their fiduciary, contractual, and statutory duties to NPBL.

COUNT I
(Violation of Sherman Act § 1, 15 U.S.C. § 1: Conspiracy to Restrain Trade Against Defendants NS and NPBL)

77. CSXT incorporates and realleges the allegations of paragraphs 1 through 76 of this Complaint as if fully set forth herein.

78. Defendants NS and NPBL agreed to and did participate in anticompetitive conduct that unreasonably restrained trade and commerce. Thus, Defendants engaged in combination and conspiracy and violated Section 1 of the Sherman Act, 15 U.S.C. § 1.

79. NS conspired with NPBL and the Individual Defendants to take actions and implement policies that effectively foreclosed CSXT from utilizing the NPBL to compete in the provision of multi-modal services at NIT.

80. This conspiracy has served to enhance and further solidify NS's monopoly power in the relevant market, which has had the effect of severely restricting supply and increasing the prices charged to customers for intermodal transportation.

81. Defendants' anticompetitive conduct is a *per se* violation of Section 1 of the Sherman Act.

82. Alternatively, even if Defendants' anticompetitive conduct is judged under the antitrust Rule of Reason, there is no legitimate business justification for Defendants' actions and the conduct through which they adopted and implemented their combination and conspiracy. Moreover, the anticompetitive effects of Defendants' conduct far outweigh any conceivable procompetitive benefits or

justifications. Even if such a justification existed, any possible procompetitive benefits could have been obtained by less restrictive alternatives.

83. As a direct and proximate result of Defendants' combination and conspiracy, Defendants have unreasonably restrained trade and commerce. They have excluded actual and potential competition from the relevant market, and profited from their anticompetitive conduct by establishing and maintaining artificially high prices for intermodal transportation services provided to customers, and by otherwise reaping financial benefits from their combination and conspiracy.

84. As a direct and proximate result of Defendants' combination and conspiracy, CSXT and consumers have been injured. The injury consists of paying artificially inflated prices for intermodal transportation—prices higher than consumers and CSXT would have paid absent Defendants' combination and conspiracy. Their injuries are what the antitrust laws were designed to prevent and flow directly from Defendants' conduct.

COUNT II
(Violation of Sherman Act § 2, 15 U.S.C. § 2: Conspiracy to Monopolize Against Defendants NS and NPBL)

85. CSXT incorporates and realleges the allegations of paragraphs 1 through 84 of this Complaint as if fully set forth herein.

86. Defendants NS and NBPL acted with a specific intent to combine or conspire to monopolize and to destroy competition in the relevant market.

Defendants devised and implemented a plan in furtherance of the conspiracy to systematically eliminate competition in the relevant market, in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2.

87. NS conspired with NPBL and the Individual Defendants to willfully engaged in a course of exclusionary conduct in furtherance of the conspiracy to obtain a monopoly in the relevant market, including:

(a) causing the NPBL to reject, without any reasonable, meaningful and lawful consideration or negotiation, CSXT's Service Proposal, thereby denying CSXT access to NIT by rail in competition with NS;

(b) failing to allow the movement of, in a reasonable and timely manner, cars delivered to the NPBL by CSXT, sacrificing NPBL's own profits from the business CSXT would otherwise deliver;

(c) discriminating against CSXT by refusing to allow NPBL to use CSXT's fully fueled locomotives to access NIT, while requiring NS-owned or supplied locomotives exclusively to be used by or on the NPBL;

(d) setting the NPBL's switch rates at levels designed to exclude competition in the relevant market for comparable switch rates, thereby dramatically raising CSXT's costs to serve intermodal rail customers, and diminishing the amounts of freight moved, and related revenues earned by, NPBL;

(e) causing NPBL to terminate its access rights to the track between NS Juncture and Carolina Juncture, i.e. the "diamond" track (with NS then removing that track), which has severely impaired NPBL's ability to efficiently and predictably provide CSXT and other competitors with rail access to NIT; and

(f) threatening to enter into agreements with NPBL to increase dramatically the charges that NPBL would pay to NS for exercise of the NPBL's rights to access NS trackage, if NPBL provided the service to NIT proposed by CSXT.

88. Defendants do not have a legitimate business purpose for any of their anticompetitive conduct in furtherance of the conspiracy. Any claimed procompetitive benefit is pretextual in light of the obvious competitive circumstances and associated marketplace conduct inconsistent with any such benefit. Defendants' conduct does not result in greater competition in the relevant market. The only "benefit" that flows from Defendants' conduct is a reduction in competition, and that benefit inures only to NS's advantage, not to that of customers or competition in the relevant market.

89. Defendants' anticompetitive acts in furtherance of the conspiracy to monopolize have injured competition in the relevant market, suppressed CSXT's provision of intermodal transportation, and the provision of intermodal

transportation of other rail carriers, diminished CSXT's future provision of intermodal transportation and the opportunities for provision of intermodal transportation of other competitors, and increased CSXT's operating costs and the operating costs of other competitors.

90. Defendants' overall course of conduct has and will continue to, among other things, maintain rates designed to exclude competition in the relevant market, and otherwise deprive customers of their ability to make an unfettered choice of rail carriers on the merits.

COUNT III
(Violation of Sherman Act § 2, 15 U.S.C. § 2: Monopolization Against Defendant NS)

91. CSXT incorporates and realleges all of the allegations of paragraphs 1 through 90 this Complaint as if fully set forth herein.

92. Defendant NS's conduct constitutes the intentional maintenance of monopoly power in the relevant market, in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2.

93. For the purpose of maintaining its monopoly power, NS committed numerous anticompetitive acts, including:

(a) causing NPBL to reject, without any reasonable, meaningful and lawful consideration or negotiation, CSXT's Service Proposal, thereby denying CSXT access to NIT by rail in competition with NS;

(b) failing to allow the movement of in a reasonable and timely manner, cars delivered to the NPBL by CSXT, sacrificing NPBL's own profits from the business CSXT would otherwise deliver;

(c) discriminating against CSXT by refusing to allow NPBL to use CSXT's fully fueled locomotives to access the NIT, while requiring NS-owned or supplied locomotives exclusively to be used by or on the NPBL;

(d) setting the NPBL's switch rate[s] at levels designed to exclude competition in the relevant market, thereby dramatically raising CSXT's costs to serve intermodal rail customers, and diminishing the amounts of freight moved, and related revenues earned by, NPBL;

(e) causing NPBL to terminate its access rights to the track between NS Juncture and Carolina Juncture, i.e. the "diamond" track (with NS then removing that track), which has severely impaired NPBL's ability to efficiently and predictably provide CSXT and other competitors with rail access to NIT; and

(f) threatening to enter into agreements with NPBL to increase dramatically the charges that NPBL would pay to NS for exercise of the NPBL's rights to access NS trackage, if NPBL provided the service to NIT proposed by CSXT.

94. NS has excluded CSXT from the relevant market and has deprived consumers of the benefits of competition among rail carriers.

95. NS does not have a legitimate business purpose for any of its anticompetitive conduct. Any claimed procompetitive benefit is pretextual in light of the obvious competitive circumstances and associated marketplace conduct inconsistent with any such benefit. NS's conduct does not result in greater competition in the relevant market. The only "benefit" that flows from NS's conduct is a reduction in competition, and that benefit inures only to NS's advantage, not to that of customers or competition in the relevant market.

96. NS's monopolization has injured competition in the relevant market, suppressed CSXT's provision of intermodal transportation, and the provision of intermodal transportation of other rail carriers, diminished CSXT's future provision of intermodal transportation and the opportunities for provision of intermodal transportation of other competitors, and increased CSXT's operating costs and the operating costs of other competitors.

97. NS's overall course of conduct has and will continue to, among other things, maintain rates designed to exclude competition in the relevant market, and otherwise deprive customers of their ability to make an unfettered choice of rail carriers on the merits.

COUNT IV
(Violation of Sherman Act § 2, 15 U.S.C. § 2: Attempted Monopolization Against Defendant NS)

98. CSXT incorporates and realleges the allegations of paragraphs 1 through 97 of this Complaint as if fully set forth herein.

99. Defendant NS acted with a specific intent to monopolize and to destroy competition in the relevant market. NS devised and implemented a plan to systematically eliminate competition in the relevant market, in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2.

100. NS willfully engaged in a course of exclusionary conduct to obtain a monopoly in the relevant market, including:

(a) causing the NPBL to reject, without any reasonable, meaningful and lawful consideration or negotiation, CSXT's Service Proposal, thereby denying CSXT access to NIT by rail in competition with NS;

(b) failing to allow the movement of, in a reasonable and timely manner, cars delivered to the NPBL by CSXT, sacrificing NPBL's own profits from the business CSXT would otherwise deliver;

(c) discriminating against CSXT by refusing to allow NPBL to use CSXT’s fully fueled locomotives to access the NIT, while causing NS-owned or supplied locomotives exclusively to be used by or on the NPBL;

(d) setting the NPBL's switch rates at levels designed to exclude competition in the relevant market for comparable switch rates, thereby dramatically raising CSXT's costs to serve intermodal rail customers, and diminishing the amounts of freight moved, and related revenues earned by, NPBL;

(e) mandating NPBL to terminate its access rights to the track between NS Juncture and Carolina Juncture, i.e. the "diamond" track (with NS then removing that track), which has severely impaired NPBL's ability to efficiently and predictably provide CSXT and other competitors with rail access to NIT; and

(f) threatening to enter into agreements with NPBL to increase dramatically the charges that NPBL would pay to NS for exercising NPBL's rights to access NS trackage, if NPBL provided the service to NIT proposed by CSXT.

101. NS does not have a legitimate business purpose for any of its anticompetitive conduct. Any claimed procompetitive benefit is pretextual in light of the obvious competitive circumstances and associated marketplace conduct inconsistent with any such benefit. NS's conduct does not result in greater competition in the relevant market. The only "benefit" that flows from NS's

conduct is a reduction in competition, and that benefit inures only to NS's advantage, not to that of customers or competition in the relevant market.

102. Throughout the time NS engaged in this exclusionary conduct, it had a dangerous probability of succeeding in gaining a monopoly in and controlling the relevant market and excluding its competitors.

103. NS's attempts to destroy competition in the relevant market have injured competition in the relevant market, suppressed CSXT's provision of intermodal transportation, and the provision of intermodal transportation of other rail carriers, diminished CSXT's future provision of intermodal transportation and the opportunities for provision of intermodal transportation of other competitors, and increased CSXT's operating costs and the operating costs of other competitors.

104. NS's overall course of conduct has and will continue to, among other things, maintain rates designed to exclude competition in the relevant market, and otherwise deprive customers of their ability to make an unfettered choice of rail carriers on the merits.

COUNT V
(Breach of Contract, against Defendant NS)

105. CSXT incorporates and realleges the allegations of paragraphs 1 through 104 of this Complaint as if fully set forth herein.

106. CSXT and Defendant NS are co-parties to the NPBL Operating Agreement, which establishes legally enforceable obligations owed by NS to CSXT.

These include, but are not limited to: 1) that shareholders shall maintain and operate NPBL as a "separate organization in which all are to be equally interested," 2) NS will "co-operate cordially in encouraging the business of the [NPBL] for which it is constructed," 3) NS shall "deliver to [NPBL] all cars to be interchanged with other [parties to the agreement]," 4) NS shall ensure its Directors "vote for such resolutions, by-laws or other proceedings as may be necessary to carry into effect" the NPBL Operating Agreement, and 5) the implied covenant of good faith and fair dealing.

107. Defendant NS has breached these contractual obligations by, *inter alia*, effectively blocking CSXT's access to NS's trackage over which NPBL has rights, by refusing to consider proposals that would improve the revenues of NPBL, by failing to encourage the business of NPBL, and by inducing its employees and/or the Individual Defendants to vote for measures that are harmful to NPBL.

108. NS's breaches have harmed CSXT, *inter alia*, by reducing the revenues of NPBL, of which CSXT is a shareholder, by causing CSXT to pay high rates when it has utilized the NPBL, and by causing CSXT to lose potential business due to its inability to economically access NIT by rail.

COUNT VI (Derivative Claim)
(Breach of Fiduciary Duties, against Individual Defendants Hall, Hurlbut, Merilli, and Moss)

109. CSXT incorporates and realleges the allegations of paragraphs 1 through 108 of this Complaint as if fully set forth herein.

110. CSXT, in its capacity as a shareholder in NPBL, brings this derivative action on behalf of NPBL and its shareholders, pursuant to Va. Code § 13.1-672.1, against the Individual Defendants for their breaches of fiduciary duties. CSXT was a shareholder of NPBL at all times during the conduct complained of in this action, and it fairly and adequately represents the interests of NPBL in enforcing NPBL's rights.

111. CSXT made a written demand to NPBL to take suitable action on June 22, 2018. NBPL responded to CSXT on September 11, 2018, denying any illegal conduct and disagreeing that any action is warranted in response to CSXT's demand letter.

112. The Individual Defendants have breached their fiduciary duties to NPBL, including their duties of good faith and loyalty and to act in an honest, fair and reasonable manner in the best interests of NPBL. Instead of acting in the best interests of NPBL, they have acted predominately in the interests of NS at the expense of NPBL, by, for instance, denying CSXT's Service Proposal and proposal for reforms of NPBL's corporate governance structure, and by failing to appropriately manage NPBL, leading to its deteriorating financial condition.

113. These breaches have damaged NPBL. CSXT, on behalf of NPBL, specifically seeks injunctive relief as specified in the prayer for relief as to the Individual Defendants.

COUNT VII
(Tortious Interference with Business Expectancy, Against Defendants NS and NPBL)

114. CSXT incorporates and realleges the allegations of paragraphs 1 through 113 of this Complaint as if fully set forth herein.

115. As a shareholder of the NPBL, CSXT has reasonable business expectancies, including that the corporation will be managed and directed in a manner that is in accord with the Operating Agreement, allowing CSXT access to NPBL trackage in Hampton Roads. CSXT reasonably expects economic benefit as a result of being a shareholder of NPBL, such as revenues from NPBL and its ability to access NPBL trackage and NPBL-served industries. As the majority shareholder of NPBL, NS, and the Individual Defendants, respectively, have knowledge of CSXT's business expectancies.

116. Defendants NS and NPBL have wrongfully employed improper methods in order to intentionally interfere with these expectancies, such as unfair competition, breach of fiduciary duty by the Individual Defendants, and using the NPBL as a means of self-dealing.

117. Defendants' interference is without justification and privilege, and has caused CSXT damages, such as lost opportunities for contracts with shipping partners. Additionally, because Defendants' conduct was intentionally undertaken with malice to harm CSXT and benefit themselves, CSXT is further entitled to punitive damages.

COUNT VIII
(Statutory Business Conspiracy, Va. Code § 18.2-499, Against Defendants NS and NPBL)

118. CSXT incorporates and realleges the allegations of paragraphs 1 through 117 of this Complaint as if fully set forth herein

119. In violation of Va. Code § 18.2-499, Defendant NS has conspired, by express agreement and tacit understanding, with Defendant NPBL, and with the Individual Defendants, in their capacity as directors and/or managers of NPBL, to intentionally, purposefully, and without lawful justification willfully and maliciously interfere with CSXT's reasonable business expectations, violate the individual Defendants' fiduciary duties to NPBL, and to breach NS's contract with CSXT. Defendants acted without lawful justification.

120. This conspiracy has harmed CSXT, *inter alia*, by reducing the revenues of NPBL, of which CSXT is a shareholder, and by causing CSXT to lose potential business with shipping companies, due to its inability to access NIT.

121. In addition to compensatory damages, CSXT is entitled to treble damages, lost profits, punitive damages, attorneys' fees, and other relief pursuant to Va. Code § 18.2-500.

COUNT IX
(Civil Conspiracy, Against Defendants NS and NPBL)

122. CSXT incorporates and realleges the allegations of paragraphs 1 through 121 of this Complaint as if fully set forth herein.

123. Defendant NS has conspired, by express agreement and tacit understanding, with Defendant NPBL, and with the Individual Defendants, in their capacity as directors and/or managers of NPBL, to intentionally, purposefully, and without lawful justification willfully and maliciously interfere with CSXT's reasonable business expectations, violate the Individual Defendants' fiduciary duties to NPBL, and to breach NS's contract with CSXT. Defendants acted without lawful justification.

124. This conspiracy has harmed CSXT, *inter alia*, by reducing the revenues of NPBL, of which CSXT is a shareholder, and by causing CSXT to lose potential business with shipping companies, due to its inability to access NIT.

125. In addition to compensatory damages, CSXT is entitled to punitive damages because the Defendants acted with malice.

PRAYER FOR RELIEF

WHEREFORE, CSXT respectfully prays for the following:

1) That this Court render judgment in favor of CSXT, individually and on behalf of NPBL, and against Defendants;
2) That this Court award CSXT, individually and on behalf of NPBL, actual, consequential, and compensatory damages, and treble damages;
3) That this Court award CSXT punitive damages in amounts to be determined by the jury;
4) That this Court enter an injunction against Defendants from continuing to commit the above referenced violations of federal and state law;
5) That this Court enter an injunction against NS, NPBL, and the Individual Defendants, as appropriate, that restores CSXT's right as a co-equal shareholder and/or establishes an independent board structure as previously proposed by CSXT and that directs that NPBL approve CSXT's Service Proposal;
6) That this Court award CSXT its costs, attorneys' fees and litigation expenses; and
7) That this Court enter such other and further relief as it deems just and proper under the circumstances.

CSXT requests trial by jury on all counts so triable.

Dated: October 4, 2018

Respectfully submitted,

CSX TRANSPORTATION, INC.

By Counsel

/s/

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EXHIBIT A

Provided by Lewis Hook

AFE-WP STEP-7 7/12/18

Agreement

BETWEEN

NEW YORK, PHILADELPHIA & NORFOLK R. R. CO.,

SEABOARD AND ROANOKE R. R. CO.,

NORFOLK AND SOUTHERN R. R. CO.,

NORFOLK AND WESTERN RY. CO.,

ATLANTIC AND DANVILLE RY. CO.,

SOUTHERN RY. CO.,

NORFOLK AND CAROLINA R. R. CO.,

AND

CHESAPEAKE AND OHIO RY. CO.

DATED JULY 7, 1897.

IN RE: NORFOLK AND PORTSMOUTH BELT LINE R. R. CO.

AN AGREEMENT made and entered into on this Seventh day of July, A. D. 1897, by and between THE NEW YORK, PHILADELPHIA & NORFOLK RAILROAD COMPANY, THE SEABOARD & ROANOKE RAILROAD COMPANY, THE NORFOLK & SOUTHERN RAILROAD COMPANY, THE NORFOLK & WESTERN RAILWAY COMPANY, THE ATLANTIC & DANVILLE RAILWAY COMPANY, THE SOUTHERN RAILWAY COMPANY, THE NORFOLK & CAROLINA RAILROAD COMPANY, and THE CHESAPEAKE & OHIO RAILWAY COMPANY.

WHEREAS each of the Companies above named desires to secure the construction of a Belt Line Railroad from Pinner's Point, Virginia, to a connection with the Norfolk and Western Railway in Berkley, Virginia, for the mutual benefit of each in the interchange of business, and it is conceded to be for the best interest of all that the same should be constructed, maintained and operated under a separate organization in which all are to be equally interested and each to have an equal representation, and it has been decided to construct, maintain and operate the same under the charter of The Southeastern and Atlantic Railroad Company.

Now, Therefore, This Agreement Witnesseth That the several companies hereinbefore named, each in consideration of the mutual agreements hereinafter made, do hereby mutually agree that the said The Southeastern and Atlantic Railroad Company shall be organized and its business and affairs conducted and maintained on the following terms and conditions, to wit:

First.—That the Capital Stock of the said Southeastern and Atlantic Railroad Company shall be fixed at Fifty Thousand Dollars.

Second.—That each of the Companies above named, parties hereto, doth hereby agree to subscribe to one-eighth of the Capital Stock of said Company, and to pay for the same at such time or times and in such amount or amounts as the same may be called by the Board of Directors of said Company.

Third.—That if the said Capital Stock should at any time hereafter be increased, the same will be subscribed for and taken in equal proportions by such of the Companies above named as may then hold stock in the said Southeastern and Atlantic Railroad Company.

Fourth.—That the number of Directors of the said Southeastern and Atlantic Railroad Company shall always be fixed to correspond to the number of Companies holding stock therein, so that each of said Companies shall have one representative on the Board, and that such representative shall in all cases be elected upon the nomination of the President or Vice-President of the Company holding such stock. In case of a vacancy the Board of Directors shall fill the same at their first subsequent meeting upon the nomination of the President or Vice-President of the Company in whose representation the vacancy occurred.

Fifth.—That there shall be a President, a Vice-President, a Secretary and Treasurer, which two last named offices may be filled by one person, and such other officers and agents as may be from time to time elected by the Board of Directors of the Southeastern and Atlantic Railroad Company.

Sixth.—That the affairs of the Company shall be under the management of the President and Directors, and that the By-Laws of the Company to be adopted by them shall provide for carrying into effect the provisions of this Agreement.

Seventh.—That the Southeastern and Atlantic Railroad Company is to forthwith commence and is to complete as soon as practicable a Belt Line Railway from the point of connection of the New York, Philadelphia and Norfolk Railroad Company's terminal tracks with the tracks of the Norfolk and Carolina Railroad Company at Pinner's Point, Virginia, to a connection with the track of the Norfolk & Western Railway Company in Berkley, crossing and connecting with the tracks of the Seaboard and Roanoke Railroad Company, the Atlantic & Danville Railway Company and the Norfolk & Southern Railroad Company, and crossing the Southern branch of the Elizabeth River by a suitable bridge.

Eighth.—That to provide for the construction of the said Belt Line Railway, and for the future purposes of the Company, the Southeastern and Atlantic Railroad Company is to make a mortgage to secure an issue of forty year five per cent Gold Bonds, limited in the aggregate to Four Hundred Thousand Dollars, in denominations of One Thousand Dollars each, and that the said Company shall have the right to issue so many of such bonds as may be necessary for the construction and equipment of its railroad including right-of-way, roadbed, superstructures and bridges, not to exceed Two Hundred and Fifty Thousand Dollars, as the same may be required, but the remaining One Hundred and Fifty Thousand Dollars shall be issued under the direction of the Board of Directors only when necessary to provide in part the funds required for the acquisition of property and for additional construction and equipment purposes, and then to the extent only of seventy-five per cent of such expenditures, the remaining twenty-five per cent to be provided by the issue of additional Capital Stock, or otherwise as may be provided by the Board of Directors.

Ninth.—That a uniform rate shall be fixed for the movement of freight cars over the said Southeastern and At-

lantic Railroad Company's railroad, regardless of distance, and that the rate per loaded freight car shall be so adjusted from time to time as to yield a net revenue sufficient to pay the interest upon the bonds outstanding and a dividend of six per cent on the stock. In case arrangements shall hereafter be perfected for the handling of passenger traffic by the Belt Line the net revenues derived therefrom shall be divided equally among the lines, owners of the stock, as an extra dividend, quarterly semi-annually or annually, as the Directors may determine, it being understood that if the net revenue from the passenger business shall be sufficient to pay extra annual dividends of more than six per cent, then the Directors may reduce the rate per loaded freight car sufficiently to absorb such excess.

Tenth.—That the Companies hereinbefore named, parties to this agreement, will co-operate cordially in encouraging the business of the Southeastern and Atlantic Railroad Company, for which it is constructed, and that each of them will deliver to the said Company all cars to be interchanged with other Companies hereinbefore named, parties hereto, except where there are physical connections already existing.

Eleventh.—That each and all of the aforesaid Companies, parties hereto, are to make the rates of freight in full car load lots between points on the said Southeastern and Atlantic Railroad to points on or that can be reached by their respective lines, in both directions, no higher than those between Norfolk or Portsmouth and such points.

Twelfth.—That no one of the aforesaid Companies, parties hereto, will sell its stock in the Southeastern and Atlantic Railroad Company to any other person, persons, corporation or corporations, until it shall first have given to the other owners of the stock in said Company the

right to purchase the same in an amount *pro rata* to the amount held by each of them, and at a price not to exceed what may be offered by others, and that to accomplish this notice shall be given by any such stockholder which may desire to sell its interest, to the President and Directors of the Southeastern and Atlantic Railroad Company of its desire to sell, and that the stockholders in said Southeastern and Atlantic Railroad Company shall have at least thirty days from the delivery of such notice within which to purchase the same under the terms above set forth, and that the certificates of stock to be issued by the Southeastern and Atlantic Railroad Company shall provide that the same are not transferable except upon the conditions stated above.

Thirteenth.—That any and all vacancies that may occur in the Board of Directors shall be promptly filled, at once if nomination can be made and the Board be in session, and if not then at the succeeding meeting of the Board, such vacancies to be filled by the election of the nominee of the President or Vice-President of the Company whose representation may be vacant, and that such election shall take place when such nomination has been or may be made before any other business shall be transacted at the said meeting.

Fourteenth.—That none of the Companies, parties hereto, shall be in any way liable for any of the debts, obligations or liabilities of the said Southeastern and Atlantic Railroad Company beyond the amount of their subscriptions to its Capital Stock.

Fifteenth.—It is understood and agreed that the locomotives owned by the parties hereto are not to enter upon or use the tracks of the Southeastern and Atlantic Railroad Company for any purpose whatever, excepting under such rules and regulations as may be established by the Board of Directors of the Southeastern and At-

lantic Railroad Company by a vote of a majority of all the members of said Board, the intent being that the Southeastern and Atlantic Railroad Company shall perform the service for which it was built and said Company be directly responsible for the competent and efficient discharge of its every obligation to the parties hereto.

Sixteenth.—No other Railroad Company shall be admitted as a stockholder of the Southeastern and Atlantic Railroad Company excepting with the consent of a majority of all of the members of the Board of Directors.

Seventeenth.—That each of the Companies parties hereto, agrees that the Director named by each to represent it in the Board of the Southeastern and Atlantic Railroad Company shall and will vote for such resolutions, by-laws or other proceedings as may be necessary to carry into effect the agreements herein made.

In Witness Whereof the several Companies above named have each caused this agreement to be signed by its President, Vice-President or General Manager.

THE CHESAPEAKE & OHIO RWY. CO.
By
DECATUR AXTELL,
2nd Vice-President.

THE ATLANTIC & DANVILLE RY. CO.
By
CHAS. O. HAINES,
Gen. Manager.

THE NORFOLK & SOUTHERN R. R. CO.
By
W. B. DICKERMAN,
President.

THE NORFOLK & CAROLINA R. R. CO.
By
W. G. ELLIOTT,
President.

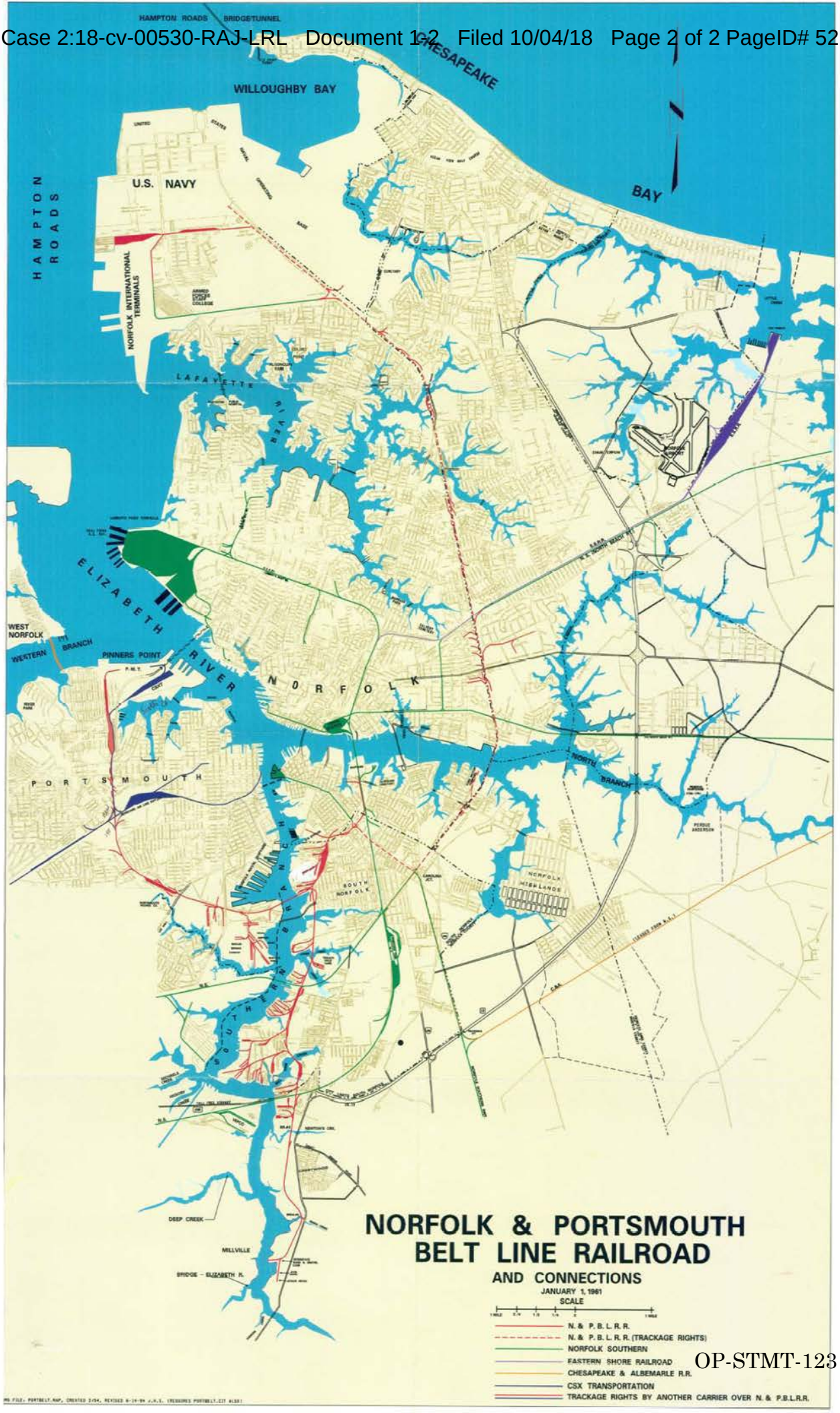
THE NEW YORK, PHILA. & NORFOLK R. R. CO.
By
A. J. CASSATT,
President.

THE NORFOLK & WESTERN RWY. CO.
By
HENRY FINK,
President.

SOUTHERN RAILWAY COMPANY,
By
A. B. ANDREWS,
1st Vice-President.

SEABOARD AND ROANOKE R. R. CO.
By
R. C. HOFFMAN,
President.

EXHIBIT B


HAMPTON ROADS BRIDGE-TUNNEL
CHESAPEAKE BAY
WILLOUGHBY BAY
U.S. NAVY
HAMPTON ROADS
NORFOLK INTERNATIONAL TERMINALS
LAFAYETTE RIVER
ELIZABETH RIVER
WEST NORFOLK
WESTERN BRANCH
PINNERS POINT
NORFOLK
PORTSMOUTH
NORTH BRANCH
SOUTH NORFOLK
NORFOLK HIGHLANDS
DEEP CREEK
MILLVILLE
BRIDGE – ELIZABETH R.
NORFOLK & PORTSMOUTH
BELT LINE RAILROAD
AND CONNECTIONS
JANUARY 1, 1961
SCALE
N. & P. B. L. R. R.
N. & P. B. L. R. R. (TRACKAGE RIGHTS)
NORFOLK SOUTHERN
EASTERN SHORE RAILROAD
CHESAPEAKE & ALBEMARLE R.R.
CSX TRANSPORTATION
TRACKAGE RIGHTS BY ANOTHER CARRIER OVER N. & P.B.L.R.R.

OP-STMT-123

EXHIBIT C

Dated: March 1, 1989

NORFOLK AND PORTSMOUTH BELT LINE
RAILROAD COMPANY

NPBL not made a party to this
Agreement - Copy of Supplemental
Agreement between Proprietary Compa
of the Belt Line) AS INFORMATION

AMONG

CSX TRANSPORTATION

and

NORFOLK AND WESTERN

and

SOUTHERN RAILWAY

Copy of Supplemental Agreement
between Proprietary Companies, relating
to the NPBL Operating Agreement No. 9
dated July 7, 1897, and No. 267 dated
February 1, 1924.

NORFOLK SOUTHERN

Norfolk Southern Corporation
Law Department
Three Commercial Place
Norfolk, Virginia 23510-2191

Writer's Direct Dial Number

(804) 629-2818

APR 1989
RECEIVED
Vice Pres.
N & P Belt Line
Norfolk, Va.

Norfolk, VA - April 5, 1989

Mr. J. M. Donnelly
Vice President, Secretary and Comptroller
Norfolk and Portsmouth Belt Line Railroad Company
P. O. Box 3669
Norfolk, VA 23514

Dear Mr. Donnelly:

Enclosed for your information is a copy of the Supplemental Agreement dated March 1, 1989, among CSXT, Norfolk and Western, and Southern Railway, relating to the NPBL operating agreement dated July 7, 1897. The parties have agreed that, notwithstanding Article Fourth of the 1897 agreement, CSXT will continue to have the right to appoint two representatives to the NPBL Board of Directors, and NW and Southern will have the right to appoint a total of three representatives.

Very truly yours,

J. Gary Lane
General Attorney

Enclosure

cc L. W. FISHER

Operating Subsidiaries: Norfolk and Western Railway Company / Southern Railway Company / North American Van Lines, Inc.

SUPPLEMENTAL AGREEMENT

THIS SUPPLEMENTAL AGREEMENT, dated as of March 1, 1989, is between CSX TRANSPORTATION, INC., a Virginia corporation ("CSX"), NORFOLK AND WESTERN RAILWAY COMPANY, a Virginia corporation ("NW"), and SOUTHERN RAILWAY COMPANY, a Virginia corporation ("SR").

WITNESSETH:

WHEREAS, CSX owns 216 shares of the common stock of Norfolk and Portsmouth Belt Line Railroad Company, a Virginia corporation ("NPBL");

WHEREAS, NW and SR each owns 144 shares of the common stock of NPBL;

WHEREAS, CSX, on the one hand, and NW and SR, on the other hand (NW and SR together being hereinafter referred to as "NW/SR"), are successors in interest to railroad companies that were parties to an Agreement dated July 7, 1897 (the "NPBL Agreement"), relating to the ownership and operation of NPBL;

WHEREAS, Article Fourth of the NPBL Agreement provides that the number of directors of NPBL shall always be fixed to correspond to the number of companies owning stock in NPBL;

WHEREAS, as of the date hereof, two of the directors of NPBL are representatives of CSX and three of the directors are representatives of NW/SR, and the parties hereto desire to retain such representation on the board of directors of NPBL ("NPBL Board") notwithstanding the provisions of Article Fourth of the NPBL Agreement;

NOW, THEREFORE, the parties hereto agree as follows:

1. Notwithstanding the first sentence of Article Fourth of the NPBL Agreement, CSX shall have the right to appoint two representatives to the NPBL Board, and NW/SR shall have the right to appoint three representatives to the NPBL Board.

2. Nothing herein shall be deemed to amend, alter, or affect any other provision of the NPBL Agreement.

IN WITNESS WHEREOF, the parties have caused this Supplemental Agreement to be executed by their duly authorized officers.

CSX TRANSPORTATION, INC.

By: _____
~~Vice President~~ Treasurer

NORFOLK AND WESTERN RAILWAY COMPANY

By: _____
Vice President

SOUTHERN RAILWAY COMPANY

By: _____
Vice President

EXHIBIT D

BY-LAWS

OF THE

NORFOLK AND PORTSMOUTH BELT LINE RAILROAD COMPANY

AMENDED APRIL 10, 1996

B Y - L A W S

of the

NORFOLK AND PORTSMOUTH BELT LINE RAILROAD COMPANY

ARTICLE FIRST

The principal office of the Company shall be in the City of Portsmouth, Virginia.

ARTICLE SECOND

The annual meeting of the Stockholders for election of Directors and for the transaction of such other business as may come before the meeting shall be held on the second Wednesday of April in each year hereafter.

Special meetings of the Stockholders shall be held whenever called by the President, the Board of Directors or the holders of not less than one-tenth of all the shares of stock entitled to vote at the meeting, as provided in §13.1-25 of the Code of Virginia of 1950 as amended. All meetings of the Stockholders shall be held at the office of the Company in Portsmouth, Virginia or at such place as may be designated by the Board of Directors or by the party or parties who may call a special meeting as hereinabove provided.

Notice of annual and special meetings of the Stockholders shall be given in the manner provided by the laws of the State of Virginia.

At any meeting of the Stockholders each shareholder shall be entitled to one vote for each share of stock standing in its name on the books of the Company and may cast such vote in person or by proxy.

ARTICLE THIRD

The Board of Directors shall consist of six voting members and one non-voting member who shall be elected by the Stockholders at this meeting and at all annual meetings thereafter.

Any vacancy occurring in the Board of Directors between elections of the Stockholders shall be filled by the remaining voting members of the Board at their first meeting after the vacancy shall have occurred.

Meetings of the Board of Directors shall be called by the Secretary, on order of the President, or at the request, in writing, of two or more voting members of the Board.

Four voting members of the Board of Directors shall constitute a quorum for the transaction of business.

The Directors shall continue in office until their successors have been elected and duly qualify.

The President of the Company shall preside at meetings of the Board of Directors and in his absence the Directors shall elect a President pro tem.

ARTICLE FOURTH

At their first meeting after their election by the Stockholders, the Board of Directors shall elect from their own number a President and General Manager and shall appoint a Vice-President, a Secretary and Comptroller and a Treasurer. The Board may then, or at any time, appoint an Assistant Secretary and an Assistant Treasurer, and such subordinate officers as they see fit. All the said officers shall hold their offices during the pleasure of the Board.

ARTICLE FIFTH

The President shall have the general supervision and direction of all the Company's activities, preside at all meetings of the Stockholders or Directors and perform such acts in the name of the Company as he may be authorized by the Directors to do and such other duties as generally are discharged by a President.

ARTICLE SIXTH

The Vice-President shall act for the President in his absence and perform such other duties as may from time to time be assigned by the President or Directors.

ARTICLE SEVENTH

The Secretary and Comptroller shall be present at the meetings of the Board of Directors and shall keep the minutes of the same. He shall keep the stock and transfer ledgers and issue new certificates of stock.

He shall also be the custodian of the corporate seal of the Company, and shall perform all such other duties as appertain to the office of Secretary. He shall have charge of the general accounting records of the Company and shall audit the accounts of the Treasurer monthly. He shall see that all accounts of the Company are promptly settled and shall perform such other duties as appertain to the office of Comptroller.

ARTICLE EIGHTH

The Treasurer shall be the custodian of all moneys and securities of the Company. He shall keep accurate accounts of all receipts and disbursements and his books shall at all times be open to the inspection of Directors, the President, the Vice President and the Secretary and Comptroller. Before entering upon the duties of his office the Treasurer shall give a bond in the sum of $25,000, with sureties to be approved by the Board of Directors, for the faithful discharge of his duties. Said bonds shall be filed with the President.

ARTICLE NINTH

All agents of the Company who may receive or disburse moneys on account of the Company shall give bonds, to be approved by the Board of Directors, in such sums as may be required by the Board of Directors, and all such bonds shall, when approved, be filed with the President.

ARTICLE TENTH

All deeds, bonds, mortgages, and other instruments required to be under the seal of the Company shall be executed by the President, or Vice-President, in the name of the Company, and attested by the Secretary, and have the seal of the Company affixed.

ARTICLE ELEVENTH

The Capital Stock of the Company is transferable only on the books of the Company in person or by attorney upon surrender of certificate, and no transfer of the same shall be made to any other person or persons, corporation or corporations until the other owners of the stock shall have first been given the right to purchase the same in an amount pro rata to the amount of stock held by each, and at a price not to exceed what may be offered by others. Notice shall be given to the President and Board of Directors of this Company of the desire of any shareholder to sell its stock, the remaining stockholders to have thirty (30) days from the delivery of such notice within which to purchase the same under the terms set forth. The certificates of stock to be issued by the Company shall provide that the same are transferable only upon these conditions.

ARTICLE TWELFTH

No other locomotives than those of the Company shall be allowed to use its tracks, excepting under such rules and regulations as may be established by the President, and the President shall immediately report to each member of the Board any consent that may be given by him under this by-law for the use of the tracks by other locomotives, and any such arrangement shall be subject to confirmation or rejection by the Board at any subsequent meeting.

ARTICLE THIRTEENTH

These by-laws may be amended at any annual meeting of the Stockholders or at any special meeting of the Stockholders called for the purpose.

Original By-Laws adopted by Stockholders July 28, 1897.

Amendments made as follows:

ARTICLE FIRST:	April 8, 1987
ARTICLE SECOND:	April 2, 1930 April 7, 1938 April 8, 1959 April 11, 1973 April 10, 1996
ARTICLE THIRD:	April 7, 1911 April 8, 1942 April 10, 1946 April 13, 1960 April 10, 1968 April 10, 1974 April 12, 1978 April 11, 1979 April 8, 1981 April 8, 1987 April 10, 1996
ARTICLE FOURTH:	April 8, 1942 April 10, 1946 April 13, 1960 April 12, 1972
ARTICLE FIFTH:	April 4, 1917 April 3, 1929 April 8, 1942 April 14, 1943 Repealed April 13, 1949 New Article Fifth adopted April 13, 1960
ARTICLE SIXTH:	April 8, 1942 April 13, 1960
ARTICLE SEVENTH:	April 13, 1960 April 12, 1972
ARTICLE EIGHTH:	April 13, 1960 April 12, 1972
ARTICLE NINTH:	April 13, 1960
ARTICLE THIRTEENTH:	April 8, 1959

EXHIBIT E



CSX Transportation, Inc.
500 Water Street, J-801
Jacksonville, Florida 32202
Tel. 904-359-7637
Email: Tony_DiDeo@csx.com

Tony DiDeo
Director Intercarrier Management
Joint Facilities

March 23, 2018

VIA OVERNIGHT MAIL AND ELECTRONIC MAIL

Mr. Cannon Moss
Director, President & General Manager
Norfolk and Portsmouth Belt Line Railroad Company
1340 Truxton Street
Chesapeake, VA 23324

Ms. Donna Coleman
Director, Vice President, Comptroller & Corporate Secretary
Norfolk and Portsmouth Belt Line Railroad Company
1340 Truxton Street
Chesapeake, VA 23324

Re: Rate Proposal for Long Term Rail Service to NIT

Dear Sir and Madam:

By this letter, CSX Transportation (CSXT) requests that NPBL management adopt the following proposal for long term rail intermodal service to Norfolk International Terminals (NIT), as described in detail below, and as consistent with the NPBL's purpose and interests.

A few years ago, NPBL handled several intermodal trains during a period of near historical shipping container congestion at the ports in Virginia and along the east coast. From those movements alone, we confirmed that consistently operating trains to NIT for CSXT is possible. During that short-lived crunch, CSXT was able to justify the extremely high cost of moving those trains via NPBL at its general tariff rate only because the Virginia Port Authority (VPA) and our customers were desperate to clear the backlog caused by the

unexpected container surge, and our drayage providers were completely overwhelmed. In other words, we had no other practical choice at the time.

The NPBL's general tariff rate, however, remains prohibitive for normal movements of shipping containers to and from NIT. NPBL has not handled a single intermodal train for CSXT since that period of extreme congestion (nor did it move any intermodal trains to NIT for CSXT prior to that time). This is principally because NPBL's unduly high rates, as well as operational constraints on its service to NIT that should not have existed, and in all events are avoidable or remediable, have made use of NPBL to move containers to or from NIT economically non-viable, or even effectively impossible.

We have been studying this issue closely, however, and remain confident that a rate package promptly can be negotiated and agreed-to that would provide the NPBL with a consistent, long term stream of additional income that could improve its financial position and sustain it into the future, while also being sufficiently reasonable that NPBL could attract sufficient additional traffic to support the rates profitably. In fact, we estimate the service for CSXT we are proposing will generate for NPBL approximately $1,440,000 in incremental revenue and potentially $660,000 in incremental operating income in the first year of service alone (estimates based on NPBL's 2016 Annual Report).

The following is a proposal of terms which can serve as the foundation for a definitive rail transportation agreement. We are open to discussion on all points, and welcome your input throughout the process, though we want to move this to conclusion swiftly and see no reason it cannot be.

Background

On July 19, 2010, CSXT provided NPBL management with a formal rate proposal and operating plan (enclosed), which was the product of months of review with NPBL management and Virginia International Terminals (VIT). In particular, NPBL management provided financial and costing information that allowed CSXT to tailor its proposal in a manner that would have provided consistent additional operating income to the NPBL and would have been mutually beneficial for NPBL and CSXT. We expect much of the work and learning from that extensive review process is still relevant and useable, and can be replicated or updated to expedite development of a new mutually-beneficial arrangement. Similarly, we believe the commercial sensitivity and depth of historical information on hand would obviate the need for convening another rate committee, but we are willing to work again through this approach if necessary.

With respect to the operating plan, we are pleased to report that senior officers of CSXT have already met with VPA officers to discuss our objective. The VPA was very supportive of our plans and have committed to assisting us with this important endeavor. Thus, much like the rate committee, we expect any discussions with VIT regarding operations will be productive and can be arranged in short order.

Summary of Proposed Rates and Contractual Terms

The past two decades have demonstrated that the NPBL general tariff charge of $210 per car (or per unit, in the case of articulated cars) remains an economic barrier for the NPBL to handle intermodal freight. This charge, whether absorbed by CSXT or passed through to the customer, is simply not competitive for any lane on our network and beyond. Although the NPBL's tariff history demonstrates that the NPBL has often published different switch charges for different commodities, we are aware of NPBL managements' past statements that it was not willing to offer different rates based on commodities. Similarly, we understand the NPBL has faced challenges from its Board and/or the other shareholder with respect to private contracts. More specifically, some Board members in the past have argued that an amendment to the NPBL bylaws would be required to permit the NPBL to enter into private freight contracts (even though the NPBL enters into private contracts for other services, such as locomotive leases, contractor services, etc.), and to allow use of non-NPBL owned or leased locomotives for movements over NPBL trackage. After reviewing case law and Virginia code extensively, we are not convinced this is an accurate interpretation of NPBL's bylaws or the law, generally. Nevertheless, we believe that we will be able to reach agreement on a long term transportation agreement that will be sufficiently beneficial to NPBL such that no reasonable person could refuse to take whatever action is necessary to allow NPBL to enter into such a contract, even if it would involve using locomotive power provided by CSXT or another company. By doing so, we might also be able to lay the groundwork for similar rates and services to be provided by NPBL for NS to reach Portsmouth Marine Terminal (PMT) going forward.

Even at an income-neutral level, we think aspects of how the NPBL operates need to be updated for it to remain viable and competitive, and able to fulfill its charter. Port traffic in Norfolk and Portsmouth is continuing to increase, and NIT is undergoing a radical expansion thanks in large part to a capital infusion of hundreds of millions of taxpayer dollars. If ever there was a time to demonstrate the NPBL's commitment to serve its shareholders and the community that supports it financially, and provide intermodal service to NIT, it is now. Failure to seize this opportunity virtually begs VPA to configure NIT in a manner that would effectively preclude NPBL from continuing to provide even nominal rail service to NIT.

Rate:

We propose $80 per car (i.e., each articulated section of an articulated car), for loaded or empty cars, moved to or from NIT for the purpose of handling international containers. We think this rate will be sufficiently competitive to attract incremental rail intermodal freight to NIT, while allowing NPBL to earn additional revenue of $1,440,000, annually, based on the initial level of volume we describe below.

***Volume*:**

CSXT proposes a minimum annual volume guarantee, with mutually agreed conditions, of moving 18,000 cars (i.e., each articulated section), loaded or empty, moving to or from NIT, on the NPBL per contract year. We are open to a gradual ramp up of volumes in the first years, to allow for less volume in the initial years, progressing (or even exceeding) the proposed volumes in this proposal letter. Finally, we are willing to negotiate mutually-suitable minimum and/or maximum train sizes (on a per car basis).

Shortfall Fee:

CSXT proposes a shortfall fee of $60 per car, based on a minimum volume commitment of 18,000 cars per year. Standard defenses or exceptions (e.g., force majeure) would apply.

Days of Service:

We have modeled our proposal based on 5 days per week service, consistent with the days of operation at NIT, in order to take advantage of the efficiency and safety benefits provided by fixed crew assignments. Over time, we would be interested in up to 7 days per week service (with a corresponding increase in guaranteed minimum volume), and are willing to consider a graduated "ramp up" to 7 days in the earlier stages of this service. We understand we will both need to consider labor costs, among other things, and are willing to work with you to maximize productivity.

Start Date and Term:

CSXT is ready, willing and able to commence service today. That said, we would be open to a commencement date within 30 days of the execution and delivery of the mutually agreed contract. With respect to the term of any agreement, CSXT is willing to negotiate a reasonable fixed term, including conditions for renewal, all to be mutually agreed.

Locomotives and Fuel:

CSXT is willing to provide NPBL with the locomotives and fuel to handle movement of CSXT traffic at no charge to NPBL. We understand there has been an objection to using CSXT power in the past, even though CSXT and NS locomotives operate on NPBL property every day. As noted above, we think we can reach a mutually agreed arrangement that is sufficiently attractive to motivate appropriate corporate action (if any is necessary) to remove any obstacles. Nevertheless, we are also willing to work with NPBL to adjust the

rates and operating plan to account for use of NPBL power and fuel, at least to the extent and for so long as any corporate formality actually requires NPBL to do so.

Regardless of which locomotives are used for the move, we would defer to NPBL's stated preference or requirements with respect to the minimum locomotive power (i.e., Horsepower per Ton Ratio).

Interchange Location, Time of Handoff, and Maximum Train Length:

Here again, we would defer to the NPBL with respect to the interchange location, and are open to designation of multiple interchange locations (e.g., Berkley Yard and Portsmouth Yard) to be determined by the parties prior to each interchange event. Rates would remain the same, regardless of interchange location. Similarly, we are willing to work with you to determine operating windows for the exchange of interchange cars. We understand that, at least initially, the windows may vary on a weekly (if not daily) basis.

Documentation:

The foregoing terms would be subject to and become binding only upon memorialization in a mutually agreed written format (rail transportation contract or equivalent) duly signed for both NPBL and CSXT.

Economic Impact on the NPBL

Based on CSXT's internal projections of the NPBL cost structure, and the use of CSXT's locomotives and fuel at no cost to NPBL, we estimate this proposal would provide the NPBL with a minimum of $660,000 of additional annual operating income (and an operating ratio for the service equal to 54%) starting in the first full year of operations. That would represent a substantial increase over 2016 total operating income for the NPBL, with almost zero risk to the NPBL.

It is worth emphasizing that there is nothing but upside to this proposal, especially with a baseline commitment from CSXT to move 18,000 cars per year. Given the estimated operating ratio NPBL would enjoy from this service, and CSXT's expectation that volumes will only grow once the parties can demonstrate consistent service, we believe this proposal could be a significant element of NPBL's long term strategy in Norfolk.

Operating Plan

The requested services is for "drop and swap" intermodal single-stack or double-stack unit train service between Berkley Yard (or Portsmouth Yard) and NIT. We intend to

work with you to minimize direct expenses to the NPBL, to work with VIT to integrate with existing and planned operations inside the gate at NIT. We also recognize the need to work with NS to integrate with their operating needs, and we believe it is imperative for all parties to work together in order for NPBL to honor its longstanding obligation to provide service to its owners, to enjoy the use of its trackage rights, and to fulfill the purpose of its retained trackage rights from the sale of its property outside of NIT to the VPA in 2010.

We also note that the NPBL management endorsed the operating plan detailed in the July 19, 2010 rate proposal, and we are willing to work from that operating plan with such adjustments as may be deemed necessary to address any bona fide concerns raised by NS or VIT.

Summary

During the eight years since CSXT's last proposal for long term rail intermodal service, CSXT has had no choice but to dray over one hundred thousand containers that easily could have been handled by the NPBL. Under the current proposal, and based solely on a minimum volume, the NPBL could earn at least $11 million in revenue and over $5 million in incremental operating income over the same period. As NIT continues work on its massive expansion project, nearly doubling its present throughput, the projected earnings from this proposal could increase tremendously.

As stated above, we are fully committed to work with the NPBL to address any concerns regarding the requested service and any other terms of this proposal. Given the opportunity presented by this proposal, and the downside if we must continue to rely on drayage, there can be no doubt that time is of the essence for both parties. To that end, we respectfully request a written response to this proposal no later than **April 2nd**.

We look forward to working with you on this important project.

Sincerely,



Tony DiDeo

(Enclosure – July 19, 2010 Rate Proposal and Operating/Financial Plan)

July 19, 2010 Rate Proposal & Operating/Financial Plan

[Please see attached]



500 Water Street, J315
Jacksonville, FL 32202
(904) 359-3486
John_Booth@csx.com

J.N. Booth, III
Director Joint Facilities

July 19, 2010

VIA ELECTRONIC MAIL

Mr. David Stinson
Director, President & General Manager
Norfolk and Portsmouth Belt Line Railroad Company
P.O. Box 7545
Portsmouth, VA 23707

Ms. Donna Coleman
Director, Vice President, Comptroller & Corporate Secretary
Norfolk and Portsmouth Belt Line Railroad Company
P.O. Box 7545
Portsmouth, VA 23707

Re: Rail Service Connection to NIT – Rate Proposal and Operating/Financial Plan

Dear Sir and Madam:

We refer to CSXT's October 15, 2009 rate proposal, which was rejected by the NPBL because it did not include a detailed operating plan and estimated financial impact on the NPBL. To address the NPBL's concerns, CSXT has consulted with the NPBL and Virginia International Terminals, Inc. (VIT) on the following operating plan, and has further examined relevant financial information, including information provided to the 2009 NPBL Rate Committee.

CSXT is now pleased to offer the following rate proposal, together with an operating plan and related financial information. As detailed below, and assuming NPBL elects to use CSXT locomotives at no charge, this rate proposal will provide the NPBL with at least $149,452 in risk-free incremental operating income in the first calendar year of operations alone.

Operating Plan

This operating plan is for intermodal single-stack unit train service between Berkley Yard and Norfolk International Terminals (NIT). In addition to minimizing direct expenses to the NPBL, this operating plan is designed to integrate with existing and planned operations inside the gate at NIT.

At the onset, CSXT requests a drop & swap service three days per week, whereby the NPBL would complete services at NIT between 00:00 and 05:00 on Sunday, Tuesday, and Thursday. For your convenience, Annex A to this letter proposal provides a visual overview of the rail movements in the operating plan described below:

- First, CSXT will deliver a locomotive, including sufficient fuel for the round-trip to NIT, and cars to Berkley Yard, by 18:00 on the preceding day.
- Between 18:00 and 21:00 on the days of CSXT's delivery to Berkley Yard, the NPBL will access NSRR tracks starting at NS Jct., as permitted by agreements between NPBL, NSRR and their respective predecessors dated: July 26, 1917, July 27, 1917, December 31, 1985 and January 1, 2008.
- At Port Lock Yard, the NPBL will pull into an available track, as designated by the NSRR Yard Master. At this time, the NPBL crew will cut away from the front of this consist, run around to the tail, and reconnect. NPBL will perform required brake testing prior to departing. At this point, the NPBL will be staged and waiting for the NSRR Yardmaster to grant permission for movement to NIT.
- After departure from Port Lock Yard, the NPBL will arrive at NIT during the scheduled window from 00:00 to 05:00. As the NPBL advances the 8 miles to QM Jct. (crossing the right leg of the switch), it will proceed past West Jct. onto the NPBL trackage, known as Sewells Point Yard. Here, the crew will set off the consist onto the passing track near Hampton Blvd. and North Gate Road.
- The NPBL crew will then contact VIT for instructions relative to any outbound CSXT containers to be pulled from NIT.
    - If there is an outbound consist to be picked up at NIT, the NPBL crew will advance to NIT and retrieve the consist from the pickup track designated by VIT.
        - The consist will already have been inspected and air tested by TTX, at no cost to the NPBL.
        - The NPBL crew will backtrack over the same route returning to Berkley Yard for CSXT pick up between 13:00 and 17:00 same day.
    - If there is no outbound consist to be picked up at NIT, the NPBL crew would return the locomotive to Berkley during that same window.

Please note the following, which was incorporated into this operating plan:

- The NPBL management has expressed confidence that the proposed round-trip schedule can be completed efficiently with one scheduled crew start.

- This operating plan assumes the NPBL will use CSXT's locomotive between Berkley and NIT without cost or requirement to refuel.

    - This accommodation will not only simplify operations for these moves, it will enhance NPBL's profitability as noted in the first table below. If NPBL elects to us its own power, the calculations shown in Table 2 will apply.

Rates and Contractual Terms

In order for the NPBL to secure port-related traffic at NIT, its rates and operating requirements must be competitive. Presently, the NPBL's switch rate of $ 210 per car is an economic barrier that prevents CSXT from being able to move any meaningful port freight by rail at NIT.

Here's why: under Item 125 of its public tariff, the Commonwealth Railway charges $35.61 per container (empty or loaded) for a similar movement from APM Terminals. The difference between switch charges is considerable, and will only make the NPBL's rate less competitive now that VIT can shift traffic to APM Terminals in its discretion.

CSXT is not interested in placing the full burden on the NPBL to close this gap. Our proposed operating plan, which provides substantial risk-free incremental operating income, demonstrates our willingness to make accommodations to help the NPBL in this effort.

Accordingly, CSXT proposes the following, all to be memorialized in a formal agreement:

- One-way rate of $37.50 per container (empty or loaded) for a term of three years on movements handled by the NPBL between Berkley Yard and NIT. For operational convenience as necessary, the parties may mutually agree to interchange at Portsmouth Yard for the same rate.

- To minimize financial risk to the NPBL, CSXT commits to provide a minimum average volume (measured over each six month period during the term) of 50 containers per scheduled NPBL round-trip. Assuming three days per week service, the NPBL would have a consistent revenue stream of $146,250 for 3,900 containers for that six month period.

- In consideration of CSXT's commitment, CSXT may request that scheduled service days be adjusted upon CSXT's prior written request. Also upon prior written request, CSXT may request double-stack service at the same rate per container.

These adjustments, with allowance for proper notice, would give both parties adequate time to respond to changing market conditions.

- The NPBL's standard settlement and credit terms would apply to the covered traffic, with any potential container shortfall payment to be remitted in a reasonable time after each six month period.

- Mutually acceptable measures and standards of service, including incentives related thereto, would be incorporated into a formal agreement.

Economic Impact on the NPBL

As shown below in Table 1, based on CSXT's internal analysis of the NPBL cost structure, and the use of CSXT's locomotives and fuel at no cost, this proposal would provide the NPBL with a minimum of $149,452 of additional annual operating income starting in the first full year of operations. That would represent an increase of 25% over 2009 total operating income for the NPBL, with almost zero risk to the NPBL.

It is worth emphasizing that there is nothing but upside to this proposal, especially with a baseline commitment of 50 containers. For example, if CSXT tenders 80 containers per round-trip (the "Project Volume"), the NPBL's incremental operating income would be $296,872 over the first full year of operations. This modest increase in volume is not an unreasonable projection, and yet it would represent almost a 50% increase to 2009 operating income.

[TABLES FOLLOW ON NEXT PAGE]

Table 1

	W/ CSXT Locomotives & Fuel	
	Base Level	CSXT Projected
Avg. Containers Per Train (Scheduled Crew)	50	80
Annual		
Container Volume	7,800	12,480
NPBL Revenue	$292,500	$468,000
Compensation & Benefits	$96,248	$96,248
Locomotive Expense	$0	$0
Fuel	$0	$0
Incremental Maintenance	$46,800	$74,880
Direct Expense*	$143,048	$171,128
Operating Income Impact	$149,452	$296,872

* Extrapolated from 2009 Rate Committee Meeting Package

Table 2

	W/ NPBL Locomotives & Fuel	
	Base Level	CSXT Projected
Avg. Containers Per Train (Scheduled Crew)	50	80
Annual		
Container Volume	7,800	12,480
NPBL Revenue	$292,500	$468,000
Compensation & Benefits	$96,248	$96,248
Locomotive Expense	$10,714	$10,714
Fuel	$19,000	$19,000
Incremental Maintenance	$46,800	$74,880
Direct Expense*	$172,762	$200,842
Operating Income Impact	$119,738	$267,158

* Extrapolated from 2009 Rate Committee Meeting Package

Note to Table 2: As noted above, CSXT's operating and financial plan contemplates the NPBL's use of CSXT locomotives and fuel at no charge. However, should the NPBL wish to use its own locomotives and fuel, Table 2 provides an estimate of the economic impact to the NPBL, which remains quite favorable.

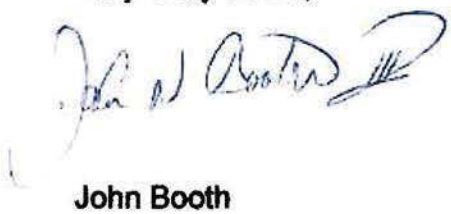
If the NPBL elects not to use CSXT's locomotives and fuel, the NPBL would still make $119,738 in incremental operating income at the base-line volume commitment level in the first year of operations. And, using the Projected Volume, the NPBL would generate $267,158 of incremental operating income, which would represent an increase of approximately 45% over 2009 total operating income for the NPBL.

Summary

CSXT reaffirms its belief that time is of the essence for the NPBL to consider this proposal, which is designed to enable both parties to attract intermodal port traffic at NIT. The outlined operating plan and projected financial gains respond to the NPBL's earlier concerns and provide the justification necessary for the NPBL management to support this endeavor.

CSXT also believes this proposal enables the NPBL to deliver on the commitments it has made, directly and indirectly, to the citizens of the Commonwealth, to create competitive dual rail service at NIT. We hope you agree and respectfully request a favorable response from you within thirty (30) days of this letter.

Very Truly Yours,



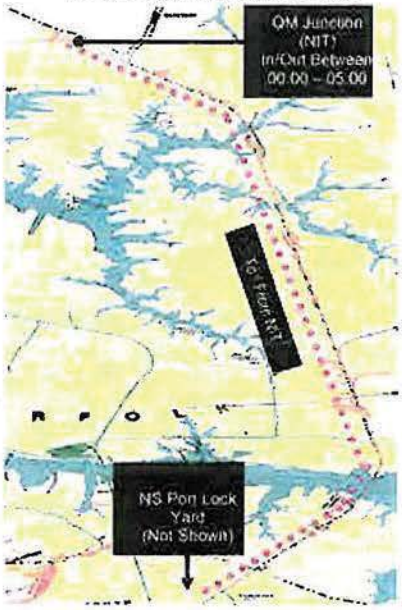
John Booth

Operating Plan Support Maps

CSXT → Berkley Yard → NSRR Port Lock Yard



NSRR Port Lock Yard → NIT



Norfolk International Terminals

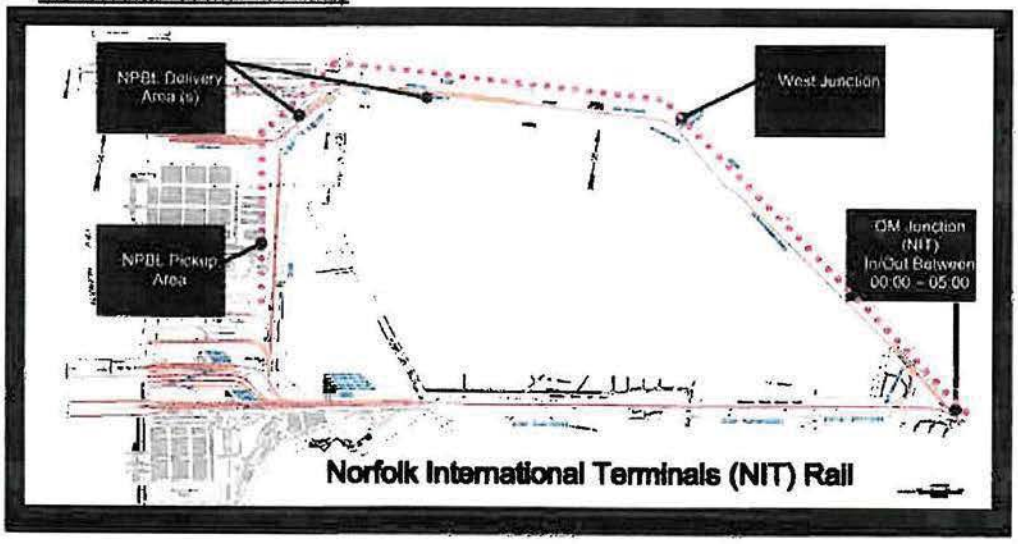


EXHIBIT F



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Steven C. Armbrust
Assistant General Counsel
Corporate & Transportation Law

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April 6, 2018

VIA ELECTRONIC MAIL AND OVERNIGHT MAIL

Norfolk & Portsmouth Belt Line Railroad Company
1340 Truxton Street
Chesapeake, VA 23324

Norfolk Southern Railway
Three Commercial Place
Norfolk, VA 23510

Re: Demand that the NBPL Board and Norfolk Southern Railway Take Remedial Actions at April 2018 Meetings of the Board and the NPBL Shareholders

To: Members of the NPBL Board
Norfolk Southern Railway

CSX Transportation, Inc. ("CSXT") demands that the Norfolk & Portsmouth Belt Line Railroad Company ("NPBL"), through its Board of Directors (the "NPBL Board"), and Norfolk Southern Railway ("NS") take remedial actions at the April 2018 meetings of the NPBL Board and the NPBL Shareholders to address serious deficiencies in the policies, procedures, controls, and governance structure of the NPBL. As detailed below, as a direct result of these deficiencies, CSXT has been deprived of its contractual right to equal representation on the NPBL Board, and NS has impermissibly taken, exercised and maintained control of the NPBL, the NPBL Board and management, and the operation of the NPBL's railroad. The need for change has been accentuated by recent events involving NPBL management's response to a new rate and traffic proposal by CSXT.

Accordingly, CSXT demands that the NPBL and NS take all necessary actions to (i) afford CSXT equal representation on the NPBL Board, including limiting the shareholder-designated representatives on the NPBL Board to one director designated by each of NS and

CSXT as its representative (and with qualified independent directors filling the remaining Board seats); (ii) replace certain NPBL management with qualified individuals who are independent of both NS and CSXT; and (iii) adopt a proper corporate compliance program (including a Code of Ethics) that is prepared and made appropriate for the NPBL and independent of any program or code adopted by and for NS.

CSXT Must be Afforded Equal Representation on the NPBL Board

As you are aware, CSXT and NS (collectively, the "Shareholders") are the holders of all of the issued and outstanding stock of the NPBL. CSXT and NS also, as successors to the original contracting parties, are the sole remaining parties to that certain Agreement dated July 7, 1897 between and among all of the original shareholders of the NPBL (as amended, the "NPBL Agreement"). The NPBL Agreement relates to and governs the ownership and operation of the NPBL and, *inter alia,* creates and establishes various duties and obligations (a) between and among the Shareholders, and (b) owed by the members of the NPBL Board and management (including its President and General Manager) to each Shareholder.

The NPBL Agreement provides that each Shareholder "shall have one representative on the Board" of the NPBL. Agreement at Art. 4. In a Supplemental Agreement dated as of March 1, 1989 (the "Supplemental Agreement"), the three rail carrier companies that comprised the NPBL's shareholders at that time -- CSXT, Norfolk and Western Railway Company ("NW") and Southern Railway Company ("SR") -- agreed to deviate from Article 4's requirement that the "number of directors of NPBL shall always be fixed to correspond to the number of companies owning stock in the NPBL." Pursuant to the Supplemental Agreement, and in view of the unique circumstances that then pertained with respect to NW and SR as separate rail carriers and companies with common corporate ownership, CSXT was afforded the right to appoint two representatives to the NPBL Board, and the other two companies, NW and SR, collectively between them were afforded the right to appoint only three representatives to the NPBL Board.

Years later, NW and SR merged to form the single company now known as NS. The merger of those two companies eliminated the purpose for which the Supplemental Agreement had been created and rendered the Supplemental Agreement's modifications to Article 4 of the NPBL Agreement unwarranted, moot, and contrary to the core organizing principle and intent of the original NPBL shareholders, as set forth in the NPBL Agreement that its railroad "should be constructed, maintained and operated under a separate organization in which all [shareholder companies] are to be equally interested and each to have an equal representation." Agreement p. 1 [first "WHEREAS" paragraph].

Notwithstanding that NW and SR ceased to exist as separate companies, and only two companies, CSXT and NS, are NPBL's sole Shareholders at the present time, CSXT has not been afforded equal representation on the NPBL Board or equal interest in the construction, maintenance and operation of the NPBL railroad, in direct contravention of CSXT's rights under the NPBL Agreement. The NPBL Board currently consists of six voting members and one non-voting member. By-Laws of the NPBL at Art. 3 (1996). NS (through its historic exercise of a greater number of votes as holder of a majority of NPBL's shares) has designated, voted for and controls five members of the NPBL Board (four voting members and one non-voting position), while allowing CSXT to designate only two members for election to the NPBL Board. All three of NS-designated voting non-management directors are current NS employees; the fourth NS-

designated director position is held by the individual serving as President and General Manager of the NPBL, who was appointed to that position by the three NS-designated non-management directors (over the objection of the CSXT-designated directors) and is a former NS employee; and the non-voting position, the Vice President, Comptroller and Corporate Secretary, is held by another former NS employee. NS has thereby taken and exercises complete control of the NPBL Board, and the management and operation of the railroad, largely to the exclusion of CSXT and without participation by any independent director or officer.

The NPBL Board and NS must take immediate action to provide CSXT with equal representation in NPBL including, but not limited to, the remedial actions stated herein.

NPBL Management Must be Replaced with Individuals who are Independent

As specified in the NPBL Agreement, the NPBL exists for the ***mutual*** and ***equal*** benefit of its shareholders to provide an efficient means of interchanging the traffic of its owners. In order to advance the purpose for which the NPBL was formed, the original shareholder companies, including those whose successors are currently the Shareholders and parties to the NPBL Agreement, expressly agreed therein that it is in the best interest of all shareholders that each shareholder have equal representation in the NPBL, and committed that each shareholder will "co-operate cordially in encouraging the business of the [NPBL] for which it is constructed." NPBL Agreement at 1. The mission and purpose of the NPBL is to be carried out by the NPBL Board, in connection with the NPBL management, which includes the President and General Manager (who acts as both management and a voting member of the NPBL Board), Vice-President, Secretary and Comptroller and Treasurer.

Pursuant to the NPBL By-laws, the NPBL "Board of Directors shall elect from their own number a President and General Manager and shall appoint a Vice-President, a Secretary and Comptroller and a Treasurer." By-Laws of the NPBL at Art. 4 (1996). NS has exploited its unequal and improper control of the NPBL Board to appoint and elect an NS-controlled individual to the position of President and General Manager who, in turn, appoints NS-controlled individuals to other NPBL management positions. Indeed, the current NPBL President, Cannon Moss, his immediate successor, President David Stinson, as well as the rest of the NPBL management, are all former employees of NS who act under and at NS's direction, and each has been reemployed by NS, or expected and/or has been led by NS to believe that they may be employed again by NS in the future. As a result, the NPBL management, including Mr. Moss in his capacity as both NPBL President and General Manager and a director, are beholden to NS and have a vested interest to act in the best interest of NS, as opposed to both Shareholders and the NPBL's business interests.

Accordingly, the NPBL Board must take immediate action to remedy the conflicts of interests between NS and the NPBL's management including, but not limited to, the remedial actions stated herein.

NPBL Must Establish a Corporate Compliance Program That Is Independent of NS (and CSXT) and Is Designed for NPBL's Particular Organization

In 2012, CSXT and NS performed a joint audit of the NPBL to evaluate the effectiveness of the NPBL's policies, procedures, controls, and governance structure. In the Final Audit

Report dated November 27, 2012, CSXT and NS identified deficiencies with the NPBL's corporate governance and observed that (1) an NPBL "corporate compliance program does not exist and general operating policies and procedures are not documented," and (2) the NPBL's "contract approval and execution controls are not sufficient." The Final Audit Report states that these deficiencies create substantial (rated as "medium") and "unnecessary" risks and liabilities for "NPBL and its owners", explains those risks in some detail, and states that that the "[a]udit observations will remain open until management's action plans are completed and validated." Final Audit Report at 3.

To remedy these deficiencies, the Final Audit Report contained several recommendations, including that the NPBL: (i) eliminate its reliance on NS's documentation for a compliance program, and policies and procedures; (ii) develop and implement a corporate compliance program appropriate for the company; (iii) develop a Code of Ethics for the NPBL, which is independent of NS's policies and procedures; and (iv) develop a formal process for each of the four types of contracts the NPBL primarily enters into (purchasing, real estate, lease, and right-of-way) that requires approval by more than one officer, as opposed to permitting a single individual to negotiate and execute contracts on the NPBL's behalf.

Despite the findings and recommendations of the audit, the NPBL management, as dominated and controlled by NS, has failed to rectify fully these deficiencies and obtain validation of completion of an effective action plan. The NPBL has also failed to take steps to address other deficiencies in its corporate governance, such as the complete absence of any independent, meaningful periodic review of the performance and compensation of the NPBL President and other members of its management.

Accordingly, the NPBL must take immediate action to remedy these corporate governance deficiencies, including, but not limited to, the remedial actions stated herein.

***

The deleterious effects of the foregoing are underscored by recent events involving the submission of a new rate and traffic proposal by CSXT. Initially, instead of responding to that commercial proposal, NPBL management deferred a response until after a "discussion" with the board at the next NPBL Board Meeting. When pressed for a response before the board meeting, NPBL management responded with numerous potential—though illusory—impediments to the proposal, as opposed to engaging on the terms towards the end of an agreement acceptable by both parties. This kind of response is inconsistent with an impartial management team whose primary purpose should be the success and growth of the business it is managing. Rather, the NPBL management's refusal to respond constructively to the latest proposal from CSXT follows the same pattern of delay and obstruction that the unchecked, NS-controlled NPBL Board and management has perpetrated for years. This practice not only unreasonably and unlawfully harms CSXT as a Shareholder in the NPBL and a competitor of NS, but also results in the NPBL acting contrary to its own interests.

Requested Remedial Actions:

CSXT demands that the NPBL Board and NS take any and all actions necessary in advance of, at and following the upcoming annual Shareholder Meeting in April 2018 (the "Shareholders' Meeting") and the contemporaneous meeting of the NPBL Board to:

a. Restructure the NPBL's governance systems to provide for equal representation of both of the Shareholders on the NPBL Board, and ensure that the NPBL is and remains "constructed, maintained and operated under a separate organization in which all [shareholder companies] are to be equally interested and each to have an equal representation." Necessary action by the NPBL Board and Shareholders include:

    1. At the Shareholders' Meeting, voting the Shareholders' respective shares (i) to elect only one director designated by, respectively, each of NS and CSXT; and (ii) elect as voting directors four disinterested qualified individuals, each of whom is fully independent of both NS and CSXT (each an "Independent Director"). Each Independent Director shall meet the requirements for independence set forth on Exhibit A hereto, which requirements are based on those found in Section 303A.02 of the New York Stock Exchange Listed Company Manual.

    2. At a meeting of the NPBL Board held during a temporary adjournment of the Shareholders' Meeting, immediately following the election of directors referenced above, the newly-elected directors must then elect and appoint, from among the four Independent Directors, a qualified individual to serve as President and General Manager of NPBL.

    3. To facilitate the effective and fair implementation of items "a.1" and "a.2" above, within five business days of the date of this letter, the NPBL Board should establish a nominating committee to identify and nominate at least four candidates for election as Independent Directors. The nominating committee should be comprised of two current directors of the NPBL (only one of whom may be a director designated by NS and the other a director designated by CSXT), and the nominating committee should be authorized and directed to engage independent professionals as consultants to assist in identifying and qualifying candidates to serve as the four Independent Directors.

    4. One of the Independent Directors identified above should be nominated for election and appointment by the NPBL Board with the expectation that this Independent Director will serve as President and General Manager of the NPBL. If no candidate for Independent Director can be identified who is qualified and willing to serve as President and General Manager by the April meetings, Cannon Moss may be elected to continue serving as a Director and appointed to continue serving as President and General Manager, provided it is understood and agreed (A) he will be continuing to serve in those positions on an interim basis and (B) he (x) promptly upon the approval of a new candidate for President and General Manager by the nominating committee described in "b" below and approved by a majority of the other voting Directors, or (y) immediately if a majority of the other voting Directors, in their sole discretion, conclude that Mr. Moss has taken

any material action or omitted to act in any way, for NPBL, that reflects a lack of independence from NS, will resign from the positions of Director, and President and General Manager of NPBL.

b. After establishing the new NPBL Board as provided in "a.1" above, establish (i) a standing nominating committee of the NPBL Board that includes no less than two Independent Directors, and both the CSXT- and the NS-designated Directors if either wants to participate on the committee, but shall not include the President and General Manager if Cannon Moss is then serving in that position; (ii) a policy setting forth the criteria for selection of candidates for the NPBL management positions and Independent Directors, which criteria shall include, without limitation, a requirement that the President and General Manager of the NPBL be selected from among the Independent Directors and must at all times be and remain independent of, and free of conflicts of interest concerning, both of the Shareholders and their respective Affiliates (including, without limitation, that such candidates would qualify as independent under the criteria set forth in Exhibit A); and (iii) a policy setting forth the qualifications and criteria for selection and appointment of the Vice-President, Secretary and Comptroller and Treasurer that would ensure that the individual appointed to and holding that position is independent of, and free of conflicts of interest concerning, both of the Shareholders and their respective Affiliates.

c. Fully and consistently implement a corporate compliance program appropriate for the NPBL that is independent of NS's policies and procedures.

d. Fully and consistently implement formal conflict of interest policies and procedures that are independent of NS's conflict of interest policies and procedures.

e. Develop and document a formal process for each of the four types of contracts the NPBL primarily enters into (purchasing, real estate, lease, and right-of-way) that eliminates single contract authorization, and provides for the review and approval of contracts by at least two officers prior to execution.

f. Establish a committee of Independent Directors charged with, no less than annually, reviewing the performance of the NPBL's President and General Manager, and all other officers, managers and superintendents, and with reviewing and determining the reasonable compensation for those executive and management employees.

Very truly yours,

Steven Armbrust

ELECTRONIC MAIL DISTRIBUTION

Jermaine Swafford (Jermaine_Swafford@csx.com)

Drew Glassman (Drew_Glassman@csx.com)

Cannon Moss (Cannon.Moss@nscorp.com)

Donna Coleman (Donna.Coleman@nscorp.com)

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Thomas Hurlbut (Thomas.Hurlbut@nscorp.com)

Philip Merilli (Philip.Merilli@nscorp.com)

EXHIBIT A

INDEPENDENT DIRECTOR REQUIREMENTS

No person shall serve as an Independent Director of the NPBL if:

(i) The person is, or has been within the last three years, an employee of a Shareholder or a Shareholder's Affiliate (as defined below), or an immediate family member is, or has been within the last three years, an executive officer, of a Shareholder or a Shareholder's Affiliate;

(ii) The person has received, or has an immediate family member who has received, during any twelve-month period within the last three years, more than $120,000 in direct compensation from a Shareholder or a Shareholder's Affiliate, other than director and committee fees and pension or other forms of deferred compensation for prior service (provided such compensation is not contingent in any way on continued service);

(iii) (A) The person is a current partner or employee of a partnership, company or other business organization (a "firm") that is a Shareholder or a Shareholder's Affiliate's internal or external auditor; (B) the person has an immediate family member who is a current partner of such a firm; (C) the person has an immediate family member who is a current employee of such a firm and personally works on a Shareholder or a Shareholder's Affiliate's audit; or (D) the person or an immediate family member was within the last three years a partner or employee of such a firm and personally worked on a Shareholder or a Shareholder's Affiliate's audit within that time;

(iv) The person or an immediate family member is, or has been with the last three years, employed as an executive officer of another company where any Shareholder's or Shareholder's Affiliate's present executive officers at the same time serves or served on that company's compensation committee;

(v) The person is a current employee, or an immediate family member is a current executive officer, of a company that has made payments to, or received payments from, a Shareholder or a Shareholder's Affiliate for property or services in an amount which, in any of the last three fiscal years, exceeds the greater of $1 million, or 2% of such other company's consolidated gross revenues; or

(vi) The person otherwise has a material relationship with a Shareholder or a Shareholder's Affiliate (either directly or as a partner, shareholder or officer of an organization that has a relationship with a Shareholder or a Shareholder's Affiliate).

As used herein, the term "Affiliate" means, when used with respect to a specified person or entity, another person or entity that either directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with, the person or entity specified. For purposes of this definition, "control" (and its derivatives) means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person or entity, whether through ownership of equity, voting or other interests, as trustee or executor, by contract or otherwise.

JS 44 (Rev. 08/16)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

I. (a) PLAINTIFFS

CSX TRANSPORTATION, INC., individually and on behalf of NORFOLK & PORTSMOUTH BELT LINE RAILROAD COMPANY

(b) County of Residence of First Listed Plaintiff Duval County, Florida
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys *(Firm Name, Address, and Telephone Number)*
Robert W. McFarland; Benjamin L. Hatch, Rebecca Gantt; McGuireWoods LLP, 101 West Main St., Ste. 9000, Norfolk, VA 23510

DEFENDANTS

NORFOLK SOUTHERN RAILWAY COMPANY, NORFOLK & PORTSMOUTH BELT LINE RAILROAD COMPANY, JERRY HALL, THOMAS HURLBUT, PHILIP MERILLI, and CANNON MOSS

County of Residence of First Listed Defendant
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ❒ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question *(U.S. Government Not a Party)*
- ❒ 2 U.S. Government Defendant
- ❒ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*

(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	❒ 1	❒ 1	Incorporated *or* Principal Place of Business In This State	❒ 4	❒ 4
Citizen of Another State	❒ 2	❒ 2	Incorporated *and* Principal Place of Business In Another State	❒ 5	❒ 5
Citizen or Subject of a Foreign Country	❒ 3	❒ 3	Foreign Nation	❒ 6	❒ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

Click here for: Nature of Suit Code Descriptions.

CONTRACT
- ❒ 110 Insurance
- ❒ 120 Marine
- ❒ 130 Miller Act
- ❒ 140 Negotiable Instrument
- ❒ 150 Recovery of Overpayment & Enforcement of Judgment
- ❒ 151 Medicare Act
- ❒ 152 Recovery of Defaulted Student Loans (Excludes Veterans)
- ❒ 153 Recovery of Overpayment of Veteran's Benefits
- ❒ 160 Stockholders' Suits
- ❒ 190 Other Contract
- ❒ 195 Contract Product Liability
- ❒ 196 Franchise

REAL PROPERTY
- ❒ 210 Land Condemnation
- ❒ 220 Foreclosure
- ❒ 230 Rent Lease & Ejectment
- ❒ 240 Torts to Land
- ❒ 245 Tort Product Liability
- ❒ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ❒ 310 Airplane
- ❒ 315 Airplane Product Liability
- ❒ 320 Assault, Libel & Slander
- ❒ 330 Federal Employers' Liability
- ❒ 340 Marine
- ❒ 345 Marine Product Liability
- ❒ 350 Motor Vehicle
- ❒ 355 Motor Vehicle Product Liability
- ❒ 360 Other Personal Injury
- ❒ 362 Personal Injury - Medical Malpractice

PERSONAL INJURY
- ❒ 365 Personal Injury - Product Liability
- ❒ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ❒ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ❒ 370 Other Fraud
- ❒ 371 Truth in Lending
- ❒ 380 Other Personal Property Damage
- ❒ 385 Property Damage Product Liability

CIVIL RIGHTS
- ❒ 440 Other Civil Rights
- ❒ 441 Voting
- ❒ 442 Employment
- ❒ 443 Housing/ Accommodations
- ❒ 445 Amer. w/Disabilities - Employment
- ❒ 446 Amer. w/Disabilities - Other
- ❒ 448 Education

PRISONER PETITIONS

Habeas Corpus:
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- ❒ 510 Motions to Vacate Sentence
- ❒ 530 General
- ❒ 535 Death Penalty

Other:
- ❒ 540 Mandamus & Other
- ❒ 550 Civil Rights
- ❒ 555 Prison Condition
- ❒ 560 Civil Detainee - Conditions of Confinement

FORFEITURE/PENALTY
- ❒ 625 Drug Related Seizure of Property 21 USC 881
- ❒ 690 Other

LABOR
- ❒ 710 Fair Labor Standards Act
- ❒ 720 Labor/Management Relations
- ❒ 740 Railway Labor Act
- ❒ 751 Family and Medical Leave Act
- ❒ 790 Other Labor Litigation
- ❒ 791 Employee Retirement Income Security Act

IMMIGRATION
- ❒ 462 Naturalization Application
- ❒ 465 Other Immigration Actions

BANKRUPTCY
- ❒ 422 Appeal 28 USC 158
- ❒ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ❒ 820 Copyrights
- ❒ 830 Patent
- ❒ 840 Trademark

SOCIAL SECURITY
- ❒ 861 HIA (1395ff)
- ❒ 862 Black Lung (923)
- ❒ 863 DIWC/DIWW (405(g))
- ❒ 864 SSID Title XVI
- ❒ 865 RSI (405(g))

FEDERAL TAX SUITS
- ❒ 870 Taxes (U.S. Plaintiff or Defendant)
- ❒ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ❒ 375 False Claims Act
- ❒ 376 Qui Tam (31 USC 3729(a))
- ❒ 400 State Reapportionment
- ☒ 410 Antitrust
- ❒ 430 Banks and Banking
- ❒ 450 Commerce
- ❒ 460 Deportation
- ❒ 470 Racketeer Influenced and Corrupt Organizations
- ❒ 480 Consumer Credit
- ❒ 490 Cable/Sat TV
- ❒ 850 Securities/Commodities/ Exchange
- ❒ 890 Other Statutory Actions
- ❒ 891 Agricultural Acts
- ❒ 893 Environmental Matters
- ❒ 895 Freedom of Information Act
- ❒ 896 Arbitration
- ❒ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ❒ 950 Constitutionality of State Statutes

V. ORIGIN *(Place an "X" in One Box Only)*

☒ 1 Original Proceeding ❒ 2 Removed from State Court ❒ 3 Remanded from Appellate Court ❒ 4 Reinstated or Reopened ❒ 5 Transferred from Another District *(specify)* ❒ 6 Multidistrict Litigation - Transfer ❒ 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing ***(Do not cite jurisdictional statutes unless diversity)***:
15 U.S.C. § 2

Brief description of cause:
Unlawful Monopolization

VII. REQUESTED IN COMPLAINT:

❒ CHECK IF THIS IS A **CLASS ACTION** UNDER RULE 23, F.R.Cv.P.

DEMAND $

CHECK YES only if demanded in complaint:
JURY DEMAND: ☒ Yes ❒ No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE _____ DOCKET NUMBER _____

DATE
10/04/2018

SIGNATURE OF ATTORNEY OF RECORD
/s/ Robert W. McFarland

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

QP-STMT-160

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

I.(a) **Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.

(b) **County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)

(c) **Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".

II. **Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below**; NOTE: federal question actions take precedence over diversity cases.**)

III. **Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

IV. Nature of Suit. Place an "X" in the appropriate box. If there are multiple nature of suit codes associated with the case, pick the nature of suit code that is most applicable. Click here for: Nature of Suit Code Descriptions.

V. **Origin.** Place an "X" in one of the seven boxes.
Original Proceedings. (1) Cases which originate in the United States district courts.
Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.
Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
Multidistrict Litigation – Transfer. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407.
Multidistrict Litigation – Direct File. (8) Check this box when a multidistrict case is filed in the same district as the Master MDL docket.
PLEASE NOTE THAT THERE IS NOT AN ORIGIN CODE 7. Origin Code 7 was used for historical records and is no longer relevant due to changes in statue.

VI. **Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service

VII. **Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

VIII. **Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.

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October 4, 2018

Fernando Galindo, Clerk
Walter E. Hoffman
United States Courthouse
600 Granby Street
Norfolk, VA 23510

Re: CSX TRANSPORTATION, INC., individually and on behalf of NORFOLK & PORTSMOUTH BELT LINE RAILROAD COMPANY
v.
NORFOLK SOUTHERN RAILWAY COMPANY, NORFOLK & PORTSMOUTH BELT LINE RAILROAD COMPANY, JERRY HALL, THOMAS HURLBUT, PHILIP MERILLI, and CANNON MOSS

Dear Mr. Galindo:

Attached to this Complaint are proposed summons forms for the corporate defendants, Norfolk Southern Railway Company and Norfolk & Portsmouth Beltline Railroad Company. As to the individual defendants, Jerry Hall, Thomas Hurlbut, Philip Merilli, and Cannon Moss, Plaintiff intends to seek a waiver of service of process, and will file proposed summons if unable to obtain waivers.

Thank you for your assistance.

Sincerely,

Benjamin L. Hatch

BLH/mgm

Enc.

108054056_1

Before the
SURFACE TRANSPORTATION BOARD

Finance Docket No. 36522

NORFOLK SOUTHERN RAILWAY COMPANY
—PETITION FOR DECLARATORY ORDER

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

CSX TRANSPORTATION, INC., individually and on behalf of NORFOLK & PORTSMOUTH BELT LINE RAILROAD COMPANY,

Plaintiff,

v. Civil Action No. 2:18-cv-530-MSD

NORFOLK SOUTHERN RAILWAY COMPANY, *et al.*,

Defendants.
_____/

PLAINTIFF CSX TRANSPORTATION, INC.'S CONSOLIDATED
OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

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Ex. No.	Description	Confidentiality Designation
1	6/29/19 Email Re: CSX-NIT with handwritten notes (NSR_00306367)	Filed Under Seal (AEO)
2	5/14/09 Email Re: NPBL - Rate Committee (CONFIDENTIAL) (NSR_00084753)	Filed Under Seal (AEO)
3	7/27/09 Email Re: CSX and NPBL - Letter to Manion, with attachment (NSR_00177916)	Filed Under Seal (Confidential)
4	Michael Wheeler, 2/24/20 Deposition Excerpts	Filed Under Seal (Confidential)
5	Donna Coleman, 3/24/20 Deposition Excerpts	Filed Under Seal (Confidential)
6	NS's Response to CSX's Interrogatory No. 1	Filed Under Seal (AEO)
7	Deposition Excerpts of Cannon Moss	Filed Under Seal (Confidential)
8	8/27/18 Email Re: Cannon Moss – NPBL (NSR_00005707)	Filed Under Seal (Confidential)
9	6/12/15 Email Re: Personnel – (Confidential) (NSR_00071467)	Filed Under Seal (AEO)
10	Randall Hunt, 2/18/20 Deposition Excerpts	Filed Under Seal (AEO)
11	Robert Girardot 2d Declaration, dated 3/5/21	Filed Under Seal (AEO)
12	Robert Girardot, 3/17/21 2d Deposition Excerpts	Filed Under Seal (AEO)
13	Thomas Capozzi, 1/22/21 Deposition Excerpts	Filed Under Seal (AEO)
14	CSX's 2d Supp. Responses to Defendant NPBL's Interrog. No. 3 and 4	Filed Under Seal (AEO)
15	7/19/1999 Letter to NPBL Rate Committee(NSR_00199530)	Filed Under Seal (Confidential)
16	8/25/2019 NPBL letter with handwritten notes (NSR_00199524)	Filed Under Seal (Confidential)
17	Sept. 1999 NPBL consent forms (NSR_00199515)	Filed Under Seal (Confidential)
18	1/1/17 Email Re: CSX intermodal doings (NSR_00071344)	Filed Under Seal (AEO)
19	7/31/09 Email Re: Rate Committee Follow up, attaching NS Internal Meeting Notes dated 7/29/09 (NSR_00027070)	Filed Under Seal (Confidential)
20	12/15/06 Letter enclosing 1/1/07 tariff (NSR_00306443)	Filed Under Seal (Confidential)
21	12/27/02 Letter enclosing 2/1/03 tariff (NSR_00306377)	Filed Under Seal (Confidential)

Ex. No.	Description	Confidentiality Designation
22	4/20/09 Letter from Coleman, with attachments (NPBL009639)	Filed Under Seal (AEO)
23	3/29/99 Email Re: NPBL Rates (NSR_00199532)	Filed Under Seal (Confidential)
24	9/26/02 Email Re: NPBL - Rate Structure Committee Recommendations (NS Portion) (NSR_00306424)	Filed Under Seal (AEO)
25	10/24/06 Email Re: NPBL Rate Meeting (NSR_00306426)	Filed Under Seal (AEO)
26	7/16/09 Email Re: Rate Committee Packet, attaching rate committee information (NSR_00074104)	Filed Under Seal (Confidential)
27	6/16/09 Letter from T. Ingram to D. Stinson (CSXT0080856)	Filed Under Seal (Confidential)
28	6/23/2009 Email Re: NPBL Information (NSR_00084730)	Filed Under Seal (Confidential)
29	4/17/09 Email Re: NPBL (NSR_00027114)	Filed Under Seal (Confidential)
30	4/24/09 Email Re: NPBL - Rate Committee (CONFIDENTIAL) (NSR_00011118)	Filed Under Seal (Confidential)
31	9/24/09 NPBL Rate Committee Meeting Recap for NS Participants only (NSR_00035903)	Filed Under Seal (Confidential)
32	10/15/09 Letter from J. Booth (CSXT0082145)	Filed Under Seal (Confidential)
33	10/23/09 Email Re: NS Recommendations, with attachment (NSR_00035548)	Filed Under Seal (Confidential)
34	8/5/10 Letter from D. Stinson Re: Rail Service Connection to NIT _ CSXT Rate Proposal dated July 23, 2010 (NPBL007438)	
35	David Stinson, 2/26/20 Deposition Excerpts	Filed Under Seal (Confidential)
36	8/9/10 NPBL Board Meeting minutes, with handwritten notes (NSR_00000781)	Filed Under Seal (Confidential)
37	Steven Armbrust, 3/11/20 Deposition Excerpts	Filed Under Seal (Confidential)
38	8/5/10 Email Re: CSX NIT Operation Proposal (NSR_00073997)	Filed Under Seal (Confidential)
39	8/30/10 Email Re: CSX NIT Operation Proposal (NSR_00062857)	Filed Under Seal (Confidential)
40	9/3/10 Email Re: CSX NIT Operation Proposal (NSR_00062844)	Filed Under Seal (Confidential)
41	9/8/10 NPBL Board Meeting Minutes (NPBL019920)	Filed Under Seal (Confidential)
42	12/8/10 Email Re: NPB (CSX) Intermodal Service to NIT (NPBL012305)	Filed Under Seal (AEO)
43	12/27/10 Memorandum to NPBL Board Members Re: NPBL Management Response to CSXT Rate Proposal (NPBL012284)	Filed Under Seal (Confidential)
44	12/29/10 NPBL Board Meeting Minutes (NSR_00000704)	Filed Under Seal (Confidential)

Ex. No.	Description	Confidentiality Designation
45	3/1/11 Letter from J. Yates to D. Stinson (NPBL012988)	Filed Under Seal (AEO)
46	4/12/11 Email Re: Agenda for Board of Directors Meeting (CSXT0110423)	Filed Under Seal (Confidential)
47	4/13/11 NPBL Board Meeting Minutes (NPBL017933)	Filed Under Seal (Confidential)
48	9/14/11 Email Re: NPBL - NS Response to MacDonald nomination (CSXT0127526)	Filed Under Seal (AEO)
49	9/16/11 Memorandum and Resolution Re: Selection Process for NPBL President & General Manager (CSXT0027044)	Filed Under Seal (AEO)
50	9/19/11 NPBL Board Meeting Minutes (CSXT0000508)	Filed Under Seal (Confidential)
51	9/23/11 Board Meeting Minutes (CSXT0000509)	Filed Under Seal (Confidential)
52	James Allan, 3/13/20 Deposition Excerpts	Filed Under Seal (AEO)
53	Robert Girardot Declaration dated 2/21/20	Filed Under Seal (AEO)
54	Master Rail Plan for The Port of Virginia (Senate Joint Resolution 69)	
55	Robert Girardot, 1/12/21 Deposition Excerpts	Filed Under Seal (AEO)
56	4/27/09 Email Re: NPBL - Rate Committee (CONFIDENTIAL) (NSR_00011108)	Filed Under Seal (Confidential)
57	4/3/09 Letter from R. Hood to D. Stinson Re: Proposed Purchase of Norfolk and Portsmouth Beltline Property (NPBL006972)	
58	12/2/09 Docket of Proceedings of NPBL Board Meeting (NPBL007205)	
59	7/5/09 Email Re: Port Norfolk Yard, attaching 6/29/09 Letter Re: Market Update (NPBL014367)	Filed Under Seal (AEO)
60	4/2/08 Email Re: NPBL Port Norfolk Yard (NSR_00084773)	Filed Under Seal (AEO)
61	3/31/15 Email Re: CSX Traffic to NIT via NPBL (NPBL010915)	Filed Under Seal (AEO)
62	8/29/12 Email Re: Meeting with VPA, Purdue re PMT (NSR_00065318)	Filed Under Seal (AEO)
63	Ryan Houfek, 12/9/20 Deposition Excerpts	Filed Under Seal (AEO)
64	3/31/15 Email Re: CSX Traffic to NIT via NPBL (SDT RES 000298)	Filed Under Seal (Confidential)
65	4/9/15 Email Re: Request for Operating Window (NPBL005672)	
66	Anthony MacDonald, Deposition Excerpts	Filed Under Seal (Confidential)

Ex. No.	Description	Confidentiality Designation
67	4/9/15 Email Re: Request for Operating Window (NPBL024288)	Filed Under Seal (Confidential)
68	David Luebbers, 2/25/20 Deposition Excerpts	Filed Under Seal (Confidential)
69	MaryClare Kenney, 12/11/20 Deposition Excerpts	Filed Under Seal (AEO)
70	4/19/15 Email re: CSX move request--UPDATE; Information Only (CSXT0154004)	Filed Under Seal (Confidential)
71	6/23/2016 Email Re: CSX move (NPBL005643)	
72	7/29/09 NS Internal Meeting Notes - NPBL Rate Committee Meeting (NSR_00027071)	Filed Under Seal (Confidential)
73	7/9/15 Email Re: NPBL Agreements (NSR_00047112)	Filed Under Seal (Confidential)
74	5/21/15 Email Re: Plan for CSX Loading (CSXT0004998)	Filed Under Seal (Confidential)
75	5/27/15 Email Re: Empties for NIT (CSXT0001528)	Filed Under Seal (Confidential)
76	6/29/15 Email Re: CSX Cars (CSXT0154066)	Filed Under Seal (Confidential)
77	7/31/15 Letter from R. Hunt to C. Moss Re: Notification of intent to cancel certain trackage rights agreements (NSR_00104581)	Filed Under Seal (AEO)
78	4/18/16 Email Re: NPBL Term Sheet (Randy Edit) (NSR_00008141)	Filed Under Seal (Confidential)
79	3/15/16 Meeting Invitation Re: Review Strategy Regarding NIT Access (NSR_00005173)	Filed Under Seal (Confidential)
80	D. Coleman notes (NPBL000189)	
81	4/18/18 Email Re: Rate Proposal for Long Term Rail Service to NIT (NSR_00051329)	Filed Under Seal (Confidential)
82	4/19/18 Email Re: NPBL Agreement Questions (NPBL005881)	Filed Under Seal (AEO)
83	4/3/18 Email Re: NPBL – CSX (NSR_00006321)	Filed Under Seal (Confidential)
84	4/5/18 Email Re: Rate Proposal for Long Term Rail Service to NIT (NPBL006228)	
85	4/16/18 Letter from S. Armbrust Re: Election NPBL Directors at April 2018 Annual Meeting of the NPBL Shareholders (CSXT0101908)	Filed Under Seal (Confidential)
86	4/24/19 Agenda for NPBL Annual Stockholders' Meeting (CSXT0158238)	Filed Under Seal (Confidential)
87	Phillip Merilli, 3/2/20 Deposition Excerpts	
88	Jerry Hall, 2/21/20 Deposition Excerpts	
89	Thomas Hurlbut, 2/21/20 Deposition Excerpts	
90	5/18/18 Letter from S. Armbrust Re: Response of NPBL Management and Board to CSXT's Service Proposal (CSXT0142657)	Filed Under Seal (Confidential)

Ex. No.	Description	Confidentiality Designation
91	CSX Corporate Rep. (Robert Girardot), 1/13/21 Deposition Excerpts	
92	NS Corporate Rep. (Kenneth Joyner), 2/19/20 Deposition Excerpts	Filed Under Seal (AEO)
93	Jeffrey Heller, 3/10/20 Deposition Excerpts	Filed Under Seal (Confidential)
94	Carl Warren Declaration, dated 2/21/20	Filed Under Seal (AEO)
95	2/17/15 Email Re: February 19 Forecast Meeting (NSR_00128851)	Filed Under Seal (AEO)
96	Jay Strongosky, 12/8/20 Deposition Excerpts	
97	Excel - 2016 RFP (CSXT0050597)	Filed Under Seal (AEO)
98	Dean Piacente, 1/15/21 Deposition Excerpts	
99	Carl Warren, 1/6/21 Deposition Excerpts	Filed Under Seal (AEO)
100	2/22/10 NS Ports and International Department Presentation (NPBL003225)	Filed Under Seal (Confidential)
101	9/2/10 Email Re: Questions, with attachment (NSR_00031335)	Filed Under Seal (Confidential)
102	Robert Martinez, 10/23/20 Deposition Excerpts	Filed Under Seal (AEO)
103	Article: "*What's at Stake in North Charleston Rail Debate*?"	
104	VPA Corporate Rep. (Catherine Vick), 1/19/21 Deposition Excerpts	Filed Under Seal (AEO)
105	12/16/15 Email Re: Follow-up (NSR_00122609)	Filed Under Seal (Confidential)
106	Cary Booth, 11/5/20 Deposition Excerpts	Filed Under Seal (Confidential)
107	Michael McClellan, 2/20/20 Deposition Excerpts	Filed Under Seal (Confidential)
108	Christopher Wagel, 12/7/20 Deposition Excerpt	
109	John Booth, 3/12/20 Deposition Excerpts	Filed Under Seal (Confidential)
110	7/25/08 Email re: Routing Containers over Norfolk to Columbus (NSR_00157631)	Filed Under Seal (Confidential)
111	Jeffrey Heller, 10/30/20 2d Deposition Excerpts	Filed Under Seal (Confidential)
112	3/22/17 Email Re [redacted] - Norfolk NIT Activity (CSXT0136053)	Filed Under Seal (AEO)
113	6/19/09 Email Re: CSX and NIT (NSR_00027097)	Filed Under Seal (Confidential)

Ex. No.	Description	Confidentiality Designation
114	6/19/09 Email Re: The Port of Virginia - New On-Dock Rail at NIT (NSR_00027098)	Filed Under Seal (AEO)
115	3/1/17 Email Re: [redacted] (CSXT0096961)	Filed Under Seal (AEO)
116	Excel – Account Notes 2019 (CSXT0013901)	Filed Under Seal (AEO)
117	Fredrik Eliasson, 1/8/21 Deposition Excerpts	Filed Under Seal (Confidential)
118	4/13/18 Letter from J. Reinhart to C. Moss (CSXT0100756)	Filed Under Seal (Confidential)

Plaintiff CSX Transportation, Inc. ("CSX"), by counsel, states as follows in opposition to the Motion for Summary Judgment filed by Defendant Norfolk Southern Railway Company ("NS") (ECF Nos. 307, 308) and the Motion for Summary Judgment filed by Defendant Norfolk & Portsmouth Beltline Railroad Company ("NPBL" or the "Belt Line") (ECF Nos. 296, 297):

INTRODUCTION

CSX's Evidence. CSX is the victim of a decades-long effort by NS, on its own and in combination with NPBL, to exclude CSX from on-dock rail access at Norfolk International Terminal ("NIT"), the most important marine terminal in the Port of Virginia ("POV")—a critical entry point through which almost all major ocean carriers move international intermodal traffic. Defendants' efforts have so far succeeded, resulting in NS charging supracompetitive prices to ocean carriers who rely on NIT and inflicting hundreds of millions of dollars in harm to CSX in the form of lost business. NS has demonstrated an astonishing commitment to preventing CSX from gaining on-dock access at NIT via the NPBL, maintaining its monopoly through every means at its disposal.

In denying multiple motions to dismiss, this Court found CSX's detailed allegations about Defendants' scheme, except for one tortious interference count, were well-pleaded. *See* ECF No. 66. Now, after many months of discovery, Defendants claim that *no reasonable jury* could find those allegations substantiated. The record and the law disprove this remarkable assertion.

As Defendants' documents show, NS has long viewed its stranglehold on NIT as critical to its success. NS's own documents reveal the fundamental motivation underlying its conduct towards CSX since 1999: "[redacted]*?*" Other documents show not only that NS's strategy of blocking CSX was effectively executed, but also the many ways that NS, both independently and in combination with NPBL, inflicted harm on CSX and competition generally.

As one example, in 1999, after learning CSX initiated talks with Virginia International Terminals ("VIT"), the commercial entity that operates NIT, about "[redacted]" a senior NS executive asked an NS colleague: "[redacted]" **CSX Ex. 1** (NSR_00306367). The colleague responded: "[redacted]" *Id.*

As another example, when NS learned in April 2009 that CSX was seeking a lower rate for NPBL services to NIT—which would have benefitted NPBL through significantly increased revenue—NS moved swiftly to block it through its appointed NPBL "rate committee" members and directors. An NS executive wrote to his colleagues: "[redacted]." **CSX Ex. 2** (NSR_00084753 at -754) (emphasis added). As demonstrated by this email, NS saw CSX's access NIT as a threat to its monopoly and "[redacted]" and NS's rate committee members worked to block it. NS was committed to the goal of blocking CSX, and saw the only "challenge" as justifying its blatantly anticompetitive acts. *Id.* at -753. As NS's Luebbers candidly put it, the NS-appointed rate committee members needed simply to "[redacted]" *Id.*; *see also* **CSX Ex. 3** (NSR_00177916) (letter drafted by NS executives prior to NPBL rate committee meeting, urging NS-appointed directors to "[redacted]").

Lest Defendants protest that these examples arise from earlier points in the conspiracy and thus support their statute of limitations arguments, the record also contains evidence of Defendants' actions to block CSX in later years, including 2015 and 2018. *For example*, when a surge in port congestion in early 2015 left CSX with no choice but to pay NPBL's exorbitant switch rate to move traffic to NIT via NPBL, NS-appointed NPBL directors and other NS personnel imposed unreasonable hurdles, making these moves operationally unviable. In total, NPBL moved only a handful of trains for CSX over a period of many months. Meanwhile, NPBL's Cannon Moss forwarded NS marketing personnel his communications with CSX, expressly so NS could protect its own competitive interests.

CSX knew when it brought this case that it had been precluded from rail access to NIT by Defendants' actions. But now Defendants' own documents have demonstrated just how far—and for how long—NS and NPBL have been willing to go to "block" CSX. As illustrated by the vignettes above, and the many more described herein, NS has pursued a decades-long campaign to keep CSX out of NIT via rail in order to preserve its own interests. It did this both *with* NPBL and also *at the expense of* NPBL, as the Complaint detailed and the evidence now shows.

The record amply supports CSX's claims and would certainly enable a reasonable jury to find for CSX with respect to both liability and relief. Summary judgment should be denied.

* * *

Defendants' Arguments. Defendants' arguments in favor of summary judgment rely on errors of law and assertions of fact that are, at the very least, disputed (if not directly contradicted by Defendants' own documents). Moreover, the Court should evaluate Defendants' current arguments against the backdrop of the inconsistent arguments, positions, and concessions they have previously advanced. Most strikingly, NPBL claimed at the motion to dismiss stage that it

was incapable of conspiring with NS because the Defendants were a unitary entity under the *Copperweld* doctrine. *See* ECF No. 66 at 29. After its first motion was denied, NS filed a new motion to dismiss, belatedly claiming it "control[led]" NPBL. That motion remains pending. *See* ECF No. 115. But these arguments appear to have been forgotten by Defendants, who now argue there is *no evidence* of collusion. Defendants never bother to explain how they can assert that, on the one hand, they are a solitary unit with one controlling the other, while on the other hand claim there is no evidence from which a reasonable jury could conclude they worked in concert.

NS's tardy, still-pending motion to dismiss and for judgment on the pleadings also asserts that "NSR's exercise of control over NPBL—which is directly at issue in this litigation—is exempt from the federal antitrust and state law conspiracy claims asserted by CSXT." ECF No. 116 at 10. This was a curious argument at the time, considering NS had conceded this point in its first, unsuccessful motion, but it is more curious still to see that NS has barely acknowledged this "exemption" argument in its current motion. Indeed, NS only notes briefly in passing that STB oversight "militates against antitrust intervention here." NS Br. at 32.

The arguments Defendants do advance at this stage fare no better, whether as a matter of fact or law. Defendants contend, for example, that CSX's antitrust claims are barred by the applicable limitations periods. It is well-settled, however, that Defendants cannot rely on the statute of limitations to escape the consequences of their continuing antitrust violations. Defendants' statute of limitations arguments as to CSX's other claims fail for the reasons this Court previously identified in ruling on Defendants' motions to dismiss, which are now borne out by the factual record. Defendants also claim that the actions of NS-appointed NPBL directors cannot be attributed to NPBL for purposes of conspiracy. This argument misstates basic tenets of agency law, which provides that an individual director can be found to act on behalf of the

corporation that he or she directs. It further ignores the substantial record evidence of conspiracy *not* involving the NS-appointed directors.

Defendants also argue that CSX has not properly supported its antitrust claims. NS's arguments about unilateral conduct and essential facilities are wrong on the law, and its protestations about the market ignore the realities of international intermodal transportation. NS—which maintains nearly 90 percent of international intermodal business at NIT and nearly 75 percent at the Port of Virginia ("POV") intermodal terminals—also suggests that CSX should not complain about the anticompetitive harm inflicted because "CSX's intermodal container traffic at NIT has *increased* by over 700% since 2010." NS Br. at 1. This statistic is misleading, as evidenced by the fact that such an increase in CSX's traffic has nonetheless failed to make a dent in NS's monopoly hold on the market. That NS would exaggerate the significance of CSX's growth at POV is unsurprising, in light of the substantial evidence showing NS's use of every tool at its disposal to combat CSX's efforts to economically access NIT. Between 2010 and 2020, the *total* volume of international intermodal business at the Port of Virginia increased substantially through infrastructure improvements and the expansion of the Panama Canal. CSX has competed vigorously for business wherever it can, despite the illegal constraints imposed by NS and NPBL. But CSX's share of international intermodal traffic at NIT remains a small fraction of NS's. Indeed, the empirical data show that the vast majority of CSX's gains in market share come from its success at POV's other container terminal, Virginia International Gateway ("VIG")—where CSX is able to offer on-dock rail service and thus compete on equal footing with NS.

Defendants remaining arguments hinge on disputed facts that must be resolved by a jury. For instance, Defendants insist that CSX has access to NIT via NPBL, but just chooses not to pay the rate to use it. The record evidence shows, however, that the rate is set at a level designed to

completely insulate NS from competition, and which has had the intended effect of making it economically infeasible for CSX to use NPBL for intermodal traffic. Defendants also suggest that NPBL could not accept CSX's proposals due to the "uniform rate" provision in its Operating Agreement—an argument this Court already rejected at the motion to dismiss phase. A reasonable jury clearly could find that CSX proposed a rate for intermodal service to NIT, which could have been published in a tariff and "uniformly" applied to other customers wanting to use the service. Moreover, missing from Defendants' briefs, despite their protestations that the $210 rate is required to cover NPBL's costs, is the fact that every time NPBL management evaluated CSX's proposals, it determined that it would *make a profit* at the rate proposed by CSX. Why would NPBL *not* adopt a proposal it considered profitable, that would mutually benefit itself *and* one of its owners, and that would be consistent with the purpose for which it was created? A reasonable jury could easily conclude on this record that the answer is the conspiracy between itself and NS. Not to mention, even when CSX paid NPBL's excessive rate to move trains in 2015, Defendants acted in concert to prevent CSX from reasonably accessing NIT at *any* price.

The record reflects overwhelming evidence of conspiracy and anticompetitive conduct, supporting CSX's timely claims and undermining Defendants' arguments. Though NS suggests NIT is fungible with any other port on the East Coast, the record evidence and its own actions belie that claim. The Court need look no further for evidence of monopoly power and exclusionary conduct than NS's own documents, which demonstrate its deliberate and persistent efforts to keep CSX out of NIT at all costs because, in its own words, it had "the most to lose."

Defendants' motions should be denied so that a jury may weigh the evidence.

STATEMENT OF DISPUTED MATERIAL FACTS

Defendants' statements of fact overlap considerably. CSX responds to both in a consolidated

fashion here, with citations to the specific paragraph numbers from each. CSX does not dispute the facts contained in NS SOF ¶¶ 1-3, 5-7, 13-14, 18, 46-47, 51, 53, and 57, or in NPBL SOF ¶¶ 1-5, 11-14, 16-17, 20-22, 34, and 37.[1] All other facts are disputed, as explained below.

I. The Parties

[Disputed: NS SOF ¶¶ 4, 16-17; NPBL SOF ¶ 6]

1. CSX and NS are Class 1 railroads operating in the eastern United States. NS SOF ¶ 1; ECF No. 66 at 2. NPBL is a terminal switching railroad (sometimes called a "short line") in Hampton Roads, Virginia. NS SOF ¶ 2; NPBL SOF ¶¶ 1-2. NPBL is currently owned 57% by NS and 43% by CSX. NS SOF ¶ 3; NPBL SOF ¶ 4.

2. NPBL was founded by eight railroads in 1896 "for the mutual benefit of each [of the railroads] in the interchange of business." ECF No. 1-1 at 3. NPBL's Operating Agreement provides that each railroad will have "equal representation" in the Belt Line, *see id.*, and that each must "co-operate cordially in encouraging the business of the [NPBL]," *id.* at 6.

3. In 1989, the NPBL's then-existing owners—CSX, Norfolk and Western Railway Company ("NW") and Southern Railway Company ("SR")—agreed to amend "Article Fourth" of the Operating Agreement to allow CSX to appoint two directors and NW and SR to collectively appoint three.[2] NS SOF ¶ 3, NPBL SOF ¶ 5. This agreement expressly did not "amend, alter, or affect any other provision of the NPBL Agreement." NS Ex. 3 ¶ 2.

4. NPBL's president is the sixth voting member of the Belt Line's Board. NPBL SOF ¶ 5. Since at least 2005, the NS-controlled NPBL Board has installed a former NS employee in this position. *See* **CSX Ex. 4** (Wheeler Dep. 31:18-22); **CSX Ex. 5** (Coleman Dep. 27-17-21;

[1] CSX refers to its exhibits as "CSX Ex.," NS's as "NS Ex.," and NPBL's as "NPBL Ex."

[2] NW and SR subsequently finalized their merger, becoming NS. *See* NS SOF ¶ 3 & n.2.

53:11-13). The two most recent past presidents, who served from 2005 to 2011, returned to work at NS following their tenures at the Belt Line. *See* **CSX Ex. 4** (Wheeler Dep. 32:1-4); **CSX Ex. 6** (NS's Resp. to CSX's Interrog. No. 1 at 9, 14). Current NPBL President Cannon Moss has made clear he intends to do the same. *See* **CSX Ex. 7** (Moss Dep. 24:1-11); **CSX Ex. 8** (NSR_00005707); **CSX Ex. 9** (NSR_00071467). Donna Coleman—NPBL's Vice President, Comptroller, and Corporate Secretary and a non-voting member of the NPBL Board—is also a former NS employee. *See* **CSX Ex. 5** (Coleman Dep. 9:15-16, 20:6-9).

5. Under the Operating Agreement, the Belt Line's purpose is to interchange railcars for its owners, meaning that NPBL receives cars from NS or CSX and delivers them to locations on its tracks, or vice versa. NPBL SOF ¶ 3.

6. One location for which NPBL provides switching services is Norfolk International Terminal ("NIT"), the largest marine terminal in Virginia and one of the most important terminals for international intermodal cargo on the East Coast. *See* NS Ex. 7 ¶ 24 & Ex. 3; NS Ex. 71 ¶ 53 & Ex. 4. NIT is owned by the VPA and operated by VIT. *See* NS SOF ¶ 18.

7. NS has access to on-dock rail at NIT over its own tracks.[3] NS SOF ¶ 14. NS currently travels through NIT in a continuous clockwise fashion, in part by traversing tracks owned by NPBL, for which NS pays a nominal trackage rights fee. *See* **CSX Ex. 10** (Hunt Dep. 20:2-22:24); **CSX Ex. 7** (Moss Dep. 164:6-16).

8. NPBL has on-dock access at NIT via trackage rights over NS's tracks. NS SOF ¶ 14. NPBL currently can enter and exit NIT using the terminal's "North Gate." *See* NS SOF ¶ 17. Railroads effectively manage operational patterns much like NPBL's at other terminals. *See*

[3] The term "on-dock" refers to a railroad's ability to move its train into a marine terminal so that containers can be loaded onto railcars either on or near the dock itself. *See* NS Ex. 10 ¶ 25.

CSX Ex. 11 (2d Girardot Decl. ¶ 10); **CSX Ex. 12** (2d Girardot Dep. 86:24-93:12). Tom Capozzi, VIT's Chief Sales Officer (*see* NS SOF ¶ 18), testified that "[redacted]" about NPBL's route at NIT.[4] **CSX Ex. 13** (Capozzi Dep. 40:9-20).

9. Although NPBL does not compete for ocean carrier business, NS SOF ¶ 4; NPBL SOF ¶ 6, NPBL and NS are the only two means to access on-dock rail at NIT, *see* NS SOF ¶ 14.

II. "[redacted]?": NS and NPBL Conspire to Block CSX at NIT

10. For more than two decades, NS and NPBL have conspired to maintain NS's control of intermodal freight moving by rail through the Port of Virginia ("POV"). Defendants have produced *dozens* of internal documents and communications evidencing this conspiracy and the many overt acts committed to further it. *See* **CSX Ex. 14** (CSX's 2d Supp. Resp. to NPBL's Interrog. No. 3 & 4) (describing documents reflecting NPBL's participation in the conspiracy).

11. Defendants' goal is to block CSX's ability to access on-dock rail at NIT. For example, after learning CSX initiated talks with VIT "[redacted]," NS VP of Intermodal Michael McClellan asked an NS colleague: "[redacted]?" **CSX Ex. 1** (NSR_00306367) (emphasis added). NS intermodal manager Augie Eckhardt responded: "[redacted]." *Id.* (emphasis added). Defendants eventually did increase the NPBL switch rate and formulate a trackage rights "dispute." *See* CSX SOF ¶¶ 56-61.

[4] Although NS suggests NS's and NPBL's varying routes mean "two trains *cannot* be on the tracks at the same time," none of the documents cited says that. *See* NS SOF ¶ 17. Moreover, as the cited testimony from CSX's former Portsmouth terminal manager Tony MacDonald shows, any challenges associated with NPBL's current route or coordination with NS trains could be alleviated by the Port or NS allowing NPBL to access NIT via the southern gate. *See* NS Ex. 19 at 93:9-14.

12. As NS's VP of Strategic Planning has explained, CSX's ability to compete for international intermodal business is limited because [redacted]." **CSX Ex. 18** (NSR_00071344) (emphasis added).

13. NS has handled between [redacted]% and [redacted]% of international intermodal business at the Port of Virginia—and between [redacted]% and [redacted]% at NIT—between 2009 and 2020. *See* **CSX Ex. 6** (NS's Resp. to CSX's Interrog. No. 6); NS Ex. 71 ¶ 111 & Ex. 13.

a. Defendants Use NPBL's Switch Rate to Block CSX
[Disputed: NS SOF ¶¶ 42-44; NPBL SOF ¶¶ 7-8]

14. One way Defendants have blocked CSX's access to on-dock rail at NIT is through NPBL's switch rate. Although the NPBL Operating Agreement states that "a uniform rate shall be fixed for the movement of freight cars . . . regardless of distance," *see* NS SOF ¶ 42; NPBL SOF ¶ 7, the NPBL Board has the ability to and historically has "agree[d] to override" this provision, such as by approving rates that vary by commodity type and international versus domestic business. **CSX Ex. 5** (Coleman Dep. 137:21-138:8); *see also* **CSX Ex. 19** (NSR_00027070) ("[redacted] **CSX Ex. 20** (NSR_00306443); **CSX Ex. 21** (NSR_00306377).

15. The Operating Agreement also provides that the NPBL rate may be "adjusted from time to time as to yield a net revenue sufficient to pay . . . a dividend of six per cent" to its owners. ECF No. 1-1 at 6. Defendants suggest that this provision prohibits the Belt Line from earning any profit, *see* NPBL SOF ¶ 7; NS SOF ¶ 43, but nothing in the Operating Agreement prohibits NPBL from earning revenues in excess of the 6% dividend, and NPBL's own documents reflect that profitability is one of its goals. *See, e.g.*, NPBL Ex. 4 (NPBL Annual Reports 2010-2019, each describing intent to "[redacted]").

16. NPBL periodically convenes "rate committees," purportedly to "evaluate and propose adjustments to the switch rate to the NPBL Board for a vote." NS SOF ¶ 44; *see also* **CSX Ex. 22** (NPBL009639). Historically, these committees have been comprised of NPBL management and NS and CSX personnel. *See* **CSX Ex. 5** (Coleman Dep. 110:6-15).

17. NS has long used NPBL rate committees to monitor CSX's activities in the region and preserve its control of NIT. *See, e.g.*, **CSX Ex. 23** (NSR_00199532) (1999 message from NS's Bob Belvin to members of the 1999 NPBL rate committee and NS-appointed NPBL directors, stating that [redacted]"); **CSX Ex. 24** (NSR_00306424) (email from NS intermodal market manager Chris Luebbers, summarizing 2002 rate committee meeting, including NS's concern that [redacted]"); **CSX Ex. 25 (**NSR_00306426 at -427) (email from Luebbers, summarizing 2006 committee's recommended [redacted]").

b. The 2009 Rate Committee

18. In 2009, NPBL convened a rate committee "[redacted]." **CSX Ex. 26** (NSR_00074104 at -107). [redacted] "[redacted]. **CSX Ex. 19** (NSR_00027070 at -071). As part of the discussion, CSX recommended NPBL reduce its rate to allow for CSX intermodal traffic to NIT, which would increase NPBL's revenues. *See* **CSX**

Ex. 27 (CSXT0080856) (June 2009 letter from CSX's Tony Ingram to NPBL's David Stinson); **CSX Ex. 19** (NSR_00027070 at -073).

19. The NS-appointed members of the NPBL rate committee had a different goal. As NS's Chris Luebbers explained in an April 2009 email to NS-appointed rate committee members Liesl McLemore and Gregg Cronk: *"[* [redacted] **CSX Ex. 2** (NSR_00084753 at -754) (emphasis added). According to Luebbers, the rate committee was a high priority for NS's intermodal group because "[redacted]." *Id.* at -753.

20. NS rate committee members internally discussed how to combat CSX's position "[redacted]." **CSX Ex. 28** (NSR_00084730) (emphasis added); *see also* **CSX Ex. 29** (NSR_00027114) (April 2009 email string with Luebbers, NS's VP of Intermodal & Automotive Jeff Heller, and NS-appointed NPBL director Mark Manion, discussing trackage at NIT, which Heller describes as "[redacted]"); **CSX Ex. 30** (NSR_00011118) (April 2009 email from NS's Luebbers to NS rate committee members McLemore and Cronk, warning that a lower NPBL rate at NIT "[redacted]").

21. Two days before the rate committee's July 2009 meeting, NS intermodal executives drafted a letter to NS-appointed NPBL director Mark Manion and the other NS-appointed members of the NPBL Board, titled "[redacted]." **CSX Ex. 3** (NSR_00177916). The letter describes that "[redacted]

[redacted] *Id.* at -917. Though the rate committee had yet to meet, the letter included NS's assumption that [redacted]. *Id.* It concludes: "[redacted]"[5] *Id.* at -918 (emphasis added).

22. At the July 29, 2009 rate committee meeting, NPBL management made several proposals to the committee. *See* **CSX Ex. 26** (NSR_00074104 at -123). First, management recommended replacing the existing $[redacted] rate and the $[redacted] rate with a single $210 line-haul switch rate, not out of concern for any perceived violation of the NPBL Operating Agreement, but because the NS accounting systems used by the Belt Line could not handle the two-tiered structure. *See* **CSX Ex. 19** (NSR_00027070 at -073); *see also* **CSX Ex. 5** (Coleman Dep. 117:18-118:18) (NPBL wanted to eliminate dual rates because it could not distinguish between domestic and import/export traffic).

23. NPBL management also recommended adopting a $[redacted] per car rate for "unit trains," i.e., trains moving more than forty cars to one destination under a single waybill. **CSX Ex. 19** (NSR_00027070 at -073). Management developed this rate by reviewing rates charged by other short lines for similar services and evaluating NPBL's costs in a "worst case" scenario. *See id.* CSX expressed interest in using this rate to move trains of intermodal freight to and from NIT,

[5] This is not the first time that NS personnel sought to influence the votes of NS-appointed NPBL directors to preserve NS's competitive position, without regard for NPBL's independent business interests. *See, e.g.*, **CSX Ex. 15** (NSR_00199530); **CSX Ex. 16** (NSR_00199524) ([redacted] *and* **CSX Ex. 17** (NSR_00199515) [redacted]").

though these moves involved multiple waybills. *See id.* NPBL management said that it was not opposed to dropping the "one waybill" requirement for this traffic. *See id.*

24. Within days of this meeting, NS's Luebbers sent NS rate committee members McLemore and Cronk his draft recommendations, including that the NPBL Board should "[redacted]"—a proposal that would *increase* the rate for CSX's traffic to NIT. **CSX Ex. 19** (NSR_00027070 at -070); *see* CSX SOF ¶ 17. Luebbers debated whether NS should recommend approving the $210 switch rate, but recommended "against the $[redacted] unit train per car rate" proposed by NPBL management. *Id.* As he explained:

[redacted] Id.

25. During the next rate committee meeting, CSX committee members supported the consolidated $210 rate *and* the [redacted] per car unit train rate proposed by NPBL management. **CSX Ex. 31** (NSR_00035903 at -905). CSX also explained that it wanted to develop an operating plan to move regular volumes to NIT at the $[redacted] per car rate. *Id.*

26. NS rate committee members opposed the $[redacted] rate, questioning whether the analysis conducted by NPBL management was sufficient. *Id.* After NS raised this issue, management suggested it would reconsider its evaluation, stating that "[redacted]." *Id.* NS rate committee members encouraged NPBL to negotiate "[redacted]" rather than incorporating the $[redacted] rate into the tariff. *Id.*

27. Following this meeting, the CSX-appointed members of the NPBL rate committee submitted a formal recommendation to the NPBL Board, including an economic and operational

analysis supporting the [redacted] per car unit train rate proposed by Belt Line management. **CSX Ex. 32** (CSXT0082145 at -146). CSX also proposed adding a volume-based discount to the line-haul tariff, to increase NPBL's revenue and "sharply enhance [NPBL's] business prospects and competitive offerings." *Id.*

28. The NS-appointed rate committee members submitted a formal recommendation opposing the $[redacted] rate. **CSX Ex. 33** (NSR_00035548). They recommended the NPBL Board disapprove this rate because "[redacted]" *Id.* at -549.

29. In December 2009, NPBL management presented the Board with proposed tariff changes, including the $210 line-haul rate but *not* the $[redacted] per car unit train rate or the volume-based discount proposed by CSX. *See* NPBL Ex. 19 at -302, -318. The three NS-appointed NPBL directors voted to adopt the changes in the NPBL proposed tariff "[redacted]" *See id.* at -302. Neither CSX-appointed director voted to approve the tariff. *Id.* The $210 rate became effective on January 1, 2010, and it remains in effect today. NS SOF ¶ 47; NPBL SOF ¶ 8.

c. CSX's 2010 Proposal
[Disputed: NS SOF ¶¶ 54-55; NPBL SOF ¶¶ 25-27]

30. In early 2010, in response to NS's purported desire to review a "[redacted]," *see* **CSX Ex. 33** (NSR_00035548 at -549), CSX developed a comprehensive plan to access on-dock intermodal container service at NIT via NPBL. *See* NS Ex. 91 (NPBL007431) ("2010 Proposal"). In the 2010 Proposal, CSX proposed paying NPBL $37.50 per container for intermodal traffic to and from NIT, a rate higher than that charged by Commonwealth Railway ("CWRY"), the short line providing switching services to NS and CSX at VIG, the terminal just across the Elizabeth River from NIT. *Id.* at -433. To reduce any risk to

NPBL, CSX included a volume commitment, *see id.*, and offered to allow NPBL to use CSX's locomotives and fuel *for free*, *id.* at -432. The 2010 Proposal also included a detailed operating plan. *Id.* Given NS's recommendation that NPBL should negotiate "[redacted]" instead of a tariff, *see* **CSX Ex. 31** (NSR_00035903 at -905), CSX offered in the 2010 Proposal to memorialize the proposed terms in a contract, *see* NS Ex. 91 at -433; *see also* NS SOF ¶ 53, though nothing in the proposal was inconsistent with the rate being applied to other NPBL customers.

31. David Stinson, then-president of the Belt Line, responded to the 2010 Proposal on August 5, 2010. *See* **CSX Ex. 34** (NPBL007438). Stinson stated that CSX's proposal would require hiring more personnel, which he projected would reduce NPBL's potential increased operating income under the proposal from $146,000 to $85,000. *See id.* at -438; *see also* **CSX Ex. 35** (Stinson Dep. 164:19-167:11) (NPBL management did no analysis suggesting the proposal would not generate positive operating income). Stinson also questioned whether the proposal complied with the Operating Agreement's "uniform rate" provision (*see* CSX SOF ¶ 14), and a prohibition on "foreign" locomotives in the NPBL by-laws. *See* **CSX Ex. 34** at -438. CSX promptly addressed Stinson's concerns, explaining that it was not opposed to the proposed rate being incorporated into NPBL's tariff or NPBL using its own locomotives (which are leased from NS). *See* **CSX Ex. 36** (NSR_00000781 at -819); **CSX Ex. 37** (Armbrust Dep. 203:1-14). Stinson testified that this response addressed his concerns. *See* **CSX Ex. 35** (Stinson Dep. 157:1-159:24).

32. Shortly after CSX submitted the 2010 Proposal, NS began to "review" it. *See* **CSX Ex. 38** (NSR_00073997). NS's Chris Luebbers—an intermodal sales and marketing manager with no operational experience and no affiliation with NPBL (*see* **CSX Ex. 4** (Wheeler Dep. 123:5-13))—took the lead. Over the next several weeks, NS employees worked to identify economic

and operational barriers that could be used to "argue" against the proposal, including route timing and terminal congestion. *See* **CSX Ex. 39** (NSR_00062857); **CSX Ex. 40** (NSR_00062844).

33. At the September 8, 2010 NPBL Board meeting, NPBL management presented the 2010 Proposal to the Board. *See* **CSX Ex. 41** (NPBL019920). The Board directed management "[redacted]." *Id.* Management was to report back "in 30 days." *Id.* Despite these statements, handwritten meeting notes from an unidentified NS-appointed NPBL director reflect that NS had no intention of fairly assessing the proposal. *See* **CSX Ex. 36** (NSR_00000781 at -781) ("[redacted]").

34. On October 8, 2010, Stinson relayed to the NPBL Board that management had met with NS operations to evaluate the 2010 Proposal, and that he would update the Board within 30 days after receiving additional information from NS. *See* **CSX Ex. 42** (NPBL012305). Sixty days later, however, NS had still not produced Stinson the information. *See id.*

35. On December 27, 2010, the CSX-appointed members of the NPBL Board sent a memorandum to the Board, requesting that it (1) act to remove any barriers preventing fair consideration of the 2010 Proposal, and (2) direct NS to conclude its operational review of the 2010 Proposal no later than March 30, 2011. **CSX Ex. 43** (NPBL012284).

36. At the December 29, 2010 NPBL Board meeting, Stinson presented "[redacted]" **CSX Ex. 44** (NSR_00000704 at -712). Management's analysis showed that the proposal would result in positive net income to NPBL *under either scenario*. *See id.* at -736.

37. Following discussion, a motion was made and seconded that NPBL be allowed to use CSX locomotives in service to NIT. *Id.* at -712. Before a vote could be taken, however, NS-

appointed members of the NPBL Board moved to table the vote "[redacted]." *Id.* The motion at first did not pass because Stinson voted against it, along with the two CSX-appointed directors. *Id.* An amended motion to table the vote, which promised that [redacted] was unanimously approved. *Id.*

38. On March 1, 2011, NS's Jeff Yates rejected Stinson's request for service to NIT in connection with the 2010 Proposal. *See* **CSX Ex. 45** (NPBL012988). This letter does not mention (much less "address") the locomotive issue discussed at the December Board meeting.

39. On April 11, 2011—approximately eight months after CSX's proposal was tendered to NPBL for consideration—NS-appointed NPBL director Jake Allison emailed NPBL's Donna Coleman, stating for the first time that the NS-appointed directors believed [redacted] **CSX Ex. 46** (CSXT0110423). Allison also said the NS directors did not believe the Board could [redacted], *see* CSX SOF ¶¶ 14, 26.

40. At the April 2011 NPBL Board meeting, a vote was requested on the motion about NPBL's use of CSX's locomotives. *See* **CSX Ex. 47** (NPBL017933 at -938). The motion did not pass because all NS-appointed Board members voted against it.[6] *Id.* Soon after, NS removed

[6] Defendants' suggestion that the 2010 Proposal was never raised for a vote (NS SOF ¶ 55; NPBL SOF ¶ 27) ignores the evidence reflecting multiple attempts by CSX to obtain a vote on core

Stinson as president and replaced him with current NPBL President Cannon Moss, who had been employed in a business development role at NS. *See* **CSX Ex. 7** (Moss Dep. 15:21-16:7).

41. When NS first nominated Moss as Stinson's replacement, CSX expressed serious concerns about his qualifications based on his limited experience with rail operations. *See* **CSX Ex. 48** (CSXT0127526). CSX proposed a candidate with significantly more relevant experience, but the NS-appointed members of the NPBL Board refused to interview him and installed Moss over CSX's objections. *See* **CSX Ex. 49** (CSXT0027044) (Sept. 11, 2011 memorandum from CSX-appointed directors, asking the Board conduct interviews before selecting a new president); **CSX Ex. 50** (CSXT0000508) (Sept. 14, 2011 Board minutes reflecting Board agreed to table election pending interviews of proposed candidates); **CSX Ex. 51** (CSXT0000509) (Sept. 19, 2011 Board minutes installing Moss as president without conducting the requested interviews and without all CSX directors present).

42. Defendants suggest that, in developing the 2010 Proposal, CSX did not consider NPBL's costs. NS SOF ¶ 54; NPBL SOF ¶ 26. None of the evidence cited supports this conclusion. First, all of the testimony from CSX witnesses relates to the 2009 rate committee, not the 2010 Proposal. *See* NS Ex. 92 at 69:4-8, 72:7-11, 123:19-124:4 (John Booth testifying that, in supporting the 2009 rate committee, he did not *personally* review NPBL's costs, because "[o]ther folks on the committee . . . dealt with that"), NPBL Ex. 20 at 124:2-4 (same); **CSX Ex. 52** (Allan Dep. 127:7-135:15) (CSX's James Allan testifying that the recommended volume-based discount was based on revenue, not cost, but also noting CSX *did* consider incremental costs to NPBL associated with additional traffic). The only cited testimony pertaining to the 2010 Proposal comes

elements of the proposal, as well as the evidence of artificial barriers constructed by NS to delay and ultimately prevent a vote. *See* **CSX Ex. 37** (Armbrust Dep. 211:17-213:7).

from NS's Mike Wheeler, who said that the NPBL Board [redacted]. *See* NS Ex. 80 at 117:14-118:7; *see also* **CSX Ex. 4** (Wheeler Dep. 119:16-120:6) ([redacted]"). The financial analysis requested by NS-appointed directors showed the Belt Line would cover its costs *and* make money under either scenario. *See* CSX SOF ¶ 36.

d. Defendants Impose Logistical and Operational Obstacles to Access NIT
[Disputed: NS SOF ¶¶ 15, 63-67, 75-77; NPBL SOF ¶ 10, 15, 19, 28-33, 35]

43. In 2008, NS discontinued service on a segment of track located near NIT, often called the "Diamond," where NPBL had maintained trackage rights.[7] NS SOF ¶¶ 76-77; NPBL SOF ¶¶ 19-20. The Diamond had allowed NPBL to access NIT via "an efficient, progressive move." **CSX Ex. 53** (Girardot Decl. ¶ 7). Without it, NPBL trains carrying CSX intermodal freight must travel a longer distance and move into NS's Portlock Yard, where engines have to be attached to the back of the train before proceeding along NS's track (where NPBL has trackage rights) to NIT. *Id.*; *see also* **CSX Ex. 7** (Moss Dep. 170:11-172:20); **CSX Ex. 10** (Hunt Dep. 159:3-160:7). As the Port of Virginia has recognized, this increases CSX's operational costs to access NIT. *See* **CSX Ex. 54** at 23; *see also* **CSX Ex. 53** (Girardot Decl. ¶ 7) (removal of Diamond results in long delays and unequal treatment relative to NS trains); **CSX Ex. 55** (Girardot Dep. 93:5-95:20) (describing burdensome operations required to access NIT via NPBL without the Diamond); **CSX Ex. 56** (NSR_00011108) (2009 email from NS's Luebbers, explaining that the Diamond "was conveniently removed when the Ford plant shut down").

44. In 2009, NPBL rejected CSX's offer to purchase the Belt Line's Port Norfolk Yard

[7] Although NPBL suggests the NPBL Board agreed to discontinue its trackage rights due to "costs," NPBL SOF ¶ 19, the meeting minutes cited imply the Board discussed costs associated with an "alternative route" to the Diamond. *See* NPBL Ex. 16 at -847.

(also known as "Pinner's Point"), despite its declining revenues and stated need to increase its cash flow. *See* **CSX Ex. 57** (NPBL006972); **CSX Ex. 58** (NPBL007205 at -213). NPBL's Stinson characterized CSX's opening offer as [redacted]. *See* **CSX Ex. 59** (NPBL014367 at -369). NS identified CSX's offer to purchase this property as a threat, because it would have [redacted] **CSX Ex. 3** (NSR_00177916 at -917). NS personnel asked NS-appointed NPBL directors to "[redacted]" on this issue.[8] **CSX Ex. 3** (NSR_00177916 at -918); see also **CSX Ex. 30** (NSR_00011118) (NS's Cronk: "[redacted] NS's Luebbers: "[redacted]"); **CSX Ex. 60** (NSR_00084773) (email between Heller and NS's John Friedmann, noting that NS was "[redacted]").

45. Apart from one unique instance in 2010,[9] NPBL moved no international intermodal

[8] NS's suggestion the NPBL Board collectively agreed that NPBL "should hold off on selling" the Pinner's Point property, NS SOF ¶ 75, misunderstands the timeline of events. After rejecting CSX's offer in 2009, NPBL executed an agreement to sell the property to a third party, but that sale eventually fell through. *See* NS Ex. 83 at 91:5-12. Nearly two years later, in connection with a *new* unsolicited purchase offer, the NPBL directors agreed selling was not in the best interests of NPBL. *See* NS Ex. 86.

[9] In January 2010, CSX paid the $210 rate to NPBL for the movement of a single train from NIT, to accommodate a customer's need for a one-time move of empty containers from Virginia to Wilmington, North Carolina. **CSX Ex. 63** (Houfek Dep. 101:18-106:24). CSX used this as a "PR" opportunity, including having professional photographs taken of the train. *Id.* at 105:16-21. These benefits, combined with the ability to "[redacted]" led one

traffic for CSX until March 2015. **CSX Ex. 5** (Coleman Dep. 179:10-19); **CSX Ex. 61** (NPBL010915). At that time, during a period of extreme port congestion across the East Coast, CSX paid NPBL's $210 rate to move backlogged freight at NIT, recognizing that doing so under these circumstances would "[redacted]." **CSX Ex. 52** (Allan Dep. 172:16-173:9); *see also* NPBL SOF ¶ 33.[10]

46. To move this traffic, NPBL President Cannon Moss requested that NS provide a window during which NPBL could operate a CSX train across its tracks to NIT. **CSX Ex. 61** (NPBL010915). This request met with a negative reaction within NS, culminating in NS's VP of Transportation and NS-appointed NPBL Board member Terry Evans responding: "[redacted]" *Id.* at -915.

47. Although NS eventually agreed to provide an operating window for this train, it voiced "[redacted]." *Id.* at -917; *see also id.* ("[redacted]."). NS outlined strict parameters restricting how and when NPBL and VIT were to move this single train. *Id.* VIT's Tom Capozzi testified that [redacted]." **CSX Ex. 13** (Capozzi Dep. 238:12-239:9); **CSX Ex. 64** (SDT RES 000298) ("[redacted],

person at CSX to conclude that the $210 rate for this single train was "[redacted]." *Id.* 106:16-106:24 (describing the various "strategic benefits" of operating this train).

[10] NPBL's cites CSX's MacDonald's testimony for the proposition that CSX paid the NPBL's tariff only for "loaded wells," *see* NPBL SOF ¶ 33; however, neither the cited testimony nor any other evidence proffered by NPBL confirms that the rate does not also apply to empty wells. *See* NPBL Ex. 12 at 140:14-141:8. In fact, MacDonald testified that the $210 switch charge applied to loaded *and* empty cars moving to NIT. *See* **CSX Ex. 66** (MacDonald Dep. at 136:17-138:1). At a minimum, this is a disputed fact.

[redacted].”). According to Capozzi, [redacted]. *See* **CSX Ex. 13** (Capozzi Dep. 238:23-24).

48. After the first train in April 2015, CSX tried to use NPBL to move other international intermodal freight to and from NIT, but NS imposed serious difficulties, repeatedly refusing to provide operating windows based on vague, unexplained “proprietary issues.” *See, e.g.*, **CSX Ex. 65** (NPBL005672) (NPBL unable to provide operating window due to NS’s claimed “proprietary operational issues”).

49. When CSX’s Portsmouth terminal manager Tony MacDonald spoke with the NS trainmaster, he was told: “[P]roprietary means proprietary. If you don’t work for the NS, then I can’t help you with what the operating issue is, as they’re proprietary operating issues.” **CSX Ex. 66** (MacDonald Dep. 152:15-154:4). When MacDonald drove the length of NS’s track, however, he identified no visible operating issue that would prevent NPBL’s movement. *See id.*

50. Moss kept NS’s Chris Luebbers—an NS intermodal *sales* person—apprised of CSX’s attempts to use NPBL to access NIT. *See* **CSX Ex. 67** (NPBL024288) (minutes after receipt of MacDonald’s email, Moss forwards to Luebbers, commenting “[redacted]”). Luebbers testified that Moss kept him informed in connection with his *sales* role at NS, so he would be aware of how CSX’s attempts to move traffic via NPBL would impact NS’s customers.[11] *See* **CSX Ex. 68** (Luebbers Dep. 281:24-282:14).

51. CSX’s efforts to use NPBL to move international intermodal traffic to and from NIT

[11] This was not the first time Moss shared CSX’s commercial information with Luebbers. *See* **CSX Ex. 62** (NSR_00065318) (August 2012 email from Heller to NS’s Rob Martinez, stating that, “[redacted]”).

during 2015 proved unworkable.[12] *See, e.g.*, **CSX Ex. 66** (MacDonald Dep. 165:20-166:11) (describing that the "process of going back and forth to NIT [via NPBL] was melting down" because of the inability to get operating windows to move trains, and noting that CSX cars "ended up stuck over at NIT for 21 days"); *see also* **CSX Ex. 69** (Kenney Dep. 28:2-24).

52. The situation escalated to the point that CSX's Senior VP of Operations personally called NS executives to request an operating window. **CSX Ex. 70** (CSXT0154004); **CSX Ex. 66** (MacDonald Dep. 171:21-173:17) (when a CSX train was "captive" at NIT, MacDonald called CSX's Senior VP of Operations, "asking her to make a phone call over to the guys in Atlanta or Norfolk to let the train go and quit quoting their proprietary issues").

53. NPBL ultimately moved a small number—about which witness accounts vary—of international intermodal trains for CSX over a period of several months in 2015. **CSX Ex. 7** (Moss Dep. 128:6-129:4; 130:17-131:1) (NPBL moved intermodal traffic for CSX for a "one- or two-month period" ending before June 2015); **CSX Ex. 13** (Capozzi Dep. 39:18-21) (three trains); **CSX Ex. 55** (Girardot Dep. 232:6-20) (one train over the course of a month); **CSX Ex. 69** (Kenney Dep. 28:2-24) (one train).[13] By contrast, NS moves multiple of its own trains *daily* at NIT. *See* **CSX**

[12] NPBL cites testimony from MacDonald to suggest that the "operating plan" developed in 2015 was "workable." *See* NPBL SOF ¶ 31. But whether the plan on paper was "workable" is beside the point; the record contains substantial testimony from MacDonald and others reflecting that *implementation* of that plan was nothing short of a disaster. *See* CSX SOF ¶¶ 48, 49, 51, 52.

[13] NS and NPBL suggest that NPBL moved nine trains for CSX in 2015, based on testimony from CSX's MacDonald. *See* NS SOF ¶ 64, NPBL SOF ¶¶ 30, 33. But several exhibits shown to MacDonald reflect *plans* to move CSX trains, not confirmed moves. *See*, *e.g.*, **CSX Ex. 74** (CSXT0004998); **CSX Ex. 75** (CSXT0001528); **CSX Ex. 76** (CSXT0154066). Moreover, several of these moves were non-revenue moves made at VIT's request. At a minimum, MacDonald's testimony, these exhibits, and other record testimony show that the precise number of trains moved in 2015 is in dispute. NPBL also suggests that CSX did not "consult" MacDonald "about the 2015 rail moves" before filing suit. *See* NPBL SOF ¶ 32. But MacDonald testified only that he was not engaged in the process of filing this litigation, *not* that he did not discuss these issues with anyone

Ex. 39 (NSR_00062857 at -860).

54. Due to the onerous restrictions and inexplicable delays imposed by Defendants, CSX lost business from customers who could not be adequately and reliably serviced without on-dock access at NIT. *See* **CSX Ex. 69** (Kenney Dep. 31:6-21; 104:4-18).

55. In June 2015, NPBL's Moss emailed CSX's MacDonald to inquire whether CSX intended to continue moving intermodal freight to NIT via NPBL, because without revenue from these moves, Moss would have to lay off NPBL employees. *See* **CSX Ex. 71** (NPBL005643).

e. Defendants' Ongoing Trackage Rights "Dispute"
[Disputed: NS SOF ¶¶ 72-74; NPBL SOF ¶¶ 53-54]

56. According to NPBL, the 1916 Joint Facility Agreement for NPBL to move over NS's tracks, "[redacted]." **CSX Ex. 72** (NSR_00027071 at -074); **CSX Ex. 5** (Coleman Dep. 143:1-15). Pursuant to this agreement, NPBL paid NS a fixed trackage rights fee that did not vary based on the number of cars moved. *See* **CSX Ex. 10** (Hunt Dep. 123:23-127:14). NPBL's Cannon Moss estimated this fee worked out to $[redacted] per car, in addition to certain fixed costs. *See* **CSX Ex. 7** (Moss Dep. 175:12-178:8).

57. In July 2015, while CSX tried to access NIT using NPBL, NS internally worked to "[redacted] NPBL and NS. **CSX Ex. 73** (NSR_00047112). NS's Chris Luebbers recommended that "[redacted]." *Id.*

58. NS provided notice to NPBL on July 31, 2015—not long after CSX's efforts to use

at CSX. *See* NPBL Ex. 12 at 220:13-16. Moreover, as the record evidence demonstrates, many people at CSX were acutely aware of the obstacles imposed by Defendants during this period.

NPBL to access NIT—that it intended to cancel NPBL's trackage rights over NS leading into NIT, unless the parties could negotiate new agreements to preserve NPBL's access. *See* **CSX Ex. 77** (NSR_00104581)

59. Although NS stated externally that it intended for the parties' new trackage rights agreement to afford NPBL "materially the same access" to NS's tracks, *see* NS SOF ¶ 72, internally it made clear that its purpose was (1) [redacted] **CSX Ex. 78** (NSR_00008141).

60. The trackage rights negotiation was part of NS's broader "strategy" related to CSX's NIT access—specifically NS's "[redacted]." **CSX Ex. 79** (NSR_00005173).

61. NS demanded a variable trackage rights fee of $[redacted] per car. *See* **CSX Ex. 10** (Hunt Dep. 123:23-127:14). NPBL proposed $[redacted] per car. *See* **CSX Ex. 7** (Moss Dep. 175:12-177:18).

f. CSX's 2018 Service & Governance Proposals
[Disputed: NS SOF ¶¶ 58-62; NPBL SOF ¶¶ 36-42]

62. On March 23, 2018, CSX sent NPBL management a Rate Proposal for Long Term Rail Service to NIT. *See* ECF No. 1-5 ("2018 Proposal"). CSX proposed a switch rate of $80 per car, loaded or empty, for international intermodal containers moving to or from NIT, with a guaranteed minimum of 18,000 cars per year. *Id.* The 2018 Proposal presented NPBL a consistent, long-term, and substantial stream of income, as well as new revenue opportunities. *See id.*

63. NPBL Vice President Donna Coleman did a "back-of-the envelope financial evaluation" of the 2018 Proposal, which she discussed with President Cannon Moss. **CSX Ex. 5** (Coleman Dep. 181:13-25); **CSX Ex. 80** (NPBL000189 at -93). Her calculations showed net revenue for NPBL per trip under the proposal would be $1,500, not including supervisor costs.

Id.; *see also* **CSX Ex. 5** (Coleman Dep. 188:9-190:8). She concluded there was enough "validity" to send the proposal to a rate committee. **CSX Ex. 5** (Coleman Dep. 189:19-22).

64. On March 28, 2018, NS called an internal meeting to discuss CSX's proposal, including how it would be impacted by NS's "[redacted]." **CSX Ex. 81** (NSR_00051329). During this internal meeting, NS recognized that the "[redacted]." *Id.* (emphasis added); *see also* **CSX Ex. 82** (NPBL005881 at -882) (April 2016 email from NS's Cheryl Jenkins, pressing NPBL's Cannon Moss to execute trackage rights agreement including NS's proposed trackage rights rate).

65. On April 3, 2018, NPBL personnel asked NS operations employees for permission to "[redacted]" **CSX Ex. 83** (NSR_00006321). NS reported internally: "[redacted]." *Id.* (emphasis added).

66. On April 5, 2018, NPBL's Moss sent an email to CSX's Tony DiDeo, outlining a few "thoughts" about the 2018 Proposal. **CSX Ex. 84** (NPBL006228). Moss noted, among other things, that the "major factor in play are the windows NS would provide for NPBL to make our run to NIT" (i.e., the request NS denied two days earlier). *Id.* Moss also noted that the proposal would "require" two NPBL locomotives (leased from NS), and that NPBL management "would recommend to the board for a rate committee to do a complete review of the tariff." *Id.* Moss testified that, in addition to these purported concerns, he did not feel he could perform an in-depth analysis of CSX's proposal until he knew what NPBL was "going to be paying [NS] for trackage rates." **CSX Ex. 7** (Moss Dep. 244:2-8).

67. On April 6, 2018, CSX sent a letter to NPBL and NS demanding remedial actions at the upcoming meetings of the NPBL Board and Shareholders, including affording CSX equal representation on the Board; adding qualified, independent directors to the Board; replacing members of NPBL management with qualified, independent individuals; and adopting a corporate compliance program independent of that adopted by NS. *See* ECF No. 1-6.

68. On April 16, 2018, CSX submitted a list of qualified candidates to serve as independent members of the NPBL Board of Directors, who CSX proposed be considered for election at the NPBL Shareholders meeting set for April 18. *See* **CSX Ex. 85** (CSXT0101908).

69. At the April 18 Shareholders' meeting, CSX proposed the governance changes outlined in its April 6 letter, and recommended interim officers be installed at NPBL until the transition was completed. **CSX Ex. 86** (CSXT0158238). The proposal failed when NS voted its 57% majority shares against it. *Id.*

70. One NS-appointed NPBL Board member conceded that several of CSX's requests for corporate governance changes were reasonable, but confirmed the Board ultimately took no action in response. **CSX Ex. 87** (Merilli Dep. 57-21-58:20); **CSX Ex. 88** (Hall Dep. 49:15-50:22).

71. At its April 18, 2018 meeting, the NPBL Board did not discuss the 2018 Proposal and did not vote to form a rate committee to analyze the tariff or the proposal. **CSX Ex. 89** (Hurlbut Dep. 67:23-68:16); **CSX Ex. 87** (Merilli Dep. 75:11-21). The CSX-appointed directors requested that the Board appoint an independent committee to review and evaluate the 2018 Proposal, but the NS-appointed directors refused, based on purported "conflicts" with NPBL's governing documents. **CSX Ex. 90** (CSXT0142657 at -659); *but see* **CSX Ex. 5** (Coleman Dep. 110:6-15) (Coleman testifying that NPBL rate committees were "ad hoc" and "anybody" could be appointed); *see also* **CSX Ex. 37** (Armbrust Dep. 246:8-21) ("I understood the rate committee to

be essentially a farce to reject [CSXT's] proposal."); *id.* at 254:18-255:4 (only a committee of "independent experts" would be reasonable, based on his experience as an NPBL director).

III. NPBL's $210 Switch Rate is Preclusive and Exclusionary

[Disputed: NSR SOF ¶¶ 8, 45, 47, 52, 67; NPBL SOF ¶¶ 23-24, 43-51]

72. The Belt Line's $210 switching rate is substantially higher than rates charged by other terminal switching railroads for similar services.[14] *See* **CSX Ex. 53** (Girardot Decl. ¶ 2). The most obvious comparison is CWRY, which provides terminal switching services to NS and CSX at VIG. *See* NS SOF ¶ 10; NPBL SOF ¶¶ 11-13. In 2009, CWRY charged CSX [redacted] per container for switching services—nearly [redacted] *times less* than NPBL's $210 per well rate. *See* NS Ex. 71 ¶ 60. Today, NPBL's rate remains nearly [redacted] as high as CWRY's, even when accounting for the ability to "double-stack" containers.[15] *See id.* at ¶ 62. NPBL's $210 per well rate is also significantly higher than the rates charged by terminal switching railroads handling intermodal traffic at other East Coast ports, which generally range from $[redacted] to $[redacted] per container. *See* **CSX Ex. 53** (Girardot Decl. ¶¶ 2-4); *see also* NS Ex. 7 ¶ 54; NS Ex. 71 ¶ 64. NPBL's and NS's own documents confirm that the $210 rate is high. *See* **CSX Ex. 30** (NSR_00011118 at -119); **CSX Ex. 68** (Luebbers Dep. 186:9-191:11) (acknowledging the NPBL switch rate was already

[14] NPBL cites CSX's John Booth's testimony that NPBL's $210 rate was "not unusual." NPBL SOF ¶ 23. As Booth explained, however, "switch charges can vary significantly." NPBL Ex. 20 at 141:22. Switch rates can also vary by commodity, and the economics of some commodities are that they can support a higher switch rate than intermodal. *See* CSX SOF ¶ 75.

[15] "Double-stacking" refers to the ability to load more than one container on a railcar. NS SOF ¶ 7. CSX gained "double-stack" capabilities at POV in December 2016. *See* NS Ex. 5 at 217:5-12. NPBL suggests a double-stacked railroad "common[ly]" loads "two or three" containers in a single well. *See* NPBL SOF ¶¶ 50-51. But the record reflects that a variety of factors limit the number of containers loaded per well, and that CSX averages [redacted] per well under normal operating circumstances. *See* **CSX Ex. 11** (2d Girardot Decl.) ¶¶ 3-4; **CSX Ex. 12** (Girardot 2d Dep. 101:5-17, 109:23-110:8); *see also* NS Ex. 71 ¶¶ 61-62. Thus, contrary to NS's suggestion, double-stacking does not "double" train capacity. *See* NS SOF ¶ 8.

"[redacted]" *before* the Board raised it to $210 in 2009); **CSX Ex. 19** (NSR_00027070 at -074) (notes reflecting that NPBL's Coleman stated that the $[redacted] per car rate proposed by NPBL management in 2009 was "in line" with rates charged by other switching railroads).

73. In trying to recast its rate as reasonable, NPBL suggests the "industry standard" for evaluating rail rates is on a "per mile" basis.[16] NPBL SOF ¶ 46 (citing NPBL Ex. 3). But NPBL's expert, Thomas Crowley, does not describe his "per mile" methodology as "industry standard," much less cite any industry publications or other authorities supporting that conclusion. *See* NPBL Ex. 3 at 12. At his deposition, Mr. Crowley testified only that this was an "acceptable" method. *See* NPBL Ex. 32 at 235:7-15. And, as NPBL's Donna Coleman testified, [redacted]." **CSX Ex. 5** (Coleman Dep. 187:12-19); *see also* **CSX Ex. 11** (2d Girardot Decl.) ¶ 6.

74. Defendants contend the Belt Line's rate was established to cover its operating costs, based on NPBL's purported "per car" expenses between 2010 and 2020. *See* NS SOF ¶¶ 48-50; NPBL ¶¶ 44-45 (both citing NPBL Ex. 3 at 5-6 & Tbl. 1). NPBL's cost analysis makes no attempt to distinguish between fixed and variable costs, or to consider that its operating expenses per car would decrease as the number of cars handled increased. *See* **CSX Ex. 7** (Moss Dep. 238:10-14) (agreeing that operating expenses per car would decrease as traffic increased); *see also* **CSX Ex. 5** (Coleman Dep. 104:9-18) (a "unit train" usually "costs less" than other moves); **CSX Ex. 91** (CSX Corporate Dep. 100:18-106:4) (discussing difference between fixed and variable costs). Contemporaneous analyses from both CSX *and NPBL* reflect that NPBL would cover its costs *and* gain new revenue if it charged a more competitive rate for intermodal traffic. *See* CSX SOF ¶¶

[16] NS, for its part, suggests NPBL's rate is governed by the Surface Transportation Board ("STB"). *See* NS SOF ¶ 45. This is an argument as to the law, not a statement of fact. And, as this Court has already held, STB jurisdiction does not prevent CSX's claims. *See* ECF No. 66 at 20.

30-31 (2010 Proposal); CSX SOF ¶¶ 62-63 (2018 Proposal); *see also* NS Ex. 71 ¶¶ 57-58.

75. CSX has paid NPBL's $210 tariff rate to move "carload" or "dimensional" traffic. *See* NS SOF ¶ 67; NPBL SOF ¶ 24; *see also* **CSX Ex. 7** (Moss Dep. 125:15-126:10). Comparing carload or dimensional freight to intermodal container traffic is "apples to oranges," however, because the markets for these commodities are different. **CSX Ex. 7** (Moss Dep. 225:23-25); **CSX Ex. 91** (CSX Corporate Dep. 158:15-160:17). NPBL could offer a reduced rate for intermodal traffic without lowering the switch rate applicable to other types of traffic. *See* **CSX Ex. 91**.

IV. The International Intermodal Transportation Market

[Disputed: NS SOF ¶¶ 21-25]

76. CSX and NS compete for international intermodal shipping contracts. NS SOF ¶ 5. Ocean carriers shipping containers of goods to and from the United States enter into multi-year contracts with a single railroad, under which that railroad handles the vast majority of rail movements for that carrier across a geographic portfolio (e.g., all containers moving by rail to and from East Coast ports). *See* **CSX Ex. 92** (Joyner Dep. 42:1-44:11, 63:10-18); **CSX Ex. 93** (Heller Dep. 38:13-39:20); **CSX Ex. 94** (Warren Decl. ¶ 4); *see also* NS Ex. 7 ¶¶ 27-30. Each of these contracts is worth tens—if not hundreds—of millions of dollars.[17] *See, e.g.*, **CSX Ex. 95** (NSR_00128851 at -876).

77. Ocean carriers issue Requests for Proposals ("RFPs") to CSX and NS, identifying a volume of international intermodal containers to be moved by rail in particular "lanes" (i.e., port to destination pairs). *See* **CSX Ex. 92** (Joyner Dep. 43:9-45:4); **CSX Ex. 96** (Strongosky Dep. 77:9-78:18); **CSX Ex. 97** (CSXT0050597) (2016 [redacted] RFP); *see also* NS Ex. 7 ¶ 31.

[17] CSX and NS also compete for *domestic* intermodal business, which involves transportation of cargo between two points within the United States. *See* NS Ex. 10 ¶ 21. Domestic intermodal business is not at issue in this case. *See id.*

78. Ocean carriers' decisions about which ports to call depend on a variety of factors, including [redacted]. *See* **CSX Ex. 93** (Heller Dep. 245:5-246:14). Vessel routing also depends in large part on ocean carrier alliances, in which multiple carriers agree to share a single vessel to reduce costs and increase efficiency. *See* NS Ex. 7 ¶¶ 36; NS Ex. 71 ¶¶ 80-81.

79. Although *ports* may compete for "discretionary cargo" (NS SOF ¶¶ 21-25), this is not relevant to the question of whether *railroads* can direct which port an ocean carrier selects to unload their goods. *See* **CSX Ex. 94** (Warren Decl. ¶¶ 3-7); *see also* NS Ex. 7 ¶¶ 22, 32-36; NS Ex. 47 at -487 ("[redacted].]"). As NS's Jeff Heller testified, [redacted].[18] *See* **CSX Ex. 93** (Heller Dep. 245:5-246:14); *see also* **CSX Ex. 98** (Piacente Dep. 45:22-46:17); NS Ex. 71 ¶¶ 45-54. NS's and CSX's data confirm that ocean carriers move international intermodal containers to and from the same inland destinations through multiple ports. *See* NS Ex. 71 ¶ 50-54 & Exs. 3 & 4.

[18] NS describes in detail competition among *ports* for international intermodal business, *see* NS SOF ¶¶ 21-24, 26-27, 32, and states that CSX and NS "consider how pricing affects an ocean carrier's decision to call at various ports," *id.* ¶ 25. But competition among *ports* does not affect whether *railroads* can influence ocean carriers' routing decisions. The evidence cited by NS reflects that port costs and characteristics—*not rail rates or routes*—influence these choices. *See, e.g.*, NS Ex. 46 at -388 (noting carrier might shift traffic to Norfolk to "[redacted]"); **CSX Ex. 99** (Warren Dep. 111:5-113:10) (confirming this statement pertains to port charges, not rail rates). None of the cited evidence suggests that an ocean carrier has ever diverted international intermodal freight based on rail rates or routes alone. *See* NS Ex. 48 at -305, -309 [redacted]; NS Ex. 51 at -162 ([redacted]); NS Ex. 52 [redacted]); NS Ex. 49 [redacted]); *see also* **CSX Ex. 12** (Girardot 2d Dep. 59:4-62:12) ([redacted].

80. Simply put, railroads must take an ocean carrier's choice of ports as "given." *See* **CSX Ex. 92** (Joyner Dep. 35:19-36:11; 142:12-18); **CSX Ex. 69** (Kenney Dep. 39:25-40:13); **CSX Ex. 96** (Strongosky Dep. 44:17-45:5); **CSX Ex. 100** (NPBL003225 at - 240) ("[redacted]"). Thus, in order to be competitive for contracts with ocean carriers, CSX must offer competitive service at all major ports in a geographic region.

81. A significant component of competitive rail service is whether a railroad can provide on-dock access at major marine terminals. *See, e.g.*, **CSX Ex. 94** (Warren Decl. ¶ 10). As NS Vice President for Business Development and Real Estate Rob Martinez has explained, on-dock service "[redacted] **CSX Ex. 101** (NSR_00031335 at -342); *see also* **CSX Ex. 102** (Martinez Dep. 128:16-20); **CSX Ex. 103** ("What's at stake in North Charleston rail debate?," *Charleston Regional Business Journal* (July 19, 2010)) (Joyner Dep. Ex. 15) ("It would be a *considerable disadvantage* to not have direct rail access [to a marine terminal] when our competitor does."); **CSX Ex. 13** (Capozzi Dep. 78:16-79:14) ([redacted]); **CSX Ex. 104** (VPA Corporate Rep. Dep. 124:1-126:7, 149:19-150:4, 201:22-202:21).

a. Drayage is Not an Adequate Substitute for On-Dock Rail at NIT
[Disputed: NPBL SOF ¶¶ 18, 52]

82. Because Defendants have blocked CSX's access to on-dock rail, CSX must truck each container arriving at NIT individually to its rail yard in Portsmouth, where the container is then loaded onto a rail car—a process called "drayage." For exports, the process is reversed, with containers arriving in Norfolk by rail being individually drayed from CSX's Portsmouth yard to NIT. *See* NS Ex. 10 ¶ 25.

83. Drayage is an expensive and inefficient alternative to on-dock rail, especially at high-volume terminals like NIT. *See* **CSX Ex. 53** (Girardot Decl. ¶ 5); **CSX Ex. 94** (Warren Decl. ¶ 9); **CSX Ex. 96** (Strongosky Dep. 37:6-12); **CSX Ex. 92** (Joyner Dep. 31:23-33:12, 79:24-80:1) (NS "[redacted]"); **CSX Ex. 102** (Martinez Dep. 56:13-57:20) (on-dock rail is less expensive and more efficient); **CSX Ex. 105** (NSR_00122609) (NS describing on-dock at NIT as "[redacted]"); **CSX Ex. 106** (C. Booth Dep. 59:19-65:6) (due to rail's efficiency, drayage is typically used only if on-dock rail is unavailable).[19] Drayage adds "[redacted]" to container transit times. **CSX Ex. 13** (Capozzi Dep. 239:16-240:11).

84. Drayage is a particularly problematic at NIT. The drayage route between NIT and CSXT's Portsmouth yard follows Hampton Boulevard, a four-lane local road passing directly in front of the Old Dominion University campus. *See* NS Ex. 7 ¶ 45 & Ex. 7. Local regulations prohibit trucks on Hampton Blvd. "between the hours of 4:00 p.m. and 6:00 a.m." Norfolk Municipal Code § 25-262. Street congestion, gate delays, and the limited availability of truckers and chassis also limit the efficiency and reliability of drayage. *See* **CSX Ex. 108** (Wagel Dep. 42:8-21, 46:18-22); **CSX Ex. 109** (J. Booth Dep. 81:21-82:12); **CSX Ex. 104** (VPA Corporate Rep. Dep. 67:4-68:6).

85. VIT coordinates drayage at NIT and other POV terminals. *See* **CSX Ex. 13**

[19] In limited circumstances, NS and CSX use drayage at terminals where they have on-dock access. *See, e.g.*, **CSX Ex. 107** (McClellan Dep. 72:13-22) (describing NS's use of drayage in Jacksonville). NS does not view drayage as inferior in these locations, because the volume of containers handled is small. *See* **CSX Ex. 92** (Joyner Dep. 72:13-22); *see also* **CSX Ex. 69** (Kenney Dep. 69:22-70:9) (describing low volumes and straightforward drayage route in Jacksonville); **CSX Ex. 11** (Girardot 2d Decl. ¶ 9).

(Capozzi Dep. 122:14-15). [redacted].[20] *See* **CSX Ex. 13** (Capozzi Dep. 79:16-80:18). [redacted]. *See* **CSX Ex. 13** (Capozzi Dep. 241:8-15). [redacted]. *See* NS Ex. 71 ¶¶ 34-35.

86. Ocean carriers express a strong preference for on-dock rail and "view drayage as a significantly inferior option." **CSX Ex. 94** (Warren Decl. ¶ 10) (former CSX executive explaining he "[redacted]."); *see also* **CSX Ex. 96** (Strongosky Dep. 37:6-12); **CSX Ex. 13** (Capozzi Dep. 76:16-78:15); **CSX Ex. 110** (NSR_00157631 at -631) ([redacted]); **CSX Ex. 111** (Heller 2d Dep. 25:20-27:6) ([redacted]"); **CSX Ex. 112** (CSXT0136053) ([redacted]]").

87. NS aggressively protects its reputation as the sole provider of on-dock rail access at NIT. *See, e.g.*, **CSX Ex. 113** (NSR_00027097) ("[redacted].");

[20] NPBL's suggestion that its rate is "[redacted]," *see* NPBL SOF ¶ 52, ignores the many non-monetary obstacles imposed by Defendants on CSX's attempts to use NPBL to access NIT, *see* CSX SOF ¶¶ 43-44, 46-49, 51-54.

CSX Ex. 114 (NSR_00027098) ("[redacted].").

88. CSX's lack of on-dock rail access at NIT has driven multiple ocean carriers to contract with NS rather than CSX, including in each of 2015, 2016, 2017, and 2019. *See* **CSX Ex. 69** (Kenney Dep. 20:8-21:4, 31:6-11) ([redacted]); **CSX Ex. 94** (Warren Decl. ¶ 11) ([redacted] & [redacted]); **CSX Ex. 99** (Warren Dep. 162:22-163:12) ([redacted]); **CSX Ex. 115** (CSXT0096961 at -963) ([redacted]); **CSX Ex. 53** (Girardot Decl. ¶ 8) ([redacted] & [redacted]); **CSX Ex. 55** (Girardot Dep. 233:24-234:18; 271:13-272:12); **CSX Ex. 116** (CSXT0013901) (account notes indicating, with respect to [redacted] proposal, [redacted]"). Ultimately, CSX's lack of on-dock access at NIT has reduced its market share across the entire East Coast. *See* **CSX Ex. 117** (Eliasson Dep. 40:12-41:10).

b. Other Terminals are Not Adequate Substitutes for On-Dock Rail at NIT
[Disputed: NS SOF ¶¶ 9-12, 19, 20, 26-32, 69; NPBL SOF ¶ 9]

89. NIT is the largest and most important marine terminal at the Port of Virginia. *See* NS Ex. 10 ¶ 32. It has six berths, the largest number of any POV terminal. It is accessible by a 50-foot navigation channel and can accommodate the largest modern Post-Panamax class vessels. *See* **CSX Ex. 13** (Capozzi Dep. 95:18-24).

90. A second terminal, VIG, is located across the Elizabeth River from NIT. Although a recent expansion increased VIG's annual throughput capacity to approximately 1.2 million containers (*see* NSR SOF ¶ 10), a level similar to NIT's, VIG remains more constrained because it has only three berths—half the number at NIT. *See* NS Ex. 71 ¶¶ 83-84; **CSX Ex. 13** (Capozzi Dep. 95:25-96:12). Both CSX and NS access on-dock rail at VIG via CWRY. *See* CSX SOF ¶ 72.

91. A third terminal, Portsmouth Marine Terminal ("PMT"), is smaller and cannot accommodate the largest modern container ships. *See* NS Ex. 71 ¶ 88. PMT was closed from 2010

to 2013, but reopened in 2014 to handle "overflow" traffic while expansion efforts were underway at VIG and NIT. *See* **CSX Ex. 13** (Capozzi Dep. 172:23-173:19) (PMT was a "[redacted]"); **CSX Ex. 55** (Girardot Dep. 159:24) (PMT was an "emergency workaround Band-Aid"). PMT was closed again in 2018, and VIT has no plans to re-open it for container cargo. *See* **CSX Ex. 13** (Capozzi Dep. 172:23-173:19). When operational, PMT could handle only between [redacted] and [redacted] containers annually—a tiny fraction of VIG or NIT. *See* NS Ex. 10 ¶ 116; NS Ex. 71 ¶¶ 85-90. NS and CSX both had access to on-dock rail at PMT. *See* NS SOF ¶¶ 11-12.

92. VIT determines at which terminal a vessel will call. *See* NS SOF ¶ 19; **CSX Ex. 13** (Capozzi Dep. 91:14-93:7; 94:12-104:19). In making this decision, the most important factor considered is [redacted], followed by [redacted]. *See id.* at 91:25-93:7. After those factors, VIT considers [redacted]. *See id.* at 99:23-100:11. [redacted]. *See id.* at 193:10-17; *see also* **CSX Ex. 94** (Warren Decl. ¶ 5) ([redacted]); NS Ex. 71 ¶¶ 70-72. VIT retains discretion to [redacted] *See* **CSX Ex. 13** (Capozzi Dep. 101:12-13; 243:15-24); **CSX Ex. 69** (Kenney Dep. 29:2-8).

93. Although VIT has expressed a desire to steer CSX-aligned containers to VIG, the empirical data show that ocean carrier volumes do not shift from NIT to VIG following a change in alignment from NS to CSX. *See* NS Ex. 71 ¶¶ 77-79 & Ex. 5; *see also* **CSX Ex. 13** (Capozzi Dep. 182:15-185:23; 243:15-24) (VIT's Capozzi explaining it is "[redacted]

[redacted], *see* CSX SOF ¶¶ 78, 92).

94. NS suggests that no international intermodal traffic or customer "must" move through NIT, *see* NS SOF ¶ 69; however, the volume of containers moved through NIT each year could not realistically be shifted to other POV terminals, or to marine terminals at other ports, like the Port of NY/NJ. *See* NS Ex. 71 ¶¶ 50-54, 70-76, 80-81.

c. Trucks Do Not Compete with Rail for International Intermodal Freight
[Disputed: NS SOF ¶¶ 36-41]

95. NS states that 60-65% of international intermodal containers at POV were moved by truck between 2012 and 2019. *See* NS SOF ¶ 36. This statistic does not distinguish between containers destined for local markets, which necessarily move by truck, and those traveling longer distances, which move by rail. *See* **CSX Ex. 69** (Kenney Dep. 44:9-45:14). VIT's Tom Capozzi confirmed that [redacted]. *See* **CSX Ex. 13** (Capozzi Dep. 164:25-166:2). This is a "[redacted]." *Id.*

96. Trucking is a "very minor consideration" in competition for international intermodal cargo traveling more than 200 to 500 miles. *See* **CSX Ex. 98** (Piacente Dep. 64:2-16, 86:7-87:8) (200 miles); **CSX Ex. 99** (Warren Dep. 72:10-73:23) (150 to 200 miles); **CSX Ex. 104** (VPA Corporate Rep. Dep. 48:7-50:5) (100 to 140 miles); **CSX Ex. 55** (Girardot Dep. 60:16-61:15) (150 to 400 miles); **CSX Ex. 96** (Strongosky Dep. 112:16-24) (500 miles); **CSX Ex. 107** (McClellan Dep. 71:24-72:1) (500 miles); **CSX Ex. 92** (Joyner Dep. 19:7-20:9) (500 miles).

97. Although NS suggests that "at least some" international intermodal rail rates are set "to remain competitive with trucks," NS SOF ¶ 40, the documents cited involve moves of less than 500 miles. *See* NS Ex. 40 (discussing rate from New York to Pittsburgh, less than 400 miles); NS

Ex. 72 (discussing rate from Jacksonville to Eden, N.C., less than 500 miles); NS Ex. 77 (discussing rate from Port of New York/New Jersey to Syracuse, less than 250 miles). The Midwest destinations competitively served by NS and CSX are farther than 500 miles from POV. *See* NS Ex. 10 Tbl. 1.

98. Contrary to NS's suggestion (NS SOF ¶ 41), CSX's Highway to Rail ("H2R") program primarily targeted converting *domestic* intermodal container volumes from truck to rail. *See* **CSX Ex. 69** (Kenney Dep. 65:6-12); *see also* NS Ex. 71 ¶¶ 40-41 (explaining differences between international and domestic intermodal competition).

V. Harm to Competition and Damage to CSX

[Disputed: NS SOF ¶¶ 33-35, 70-71]

99. CSX vigorously competes for international intermodal business at all major ports on the East Coast, including the Port of Virginia. *See* NS SOF ¶ 5. Although CSX's container volumes at POV have increased since 2009, *see* NS SOF ¶¶ 70-71, this expansion is almost entirely concentrated at VIG, where CSX has access to on-dock rail, *see* NS Ex. 71 ¶¶ 109-118.[21]

100. As John Reinhart, the CEO and Executive Director of the Virginia Port Authority ("VPA"), emphasized in a letter to NPBL President Cannon Moss, "[redacted]. *See* **CSX Ex. 118** (CSXT0100756). Reinhart "[redacted]]" *Id.*; *see also* **CSX Ex. 54** at 21-26.

101. As CSX's expert, Dr. Howard P. Marvel, Dr. Howard P. Marvel—an economics

[21] NS points to completion of CSX's National Gateway Project in 2016, and certain purported service disruptions in 2019, to suggest CSX has a "competitive disadvantage" at POV. *See* NS SOF ¶¶ 33-35. The evidence makes clear, however, that CSX has competed vigorously at POV since at least 2009, and that it has had success, primarily at VIG. *See* NS Ex. 71 ¶¶ 109-119.

professor with more than forty years' experience—has confirmed, the empirical data show that NS's and NPBL's conduct harms ocean carriers. Because CSX cannot effectively act as a competitive constraint on NS at NIT, NS charges higher prices to carriers who use NIT intensively. *See* NS Ex. 7 ¶¶ 69-81. [redacted]. *See id.* ¶ 81. And because ocean carriers contract with NS for multiple lanes across a large geographic portfolio, the reverberations of this overcharge extend throughout the network. *See id.*

102. Because ocean carrier RFPs cover multiple ports, CSX has lost substantial business across its entire network because of its lack of on-dock access at NIT. *See* CSX SOF ¶¶ 77-81, 86, 88. Dr. Marvel estimates that CSX's lost profits totaled more than $[redacted] million between 2009 and 2020:

[redacted]

See NS Ex. 71 ¶¶ 120-126 & Exs. 14 & 15; *see also* NS Ex. 7 ¶¶ 85-100.

STANDARD OF REVIEW

The Court can grant summary judgment to Defendants only if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "Because credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge,'" the Court may evaluate the evidence only as needed to determine whether there is "sufficient disagreement to require submission to a jury." *McAirlaids, Inc. v. Kimberly-Clark Corp.*, 756 F.3d 307, 310 (4th Cir. 2014). The Court should view all facts and permissible inferences from them in the light most favorable to CSX. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986). If a reasonable jury could return a verdict for CSX, "then a genuine factual dispute exists and summary judgment is improper." *Wright v. Va. Peninsula Regional Jail Auth.*, No. 2:19cv189, 2021 WL 963496 at *2 (E.D. Va. March 15, 2021) (Davis, C.J.).

ARGUMENT

I. CSX's Claims are Timely.

Though Defendants do not acknowledge it, they bear the burden of proof on the affirmative defenses of the statute of limitations. *See Graham v. Island Creek Coal Co.*, 184 F. Supp. 2d 511, 515 (W.D. Va. 2002) (noting that defendants "bear the burden of proof on the issue of whether the plaintiff's claims are barred by the statute of limitations," and denying summary judgment where the record contained disputed evidence as to the date on which plaintiff's injury occurred). The record does not support summary judgment on limitations grounds. As explained below, CSX alleges ongoing antitrust violations, which are timely so long as they continue into the limitations period, which CSX has shown. Accordingly these claims—including *all* evidence of Defendants' ongoing anticompetitive conduct—must be submitted to a jury. The same is true for CSX's state law claims, as detailed below.

a. CSX's Sherman Act Claims are Timely (Counts I-IV).

Defendants' primary argument against CSX's antitrust claims is that they are barred by the applicable four-year statute of limitations. *See* NS Br. at 16-20; NPBL Br. at 15-21 (both citing 15 U.S.C. § 15b). Defendants contend that, because CSX did not sue within four years of their very first anticompetitive act, their ongoing monopoly and conspiracy are now unreachable, and they are free to block CSX's access to NIT, stifle competition, and overcharge ocean carriers in perpetuity with impunity.

Defendants' arguments misstate the law. Under the "continuing violation" doctrine—which NS only briefly acknowledges and NPBL ignores—"[t]he period of limitations for antitrust litigation runs from the most recent injury caused by the defendants' activities rather than from the violation's inception." *Xechem, Inc. v. Bristol-Myers Squibb Co.*, 372 F.3d 899, 902 (7th Cir. 2004). And, contrary to NS's suggestion, this principle applies equally to CSX's antitrust conspiracy *and* monopolization claims. *See id.* (explaining, in applying continuing violation doctrine to monopolization claim, that "improperly prolonging a monopoly is as much an offense against the Sherman Act as is wrongfully acquiring market power in the first place"). As the Fourth Circuit reaffirmed *just one day* after Defendants filed their motions, "'in the context of a continuing conspiracy to violate the antitrust laws,' the statute of limitations begins to run from 'each time a plaintiff is injured by an act of the defendants.'" *Mayor of Baltimore v. Actelion Pharms. Ltd.*, __ F.3d __, 2021 WL 1376980, at *6 (4th Cir. Apr. 13, 2021) (citing *Zenith Radio Corp. v. Hazeltine Res., Inc.*, 401 U.S. 321, 338 (1971)); *see also United States v. Dentsply Int'l, Inc.*, No. Civ. A. 99-005, 2001 WL 624807, at *17 & n.18 (D. Del. Mar. 30, 2001), *aff'd sub nom. Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc.*, 424 F.3d 363 (3d Cir. 2005) (in Sherman Act monopoly case, denying motion for summary judgment based on the statute of

limitations after concluding that a jury could find certain conduct sufficient to restart the statute of limitations under the continuing violation doctrine).

This is true even if "the acts occurr[ing] within the limitations period were reaffirmations of decisions originally made outside the limitations period," *W. Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 107 (3d Cir. 2010), and even if the conduct at issue is "intentional, concerted *inaction*" rather than affirmative acts, *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144, 1172 (3d Cir. 1993) (emphasis added). For example, in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, the Supreme Court held that the plaintiff's claims were timely, even though the defendant's allegedly monopolistic leasing policy had been first adopted more than *forty years* before plaintiff sued. *See* 392 U.S. 481, 502 n.15 (1968). The Court explained: "We are not dealing with a violation which, if it occurs at all, must occur within some specific and limited time span. Rather, we are dealing with conduct which constituted a continuing violation of the Sherman Act and which inflicted continuing and accumulating harm." *Id.*

So too here. Although evidence produced in discovery shows that Defendants have engaged in anticompetitive and conspiratorial conduct for years, *see, e.g.*, CSX SOF ¶¶ 10, 17, the record contains ample evidence of overt acts and "intentional, concerted inaction" causing new injuries within the limitations period, *see, e.g., id.* ¶¶ 45-54 (operational challenges and CSX's payment of $210 rate in 2015), ¶¶ 56-61 (trackage rights); ¶¶ 62-71 (2018 proposal); *see also id.* ¶ 102 (injury to CSX).[22] Each of these acts is enough to "start[ ] the statutory period running again" on CSX's antitrust claims. *Actelion Pharms.*, 2021 WL 1376980, at *6.

[22] Defendants take a stinted view of the evidence, suggesting that CSX has pointed to only six examples of wrongful conduct since 2009. *See* NS Br. at 16; NPBL Br. at 15 (citing CSX's 2d Supp. Resp. to NPBL's Interrog. No. 4). To be clear, the interrogatory cited by Defendants asked CSX to identify "the specific overt act(s) *by NPBL* that you contend form the basis for the conspiracy alleged in Counts I, II, VIII, and IX of your Complaint." *See* NS Ex. 118 at 2 (emphasis

None of the authority Defendants cite is to the contrary. First, *Klehr v. A.O. Smith Corp.*, actually *refutes* their arguments. There, the Supreme Court analyzed a RICO claim by analogizing to the Sherman Act, explaining that "in the case of a continuing violation . . . , each overt act that is part of the violation and that injures the plaintiff . . . starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times." 521 U.S. 179, 189 (1997).[23] In other words, when a continuing violation includes conduct within the limitations period that causes injury, the plaintiff may bring claims based on that conduct, regardless of when the conduct began. *See W. Penn Allegheny Health*, 627 F.3d 85 at 107 (holding, after *Klehr*, that "*Hanover Shoe* and *Lower Lake Erie* leave no room for [Defendants'] proposed rule. . . . [P]laintiff's suit was timely even though the acts that occurred within the limitations period were reaffirmations of decisions originally made outside the limitations period.").

The other cases cited by NS are inapposite. Both *Kaw Valley Electric Cooperative Co. v. Kansas Electric Power Cooperative, Inc.*, 872 F.2d 931, 933-35 (10th Cir. 1989), and *Lancianese v. Bank of Mount Hope*, 783 F.2d 467, 470 (4th Cir. 1986), held that the continuing violation doctrine did not apply because the plaintiff pointed to damages, but not *conduct*, within the limitations period. And in *Al George, Inc. v. Envirotech Corp.*, 939 F.2d 1271, 1275 (5th Cir.

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added). It did not ask CSX to identify all wrongful conduct within the limitations period; nor did it ask for examples of action (or purposeful inaction) by NS. *See id.* at 2-3 (CSX's response, clarifying that it is "in no way intended as an exhaustive list of overt acts committed by NS in furtherance of the conspiracy"). CSX's response is thus not a catalogue of all evidence supporting its claims.

[23] In arguing that CSX's antitrust claims are time-barred, NPBL suggests CSX "was aware of its alleged injuries" in 2009. *See* NPBL Br. at 16-17. The evidence cited by NPBL does not support this conclusion, particularly in light of Defendants' repeated obfuscations during this period. *See* CSX SOF ¶¶ 18-41. Regardless, CSX's knowledge is immaterial, since each act in furtherance of Defendants' continuing violations restarts the limitations period on its claims, no matter what CSX knew or when. *See Klehr*, 521 U.S. at 189.

1991), the court determined that the last overt act occurred *outside* the limitations period. Here, as discussed above, CSX has identified both conduct *and* damages within the limitations period.

NS contends that Defendants' post-2014 conduct does not constitute "new and independent act[s]" that are "distinct from the 'abatable but unabated inertial consequences' of NPBL's 2009 decision to set the switch rate at $210." NS Br. at 20. As the Fourth Circuit recently reiterated, however, in cases involving anticompetitive pricing, each sale constitutes a new injury restarting the limitations period. *See Actelion Pharms.*, 2021 WL 1376980, at *6. So even if the $210 switch rate were the only conduct at issue—which it is not, as the Court has already recognized, *see* ECF No. 66 at 38-39—CSX's payment of that anticompetitive rate in 2015 would suffice to restart the statute of limitations on its claims. But those payments are just one piece of CSX's case—the record also contains plentiful evidence of Defendants' obstruction of CSX's efforts to access NIT via NPBL in 2015, NS's cancellation of NPBL's trackage rights and subsequent attempts to negotiate a prohibitively high rate between 2015 and 2018, and Defendants' rejection of CSX's 2018 service and governance proposals. All of these events constitute "new and independent" acts, distinct from the setting of the switch rate, that caused harm and thus restarted the statute of limitations.[24]

NS claims "Defendants took *no overt action* on the 2018 Rate Proposal." NS Br. at 19 (emphasis in original). But "overt action" for antitrust or conspiracy purposes need not be a formal Board vote denying CSX's request. Rather, impeding, delaying and effectively denying through inaction are all sufficient to restart the limitation period, whether those acts are characterized as

[24] For this reason, NS's citation to *XY, LLC v. Trans-Ova Genetics* is inapposite. In that case, the Federal Circuit affirmed summary judgment on limitations grounds because the plaintiff failed to identify *any* "new and accumulating" injury within the limitations period resulting from the alleged conspiracy. *See* 890 F.3d 1282, 1292 (Fed. Cir. 2018).

actions to impede or *purposeful inaction*. *See Lower Lake Erie*, 998 F.2d at 1172 (explaining that "continuing and accumulating damage may result from intentional, concerted inaction. The purposeful nature of the inaction . . . obviously constitutes an injurious act, although perhaps not an overt one in the commonly-understood sense"). It is undisputed that, pursuant to its charter, NPBL exists to connect its owner railroads to destinations on its network, including NIT. Barring Defendants' anticompetitive conduct, NPBL would have acted to facilitate CSX's access to NIT, as it has facilitated CSX's and NS's access to other points. By refusing to take action on CSX's proposals—which would have furthered NPBL's stated purpose and benefitted NPBL financially—Defendants actively blocked CSX's access to NIT, thus engaging in the very anticompetitive activity reflected in the record.

Most critically, NS's arguments underscore the many material disputes of fact at issue. *Compare* NS Br. at 19 (arguing CSX "successfully used NPBL to access NIT in 2015") *with* CSX SOF ¶¶ 46-49, 51-53 (describing substantial, unreasonable barriers imposed on CSX's access in 2015); NS Br. at 19 (arguing "Defendants took *no overt* action" on 2018 Proposal) *with* CSX SOF ¶¶ 64-71 (describing actions by NS and NPBL directors and management to prevent fair consideration of the 2018 Proposal); NS Br. at 19-20 (arguing that NS "had the contractual right" to reject CSX's Governance Proposal) *with* CSX SOF ¶ 2 & *infra* at 69-70 (disputing NS's interpretation of the relevant agreements). These factual disputes preclude summary judgment.[25]

[25] To the extent that Defendants suggest that *evidence* of pre-2014 conduct is not admissible to support CSX's claims, that argument fails. The trier of fact may consider all evidence of Defendants' continuing violations. *See, e.g.*, *Dial Corp. v. News Corp.*, 165 F. Supp. 3d 25, 37-38 (S.D.N.Y. 2016) ("[A] monopoly which is 'maintained' during the damages period would need to be created before the damages period, and anticompetitive conduct before the limitations period may be material to a showing that Plaintiffs were injured during the damages period.").

b. CSX's State-Law Claims are Timely (Counts V, VIII, IX).

Defendants also contend that CSX's state law claims are time-barred, *see* NS Br. at 17-18; NPBL Br. at 17-18, but these arguments likewise miss the mark. The statute of limitations on CSX's state law claims is five years.[26] *See* ECF No. 66 at 36; NS Br. at 17; NPBL Br. at 17. The limitations period begins to run when a cause of action accrues. *See Forest Lakes Community Ass'n, Inc. v. United Land Corp. of Am.*, 795 S.E.2d 875, 881 (Va. 2017). Although a cause of action for property damage accrues when the damage is first incurred, "[i]t is possible for a new cause of action to accrue that looks remarkably like an earlier one but is nonetheless a stand-alone claim in its own right." *Id*. In such cases, "the damage accompanying the new cause of action sets new accrual starting blocks for a separate limitation period." *Id*.

Whether there is a single conspiracy or multiple conspiracies is a factual question. Indeed, because analysis of the "accrual starting blocks" in each case "depends so heavily on the factual context," it "def[ies] any attempts at formulaic applications." *Id.* at 881-82. Put differently, "[w]hether the evidence establishes a single conspiracy or multiple conspiracies is an issue for the jury." *United States v. Lozano*, 839 F.2d 1020, 1023 (4th Cir. 1988); *accord In re Zetia (Ezetimibe) Antitrust Litig.*, No. 2:18md2836, 2019 WL 6977405, at *4 (E.D. Va. Dec. 20, 2019); *Williams v. Commonwealth*, 407 S.E.2d 319, 322 (Va. Ct. App. 1991).

The record certainly contains facts from which a reasonable jury could find that Defendants engaged in a single, ongoing conspiracy throughout the relevant time period. *See, e.g.*, *supra* at 42-46. But there are also facts in the record from which a jury could conclude that Defendants'

[26] NS suggests that CSX's common law conspiracy claim is subject to a two-year statute of limitations, based on its misguided assumption that the only "wrongful act" underlying that claim is breach of fiduciary duty. *See* NS Br. at 17 & n.4. As explained below, however, CSX's state law conspiracy claims rely on multiple wrongful and unlawful acts, including Defendants' violations of federal antitrust law, in addition to individual directors' violations of fiduciary duties.

entered into a new conspiracy within the limitations period, as this Court outlined in denying Defendants' motions to dismiss:

> [I]n 2018, Defendants entered into a new agreement to increase the amount Belt Line pays to NS to access NS's tracks to NIT. . . . Any increase in the price that [NS] charges Belt Line would, in turn, be passed on to Belt Line's customers. That is, it would lead to an increase in the Uniform Rate. The Court concludes that Plaintiff has alleged a *new conspiracy* within the statute of limitations period; this second attempt to raise the Uniform Rate is not a continuation of the same conspiracy to set the Uniform Rate at the [2009] level because the price is again increased.

ECF No. 66 at 39-40 (emphasis added). CSX is entitled to proceed on alternate theories of liability at trial when both are supported by the record. *See, e.g.*, *Davis v. Richmond, Fredericksburg and Potomac R. Co.*, 803 F.2d 1322, 1327 (4th Cir. 1986) (affirming district court's decision to allow plaintiffs to proceed on two alternate theories of Title VII liability at trial). Whether there was one or more conspiracies is a factual matter for the jury to find.

In an attempt to discount this evidence, NPBL cites CSX's admission that "NPBL and NS did not enter a new agreement in 2018 to increase the amount NPBL pays NS to access NS's tracks to NIT." *See* NPBL Br. at 21-22; *see also* NPBL Ex. 28. But the fact that NS and NPBL have not executed a new trackage rights agreement is beside the point. To the contrary, as CSX alleged—and as the evidence now shows—Defendants have used their purported "dispute" over trackage rights as pretext to justify NPBL's artificially high rate and to reject CSX's proposal seeking a commercially reasonable rate. *See* CSX SOF ¶¶ 56-61. It was not necessary for Defendants to actually *agree* on a higher rate for their scheme to work, as they were able to delay and deny CSX's proposal based on the purported uncertainty surrounding this issue alone. And these actions—among others—constitute breaches of the NPBL Operating Agreement by NS occurring within the applicable limitations period. *See infra* at 69-70.

Because all of this evidence falls within the applicable limitations period, CSX's state law claims are timely. At a minimum, the Court cannot resolve these factual issues on summary judgment. *Lozano*, 839 F.2d at 1023.

c. CSX's Damages Calculation Methodology Does Not Govern Accrual.

In trying to show that CSX's claims are time-barred, Defendants point to CSX's damages calculation methodology, which they criticize, based on a total of two federal decisions, as not "apportion[ing] damages between any separate unlawful acts." NPBL Br. at 18-19; *see also* NS Br. at 18-19. To be sure, CSX's expert, Dr. Howard Marvel, calculated profits CSX lost due to "the totality of NS's and NPBL's efforts to foreclose CSX" from on-dock rail at NIT. *See* CSX SOF ¶ 102. Most of these occurred in years *after* 2013—within the limitations periods. *See id.*

Defendants' argument that CSX must tie its damages calculation to specific overt acts "obfuscates the difference between, on the one hand, an 'overt act' necessary to show the existence of a conspiracy, and, on the other hand, an 'injurious act' causing damages within the limitations period." *Lower Lake Erie*, 998 F.2d at 1172. Although a plaintiff must identify at least one timely overt act causing injury in order to satisfy the statute of limitations, *Zenith Radio Corp.*, 401 U.S. at 338, its damages calculations need not be tied to that act, because "overt acts aren't what cause damage. *It is the effectiveness of the overall conspiracy that causes damages*." *Lower Lake Erie*, 998 F.2d at 1172 (emphasis added).

Particularly in monopoly cases like this one, "the relevant inquiry is the anticompetitive effect of [Defendants'] exclusionary practices considered together." *LePage's v. 3M*, 324 F.3d 141, 162 (3d Cir. 2003); *see also City of Anaheim v. S. Cal. Edison Co.*, 955 F.2d 1373, 1376 (9th Cir. 1992) ("[I]t would not be proper to focus on specific individual acts of an accused monopolist while refusing to consider their overall combined effect."). Thus, once the jury finds that

Defendants' unlawful conduct injured CSX, "damages may be determined without strict proof of what act caused the injury, as long as the damages are not based on speculation or guesswork." *3M*, 324 F.3d at 166; *see also Dial Corp*, 165 F. Supp. 3d at 38 (in monopoly case, rejecting summary judgment argument that plaintiff's damages model did not "sort out the effects of any particular form of anticompetitive conduct," explaining that "calculating damages in antitrust cases is not an exact science," and that "if a jury were to find [defendant's] actions taken as a whole to be a violation of Section Two of the Sherman Act, disaggregating the monopolist's lawful actions from its unlawful actions for the purpose of calculating damages may be unnecessary, if not impossible"); *Poster Exch'g, Inc. v. Nat'l Screen Serv. Corp.*, 517 F.2d 117, 125 (5th Cir. 1975) (approving "day by day calculation of accruing injury" in monopoly and conspiracy case "based on continuing antitrust behavior, not merely the continuing damage [plaintiff] feels from a single day's monopoly and refusal to deal").

The same is true of CSX's state law conspiracy claims. The Fourth Circuit has recognized that, under Virginia law, damages result from the totality of a conspiracy, not any particular overt act. *See Blackwelder v. Millman*, 522 F.2d 766, 776 (4th Cir. 1975) (reversing summary judgment where damages resulting from conspiracy continued into limitations period); *see also Com. Bus. Sys., Inc. v. Bellsouth Servs., Inc.*, 453 S.E.2d 261, 267 (Va. 1995) ("Whether a conspiracy caused the alleged damage ordinarily is a question for a jury."). None of the cases cited by NPBL suggest otherwise. *See* NPBL Br. at 19-20 (citing *Gallop v. Sharp*, 19 S.E.2d 84, 86 (Va. 1942) (providing only that "the damage produced must arise as the effective result of the conspiracy")).[27]

[27] The other Virginia cases cited by NPBL do not involve conspiracy claims. *See Street v. Consumers Mining Corp.*, 39 S.E.2d 271 (Va. 1946) (trespass); *Louisville & N.R. Co. v. Saltzer*, 144 S.E. 456 (Va. 1928) (negligence).

NPBL contends that this Court's decision denying Defendants' motions to dismiss provided a "roadmap" for CSX's calculation of damages. *See* NPBL Br. at 20-21 (citing ECF No. 66 at 38-39). But this Court explained that CSX's damages would arise from profits lost as a result of Defendants' ongoing anticompetitive and conspiratorial conduct. *See* ECF No. 66 at 38. It did not suggest, at the motion to dismiss phase of the case, that CSX must apportion those lost profits by contract or tie them to any singular overt act. *See id.* NPBL's argument to the contrary misunderstands the facts of the case. CSX's lost profits are not limited to the marginal difference between the switch rate proposed by CSX and the rate charged by NPBL; they are the profits lost as a result of ocean carriers choosing not to contract with CSX due to its inability to access on-dock rail at NIT, as a result of the totality of Defendants' anticompetitive and conspiratorial conduct. Indeed, that is the consequence of the Defendants' conspiracy: CSX cannot effectively access NIT via NPBL and has lost business and profits due to that constraint. The record contains evidence of this lost business, *see id.* ¶ 88, and CSX's expert, Dr. Marvel, has calculated CSX's lost profits by year, *see id.* at ¶ 102. Neither Defendant challenges Dr. Marvel's damages calculation methodology.

The record contains ample evidence of overt acts by Defendants during the limitations period. The quantum or method for calculating damages arising from the totality of Defendants' conduct does not affect the timeliness of CSX's claims.

II. There is Ample Evidence Supporting CSX's Conspiracy Claims (Counts I, II, VII, IX).

CSXT has asserted four conspiracy claims against Defendants. *See* ECF No. 1 ¶¶ 77-84 (conspiracy to restrain trade in violation of Sherman Act § 1); *id.* ¶¶ 85-90 (conspiracy to monopolize in violation of Sherman Act § 2); *id. id.* ¶¶ 101-121 (statutory business conspiracy under Va. Code § 18.2-499, -500); *id.* ¶¶ 122-125 (Virginia common law conspiracy). Although

these claims differ somewhat, Defendants challenge three overlapping elements: (1) whether there is evidence of an agreement; (2) whether there is evidence of overt acts in furtherance of the conspiracy; and (3) for CSX's state law claims, whether there is evidence of a wrongful act or tort. These challenges fail, because the record contains evidence supporting all three elements.

a. The Record Contains Substantial Evidence of Agreement and Overt Acts.

The parties agree that, to recover on its conspiracy claims, CSX must prove that an unlawful agreement existed between NS and NPBL,[28] and that an overt act was committed to further that agreement. *See* NS Br. at 33-35, 36-37; NPBL Br. at 22-30. To defeat summary judgment, CSX need only present evidence that can "reasonably lead to the inference that [Defendants] positively or tacitly came to a mutual understanding to try to accomplish a common and unlawful plan." *Fed. Ins. Co. v. Locash*, No. 2:12cv504, 2014 WL 12588635, at *9 (E.D. Va. Feb. 18, 2014). CSX is entitled to rely on both direct and circumstantial evidence of conspiracy. *See Robertson v. Sea Pines Real Est. Cos.*, 679 F.3d 278, 289-90 (4th Cir. 2012) ("Conspiracies are often tacit or unwritten in an effort to escape detection, thus necessitating resort to circumstantial evidence to suggest that an agreement took place.").

The record amassed in discovery has no lack of conspiracy evidence, including:

- As early as 2002, NS's Chris Luebbers—an NS intermodal market manager—served on NPBL rate committees. NS does not use NPBL for intermodal switching at NIT, so Luebbers' only purpose is clear: to ensure CSX did not obtain favorable rates or any other potential advantages via NPBL. *See* CSX SOF ¶ 17.

- In 2009, NS-appointed rate committee members (including Luebbers) developed pretextual justifications to reject the [redacted] per car unit train rate, including raising concerns about supposed "[redacted]" *See* CSX SOF ¶¶ 18-29.

[28] NPBL challenges the existence of "concerted action," while NS argues there was no "agreement." NS Br. at 33-35; NPBL Br. at 22-30. These arguments are functionally the same. *See Schlegel v. Bank of Am., N.A.*, 505 F. Supp. 2d 321, 325-26 (W.D. Va. 2007).

- Ultimately, as described in a draft letter from NS intermodal to its appointed Board members, NS-appointed NPBL directors were to [redacted]." *See* CSX SOF ¶ 21. NS-appointed director Mark Manion appointed the NS members of the NPBL rate committee, who in turn worked to recommend rejection of CSX's proposal. And NPBL, including through its NS-appointed directors did, voting to raise the rate to $210—even though the previous rate was already "[redacted]"—and declining to approve CSX's competing proposals for a lower rate to NIT. *See* CSX SOF ¶ 72.

- In 2010, after a lengthy period of NS-induced delay, NS-appointed NPBL directors rejected CSX's service proposal by voting against a piece of it, despite NPBL management's profitability assessment, in part based on a pretextual argument that the NPBL Operating Agreement requires a "uniform rate," even though the NPBL Board had frequently "overridden" this purported restriction in the past, and CSX made clear that it had no objection to the rate being embodied in a tariff and offered to other intermodal customers. *See* CSX SOF ¶¶ 30-40.

- In 2015, Defendants imposed operational hurdles (framed as "proprietary issues") to impede CSX's ability to use NPBL to access NIT, even at the inflated rate. *See* CSX SOF ¶¶ 48, 49. NPBL's Moss kept NS's Luebbers apprised of CSX's attempted movements, so Luebbers could assess the impact on NS's customers. *See* CSX SOF ¶ 50.

- In 2015, NS canceled NPBL's trackage rights so it could "[redacted], with the parties ultimately disagreeing about the rate. *See* CSX SOF ¶¶ 58-61. NPBL's Moss identified this "dispute" as one basis preventing NPBL from considering CSX's service proposal. *See* CSX SOF ¶ 66.

- In 2018, NPBL refused to establish an independent committee to assess CSX's proposal, purportedly because it would "conflict" with the NPBL Operating Agreement, even though rate committees are "ad hoc" and "anybody" can participate, and refused to accept CSX's proposal despite the fact that management concluded it would financially benefit NPBL. *See* CSX SOF ¶ 71.

In an attempt to discount all of this evidence, Defendants make two arguments: (1) that individual NS-appointed NPBL directors cannot be agents of NPBL, and (2) that there is no evidence of NPBL management's involvement in the conspiracy. *See* NS Br. at 33-34; NPBL Br. at 24-27. As explained below, Defendants' positions misstate the law and rely on contested facts. There is ample evidence of conspiracy here, including among NS employees, NS-appointed NPBL directors (who may act as agents of each of NS and NPBL), and NPBL management.

1. NS's directors are agents of NPBL when acting in that capacity.

Defendants are simply wrong to suggest that individual NPBL directors employed by NS cannot be deemed agents of NPBL when acting in that capacity. "Directors are agents of a corporation who must act within the scope of their authority." 18B Am. Jur. 2d Corporations § 1264; *see also Starring v. Kemp*, 188 S.E. 174, 177 (Va. 1936) (explaining that directors are agents of their corporation when conducting its business). Moreover, as the Supreme Court of Virginia has recognized, a person can act as an agent for one entity for one purpose while acting as an agent for another entity for a different purpose, depending on the facts of a particular case.[29] *See Cook v. John Hancock Life Ins. Co. (U.S.A.)*, No. 7:12–cv–00455, 2015 WL 178108, at *7 (W.D. Va. Jan. 14, 2015) (citing *Md. Cas. Co. v. Craig*, 194 S.E.2d 729 (Va. 1973) (analyzing an agent "acting in a dual capacity")); *see also Haines v. Local 149, UAW*, No. 99-122, 2000 WL 1100034, at *1 (Va. Cir. Ct. July 27, 2000) ("[A] person may be an agent of two persons" or entities). The "creation, duration, and scope of an agency relationship" is a question of fact for the jury. *Famous Knitwear Corp. v. Drug Fair, Inc.*, 493 F.2d 251, 253 (4th Cir. 1974); *Acordia of Va.*, 560 S.E.2d at 250.

Neither case cited by Defendants suggests otherwise. Indeed, neither involves a conspiracy claim. In *Mosell Realty Corp. v. Schofield*, the Supreme Court of Virginia held that a would-be buyer could not enforce a real estate contract authorized by two directors but "repudiated" by the third. 33 S.E.2d 774, 778-79 (Va. 1945). The Court reasoned that, under the facts presented, the directors did not have "inherent or implied authority" to undertake "extraordinary and unusual

[29] For this reason, Defendants cannot rely on conduct by CSX-appointed NPBL directors to support its desired blanket "no agency" rule. *See* NS Br. at 34; NPBL Br. at 27. Whether an individual acts as an agent of an entity in any given situation depends on the specific facts at issue. *See Acordia of Va. Ins. Agency, Inc. v. Genito Glenn, L.P.*, 560 S.E.2d 246, 250 (Va. 2002).

transactions such as the sale and purchase of real estate." *Id.* at 777. Here, neither NS nor NPBL argue that NS-appointed Board members lack authority to vote on CSX's various proposals; indeed, their argument is that only the Board could approve such things. Similarly, in *Monocan Hills, Inc. v. Page*, the Supreme Court of Virginia considered only whether, in a case seeking to compel transfer of stock, statements of individual directors were admissible as statements of the corporation. *See* 122 S.E.2d 654 (Va. 1961). Neither *Mosell Realty* nor *Monocan Hills* holds that actions by individual directors cannot be attributed to a corporation as a matter of law.

The Supreme Court's decision in *Am. Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.* is instructive. *See* 456 U.S. 556 (1982). In that case, an employee of a product manufacturer used his position on a subcommittee at a trade association, the American Society of Mechanical Engineers (ASME), to conspire *with his own company* against a competitor. *Id*. at 560-61. The Supreme Court affirmed a finding of conspiracy under the Sherman Act *against ASME*. *Id*. at 558-59. The Court held that facts were sufficient to confer conspiracy liability on ASME—particularly in the antitrust context—even though ASME's only conspiratorial conduct came from a single subcommittee member conspiring with his employer. *Id*. at 572. Like ASME, NPBL can be held liable for the conspiratorial conduct of its individual directors, even when those directors engage in that conduct with their employer, NS.

The record contains more than enough evidence to allow the trier of fact to determine that NS-appointed NPBL directors acted as agents of NPBL when conducting NPBL business or directing the actions of NPBL itself. At a minimum, this is a fact issue that cannot be resolved on summary judgment. *See Famous Knitwear*, 493 F.2d at 253.

2. The record contains ample evidence of conspiracy between NS and NPBL, above and beyond the conduct of NS's NPBL directors.

There is no question that CSX has adduced overwhelming evidence of the conspiratorial agreement between NS and NPBL, and overt acts in furtherance of that conspiracy, particularly when accounting for the conduct of NS-appointed NPBL directors that is attributable to NPBL. *See, e.g.*, CSX SOF ¶ 17 (evidence reflecting NS-appointed NPBL board member voting to disapprove rate that would benefit CSX at the behest of NS marketing personnel); *id.* ¶¶ 19-21, 24 (communications reflecting NS-appointed rate committee members' recommendations to NS-appointed NPBL directors to oppose favorable rate); *id.* ¶ 50 (communications between NPBL management and NS personnel regarding CSX's efforts to use NPBL to access NIT). This is more than enough to permit the trier of fact to reasonably conclude that Defendants entered into a conspiratorial agreement, and that at least one of them committed an overt act in furtherance of that agreement.[30] *See Robertson*, 679 F.3d at 289-90. Indeed, neither NS nor NPBL argues that there is insufficient evidence of a conspiracy if NS's NPBL Board members are agents of NPBL when they act in their Board capacity. *See* NS Br. at 33-35, NPBL Br. at 22-30.

Even without attributing the actions of NPBL Board members to NPBL, however, there remains ample evidence of conspiracy. Along with conduct by individual directors, CSX has identified evidence that the NS-controlled NPBL Board majority took actions—including official Board votes—in furtherance of Defendants' unlawful conspiracy. *See, e.g.*, CSX SOF ¶¶ 29, 40, 71. CSX also has identified evidence that Belt Line management (including NPBL President Cannon Moss) participated in the conspiracy. *See, e.g.*, CSX SOF ¶¶ 26, 50. NPBL's lengthy

[30] CSX must show only that *either* NS *or* NPBL committed an overt act in furtherance of the conspiracy. For this reason, NPBL's laser-like focus on CSX's answers to its Interrogatories Nos. 3 and 4 (*see* NPBL Br. at 23-27)—which asked CSX to identify only conspiratorial "communication(s)" and "overt act(s)" *by NPBL*—is misplaced.

arguments about what inferences should be drawn from this evidence (NPBL Br. at 23-24, 27-30) simply underscore that summary judgment is inappropriate on CSX's claims. *Compare, e.g.*, NPBL Br. at 28 (interpreting evidence related to CSX's attempts to move traffic via NPBL in 2015) *with* CSX SOF ¶¶ 45-54.

At base, given NPBL's purpose to connect its owners (NS and CSX) to terminals along its line, a jury could easily infer that NPBL's refusal to engage with CSX's proposals—which NPBL itself had concluded would make it money—are reflective of a conspiracy with NS, particularly given the evidence of NS's involvement. *See* ECF No. 66 at 27 ("Although ultimately a merits question, courts have found that rejecting proposals which are in a company's own interest and within the company's power to accept may be evidence of, for instance, an antitrust conspiracy.") (citing *SourceOne Dental, Inc. v. Patterson Companies, Inc.*, 310 F. Supp. 3d 346, 357 (E.D.N.Y. 2018) (in denying summary judgment, finding that "evidence that shows that the parallel acts were against the apparent individual economic self-interest of the alleged conspirators" may reflect "a common motive to conspire")); ECF No. 66 at 33 ("Therefore, Norfolk Southern's interest in maintaining a higher switch service rate, so that it can allegedly retain a virtual monopoly, diverges from Belt Line's interest in encouraging the business of Belt Line for which it was formed.").

b. CSX's state-law conspiracy claims are supported by ample record contains evidence of "wrongful or tortious" conduct (Counts VIII-IX).

In arguing that CSX has not identified evidence of "unlawful" acts to support its conspiracy claims, Defendants misunderstand the standard for "wrongful or tortious" conduct underpinning these claims. CSX alleged wrongful or tortious conduct to support its Virginia conspiracy claims, and it now has sufficient evidence to support those allegations.

First, Defendants argue that only conduct pled as a separate count can support a Virginia statutory business conspiracy claim. *See* NS Br. at 37, NPBL Br. at 30-31. The Court can quickly

dispense with this argument. The conduct underlying CSX's conspiracy claims need not be a "tort" taught in the first year of law school. Virginia law requires only that CSX show that it suffered damages from "an act that is itself *wrongful or tortious*." *Dunlap v. Cottman Transmission Sys., LLC*, 754 S.E.2d 313, 317 (Va. 2014) (emphasis added).

Moreover, contrary to Defendants' suggestion, CSX need not show that all conspirators engaged in the underlying misconduct. "The object of a civil conspiracy claim is to spread liability to persons other than the primary tortfeasor." *Gelber v. Glock*, 800 S.E.2d 800, 821 (Va. 2017). So "[t]here is no requirement that the party sued for civil conspiracy be the actual tortfeasor." *L-3 Commc'ns Corp. v. Serco, Inc.*, 926 F.3d 85, 92 (4th Cir. 2019) (applying Virginia law).

The record contains evidence of many "wrongful or tortious" acts, including NS's wrongful monopolization under the Sherman Act and the Belt Line's individual directors' violations of fiduciary duties.[31] The state law conspiracy claims must remain.

III. CSX Has Properly Supported its Antitrust Claims (Counts I-IV).

a. NS is not absolved of Section 2 liability merely because NPBL was involved.

NS contends that CSX cannot assert monopolization and attempted monopolization claims under Section 2 of the Sherman Act, because that section addresses only "unilateral conduct by a single firm." NS Br. at 28. This argument fundamentally misunderstands CSX's monopoly claims and the relevant law.

A claim of monopolization under Section 2 of the Sherman Act requires, "in addition to the possession of monopoly power in the relevant market," proof that the defendant willfully

[31] Again, because the defendant in a conspiracy claim need not be the underlying tortfeasor, *L-3 Commc'ns*, 926 F.3d at 92, it does not matter that the individual defendants were voluntarily dismissed from the case. Those co-conspirators were not dismissed for failure to state a claim, and the Court has never ruled that they did *not* breach their fiduciary duties, as CSX alleged and as the record supports. *See* ECF Nos. 143 (dismissal order).

acquired or maintained its monopoly through anticompetitive means, "as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'" *Verizon Commc'ns v. Law Offices of Curtis V. Trinko, LLP,* 540 U.S. 398, 407 (2004). Although "[a]nticompetitive conduct can come in too many different forms, and is too dependent upon context, for any court or commentator ever to have enumerated all the varieties," *Caribbean Broad. Sys. Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080, 1087 (D.C. Cir. 1998), Section 2 claims "usually involv[e] some assay by the monopolist into the marketplace—to limit the abilities of third parties to deal with rivals (exclusive dealing), to require third parties to purchase a bundle of goods rather than just the ones they really want (tying), or to defraud regulators or consumers." *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1072 (10th Cir. 2013); *see, e.g.*, *Conwood Co., LP v. U.S. Tobacco Co.*, 290 F.3d 768 (6th Cir. 2002) (upholding $1.5 billion total jury award on § 2 claims based in part on evidence that monopolist's sales representatives persuaded third party retailers to remove or destroy rival's product displays and exclude rival's products from sales); *U.S. v. Microsoft*, 253 F.3d 34, 71 (DC Cir 2001) (approving monopolization claim premised on licensing arrangements prohibiting customers from engaging with competitors).

NS cites no case suggesting otherwise. Neither *Oksanen v. Page Memorial Hospital* nor *Midwest Gas Services, Inc. v. Indiana Gas Company* considered whether a defendant could involve third parties in its monopolistic efforts, as both turned on other elements of a Section 2 claim. *See Oksanen*, 945 F.2d 696, 710 (4th Cir. 1991) (monopolistic intent); *Midwest* Gas, 317 F.3d 703, 713 (7th Cir. 2003) (antitrust injury). And in *Sun Dun, Inc. of Washington v. Coca-Cola Co.*, the court considered whether two competitors could engage in a "shared monopoly" for their *joint* benefit. *See* 740 F. Supp. 381, 391 (D. Md. 1990). That is not the situation here, where the

monopolist is NS, and the conduct at issue is not intended to benefit NPBL—in fact, NPBL has been *harmed* by NS's monopolistic actions.[32]

b. The record shows that NS has maintained an illegal monopoly at NIT, not that NIT is an "essential facility" to which NS has denied access.

NS argues at length that CSX cannot prove its monopoly claims under an "essential facilities" theory. *See* NS Br. at 28-33. But CSX has not pled—and need not rely on—a theory that NS has denied CSX access to an "essential facility" under its control. The parties agree that NIT, like other POV terminals, is owned by VPA and operated by VIT, both of which have endorsed CSX's efforts to obtain on-dock access at NIT. *See* CSX SOF ¶¶ 81, 86, 100. And CSX's efforts, as alleged in the Complaint and reflected in the record, have been in an attempt to access NIT *via NPBL*, not NS.

CSX has asserted straightforward monopoly claims based on NS's illegal maintenance of its monopoly at NIT, including through its conspiracy with NPBL to block CSX's access to on-dock rail at NIT. *See* ECF No. 1 ¶¶ 85-104. NS cannot avoid the consequences of its anticompetitive actions by attempting to recast CSX's claims under the "essential facilities" doctrine.[33]

c. NS and NPBL conspired to restrain trade in violation of Section 1.

Defendants' arguments about CSX's § 1 claim is also unpersuasive. To establish a

[32] This is yet another argument in which NS seeks to have it both ways. It claims, on the one hand, that it cannot be responsible for actions by a third party (NPBL), while at the same time arguing that its appointed majority of that third party's board "exercise control" over that third party. *See* ECF No. 116 at 9-10.

[33] NS suggests briefly that, even outside the "essential facilities" doctrine, CSX has not shown that it was "substantially foreclosed" by Defendants' conduct, because CSX has paid NPBL's switch rate in other contexts and CSX's market share increased over the relevant period. *See* NS Br. at 32-33. These are issues of disputed fact that cannot be resolved on summary judgment. *See* CSX SOF ¶¶ 75, 99.

violation of § 1 of the Sherman Act, CSX must prove "(1) a contract, combination, or conspiracy; (2) that imposed an unreasonable restraint of trade." *N.C. State Bd. of Dental Exam'rs v. FTC*, 717 F.3d 359, 371 (4th Cir. 2013). The record contains substantial evidence of Defendants' conspiracy. *See supra* at 52-58. That concerted action has unreasonably restrained competition under either of the prevailing standards for evaluating challenged restraints: the per se standard or the "rule of reason." *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885-86 (2007).

1. Defendants' conduct is a per se violation of the Sherman Act.

NS contends that Defendants' conduct cannot be a per se violation of the Sherman Act because NS and NPBL are in a vertical relationship. *See* NS Br. at 35-36. Not so. It is undisputed that the only railroads capable of offering on-dock access at NIT are either NPBL or NS. In the context of that service, therefore, NS and NPBL are at a minimum *potential* horizontal competitors. Accordingly, their conspiracy to block CSX's access to on-dock rail at NIT is a horizontal agreement that is per se illegal. *See Lumber Liquidators, Inc. v. Cabinets To Go, LLC*, 415 F.Supp.3d 703, 712 (E.D. Va. 2019) (agreements between competitors or potential competitors to restrain trade are horizontal). That does not change simply because NPBL may have a vertical relationship to NS at other locations. Where, as here, the predominate nature of the restraint at issue is horizontal, the per se rule applies. *See Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 58 n.28 (1977) (certain restrictions originating from agreements between entities can be vertical in some contexts and horizontal in others).

2. Defendants' conduct is also a violation of the Sherman Act under the Rule of Reason.

Under the rule of reason, a factfinder must analyze "all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint

on competition." *Continental T. V.*, 433 U.S. at 49. The focus of this analysis is the impact on competitive conditions in the relevant market, *see Nat'l Soc'y of Pro. Engineers v. United States*, 435 U.S.679, 688-92 (1978), including "consideration of the facts peculiar to the business in which the restraint is applied, the nature of the restraint and its effect, and the history of the restraint and the reasons for its adoption," *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 607 (1972), and whether the defendants have market power in the relevant market, *Leegin Creative Leather Prods.*, 551 U.S. at 885-86; *see also E.I. DuPont de Nemours and Co. v. Kolon Indus. Inc.*, 688 F. Supp. 2d 443, 456 (E.D. Va. 2009).

(i) CSX has defined a relevant market, and NS's criticisms of that market turn on disputed facts.

"[T]he definition of a relevant antitrust market is a highly fact-intensive inquiry," *Cont'l Airlines, Inc. v. United Air Lines, Inc.*, 120 F. Supp. 2d 556, 568 (E.D. Va. 2000), and NS's arguments about the relevant market turn on issues of disputed fact. "The market definition has two components—the relevant product market and the relevant geographic market." *E.I. DuPont de Nemours and Co. v. Kolon Indus. Inc.*, 637 F.3d 435, 441 (4th Cir. 2011). Each piece of this analysis is "a fact-intensive exercise centered on the commercial realities of the market and competition." *Id*. at 442, 443 n.3. Examining these "commercial realities" must include analyzing:

> where the parties market their products; the size, cumbersomeness, and perishability of the products; regulatory requirements impeding the free flow of competing goods into or out of the area; shipping costs and limitations; the area within which the defendant and its competitors view themselves as competing; and other factors bearing upon where customers might realistically look to buy the product.

Id. at 442-43. The broad range of the results of these analyses shows the importance of each case's particular facts. In part because of the "deeply fact-intensive inquiry" inherent in defining a market, *id*. at 443, "[t]he Supreme Court has counseled that summary judgment in antitrust

litigation should be used sparingly." *Ratino v. Med. Serv. of Dist. of Columbia (Blue Shield)*, 718 F.2d 1260, 1268 n.23 (4th Cir. 1983) (citation omitted).

NS seeks to paint a picture of a world in which ocean carriers can decide to send their ships to *any* port at *any* time and discharge their cargo to *any* form of transportation. Indeed, NS asserts that competition among ports along the East Coast invalidates CSX's market definition. *See* NS Br. at 25. This distortion of reality has the benefit of avoiding any consequences from Defendants' anticompetitive conduct to block CSX from on-dock access at NIT. But in the real world, ocean carriers demand service at the Port of Virginia—including NIT specifically—and CSX must have on-dock rail access at NIT to be competitive for their business. *See* CSX SOF ¶¶ 81-86 Ocean carriers do not, as NS suggests, make a decision about railroad alignment and then on that basis decide to discharge cargo at the Port of Baltimore, or even the Port of NY/NJ, instead of at Port of Virginia. *See* CSX SOF ¶¶ 79-80. To the contrary, carriers make sophisticated decisions about port routing on the basis of many factors other than railroad alignment, including port costs, vessel productivity, and carrier alliances. *See* CSX SOF ¶¶ 78-79. The same is true within the Port of Virginia. Terminal selection at POV is driven by a variety of considerations, the *least* of which is railroad alignment. *See* CSX SOF ¶ 92. Indeed, the empirical data confirm that container traffic *does not shift* between NIT and VIG based on changes in railroad alignment. *See* CSX SOF ¶ 93. Accordingly, CSX must take ocean carriers' choices of ports and terminals as given—and it must offer on-dock service at major terminals like NIT to compete for their business.

The parties disagree on the factual underpinnings of the relevant market definition. For example, NS contends that CSX's proffered geographic market disregards competition among various *ports* for discretionary cargo. *See* NS Br. at 24-26. But the record contains ample evidence that although *ports* may compete for this traffic, railroads have little ability to influence ocean

carriers' choices about at which ports to call. *See* CSX SOF ¶¶ 79-80. NS also argues that NIT is interchangeable with other POV terminals, because VIT decides at which terminal carriers call. *See* NS Br. at 24. PMT and VIG are not reasonable substitutes for NIT, however, because the record shows that many factors other than rail alignment influence terminal selection. *See* CSX SOF ¶¶ 89-91. Indeed, VIT candidly admits that it cannot steer all CSX-aligned traffic away from NIT—a fact that the empirical data confirm. *See* CSX SOF ¶¶ 92-93. Finally, NS contends that CSX's defined service market overlooks "end-to-end truck transportation" as a competitive alternative to rail. *See* NS Br. at 26. This argument ignores the great weight of the evidence, which reflects that trucks and rail do *not* compete for international intermodal freight traveling beyond local markets. *See* CSX SOF ¶¶ 95-98. As NS's expert acknowledges, the major Midwest markets served from NIT are all are further than 500 miles, meaning trucks are not a reasonable competitive alternative. *See* CSX SOF ¶¶ 96-97; *see also* NS Ex. 71 ¶¶ 38-44. All of these factual disputes preclude summary judgment.

(ii) NS's monopoly power is also shown through ample evidence of actual harm to competition.

Separate and apart from defining the relevant market, CSX can also prevail by demonstrating monopoly power directly. Defining the relevant market, and showing a defendant's power within that market, allows an antitrust plaintiff to establish anticompetitive effect indirectly. *See Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1019 (10th Cir. 1998). When the plaintiff can prove monopoly power "directly by showing *actual anticompetitive effects*, such as control over output or price," however, there is no need to precisely define the relevant market. *Id.*; *see also FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 460-61 (1986) ("Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, 'proof of actual detrimental effects, such

as a reduction of output,' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects."). CSX need not specifically define the relevant market in this case, because the record shows that Defendants' actions have resulted in actual anticompetitive harm to ocean carriers, regardless of the precise metes and bounds of the market. *See* CSX SOF ¶ 101; *see also* NS Ex. 7 ¶¶ 69-73, 78-81; NS Ex. 71 ¶¶ 78-81.

(iii) CSX's expert's market definition matches the Complaint, and NS has shown no prejudice from any purported differences.

Finally, NS contends that the Court should grant summary judgment based on purported discrepancies between the market definition alleged in CSX's complaint and that set forth in its expert's report. *See* NS Br. at 21-22.

As stated in CSX's Complaint, the relevant geographic and service market at issue is rail freight transportation into and out of Hampton Roads' intermodal port facilities. ECF No. 1 ¶¶ 49-50. As discussed at length in the Complaint, this case is about Defendants' efforts to deny CSXT on-dock rail access at NIT and the resultant harm to CSX and the market. *Id.* ¶ 3 (Defendants have acted in concert to "maintain NS's monopolistic control over intermodal transportation in and out of NIT by making it practically impossible for any other rail carriers to provide intermodal rail service to NIT."); ¶ 54 (NS and NPBL have taken anticompetitve acts to "effectively deny[] CSXT access to NIT by rail in competition with NS"); ¶ 57 (Defendants conspired to set and maintain NPBL switch rates—which CSX must pay to access NIT—"at levels designed to exclude competition in the relevant market"); ¶ 79 (Defendants conspired to take actions to effectively foreclose CSX from using NPBL "to compete in the provision of multi-modal services at NIT," in violation of § 1 of the Sherman Act).

To the extent there was any question about the relevant market, CSX's expert put a finer point on it in his February 25, 2020 expert report: "[T]he provision of on-dock access to NIT is a

relevant market." NSR Ex. 7 at ¶ 12 (emphasis in original); *see also id.* ¶¶ 37-51 (describing the relevant market). NS's expert understood CSX's market definition and responded to it in his report, filed February 3, 2021. *See* NS Ex. 10 ¶ 49 ("This case involves the alleged foreclosure by NSR of CSXT's rail access to one terminal, NIT, at the Port of Virginia.") (citing ECF No. 1 ¶ 42). Given that CSX's market definition has been clear since the Complaint was filed in October 2018, NS's new protests that it has not been provided fair notice ring hollow.

Even if there were a difference between the market definition pled by CSX and that articulated by Dr. Marvel (which there is not), Defendants cannot show they have been prejudiced as a result. Dr. Marvel's description of the market is comfortably within the market defined by the Complaint, which not only referenced market share at NIT, but also contained numerous allegations related to NIT specifically—as this Court noted in assessing CSX's allegations of antitrust injury at the motion to dismiss stage. *See* ECF No. 66 at 35; *see also Four Corners Nephrology Assoc., P.C. v. Mercy Med. Ctr. of Durango*, No. 05-2084, 2008 WL 2355533, at *4 n.3 (D. Colo. May 22, 2008) (permitting plaintiffs to rely on a narrower market definition than plead in their complaint, given lack of prejudice to defendants).

Moreover, due to the long stay in this case, Defendants conducted substantially all of their fact discovery with the benefit of Dr. Marvel's report, including his detailed description and analysis of the relevant market. *See* ECF No. 254. NS's expert likewise had a full year to formulate his response to Dr. Marvel's report, and he *directly addressed* this issue. This is simply not a case in which a purported change to market definition surprised Defendants or prejudiced their defense in any way. *See City of New York v. Group Health, Inc.,* 649 F.3d 151, 157-58 (2d Cir. 2011) (affirming refusal to permit plaintiff to amend its complaint to alter its market definition, noting that defendant would be prejudiced because of the need to conduct new discovery on a

"different and much broader market"). Summary judgment is thus inappropriate. *See Precision Seed Co. v. Consol. Grain & Barge Co.*, No. 3:03cv079, 2006 WL 840377, at *11 (S.D. Ohio March 30, 2006) (refusing to grant summary judgment where market definition asserted by plaintiff's expert was different than that pled in the complaint, finding defendant would suffer no prejudice if "new" definition were offered at trial).

Further, the record contains ample evidence that NS dominates the market, whether evaluating its share at just NIT or at all Port of Virginia terminals. *See* CSX SOF ¶ 13 (NS has handled between [redacted]% and [redacted]% of international intermodal business at the Port of Virginia—and between [redacted]% and [redacted]% at NIT—between 2009 and 2020); *see also E.I. DuPont de Nemours and Co. v. Kolon Indus. Inc.*, 688 F. Supp. 2d 443, 456 (E.D. Va. 2009) (noting monopoly power has been found where "the defendant controlled seventy to one hundred percent of the relevant market"). Indeed, in response to criticisms from NS's expert, Dr. Marvel assessed harm to ocean carriers and calculated damages to CSX based on an alternative market definition comprising the Port of Virginia as a whole. *See* CSX SOF ¶¶ 101-102; NS Ex. 71 ¶¶ 122-23.

If this Court concludes, however, that there is a meaningful divergence between the market definition in CSX's Complaint and Dr. Marvel's report, CSX can readily and quickly amend its Complaint, with leave of Court, to modify its market definition—a course of action approved in antitrust matters even at the late stage of trial. *See*, *e.g.*, *Ad-Vantage Tel. Directory Consultants, Inc. v. GTE Directories Corp.*, 849 F.2d 1336, 1342-43 (11th Cir. 1987) (permitting plaintiffs to amend complaint to allege different market because defendant failed to show prejudice).

3. Defendants' argument that the NPBL rate is "justified" rests on disputed facts.

NPBL argues that CSX has not shown that Defendants' conduct "unreasonably restrained trade," because, in its view, NPBL's switch rate is "justified" by its costs. *See* NPBL Br. at 31-

36; *see also* NS Br. at 35. This argument fails. Contrary to NPBL's suggestion, CSX's claims do not "hinge" on the NPBL's switch rate.[34] As the record shows, Defendants have engaged in wide variety of anticompetitive conduct, including, but not limited to, setting and maintaining a switch rate excessive for intermodal traffic. When deciding whether Defendants' conspiracy unreasonably restrained trade in violation of the Sherman Act, the trier of fact must consider the *totality* of this conduct. *See 3M*, 324 F.3d at 162.

The record also contains substantial evidence refuting NPBL's suggestion that the $210 rate is needed to cover its costs for service to NIT. See NS Ex. 71 ¶¶ 57-58 (noting that, because average costs would decline with additional traffic, charging a price per car sufficient to cover current average costs is unreasonable). In analyzing the Belt Line's costs, NPBL's expert makes no attempt to distinguish between fixed costs, which would not increase with additional traffic, and variable costs, which would. See NPBL Br. at 34 (citing NPBL Ex. 3 at Tbl. 5). As NPBL's Cannon Moss testified, because fixed costs would not change, NPBL's total cost per car would decrease as the number of cars handled increased. See CSX SOF ¶¶ XX. And both CSX and NPBL repeatedly determined that NPBL could cover its costs and gain incremental income by moving intermodal containers at a lower switch rate. See CSX SOF ¶¶ XX. These disputes of fact preclude summary judgment.

NPBL's reliance on *Laurel Sand & Gravel, Inc. v. CSX Transp., Inc.*, 704 F. Supp. 1309, 1323 (D. Md. 1989), is misplaced. *See* NPBL Br. at 34-37. In *Laurel Sand*, the court considered whether, in the context of an essential facilities claim, CSX had to offer the plaintiff trackage rights in lieu of the switch rate offered. *See* 704 F. Supp. at 1323. It determined that the rate offered by CSX ($0.01 per ton above its *variable* costs) was not so unreasonable as to amount to a denial of

[34] Indeed, NS does not attempt to argue that this is the only conduct at issue. *See* NS Br. at 35-36.

access under an "essential facilities" theory. *See id.* As explained above, this is not an essential facilities case. *See supra* at 60-61. Nothing in *Laurel Sand* suggests that the Court can conclude that NPBL's rate is justified by its costs as a matter of law—much less that Defendants' conduct as a whole did not unreasonably restrain trade or improperly maintain NS's unlawful monopoly.

IV. CSX's Breach of Contract Claim (Count V) is Well-Supported

NS breached its obligations under the NPBL Operating Agreement. Under Virginia law, "[t]he elements of a breach of contract action are (1) a legally enforceable obligation of a defendant to a plaintiff; (2) the defendant's violation or breach of that obligation; and (3) injury or damage to the plaintiff caused by the breach of obligation." *Filak v. George*, 594 S.E.2d 610, 614 (Va. 2004). NS does not dispute that the Operating Agreement creates legally binding obligations between it and CSX; it contends that none of its actions breached a provision of the Operating Agreement. NS Br. at 37-40.

NS has breached several provisions of the Operating Agreement. For example, the Tenth Article states that the parties to the agreement—that is, NS and CSX—"will co-operate cordially in encouraging the business of the [NPBL] for which it is constructed." ECF No. 1-1 at 6. As this Court has noted, "cooperation clauses are generally enforceable." ECF No. 66 at 42 (citing *Feldman Prod., Inc. v. Indus. Risk Insurers*, No. Civ.A. 3:09-0481, 2011 WL 4543966, at *4 (S.D.W. Va. Sept. 29, 2011)). NS argues that NPBL, not CSX, would be the proper party to claim damages caused by a breach of this obligation—contrary to the express language of the Operating Agreement that NPBL operates "for the mutual benefit of each [shareholder] in the interchange of business." NS Br. at 39; ECF No. 1-1 at 3. Indeed, the record evidence establishes that NS has failed to co-operate with CSX to encourage the business of NPBL, blocked CSX from using NPBL,

failed to act on proposals that would encourage the business of NPBL, insisted on actions that would harm NPBL, and induced its directors to do the same.

NS has also breached the implied covenant of good faith and fair dealing, included in every contract governed by Virginia law. *Enomoto v. Space Adventures, Ltd.*, 624 F. Supp. 2d 443, 450 (E.D. Va. 2009). In addition to certain of NS's actions expressly violating the Operating Agreement, NS is also liable for breach of the Agreement if it exercised its "contractual discretion in bad faith." *Morrison v. Wells Fargo Bank, N.A.*, 30 F. Supp. 3d 449, 456 (E.D. Va. 2014). Courts have also held that the covenant is breached when a party has "act[ed] in such a manner as to prevent the other party from performing his obligations under the contract." *E. Shore Markets, Inc. v. J.D. Assocs. Ltd. P'ship*, 213 F.3d 175, 183 (4th Cir. 2000). At the least, NS has prevented CSX from "deliver[ing] to the [NPBL] all cars to be interchanged with other Companies." ECF No. 1-1 at 6. Ample evidence exists that NS breached the NPBL Operating Agreement.

CONCLUSION

For all these reasons, the Court should deny Defendants' Motions.

Dated: May 3, 2021

Respectfully submitted,

CSX TRANSPORTATION, INC.
By Counsel

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CERTIFICATE OF SERVICE

I certify that on this 3rd day of May, 2021, a true and correct copy of the foregoing was served on all counsel of record via Notice of Electronic Filing by filing with the Court's CM/ECF system.

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Before the
SURFACE TRANSPORTATION BOARD

Finance Docket No. 36522

NORFOLK SOUTHERN RAILWAY COMPANY
—PETITION FOR DECLARATORY ORDER

EXHIBIT D

FILE IN DOCKET

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July 24, 1980

FILED
JUL 24 1980
INTERSTATE
COMMERCE COMMISSION

Mr. James Bayne
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Re: Finance Docket No. 29430, NWS Enterprises, Inc. -- Control -- Norfolk and Western Railway Company and Southern Railway Company

INTERSTATE COMMERCE COMMISSION
JUL 29 4 54 PM '80
RECEIVED
PROCESS SERVING
BRANCH

Dear Mr. Bayne:

Enclosed for filing in the above-referenced proceeding are an original and twenty (20) copies of the "Petition of Norfolk and Western Railway Company and Southern Railway Company Seeking Waiver and Clarification of the Railroad Consolidation Procedures (49 C.F.R. Part 1111)."

Please direct any inquiries regarding this matter to the undersigned.

Sincerely,

INTERSTATE COMMERCE COMMISSION

Richard J. Flynn

JUL 24 1980

Enclosures 2

ADMINISTRATIVE SERVICES
MAIL UNIT

OP-STMT-251

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Finance Docket No. 29430

NWS ENTERPRISES, INC. -- CONTROL --
NORFOLK AND WESTERN RAILWAY COMPANY AND
SOUTHERN RAILWAY COMPANY

PETITION OF
NORFOLK AND WESTERN RAILWAY COMPANY
AND
SOUTHERN RAILWAY COMPANY
SEEKING WAIVER AND CLARIFICATION OF
THE RAILROAD CONSOLIDATION PROCEDURES
(49 C.F.R. PART 1111)

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Dated: July 24, 1980

BEFORE THE

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 29430

NWS ENTERPRISES, INC. -- CONTROL --
NORFOLK AND WESTERN RAILWAY COMPANY AND
SOUTHERN RAILWAY COMPANY

PETITION OF
NORFOLK AND WESTERN RAILWAY COMPANY
AND
SOUTHERN RAILWAY COMPANY
SEEKING WAIVER AND CLARIFICATION OF
THE RAILROAD CONSOLIDATION PROCEDURES
(49 C.F.R. PART 1111)

COME NOW Norfolk and Western Railway Company (NW), on behalf of itself and its subsidiary companies, and Southern Railway Company (SRC), on behalf of itself and its consolidated system companies, and seek waiver and clarification of the Interstate Commerce Commission's regulations (49 C.F.R Part 1111) governing the preparation, filing, and procedural details of applications under 49 U.S.C. §§11343 et seq.. NW and SRC intend to file with the Commission an application seeking approval of the control of NW and SRC by a new holding company, initially named NWS Enterprises, Inc.

NW and SRC will file their control application and all related applications before the end of 1980. To meet

the 1980 filing date, NW and SRC have already begun preparation of the necessary applications. NW and SRC had believed, as they began their preparations, that the rather extensive proposed revisions to the railroad consolidation regulations contained in the notice of proposed rulemaking served November 8, 1979, in Ex Parte No. 282 (Sub-No. 3), Railroad Consolidation Procedures, would be finalized by the time of, and would govern, their application. Only within the last two weeks NW and SRC have been advised by Commission staff members that, rather than adopting the proposed regulations, the Commission will issue a new set of proposed regulations. The new proposal will, we understand, solicit additional comments and will, therefore, not become final until some indefinite future date.

As the Commission must be aware, preparation of the evidence necessary to demonstrate that a control transaction is consistent with the public interest takes a long time, involves preparation of a considerable amount of technical data, and requires the efforts of many railroad employees and outside consultants. Given the large amount of resources already dedicated to or earmarked for preparation of the NW/SRC application, NW and SRC require immediate guidance as to the requirements which will govern their application.

NW and SRC preparations for filing their application are already well underway. To postpone additional preparations until new proposed regulations, and eventually final regulations, are issued could prevent filing of the NW/SRC application during 1980 or early 1981. Therefore, NW and SRC hereby advise the Commission that their control application and any related applications will be filed pursuant to the existing regulations found at 49 C.F.R. Part 1111, except to the extent portions of those regulations are modified pursuant to waiver requests in this petition. N&W and SRC do intend to file their direct testimony concurrently with such applications.

NW and SRC also request that the existing consolidation regulations, as modified pursuant to this petition, be applied to and govern all procedural aspects of the submissions of all other parties to the NW/SRC control proceeding. NW and SRC believe that it is essential that the existing regulations apply across the board to assure the Commission of comparable data and to assure the parties that all applications and other pleadings will be prepared and handled under the same rules.

To assure that all interested parties are fully aware of the requirements and procedures which will govern the NW/SRC control proceeding, NW and SRC have prepared a notice of the type required by Section 1111.6(B) of the

proposed regulations. This notice, which was filed on July 23, 1980, advised both of the proposed filing date of the NW/SRC application and of the fact that the existing regulations (as modified by Commission order) will govern all aspects of, and all other pleadings filed in, the proceeding. NW and SRC request that the Commission publish the notice promptly in the Federal Register.

NW and SRC's current preparations have led them to conclude that waiver of certain provisions of the existing regulations would be appropriate for the type of transaction NW and SRC propose. The waivers NW and SRC deem essential, and certain additional clarifications, are set forth below.

I. Waiver to Permit Submission of Data on a System Basis.

Numerous provisions of the regulations require submission of information for "applicants," which is defined as "all carriers with properties directly involved." 49 C.F.R. §1111.1(a), fn 1.

Southern Railway Company, which will be an applicant in the proposed transaction, is a Class I railroad and also controls three Class III railroads, and numerous terminal and other railroad companies (Appendix A). SRC and each of its consolidated companies are separate corporate entities, but the transportation functions of the companies are under

common management, and in most instances required reports to the Commission and to other regulatory agencies are submitted on a system basis.*

The validity, propriety, and accuracy of system reporting and accounting by SRC and its consolidated system lines have been substantiated by long usage. Southern Ry. Co. Purchase, 275 I.C.C. 724, 732 (Div. 4, 1950). Use of consolidated system accounting for all abandonments by SRC and its consolidated system companies was approved by the Commission in Finance Docket No. 28479, Southern Railway Company--Petition for Clarification or Waiver of Portions of the Regulations Governing Abandonment of Railroad Lines and Discontinuance of Service (49 C.F.R. Sections 1121.10-46) (order of Division 3, served August 2, 1977). Most recently, in Finance Docket No. 28961, Southern Railway Company, Eastern Kentucky Railway Company, and Western Florida Railway Company-Acquisition of Properties--Chessie System, Inc., and Seaboard Coast Line Industries, Inc., (decision of the Com-

* All railroad reports required by the Commission, with the sole exception of the R-1 and R-2 annual reports, are filed by SRC and its consolidated system lines on a consolidated system basis, not by individual railroads, and do not reflect individual railroad accounts. In addition, the quarterly Operating Statistics-A, -B, and -C reports, and the quarterly Revenue, Expense, and Income (RE&I) report, which summarizes information from annual R-1's and R-2's, are compiled and submitted on a consolidated system basis.

mission, served April 13, 1979), the Commission approved the use of SRC consolidated system data in preparation of an inconsistent application filed pursuant to Section 11345(c).

Norfolk and Western Railway Company, also an applicant in the proposed transaction, controls five Class III railroads, one terminal company, and other non-operating railroad companies (Appendix B).* As in the case of SRC, each of these companies is a separate corporate entity, but the rail operations of each are effectively controlled by NW. For the year 1979, the gross operating revenues and expenses of all of these subsidiary companies constituted no more than 1.26 and 1.36 percent, respectively, of NW's gross operating revenues and expenses on a consolidated basis. The 1979 income from railway operations and the total assets of the subsidiaries amounted to 0.89 and 3.67 percent, respectively, of the NW system figures. Similarly, changes in railway employment, freight car fleets, revenue freight traffic information, and commodity revenue and tonnage on NW's subsidiary rail lines are minimal when compared to NW statistics and, furthermore, either are not readily retrievable or overlap NW data and thus cannot be added to NW's data without extensive manual processing. NW submits that exclusion of all data relating to these subsidiaries, except

* Delaware & Hudson Railway Company is not included in Appendix B for reasons discussed herein.

to the extent that it is currently maintained on a consolidated basis, as in financial reporting, will not inhibit the Commission's evaluation of the NW/SRC proposal.

Delaware and Hudson Railway Company (D&H) will also fall within the definition of "applicant" in this proceeding because its stock is held by Dereco, Inc., a wholly-owned subsidiary of NW. However, the operations of D&H are not effectively controlled by NW, nor will NW, SRC, or their future holding company exercise control over D&H operations. Data with regard to D&H traffic and equipment is kept by D&H, not NW. Therefore, information with regard to D&H will be submitted separately from that for NW. D&H controls two Class III carriers* which, as in the case of NW, are a negligible part of the D&H system. For the year 1979, the gross operating revenues and expenses of D&H's subsidiary railroads equalled 1.86 and 1.68 percent, respectively, of D&H's gross operating revenues and expenses on a consolidated basis. Therefore, it is requested that NW be permitted to disregard these two subsidiaries in compiling the required data for D&H.

Because much of the data sought to be filed on a system basis is compiled by SRC only on a system basis,

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* These are the Greenwich and Johnsonville Railway Company and the Napierville Junction Railway Company.

recreation of this data on an individual railroad basis would be extremely burdensome. This burden cannot be justified when submission of consolidated system data by SRC will result in a more accurate and complete application. A similarly unjustifiable burden would fall on NW and D&H if they were required to develop manually information on their subsidiary carriers which, in both cases, would have a very insignificant impact on the data for NW or D&H alone. Therefore, NW and SRC request a waiver to submit data on the bases indicated below for the following items and exhibits:

§1111.1(d)(5)	-	Principal routes and terminals, principal points of interchange, main line and branch line mileage to be described separately for NW system, D&H system, and SRC system without differentiation by subsidiaries within these systems.
§1111.1(d)(7)	-	Property values to be given for SRC on a consolidated system basis and for NW and D&H only.
Exhibit 8	-	Map to show, separately, NW system lines, D&H system lines, and SRC system lines without distinguishing individual subsidiary lines within these systems.
Exhibit 10	-	Impacts on railway labor, including information relating to pension plans, work changes, costs and savings, and rate of attrition, to be based upon consolidated system data, where so maintained, or if not so maintained in the case of NW and D&H, upon data for NW and D&H only.

Exhibit 12	-	Environmental information and calculations to be based upon consolidated system data, where so maintained, or if not so maintained in the case of NW and D&H, upon data for NW and D&H only.
Exhibit 13	-	Energy information and calculations to be based upon consolidated system data, where so maintained, of if not so maintained in the case of NW and D&H, upon data for NW and D&H only.
Exhibit 14(i)	-	Density charts to be prepared for SRC on a consolidated system basis and for NW and D&H only.
Exhibit 14(ii), Table A	-	Carload interchange data to be prepared for SRC on a consolidated system basis and for NW and D&H only.
Exhibit 14(ii), Table B	-	State-to-state data to be provided for SRC on a consolidated system basis and for NW and D&H only.
Exhibit 14(iii)	-	Carload origin and destination data to be given for SRC on a consolidated system basis and for NW and D&H only.
Exhibit 15(i)	-	Freight car fleet to be shown for SRC on a consolidated system basis and for NW and D&H only.
Exhibit 15(ii)	-	Revenue freight traffic to be shown for SRC on a consolidated system basis and for NW and D&H only.
Exhibit 15(iii)	-	Commodity revenue data to be given for SRC on a consolidated system basis and for NW and D&H only.

Exhibit 15(iv)	-	Commodity tonnage data to be given for SRC on a consolidated system basis and for NW and D&H only.
Exhibit 16(i-vii)	-	Traffic study data to be given on consolidated system bases.
Exhibit 17	-	Operating plan to be developed on consolidated system bases.
Exhibit 18(i-vi)	-	Balance sheets to be provided for NW on a consolidated system basis, for D&H on a consolidated system basis, for SRC on a consolidated system basis, and for the new holding company.*
Exhibit 18(vii)	-	Pro forma balance sheets, if required, to be based on consolidated system bases.**
Exhibit 19(i-vi)	-	Income statements to be provided for NW on a consolidated basis, for D&H on a consolidated system basis, for SRC on a consolidated system basis, and for the new holding company.***
Exhibit 19(vii)	-	Pro forma income statements if required, to be based on consolidated system data.****
Exhibit 19(viii)	-	Statement of sources and application of funds, if required, to be based upon consolidated system data.*****

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* See waiver request VIII, pp. 26-27 for more detailed explanation.

** See waiver request IX, pp. 27-28 for more detailed explanation.

*** See waiver request VIII, pp. 26-27 for more detailed explanation.

**** See waiver request IX, pp. 27-28 for a more detailed explanation.

***** See waiver request X, pp. 28-29 for a more detailed explanation.

II. Clarification of the Meaning of the Term "Applicant".

A. Clarification that "Applicant" Refers Only to the Initiating Parties.

As noted in waiver request I, the term "applicant" is defined in the consolidation regulations to encompass "all carriers with properties directly involved." 49 C.F.R. §1111.1(a), n.1. However, the first sentence in that definition states that "applicant" is used "as a general reference to persons initiating an application." NW and SRC believe that, particularly with regard to corporate data, the intent of the regulations is to require information only about initiating parties. To compile and submit such data for all of the numerous subsidiary carriers of the initiating parties, NW and SRC, and of D&H would be a considerable burden and would significantly increase the paperwork required for the control application.

NW and SRC request clarification that the term "applicant," as used in Section 1111.1(b) and (c), applies only to NW, SRC, and the new holding company, which are the initiating parties in this control transaction, and to D&H, which is operated separately from NW.

B. Clarification That The Term "Applicant" Does Not Encompass Non-Consolidated Companies.

In addition to the consolidated system companies of NW, SRC and D&H, both NW and SRC have interests in

certain railroad companies which are operated independently of the NW or SRC systems. NW and SRC hold 50 percent or less of the stock of such companies, do not now exercise control over them, and have no intention of exercising control over any such companies after the control transaction is approved. The records of these companies are maintained separate and apart from NW and SRC consolidated system data. NW and SRC believe that bringing into this proceeding data concerning these carriers (other than identifying them in the response required by Section 1111.1(c)(8)) would serve no useful purpose and would substantially burden the record. Therefore, NW and SRC seek clarification that the term "applicant" does not encompass such non-controlled carriers.

III. Waiver to Permit Submission of Exhibit 14(i) in the Form of a Density Map and Explanatory List.

Exhibit 14(i) requires submission of a density chart showing principal lines, yards, terminals, station and common names, density in each direction by segment, and mileage by segment. Section 1111.2 (b)(1)(i) indicates that all of this data must be placed upon the face of the chart.

NW and SRC in prior consolidation proceedings have found that inclusion of all the required data on the face of the map often results in an illegible product. To make the

density chart more readable, SRC submitted as Exhibit A-14(i) in its recent application in Finance Docket No. 28961 both a density chart and supplemental explanatory list. NW followed a similar format in Finance Docket No. 29009 (Sub-No. 1) and related subnumbers. NW and SRC believe that Exhibit 14(i) in their control application would be more useful to the Commission and interested parties in the form of maps supported by explanatory lists.

NW and SRC seek waiver to permit filing of Exhibit 14(i) in the form of density maps showing graphically the density in each direction on line segments between given end points plus a detailed explanatory list containing for each segment the additional required information.

IV. Waiver to Permit Alphabetical Sequencing of Gateways in Exhibit A-14(ii), Tables A and B

Section 1111.2(b)(1)(ii) requires submission of detailed revenue carload interchange data and precisely prescribes the form in which such data shall be submitted. This NW/SRC waiver request does not address the substance of the material to be filed, but only the form of such submission.

Gateways are required to be submitted by geographic sequence from east to west. The existing NW, SRC and D&H rail systems cover states extending westward from the Atlantic coastline to Omaha, Nebraska, and also

northward from Florida and the Gulf Coast to Canada. To list gateways from east to west in any sequence which would be useful to a person in need of information from Exhibit A-14(ii), NW, SRC and D&H would have to construct artificially a grid over each of their systems by which gateways could be divided. Sequencing of the gateways would require many hours of completely manual effort, because the computerized records from which the substantive data will be drawn are not in geographical sequence.

To avoid the considerable burden of this strictly manual process and to provide the Commission and other interested parties a simpler and more useful exhibit, NW, SRC and D&H propose to sequence gateways in Exhibit A-14(ii) alphabetically by state and alphabetically by gateways within each state. A similar waiver was granted SRC in Finance Docket No. 28961.

V. Waiver to Permit Submission of Two Copies Only of Exhibit A-14(ii), Table B, and to be Relieved of the Requirement That Exhibit A-14(ii), Table B Be Served.

Section 1111.4(a)(3) states that all applications filed with the Commission or served upon parties shall contain all exhibits. However, by waiver regularly sought and granted in recent consolidation proceedings (including Finance Docket Nos. 28583, 28905, and 28961), the Commis-

sion has recognized the considerable size of Exhibit 14(ii), Table B, the major expense involved in producing and serving multiple copies of this exhibit, the limited interest in this exhibit among parties to the proceeding, and the significant burden upon applicants to reproduce and serve multiple copies of this exhibit. Under these circumstances the Commission has in the past required that only two copies of Exhibit A-14(ii), Table B, be filed with the Commission and has also permitted deletion of this exhibit from service copies of the application.

NW and SRC request that Section 1111.4(a)(3) be waived to the extent necessary to permit filing only two copies of Exhibit A-14(ii), Table B, with the Commission, to permit the deletion of Exhibit A-14(ii), Table B, from all service and other copies of the application, and to require NW, SRC and D&H to make available at each corporate headquarters copies of Exhibit A-14(ii), Table B, upon request.

VI. Waiver to Permit Submission of Certain Historical Data Only For 1976, 1977, 1978, and 1979.

Exhibit 15 requires the submission of certain historical equipment and traffic data for 10 calendar years prior to the filing of an application. Similarly, employee attrition data under Exhibit 10(vi) must be for 6 years

prior to filing. The counterparts of Exhibit 15 in the proposed regulations (Exhibits 21, 22, 23, and 24) reduce the requirement to cover only the first, fifth, and tenth years preceding filing.

In the opinion of NW and SRC, the 10 year data requirement of Section 1111.2(b)(2) results in preparation and submission of an enormous amount of data which is rarely used, as the proposed regulations recognize. On the other hand, first, fifth and tenth year data does not provide the Commission with a particularly useful basis for evaluating the future effects of the proposed control transaction. NW and SRC suggest that more current historical data is a more realistic basis upon which to project the future impact of NW and SRC under common control.

NW and SRC therefore request that the Commission permit submission of Exhibits 10(vi) and 15 containing data for calendar years 1976, 1977, 1978, and 1979. NW and SRC have chosen the most recent four year period because calendar year 1978 data is not representative for NW, because such data was distorted by two major strikes during that year.

VII. Waiver and Clarification of Certain Requirements of Exhibit A-16, Traffic Study.

Section 1111.2(b)(3) of the regulations sets forth in considerable detail the requirements for a rail traffic

diversion study, Exhibit A-16. Because of the large number of shipments potentially involved in such a study, the long time required to do the study, and the dependence of numerous other exhibits upon the results of such a study, NW and SRC have already begun the preparations for their rail diversion study. Although these preliminary efforts conform generally with Section 1111.2(b)(3), the need for waiver or clarification has become obvious.

A. Clarification That Certain Assumptions Made By NW and SRS Evaluators Are Appropriate

As required by Section 1111.2(b)(3)(i), the NW, SRC and D&H data bases will cover "the latest full calendar year," in this instance calendar year 1979. However, neither subparagraph (i) of Section 1111.2(b)(3) nor any other paragraph in that section requires that marketing, operating, or any other conditions which prevailed during the calendar year chosen be adopted by the traffic evaluators as assumptions governing their diversion judgments. Indeed, the regulations are silent as to particular assumptions which may or should be made, leaving the choice thereof to the applicants.

NW and SRC believe this flexibility with regard to assumptions is essential, considering the unavoidable lag between the study year and the filing of an application, and in

light of the potential for significant developments during that time. Such developments during and subsequent to calendar year 1979, with which NW and SRC must deal, clearly demonstrate the necessity of applicants' developing and articulating the assumptions peculiar to their traffic study.

To assure that their traffic study is not merely an artificial construction bearing no resemblance to present realities upon which their decision to join under common control was made, NW and SRC have made, in their traffic studies and resulting operating plan, certain assumptions with regard to the structure of and constraints upon the railroad industry. These assumptions were discussed with members of the Commission's staff, who suggested that the Commission be advised in advance of the assumptions.

Because preparations for the rail diversion study were, of necessity, begun immediately upon agreement by the managements of NW and SRC to go forward with the control transaction, NW and SRC decided to prepare two versions of the rail diversion study. The first version will include the following assumptions with regard to industry structure and regulatory constraints:

1) 1979 rates and routes are in effect, subject to the following modifications:

   a) The most direct NW/SRC routes are available;

   b) Traffic protective conditions will not be imposed by the Commission;

   c) Carriers' known and existing routing practices will be considered.

2) The structure of the railroad industry is as it was during 1979, subject to the following modifications:

   a) NW, SRC and the system lines of each are operating under common control with an efficient Cincinnati interchange;

   b) D&H will retain traffic and operating independence;

   c) The Burlington Northern/Frisco merger, as approved by the Commission, has been consummated;

   d) Grand Trunk Western has acquired control of the Detroit, Toledo & Ironton but has no ownership interest in the Detroit and Toledo Shore Line;

   e) Rock Island is no longer operating, but certain Rock Island properties are being operated pursuant to temporary authority orders in effect on June 15, 1980 (including operation by Cotton Belt on the Santa Rosa-St. Louis line);

   f) Of those Milwaukee lines no longer operated by the Trustee, certain lines are being operated pursuant to temporary authority orders in effect on June 15, 1980.

The second version of the NW/SRC rail diversion study will be based upon the assumptions listed above, plus the following additional assumptions:

1) The Chessie System/Seaboard Coast Line consolidation has been approved by the Commission and has been consummated.

2) NW has obtained trackage rights between Hagerstown, MD, and Connellsville, PA; and between Lynchburg and Glasgow, VA.

3) D&H has obtained trackage rights between Lurgan, PA, and Hagerstown, MD.

NW and SRC believe strongly that a traffic study which considers only 1979 circumstances and ignores subsequent developments would not provide the Commission and interested parties with a realistic basis upon which to evaluate the effects of the NW/SRC control transaction. Therefore, NW and SRC have made every effort to develop a traffic study which reflects their judgment as to the structural and regulatory climate likely to exist at the time the Commission considers their control application.

Both versions of the rail diversion study will be progressed by NW and SRC, and the other application exhibits affected thereby (including the operating plan) will be predicated upon the more appropriate version of the two. Therefore, should the Commission approve the Chessie/Seaboard

Coast Line consolidation, Exhibit A-17 to the NW/SRC application would be premised on the second version of the traffic study. Similarly, should the Chessie/Seaboard Coast Line transaction be disapproved by the Commission, version one of the traffic study would be adopted.

NW and SRC seek clarification that Section 1111.2(b)(3) permits applicants sufficient flexibility to recognize, in making their traffic diverison estimates, structural and regulatory developments subsequent to the calendar year of their data bases and to carry the effects of such developments forward into their operating plan.

B. Clarification that Certain Deletions from the Traffic Study Data Base Either Prior to or Following Sample Selection Are Permissible

The data base for the NW/SRC rail diversion study includes the entire 1979 traffic universes of NW, SRC and D&H, arranged in proper hierarchy to eliminate duplication. This data base includes millions of individual shipments.

Shipments for which NW, SRC or D&H system lines provided only a switch movement and did not participate in the line haul are not included in the NW, SRC or D&H data bases. Complete data necessary for evaluation of such movements is not kept by NW, SRC or D&H, and to obtain the complete data would involve a manual process requiring

cooperation from other roads which could not be completed without considerable delay to the entire traffic study and application. To the extent that traffic handled by NW, SRC or D&H system lines as a switch movement only could be diverted by NW, SRC or D&H system lines for a future line haul movement, this data would be in the traffic base of the carrier now enjoying the line haul and would appear most logically in that carrier's traffic diversion study.

In addition, both SRC and NW systems handle a small amount of U.S. Postal Service traffic under negotiated contracts. Because of the unique circumstances of such government traffic, it is not susceptible to classic diversion study analysis.

Finally, NW and SRC know that the traffic sample will include a considerable number of movements which can be identified by computer as : (1) geographically irrelevant to the control transaction; (2) entirely local to NW, SRC or D&H systems; or (3) interlined only among NW, SRC and D&H system lines. NW and SRC propose to delete such traffic from either their data base or their sample prior to the evaluation process by which possible gain or loss will be estimated.

NW and SRC seek clarification that Section 1111.2(b)(3) will permit exclusion from the traffic base,

prior to sampling, of shipments for which NW, SRC or D&H system lines served only as the switching carrier, of shipments which were local to NW, SRC or D&H system lines, or of shipments which were interlined only among NW, SRC or D&H system lines. In addition, NW and SRC request clarification that exclusion, following sampling and prior to the evaluation process, of complete study movement sheets for U.S. Postal Service traffic and traffic which can be identified by computer as geographically irrelevant to the consolidation is permitted under Section 1111.2(b)(3). NW and SRC would prepare, and have available for inspection at their offices, a computer printout summarizing such omitted movements.* Thus, should the Commission or an interested party request information about excluded U.S. Postal Service traffic or movements excluded as geographically unrelated, NW and SRC will possess sufficient data to identify such movements.

C. Clarification That the Expanded Gain or Loss Need Not Be Provided on the Study Movement Sheets

Section 1111.2(b)(3) does not prescribe the format or contents for the study movement sheets to be prepared and

* The computer printout will contain for each movement the following: car initial and number, waybill date and number, origin and destination, origin and destination road, STCC code, off-junction and connecting road, on-junction and connecting road.

submitted for each sample movement. However, proposed Section 1111.2(H)(3) and Appendix C to the November 1979 proposed regulations did reveal the Commission's thinking about material needed on an SMS. NW and SRC are prepared to include on each SMS all of the information which the Commission has most recently indicated it needs, with one exception.

NW and SRC intend to provide for each study movement the sample gain or loss for NW, SRC and D&H system lines and for all connecting lines. However, the SMS will show the expansion factor for the study movement, not the expanded gain or loss. The format of the SMS which NW and SRC have prepared will not permit inclusion of both sample and expanded revenue for each carrier. Furthermore, expansion from sample to expanded revenue is a manual process which cannot be computerized for entry on the SMS. Therefore, NW and SRC seek waiver of the requirement that expanded revenue be entered manually on each SMS and propose in the alternative to provide on each SMS the gain or loss for each affected road for that sample movement plus the expansion factor for that sample movement as provided by computer.

D. Clarification That an Estimate of Costs and Net Revenue Gain or Loss Are Required Only for NW, SRC and D&H.

Section 1111.2(b)(3)(viii) requires submission of gross revenue gains or losses, estimated cost of handling

traffic gained or lost, and net revenue gain or loss. As noted in waiver request VII C above, each SMS will show the estimated gross revenue gain or loss for each affected road. NW and SRC will have the computer capability to summarize and expand this data by carrier. NW and SRC also intend to cost each diverted movement and to submit the resulting net revenue effects upon NW, SRC and D&H.

However, NW and SRC lack access to the data necessary to determine the costs of other roads and to make net revenue calculations for those roads. NW and SRC seek clarification that Section 1111.2(b)(3)(viii) recognizes the unavailability of such information and requires costing and submission of net revenues only for NW, SRC and D&H.

E. Waiver to Permit Filing With the Commission of Only the Study Movement Sheets.

Section 1111.2(b)(3)(ii) requires that two copies of an abstract, containing all SMS's and other information upon which diversion evaluations were based, be filed with the Commission. Undoubtedly in recognition of the enormous bulk of the abstracts which have been filed with the Commission in recent consolidation proceedings, Section 1111.3(H)(3) of the November 1979 proposed regulations requires that only SMS's be filed with the Commission and that all other material relied upon in the evaluation process, including

waybills, be kept by applicants as workpapers. NW and SRC believe that this provision in the proposed regulations is a laudable improvement. NW and SRC request that Section 1111.2(b)(3)(ii) be waived to the extent necessary to permit NW and SRC to submit with their application two copies of the study movement sheets only, with waybills and/or any other information sources relied upon in making individual evaluations to be made available as workpapers.

VIII. Waiver of the Requirement That Balance Sheets and Income Statements Be Submitted on a Corporate Entity Basis

As a result of the requirements in Exhibits 18(i-vi) and 19(i-vi) that balance sheets and income statements be submitted on both corporate entity and consolidated bases, NW, SRC and D&H would be required to prepare more than 85 separate balance sheets and more than 255 separate income statements for themselves and their many carrier and non-carrier subsidiaries. Most of these financial statements would be for small NW, SRC or D&H affiliates not directly involved in the control transaction. NW, SRC and D&H each currently prepare balance sheets and income statements on a consolidated system basis.*

* Commencing with the preparation of financial statements for the year 1979, D&H was eliminated from NW's consolidated statements.

To require preparation of financial statements for each subsidiary of these carriers would divert valuable resources from ordinary railroad business and from preparation of other portions of the control application, would greatly expand the size of the NW/SRC application contrary to the clear intent of the Commission, and would provide little additional useful information to the Commission.

NW and SRC request that the requirements of Exhibits 18(i-vi) and 19(i-vi) be waived and that NW and SRC be permitted to submit balance sheets and income statements for 1) Norfolk and Western Railway Company and its subsidiaries on a consolidated system basis, 2) Southern Railway Company and its subsidiaries on a consolidated basis, 3) Delaware and Hudson Railway Company and its subsidiaries on a consolidated basis, and 4) the new NW/SRC holding company on a corporate entity basis as of the date of its formation. If this waiver is denied, NW and SRC request that, with respect to their subsidiary companies, they be required to provide balance sheets and income statements only for operating railroad subsidiaries and that calendar year 1979 be treated as the most current period, waiving the requirement that the most current data be not more than 6 months old.

IX. Clarification That Pro Forma Balance Sheets and Income Statements Are Not Required for the NW/SRC Transaction

Pro forma balance sheets and income statements are to be submitted as Exhibits 18(vii) and 19(vii) only "where the transaction involves a proceeding other than a control." Section 1111.2(b)(5)(vii) and Section 1111.2(b)(6)(vii). Norfolk and Western Railway Company, Southern Railway Company, Delaware and Hudson Railway Company, and all of their subsidiaries will remain as separate corporate entities, to be controlled by a new holding company. NW and SRC believe that the proposed transaction constitutes a control proceeding and seek confirmation that their interpretation is correct.

In lieu of pro forma balance sheets, pro forma income statements, and forecasts of sources and application of funds,* NW and SRC plan to submit a statement of benefits summarizing the benefits expected to result from the control transaction.

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* See waiver request X, pp. 28-29.

X. Clarification That Forecasts Of Source and Application of Funds Are Not Required For a Control Application Or in the Alternative May be Submitted on a Consolidated Basis.

As noted in waiver request IX, supra, Sections 1111.2(b) (5)(vii) and 1111.2(B)(6)(vii) eliminate the requirements that pro forma balance sheets and pro forma income statements be submitted in control transactions. Section 1111.2(b)(6)(vii) is not consistent with these prior sections because it does not create a similar exception for control transactions and, therefore, does not recognize that a pro forma statement of source and application of funds is derived from pro forma balance sheets and income statements and is no more appropriate or informative in a control transaction than are the other pro forma statements.

NW and SRC seek clarification that submission in Exhibit 19(viii) of forecasts of source and application of funds is not required in a control transaction. In the alternative NW and SRC request clarification that Exhibit 19(viii) may contain a statement of source and application of funds for 1979 (the most current year) for NW, for SRC and for D&H, each on a consolidated basis, and for the new holding company, and may provide a pro forma statement of source and application of funds only for the holding company on a consolidated basis. Submission of the pro forma state-

ment on a consolidated holding company basis is essential because allocation of certain benefits among NW, SRC and D&H would in many areas be impossible and in others would be artificial and would inaccurately present the effects of the consolidation.

XII. Waiver of Certain Requirements of 49 C.F.R. Part 1120 Governing Applications for Construction and Operation of Railroad Lines

NW and SRC are currently in the preliminary stages of developing the operating plan for the rail carriers to be commonly controlled. Early studies indicate that one or more projects may require filing an application under Section 10901 for authority to construct and operate certain rail lines. If such applications are needed, NW and SRC read Section 1111.4(a)(5) to require that such applications be filed concurrently with the control application.

As the Commission is aware, the construction regulations at 49 C.F.R. Part 1120 have not been recently revised. As a result, certain of those regulations appear to conflict with the consolidation regulations, to overlap the consolidation regulations, or to make strict compliance with both the consolidation and construction regulations virtually impossible. Therefore, NW and SRC seek the following waivers of 49 C.F.R. Part 1120.

A. Waiver to Permit Incorporation by Reference of Data in the Control Application.

Much of the information sought under Part 1120 will already be submitted, in identical or similar form, in the control application. NW and SRC seek waiver of the following sections of Part 1120 to permit incorporation by reference of substantially similar data in the control application:

§1120.1(c)	- incorporation
§1120.6(1)	- incorporation
§1120.6(3)	- control
§1120.6(4)	- common control
§1120.7(E)	- related costs
§1120.7(F)	- financial statements
§1120.7(G)	- opinion of counsel

B. Waiver to Permit Deletion of Certain Data Required by 49 C.F.R. Part 1120

The projects contemplated by NW and SRC which could require applications under §10901 are not extensions of railroad lines which will permit NW and SRC to reach new markets or customers but instead are projects which will permit more efficient connection between NW and SRC's existing operations. These efficiencies and related operating changes will be explained in the operating plan, Exhibit A-17 to the control application. For this reason many of the

requirements of Part 1120 appear to NW and SRC to be irrelevant to the applications they might file or to be extremely burdensome. NW and SRC request that the following sections be entirely waived:

§1120.6(12)	-	nearby but unrelated municipalities
§1120.6(13)	-	rail service to nearby but unrelated municipalities
§1120.6(15)	-	motor carrier service
§1120.6(16)	-	character of adjacent territory
§1120.6(17)	-	use of adjacent territory
§1120.6(18)	-	nearby industries
§1120.6(19)	-	facts about nearby industries
§1120.6(20)	-	service to nearby industries
§1120.6(21)	-	chief support of track to be constructed
§1120.6(22)	-	beneficiaries of track to be constructed
§1120.6(24)	-	volume and economies of interchange
§1120.6(25)	-	service for existing interchange traffic
§1120.6(29)	-	character and volume of anticipated traffic
§1120.6(30)	-	revenues and expenses related to anticipated traffic
§1120.6(31)	-	diversion estimates
§1120.6(35)	-	increase in charges to road and equipment accounts
§1120.7(F)	-	income statements prior to those required in proposed Exhibit 34.

C. Waiver of Certain Procedural Requirements of Part 1120

NW and SRC believe that the procedural requirements covering construction and operation applications are not consistent with the procedural requirements governing their control application. To permit filing complete construction applications and supporting testimony at the same time as the control application, NW and SRC request the following procedural waivers:

Section 1120.2(c) - Notice

Permit the Commission's staff to approve the notice of filing prior to the filing of the application. NW and SRC will serve the notice and the construction application upon the required state officials at the time the construction application is filed with the Commission. The notice will provide that state officials have the same time to advise of their intent to participate in the construction application as they have with regard to the control application (45 days from Federal Register publication of the notice of acceptance of the application).

§1120.2(d) - Return to Questionnaire

Permit the return to questionnaire to be included within and filed and served with the application itself.

Order that any construction and operation applications directly related to the NW/SRC control application be handled in the same proceeding as that application, not under separate proceedings with additional, cumulative evidence.

Any construction and operation applications which NW and SRC might file with their control application will be an integral part of the control transaction and subject to evaluation only as a part of that transaction. NW and SRC believe that the above waivers are necessary to permit coordinated filing and consideration of these related applications.

Respectfully submitted,

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Dated: July 24, 1980

SOUTHERN RAILWAY COMPANY'S CONSOLIDATED SUBSIDIARIES

CLASS I

The Alabama Great Southern Railroad Company
Central of Georgia Railroad Company
The Cincinnati, New Orleans and Texas Pacific Railroad Company

CLASS II

Georgia Southern and Florida Railway Company
Norfolk Southern Railway Company

CLASS III

Atlantic and East Carolina Railway Company
Birmingham Terminal Company
Camp Lejeune Railroad Company
Chattanooga Station Company
The Georgia Northern Railway Company
Interstate Railroad Company
Live Oak, Perry and South Georgia Railway Company
Louisiana Southern Railway Company
New Orleans Terminal Company
St. Johns River Terminal Company
State University Railroad Company (54%)
Tennessee, Alabama & Georgia Railway Company
Tennessee Railway Company

OTHER COMPANIES

Airforce Pipeline, Inc.
The Atlanta and Charlotte Air Line Railway Company
Atlanta Terminal Company
Blue Ridge Railway Company
Charlotte-Southern Corporation
Chattanooga Terminal Railway Company
Danville and Western Railway Company
Durham and South Carolina Railroad Company
Elberton Southern Railway Company
The Georgia Midland Railway Company

High Point, Randleman, Asheboro and Southern Railroad Company (86%)
Macon Terminal Company
Memphis and Charleston Railway Company
Mobile and Birmingham Railroad Company (78%)
Norfolk Southern Industrial Development Corp.
The North Carolina Midland Railroad Company (97%)
Southern Region Motor Transport, Inc.
The South Western Rail Road Company (99.8%)
Transylvania Railroad Company (97%)
Virginia and Southwestern Railway Company
Yadkin Railroad Company (74%)

NOTE: Control 100% or as indicated

NORFOLK AND WESTERN RAILWAY COMPANY'S RAILROAD SUBSIDIARIES

CLASS III

The Akron, Canton & Youngstown Railroad Company
Chesapeake Western Railway
The Lorain & West Virginia Railway Company
New Jersey, Indiana & Illinois Railroad Company
Norfolk, Franklin and Danville Railway Company

TERMINAL COMPANY

The Lake Erie and Fort Wayne Railroad Company

OTHER RAILROAD COMPANIES

The Scioto Valley and New England Railroad Company
The Toledo Belt Railway Company
Wabash Railroad Company
The Wheeling and Lake Erie Railway Company

Before the
SURFACE TRANSPORTATION BOARD

Finance Docket No. 36522

NORFOLK SOUTHERN RAILWAY COMPANY
—PETITION FOR DECLARATORY ORDER

EXHIBIT E

Minneapolis, MN 55440. To operate as a *common carrier,* by motor vehicle, in interstate or foreign commerce over irregular routes, transporting (1) *liquor,* and (2) *materials and supplies* used in the distribution of liquor, between the facilities of Ed Phillips & Sons, at Minneapolis, MN, on the one hand, and, on the other, Fargo and Bismarck, ND.

Note.—The sole purpose of this application is to substitute single-line operations for joint-line operations.

MC 110420 (Sub-849F), filed February 25, 1980. Applicant: QUALITY CARRIERS, INC., 100 Waukegan Road, P.O. Box 1000, Lake Bluff, IL 60044. Representative: John R. Sims, Jr., 915 Pennsylvania Bldg., 425—13th Street, NW., Washington, DC 20004. Authority sought to operate as a *common carrier,* by motor vehicle, in interstate or foreign commerce, over irregular routes, transporting *liquid chemicals,* in bulk, in tank vehicles, from Mapleton, and points in Cook, Grundy, Lake, and Will Counties, IL, to points in AL, AR, CO, CT, DE, FL, GA, IN, IA, KS, KY, LA, MA, MD, MI, MS, MN, MO, NJ, NY, NC, ND, NE, OH, OK, PA, RI, SC, TN; TX, VA, WV, WY, and WI.

Note.—The purpose of this application is to substitute single-line for joint-line operations.

MC 119750 (Sub-4F), filed May 20, 1980. Applicant: PERKINS MOTOR TRANSPORT, INC., P.O. Box 218, Savage, MN 55378. Representative: Neil Perkins (same address as applicant). Authority sought to operate as a *common carrier,* by motor vehicle, in interstate or foreign commerce, over irregular routes, transporting (1) *commodities,* the transportation of which because of size or weight require the use of special equipment; and (2) *building contractors' tools and supplies,* between points in IL, IA, KS, MN, MO, NE, SD and WI, on the one hand, and, on the other, points in the U.S. (except AK and HI).

Note.—The purpose of this application is to substitute single-line for joint-line operations.

MC 120181 (Sub-21F), filed June 27, 1980. Applicant: MAIN LINE HAULING CO., INC., P.O. Box C, St. Clair, MO 63077. Representative: William H. Shawn, Suite 501, 1730 M Street, NW., Washington, DC 20036. Authority sought to operate as a *common carrier,* by motor vehicle, in interstate or foreign commerce, over irregular routes, transporting *general commodities* (except those of unusual value, classes A and B explosives, household goods as defined by the Commission, commodities in bulk, and those requiring the use of special equipment), between Bourbon, St. Clair, and St. Louis, MO, on the one hand, and, on the other, points in the U.S. (except AK and HI).

Note.—The purpose of this application is to substitute single-line for joint-line operations.

By the Commission.

Agatha L. Mergenovich,

Secretary.

[FR Doc. 80-31264 Filed 10-7-80; 8:45 am]

BILLING CODE 7035-01-M

[Finance Docket No. 29430]

NWS Enterprises, Inc.—Control—Norfolk & Western Railway Co. and Southern Railway Co.

October 1, 1980.

AGENCY: Interstate Commerce Commission.

ACTION: Waiver and clarification of procedural regulations and filing requirements.

SUMMARY: Petitioner's requests for waiver of specific filing requirements of the existing regulations regarding railroad consolidations, 49 CFR Part 1111, and railroad construction and operation, 49 CFR Part 1120, are granted subject to stated qualifications. The Commission reserves its right under 49 CFR 1111.4(c)(2)(v) to require additional imformation.

SUPPLEMENTARY IMFORMATION: On July 24, 190, the Norfolk and Western Railway Company (NW) and the Southern Railway Company (SRC) filed a petition seeking waiver and clarification of our railroad consolidation regulations, 49, CFR Part 1111.

The waiver petition was filed in anticipation of petitioners submitting a consolidation application under 49 U.S.C. § § 11343 and 11344 later this year. Petitioners expect to file their application on or about December 1, 1980. The application will seek Commission approval for a new holding company, NWS Enterprises, Inc. (NWS), to acquire control of NW and SRC and of the Delaware and Hudson Railway Company (D&H), whose stock is held by Dereco, Inc., a wholly-owned subsidiary of NW.

Specifically, petitioners seek:

(1) application of the existing regulations at 49 CFR Part 1111 to the application;

(2) waiver or clarification of the following sections of the regulations to permit filing (a) on a consolidated system basis where information is so maintained; (b) individually for NW and D&H (which normally do not maintain this information on a consolidated basis) and not for their subsidiaries; and (c) on a consolidated basis for the new holding company where applicable:

- § 1111.1(d)(5)
- § 1111.1(d)(7)
- § 1111.2(a)(8)
- § 1111.2(a)(10)
- § 1111.2(a)(11–12), formerly § 1111.2(a)(12–13)
- § 1111.2(b)(1–2)
- § 1111.2(b)(3)(i–vii)
- § 1111.2(b)(4–6);

(3) clarification of the term "applicant" in § 1111.3, formerly § 1111.1;

(4) waiver of clarification of the information or format required by the following sections:

- § 1111.2(b)(1)(i)
- § 1111.2(b)(1)(ii)
- § 1111.4(c)(2)(iv), formerly 1111.4(a)(3)
- § 1111.2(b)(2)
- § 1111.2(a)(10)(vi)
- § 1111.2(b)(3)
- § 1111.2(b)(5)
- § 1111.2(b)(6)

(5) waiver of the following sections of 49 CFR Part 1120 governing applications for construction and operation of a rail line:

- § 1120.1(c)
- § 1120.2(c-d)
- § 1120.6(1)
- § 1120.6(3–4)
- § 1120.6(12–13)
- § 1120.6(15–22)
- § 1120.6(24–25)
- § 1120.6(29–31)
- § 1120.6(35)
- § 1120.7(E-G)

A supplemental petition was filed on September 10, 1980 seeking application of the procedural regulations adopted in Ex Parte 282 (Sub-No. 3) *Railroad Consolidation Procedures* (served August 25, 1980), 45 FR 62991 and 63012, September 23, 1980 363 I.C.C. 201 (1980), in lieu of the procedural regulations requested in the original petition.

(1) *Appropriate Regulations.*

Petitioners request that their application be handled under the regulations as codified at 49 CFR Part 1111 (1979) *Railroad Acquisition, Control, Merger, Consolidation Project, Trackage Rights and Lease Procedures* as modified in Ex Parte 282 (Sub-No. 3), *Railroad Consolidation Procedures* (served August 25, 1980) 45 FR 62991 and 63012, September 23, 1980 363 I.C.C. 201 (1980). These regulations, including the recent procedural modification, are the most current approved version of our consolidation regulations. In order to prepare and file an application, petitioners must be certain of the rules which will govern the proceeding. Use of these regulations incorporates the innovations of the new procedural rules

while creating the certainty of using approved regulations.

The substantive aspects of the regulations remain unchanged at this time but are the subject of ongoing discussion. *See Railroad Consolidation Procedures, supra* (the "1980 propose regulations"); *see also* the decision in that proceeding served November 8, 1979, 44 FR 66626 (November 26, 1979) (the "1979 proposed regulation"). We note that the 1980 proposed regulations would make significant changes in the information requirements imposed on merger applicants. By obtaining the waivers set forth in this decision, petitioners are not forclosed for seeking further waivers. Finance Docket No. 30000, *Union Pacific Corporation and Union Pacific Railroad Company-Control Missouri Pacific Corporation and Missouri Paci-fic Railroad,* (not printed), served August 25, 1980.

Finally, we reserve the right to require additional information at anytime, 49CFR 1111.4(c)(2)(v), formerly § 1111.4(a)(4).

(2) *Entities Required to Submit Data:*

Numerous provisions of the regulations require submission of information by applicants, formerly defined to be "all carriers with properties directly involved," 49 CFR 1111.1(a), fn. 1 (1979). This footnote was deleted by the new regulations, in which "applicant" is defined as "the parties initiating the transaction," 49 CFR 1111.3(a) (1980). Petitioners seek clarification of this definition or waiver to allow SRC to file its information on a consolidated system basis and for NW and D&H to file information individually as the only significant carriers in their systems.

SRC is a Class I railroad which controls a number of rail and non-rail subsidiaries as set forth in Appendix A. SRC and each of its consolidated companies are separate corporate entities, but the transportation functions of the companies are under common management, and in most instances required reports to the Commission and other regulatory agencies are submitted on a system basis.

The Commission has long accepted system reporting and accounting by SRC and its consolidated companies, *Southern Ry. Co. Purchase,* 275 I.C.C. 724, 732 (1950), and that practice will be continued in this proceeding.

NW, also a Class I railroad, controls a number of rail subsidiaries as shown in Appendix B. As with SRC, each of these comanies is a separate corporate entity, but the rail operations are effectively controlled by NW. For the year 1979, the gross operating revenues and expenses of all NW subsidiary companies constituted no more than 1.26 and 1.36 percent, respectively, of NW's gross operating revenue and expenses on a consolidated basis. The 1979 income from railway operations and total assets of the subsidiaries amount to 0.89 and 3.67 percent, respectively, of NW system totals, Other statistics regarding the subsidiaries are similarly minimal and are not readily retrievable.

D&H will also be an applicant in this proceeding due to its relationship to NW. However, the operations of D&H are not effectively controlled by NW, nor will NW, SRC or NWS exercise operational control over D&H. D&H system data is kept by D&H, not NW, and information regarding D&H will be submitted separately. D&H controls two Class III railroads which, as with NW, form a negligible part of its system. In 1979 the gross operating revenues and expenses of D&H's subsidiary railroads equalled 1.86 and 1.68 percent, respectively, of D&H system totals.

We believe that the benefit, if any, of obtaining detailed information regarding NW and D&H subsidiaries is outweighed by the difficulty in obtaining it. Information may be filed for NW and D&H individually in this proceeding, or on a consolidated basis if available.

(3) *Clarification of Term "Applicant".*

Petitioners request clarification of the term "applicant", as it is used in our previous regulations at 49 CFR 1111.1, to apply only to the initiating parties in the control transaction—NW, SRC, and the new holding company,—and to D&H as a separately operated subsidiary of NW. NW and SRC allege that compiling and submitting the required data for all their numerous subsidiary carriers as initiating parties would be a considerable burden. Petitioners' interpretation is consistent with the revised definition of "applicant" adopted in Ex Parte No. 282 (Sub.-3). We accept the definition of applicant as including the NW, D&H, the consolidated SRC and the new holding company. In lieu of filing extensive information regarding the subsidiaries, corporate charts should be filed for SRC, NW, D&H and the new holding company, as described in section 1111.2 (B)(1)(f) of the 1979 proposed regulations.

In addition to the consolidated system companies of NW, SRC and D&H, both NW and SRC have interests in other railroad companies which are operated independently of the NW or SRC systems. NW and SRC hold 50 percent or less of the stock of such companies, do not now exercise control over such companies, and have no intention of exercising control over these companies if the proposed transaction is approved. The records of these companies are maintained separate and apart from NW and SRC consolidated system data.

We believe it would serve no useful purpose to produce detailed information for these companies (other than identifying them as required by 49 C.F.R. 1111.1(c)(8) which may be done on the corporate charts). We agree with petitioners that the term "applicant", as used in our regulations, does not encompass such non-controlled carriers.

(4) *Waiver or Clarification.*

Section 1111.2(b)(1)(i), Exhibit A-14(i).

Exhibit 14(i) requires submission of a density map showing principal lines, yards, terminals, station and common names, desity in each direction by segment, and mileage by segment. Section 1111.2 (b)(1)(i) requires all this data to be placed on the face of the chart. Petitioners request a waiver to permit filing of Exhibit 14(i) in the form of density maps showing graphically the density in each direction on various line segments accompanied by an explanatory list containing the additional information for each segment. We agree with petitioners that inclusion of all the required data on the face of the map can result in an illegible product. This waiver will be granted to allow the use of appropriate explanatory lists.

Section 1111.2(b)(1)(ii), Exhibit A-14(ii).

Section 1111.2(b)(1)(ii) requires submission of detailed revenue carload interchange data in a prescribed form. Gateways are to be submitted by geographic sequence from east to west.

The existing NW, SRC and D&H systems extend westward from the Atlantic coast to Omaha, NE, and northward from Florida and the Gulf coast into Canada. Petitioners note that an east to west description of gateways would not be useful and would be difficult to generate and time consuming. To avoid this burden and provide a simple and more useful product, petitioners propose to sequence gateways in Exhibit A-14(ii) alphabetically by state and alphabetically by gateways within each state. The waiver will be granted.

Section 1111.4(c)(2)(iv), Formerly 1111.4(a)(13), Exhibit A-14(ii), Table B.

Section 1111.4(c)(2)(iv) requires that all applications filed with the Commission or served upon parties contain all exhibits. Petitioners seek waiver of this requirement to permit filing of only two copies of Exhibit A-14(ii), Table B, with the Commission and to permit deletion of Exhibit A-14(ii), Table B, from all service and other copies of the application. NW, SRC and D&H will make copies of this exhibit available upon request at each of their

corporate headquarters. Section 1111.4(c)(2)(vii)(A) excepts Exhibit A–14, Table A, from the general service requirement. Due to the considerable size of Exhibit A–14(ii), Table B, and the expense involved in producing and serving multiple copies of the exhibit, we believe the waiver is warranted. Petitioners are required to maintain appropriate copies at their respective corporate headquarters. Additionally, to ease the Commission's burden of dealing with this exhibit we request that, if practicable, petitioners provide one copy of a machine readable tape containing only the data required in Table B. Upon reconsideration, we do not believe the exception for Table A is justified. Table A will be a relatively brief document. Its inclusion in each copy of the application will not unduly burden applicants but will greatly facilitate evaluation of the application. See Finance Docket 30000, served August 25, 1980, *supra.*

Section 1111.2(b)(2), Exhibit A–15 and Section 1111.2(a)(10)(vi), Exhibit A–10(vi).

Exhibit 15 requires submission of certain historical equipment and traffic data for 10 calendar years prior to the filing of an application. The counterparts of Exhibit A–15 in the 1979 proposed regulations (Exhibits 21, 22, 23 and 24) recognized this as a burdensome requirement and would have reduced the necessary data to that of the first, fifth and tenth years preceeding filing.

Petitioners argue that the 10 year data requirement of Section 1111.2(b)(2) results in preparation of an enormous amount of data which is rarely used. On the other hand, first, fifth and tenth year data cannot provide a useful basis for evaluating present trends or the future effects of a proposed control transaction. Petitioners suggest that more current historical data is a more realistic basis upon which to project future impacts.

Similarly, petitioners allege, the requirement of 6 years of employee attrition data for Exhibit A–10 (vi) is excessive.

Petitioners request that Exhibits 15 and 10(vi) be based on data for calendar years 1976, 1977, 1978, and 1979. This 4 year period will be sufficient for our analysis. The waiver will be granted.

Section 1111.2(b)(3), Exhibit A–16.

Section 1111.2(b)(3) sets forth in detail our requirements for a rail traffic study, Exhibit A–16. Petitioners have begun their studies but require clarification or waiver of a number of specific requirements.

A. *Clarification of Assumptions.*

Petitioners seek clarification that Section 1111.2(b)(3) permits applicants sufficient flexibility to recognize, in making their traffic diversion estimates, structural and regulatory developments subsequent to the calendar year of their data bases and to carry the effects forward into their operating plan.

Section 1111.2(b)(3) does not describe the particular diversion assumptions appropriate to a traffic study; the choice of assumptions is left to applicants. However, any assumption used by the traffic evaluators should be reasonable and may be subject to cross-examination during the course of a proceeding.

The results of a traffic study should reflect, as nearly as possible, current circumstances. In order for all traffic studies submitted in this proceeding to be comparable, the assumptions regarding the structure of the railroad industry which applicants intend to employ should be made available to all parties for their consideration in conducting their own studies.

B. *Deletions from Traffic Study Data Base.*

Petitioners seek clarification that § 1111.2(b)(3) will permit deletion of the following from the traffic data base prior to sampling: (1) shipments for which the study carrier served only as a switching carrier; (2) shipments which were local to NW, SRC or D&H system lines; (3) shipments which were interlined only among NW, D&H and SRC system lines. In light of the fact that complete data is not readily available for switched traffic and that traffic entirely local to applicants or interlined among applicants will not be affected by the transaction, we believe their request should be granted. However, to permit effective analysis of petitioners' traffic studies by both the Commission and protestants, the study carriers should clearly indicate in their instructions regarding selection of the sample that these shipments are to be excluded from the study.

In addition, NW and SRC request clarification that § 1111.2(b)(3) permits exclusion, following sampling and prior to the evaluation process, of complete study movement sheets for U.S. Postal Service traffic and for traffic which can be identified by computer as geographically irrelevant to the consolidation. NW and SRC would prepare and have available for inspection a computer printout summarizing such omitted movements.[1] Because these printouts will enable any interested party to test the validity of the evaluator's judgment of non-divertibility, we approve this clarification. However, we require that two copies of these printouts be filed with the Commission.

C. *Expanded Gain on Loss.*

Section 1111.2(b)(3) does not prescribe the format or contents for the Study Movement Sheets to be prepared and submitted for each sample movement. However, proposed § 1111.2(H)(3) and Appendix C to the 1979 proposed regulations did set forth a proposed format. Petitioners are prepared to follow that proposed format with one exception. In lieu of entering the expanded revenue on each Study Movement Sheet, petitioners request that they be allowed to present the present revenue and an expansion factor for each movement. We will accept this format. It will save petitioners unnecessary effort and provision of the expansion factor will give any interested party the opportunity to determine the expanded revenue gain or loss on each diverted movement.

D. *Provision of Costs and Net Revenue Gains or Losses Only for NW, SRC and D&H.*

Petitioners seek clarification that § 1111.2(b)(3) (viii) requires costing and submission of net revenues only for NW, SRC and D&H. Petitioners do not possess the data necessary to determine the costs or to make the net revenue calculations of other railroads. The waiver will be granted.

E. *Filing with Commission of Only Study Movement Sheets.*

Petitioners seek waiver of the requirement in § 1111.2(b)(3)(ii), that they file with the Commission two copies of an abstract containing all Study Movement Sheets and other information upon which diversion evaluations were based. Petitioners request that they be allowed to comply with § 1111.3(H)(3) of the 1979 proposed regulations. Under that proposal only the Study Movement Sheets must be filed with the Commission, while all other material relied upon in the evaluation process is to be kept by applicants as work papers. The waiver will reduce the burden of filing and handling the application while preserving all underlying data for examination by interested parties. Therefore it will be granted.

Sections 1111.2(b)(5–6), Exhibits 18 and 19.

Petitioners request several waivers regarding the financial information required by § 1111.2(b)(5–6). First, petitioners seek waiver to file income statements and balance sheets for NW, SRC and D&H each on a consolidated

[1] The printouts will show car initial and number, waybill date and number, origin and destination, origin and destination road, STCC code, off-junction and connecting road, and on-junction and connecting road.

system basis rather than the corporate entity basis required by the regulations. Otherwise petitioners allege they would be required to prepare more than 85 separate balance sheets and 255 separate income statements. Petitioners will file a balance sheet and income statement for NWS on a corporate entity basis as of the date of its formation.

Second, petitioners seek clarification and confirmation that the *pro forma* income statements and balance sheets required by §§ 1111.2(b)(5)(vii) and 1111.2(b)(6)(vii) are not required in this proceeding because it is a control transaction.

Finally, petitioners seek waiver of the requirement in § 1111.2(b)(6)(viii) that they submit *pro forma* statements of sources and applications of funds. This information is derived from the *pro forma* balance sheets and income statements which are not required in control transactions. Petitioners suggest that the omission of the control exception from section 1111.2(b)(6)(viii) is inconsistent with § 1111.2(b)(6)(vii).

Petitioners' requests are reasonable and will be granted. The preparation of numerous financial statements would greatly expand the application without concomitant benefit to the Commission's analysis. We note, however, that one of our primary considerations in evaluating a rail consolidation proposal is the financial viability of the resulting entity. While *pro forma* financial statements are not required, it behooves applicants to provide as much *pro forma* or other data as is necessary to demonstrate financial viability.

(5) *Partial Waiver of Construction and Operation of Railroad Lines Regulations, 49 CFR Part 1120.*

Petitioners' early studies indicate that one or more projects necessary to implement their operating plan for the commonly controlled carriers may require applications under 49 U.S.C. 10901 for authority to construct or operate certain rail lines. If such related applications are necessary, 49 CFR 1111.4(a)(5) requires they be concurrently filed with the control application. Some of the regulations regarding construction and operation are inconsistent with the policy reflected in the consolidation regulations and petitioners seek the following waivers of 49 CFR Part 1120.

A. *Incorporation by Reference of Data in the Control Application.*

Much of the information required under Part 1120 will be submitted, in identical or similar form, in the control application. Petitioners request that the following sections of Part 1120 be waived to permit incorporation by reference of substantially similar data in the control application:

- § 1120.1(c)—incorporation
- § 1120.6(i)—incorporation
- § 1120.6(3)—control
- § 1120.6(4)—common control
- § 1120.7(E)—related costs
- § 1120.7(F)—financial statements
- § 1120.7(G)—opinion of counsel

The waiver reduces the burden upon applicants without depriving the Commission of necessary data and will be granted. However, we note that this waiver is effective only to the extent that the information required by the specific sections of Part 1120 is included in the control application.

B. *Deletion of Certain Data Required by Part 1120.*

The projects contemplated by NW and SRC are not extensions of rail lines to allow these carriers to serve new markets or customers, but instead are projects which permit more efficient connection between NW and SRC's existing operations. These changes will be explained in the operating plan, Exhibit A–17 of the control application. For this reason petitioners allege certain requirements of Part 1120 are irrelevant as well as burdensome. Petitioners request that the following requirements be completely waived:

- § 1120.6(12)—nearby but unrelated municipalities
- § 1120.6(13)—rail service to nearby unrelated municipalities
- § 1120.6(15)—motor carrier service
- § 1120.6(16)—character of adjacent territory
- § 1120.6(17)—use of adjacent territory
- § 1120.6(18)—nearby industries
- § 1120.6(19)—facts about nearby industries
- § 1120.6(20)—service to nearby industries
- § 1120.6(21)—chief support of track to be constructed
- § 1120.6(22)—beneficiaries of tack to be constructed
- § 1120.6(24)—volume and enconomies of interchange
- § 1120.6(25)—service for existing interchange traffic.
- § 1120.6(29)—character and volume of anticipated traffic
- § 1120.6(30)—revenues and expenses related to anticipated traffic
- § 1120.6(31)—diversion estimates
- § 1120.6(35)—increase in charges to road and equipment accounts
- § 1120.7(F)—income statements

Petitioner's request is reasonable and will be granted.

C. *Procedural Requirements of Part 120.*

To permit filing complete construction applications and supporting testimony concurrently with the control application, petitioners request two procedural waivers.

First, with regard to the notice required by § 1120.2(c), petitioners request that the Commission staff be allowed to approve the notice of filing prior to filing of the application. NW and SRC will then serve the notice and the construction applications upon the necessary State officials at the time the contruction application is filed with the Commission. The notice will provide State officials the same time in which to advise of their intent to participate in the construction applications as is provided in the control application.

Second, petitioners request that the Return to Questionaire required by § 1120.2(d) be allowed to be included within and filed and served with the application itself.

The requested waivers will allow any related construction and operation applications to be handled expeditiously along with the control application. The waiver will be granted.

It is ordered:

(1) The petition for waiver is granted to the extent set forth in this decision.

(2) The Commission reserves its right under 49 CFR 1111.4(c)(2)(v) to require applicants to file additional informantion in support of the application.

(3) This decision shall be effective upon service.

Decided: September 30, 1980.

By the Commission, Chairman Gaskins, Vice-Chairman Gresham, Commissioners Clapp, Trantum, Alexis, and Gilliam.

Agatha L. Mergenovich,
Secretary.

Appendix A—Southern Railway Co.'s Consolidated Subsidiaries

Class I

The Alabama Great Southern Railroad Company
Central of Georgia Railroad Company
The Cincinnati, New Orleans and Texas Pacific Railroad Company

Class II

Georgia Southern and Florida Railway Company
Norfolk Southern Railway Company

Class III

Atlantic and East Carolina Railway Company
Birmingham Terminal Company
Camp Lejeune Railroad Company
Chattanooga Station Company
The Georgia Northern Railway Company
Interstate Railroad Company
Live Oak, Perry, and South Georgia Railway Company
Louisiana Southern Railway Company
New Orleans Terminal Company
St. Johns River Terminal Company
State University Railroad Company (54%)

Tennessee, Alabama & Georgia Railway Company
Tennessee Railway Company

Other Companies

Airforce Pipeline, Inc.
The Atlanta and Charlotte Air Line Railway Company
Atlanta Terminal Company
Blue Ridge Railway Company
Charlotte-Southern Corporation
Chattanooga Terminal Railway Company
Danville and Western Railway Company
Dusham and Southern Railway Company
The Georgia Midland Railway Company
High Point, Randleman, Asheboro and Southern Railroad Company (86%)
Macon Terminal Company
Memphis and Charleston Railway Company
Mobile and Birmingham Railroad Company (78%)
Norfolk Southern Industrial Development Corp.
The North Carolina Midland Railroad Company (97%)
Southern Region Motor Transport, Inc.
The Southern Western Rail Road company (99.8%)
Transylvania Railroad Company (97%)
Virginia and Southwestern Railway Company
Yadkin Railroad Company (74%)

Note.—Control 100% or as indicated.

Appendix B—Norfolk & Western Railway Co.'s Railroad Subsidiaries

Class III

The Akron, Canton & Youngstown Railroad Company
Chesapeake Western Railway
The Lorain & West Virginia Railway Company
New Jersey, Indiana & Illinois Railroad Company
Norfolk, Franklin and Danville Railway Company

Terminal Company

The Lake Erie and Fort Wayne Railroad Company

Other Railroad Companies

The Scioto Valley and New England Railroad Company
The Toledo Belt Railway Company
Wabash Railroad Company
The Wheeling and Lake Erie Railway Company

[FR Doc. 80-31258 Filed 11-7-80; 8:45 am]
BILLING CODE 7035-01-M

Long- and Short-Haul Application for Relief (Formerly Fourth Section Application)

October 3, 1980.

This application for long- and short-haul relief has been filed with the I.C.C.

Protests are due at the I.C.C. within 15 days from the date of publication of the notice.

No. 43861–1, Trans-Continental Freight Bureau, Agent, (No. 552), reduced rate on buckwheat, in boxcars, minimum weight 100,000 pounds, from Kincheloe, MI (on the SOO) to Vancouver, BC (on the CP Rail), as published in Supplement 174, Item 2469.01 to its Tariff ICC TCFB 3029–P. Rate became effective September 15, 1980 on 5 days' notice under Special Permission 79–2300. Due to the short notice filing and the emergency situation that was stated to exist, long- and short-haul relief was temporarily granted in Long-And-Short-Haul Order No. 20665. This relief expires with October 20, 1980. The application now under consideration requests that the long- and short-haul relief be permanently granted.

By the Commission.
Agatha L. Mergenovich,
Secretary.

[FR Doc. 80-31206 Filed 10-7-80; 8:45 am]
BILLING CODE 7035-01-M

INTERNATIONAL TRADE COMMISSION

[Investigation No. 303–TA–13 (Final)]

Certain Iron-Metal Castings From India

Determination

On the basis of the record[1] developed in investigation No. 303–TA–13 (Final), the Commission determines (Chairman Alberger dissenting), pursuant to section 303 of the Tariff Act of 1930 (19 U.S.C. 1303), that an industry in the United States is materially injured, or is threatened with material injury,[2] by reason of imports from India of certain iron-metal castings,[3] provided for in item 657.09 of the Tariff Schedules of the United States and accorded duty-free treatment, which the Department of Commerce has found to be subsidized by the Government of India.

Background

The Commission instituted this investigation effective May 20, 1980, following a preliminary determination by the Department of Commerce that bounties or grants are being provided by the Government of India with respect to the production or export of certain iron-metal castings imported into the United States. Notice of the institution of the Commission's investigation and of the public hearing to be held in connection therewith was duly given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, D.C., and in the Commission's New York City Office, located at 6 World Trade Center, and by publishing the notice in the Federal Register on June 18, 1980 (45 FR 41244). The hearing was held in San Francisco, Calif., on August 27 and 28, 1980, and all persons who requested the opportunity were permitted to appear in person or by counsel.

Statement of Reasons for the Affirmative Determination of Commissioners George M. Moore and Catherine Bedell

Determination

On the basis of the record developed in investigation No. 303–TA–13 (Final), we determine that an industry in the United States is materially injured[4] by reason of the importation of certain iron-metal castings from India, provided for in item 657.09 of the Tariff Schedules of the United States (TSUS) and accorded duty-free treatment, upon which the Department of Commerce has determined that bounties or grants are provided by the Government of India.

The following findings and conclusions, based on the record in this investigation, support our determination.

The Imported Article and the Domestic Industry

The certain iron-metal castings which are the subject of this investigation are manhole covers and frames, catch-basin grates and frames, and cleanout covers and frames. These iron-metal castings are encompassed within a larger class of articles commonly called public works castings, and are used either for drainage or access purposes to public utility, water, and sanitary systems.

In this determination we have found that the U.S. industry being injured consists of the domestic producers of these products located in the Western United States, and that these States constitute a regional market.[5] This regional market is well defined since all known imports and production of the subject public works castings in these States are consumed there, and the demand in that market is not supplied to a substantial degree by producers located in other States, because high

[1] The record is defined in sec. 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

[2] Vice Chairman Calhoun and Commissioners Moore and Bedell found material injury; Commissioner Stern found material injury or threat of material injury.

[3] The specific articles included within the scope of this investigation are manhole covers and frames, catch-basin grates and frames, and cleanout covers and frames.

[4] No party alleged that imports of such merchandise prevented an industry from being established. Therefore, this issue will not be discussed further in this statement.

[5] The Western marketing area was defined for the purposes of this investigation to include the following States: Washington, Oregon, California, Nevada, Idaho, Montana, Arizona, Utah, Wyoming, Colorado, New Mexico, Hawaii, and Alaska.

Before the
SURFACE TRANSPORTATION BOARD

Finance Docket No. 36522

NORFOLK SOUTHERN RAILWAY COMPANY
—PETITION FOR DECLARATORY ORDER

EXHIBIT F

Before the

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 29430 (Sub-No. 1)

NWS ENTERPRISES, INC.
— CONTROL —
NORFOLK AND WESTERN RAILWAY COMPANY AND
SOUTHERN RAILWAY COMPANY

APPLICATION - VOLUMES 2 AND 2A

CORPORATE INFORMATION - SECTIONS 1111.1 (a-e)
BALANCE SHEETS - EXHIBIT A-18
INCOME STATEMENTS - EXHIBIT A-19
STATEMENT OF BENEFITS - EXHIBIT 20
VERIFIED STATEMENTS OF:

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DATED: December, 1980

NWS — 1
NWS — 94 and 95

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VOLUME 2

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SECTION 1111.1(a) - NARRATIVE DESCRIPTION OF THE PROPOSED TRANSACTION

(1) Brief summary of the proposed transaction.

The proposed transaction involves Interstate Commerce Commission (Commission) authorization under Section 11343 et seq. of the Interstate Commerce Act (49 U.S.C. §11343 et seq.) for NWS Enterprises, Inc. (NWS), a newly-incorporated non-carrier holding company, to acquire control through stock ownership of Norfolk and Western Railway Company (NW) and its subsidiary carrier companies, and of Southern Railway Company (Southern) and its consolidated system companies (collectively SR).

Specifically, upon receipt of Commission approval and authorization, Norfolk and Western Railroad Company of Virginia (NWRC) and Southern Railroad Company of Virginia (SRC), both formed for purposes of merger and owned by NWS, will be merged respectively into NW and Southern. At the time of these mergers, all issued shares of NW and Southern Common Stock will be exchanged for newly-issued shares of NWS Common Stock.* Upon completion of these transactions, NWS will directly control NW and SR.

* Each share of NW Common Stock will be converted into one share of NWS Common Stock, and each share of SR Common

(Footnote continued on following page.)

As a result of the proposed transaction, NWS will also acquire indirect control through stock ownership of all subsidiaries of NW and Southern, including Southern Region Motor Transport, Inc. (SRMT), a motor carrier subsidiary of a wholly owned rail carrier subsidiary of Southern. An application under 49 U.S.C. §§11343 and 11345 for approval of control of SRMT by NWS (Docket No. MC-F 14484) is contained in Volume 7.

Applicants also seek authority under 49 U.S.C. §11343 to operate over one another's lines and those of other carriers, and for SR to acquire a portion of the lines of the Norfolk, Franklin & Danville Railway Company (NF&D), a subsidiary of NW. (See Vol. 4, Exh. A-17.)

(2) The proposed time schedule for consummation of the proposed transaction.

Consummation of the proposed transaction will be initiated promptly after the effective date of a final order of the Commission authorizing the transaction.

(Footnote continued from previous page.)

Stock will be converted into 1.9 shares of NWS Common Stock. Authority for NWS to issue Common Stock is sought in Finance Docket No. 29430 (Sub-No. 6). See Vol. 8, infra. For a detailed description of the terms and manner of exchange, see Agreement of Merger and Reorganization, Exhibit 9.

(3) The purposes sought to be accomplished by the proposed transaction, e.g., operating economies, elimination of excess facilities, extension of markets, improved financial viability.

The proposed transaction will bring together the complementary rail systems of NW and SR under the common direction and control of NWS. The unification of NW and SR will create an end-to-end single-system rail network connecting the East and Midwest regions with the growing markets of the Southeast. The NWS system will serve 21 states, the District of Columbia and the Province of Ontario, Canada. (See Vol. 4, Exhibit 8).

Creation of this single-system rail network will strengthen both intramodal and intermodal competition in the markets served by NWS. Unification will enhance the abilities of NW and SR to provide an effective competitive counterweight to the recently created CSX system. The proposed transaction will also help to alleviate the "gateway watershed" problem (see Verified Statement of Richard J. Barber, Vol. 1B),* thereby extending Applicants' individual access to markets and increasing the rail industry share of the overall transportation market. Consolidation will also lead

* See also Rail Services Planning Office, Rail Merger Study - Final Report at 32.

to increased traffic diversion from motor carriers to rail intermodal (TOFC) between major cities in the Midwest and Southeast. (See Verified Statement of Lester K. Kloss, Vol. 6B).

The combined NWS system will also enjoy improved market access to coal. The coal origins located on NW and SR's lines are largely complementary. The overwhelming preponderance of NW-originated coal is metallurgical coal while SR origins, which possess much smaller reserves than those of NW, primarily produce steam coals. Consolidation will create new single-system access for SR's steam coal origins to both domestic consumers and to major export facilities, most notably NW's major facility at Norfolk, Virginia. At the same time, the consolidated system will provide improved access for NW-originated metallurgical and steam coal to southeastern industries and utilities located on or near SR's lines. (See Vol. 1B, Verified Statement of Peter M. Cukor.) Moreover, the proposed utilization of coal hopper cars on a system-wide basis will enhance the ability of NW and SR to meet the equipment needs of their respective coal shippers. (See Vol. 4, Exh. A-17.)

A similar extension of market access will be created for grain produced at NWS origins in the Midwest. Consolidation will permit Applicants to offer efficient single-system service, at competitive rates, for movements of NW-originated

grain to the grain-deficit states served by SR. (See Vol. 1A, Verified Statement of John P. Duncan, Jr.)

Consolidation of NW and SR under common control will also produce substantial operating efficiences on merchandise traffic. Improved connections at a number of points will permit additional run-through train service, and the consolidation of existing NW and SR facilities at Cincinnati, St. Louis, Norfolk, and other points will expedite the interchange of traffic. Internal rerouting will further improve service and efficiency over the combined system. (See Vol. 4, Exh. A-17.)

The car and locomotive fleets of NW and SR will be managed for the benefit of the system as a whole, resulting in more efficient utilization and reduction of empty movements. Substantial cost savings will also be generated by consolidation of various shop and repair functions, and through coordinated use of maintenance-of-way equipment.

The consolidation of NW and SR under common management will improve the service capabilities and financial viability of both carriers. It is anticipated that the proposed transaction will produce net benefits of $ 95.8 million per year by the third year following consummation. (See Exh. 20, infra) Achievement of these benefits will enhance the ability of Applicants to meet the service

requirements of the shipping public, and will better enable them to face the challenges presented by changes in the regulatory environment.

(4) Nature and Amount of New Securities or Other Financial Arrangements

As described more fully in the Agreement of Merger and Reorganization and related Plans of Merger (see Vol. 3, Exh. 9), NWRC, a Virginia corporation formed for the purpose of merger and owned by NWS Enterprises, Inc. will be merged into NW, and SRC, a Virginia corporation formed for the purpose of merger and owned by NWS, will be merged into Southern. At the time of merger, each issued share of NW Common Stock will be exchanged for one (1) share of NWS Common Stock, and rights to acquire shares of NW Common Stock upon conversion or exchange of other securities will be converted into rights to acquire the same number of shares of NWS Common Stock upon conversion or exchange of such securities. Each issued share of Southern Common Stock will be converted into 1.9 shares of NWS Common Stock. The outstanding shares of Southern $2.60 Cumulative Preferred Stock, Series A, will remain unchanged as preferred stock of Southern. All outstanding shares of NWRC and SRC Common Stock, owned by NWS, will be converted into the aggregate number of outstanding shares of NW Common Stock and of SR Common Stock, respectively, and NW and Southern will surrender for cancellation the 1000 shares of NWS Common Stock currently owned by them. An application under

49 U.S.C. §11301 to permit issuance of NWS Common Stock as required to effectuate the consolidation is being filed simultaneously herewith in Finance Docket No. 29430 (Sub-No. 6) (see Vol. 8, infra). Additional details concerning the financial consideration involved in the proposed transaction may be found in the response to Section 1111.1(e)(i), infra.

(5) A brief summary of the Applicants' public interest justification in support of the application.

The proposed transaction will substantially improve the quality of rail service available to shippers in the markets served by NW and SR. As described in Exhibit A-17 and the verified statements in support thereof, unification will enable the Applicants to offer single-system service over a 21 state area and will improve Applicants' ability to compete in a number of important transportation markets.

Specifically, consolidation of NW and SR under the common ownership of NWS will help to alleviate the gateway watershed problem now experienced by NW and SR, and will create new single-system service between major northeastern and midwestern cities and the growing markets of the Southeast. The unified NWS system will provide an effective competitive counterweight to the CSX system, which has now been created pursuant to Commission authorization in Finance Docket

No. 28905 (Sub-No. 1), CSX Corporation -- Control -- Chessie System, Inc. and Seaboard Coast Line Industries, Inc., Decision served September 25, 1980.

The proposed transaction will also create new markets for coal and grain originated on Applicants' lines (see Vol. 1B, Verified Statement of Peter M. Cukor; Vol. 1A, Verified Statement of John P. Duncan, Jr.), and will permit NW and SR to expand the availability of reliable intermodal train service (see Vol. 6B, Verified Statement of Lester K. Kloss). Consolidation will also produce substantial benefits for Applicants by making possible significant operating economies, more efficient utilization of equipment and other resources, and coordination of a number of operating and managerial functions. Realization of these benefits will strengthen Applicants' financial condition without any offsetting increase in their total fixed charges.

While there may be some minor short-term impacts on labor (see Vol. 4, Exhibit 10, infra), the proposed transaction will, overall, create additional job opportunities and security for employees by attracting new business and improving the financial viability of NW and SR. Affected employees will receive adequate protection pursuant to the provisions of Section 11347 of the Interstate Commerce Act (49 U.S.C. §11347).

The proposed transaction satisfies each of the criteria set forth at Section 11344(b) of the Act, which governs Commission consideration of rail consolidation proposals, is in accord with the Commission's general policy statement on railroad consolidations set forth at 363 I.C.C. 241 (1980), and should therefore be approved.

(6) Any other supporting or descriptive statements which Applicants deem material.

Approval of the proposed transaction will substantially reduce energy consumption without creating any significant adverse environmental impacts. The operating efficiencies achieved by the unified NWS system will result in a savings of approximately 5 million gallons of diesel fuel annually. A detailed description of other environmental and energy impacts is set forth in Volume 5, Exhibits 12 and 13, infra.

SECTION 1111.1(b) - IDENTIFICATION OF APPLICANTS

(1) Full and correct name of Applicants and the business address of Applicants:*

* By Order served October 1, 1980, the Commission granted Applicants' request that information required for "applicants" be submitted for SR on a consolidated system basis, and for NW and DH on a corporate entity basis except where data is regularly maintained for these companies and their subsidiaries on a consolidated basis. An alphabetical listing of the subsidiary companies of NW, SR and DH appears in the response to Sections 1111.1(c)(7) through (11), Appendix 2, infra.

NWS Enterprises, Inc. (NWS)
707 East Main Street
Richmond, Virginia 23212

Norfolk and Western Railway Company (NW)
8 North Jefferson Street
Roanoke, Virginia 24042

Southern Railway Company (Southern or SR)*
920 15th Street, N.W.
Washington, D.C. 20005

Delaware and Hudson Railway Company (DH)
40 Beaver Street
Albany, New York 12207

The abbreviations for Applicants set forth above shall be used throughout this application and the exhibits hereto.

(2) Whether Applicants are individuals, firms, partnerships, corporations, companies, associations, joint stock companies, trustees, receivers, assignees, or other personal representatives, and trade or style, if any, under which each of the Applicants are doing business:

Each of the Applicants is a corporation, and each does business under its own name.

(3) Whether Applicants are carriers subject to the Act:

NWS is not a carrier subject to the Interstate Commerce Act. All other Applicants listed in (1), supra,

* The abbreviation SR also encompasses SR's consolidated system companies.

are carriers by railroad subject to the Interstate Commerce Act.

(4) State or states in which any part of the property of the Applicants involved is situated:

NWS does not currently own any property.

NW's rail properties are situated in the States of Illinois, Indiana, Iowa, Kentucky, Maryland, Michigan, Missouri, Nebraska, New York, North Carolina, Ohio, Pennsylvania, Virginia and West Virginia and in the Province of Ontario, Canada. NW also operates in Kansas pursuant to trackage rights.

SR's rail properties are situated in the States of Alabama, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Mississippi, North Carolina, Ohio, South Carolina, Tennessee and Virginia and in the District of Columbia.

DH's rail properties are located in the States of New York, Pennsylvania and Vermont. DH operates in New Jersey, Maryland and Virginia, and in the District of Columbia, pursuant to operating rights over the lines of Consolidated Rail Corporation.

(5) The name, title, and business address of the persons to whom correspondence with respect to the application should be addressed:

John S. Shannon
Senior Vice President-Law
Norfolk and Western Railway Company
8 North Jefferson Street
Roanoke, Virginia 24042

R. Allan Wimbish
General Solicitor
Southern Railway Company
P.O. Box 1808
Washington, D.C. 20013

Richard J. Flynn
Sidley & Austin
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006

(6) Whether Applicants or their subsidiaries are affiliated with a motor or water carrier subject to the act; also the following information with respect to rail, motor, or water operations, where applicable: the date of the certificate, permit, or temporary authority, and the number of the Commission's docket assigned to the application upon which such certificate, permit, or temporary authority was issued or granted; or if application to engage in interstate or foreign commerce has been made but is still pending, date of the application and the docket number:

NWS is not presently affiliated with any motor or water carriers subject to the Interstate Commerce Act, nor does NWS presently engage in rail, motor or water operations. By this application NWS is seeking Commission authorization under §11343 to acquire control of NW and SR.

Neither NW nor its subsidiaries are affiliated with any motor or water carrier subject to the Interstate Commerce Act.

SR's subsidiary Central of Georgia Railroad Company is affiliated through stock ownership with Southern Region Motor Transport, Inc. (SRMT), a motor common carrier subject to the Interstate Commerce Act. SRMT operates under certificate number MC-105632, issued June 18, 1963, and subnumbered certificates thereunder. Full information with respect to SRMT is on file with the Commission in Docket No. MC-105632. By application in Docket No. MC-F 14484, NWS seeks to acquire indirect control of SRMT. (See Vol. 7.) SR also owns Southern Region Coal Transport, Inc. (SRCT), an inactive water carrier which is not subject to the Act. Full information with respect to SRCT is on file with the Commission in Finance Docket No. 26310.

DH is not affiliated with a motor or water carrier.

NW and SR began operations as common carriers by railroad prior to enactment of the Transportation Act of 1920 and have been so engaged continuously since that time. Accordingly, NW and SR have not been required to procure from the Commission authorization to engage in interstate or foreign commerce. No applications for such authority have

been made except for applications filed from time to time seeking authorization to construct, acquire, or lease particular line segments.

By order of the Commission in Finance Docket No. 21510, DH is successor to the Delaware and Hudson Railroad Corporation, which began operations as a common carrier by railroad prior to enactment of the Transportation Act of 1920, and consequently does not hold an initial certificate authorizing it to engage in interstate or foreign commerce.

NW holds motor carrier operating rights under MC 42802, April 13, 1946, and MC 42802, Sub. 3, May 13, 1959.

SECTION 1111.1(c) - INFORMATION RESPECTING APPLICANTS

(1) If Applicants are corporations:

(i) Date of incorporation and Government, State or territory of incorporation.

NWS was incorporated under the laws of the Commonwealth of Virginia on July 23, 1980.

NW was incorporated by an Act of the General Assembly of the Commonwealth of Virginia, approved January 15, 1896.

Southern was incorporated under the laws of the Commonwealth of Virginia on June 18, 1894.

DH was incorporated on June 7, 1968 under the laws of Delaware.

[Applicants' responses to Sections 1111.1(c)(1)(ii), (iii) and (iv) are set forth in Appendix 1 to this Volume.]

[Sections 1111.1(c)(2) - (5) are not applicable to any of the Applicants.]

(6) If Applicants are not carriers, the type of business in which they are engaged, the length of time so engaged, and particulars of their present and prospective activities which have or may have a relation to transportation subject to the Act.

NWS was incorporated on July 23, 1980 with general business powers. Upon approval of the proposed transaction, NWS will acquire control of NW and SR, and until then its activities are related solely to that transaction.

All other Applicants are common carriers by railroad.

[Applicants' responses to Sections 1111.1(c)(7) through (11) are set forth in Appendix 2 to this Volume. Applicants' responses to Section 1111.1(c)(12) are set forth in Appendix 3 to this Volume.]

SECTION 1111.1(d) - INFORMATION RESPECTING THE NATURE OF THE TRANSACTION PROPOSED AND THE TERMS AND CONDITIONS THEREOF.

(1) The nature of the transaction, e.g., merger, control, coordination project, trackage rights:

The proposed transaction involves the acquisition of control through stock ownership of Norfolk and Western Railway Company and its subsidiary companies, and of Southern Railway Company and its consolidated system companies, by NWS Enterprises, Inc., a newly-incorporated non-carrier holding company. Such control will be obtained by merging Norfolk and Western Railroad Company of Virginia (NWRC) and Southern Railroad Company of Virginia (SRC), both formed for purposes of merger and owned by NWS, into NW and SR respectively. Following these mergers, all issued shares of NW and SR Common Stock will be converted into shares of NWS Common Stock.

(2) Briefly, the terms and conditions of the contract or agreement pursuant to which the proposed transaction is to be effected, including the manner in which it is proposed to consummate the transaction and the consideration, in money or otherwise, to be paid by Applicants.

NWS, NWRC, SRC, NW and Southern are parties to an Agreement of Merger and Reorganization dated as of July 31,

1980 (see Vol. 3, Exh. 9). The Agreement provides for the merger of NWRC into NW and of SRC into Southern. At the time of these mergers, each issued share of NW Common Stock will be converted into one share of NWS Common Stock, and each issued share of SR Common Stock will be converted into 1.9 shares of NWS Common Stock.* (See Plans of Merger, Exhibits B and C to Agreement of Merger and Reorganization Vol. 3, Exh. 9). The Agreement also imposes certain restrictions upon the conduct of business by NW and SR during the period preceding the Merger Date.

The obligations of NW and Southern under the Agreement are subject to a number of conditions precedent, including but not limited to Commission approval, opinions of counsel, certain federal income tax rulings and the absence of material adverse change to the consolidated business or financial conditions or properties of NW or SR. The Agreement may be terminated by mutual consent of the Boards of Directors of NW and Southern or, under certain circumstances, unilaterally by the Directors of either NW or Southern.

* The outstanding shares of $2.60 Cumulative Preferred Stock, Series A, of Southern will remain outstanding without change or modification in any manner as shares of Southern.

(3) Governmental financial assistance involved in the transaction.

No governmental financial assistance is involved in this transaction.

(4) Financial or other relationships, direct or indirect, not disclosed in prior responses, existing at the present time between Applicants and other parties and affiliates involved in the proposed transaction.

There are no financial or other relationships, direct or indirect, between Applicants or any of their affiliates not previously disclosed in responses in this application.

(5) Route, termini, mileage (main and branch), and principal points of interchange for all involved lines.

NWS currently holds no rail properties.

NW operates in 15 states and the Province of Ontario, Canada, with a system comprising 7,454 miles, of which 5,575 miles are main line and 1,879 miles are branch line.

The principal lines of NW are as follows:

Norfolk, Va. - Roanoke, Va. - Portsmouth, Oh. - Bellevue, Oh.;

Portsmouth, Oh. - Cincinnati, Oh. - Muncie, Ind. - Frankfort, Ind. - Decatur, Ill.;

Hagerstown, Md. - Roanoke, Va. - Winston-Salem, N.C.;

Buffalo, N.Y. - Cleveland, Oh. - Bellevue, Oh. - Ft. Wayne, Ind. - Chicago, Ill.;

Hagerstown, Md. - Connellsville, Pa. - Pittsburgh, Pa. - Brewster, Pa. - Bellevue, Oh. - Toledo, Oh. - Detroit, Mich.;

Detroit, Mich. - Ft. Wayne, Ind. - Decatur, Ill. - St. Louis, Mo.;

Chicago, Ill. - Decatur, Ill. - St. Louis, Mo.;

Decatur, Ill. - Hannibal, Mo. - Kansas City, Mo.;

St. Louis, Mo. - Moberly, Mo. - Kansas City, Mo.;

Bellevue, Oh. - Cincinnati, Oh. - Muncie, Ind.

Principal points of interchange on NW include: Chicago, Danville, Decatur, E. St. Louis, Peoria, Quincy, and Tolono, Ill.; Ft. Wayne, Indianapolis, Lafayette, Logansport, and Van Loon, Ind.; Des Moines, Iowa; Hagerstown, Md.; Detroit, Mich.; Kansas City and St. Louis, Mo.; Buffalo, N.Y.; Durham and Winston-Salem, N.C.; Ashtabula, Canton, Cincinnati, Cleveland, Columbus, Delta, Fostoria, Glen Jean, Lima, Marion, South Lorain, Spencer, and Toledo, Ohio; Connellsville, Mifflin Jct., and Wallace Jct., Pa.; Altavista, Bristol, Glasgow, Lynchburg, Norfolk, Norton, Petersburg, St. Paul, Suffolk, and Waynesboro, Va.; Kenova and Shenandoah Jct., W.Va.

SR and its system lines operate in 13 states and the District of Columbia. Mileage operated totals 10,215 miles (373 miles of jointly-used track excluded), 5,523 miles of which are classified as main line, 2,006 miles of which are branch line, and 3,059 miles of which are operated but not owned.

Principal Southern system routes are as follows:

Alexandria, Va. - Atlanta, Ga. - Birmingham, Ala. - New Orleans, La.;

Cincinnati, Ohio - Atlanta, Ga. - Macon, Ga. - Jacksonville, Fla.;

Birmingham, Ala. - Sheffield, Ala. - Memphis, Tenn.;

Birmingham, Ala. - Chattanooga, Tenn. - Knoxville, Tenn. - Asheville, N.C. - Salisbury, N.C.;

Danville, Ky. - Louisville, Ky. - E. St. Louis, Ill.;

Bulls Gap, Va. - Knoxville, Tenn.;

Birmingham, Ala. - Columbus, Ga. - Albany, Ga. - Valdosta, Ga.

Principal interchange points on Southern include: Birmingham, Dothan, Ensley, Mobile, and Montgomery, Ala.; Jacksonville, Fla; Albany, Atlanta, Augusta, Hilton, Savannah, Tennile, and Valdosta, Ga.; Centralia, East St. Louis, and Mt. Vernon, Ill.; Oakland City and Princeton, Ind.; Lexington and Louisville, Ky.; New Orleans, La.; Columbus, Corinth, Hattiesburg, and Meridian, Miss.; Charlotte, Marion, Morehead City, and Winston-Salem, N.C.; Cincinnati, Ohio; Columbia

and Spartanburg, S.C.; Bristol, Chattanooga, Frisco, Knoxville, and Memphis, Tenn.; Altavista, Lynchburg, Norfolk, Norton, Potomac Yard, and Richmond, Va.

The rail properties of DH are not involved in the proposed transaction.

(6) Whether the property involved in the proposed transaction includes all the property of the Applicants and, if not, describe what property is included in the proposed transaction.

NWS currently owns no rail properties. The proposed transaction involves all of the properties of NW and SR. The properties of DH are not involved in the transaction proposed herein.

(7) Value of each of the properties involved in the proposed transaction as found by the Commission or if such value has not been found by the Commission, then the fair market value of the properties as independently appraised for the purposes of the proposed transaction; and, separately, the net cost of additions and betterments made after the date of valuation and appraisal.

NWS currently owns no rail properties. The properties of DH are not involved in the proposed transaction. The value of the rail properties of NW and SR as found by the Commission, and the value of additions and betterments made thereto as of December 31, 1979, are as follows:

Carrier	Value of Properties as Found by ICC	Additions and Betterments	Total*
NW	616,414,221	2,415,865,724	3,032,279,9
SR	547,033,587	2,585,286,499	3,132,320,0

(8) Policy and practice of Applicants with respect to reserves for depreciation and similar reserves.

NWS currently transacts no business and consequently has established no reserves for depreciation or similar reserves to this date.

The policy and practice of NW, SR and DH with respect to reserves for depreciation is to accrue depreciation in accordance with accounting rules prescribed by the Commission. SR also accrues reserves for overcharge claims, loss and damage claims, and other potential liabilities on the basis of periodic estimates of liability for each cate-

* Included within the total value of SR and NW properties is that track over which interroad train service will be operated. Values for that trackage are: Roanoke to Lynchburg (NW) - $3,589,321; Roanoke to Altavista (NW) - $3,748,117 Lynchburg to Potomac Yard (SR) - $29,051,741; Altavista to Spencer Yard (SR) - $18,354,003; Lynchburg to Spencer Yard (SR) - $22,069,216. Values of trackage over which NW and SR will operate pursuant to trackage rights are shown in the Trackage Rights Agreement (Vol. 3, Exh. 9), with the exception of that track of the Chesapeake and Ohio Railroad Company between Muncie and Peru, Indiana, over which NW will obtain trackage rights, which is valued at $31,487,322. The value of track and appurtenant facilities between Danville, Virginia and Blanche, North Carolina, to be acquired by SR is $115,427.

gory. Rates by classes of property for NW are set forth in Schedule 350 to NW's R-1 Annual Report to the Commission for 1979. Such rates for SR are contained in Schedules 350 and 351 to SR's R-1 Annual Report for 1979. Rates by classes of property for DH are set forth in Schedules 332, 335, 340 and 342 to DH's R-1 Annual Report for 1979.

(9) The market value of any securities acquired or proposed to be acquired in consummating the proposed transaction; or, if there be no ascertainable market value, the estimated value, giving the basis of the estimate.

As described more fully in the Agreement of Merger and Reorganization (see Vol. 3, Exh. 9, infra) and the Application for Authority to Issue Securities (Vol. 8), NWS will acquire stock control of NW and Southern, and each issued share of NW Common Stock will be converted into 1 share of NWS Common Stock, and each issued share of SR Common Stock will be converted into 1.9 shares of NWS Common Stock.

As of September 18, 1980, the record date for determining stockholder eligibility to vote on the proposed transaction, there were 31,600,666 shares of NW Common Stock, and 16,560,003 shares of Southern Common Stock outstanding. Based on that number of shares and the market value of NW Common Stock as of that date, and a value of SR shares equal to 1.9 times the market value of NW shares, the valuation of securities proposed to be acquired by NWS in consummating the

proposed transaction was $2,869,442,562 as of September 18, 1980.

(10) If any of the property covered by the application is encumbered and Applicants have agreed to assume obligation or liability in respect thereof:

(i) A description of the property encumbered.

(ii) Amount of encumbrance and full description thereof, including maturity, interest rate, and other terms and conditions.

(iii) Amount of encumbrance assumed or to be assumed by Applicants.

There will be no assumption or transfer of obligation or liability with respect to encumbrances on the properties of any of the Applicants as a result of the proposed transaction.

(11) If a consolidation or merger is proposed:

(i) The name of the company resulting from the consolidation or merger, and the State or territory under the laws of which the consolidated company is to be formed or the merged company is to file its certificate of amendment.

As a result of the proposed transaction, NWS Enterprises, Inc., will acquire control through stock ownership of NW and Southern, which will continue their separate corporate existences. On July 23, 1980, NWS was incorporated under the laws of the Commonwealth of Virginia.

(ii) The capitalization proposed for the company resulting from the consolidation or merger, and, separately, the amount and character of capital stock and other securities to be issued.

Upon consummation of the proposed transaction, NWS will issue one share of Common Stock, with a par value of $1.00, for each share of NW Common Stock issued as of the Merger Date, and 1.9 shares of Common Stock, with a par value of $1.00, for each share of SR Common Stock issued as of the Merger Date. A table setting forth the consolidated capitalization of NW and SR as of June 30, 1980 and the pro forma capitalization of NWS which gives effect to the proposed transaction is contained at Volume 8, Appendix 1.

SECTION 1111.1(e) - ARGUMENTS IN SUPPORT OF THE PROPOSED TRANSACTION, WITH PARTICULAR REGARD TO:

(1) The financial consideration involved in the proposed transaction, including an explanation of economies, if any, to be effected in operations, and increase, if any, in traffic, revenues, earnings available for fixed charges, and net earnings, expected to result from the consummation of the proposed transaction.

A detailed description of economies to be effected in operations, and an explanation of anticipated increases in traffic, revenues and net earnings are set forth in Exhibits A-16, A-17 and 20, respectively.* Exhibit 20 contains a sum-

* See also Vol. 1, Executive Summary at Sections III through V.

mary Statement of Benefits for the first, second and third years following consummation of the proposed transaction. As shown therein, the net annual benefits by the third year after consummation will be $95.8 million per year.

(2) The effect of the proposed transaction upon adequate rail and other transportation services to the public.

The regions served by the proposed NWS system have undergone significant demographic and economic changes which have generated demand for improved interregional transportation service. Shippers have demonstrated an overwhelming preference for single-system service, which reduces transit time, improves equipment utilization and distribution and focuses responsibility for entire movements on a single carrier. The "Balkanized" structure of the nation's railroads at the present time requires Applicants and other carriers to interline the majority of the traffic handled by them.

The proposed transaction will combine NW's extensive coverage of the Northeast and Midwest with SR's access to major southeastern markets, improving both service reliability and competition on movements between those regions. The combined NWS system will also provide an effective competitive counterweight to the recently created CSX rail system, and will enhance Applicants' ability to compete for traffic currently moving by other modes, particularly motor carriers.

Applicants' Operating Plan (Vol. 4, Exh. A-17) sets forth a number of interrelated changes and improvements that NWS will make in order to provide more efficient, economical and reliable service. The establishment of five new principal routes -- the Altavista Gateway Route, the Lynchburg-Knoxville Cutoff Route, the Mid South Corridor Route, the Kansas City Gateway Route and the Shenandoah Corridor Route -- will substantially reduce circuity and running time between many points on the NWS system.* All traffic will be routed via the most efficient system route. Together with implementation of run-through and interroad train service, the proposed new routes will generate savings of $20 million annually** and will reduce the rail system's fuel consumption by more than 5 million gallons per year.***

Additional service improvements will result from consolidation of NW and SR facilities and operations at 10 common points served by the two carriers. Terminal and yard operations, as well as local service, will be concentrated at one facility, reducing delays currently caused by interchange activities. The retirement of duplicative terminal facilities will, in certain instances, reduce the system's operating costs as well.****

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* The benefits generated by the creation of each of these new routes are described in detail at Vol. 4, Exh. A-17, Section IIA.

** See Vol. 4, Exh. A-17 at 46; Vol. 1, p. 15, Note 4.

*** See Vol. 5, Exh. 12.

**** See Vol. 4, Exh. A-17, Section II I.

In order to enhance the NWS system's ability to attract traffic from motor carriers to rail intermodal service, NW will construct a major terminal facility at NW's Landers Yard in Chicago. Dedicated intermodal train service will also be instituted between Chicago and points in the Southeast.* A substantial potential for diversions from motor carriers has been identified,** and Applicants are firmly committed to the development of profitable intermodal traffic.

A number of significant improvements will be made at other points on both NW's and SR's lines, and new connections will be constructed at several locations (see related applications at Vol. 7 infra), at a total cost of approximately $32 million. In addition, the proposed connection of the communications systems of NW and SR will improve car tracing throughout the NWS system.*** Common policies with respect to equipment utilization will be implemented in order to enhance the ability of NW and SR to meet the car requirements of their customers, and to improve overall efficiency by reducing empty hauls. While each carrier will retain control

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* Intermodal traffic originating in Detroit will be added to the proposed dedicated trains at Fort Wayne, Indiana, for movement to destination.

** See Vol. 6B.

*** See Vol. 4, Exh. A-17, Section H.

over the day-to-day use of its equipment, all cars will be deployed for the benefit of the system as a whole. Further savings will be generated by system-wide coordination of shop and repair facilities, and by utilization of the excess capacity of NW's Roanoke Car Shops to meet SR's requirements for open top hoppers, covered hoppers and gondolas.*

These improvements and coordinations and the resulting efficiencies and enhanced capabilities would not be possible but for the proposed consolidation.** In almost all cases, the changes planned would not provide sufficient operating and financial benefits to NW or SR individually to justify their adoption. Moreover, each carrier's interest in preserving its corporate long-haul, both to maximize its revenues and to maintain control over service for the greatest possible portion of the movement, would create a strong disincentive for either carrier to agree to the reroute traffic over the most efficient system lines. Consolidation will eliminate these obstacles to achievement of operating efficiencies, and the combined financial strengths of NW and SR will place NWS in a strong position to make the major capital investments necessary to meet the future requirements of the shipping public.

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* See Vol. 4, Exh. A-17, Sections C, E.

** See, e.g., Vol. 1A, Verified Statements of Robert B. Claytor; Vol. 4A, Verified Statement of Louis M. Newton.

(3) The effect upon the public interest of the increase, if any, in total fixed charges resulting from the proposed transaction.

There will be no increase in total fixed charges resulting from the proposed transaction.

(4) The effect upon the public interest of any guaranty or assumption of payment of dividends or fixed charges contemplated in the proposed transaction.

No guaranty or assumption of payment of dividends or fixed charges is contemplated by the proposed transaction.

(5) The effect upon the interest of carrier employees resulting from the proposed transaction.

The proposed transaction will have an overall positive effect upon Applicants' employees. Realization of the anticipated benefits of consolidation will strengthen the financial viability of NW and SR and will enable Applicants to attract additional traffic to the NWS system. These consequences of unification will contribute to job security. Affiliation will result in an estimated net increase of 79 positions for Applicants.

As described more fully in Exhibit 10, infra, there will be some minor short-term negative effects on

labor. However, adversely affected employees will be adequately protected pursuant to the provisions of Section 11347 of the Interstate Commerce Act, 49 U.S.C. §11347.

(6) The effect upon the public interest of the inclusion, or the failure to include, other railroads in the territory involved in a proposed transaction under Section 5(2) of the Act.

The public interest would not be served by the forced inclusion of any other railroad in the proposed transaction.

The proposed transaction will result in the loss of some freight revenues by other carriers. (See Vol. 6, Exhibit A-16, infra). However, these revenue losses will be accompanied by offsetting cost reductions; therefore, the actual impact on affected carriers will be significantly less than their gross revenue losses. In no case will anticipated losses threaten essential rail services.

In its revised General Policy Statement issued in Ex Parte No. 282 (Sub-No. 6), Railroad Consolidation Procedures, 363 I.C.C. 241 (1980), the Commission stated that

> "[it] will only consider requiring inclusion of another carrier as a condition to approval where there is no other reasonable alternative for providing essential services, the facilities fit operationally into the new system, and inclusion can be accomplished without endangering the operational or financial success of the new company." Id. at 245.

As the Commission recently recognized, "inclusion is an extreme measure," Norfolk and Western Ry. Co., and New York, Chicago & St. Louis R. Co. -- Merger, 363 I.C.C. 270, 281 (1980), and should be granted only where all of the foregoing criteria have clearly been satisfied. Inclusion of any other carrier in the proposed transaction would dilute the financial strength of the new system and would thus deprive both Applicants and the public of the full benefits available from the proposed transaction.

CONCLUSION

Applicants respectfully submit that the transactions proposed herein are in full accordance both with the statutory criteria set forth in the Interstate Commerce Act (49 U.S.C. §§11343-11347) and with the Commission's general policy statement on railroad consolidations in Ex Parte No. 282 (Sub-No. 6), Railroad Consolidation Procedures, 363 I.C.C. 241 (1980). Therefore, Applicants respectfully request that the Commission make the following findings with respect thereto:

In Finance Docket No. 29430 (Sub-No. 1), that the following transactions are within the scope of 49 U.S.C. §11343; are consistent with the public interest; reflect terms and conditions which are just and reasonable; will not adversely affect but enhance the adequacy of transportation to the public; will not adversely affect the

public interest as a result of the failure to include other railroads in the area; will not result in the guarantee or assumption of payment of dividends or fixed charges, or in any significant increase in total fixed charges; will not result in any adverse effects on the interests of affected carrier employees which will not be adequately protected by imposition of appropriate conditions; and will have no adverse impact upon, but rather will enhance competition among rail carriers in the affected region:

1) acquisition by NWS Enterprises, Inc., of control of Norfolk and Western Railway Company and its carrier subsidiaries, and of Southern Railway Company and its consolidated system companies through acquisition of stock in a merger of Norfolk and Western Railroad Company of Virginia into Norfolk and Western Railway Company, and merger of Southern Railroad Company of Virginia into Southern Railway Company;

2) acquisition by Southern Railway Company of the tracks and facilities of Norfolk, Franklin and Danville Railway Company between Blanche, North Carolina, and Danville, Virginia, pursuant to the terms of an agreement set forth at Vol. 3, Exhibit 9;

3) acquisition by Norfolk and Western Railway Company and Southern Railway Company and its consolidated system

companies of trackage rights over each other's lines and conduct of interroad train operations as specified in the "Trackage Rights Agreement" and agreement governing interroad train operations set forth at Vol. 3, Exh. 9;

4) acquisition by Southern Railway Company of trackage rights over the Terminal Railroad Association of St. Louis, pursuant to the terms of a proposed agreement between those parties set forth at Vol. 3, Exh. 9;

5) acquisition by Norfolk and Western Railway Company of trackage rights over The Chesapeake and Ohio Railway Company between Muncie and Peru, Indiana, pursuant to the terms of an agreement between those parties set forth at Vol. 3, Exh. 9.

In Finance Docket No. 29430 (Sub-No. 6), that the proposed issuance of securities and assumption of liabilities with respect thereto (a) is consistent with the proper performance of public transportation by the carriers to be controlled by NWS Enterprises, Inc.; (b) will not impair

the ability of the controlled carriers to provide public transportation; and (c) is consistent with the public interest in other respects.

In Finance Docket No. 29430 (Sub-Nos. 2, 3, 4, and 5), that the present and future public convenience and necessity require and will be enhanced by the proposed constructions and operations.

In Docket No. AB-10 (Sub-No. 23F) and Docket No. AB-216 (Sub-No. 1), that the proposed abandonments will not have a serious adverse impact on rural and community development; that operation of the involved rail properties will no longer be required in order to provide adequate rail service; that the interests of carrier employees will be protected by appropriate conditions; and that the present and future public convenience and necessity permit the proposed abandonments.

In Motor Carrier Finance Docket No. MC-F-14484, that acquisition by NWS Enterprises, Inc. of indirect control of Southern Region Motor Transport, Inc. through control of Central of Georgia Railroad Company, a wholly-owned subsidiary of Southern Railway Company, is consistent with the public interest and will enable the NWS system to use motor carrier transportation to the public advantage in its operations and will not unreasonably restrain competition.

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WHEREFORE, NWS Enterprises, Inc., Norfolk and Western Railway Company, Southern Railway Company, and Norfolk, Franklin and Danville Railway Company pray that the Commission enter an order approving and authorizing the transactions proposed herein.

Norfolk and Western Railway Company

By Robt B. Claytor
Robert B. Claytor
President

Southern Railway Company

By Harold H. Hall
Harold H. Hall
President and Chief Executive Officer

Norfolk, Franklin and Danville Railway Company

By Donald E. Middleton
Donald E. Middleton
Secretary

NWS Enterprises, Inc.

By Donald E. Middleton
Donald E. Middleton
Chairman of the Board and Secretary

MONWEALTH OF VIRGINIA)
) ss:
TY OF ROANOKE)

Donald E. Middleton, being duly sworn, deposes and says t he is Chairman of the Board and Secretary of NWS Enterprises, c. (NWS), applicant herein; that he has been duly authorized and ignated by NWS to sign, verify, and file the foregoing document exhibits with the Interstate Commerce Commission; that he has refully examined all of the statements contained in said docu- nt and the exhibits attached thereto and made a part thereof; t he has knowledge of the matters set forth therein insofar as ose matters relate to NWS; and that all such statements made and tters set forth therein with respect to NWS are true and correct the best of his knowledge, information and belief.

Donald E Middleton
Donald E. Middleton

bscribed and sworn to before me
ls lst day of December, 1980.

Notary Public

commission expires: April 8, 1983

AL]

CERTIFICATE

COMMONWEALTH OF VIRGINIA)
) ss:
CITY OF ROANOKE)

I, Joseph Pakush, am Assistant Secretary of NWS Enterprises, Inc., and hereby certify that Donald E. Middleton is Chairman of the Board and Secretary of NWS Enterprises, Inc. and duly authorized to verify and file the attached application in behalf of NWS Enterprises, Inc.

Joseph Pakush
Joseph Pakush

Subscribed and sworn to before me
this 1st day of December, 1980.

Jeanne B. Davis
Notary Public

My commission expires: April 8, 1983

[SEAL]

COMMONWEALTH OF VIRGINIA)
) ss:
CITY OF ROANOKE)

Robert B. Claytor, being duly sworn, deposes and says that he is President of Norfolk and Western Railway Company (NW), applicant herein; that he has been duly authorized and designated by NW to sign, verify, and file the foregoing document and exhibits with the Interstate Commerce Commission; that he has carefully examined all of the statements contained in said document and the exhibits attached thereto and made a part thereof; that he has knowledge of the matters set forth therein insofar as those matters relate to NW; and that all such statements made and matters set forth therein with respect to NW are true and correct to the best of his knowledge, information and belief.

Robt B. Claytor
Robert B. Claytor

Subscribed and sworn to before me
this 1st day of December, 1980.

Jeanie B. Davis
Notary Public

My commission expires: April 8, 1983

[SEAL]

CERTIFICATE

COMMONWEALTH OF VIRGINIA)
) ss:
CITY OF ROANOKE)

I, Donald E. Middleton, am Secretary of Norfolk and Western Railway Company and hereby certify that Robert B. Claytor is President of Norfolk and Western Railway Company and duly authorized to verify and file the attached application in behalf of Norfolk and Western Railway Company.

Donald E. Middleton
Donald E. Middleton

Subscribed and sworn to before me
this 1st day of December, 1980.

Jeanne B. Davis
Notary Public

My commission expires: April 8, 1985

[SEAL]

DISTRICT OF COLUMBIA: ss

H. H. Hall, being duly sworn, deposes and says that he is President of Southern Railway Company (Southern), applicant herein; that he has been duly authorized and designated by Southern to sign, verify, and file the foregoing document and exhibits with the Interstate Commerce Commission; that he has carefully examined all of the statements contained in said document and the exhibits attached thereto and made a part thereof; that he has knowledge of the matters set forth therein insofar as those matters relate to Southern; and that all such statements made and matters set forth therein with respect to Southern are true and correct to the best of his knowledge, information and belief.

H. H. Hall

Subscribed and sworn to before me this 28th day of November, 1980.

Notary Public

My commission expires: June 14, 1983

(SEAL)

PHILIP J. CAFFREY
NOTARY PUBLIC
IN AND FOR THE DISTRICT OF COLUMBIA
MY COMMISSION EXPIRES JUNE 14, 1983

CERTIFICATE

DISTRICT OF COLUMBIA: ss

I, Milton M. Davenport, am Secretary of Southern Railway Company and hereby certify that H. H. Hall is President of Southern Railway Company and duly authorized to verify and file the attached application in behalf of Southern Railway Company.

Milton M. Davenport

Milton M. Davenport

Subscribed and sworn to before me this 28th day of November, 1980.

Notary Public

My commission expires: June 14, 1983

(SEAL)

PHILIP J. CAFFREY
NOTARY PUBLIC
DISTRICT OF COLUMBIA
MY COMM. EXPIRES JUNE 14, 1983

OMMONWEALTH OF VIRGINIA)
) ss:
ITY OF ROANOKE)

Donald E. Middleton, being duly sworn, deposes and says at he is Secretary of Norfolk, Franklin and Danville Railway mpany (NF&D), applicant herein; that he has been duly authorized nd designated by NF&D to sign, verify, and file with the Inter-tate Commerce Commission the foregoing document and exhibits ith respect to the acquisition by Southern Railway Company of ertain properties of NF&D; that he has carefully examined all f the statements contained in said document and the exhibits ttached thereto and made a part thereof; that he has knowledge of the matters set forth therein insofar as those matters relate to NF&D; and that all such statements made and matters set forth herein with respect to NF&D are true and correct to the best of is knowledge, information and belief.

Donald E. Middleton
Donald E. Middleton

ubscribed and sworn to before me
this 1st day of December, 1980.

Jeanne B. Davis
Notary Public

y commission expires: April 8, 1983

[SEAL]

CERTIFICATE

COMMONWEALTH OF VIRGINIA)
) ss:
CITY OF ROANOKE)

I, Joseph Pakush, am Assistant Secretary of Norfolk, Franklin and Danville Railway Company and hereby certify that Donald E. Middleton is Secretary of Norfolk, Franklin and Danville Railway Company and duly authorized to verify and file the attached application in behalf of Norfolk, Franklin and Danville Railway Company.

Joseph Pakush
Joseph Pakush

Subscribed and sworn to before me
this 1st day of December, 1980.

Jeanne B. Davis
Notary Public

My commission expires: April 8, 1983

[SEAL]

NWS Exhibit A-18(i)

SECTION 1111.2(b)(5) - AS EXHIBIT A-18, GENERAL BALANCE SHEETS, AS APPROPRIATE, OF THE FOLLOWING:

[By Order served October 1, 1980, the Commission granted Applicants' request for waiver to file balance sheets for NW, SR and DH each on a consolidated system basis rather than the corporate entity basis required by Sections 1111.2(b)(5)(ii)-(v). Therefore, Applicants submit responses only to Sections 1111.2(b)(5)(i) and (vi).]

(i) Transferee on a corporate entity basis.

NWS ENTERPRISES, INC.

BALANCE SHEET

June 30, 1980

Assets

Cash	$1,000

Liabilities and Shareowners' Equity

Common stock, par value $1 per share; authorized, issued and outstanding 1,000 shares	$1,000

Note: This company has had no income or expenses; therefore, no statements of earnings are submitted.

(vi) Transferor and subsidiaries on a consolidated basis.

NORFOLK AND WESTERN RAILWAY COMPANY AND SUBSIDIARIES
CONSOLIDATED BALANCE SHEET
(Thousands of Dollars)
June 30, 1980

ASSETS	
Current assets:	
Cash and temporary cash investments	$ 247,823
Accounts receivable	205,039
Materials and supplies	74,608
Other current assets	12,327
Deferred income tax benefits	13,137
Total current assets	552,934
Investments:	
Equity in and advances to affiliates	12,463
Other, at cost	43,275
	55,738
Properties	3,101,159
Less accumulated depreciation	(996,157)
Properties - net	2,105,002
Other assets	103,556
Total assets	$2,817,230
LIABILITIES AND STOCKHOLDERS' EQUITY	
Current liabilities:	
Accounts and wages payable	$ 186,970
Taxes accrued	47,989
Other current liabilities	57,702
Current maturities and long-term debt	53,720
Total current liabilities	346,381
Long-term debt, less current maturities	486,383
Other liabilities and deferred credits	90,296
Minority interest in subsidiaries	39,280
	615,959
Deferred income taxes	402,201
Stockholders' equity:	
Common stock of $8.33 1/3 par value per share. Authorized 60,000,000 shares; issued 33,669,252	280,577
Stock liability for conversion	443
Other capital	130,585
Excess at acquisition of net assets of consolidated subsidiaries over cost	41,091
Retained income	1,103,221
	1,555,917
Less cost of 2,400,888 shares of stock in treasury	(103,228)
Total stockholders' equity	1,452,689
Total liabilities and stockholders' equity	$2,817,230

SOUTHERN RAILWAY COMPANY AND CONSOLIDATED SUBSIDIARIES
BALANCE SHEET AS OF JUNE 30, 1980
(Thousands of Dollars)

ASSETS

CURRENT ASSETS		
Cash		$ 13,860
Working funds		310
Temporary cash investments		176,787
Special deposits		37
Loans and notes receivable	$ 1,709	
Accounts receivable - interline and other balances	6,798	
Accounts receivable - customers	63,667	
Accounts receivable - other	21,004	
Interest and dividends receivable	2,608	
Receivables from affiliated companies	775	
Accrued accounts receivable	117,238	
Less: Allowance for uncollectible accounts	(2,467)	
Net receivables		211,332
Prepayments		1,635
Materials and supplies		111,809
Other current assets		1
Total current assets		515,771
SPECIAL FUNDS		
Sinking funds		35
Capital funds		14,337
Other funds		2,920
Total special funds		17,292
TANGIBLE PROPERTY		
Road and equipment property		3,062,163
Less: Accumulated depreciation road and equipment property		(899,170)
Accumulated amortization - road and equipment defense projects		(3,800)
Net road and equipment property		2,159,193
Improvements on leased property		192,012
Less: Accumulated depreciation - improvements on leased property		25,752
Net improvements on leased property		166,260
Total carrier property		2,325,453
Property used in other than carrier operations		102,010
Less: Accumulated depreciation - Property used in other than carrier operations		(14,705)
Net property used in other than carrier operations		87,305
Total tangible property		2,412,758

OTHER ASSETS AND DEFERRED DEBITS			
Other Assets			562
Other deferred debits			11,087
Total other assets and deferred debits			11,649
TOTAL ASSETS			$2,971,638
LIABILITIES AND SHAREHOLDERS' EQUITY			
CURRENT LIABILITIES			
Loans and notes payable			$ 1,985
Accounts payable - Interline and other balances			3,924
Audited accounts and wages payable			15,969
Accounts payable - other			8,788
Interest payable			19,850
Dividends payable			163
Accrued accounts payable			160,200
Federal income taxes accrued			23,413
State and other income taxes accrued			2,339
Other taxes accrued			28,382
Other current liabilities			45,131
Equipment obligations and other long-term debt due within one year			78,424
Total current liabilities			388,568
LONG-TERM DEBT DUE AFTER ONE YEAR	Total issued	Held by or for Company	
Funded debt unmatured	$281,355	$49,961	231,394
Equipment obligations	582,734	None	582,734
Capitalized lease obligations			20,524
Unamortized debt discount			(1,389)
Unamortized premium on debt			82
Total long-term debt due after one year			833,345
OTHER LONG-TERM OBLIGATIONS			
Other liabilities			25,126
Accrued liability; leased property			5,067
Accrued liability; casualty and other claims			19,786
Other accrued liabilities			10,759
Total other long-term liabilities			60,738
DEFERRED CREDITS			
Other deferred credits			4,060
Accumulated deferred income tax credits			393,037
Total deferred credits			397,097
SHAREHOLDERS' EQUITY	Total issued	Held by or for Company	
Capital stock (Par or stated value): Capital stock issued	$225,324	$16,618	208,706

ADDITIONAL CAPITAL	
Premium and assessments on capital stock	41,708
Other capital	15,611
Total additional capital	57,319
RETAINED EARNINGS	
Retained earnings - appropriated	45,052
Retained earnings - unappropriated	980,813
Total retained income	1,025,865
Total shareholders' equity	1,291,890
TOTAL LIABILITIES AND SHAREHOLDERS' EQUITY	$2,971,638

DH Exhibit A-18(vi)
Page 1 of 1

DELAWARE AND HUDSON RAILWAY COMPANY AND SUBSIDIARIES
CONSOLIDATED BALANCE SHEET
June 30, 1980

	1980
ASSETS	
Current Assets:	
Cash and Temporary Cash Investments	$ 2,498,598
Special Deposits	563,842
Accounts Receivable	27,080,445
Material and Supplies	5,894,338
Other Current Assets	1,854,813
Total Current Assets	37,892,036
Investments in Affiliates and Other Companies	1,198,639
Properties, less Accumulated Depreciation	74,020,034
Other Assets	1,904,318
Total Assets	$115,015,027
LIABILITIES AND STOCKHOLDERS' EQUITY	
Current Liabilities:	
Accounts and Wages Payable	$ 39,306,127
Taxes Accrued	1,313,209
Other Current Liabilities	2,219,679
Current Maturities of Long-Term Debt	3,822,949
Total Current Liabilities	46,661,964
Long-Term Debt, Less Current Maturities	50,284,697
Other Liabilities and Deferred Credits	9,915,192
Deferred Income Taxes	-
Minority Interest	258,774
	60,458,663
Stockholder's Equity:	
Common Stock, Par Value $1,000 per Share; authorized and issued 1,000 shares	1,000,000
Excess at acquisition of Net Assets of Consolidated Subsidiaries over Cost	2,485,518
Other Capital	(36,853,818)
Total Stockholders' Equity	7,894,400
Total Liabilities and Stockholders' Equity	$115,015,027

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NWS Exhibit A-19(i)

SECTION 1111.2(b)(6) - AS EXHIBIT A-19, INCOME STATEMENTS, AS APPROPRIATE, OF THE FOLLOWING:

[By an Order served October 1, 1980, the Commission granted Applicants' request for waiver to file income statements for NW, SR and DH each on a consolidated system basis rather than the corporate entity basis required by Sections 1111.2(b)(6)(ii)-(v). Therefore, Applicants submit responses only to Sections 1111.2(b)(6)(i) and (vi).]

(i) Transferee on a corporate entity basis.

In accordance with Section 7.3(i) of the Agreement of Merger (see Vol. 3, Exh. 9), NWS may transact no business prior to consummation and consequently has no statement of income at present.

(vi) Transferor and subsidiaries on a consolidated basis.

NORFOLK AND WESTERN RAILWAY COMPANY AND SUBSIDIARIES

CONSOLIDATED STATEMENTS OF INCOME
(Thousands of Dollars)

	Year Ended December 31, 1978	1979	Six Months Ended June 30, 1980
RAILWAY OPERATING REVENUES:			
Freight	$1,057,161	$1,395,217	$751,320
Other	40,197	53,950	26,127
Total railway operating revenues	$1,097,358	$1,449,167	$777,447
RAILWAY OPERATING EXPENSES:			
Transportation	(446,234)	(553,652)	(293,683)
Equipment	(255,372)	(265,722)	(143,640)
Way and structures	(176,732)	(212,361)	(122,819)
General and administrative	(111,168)	(105,894)	(57,128)
Total railway operating expenses	(989,506)	(1,137,629)	617,270
Income from railway operations	107,852	311,538	160,177
OTHER INCOME (CHARGES):			
Interest	17,219	29,931	25,696
Income of nonrailroad subsidiaries before income taxes and extraordinary credit	17,783	29,601	9,774
Gain on debt reacquired	501	2,314	53
Service interruption insurance claims	58,406	-	-
Other-net	5,344	5,348	2,216
Provision for decline in value of investment in Dereco, Inc.	(13,722)	-	-
Minority interest in income of subsidiaries	(1,632)	(1,621)	(816)
Total other income (charges)	83,899	65,573	36,923
INTEREST EXPENSE	(44,634)	(36,096)	(17,928)
Income before income taxes and extraordinary credit	147,117	341,015	179,172

	Year Ended December 31, 1978	1979	Six Months Ended June 30, 1980
PROVISION FOR INCOME TAXES (CREDIT):			
Current:			
Federal	49,200	107,886	50,695
State	2,734	13,119	7,535
Deferred	(10,717)	21,414	13,558
Total income taxes	41,217	142,419	71,788
Income before extra-ordinary credit	105,900	198,596	107,384
Extraordinary credit-adjustment of deferred income tax liability	59,254	-	-
NET INCOME	$165,154	$198,596	$107,384

SOUTHERN RAILWAY COMPANY AND CONSOLIDATED SUBSIDIARIES

CONSOLIDATED STATEMENTS OF INCOME
(Thousands of Dollars)

	Year Ended December 31, 1978	1979	Six Months Ended June 30, 1980
RAILWAY OPERATING INCOME			
Railway operating revenue	$1,260,671	$1,467,270	$812,031
Railway operating expenses	(1,044,361)	(1,208,917)	(657,521)
Net revenue from railway operations	216,310	258,353	154,510
OTHER INCOME			
Revenue from property used in other than carrier operations	4,403	4,410	2,385
Miscellaneous rent income	2,164	1,795	1,002
Dividend income	580	891	289
Interest income	15,696	24,358	14,287
Income from sinking and other funds	3,367	3,363	1,153
Release of premimums on funded debt	65	40	7
Miscellaneous income	14,770	16,581	12,910
Total other income	41,045	51,438	32,033
Total income	257,355	209,791	186,543
MISCELLANEOUS DEDUCTIONS FROM INCOME			
Expenses on property used in other than carrier operations	632	559	368
Taxes on property used in other than carrier operations	1,743	1,847	1,060
Miscellaneous rent expense	20	18	9
Miscellaneous income charges	12,005	15,905	3,417
Uncollectible accounts	-	76	30
Total miscellaneous deductions	14,400	18,405	4,884
Income available for fixed charges	242,955	291,386	181,659
FIXED CHARGES			
Interest on funded debt (a) fixed interest not in default	61,567	67,577	35,880
Interest on unfunded debt	155	222	131
Amortization of discount on funded debt	313	548	272
Total fixed charges	62,035	68,327	36,283
Income after fixed charges	180,920	223,059	145,376

	Year Ended December 31, 1978	1979	Six Months Ended June 30, 1980
PROVISION FOR INCOME TAXES			
Income taxes on ordinary income			
Federal income taxes	20,084	21,427	19,146
State income taxes	5,397	7,525	4,274
Provision for deferred income taxes	28,120	33,485	21,399
Total income taxes	53,601	62,437	44,819
NET INCOME	127,319	160,622	100,557
Add: Retained earnings unappropriated beginning of year	725,458	805,167	909,954
Appropriations released	1,298	357	-
Less: Dividends	(44,326)	(51,710)	(29,698)
Other debits to retained income	(2,384)	(2,384)	-
Appropriations for other purposes	(2,198)	(2,098)	-
Retained earnings unappropriated end of period	$ 805,167	$ 909,954	$980,813

DELAWARE AND HUDSON RAILWAY COMPANY AND SUBSIDIARIES
Consolidated Statements of Income (Loss)

	1978	1979	Six Months Ended June 30, 1980
RAILWAY OPERATING REVENUES:			
Freight	$ 83,713,058	$100,956,580	$ 58,386,520
Other	1 ,549,580	1,546,862	748,740
Total railway operating revenues	85,262,638	102,503,442	59,135,260
RAILWAY OPERATING EXPENSES:			
Transportation	42,687,332	47,494,291	9,529,700
Maintenance of equipment	28,720,380	33,375,469	17,525,362
Maintenance of way and structures	14,263,999	18,628,171	27,359,477
General and administrative	9,284,609	10,709,863	5,812,224
Total railway operating expenses	94,956,320	110,207,794	60,226,763
Loss from railway operation	(9,693,682)	(7,704,352)	(1,091,503)
OTHER INCOME (CHARGES):			
Income from New York State Grants	861,834	1,077,535	555,324
Interest, rents and other	1,654,365	2,075,979	715,718
Gain on debt reacquired	252,360	483,077	469,882
Loss of nonrailroad subsidiaries before income taxes	(4,175)	(3,580)	(829)
Other expense	(664,990)	(461,047)	(284,321)
Minority interest in income of subsidiaries	(9,072)	(9,253)	(3,401)
Total other income (charges)	2,090,322	3,162,711	1,452,313
INTEREST EXPENSE	4,062,117	4,162,448	2,229,726
Income (Loss) before Federal income taxes	(11,665,477)	(8,704,089)	(1,868,916)
FEDERAL INCOME TAXES	9,600	8,305	-
Net income (loss)	$(11,675,077)	$ (8,712,394)	$ (1,868,916)

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NWS Exhibit 20
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SUMMARY OF ECONOMIC BENEFITS

Year 1

	Annual Benefits (000)	One Time Benefits (000)
Rail Traffic Diversion Study	$15,749	$ -
Traffic Gains from Motor Carriers	1,101	-
Improvements in Operations		
Common Point Consolidations	5,717	(8,779)
Rerouting and Run-Through	17,420	-
Shop & Repair Facilities	379	-
Maintenance of Way Coordination	1,361	-
Roanoke Car Shops	10,465	-
Equipment Requirements	-	(18,655)
Car Utilization	15,338	-
Purchasing	8,920	-
Duplicate Sales Offices	4,973	-
Labor Protection Costs	-	(4,138)
Planned System Improvements	-	(47,618)
Totals*	$81,423	$(79,190)

* This statement does not include the one-time benefit from abandonment of a portion of the NF&D (see Volume 7 -- related applications).

SUMMARY OF ECONOMIC BENEFITS

Year 2

	Annual Benefits (000)	One Time Benefits (000)
Rail Traffic Diversion Study	$20,249	$ -
Traffic Gains from Motor Carriers	1,982	-
Improvements in Operations		
Common Point Consolidations	5,717	-
Rerouting and Run-Through	20,066	-
Shop & Repair Facilities	379	-
Maintenance of Way Coordination	1,361	-
Roanoke Car Shops	10,465	-
Equipment Requirements	-	(15,213)
Car Utilization	15,338	-
Purchasing	10,840	-
Duplicate Sales Offices	5,639	-
Labor Protection Costs	-	(88)
Planned System Improvements	-	-
Totals	$92,036	$(15,301)

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SUMMARY OF ECONOMIC BENEFITS

Year 3

	Annual Benefits (000)	One Time Benefits (000)
Rail Traffic Diversion Study	$22,499	$ -
Traffic Gains from Motor Carriers	2,202	-
Improvements in Operations		
Common Point Consolidations	5,717	-
Rerouting and Run-Through	21,389	-
Shop & Repair Facilities	379	-
Maintenance of Way Coordination	1,361	-
Roanoke Car Shops	10,465	-
Equipment Requirements	-	(6,862)
Car Utilization	15,338	-
Purchasing	10,840	-
Duplicate Sales Offices	5,639	-
Labor Protection Costs	-	(2)
Planned System Improvements	-	-
Totals	$95,829	$ (6,864)

SUMMARY OF ECONOMIC BENEFITS

Normal Year

	Annual Benefits (000)	One Time Benefits (000)
Rail Traffic Diversion Study	$22,499	$ -
Traffic Gains from Motor Carriers	2,202	-
Improvements in Operations		
Common Point Consolidations	5,717	-
Rerouting and Run-Through	21,389	-
Shop & Repair Facilities	379	-
Maintenance of Way Coordination	1,361	-
Roanoke Car Shops	10,465	-
Equipment Requirements	-	-
Car Utilization	15,338	-
Purchasing	10,840	-
Duplicate Sales Offices	5,639	-
Labor Protection Costs	-	-
Planned System Improvements	-	-
Totals	$95,829	$ -

SUMMARY OF ECONOMIC BENEFITS

All Years
(000)

Year 1	Annual Benefits	$ 81,423
	One-Time Benefits	(79,190)
	Total	$ 2,233
Year 2	Annual Benefits	$ 92,036
	One-Time Benefits	(15,301)
	Total	$ 76,735
Year 3	Annual Benefits	$ 95,829
	One-Time Benefits	(6,864)
	Total	$ 88,965
Normal Year	Annual Benefits	$ 95,829
	One-Time Benefits	0
	Total	$ 95,829

SUMMARY OF ECONOMIC BENEFITS

INDEX OF SOURCES OF BENEFIT DATA

	WITNESS RESPONSIBLE
Rail Traffic Diversion Study	J.R. McMichael/S.D. Guy/ C.M. Snavely, Jr.
Traffic Gains from Motor Carriers	L.K. Kloss/C.M. Snavely, Jr.
Improvements in Operations	
Common Point Consolidations	L.M. Newton/J.R. Martin
Rerouting and Run-Through	C.M. Snavely, Jr.
Shop & Repair Facilities	L.S. Presson, Jr.
Maintenance of Way Coordination	M.E. Wilson, Jr.
Roanoke Car Shops	H.L. Scott, Jr.
Equipment Requirements	L.M. Newton/C.M. Snavely, Jr.
Car Utilization	W.J. Romig/C.M. Snavely, Jr.
Purchasing	N.B. Coggins, Jr.
Duplicate Sales Offices	J.R. McMichael
Labor Protection Costs	T.C. Sheller/R.C. Steele, Jr.
Planned System Improvements	L.M. Newton/J.R. Martin/ M.E. Wilson, Jr./P.P. Dunavant, Jr.

Response to Section 1111.1(c)(1)(ii) - Name and business address of directors:

NWS ENTERPRISES, INC.

Milton M. Davenport	920 15th Street, N.W. P.O. Box 1808 Washington, D.C. 20013
Mahlon D. Edwards	920 15th Street, N.W. P.O. Box 1808 Washington, D.C. 20013
Donald E. Middleton	8 North Jefferson Street Roanoke, Virginia 24042
Joseph Pakush	8 North Jefferson Street Roanoke, Virginia 24042

NORFOLK AND WESTERN RAILWAY COMPANY

William H. Bricker	Chairman of the Board and Chief Executive Officer Diamond Shamrock Corporation 2300 Southland Center Dallas TX 75201
August A. Busch III	Chairman of the Board and President Anheuser-Busch Companies, Inc. 721 Pestalozzi Street St. Louis MO 63118
Robert B. Claytor	President Norfolk and Western Railway Company 8 North Jefferson Street Roanoke VA 24042
Lester E. Coleman	President and Chief Executive Officer The Lubrizol Corporation 29400 Lakeland Boulevard Wickliffe OH 44092

John P. Fishwick	Chairman of the Board and Chief Executive Officer Norfolk and Western Railway Compan 8 North Jefferson Street Roanoke VA 24042
W.H. Krome George	Chairman of the Board and Chief Executive Officer Aluminum Company of America 1501 Alcoa Building Pittsburgh PA 15219
John A. Mayer	c/o Mellon Bank N.A. Room 462 Mellon Square Pittsburgh PA 15230
Robert H. Strotz	President Northwestern University Rebecca Crown Center 633 Clark Street Evanston IL 60201
Samuel R. Sutphin	P.O. Box 23 Zionsville IN 46077
William H. Wendel	Vice Chairman of the Board and Consultant Kennecott Corporation Carborundum Center P.O. Box 156 Niagara Falls NY 14302

SOUTHERN RAILWAY COMPANY

William R. Bond	3508 Redmont Road Birmingham AL 35213
D. William Brosnan	12 Lone Pine Road Biltmore Forest Asheville NC 28803
D. Tennant Bryan	Chairman of the Board Media General, Inc. 333 East Grace Street Richmond VA 23219

Archie K. Davis	612 South Main Street P.O. Box 10689 Winston-Salem NC 27108
Harry A. DeButts*	Upperville VA 22176
Harold H. Hall	President and Chief Executive Officer Southern Railway Company P.O. Box 1808 Washington DC 20013
Leonard F. Howard	President L.F. Howard Associates, Inc. Suite 1650, Lincoln Bldg. 60 East 42nd Street New York NY 10017
R.L. Ireland, III	Partner Brown Brothers Harriman & Co. 59 Wall Street New York NY 10005
Ralph F. Leach	Morgan Guaranty Trust Company of New York 23 Wall Street New York NY 10015
E.B. Leisenring, Jr.	Chairman of the Board Penn Virginia Corporation 2500 Fidelity Bldg. Philadelphia PA 19109
Arnold B. McKinnon	Executive Vice President Law & Accounting Southern Railway Company P.O. Box 1808 Washington DC 20013
Robert E. McNair	Senior Partner McNair Glenn Konduros Corley Singletary Porter & Dibble Suite 1820, Bankers Trust Tower P.O. Box 11390, Capitol Station Columbia SC 29211

* Director Emeritus.

George S. Paul	Executive Vice President Administration Southern Railway Company P.O. Box 1808 Washington DC 20013
(Two Vacancies)	

DELAWARE AND HUDSON RAILWAY COMPANY

NAME	ADDRESS
Selig Altschul	President Aviation Advisory Service, Inc. 26 Broadway New York NY 10004
Arthur B. King	Guthrie Clinic Sayre PA 18840
Lester W. Herzog, Jr.	5 South Loudon Heights Loudonville NY 12211
Jervis Langdon, Jr.	Quarry Farm P.O. Box 224 Elmira NY 14902
Howard F. Miller	Director Division of the Budget State of New York State Capitol Albany NY 12224
Kent P. Shoemaker	President Delaware and Hudson Railway Compa 40 Beaver Street Albany NY 12207

Response to Section 1111.1(c)(1)(iii) - Name, title and business address of officers:

NWS ENTERPRISES, INC.

Name	Title	Business Address
Donald E. Middleton	Chairman of the Board and Secretary	8 N. Jefferson Street Roanoke VA 24042
Milton M. Davenport	President and Treasurer	920 15th St., N.W. P.O. Box 1808 Washington DC 20013
Mahlon D. Edwards	Assistant Secretary	920 15th St., N.W. P.O. Box 1808 Washington DC 20013
Joseph Pakush	Assistant Secretary	8 N. Jefferson Street Roanoke VA 24042

NORFOLK AND WESTERN RAILWAY COMPANY

Name	Title	Business Address
John P. Fishwick	Chairman of the Board and Chief Executive Officer	8 N. Jefferson Street Roanoke VA 24042
Robert B. Claytor	President	8 N. Jefferson Street Roanoke VA 24042
Richard F. Dunlap	Executive Vice President	8 N. Jefferson Street Roanoke VA 24042
John R. Turbyfill	Executive Vice President	8 N. Jefferson Street Roanoke VA 24042
John S. Shannon	Senior Vice President-Law	8 N. Jefferson Street Roanoke VA 24042

Name	Title	Business Address
John R. McMichael	Senior Vice President-Merchandise Traffic	8 N. Jefferson Street Roanoke VA 24042
Hobart L. Scott, Jr.	Vice President-Operations	8 N. Jefferson Street Roanoke VA 24042
Joseph R. Neikirk	Vice President-Administration	8 N. Jefferson Street Roanoke VA 24042
Daniel L. Kiley	Vice President-Taxation	8 N. Jefferson Street Roanoke VA 24042
Jean Jones	Vice President and Comptroller	8 N. Jefferson Street Roanoke VA 24042
William B. Bales	Vice President-Coal and Ore Traffic	8 N. Jefferson Street Roanoke VA 24042
R. Alan Brogan	Vice President-Material Management	8 N. Jefferson Street Roanoke VA 24042
John M. Fricke	Treasurer	8 N. Jefferson Street Roanoke VA 24042
Donald E. Middleton	Secretary	8 N. Jefferson Street Roanoke VA 24042

SOUTHERN RAILWAY COMPANY

Name	Title	Business Address
Harold H. Hall	President and Chief Executive Officer	920 15th Street, N.W. Washington DC 20005
Earl L. Dearhart	Executive Vice President-Marketing	920 15th Street, N.W. Washington DC 20005
Arnold B. McKinnon	Executive Vice President-Law and Accounting	920 15th Street, N.W. Washington DC 20005
George S. Paul	Executive Vice President-Administration	920 15th Street, N.W. Washington DC 20005

Name	Title	Business Address
Edward B. Burwell	Senior Vice President-Operations	920 15th Street, N.W. Washington DC 20005
Karl A. Stoecker	Senior Vice President-Finance	920 15th Street, N.W. Washington DC 20005
Edward G. Kreyling, Jr.	Senior Vice President-Marketing Services	920 15th Street, N.W. Washington DC 20005
Edward T. Breathitt, Jr.	Vice President-Public Affairs	920 15th Street, N.W. Washington DC 20005
Robert S. Geer	Vice President-Industrial Development	99 Spring Street, S.W. Atlanta GA 30303
Samuel D. Guy	Vice President-Sales	920 15th Street, N.W. Washington DC 20005
John L. Jones	Vice President-Management Information Services	99 Spring Street, S.W. Atlanta GA 30303
Donald R. McArdle	Vice President and Comptroller	920 15th Street, N.W. Washington DC 20005
William D. McLean	Vice President-Real Estate and Insurance	920 15th Street, N.W. Washington DC 20005
Paul R. Rudder	Vice President-Transportation	920 15th Street, N.W. Washington DC 20005
Walter W. Simpson	Vice President-Engineering	920 15th Street, N.W. Washington DC 20005
James L. Tapley	Vice President-Law	920 15th Street, N.W. Washington DC 20005
D. Henry Watts	Vice President-Personnel	920 15th Street, N.W. Washington DC 20005
Walter B. Brown	Vice President-Columbia	700 Columbia Building Columbia SC 29201
Challen E. Caskie	Vice President-New Orleans	1205 St. Louis Street New Orleans LA

Name	Title	Business Address
J. Wilbert Forbes	Vice President-Raleigh	907 Wachovia Bank Building Raleigh NC 27602
Glenn E. Taylor	Vice President-Nashville	19th Floor, Life and Casualty Building Nashville TN 37219
Milton M. Davenport	Secretary	920 15th Street, N.W. Washington DC 20005

DELAWARE AND HUDSON RAILWAY COMPANY

Name	Title	Address
Kent P. Shoemaker	President and Chief Executive Officer	40 Beaver Street Albany NY 12207
Donald D. Muir	Vice President-Finance	40 Beaver Street Albany NY 12207
Thomas E. O'Brien	Vice President-Sales and Marketing Group	40 Beaver Street Albany NY 12207
William W. Collins	Vice President-Administration and Strategic Planning	40 Beaver Street Albany NY 12207
Richard E. Long	Secretary and Assistant Vice President-Administration and Planning	40 Beaver Street Albany NY 12207
Robert E. Sullivan	Comptroller	40 Beaver Street Albany NY 12207
John N. Evanoff	Treasurer	40 Beaver Street Albany NY 12207

Response to Section 1111.1(c)(1)(iv) - Name and business addresses of 10 principal stockholders as of last record date and their respective holdings:

The names, business addresses, and holdings of NW's 10 principal stockholders as of September 18, 1980 are as follows:

Name and Business Address	Common	Preferred	Total
Bankers Trust Company 16 Wall Street New York, New York 10015	2,030,480	-	2,030,480
Morgan Guaranty Trust Company 30 West Broadway New York, New York 10015	1,736,239	-	1,736,239
Merrill Lynch, Pierce, Fenner & Smith, Inc. 70 Pine Street New York, New York 10005	784,635	-	784,635
Bank of New York 48 Wall Street New York, New York 10015	767,368	-	767,368
The Chase Manhattan Bank One Chase Manhattan Plaza New York, New York 10081	580,543	-	580,543
State Street Bank and Trust 801 State Street Quincy, Illinois 62301	573,024	-	573,024
United States Trust Company 130 John Street New York, New York 10038	518,380	-	518,380
Pittsburgh National Bank Pittsburgh National Building Pittsburgh, Pennsylvania 15230	479,998	-	479,998
Manufacturers Hanover Trust Co. 40 Wall Street New York, New York 10015	424,550	-	424,550

Name and Business Address	Common	Preferred	Total
Shawmut Bank of Boston One Federal Street Boston, Massachusetts 02211	392,860	-	392,860

The names, business addresses, and holdings of SR's ten principal stockholders as of September 18, 1980 are as follows:

	Common	Preferred	Total
Cede & Co. Box 20, Bowling Green Sta. New York, NY 10274	5,300,054	163,639	5,463,693
Penn Virginia Equities Corp. Suite 12, 4th Floor 410 W. 9th Street Wilmington, Delaware 19801	400,000	-	400,000
Map and Co. P.O. Box 26986 Richmond, VA 23261	313,505	6,100	319,605
Kray & Co. c/o Midwest Stock Exchange Clearing Corp. 120 South LaSalle Street Chicago, IL 60603	277,708	4,955	282,663
Pacific & Co. P.O. Box 7877 San Francisco, CA 94120	229,790	1,126	230,916
ICO c/o Treasurer St. of Ohio P.O. Box 1170 Columbus, Ohio 43216	200,000	-	200,000
Batrus & Co. c/o Bankers Trust Company P.O. Box 706, Church St. Sta. New York, NY 10008	144,452	-	144,452

	Common	Preferred	Total
Trust Company Bank TTEE Southern Railway System Tax Reduction Act Employee Stock Ownership Plan U/A Dtd. 9/8/77 c/o Trust Department P.O. Box 4655 Atlanta, GA 30302	137,456	-	137,456
Borla c/o Union Bank Securities Custody Dept. P.O. Box 2278, Terminal Annex Los Angeles, CA 90054	120,000		120,000
EX & Co. c/o The Bank of N.Y. P.O. Box 11203 New York, NY 10249	100,000		100,000
Touchstone & Co. c/o State Street Bank & Trust Co. P.O. Box 5006 Boston, MA 02101	100,000		100,000

Delaware and Hudson Railway Company has outstanding 1000 shares of Common Stock, the only class outstanding, with a par value of $1000 per share. All shares are owned by Dereco, Inc., a wholly owned subsidiary of NW, and are pledged to USRA to secure a loan granted pursuant to a Loan Agreement dated March 15, 1976 between DH and USRA.

Response to Sections 1111.1(c)(7) through (11).

Explanatory Note: The following chart contains Applicants' responses to Sections 1111.1(c)(7) through (11) of the Commission's consolidation regulations. The data set forth in the chart discloses the extent to which Applicants are controlled by any other corporation or corporations, the measure of control of ownership exercised by Applicants over other carriers subject to the Act, the degree to which Applicants and their affiliates share common officers or directors, and the existence of any other intercorporate relationships between Applicants, or their affiliates, and any other carrier.

Name of Company	Number of Shares	Par Value	Interest or Ownership	Held By	Common Officers and Directors
The AC&Y Terminal	1,000	$ --	100%	AC&Y RR	
Airforce Pipeline, Inc.	250	100	100%	Atlantic & East Carolina	
The Akron & Barberton Belt Railroad Company	250	100	25%	AC&Y RR	
The Akron Canton & Youngstown Railroad Company	126,971	--	100%	NW	
The Alabama Great Southern Railway Company	156,600	50	100%	SR	
Albany Port Railroad Corporation	500	5	50%	DH	
Albany and Vermont Rail Road Company	4,561	100	76.02%	DH	
Algers, Winslow and Western Railway Company	2,500	--	50%	SR	
Arrowood Corporate Center Associates	--	--	47%	Arrowood Southern Executive Park	
Arrowood-Southern Company	100	100	100%	The National Investment Company	
Arrowood-Southern Executive Park, Inc.	1,000	1	100%	SR	
The Atlanta and Charlotte Air Line Railway Company	16,999	100	100%	SR	

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Name of Company	Number of Shares	Par Value	Interest or Ownership	Held By	Common Officers and Directors
Atlanta Terminal Company	1,000	$100	66.67%	SR	
	500		33.33%	Central of Georgia	
			100.00%		
Atlantic and East Coast Railway Company	1,000	--	100%	SR	
Atlantic and North Carolina Railroad Company	2,605	100	15.09%	Norfolk Southern	
Augusta and Summerville Railroad Company	500	100	25.%	SR	
	500		25.%	Central of Georgia	
			50.%		
Beaver Street Tower Company	100	1	25%	Georgia Southern and Florida	
The Belt Railway Company of Chicago	2,400	100	7.69%	NW	
Birmingham Terminal Company	1,000	100	66.66%	SR	
	250		16.67%	Alabama Great Southern	
	250		16.67%	Central of Georgia	
			100.00%		
Blue Ridge Railway Company	1,000	100	100%	SR	
Camp Lejeune Railroad Company	1,000	25	100%	SR	
Central of Georgia Railroad Company	1,000	100	100%	SR	

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Name of Company	Number of Shares	Par Value	Interest of Ownership	Held By	and Directors
Central Transfer Railway and Storage Company	250	$100	50%	SR	
Charlotte-Southern Corporation	1,000	100	100%	SR	
Chatham Terminal Company	250	100	50%	Central of Georgia	
Chattanooga Station Company	333	100	33.3%	SR	
	333		33.3%	Alabama Great Southern	
	334		33.4%	CNO&TP	
			100.0%		
Chattanooga Terminal Railway Company	600	100	100%	SR	
Chesapeake Western Railway	6,000	100	100%	NW	
Chicago and Western Indiana Railroad Company	10,000	100	20%	NW	
The Cincinnati, New Orleans & Texas Pacific	448,500	20	100%	SR	
The Cincinnati Union Terminal Company	5,000	100	14.29%	CNO&TP	H.H. Hall, Washington, D.C.
	5,000		14.28%	NW	J.R. Turbyfill, Pres. Roanoke, Va.
	10,000		28.57%		
Citico Realty Company	99	50	49.5%	SR	
	35		17.5%	Alabama Great Southern	
	29		14.5%	Central of Georgia	
	23		11.5%	CNO&TP	
	14		7.0%	Georgia Southern & Florida	
	200		100.0%		

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Name of Company	Number of Shares	Par Value	Interest or Ownership	Held By	Common Officers and Directors
The Cleveland Union Terminal Company	7	$100	7%	NW	
Danville and Western Railway Company	3,686	100	100%	SR	
Delaware and Hudson Railway Company	1,000	1,000	100%	Dereco, Inc.	
Dereco, Inc.	5,808,204	5	99.9%	NW	
Des Moines Union Railway Company	2,000	100	50%	NW	
The Detroit and Toledo Shore Line Railroad Company	15,000	100	50%	NW	
Durham and Southern Railroad Company	2,500	100	100%	Norfolk Southern	
Elberton Southern Railway Company	980 1,020 2,000	100	49% 51% 100%	SR A&CAL Railway	
Erie Lackawanna Railway Company	1,000	1,000	0%*	Dereco, Inc.	
Erie Land and Improvement Company	50	100	0%*	Erie Lackawanna	

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Name of Company	Shares				
Erie Land and Improvement Company of Pennsylvania	**100**	**$ 50**	**0%***	**Erie Lackawanna**	
Fairport Painesville and Eastern Railway Company	250	2,000	50%	NW	
1515 Eye Street Associates	--	--	62%	Southern Region Industrial Realty, Inc.	
Fort Wayne Union Railway Company	400	100	50%	NW	
Fruit Grower's Express Company	7,488	100	6.62%	SR	
	65		.05%	Alabama Great Sou.	
	2,567		2.27%	Central of Georgia	
	1,288		1.14%	CNO&TP	W.D. McLean
	463		.41%	Georgia, Sou. & Fla.	Washington, D.C.
	700		.62%	Norfolk Southern	
	12,571		11.11%		
	1,336		1.18%	NW	L. Atkinson, Jr.
	13,907		12.29%		Roanoke, Va.
The Georgia Midland Railway Company	10,000	100	100%	SR	
The Georgia Northern Railway Company	6,000	100	100%	SR	
The Georgia Southern and Florida Railway Company	18,825	100	100%	SR	

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Name of Company	Number of Shares	Par Value	Interest or Ownership	Held By	Common Officers and Directors
Green Real Estate Company	66,288	$ --	33.33%	NW	
Greenwich & Johnsonville Railway Company	2,250	100	100%	DH	
High Point, Randlemen, Asheboro and Southern Railroad Company	4,254	50	85.73%	SR	
High Point, Thomasville & Danton Railroad Company	2,187-3/4	100	100%	Winston-Salem Southbound	
The Hoboken Ferry Company	1,000	100	0%	Erie Lackawanna	
Hudson Realty Company	10	100	0%*	Erie Lackawanna	
Hudson River Estates Inc.	2,030	100	100%	DH	
Illinois Terminal Railroad Company	363.636%	10	18.18%	NW	
Interstate Railroad Company	80,000	100	100%	SR	
Iowa Transfer Railway Company	161	100	12.5%	Des Moines Union	
Kansas City Terminal Railway Company	1,833-1/3	100	8.33%	NW	

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Name of Company	Number of Shares	Par Value	Interest or Ownership	Held By
Kentenia Corporation**	10,000	$ --	100%	Pocahontas Development Corp.
Kentucky & Indiana Terminal Railroad Company	250	100	33.34	SR
Keokirk Union Depot Company	200	100	20%	NW
Knoxville & Ohio Railroad	11,222	100	100%	SR
Lackawanna and Wyoming Valley Railway	16,190	1	0%*	Erie Lackawanna
Lafayette Union Railway Company	--	--	--	(leased by NW until August 31, 1989, and thereafter on a year-to-year basis)
Lake Erie Dock Company	100	--	100%	NW
The Lake Erie and Fort Wayne Railroad Company	4,000	25	100%	NW
Lambert's Point Docks, Incorporated	1,800	610¢	100%	Virginia Holding Corporation
Lawroy Land Company	100	100	0%*	Erie Lackawanna
The Lehigh and Hudson River Railway	15,370	100	0%*	Erie Lackawanna

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Name of Company	Number of Shares	Par Value	Interest or Ownership	Held By	Common Officers and Directors
Lenoir Car Works	15,000	$100	100%	SR	
Live Oak, Perry and South Georgia Railway Company	4,870	100	100%	Georgia Southern & Fla.	
The Lorain & West Virginia Railway Company	20,000	100	100%	NW	
Louisana Southern Railway Company	10,000	10	100%	Alabama Great Southern	
Macon Terminal Company	333	100	33.34%	SR	
	333		33.33%	Georgia Sou. & Fla.	
	333		33.33%	Central of Georgia	
	999		100.00%		
Mahoning State Line Railroad Company	87	50	0%*	Erie Lackawanna	
Memphis & Charleston Railroad Company	106,261	25	100%	SR	
Memphis & Charleston Railway Company	1,000	100	100%	SR	
Mobile & Birmingham Railroad Company	8,961	100	99.83%	SR	
NW Equipment Corporation	100	--	100%	Dereco, Inc.	
Napierville Junction Railway Company	24,000	50	100%	DH	

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Name of Company	Shares				
The National Investment Company	5,000	$100	100%	SR	
New Jersey, Indiana & Illinois Railroad Company	8,250	100	100%	NW	
New Orleans Terminal Company	20,000	100	100%	Alabama Great Southern	
The Niagara Junction Railway Company	2,500	--	0%*	Erie Lackawanna	
The Nickel Plate Improvement Company Inc.	100	100	100%	NW	
Norfolk, Franklin and Danville Railway Company	15,000	100	100%	NW	
Norfolk and Portsmouth Beltline Railroad Company	72 72 144 288	100 100 	14.29% 14.28% 28.57% 57.14%	SR Norfolk Sou. NW 	Paul Rudder Washington, D.C. Richard F. Dunlap Roanoke, Va.
Norfolk Southern Industrial Development Corp.	100	1	100%	Norfolk Southern	
Norfolk Southern Railway Company	50,000	1	100%	Southern	

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Name of Company	Number of Shares	Par Value	Interest or Ownership	Held By	Common Officers and Directors
The North Carolina Midland Railroad Company	8,995	$100	97.35%	Southern	
The North Carolina Railroad Company	710	100	1.78%	The National Investment Co.	
North Charleston Terminal Company	350	100	33.33%	SR	
Northern Coal and Iron Company	15,000	100	100%	DH	
The Northern New York Development Company	100	100	100%	DH	
Northern Ohio Food Terminal, Inc.	10,800	5	71.1%	Virginia Holding Corporation	
Northwestern Mining & Exchange Company of Erie, Pennsylvania	30,000	100	0%*	Erie Lackawanna	
NWS Enterprises, Inc.	500 500 1,000	1	50% 50% 100%	NW SR	
Ocean Steamship Company of Savannah	20,000	100	100%	Central of Georgia	
Ore Belt Railroad Company	400	100	100%	SR	
Pennsylvania Coal Company	500,000	50	0%*	Erie Lackawanna	

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Name of Company	Shares	Value	Ownership		
Peoria and Pekin Union Railway Company	1,500	$100	15%	NW	
Pittsburgh & Cross Creek Railroad Company	240	50	17.1%	NW	
The Pittsburgh & West Virginia Railway Company	--	--	--	(leased by NW for 99 yrs. from October 16, 1964.)	
Pocahontas Development Corporation	100	--	100%	Pocahontas Land Corporation	
Pocahontas Kentucky Corporation	100	--	100%	Pocahontas Land Corporation	
Pocahontas Land Corporation	10,000	100	100%	NW	
Powhatan Oil and Gas Corporation	500	10	100%	NW	
The Pullman Company	7,047	.02	0%*	Erie Lackawanna	
	3,063	.02	0.42%	DH	
	15,106	.02	2.08%	NW	John R. Turbyfill Roanoke, Va. (vacancy)
	25,216		2.50%		
The Pullman Company	22,383	.02	3.06%	SR	
	2,034		.28%	Alabama Great Southern	
	3,189		.44%	Central of Georgia	
	3,198		.44%	CNO&TP	
	1,453		.19%	Georgia Southern & Fla.	
	32,257		4.41%		
	57,471		6.91%		

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Name of Company	Number of Shares	Par Value	Interest or Ownership	Held By	Common Officers and Directors
Railbox Company	--	$ --	(Restricted to guaranteeing payment of debt incurred by Railbox in connection with lease financing of 1,000 50-foot box cars up to $28,000,000)	NW SR	John R. Turbyfill Roanoke, Va. Karl A. Stoecker Washington, D.C.
Ress Realty Company	1,985	10	0%*	Erie Lackawanna	
Richmond, Fredericksburg and Potomac Railroad Company	39,863	25	76.35%	Richmond-Washington Co.	
Richmond-Washington Company	4,450	100	20%	SR	
Rochester & Genessee Valley Railroad	3,881	100	0%*	Erie Lackawanna	
Rutland and Whitehall Rail Road Company	553	100	21.63%	DH	
St. Johns River Terminal	1,000	100	100%	SR	
The Saratoga and Schenectady Rail Road Company	3,448	100	76.62%	DH	

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Name of Company	Shares			
The Sciota Valley and New England Rail Road Company	50	$100	100%	NW
700 N. Fairfax Street	--	--	45%	Southern Region Industrial Realty Inc.
Shenandoah-Virginia Corporation	100	10	100%	NW
South Buffalo Development Co., Inc.	100	--	100%	NW
The South Western Rail Road Company	51,830	100	100%	Central of Georgia
Southern Rail Terminals, Inc.	100	50	100%	National Investment Company
Southern Rail Terminals of North Carolina, Inc.	1,000	--	100%	SR
Southern Railway Company	162,570	10	.99%	CNO&TP
	21,436		.13%	Danville & Western Railway Co.
	4,186		.03%	HPRA&S
	4,476		.03%	LOP&SG
	45,212		.27%	National Investment Co.
	905,724		5.49%	Southern Region Investment Co.
	854		--	Transylvania Railroad Co.
	9,286		.06%	Yadkin Railroad Co.
	1,153,744		7.00%	

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Name of Company	Number of Shares	Par Value	Interest or Ownership	Held By	Common Officers and Directors
Southern Railway-Carolina Division	41,762	$100	100%	SR	
Southern Region Coal Transport, Inc.	100	10	100%	SR	
Southern Region Distribution Services, Inc.	5,000	10	100%	SR	
Southern Region Industrial Realty, Inc.	500	100	100%	SR	
Southern Region Investment Company	100	--	100%	SR	
Southern Region Materials Supply, Inc.	50	10	100%	SR	
Southern Region Motor Transport	2,660	100	100%	Central of Georgia	
State University Railroad Company	168	100	54.02%	SR	
Sumter and Wateree River Railroad Company	6,000	1	100%	Southern Railway-Carolina Division	
Tennessee, Alabama & Georgia Railway Company	301,063	2.50	100%	SR	
Tennessee Northern Railway Company	2,500	100	100%	SR	

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Name of Company	Number of Shares	Value	Ownership	Held By	and Directors
Tennessee Railway Company	100	$ --	100%	SR	
Terminal Properties, Inc.	50	10	50%	SR	
	25		25%	Alabama Great Southern	
	25		25%	Central of Georgia	
	100		100%		
Terminal Railroad Association of St. Louis	2,058	100	6.25%	SR	E.B. Burwell Washington, D.C.
	2,058		6.25%	NW	Richard F. Dunlap Roanoke, Va.
	4,116		12.50%		
The Toledo Belt Railway Company	3,000	100	100%	NW	
The Toledo Terminal Railroad	3,872	100	10.72%	NW	
Trailer Train Company	1,500	1	7.32%	NW	Hobart L. Scott, Jr.
	500	1	0%*	EL	John S. Shannon
	2,000	1	7.32%		John R. Turbyfill
	500	1	2.44%	SR	Walter W. Simpson Karl A. Stoecker
	500		2.44%	Central of Georgia	W. W. Simpson Washington
	1,000		4.88%		
	3,000		12.20%		

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Name of Company	Number of Shares	Par Value	Interest or Ownership	Held By	Common Officers and Directors
Transylvania Railroad Company	3,595	$100	97.16%	SR	
Union Belt of Detroit	--	--	(operated pursuant to an operating agreement dated January 22, 1958, with C&O and ConRail)	NW	
Virginia & Southwestern Railway Company	20,000	100	100%	SR	
Virginia Holding Corporation	1,000	100	100%	NW	
Virginia Midland Railway Company	51,563.45	100	100%	SR	
Wabash Railroad Company	596,719 (common)	--			
	6,500 (preferred)	100	80%	NW	
The Wheeling and Lake Erie Railway Company	298,315 (common)	100	91%	NW	
	115,867 (prior Lien)	100			
Wilkes-Barre Connecting Railroad Company	3,652	50	100%	DH	

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Name of Company	Number of Shares	Par Value	Ownership	Held By and Directors
Winston Land Corporation	2,017 (owned entirely by Winston-Salem Southbound Railway Company, which is 50% owned by NW)	$100	50%	NW
Winston-Salem Southbound Railway Company	6,225	100	50%	NW
Woodstock & Blockton Railway Company	1,200	100	50%	Alabama Great Southern
Wyoming Valley Improvement Company	374,965	50	100%	DH
Yadkin Railraod Company	9,300	50	74.40%	SR

* Norfolk and Western Railway Company (NW) owns approximately 99.9% of the voting stock of Dereco, Inc., which in turn owns 100% of the voting stock of Erie Lackawanna Railway Company (EL). However, EL entered reorganization on June 26, 1972, pursuant to the provisions of Section 77 of the Bankruptcy Act, as supplemented by the Regional Rail Reorganization Act of 1973, and commenced to be operated independently of Dereco, Inc., or NW under the supervision of court-appointed trustees. Consolidated Rail Corporation, in which neither Dereco, Inc., nor NW has any ownership interest, on April 1, 1976, took over all rail properties of EL except those eligible for discontinuance or abandonment under the Regional Rail Reorganization Act of 1976, as amended. Accordingly, the extent of control percentages indicated for EL and its affiliated companies do not reflect any control by NW over EL, or through EL over its affiliates.

** Kentenia Corporation was dissolved as of July 25, 1980.

Exhibit 7 to Appendix 2
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Response to Section 1111.1(c)(12) - The amount of Applicants' outstanding capital stock, by classes, and in connection therewith the par value or stated value of each share, its voting rights, if any, the total number of stock holders of record, and the voting rights of all security holders:

NWS ENTERPRISES, INC.

Outstanding Capital Stock as of September 18, 1980

Class	Votes Per Share	Par Value Per Share	Outstanding Shares	Stockholders of Record
Common Stock	1	$1.00	1000	2

NORFOLK AND WESTERN RAILWAY COMPANY

Outstanding Capital Stock as of September 18, 1980

Class	Votes Per Share	Par Value Per Share	Outstanding Shares	Stockholders of Record
Common Stock	1	$8.33-1/3	31,600,666	72,831

SOUTHERN RAILWAY COMPANY

Outstanding Capital Stock as of September 18, 1980

	Shares			
	Preferred	Common	Series A Preference	Total
Issued	1,198,611	16,560,003		17,758,614
Deduct shares not entitled to vote:				
Unexchanged: $100 par		190		190
50 par				
10 par	13,755			13,755
Held by susidiaries controlled 50% or more	101,600	1,153,744		1,255,344
Treasury shares		722		722
Held by National Investment Company for predecessor company stockholders	858	800		1,658
Held by National Investment Company for AGS stockholders		376		376
Held by Successor Voting Trustees	74	1,350		1,424
Held by First & Merchants for:				
Tennessee Railroad bondholders	16			16
Norfolk Southern stockholders				
Shares entitled to vote	1,082,324	15,402,805		16,485,124
Stockholders of record (one vote per share)				30,661

DELAWARE AND HUDSON RAILWAY COMPANY

Outstanding Capital Stock as of September 18, 1980

Class	Votes Per Share	Par Value Per Share	Outstanding Shares	Stockholders of Record
Common	1	$ 1000	1000	1

Before the
SURFACE TRANSPORTATION BOARD

Finance Docket No. 36522

NORFOLK SOUTHERN RAILWAY COMPANY
—PETITION FOR DECLARATORY ORDER

EXHIBIT G

VERIFIED STATEMENT

OF

ROBERT B. CLAYTOR

My name is Robert B. Claytor. I am President of Norfolk and Western Railway Company. My education and railroad experience are set forth below:

I was graduated from Princeton University in 1943 with a degree of Bachelor of Arts in economics and served in the Field Artillery, Army of the United States, from 1943 to 1946. I graduated from Harvard Law School in 1948 with a J.D. degree. After being employed as an attorney for the American Telephone and Telegraph Company in New York from 1948 to 1951, I joined the Norfolk and Western in 1951 as a Solicitor in the Law Department. I was appointed Vice President-Law in 1964 and became a director of the company in 1968. From 1970 to 1980 I served as Executive Vice President and on October 1, 1980, became President. In addition, I am a director of a number of the railroad's affiliated companies.

The proposed unification of NW and Southern offers concrete benefits to the territories we serve, our shippers, employees and stockholders. The transportation and financial advantages appear in full in the Application and supporting material. In addition, they are outlined in some detail in the opening Executive Summary. Rather than recapitulating them once again in this statement, I will outline our approach to affiliation with Southern and then discuss why corporate affiliation is the only way to achieve the benefits we anticipate.

PARTNERSHIP APPROACH

The NW-Southern affiliation had its genesis in April of 1979 when announcement was made of the initiation of studies between the two roads to assess the benefits of possible unification. Even at that time it seemed probable that the Chessie System and Family Lines would be successful in their efforts to unify under CSX to form a new and powerful system linking the South, the East and the Midwest. The initiation of such discussions between NW and Southern was a natural and logical response to the CSX proposal and one which, on its face, seemed to offer many attractions, including efficiencies greater than either road alone could achieve.

From the outset we approached the affiliation of NW and Southern as a partnership, and not as a takeover of one road by the other. It was always our position that the affiliation was to be of equals with neither company assuming a dominant role. This philosophy prevailed during our discussions and was reflected in the agreement in principle which was announced on June 2, 1980. Moreover, the terms of the definitive agreement reflect our basic understanding that NW and Southern will be equal partners in the new NWS Enterprises.

The agreement provides for a holding company; Southern shareholders would receive 1.9 shares of new holding company stock for each present common share and NW shareholders would exchange 1 for 1. Since there are approximately twice as many NW as Southern shares, the ratio represents a rough equivalence of NW and Southern participation.

The exchange ratio was developed with the advice and participation of our investment bankers, who considered with us the two companies' relative earnings, dividends, assets and markets. Such an analysis is not an exact science. Southern's greater growth and its location in an expanding region of the country weighed in its favor. NW's coal traffic and strong earnings helped it. On the basis of financial comparisons, the statement of Mr. Turbyfill (Vol. 2A) considers in detail the fairness of the exchange ratio to NW stockholders and that of Mr. Kerwin (Vol. 2A) the fairness to Southern stockholders. Both sides negotiated within the agreed partnership framework for the best deal they could make. Both companies worked from a position of strength, came close to agreement, reconsidered, and finally reached an understanding more than a year after beginning the effort. This history of prolonged deliberation and arms-length negotiation itself is good evidence of the fairness of the terms.

The initial Board of the new company will be composed of an equal number of representatives named by NW and Southern. This initial Board will elect a Chief Executive Officer. The merger agreement leaves this equally balanced board unfettered in its choice of the CEO. Leaving the choice of the CEO to the initial Board avoids a selection brokered between still-independent companies. It insures the selection will solely reflect the best interests of NWS.

The definitive agreement (Vol. 3, Exh. 9) was approved by the Boards of both companies on July 22, 1980, and by the stockholders of both companies on November 7, 1980. The time and care behind this agreement make it, we believe, an exceptionally solid platform from which to launch the new system.

The proposed holding company structure grew logically out of our initial election of a partnership approach. The holding company will own all the common stock of NW and Southern. Their prior common stockholders will become holding company stockholders. The holding company structure lends itself ideally to the conflicting imperatives facing a large transportation company. It must simultaneously permit decentralization of operations, to be efficient and responsive, and centralization of financial planning and commercial policy, to gain the benefits of integration. Under our plan, we will have a corporate structure which both provides a vehicle for unified planning — the holding company — and preserves a framework — the two roads — for decentralized operations.

Specifically, the two carriers will maintain their separate corporate identities, most employees will remain at their present locations and there will be no disruption of their operations or impairment of their ability to continue to provide good service to shippers occasioned by unplanned efforts at coordination.

There are, of course, existing plans for some coordination of operations, set out in detail in the operating plan, with further coordination of functions over time, but, apart from the necessary consolidation of the sales functions, described in Mr. Hall's statement, at this time we do not plan any consolidation of other departments or mass relocation of employees in implementing our plan. Even when a particular function, such as stockholder records, is allocated to the holding company, it may discharge that function through the offices and personnel of one or the other of the constituent railroads.

Our fundamental premise is that NWS, together with Southern and NW, will be operated for the overall benefit of the NWS system.

The proposed changes in operations described in the operating plan, and in the testimony of supporting witnesses, are based on the utilization of the most efficient routes of the NWS system, the most efficient utilization of the combined NW and Southern car and locomotive fleets, and the coordination of our sales and marketing efforts. For instance, if it provides better transportation service to reroute traffic now moving over a Southern route to a combined Southern-NW route, or if shippers' markets can be broadened by creating new routings which are now unattractive to NW as a short-haul origin carrier, but attractive to NWS because of a longer haul on Southern, we will do it. These kinds of actions clearly illustrate the benefits of, and the need for, consolidation, since they are precisely the kinds of things that carriers which are not under common ownership will not do.

Although we will maximize NWS (rather than NW or Southern) revenues and income, neither NW nor Southern will suffer as a result. When, for example, traffic is internally rerouted for better efficiency, appropriate adjustments will be made between the railroad accruing the revenues and the other railroad performing the additional service. More generally, whenever one railroad incurs a cost or provides a service to the other and the sum involved is neither trivial nor approximately "washed" by benefits coming the other way, adjustments will be made. The Joint Terminal and Trackage Rights agreements in Exhibit 9 (Vol. 3) exemplify this approach. Related

companies do not require mathematical precision, only substantial overall fairness, in these adjustments, so accounting costs will be minimized through the use of set-offs and estimates, as in the cited Joint Terminal agreement. We expect to benefit from Southern's experience in economically handling similar adjustments among its affiliated companies (Statement of Robert T. Stinnett, Vol. 4A).

We do not foresee a large holding company staff, since we visualize the function of the holding company to be primarily that of setting policy for the system and insuring its implementation by the people on the properties. We expect the holding company to be headed by a Chairman and a President. The duties of a chief executive officer and of a chief operating officer will be assumed by these offices. The persons who will fill these positions will be selected by the Board of Directors after the consolidation is consummated. The Board of Directors, which will consist of 16 members — 8 selected by NW and 8 selected by Southern — in consultation with these two top officers, will, of course, determine the overall structure of the holding company, and what I am saying now is not to be construed as an attempt to limit or impinge on that authority.

However, with that caveat, I can say that discussions between the present managements of Southern and NW have indicated general agreement on the types of functions which should be included in the holding company.

As in the case of any corporate entity, there are certain functions which must be provided, e.g., a corporate secretary and a legal staff,

and other functions which logically fall into the jurisdiction of the top of the corporate structure, e.g., financial management and federal taxes. Since all the common stockholders in the consolidated enterprise will be NWS stockholders, it seems appropriate to center stockholder relations in the holding company under the direction of the corporate secretary. Similarly, since the effective utilization of the assets of the combined enterprise will require close coordination, financial management should be centralized. Moreover, after consolidation, NWS will be the taxpayer filing consolidated Federal Income Tax returns for the system.

With respect to the legal function, NWS itself will need access to legal advice. Whether the holding company legal staff should perform any services for the operating companies, or exercise any coordinating function with respect to their law departments, will be determined in the light of experience.

Other functions, e.g., personnel and labor relations, are divisible into those matters properly handled at the holding company level and those best left to the operating companies. For example, in the personnel area, in the long run NWS will establish common policies for the entire enterprise, selecting the most appropriate practices of NW and Southern where they differ, or devising new policies where needed. Day-to-day implementation of these policies, however, is best handled at the local level. Similarly, NW and Southern should have a coordinated policy in matters such as national bargaining, but the interpretation of the differing agreements on Southern and NW at the local level is best left to operating company personnel who are familiar with their terms and history.

The public affairs function is also divisible, with the holding company responsible for national affairs, leaving state and local matters to the operating companies, subject to the establishment of common policies.

Other areas in which the holding company staff should have a planning and coordination role are material management, computer and management information services, accounting, and public relations and advertising.

Finally, with respect to operations, it is our concept that, in terms of operating policies, the Chairman or the President will be the Chief Operating Officer of the NWS system, with the Presidents of Southern and NW responsible both for advising him with respect to such matters and seeing that the policies are complied with when established. We believe that this combination of centralized and local control is the right way to insure the best possible service to the public. The combined NWS system will extend over 18,000 miles. Operating this large network to the best advantage will require both common operating policies in implementing efficient coordinations, and on-the-spot authority to make the daily adjustments and decisions necessary to make such policies work.

To summarize, NWS will be a working entity having overall responsibility for the performance of service and the optimum usage of the facilities and assets of a combined Southern and NW. At the same time, by preserving the separate corporate structures of NW and Southern, the consolidated enterprise will minimize any disruption of its services and personnel during the transition from separate to coordinated operations. As we gain experience with this new enterprise, I am sure we will find many ways to make beneficial changes not now contemplated, but such changes will be made only after careful

study and with full consideration of their effect on both our customers and our employees.

NECESSITY FOR UNIFICATION

Unworkability of Voluntary Cooperation

Sometimes it is asked why the benefits of an end-to-end affiliation cannot be achieved by voluntary cooperation. However, the fact of the matter is that it is totally unrealistic to expect unaffiliated railroads to achieve such results.

Where we see mutual benefits, we will have already tried to realize them. In large part, the absence today of a possible improvement is itself evidence of the need for affiliation to achieve it. For example, before the merger agreement NW considered upgrading the Ft. Wayne to Muncie part of its Cincinnati-Chicago line to permit better joint NW-Southern service to Chicago. But, as recently as the fall of 1979, we rejected this multi-million dollar improvement as an appropriate investment for NW alone.

The need for affiliation goes deeper than the possibility that one line or the other, standing alone, may see little or no benefit to it in a particular project. Even when both lines might temporarily benefit, they may be reluctant to make the kinds of concessions needed for coordinations. A good example in this case is the proposed run-through service from Southern in Bristol (in Southwest Virginia) over an NW shortcut to Lynchburg (in Central Virginia) and back on Southern to Washington, described in the operating plan as the Lynchburg-Knoxville Cutoff. Knoxville traffic to the Northeast will save 96 miles over Southern's route through Asheville, North Carolina. And it is traffic which NW itself has not attracted because NW reaches neither Knoxville nor Washington.

In 1967, 1971 and 1976 Southern requested trackage rights over the Lynchburg-Bristol line of NW. However, we were never able to come to an agreement. Aside from the matter of terms, we were reluctant to forfeit any potential for future participation in the business. Trackage rights, once granted, are permanent. Forever is a long time. What we might earn in charges did not justify the possible long-run effect on NW's interests.

Here lies the fallacy of voluntary coordinations as a substitute for corporate affiliation. No matter how attractive in theory, many desirable coordinations entail the retreat of one party or another from service or functions it might prefer to perform itself. No railroad wants to engage in piecemeal compromise of its self-sufficiency and franchises, even if any given step appears to offer some tangible benefit.

Corporate affiliation ends these problems at a stroke. Then the only question is what helps the system as a whole. In our experience, the transportation benefits of fully coordinated service come only with corporate affiliation. We forecast annually recurring savings of 229,251,000 ton miles and 417,419 gallons of diesel fuel from the Lynchburg-Bristol coordination alone, to say nothing of the new marketing opportunities it represents for both shippers and railroads. The Operating Plan identifies four other major new routes, none of which will achieve its potential for through service without NW-Southern unification.

Capital Needs

NW and Southern are without doubt among the strongest railroads in the industry. Furthermore, when joined they will be able to marshall greater resources than either alone could commit. NW's cash position in recent

years (now about $300 million), fixed charge coverage (10.45 in 1979) and low debt ratio (equity is 3 times debt) give it a capacity for new investment which is probably unexcelled in the industry. The new system will have the benefit of this capacity.

It is well recognized that the railroad industry faces immense capital demands simply to maintain its role in the evolving transportation system. NW and Southern will need all the financial strength they can together muster to make investment in rail assets attractive and produce an enterprise big enough, strong enough and rich enough to gain market share, expand services, and carry the coal and other business which ought to move by rail. Any circumstance which reduced NWS's return would be inconsistent with these goals. Temporary succor for some particular line or service or special interest would be purchased at the price of delaying or even preventing forward motion by NW and Southern.

Coal

Norfolk and Western has long been known as a coal hauling railroad. This company and its predecessors did much to open up the Pocahontas fields in West Virginia at the end of the last century. We have grown up with the industry, suffered with its relapse after World War II, and now look forward to its resurgence. For the first six months of 1980, 61% of NW's tonnage and 49% of its revenues came from coal. We are totally committed to this market.

NWS has a major contribution to make to the present coal renaissance. Coal's contribution to the national interest in reduced oil dependence and in an improved balance of payments I will leave to others. Today's conditions heighten the importance of competent, efficient and financially strong coal carriers.

Although I speak from the perspective of Norfolk and Western, Southern, too, has a feeling for coal, actually antedating our own and going back to the Chesterfield Railroad, which in the 1830's became the first railroad in the United States primarily committed to coal transportation. The Southern system continues to originate a significant volume of coal.

Coal transportation involves more than moving open top hoppers. We are involved in every step of the process from, on occasion, leasing mineral rights, discussing the location of a new mine, constructing spurs and sidetracks, constructing and furnishing equipment, scheduling movements, and providing dumping facilities.

What we see in the consolidation is a chance to expand and coordinate this expertise through a much larger territory. Present NW coal flows show that success comes with single system service. NW origin coal moves predominantly to NW destinations, particularly Norfolk, the Ohio River, Chicago, and Sandusky on Lake Erie. Almost three-quarters of the total (73.6% in 1979) found no outlet to other railroads. Southern will add access to Southeastern utilities and will also permit us to reach, should it become desirable, a number of alternate ports along the eastern seaboard.

The testimony of Dr. Cukor, Mr. Barber and others amply explains why affiliation and the resulting single system service is necessary to encourage these movements. Without question, coordination of service at origin and destination under common control is important for efficient and successful transportation. Such coordination in practice gives substantial benefits, some of which are hard to anticipate in advance. Let me give an example from our own merger experience.

In conjunction with the NW-Nickel Plate-Wabash unification in 1964, various coordinations were proposed. One of the major operating benefits, however. was completely unforeseen.

Before 1964, NW terminated at Columbus, Ohio. It gathered coal in the Virginia, West Virginia and East Kentucky fields, switched it at Portsmouth and interchanged at approximately six different points in Columbus. The receiving carriers in turn might at some point reclassify or switch the cars before the coal reached destination.

Those who studied the NW-NKP-Wabash unification did not focus on westbound coal. It was assumed it would be handled as before, and in fact it was handled much as before, with NW receiving a longer haul.

Over a period of years, however, we began to realize that what happened to our westbound coal in such places as Buffalo, Detroit, Chicago and St. Louis could now be coordinated with what happened in the minefields. It proved feasible to assemble blocks in the fields which could run all the way to destination or regional gateway without rehandling of the individual cars. We had the incentive and the ability to pursue this coordination as far as possible, since we were responsible at both ends, not just one.

The results, completely unforeseen and achieved only over a period of years, would surprise those who planned the merger. For this very large volume of coal traffic, over 200,000 cars a year, switching at Portsmouth has been virtually eliminated. Coal cars which previously might have been handled three or even four times now move directly from the fields to destination or gateway. The overall savings, including car day savings, have made a significant contribution to rising efficiency indexes on NW, for example, a 50% increase in cars handled per yard engine hour between 1972 and 1979.

It has become conventional wisdom to identify railroad yard, switching and terminal operations as the villain in the push for greater productivity. In the case of our westbound coal, one can see how affiliation helped NW respond to the problem: in part through minimizing interchanging, but more importantly, through coordinating handling at origin and destination and thus permitting virtually all of our westbound coal trains to bypass the Portsmouth terminal altogether. Affiliation provides, besides immediate savings, the tools and larger viewpoint essential for such improvements.

Another part of the picture has been the installation of weighing-in-motion scales at Prichard, West Virginia, which in conjunction with a closed circuit TV permits weighing and billing of cars without stopping or uncoupling with only three clerks (per shift) necessary for the entire "papering" of these thousands of cars and millions of tons of westbound coal. This non-stop weighing would have been possible with or without the NW-NKP-Wabash unification, but what has made it so valuable is its natural application to the preclassified through trains we have developed as a result of the unification. So the snowball of savings grows, with an unanticipated weigh-and-bill technology reenforcing an unanticipated rationalization of our western coal movements.

In the example given, the handling of coal in Chicago, Detroit and elsewhere governs the order in which cuts of cars are assembled in the coal fields, with a line of communications running through Roanoke. We could not have achieved this level of efficiency if NW were still giving up the coal to half a dozen connections in Columbus, though no one claimed this as a merger benefit in 1964.

New Regulatory Environment

Just as local railroads amalgamated into regional trunk lines as the American economy became more interrelated, regional lines are now forming interterritorial systems. NWS like CSX is not an accident but a logical response to the kind of long-haul transportation the economy now needs from railroads.

Deregulation accentuates the need for large systems with wide coverage. It may be too soon to say exactly where deregulation will lead. But it is clear that as holes develop in the protective regulatory canopy over interline service, railroads which must rely on such service will be increasingly handicapped. The ability to control service and equipment and to make rates unilaterally from origin to destination becomes more critical as the Commission, properly, becomes less involved in car service, routing conditions, and joint rates.

Deregulation may give railroads a legal right to respond to market opportunities, but affiliation will give them more ability to do so, without which the right alone is empty. A good example is found in our plan for dedicated intermodal trains between Chicago and the Southeast. As the Statement of Lester K. Kloss (Volume 6B, p. 11) indicates, NW alone, or NW trying to work with another railroad, simply would not be a factor in this market.

With NW-Southern affiliation, however, we can try to compete with the trucks in this corridor. Mr. Kloss identifies some specific highway traffic the unified system can expect to attract. The only dollar benefits claimed from this new intermodal business relate to this identified traffic. Of far more consequence, however, is the creation of an interterritorial

transportation system which is capable of competing for such traffic in the first place. Once we have a working service from Chicago to the Southeast, we can go about trying to add traffic. It may take years. It will probably require innovations no one has yet thought of. But the channel will be in place.

Railroads have been losing business to trucks at least since World War II. While the trend in recent years has become less pronounced, it is clear that despite the 1973 oil embargo, despite the quadrupling of fuel prices, and despite concern with emissions, safety and road damage, railroads have yet to make any real inroads on the market share gained by trucks in the postwar era.

No 35-year trend will be reversed overnight. Many shippers now have their own truck fleets, and will not abandon them lightly. Trucks, especially with deregulation, offer remarkable flexibility and responsiveness, and the highway network gives them a subsidy railroads do not enjoy.

The tide, however, may now be ready to turn the other way. As the country matures, it values more and more the fuel efficiency, safety, and environmental advantages of railroads. The new interterritorial railroads, BN-Frisco, CSX, and, we hope, NW and Southern, will offer transportation which surpasses what is now available from regional railroads. It is difficult to predict the consequences of this marked improvement in the rail infrastructure. In 1955, commentators somewhat simplistically forecast the proposed Interstate Highway System would reduce accidents, lower the cost of vehicle operation, permit quick evacuation of target areas in a war, and ease traffic jams (New York Times, February 23, 1955). They did not foresee it might revolutionize the movement of freight.

CSX and Interterritorial Transportation

CSX now has a long head start. Not only is it far larger than either NW or Southern, but by almost any measure, it is larger than NW and Southern together.

CSX	1979	NWS
27,000	Route Miles	18,100
77,000	Employees	46,000
$4.1 billion	Revenues	$2.9 billion
$6.8 billion	Total Assets	$5.7 billion
4,500	Locomotives	2,800
260,000	Freight Cars	165,000
134.3 billion	Revenue Ton Miles	104.1 billion

Between many important city pairs, including, for example, Chattanooga-Columbus, Charlotte-Cleveland, Birmingham-Toledo, and Detroit-Jacksonville, the CSX lines will alone offer single system rail service unless NW and Southern affiliate (Statement of Richard J. Barber, Vol. 1B, Figure 33). The CSX lines fully understand the competitive advantage of single system service between the Midwest and Southeast. A recent full-page Wall Street Journal (October 21) advertisement by the Family Lines publicized the "only rail system that offers you single-line service between the Southeast and Chicago." NW and Southern hope the Commission will move quickly to let NWS enter this market.

The affiliation of NW and Southern will let them compete with CSX on a more comparable footing. In the CSX case itself, we took the first steps. The Commission approved in the public interest new NW rights in Cincinnati for connecting with Southern, and Hagerstown-Connellsville and Lynchburg-Glasgow trackage rights to fill in missing links in our Shenandoah Corridor route to the south (Map, Vol. 4, at p. 67). Southern's own

settlement in the CSX case will help effectuate a better NW-Southern route to Chicago. We have obtained the parts with the Commission's blessing and must now put them together in a single system.

The ability of an affiliated system to compete with CSX means shippers will have two realistic rail alternatives. In the broad market for interterritorial transportation between the Midwest and Southeast, the types of enterprise (if not the individual firms) needing such transportation will not be solely dependent on CSX. Even individual firms will have an alternative in the long run. The Task Force on Railroad Productivity has emphasized that manufacturing activity relocates at an annual rate of about ten percent.* Our business is not a number of fixed accounts, but a constantly churning flux of shippers and receivers, which have to be won over every day. This is a bleak contest for us unless NW and Southern can offer the same interterritorial service as the competition. And it would be an unhappy prospect for major shippers and whole economic sectors to be dependent on a single railroad for unified Midwest-Southeast transportation.

The present application identifies specific and quantifiable benefits of affiliation. It deals with the here and now, extrapolated three years but still grounded in the present. The immediate benefits more than justify the unification, but should not be allowed to obscure the still greater promise of a new transportation machine.

We are not here primarily because we see savings of a given number of car days or hours of transit time, but because of the need for a single system transportation structure to compete with CSX and the trucks. We want to link, on a comparable single-system basis, the great subregions of the

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*Improving Railroad Productivity, p. 251 (1973)

country which exchange the products and raw materials for the major sectors of the American economy: midwestern grain and southeastern livestock producers,* Chicago/Cleveland/Pittsburgh heavy industry and South Atlantic consumers, Great Lakes auto production and southeastern distributors, and, of course, Pocahontas coal and southern utilities and ports. When one rail system, such as CSX forges these links, NW and Southern had better not be far behind.

NW has gotten this far because it has responded to its markets and opportunities: it took position for today's critical export coal business years ago through the Virginian merger; it reached transcontinental gateways through the NKP-Wabash unification; it consolidated its East-West service through a major acquisition in 1976. Now, again, it must move with the times and join Southern to take its place among the new generation of interterritorial railroads.

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*Statement of John P. Duncan, Vol. 1A.

VERIFICATION

COMMONWEALTH OF VIRGINIA)
) SS:
CITY OF ROANOKE)

ROBERT B. CLAYTOR, being first duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true as stated.

Robert B. Claytor
ROBERT B. CLAYTOR

Subscribed and sworn to before me this 26 day of November, 1980.

Judy C. McLaurine
NOTARY PUBLIC

My commission expires: March 31, 1981

Before the
SURFACE TRANSPORTATION BOARD

Finance Docket No. 36522

NORFOLK SOUTHERN RAILWAY COMPANY
—PETITION FOR DECLARATORY ORDER

EXHIBIT H

VERIFIED STATEMENT OF RICHARD J. BARBER

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VERIFIED STATEMENT

OF

RICHARD J. BARBER
Richard J. Barber Associates, Inc.

WITNESS QUALIFICATIONS

My name is Richard J. Barber and I am President of Richard J. Barber Associates, Inc., with offices at 1000 Connecticut Avenue, Washington, D. C. 20036. I am an economist and the firm which I head provides economic and financial counsel to the private sector and to government (including the legislative and executive branches of the Federal Government as well as governmental entities at the state and local level). A substantial share of my professional work, and that of our firm, involves transportation.

In the transportation field I have conducted studies or dealt with economic issues involving all of the modes -- air, truck, inland water, maritime, pipeline, and rail -- and have presented testimony before the Civil Aeronautics Board, the Federal Maritime Commission, and the Federal Energy Regulatory Commission, as well as the ICC. Before this Commission I have testified on diverse occasions on behalf of the AAR, roads of the major regions, and individual carriers in rate and finance proceedings.

With respect to rail transportation I was retained in 1972 by the United States Senate Commerce Committee to prepare a study of the American rail industry. The report of that study, which dealt comprehensively with the railroads and their problems and prospects, was published by the Commerce Committee in 1972. In 1973 I was again retained by the Committee to assist it in the evaluation of diverse issues involving the railroads which were later dealt with in the Regional Rail Reorganization Act of 1973. Earlier, while Deputy Assistant Secretary for Policy in the U. S. Department of Transportation, I dealt with a number of rail-related problems, including those which arose in 1970 with the collapse of the Penn Central, issues arising out of proposed railroad mergers, and the development of what became the Rail Passenger Service Act of 1970. In conjunction with litigation before the Tax Court and the Court of Claims involving the Chesapeake and Ohio Railway and the Baltimore & Ohio Railroad, I prepared (and testified concerning) a study of rail transportation during the post-World War II period. In 1975 I was invited by the Chairman of the Senate Budget Committee to testify before that panel on rail transportation and related government policy and in December 1977 I was a panelist on the Congressional Symposium on Railroads sponsored by the House Subcommittee on Transportation and Commerce.

My professional career comprehends business consulting, university instruction, and government service. I am a graduate of and hold advanced degrees from Wayne State University, the University of Michigan, and Yale University. From 1959 to 1965 I was a professor at Rutgers, Southern Methodist University, and Yale where I specialized in courses dealing with transportation, corporate finance, investment planning, and business regulation. While

on university leave from 1961 to 1962, I served as a member of the staff of the Joint Economic Committee of the Congress. As Deputy Assistant Secretary for Policy in the U. S. Department of Transportation from 1967 to 1970, I organized and managed the specialized analytical staffs in the Office of the Secretary of Transportation which were engaged in the overview and appraisal of the Department's financing and investment programs and its assessments of the economic aspects of all areas of transportation.

My personal research endeavors have included various studies of transportation issues, the effect of economic growth and changing technology on industry, and the impact of government policy on the private sector. As an outgrowth of this research, I have been invited to testify before the Joint Economic Committee and other Congressional panels. I have published a number of articles on these topics in professional journals, among which is "Technological Change in American Transportation: The Role of Government Action." I am a member of the American Economic Association, the National Association of Business Economists, and the Transportation Research Forum.

In conjunction with the instant proceeding I was asked by the applicants to conduct a study of economic and transportation issues relevant to the proposed unification and, in light of such examination, to present my opinion as to its effects. This testimony presents the results of my inquiry and sets forth the reasons why I believe that this transaction is desirable from an economic-transportation perspective.

SUMMARY[1]

(1) Significant changes in the regional economies of the North and South over time have created major traffic flows which are not congruent with the historical territorial boundaries of the eastern and southern railroads.

(2) The applicants are operating in a constantly changing and intensely competitive environment in which the non-rail modes have shown much greater adaptive capacity and accordingly have captured major shares of north-south traffic between the Southeast and the North Central states east of the Mississippi River.

(3) Structural inadequacies -- often characterized by the terms "Balkanization" and "watershed" -- have significantly impeded efficient adaptation by the railroads to fundamental changes in the economy and intermodal competition. This is especially evident among railroads attempting to serve, on an interregional basis, the Southeast and the North Central states, and is directly reflected in modal shares of north-south traffic flows.

(4) The transportation environment is certain to change even more dramatically now and in the future:

(a) Enactment of the Motor Carrier Act of 1980 has sharpened the competition offered by single-system trucking operations.

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[1] This summary should be read in the context of my testimony as a whole.

(b) The Commission has recently approved creation of the first north-south single-system rail network in the area -- CSX -- through consolidation of applicants' principal rail competitors.

(c) The Staggers Rail Act of 1980 has created at best a limited area of relaxation of economic regulation of the railroads which puts a premium on the [illegible] of the carriers independently to set rates and service offerings in response to market conditions.

(d) Confronted with a widening range of transport options and inspired by their own desire to expand their markets, shippers will continue to attach a high degree of importance to logistical arrangements that promise reliable and adaptable transport service over an extended time horizon and broad geographic areas.

(5) Given contemporary and evolving conditions, railroads must expand and enhance their single-line operations in order to remain competitive with other single-system railroads, motor carriers, and barge companies. The freer and more competitive the marketplace, the greater is the need for rapid, individualized decision-making and the greater is the handicap of reliance on interline arrangements. A status quo posture for the railroads is out of touch with the realities which characterize today's transport marketplace and would lead to a weakening of the railroads' relative competitive position. If they are to be competitive, interline-dependent railroads must reposition themselves through well-conceived consolidations that will enable them to offer single-system service.

(6) Responding to the challenge created by the approval of CSX, consolidation of Norfolk & Western and the Southern will create a rail system that can markedly enhance competition and the quality of rail service in the area comprehended by these carriers. Expanded NWS single-system service will have substantial appeal to shippers in both the North and the South.

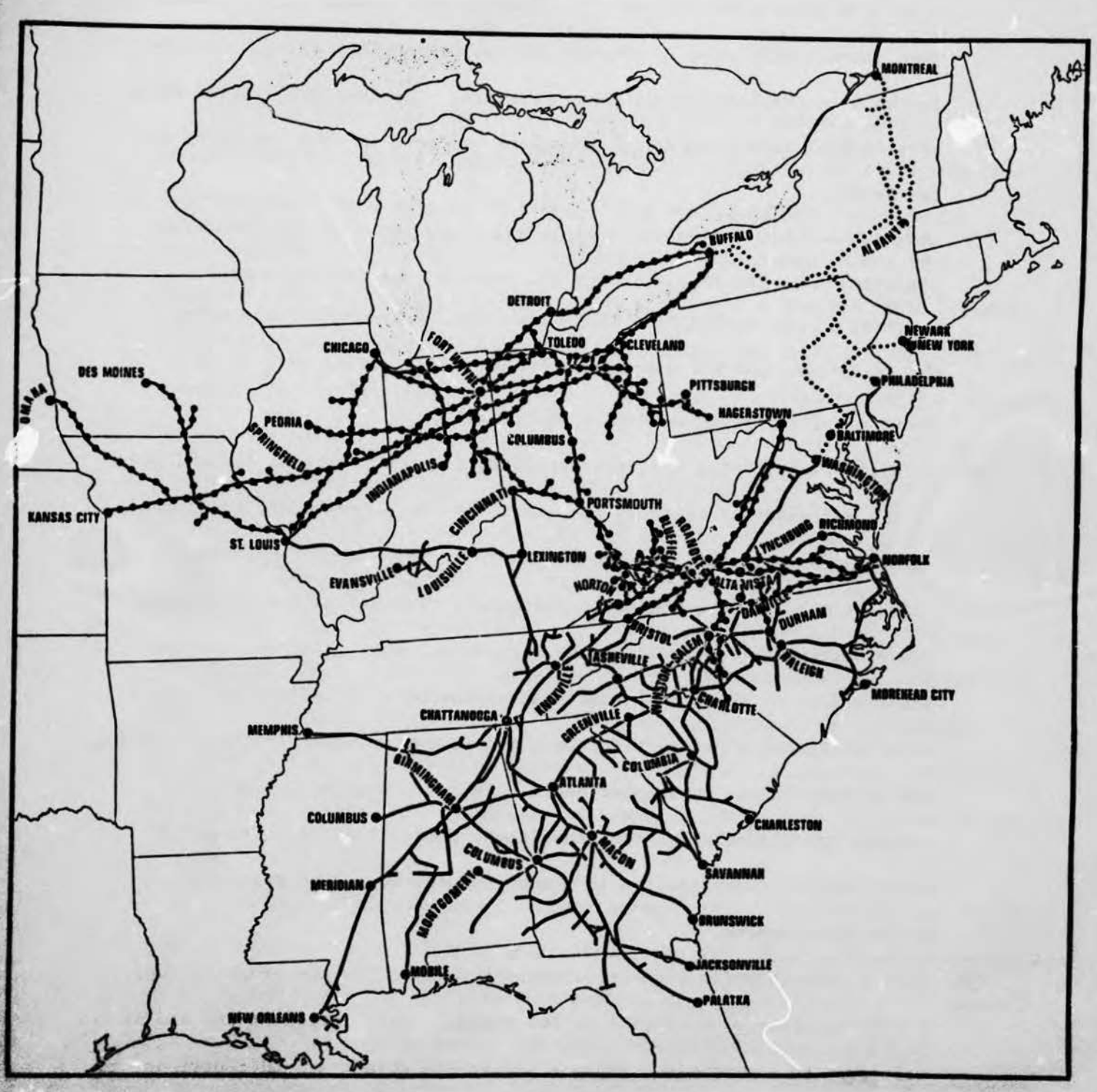
(7) This essentially end-to-end consolidation will provide single-system competition to CSX that does not now and will not otherwise exist. Approval of the application will be a stimulus to competition among the railroads, and the non-rail modes as well, in what will be an increasingly competitive market environment.

(8) Consolidation affords the greatest potential for improving the ability of the railroads effectively to compete in the contemporary transport marketplace. Limited, spasmodic efforts at intercarrier cooperation short of merger are a decidedly inadequate response to the challenges and opportunities confronting the railroads. What is needed now is the creation of systems of rail transportation which allow for long-term arrangements and initiatives aimed at improving efficiency, service, and responsiveness to shipper needs. This can best be accomplished through consolidation of the constituent enterprises so as to permit their complete coordination in a more competitive, less regulated market environment.

(9) From a comprehensive economic-transport perspective the proposed application is clearly beneficial to the public. Unification of SRS and NW will promote competition, enhance service to shippers, and contribute to the revitalization of U. S. rail transportation in the private sector.

Figure 1

NWS System Map



Norfolk & Western Railway Company

Delaware & Hudson Railway Company

Southern Railway System

I

INTRODUCTION

In this proceeding the Southern Railway Company and the Norfolk and Western Railway Company request the Commission's approval of their proposed unification.[1] As displayed in Figure 1 the resulting NWS system would bring together complementary and predominantly end-to-end constituent carriers. The basically east-west oriented Norfolk & Western (NW) -- which cuts across the North Central half of the eastern United States in an arc which stretches from Norfolk, Virginia to Kansas City, Omaha, and Des Moines -- will be connected with the north-south oriented Southern Railway System (SRS) which serves the southeastern states from the Gulf of Mexico to Virginia and the southernmost portions of Ohio, Indiana, and Illinois. This consolidated system would provide new single-system rail service between a sizable number of geographic areas, generating major volumes of intercity freight traffic, which these carriers, as presently postured, cannot now provide with single-system service. As will be demonstrated in subsequent discussion, such single-system service capability is increasingly important to effective competition in freight transport markets, both today and in the future.

A variety of economic and transportation factors are involved in assessing the merits of the proposed unification. My testimony is directed primarily to these matters. This introductory setting provides context for my analysis and outlines, in general terms, the major issues which are addressed.

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[1] The terms unification, consolidation, and merger are used interchangeably and in a non-technical sense throughout this statement.

Of principal importance is the relevance of the NWS consolidation to the Nation's constantly changing needs for responsive, competitive freight transportation. Railroads, like transporters generally, typically do not create demand; rather they respond to it and the effectiveness of their response over time is dramatically affected by developments in the external environment. This has three principal facets. First, as the economy changes and as new demographic patterns emerge, the composition of demand for transportation also changes. Nowhere has this phenomenon been more pronounced than in the eastern part of the United States, where the NW and SRS service areas are located. Second, and no less significant, is the continually evolving nature of competition, from other railroads and from other modes of transportation, and from the complex interplay between sources and products. Finally, changing economic regulation of transportation affects the marketplace, modifying both the ways in which railroads behave and the forms of rivalry in which their modal competitors can engage. In this respect recent enactment of major motor carrier and rail legislation has set the stage for significant alteration of competitive relationships among the modes.

Since the end of World War II the railroads have found themselves to be poorly positioned, competitively speaking, to respond effectively along each of these dimensions of change. The patterns and mix of freight transport demand changed radically, but the railroads' ability to adapt was effectively constrained by historical corporate boundaries, route structures, and fixed plant. Meanwhile single-system motor carriers, inherently flexible in their

operations, emerged to offer shippers in virtually every sector of the economy comprehensive and service-responsive substitutes for rail transport. Spurred by massive government infrastructure investment and advantaged by less detailed regulation, the trucks and the barges cut deeply into the market for freight transportation. The cumulative negative impact on the railroads has been pronounced and they now account for less than two-fifths of intercity ton-miles as compared with nearly two-thirds three and a half decades ago.

If these developments are to be reversed, or at least contained, and if the railroads are to be placed in a position where they can better serve the country's transportation need while remaining viable in the private sector of the economy, change is of the essence. The rail status quo -- declining market share, sub-optimal utilization of capital, etc. -- is good neither for the railroads nor for the public. Basic improvements must be made in the way that the railroads function, both individually and as they relate to each other. The key factor for railroads is adaptability. The locations of major markets, the directions of basic commodity flows, the mix or composition of freight generated by the contemporary economy, and the range of available modal alternatives have all changed, and will continue to change. It is thus extremely important to posture the railroad industry to better adapt to the ceaseless change which confronts it.

It is in this broad context that the NWS application is particularly relevant. Today's transport environment calls for the creation of integrated systems which will allow service in major freight markets to be provided

with greater efficiency and enhanced responsiveness to shippers. The current structural alignments of individual carriers, which had their genesis in a now bygone era, simply fail to reflect contemporary market and competitive requirements. Juxtaposed against the door-to-door service offered by single-system motor carriers, the Balkanized operations of the railroads in the major long-haul freight corridors where rail should be particularly able to remain competitive with other modes are seriously deficient in their attractiveness to shippers. System restructuring -- creating through merger single rail systems better fitted to the current-day marketplace -- is a crucial prerequisite to a more efficient, more competitively robust, and revitalized rail industry.

These economic considerations are widely appreciated. In adopting the 4-R Act Congress recognized the need for "the encouragement of efforts to restructure the [railway] system on a more economically justified basis."[1] The legislative history confirms the significance accorded the Act's merger-related provisions as a means of strengthening the railroads. The Senate Commerce Committee stressed that the new legislation was explicitly "intended to encourage mergers, consolidations and joint use of facilities that tend to rationalize and improve the Nation's rail system."[2] Indeed, the House made it clear that merger-related provisions of the Act were specifically designed to serve as "an incentive to the carriers to voluntarily rationalize the system in a short period of time."[3]

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[1] Public Law 94-210, § 101(a)(2).

[2] Sen. Rep. No. 94-499, 94th Cong., 1st Sess. (1975) at 20.

[3] House Rep. No. 94-725, 94th Cong., 1st Sess. (1975) at 63.

The heightened emphasis now being placed on competitive market forces as the ultimate regulator of transportation further accentuates the timeliness of rail restructuring via end-to-end consolidation and decidedly reduces the viability of alternatives to merger for those carriers whose service territories are no longer congruent with the contemporary marketplace. The 1980 motor carrier and rail regulatory reform acts were premised on the principle that free market competition should replace regulation, although the motor carrier legislation has provided a significantly greater release from regulatory burdens than has its railroad counterpart. Nevertheless, the 1980 Rail Act is intended to promote greater competition between railroads in making rate and service offerings to shippers. The emphasis decidedly is on independent, shipper-specific, movement-specific decision-making by the rail carriers, with general rate increases and collective rate bureau activities correspondingly restricted. In this setting, interline collaboration of necessity becomes more of a handicap when trying to compete with single-system rail and non-rail carriers. Enactment of this legislation thus has placed a very high premium on the ability of each railroad to establish and conduct an individualized strategy in marketing and producing its services.

Neither NW nor SRS can provide service on the same basis as the recently established CSX, the only extant single-system railroad in the geographic area which they serve. A consolidated NWS would provide shippers with another single-system alternative and the competitive benefits which such a system could offer. Rail consolidations -- especially those, like NWS, which are essentially of the end-to-end type -- possess a large potential for the

promotion of competition and the more effective use, to public gain, of the intrinsic efficiency of rail service. This has been widely recognized by, among many others, the Rail Services Planning Office and the Task Force on Rail Productivity.[1] The Commission also has acknowledged that end-to-end mergers can help "attract new business," generate "operating efficiencies," and intensify "effective inter and intra-modal competition."[2] They can thus promote the public interest and aid in the revitalization of a U. S. rail system which can function "with greater efficiency, effectiveness, and economy."[3] It is in this framework that the benefits of the proposed NWJ unification are most forcefully apparent, as will be shown in the ensuing discussion.

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[1] Rail Services Planning Office, Rail Merger Study: Final Report [hereafter cited as RSPO Final Report] (February 1, 1978); Task Force on Railroad Productivity, Improving Railroad Productivity: Final Report to the National Commission on Productivity and the Council of Economic Advisers [hereafter cited as Task Force] (November 1973).

[2] Railroad Consolidation Procedures, 359 I.C.C. 195, 199 (1978).

[3] Railroad Revitalization and Regulatory Reform Act of 1976, §101(a).

II

CHANGES IN THE ECONOMY AND IN INTERREGIONAL COMMODITY FLOW PATTERNS IN THE EASTERN UNITED STATES

On previous occasions before this Commission, I have testified at length about the substantial changes in the Nation's economy which have adversely affected the railroads.[1] These changes include shifts in demographic and production patterns which have resulted in commodity flows no longer congruent with the extant rail system, changes in commodity mix which have reduced the significance in the economy of many of the commodity types for which rail has a relative competitive advantage, and the development of an infrastructure for other modes (strongly aided by government financing) which has vastly increased the competitiveness of barges and trucks. These nationwide changes adversely affecting the railroads are widely recognized.[2]

What is worthy of further examination are those economic changes in the eastern United States which have revolutionized commodity flow patterns

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[1] See, for instance, Verified Statement of Richard J. Barber, CSX Corporation-Control-Chessie System, Inc. and Seaboard Coast Line Industries, Inc., Finance Docket No. 28905 (Sub-No. 1), and Statement of Richard J. Barber, Union Pacific Corp., Pacific Rail System, Inc., and Union Pacific RR Co.-Control-The Western Pacific Railroad Co., et al., Finance Docket No. 30000, Verified Statements of Applicants, Part 2 (September 15, 1980) [hereafter Barber, PRSI] at 6-35.

[2] See, for example, Department of Transportation, Study of Federal Aid to Rail Transportation (January 1977) [hereafter DOT § 902 Study], Chapter II; Richard J. Barber Associates, Inc., Railroads and Regulation: The Imperative Need for Change (May 1979) at 1-14; Sen. Rep. No. 96-470, 96th Cong., 1st Sess. (1979) at 4-5; and John R. Meyer and Alexander L. Morton, "The U. S. Railroad Industry in the Post-World War II Period: A Profile", Explorations in Economic Research (Fall 1975) [hereafter Meyer and Morton] at 455-468.

in the area which would be served by NWS, and to which both the recently approved CSX affiliation and the instant NWS application are logical, indeed vitally important, responses. The analysis will demonstrate that the eastern railroad networks were for many years a valid reflection of the economy of the eastern United States. For decades by far the most important sections of the eastern region (and the Nation) from both consumption and production standpoints were the Northeast and the industrial Midwest (namely, Ohio, Michigan, Indiana, and Illinois).[1] The economies of these two regions were predominant and highly interrelated, and a strong, multi-carrier east-west rail network evolved to link them.

By the advent of World War II, however, this long existing economic profile was beginning to change in a fashion which accelerated after the War. While the Northeast remained (and still remains) a major production and consumption region, its prominence vis-a-vis both the Midwest and the South has declined substantially and, in numerous commodity areas, precipitously. As a result, the extensive east-west rail system linking the Northeast[2] -- now

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[1] Unfortunately regional economic data are reported on several distinct bases, depending on the source. For the most part, the analysis here uses the divisions employed by the Bureau of the Census. On this basis, the eastern regions are the East North Central (Ohio, Michigan, Illinois, Indiana, and Wisconsin); Middle Atlantic (Pennsylvania, New York, and New Jersey); New England; South Atlantic (all Atlantic seaboard states south of New Jersey); and the East South Central (Kentucky, Tennessee, Alabama, and Mississippi). Certain Commerce Department data employ a somewhat different set of regions (and terminology). ICC railroad regions are also different. Except where noted, regional references are those of the Bureau of the Census: the term "Midwest" is used interchangeably with East North Central, the term "Southeast" refers to the South Atlantic and East South Central regions combined, and the term "Northeast" refers to the Middle Atlantic and New England regions combined.

[2] DOT § 902 Study at II-5/12 and II-25/31.

overlayed with an even more extensive east-west Interstate Highway System -- may be excess under present-day conditions. The financial debacle involving many of the eastern railroads which resulted from this situation needs no further review.

While the Northeast declined, however, the South developed enormously as both a production and consumption region in the post-war period. At the same time the industrial Midwest managed to maintain a position of relative strength. Partially as a result of the Midwest's continued vigor, the industrialization and general development of the South progressed in a manner which was basically complementary to the economy of the Midwest; indeed the South became highly dependent on the Midwest both as a supplier of capital goods and other manufactured items and as a consumer of southern products.

Moreover, the Northeast, despite its relative decline, remained important as a producer and consumer; in some instances, the combination of continued strength in some segments of the economy of the Northeast and decline of specific industries created entirely new commodity flow patterns. For example, the Northeast lost its prominence as a textile producer and became a substantial importer of textiles from the South, as did the Midwest, which formerly relied on the Northeast for this important commodity class. Many other examples exist.[1] As will be demonstrated in the ensuing section, these altered patterns of economic interdependence have created major north-south commodity flows between the South and the Midwest, and secondarily but still significantly, the Northeast. Accordingly, the instant application (and

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[1] Discussed below at 16-24.

the recently approved CSX system) should be viewed as major steps toward making the eastern railroad system more congruent with these emergent economic realities.

The demographic and economic shifts which have occurred in the eastern states in the post-war period, the growing synergism between the South and both the Midwest and Northeast in terms of economic interdependence and commodity flows, and the changes which have occurred in commodity mix and their implications for the North-South transportation system[1] are examined next.

Demographic and Economic Shifts in the Eastern United States

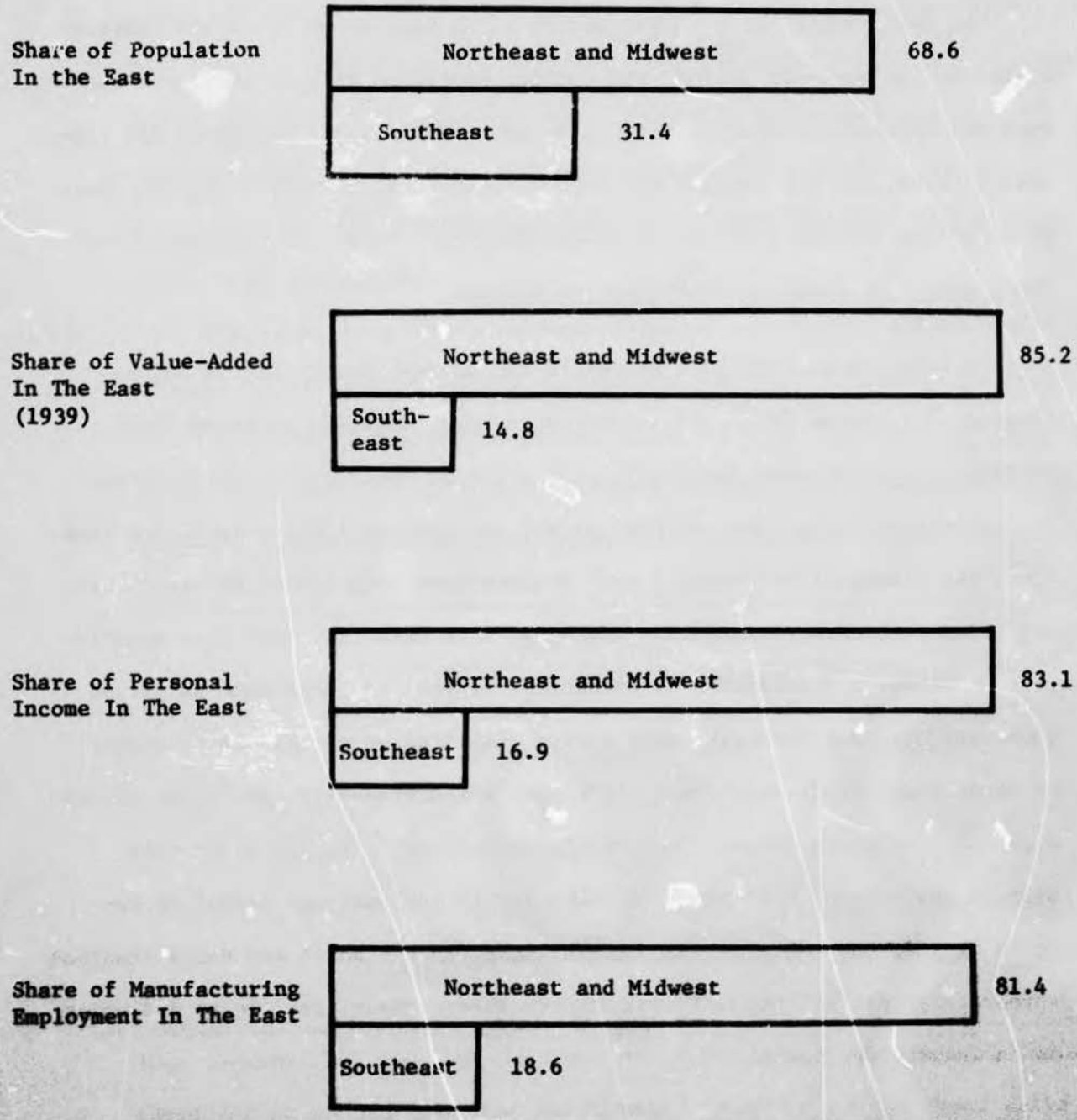
As noted above, the rail system in the eastern United States has reflected -- in terms of organizational structure, physical location, and density -- the one-time demographic and economic dominance of the Northeast and Midwest regions. Many of the largest and most well known (and, for some time, the financially strongest) rail systems have long served the Northeast and Midwest through an extensive east-west rail network. Much less significant as either a consumption or production region, the Southeast supported a comparatively less extensive rail system comprised of a substantial number of locally-oriented, short-haul railroads, which gradually came to be affiliated over the years (with a few notable exceptions) into the major rail systems now serving the South. Since prior to the post-war period North-South traffic was relatively minor, railroads in the North and South remained corporately unaffiliated and handled such interregional traffic as did exist on an interchange basis.

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[1] General phrases such as "north-south" are used to characterize traffic flows between the regions served by NW and 3RS. Such phrases comprehend flows that are east-west, as well as north-south, in orientation.

Figure 2

THE DEMOGRAPHIC AND ECONOMIC DOMINANCE
OF THE MIDWESTERN AND NORTHEASTERN STATES: 1940



Source: The Statistical Abstract (1979); Bureau of the Census, The Census of Manufactures (1972); U. S. Department of Commerce, Historical Statistics of the United States, Colonial Times To 1970, Part 1 (1975); U. S. Department of Labor, Handbook of Labor Statistics (1970).

The demographic and economic basis for this rail system profile is illustrated by Figure 2 which shows, as of 1940, the prominence of the three northern census regions relative to the two southern regions for a number of key indicators. On each of these four measures, the Midwest and Northeast far outpaced the Southeast. The northern regions claimed almost seventy per cent of population in the East and over eighty per cent of its value-added, manufacturing employment, and personal income. It is clear from these data that the northern sections of the East dominated the economic activity of the region.

Some moderation of the extreme contrasts between the midwestern/northeastern regions and the Southeast, however, could be detected even before World War II and they have been dramatically reduced in the post-war period. The rise of the Southeast as a more important consumption region, for example, is reflected impressively in growth statistics. The inset table below indicates

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RATE OF CHANGE IN THE
DISTRIBUTION OF U. S. PERSONAL INCOME

	1920-1940	1940-1970
Midwest	+4.5%	- 8.7%
Northeast	-7.7	-16.7
Southeast	+9.1	+33.3

Source: U. S. Department of Commerce, Historical Statistics of the United States, Colonial Times to 1970, Part I.

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that between 1920 and 1940 the Southeast's share of U. S. personal income increased by 9.1 per cent and the Midwest's rose by 4.5 per cent, while the

Figure 3

PRODUCTION IN THE SOUTHEAST GREW MORE RAPIDLY THAN ELSEWHERE IN THE EASTERN UNITED STATES, 1939-1977

Share Of U. S. Manufacturing Employment

	1940	1976	Per Cent Change 1940-197[illegible]
Southeast	15.7	21.5	+37
Northeast and Midwest	68.7	51.3	-25

Share Of U. S. Value-Added

	1939	1977[1]	Per Cent Change 1939-1977
Southeast	12.4	18.4	+48
Northeast and Midwest	71.3	51.3	-28

[1] Preliminary statistics.

Source: U. S. Department of Labor, Handbook of Labor Statistics (1970); The Statistical Abstract (1970); Bureau of the Census, The Census of Manufactures (1972) and (1977).

Northeast's share fell by 7.7 per cent. After World War II, this trend accelerated dramatically, the Southeast soaring by 33.3 per cent between 1940 and 1970 as the Midwest fell 8.7 per cent and the Northeast declined 16.7 per cent.

Population growth in the two regions exhibits a similar trend, as indicated by the inset table below. From 1940 to 1979, U. S. population increased

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U. S. POPULATION, 1940-1979
(In Thousands)

	1940	1979	Per Cent Change 1940-1979
U. S.	132,165	221,582	+68
Midwest	26,626	41,419	+56
Northeast	35,976	49,237	+37
Southeast	28,601	49,568	+73

Source: The Statistical Abstract (1979); Sales and Marketing Management: 1980 Survey of Buying Power.

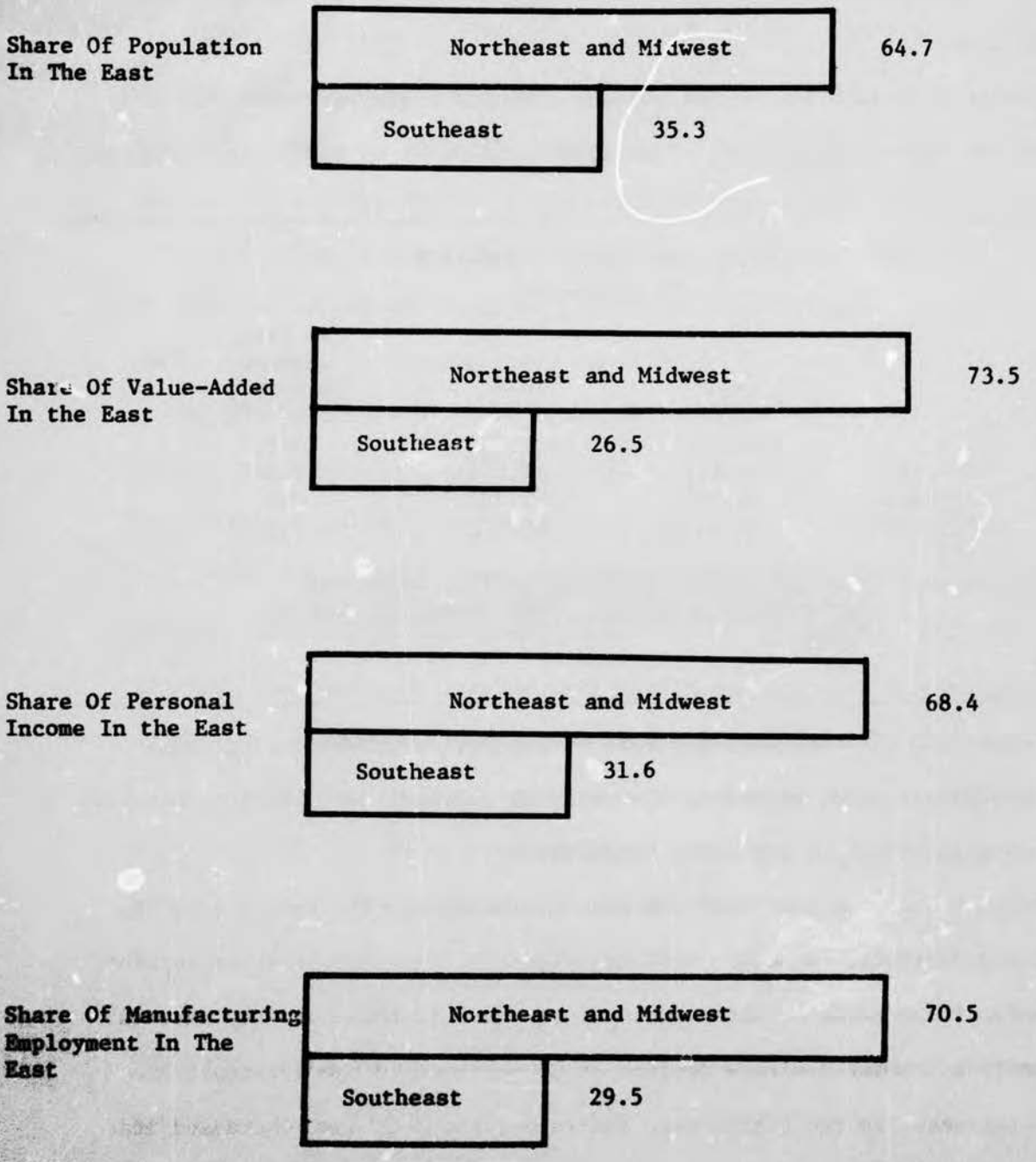
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68 per cent. In the Southeast the rate of population growth during this period was 73 per cent, exceeding the national average; the Midwest and Northeast grew only 56 and 37 per cent, respectively.

Production in the Southeast has also increased rapidly relative to the Midwest and Northeast as shown in facing Figure 3. Manufacturing employment, as a share of the nation's total, grew 37 per cent in the Southeast between 1940 and 1976, compared with a decline of 25 per cent in the Northeast and Midwest regions. As the Figure also indicates, the Southeast increased its

Figure 4

BY THE LATE 1970'S THE SOUTHEAST HAD
SUBSTANTIALLY GAINED VERSUS THE MIDWEST
AND NORTHEAST IN POPULATION AND ECONOMIC STRENGTH[1]



[1] Data reflect latest available year.

Source: Sales and Marketing Management: 1980 Survey of Buying Power; Bureau of the Census, The Census of Manufactures (1977); The Statistical Abstract (1979).

share of value added by almost 50 per cent while the combined share of the Northeast and Midwest fell 28 per cent.

The net result of these changes is displayed in Figure 4, which reflects the latest available data for the eastern census regions in terms of the indicia displayed above in Figure 2. As the Figure indicates, the Southeast has made remarkable gains and now occupies a substantial position in the economy of the eastern United States. The Southeast contains thirty-five per cent of the East's population and accounts for approximately thirty per cent of personal income and manufacturing employment and over one-fourth of value-added. Evident is a significant increase in the share of population living in the Southeast, as well as a near-doubling of the region's shares of personal income, manufacturing employment, and value added.

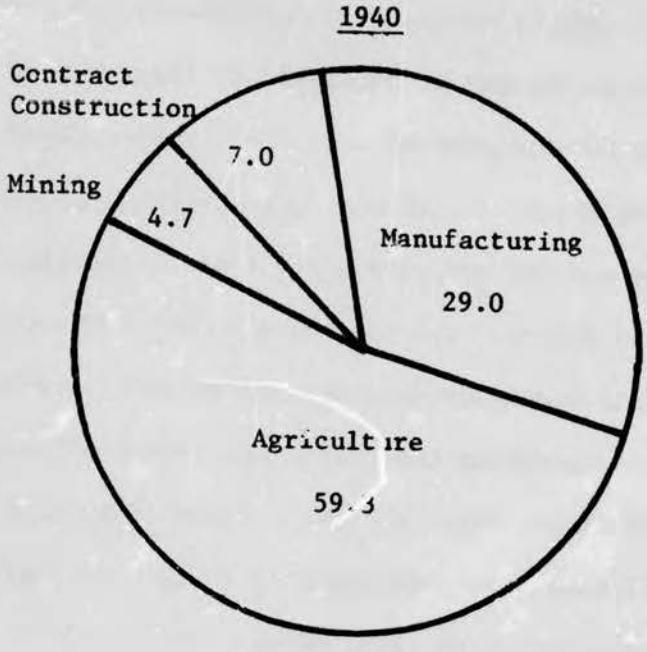
Structural Changes in the Southeast Economy

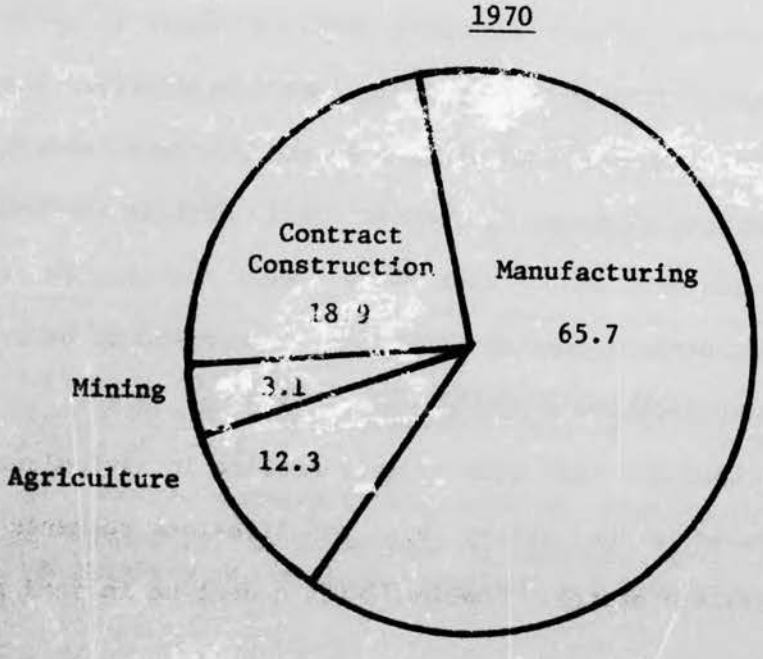
Commensurate with the growth of the Southeast, striking changes in the region's product mix have taken place. As can be seen in Figure 5, manufacturing and contract construction have flourished while agriculture has experienced a sharp decline. In 1940, manufacturing and contract construction accounted for only 36 per cent of total non-service employment in the Southeast -- agriculture claimed a dominant 59 per cent share. Over the next thirty years, manufacturing and contract construction employment soared to an overwhelming 85 per cent and agriculture's share fell to 12.3 per cent.

It should be noted, however, that this overall decline in agriculture masks a significant increase in the poultry, egg, and livestock segments of the sector in key southeastern states. Combined with a decline in feed grains

Figure 5

EMPLOYMENT[1] IN THE SOUTHEAST





[1] Excludes Government Services, Wholesale and Retail Trade, Transportation, Finance, Insurance, and Real Estate.

Source: U. S. Department of Commerce, Regional Employment By Industry, 1940-1970.

produced in the Southeast, the gains in poultry and livestock production have created a significant feed grains deficit for the region. As detailed in the testimony of Southern Railway System witness Duncan, this has generated demand for a substantial flow of grain traffic into the Southeast from prime growing areas in northern states such as Indiana, Illinois, Ohio, Kentucky, Missouri, and Michigan,[1] and creates opportunities for growers in other grain surplus areas.

Growth in manufacturing in the Southeast has brought substantial increases in the production of high-value goods. Certain machinery manufactures have been especially buoyant -- for example, the Southeast's share of value-added by electric and electronic equipment increased five-fold between 1947 and 1972.[2] Particularly high growth industries within this sector included household appliances and electrical industrial apparatus. The production of non-electrical machinery also thrived (its share of value-added more than tripled between 1947 and 1972).[3]

Employment trends in these high growth industries reflect another facet of the importance of the manufacturing sector in the Southeast economy. Between 1950 and 1970 total employment in the Southeast[4] increased 38 per

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1 Verified Statement of John P. Duncan, Jr., Table 15.

2 Bureau of the Census, The Census of Manufactures [hereafter Census of Manufactures] General Summary (1947) at 64-65, and General Summary (1972) at I-235.

3 Id., General Summary (1947) at 62-63, and General Summary (1972) at I-225.

4 As defined by the Department of Commerce, this region includes Louisiana and Arkansas and excludes Maryland and Delaware.

Figure 6

THE EAST NORTH CENTRAL, MIDDLE ATLANTIC AND NEW ENGLAND STATES REMAIN AN IMPORTANT CONSUMPTION AND PRODUCTION REGION[1]

	Population (000's)	Value Added (Million $)	Personal Income (Billions Of 1972 $)
Midwest and Northeast	90,656	300,484	490
East North Central	41,419	160,407	224
Middle Atlantic	36,887	103,859	201
New England	12,350	36,218	65
Southeast	49,568	103,067	226
South Atlantic	35,339	72,045	167
East South Central	14,229	36,022	59

[1] Data reflect latest available year.

Source: Sales and Marketing Management, 1980 Survey of Buying Power; Bureau of the Census, The Census of Manufactures (1977); The Statistical Abstract (1979).

cent, but employment in the non-electrical and electrical machinery industries increased 240 per cent and more than ten-fold, respectively.[1] Over the same period, agricultural employment declined by 73 per cent.[2] It is readily apparent from these data that growth in the economy of the Southeast has been concentrated in the manufacturing sector and particularly among those industries which produce high value goods.

The Midwest and Northeast Have Maintained Their Absolute Levels of Economic Strength

It should be emphasized that the growth of the Southeast relative to the Northeast and Midwest has not been the result of any absolute decline of the formerly dominant economic regions. The three northern census regions have all grown in terms of population, value-added, and personal income. As Figure 6 indicates these regions are highly important in the national economy. In fact the East North Central region remains the country's largest consumption and production region.

In terms of its population, value-added, and personal income, the East North Central has been the dominant economic region of the country for at least the last thirty years. While the Middle Atlantic has declined somewhat, the East North Central has maintained an essentially constant share of the nation's population, personal wealth, and value-added. The region contributes over 40 per cent of the nation's value-added for transportation equipment and 30 to 40 per cent of the value-added for machinery, fabricated metal products, and electrical equipment.[3] This heavy industrial base has

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[1] U. S. Department of Commerce, Regional Employment By Industry, 1940-1970 [hereafter Regional Employment] at 229.

[2] Ibid.

[3] Census of Manufactures, General Summary (1972) at I-215, I-225, I-235, and I-244.

provided the Southeast with much of the machinery and equipment needed for its own economic growth.

In summary, the economy of the eastern United States is much more geographically balanced than it was thirty to forty years ago. The Southeast's economic growth has not so much displaced the North (and particularly the East North Central region) as it has supplemented and complemented the economic base of these older regions. As will be discussed below, this has resulted in numerous interdependent commodity flow patterns between North and South.

The Enhanced Importance of North-South Commodity Flows

The altered economic profile of the eastern United States has created numerous commodity flows binding the Northeast and Midwest with the Southeast. A review of several of the more important commodity classes illustrates this development.

Pulpboard and Paperboard. The Southeast states accounted for approximately 63 per cent of the pulpboard produced by the U. S. in 1978. Production in these states was more than three times greater than that in any other region in the nation.[1]

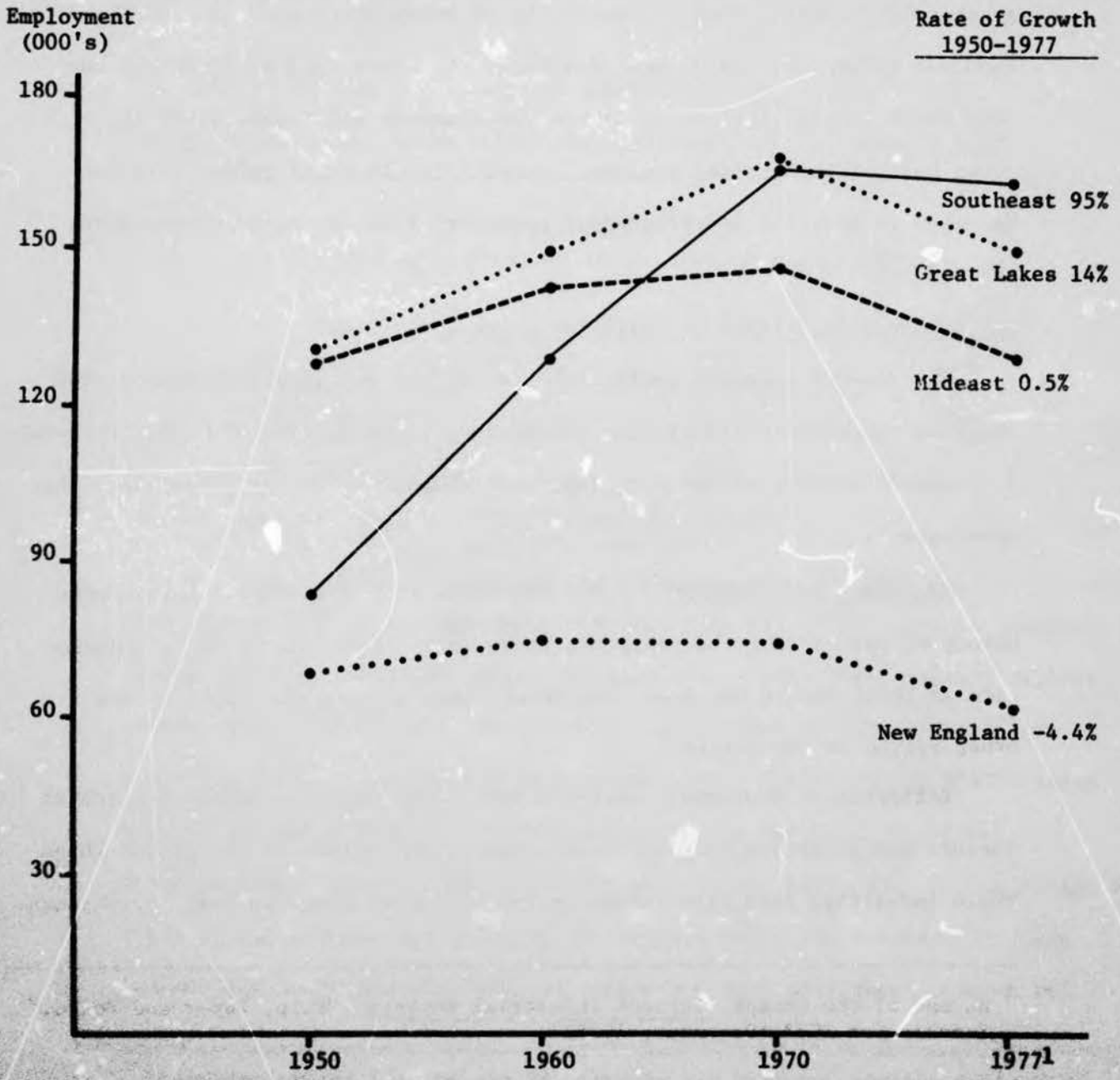
Estimates of employment in paper and allied products industries (which include the pulpboard and paperboard industries) attest to the growth which these industries have experienced in the Southeast over the last forty years.

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[1] Bureau of the Census, Current Industrial Reports, "Pulp, Paper and Board," Summary for 1977 (December, 1978).

Figure 7

EMPLOYMENT IN PAPER AND ALLIED PRODUCTS
HAS GROWN DRAMATICALLY IN THE SOUTHEAST



[1] Preliminary statistics.

Source: U. S. Department of Commerce, Regional Employment By Industry, 1940-1970, Bureau of the Census, The Census of Manufactures (1977).

According to Department of Commerce statistics,[1] in 1950 employment in the Southeast in paper and allied products industries totaled 83,262; by 1977, it had almost doubled to 162,200. This rate of growth far exceeded employment increases in any other eastern region over the same time period. (See Figure 7.)

Census data on value-added by manufacture for paperboard mills (shown in the offset table below) also establish the growing strength of

PAPERBOARD MILLS
(Per Cent Share of Total Industry Value-Added)

	1947	1977
East North Central	28.9	11.8
New England	16.4	0.0
Middle Atlantic	22.4	6.5
South Atlantic	12.1	37.2
East South Central	4.0	17.4

Source: Bureau of the Census, The Census of Manufactures (1947 and 1977).

these industries in the Southeast and the sharp decline in share attributed to the three Northeast regions. For example, in 1947 the Northeast regions contributed 68 per cent of the Nation's value-added by paperboard mills, while the South accounted for only 16 per cent. Therefore, in 1947 a large portion of the paperboard products needed in the Northeast could be found locally. By 1977 this situation had changed markedly. The Southeast's share of value-added had risen to 55 per cent while the Northeast's share had dropped to 18 per cent and, as subsequent data will show, much of the

[1] These employment figures are reported on the basis of regions defined by the Department of Commerce. In this instance, New England is unchanged; the Great Lakes Region is identical to the East North Central region; the Mideast includes Maryland, Delaware, and the Middle Atlantic States; and the Southeast includes Arkansas and Louisiana, but excludes Delaware and Maryland.

paperboard that is used in the Northeast today is shipped in from the Southeast.

The relative decline of the paperboard industry in the North, coincident with substantial gains in this industry in the Southeast, has many implications. As mentioned previously, the North is now greatly reliant upon the Southeast for its supply of paperboard. According to the 1972 Census of Transportation, well over half of the paperboard, pulpboard, and fiberboard delivered to the New England and Middle Atlantic states that year was produced in the Southeast. (See the inset table below.) The East North Central

PAPERBOARD, PULPBOARD, FIBERBOARD
(Per Cent Total Tonnage Receipts: 1972)

Census Region From Which Originated	Census Region In Which Received		
	New England	Middle Atlantic	East North Central
South Atlantic	48.4	47.4	31.9
East South Central	7.0	8.7	14.1
Total Tonnage Received: (000)	1,662	4,854	6,948

Source: Bureau of the Census, The Census of Transportation (1972), Commodity Transportation Survey, Commodity Series: Pulp, Paper and Allied Products.

region, which received more of these products than the other northeastern regions combined, obtained 46 per cent of its supply from the Southeast. Thirty years ago deliveries of pulp and paperboard to the Northeast and Midwest would have been comprised largely of movements within those regions; today, because of growth in the Southeast, the bulk of such deliveries involves shipments from South to North. As noted in witness Kreyling's statement, the NWS affiliation will enhance the ability of the combined system to handle

Figure 8

AUTOMOBILE REGISTRATIONS IN THE
EASTERN UNITED STATES, 1940-1978
(In Thousands)

	1940	1978	Per Cent Change 1940-1978
United States	27,466	116,575	324.4
Northeast and Midwest	13,427	46,201	244.1
East North Central	6,457	22,382	246.6
New England	1,729	7,163	314.0
Middle Atlantic	5,241	16,656	217.8
Southeast	4,134	27,277	559.3
South Atlantic	2,895	19,942	588.4
East South Central	1,239	7,335	491.5

Source: Federal Highway Administration, Highway Statistics, Summary to 1975, Table MV-201; Federal Highway Administration, Highway Statistics (1978), Table MV-1.

this traffic through improvements in car utilization and elimination of short-haul disincentives to SRS in soliciting such traffic.[1]

Motor Vehicles. Economic growth in the Southeast has affected consumption as well as production patterns in the eastern United States, creating an increased flow of consumer goods from the North to the South. Evidence of the increased significance of the Southeast as a consumer of goods produced in the North is illustrated by the growth in automobile ownership which took place in the Southeast between 1940 and 1978. During that time period, motor vehicle registrations in the Southeast increased more than twice as fast as in the East (see Figure 8). In fact, relative to the nation as a whole, registrations increased in the Southeast and fell in each of the other eastern regions.

The greater demand for automobiles in the Southeast would necessarily increase commodity flows between the Southeast and Midwest since the Midwest is the undisputed center of automobile production in the U. S.[2] For the last thirty years it has accounted for over 70 per cent of the value-added from motor vehicle and equipment production. Between 1940 and 1977 U.S. automobile production rose from 3.7 million to 9.2 million passenger cars

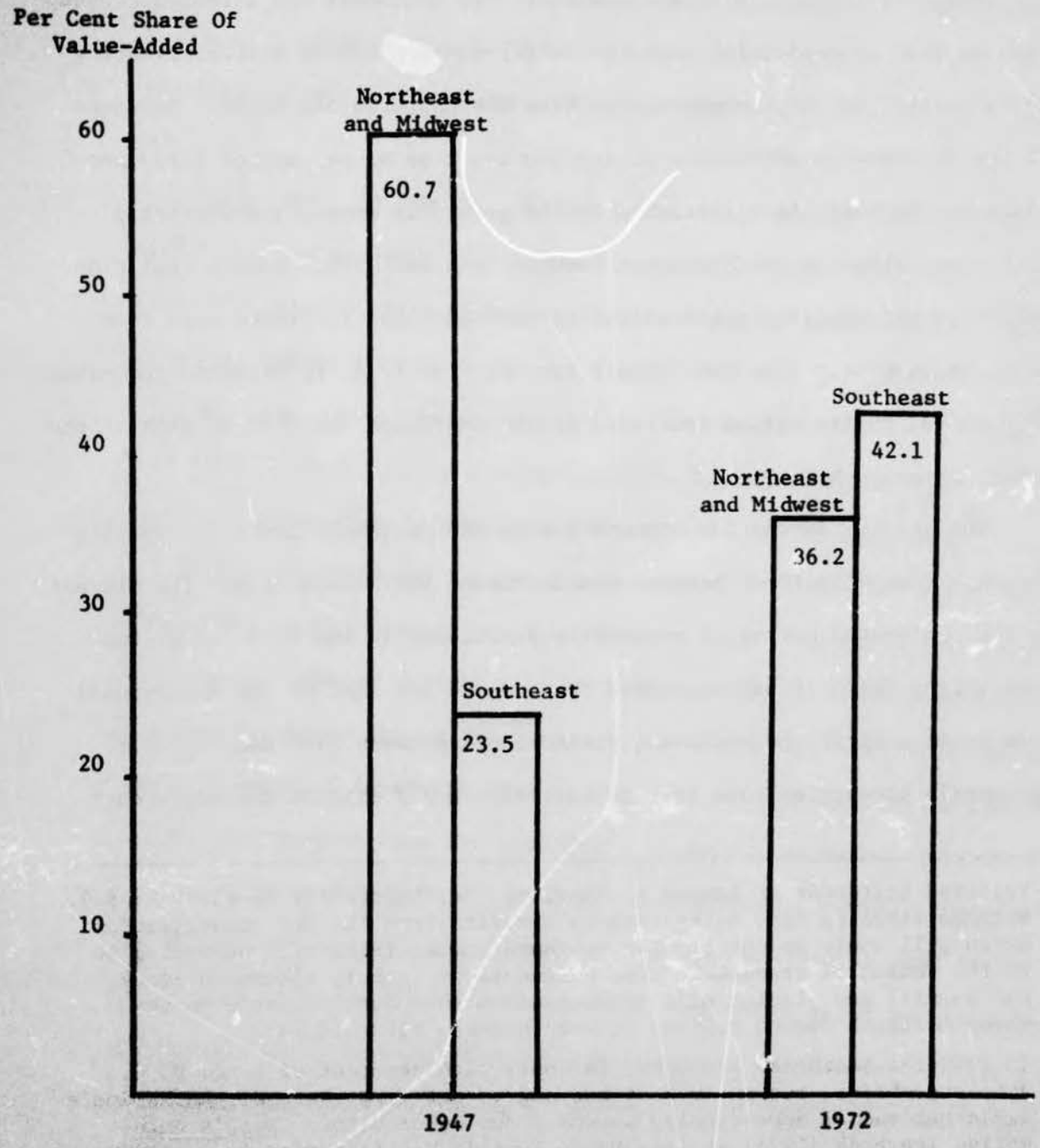
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1 Verified Statement of Edward G. Kreyling, Jr. [hereafter Kreyling V. S.]. Witness Kreyling also notes various benefits from the NWS consolidation which will apply to the growing southern lumber industry. According to to the Census of Transportation, shipments of lumber, dimension stock, and sawmill and planing mill products from the South Atlantic to the three northern Census regions doubled between 1963 and 1972.

2 In 1977 the Southeast accounted for only 14.4 per cent of total U. S. auto assemblies, but in 1978 it had a 22.7 per cent share of the Nation's registrations of domestically produced new automobiles. Ward's Automotive Yearbook (1978) at 164; Motor Vehicle Manufacturers Association, MVMA Motor Vehicle Facts and Figures (1978) at 15.

Figure 9

HOUSEHOLD AND OFFICE FURNITURE



Source: Bureau of the Census, The Census of Manufactures (1947) and (1972).

a year.[1] This increase, coupled with the actual and relative rise in automobile ownership in the Southeast, provides another example of the significant economic ties that have developed between the Midwest and Southeast in recent decades. Witness Kreyling's testimony documents the substantial improvements which NWS is expected to provide shippers in the automobile industry.[2]

Furniture. In the last thirty years the Southeast has emerged as the nation's major producer of household and office furniture. Figure 9 shows that the region's share of national value-added by household and office furniture jumped from 23.5 per cent in 1947 to 42.1 per cent in 1972. At the same time, the combined share of the Northeast and Midwest dropped sharply from 60.7 to 36.2 per cent, clearly demonstrating that the focal point of furniture production in the United States had shifted southward.

While the Southeast is now a major producer of household and office furniture, a large market for these products still exists in the Northeast and Midwest. Almost forty per cent of the furniture produced in the Southeast is shipped outside the region, primarily to the North. In fact, the overwhelming share of furniture that is used but not produced within the northern regions is obtained from the Southeast. Figure 10 indicates that in 1972 the Southeast provided 85 per cent of interregional furniture transfers to the East North Central, 73 per cent to the Middle Atlantic, and 60 per cent to New England. In essence, the areas which used to be major furniture producing regions have become the principal markets for home and office furniture produced in the Southeast, creating new commodity flows and regional

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[1] Ward's Automotive Yearbook (various years), and Motor Vehicle Manufacturers Association, MVMA Motor Vehicle Facts and Figures (1978) at 8.

[2] Kreyling V. S.

Figure 10

SHIPMENTS OF HOUSEHOLD AND
OFFICE FURNITURE, 1972
(Thousands of Tons)

Originating From	Destined To: East North Central	Middle Atlantic	New England
South Atlantic	487	700	123
East South Central	472	216	49
Total Interregional Shipments	1129	1249	287
Southeast's Share Of Total Interregional Shipments	85%	73%	60%

Source: Bureau of the Census, The Census of Transportation (1972), Commodity Transportation Survey, Commodity Series: Lumber and Wood Products Except Furniture, Furniture and Fixtures, Pulp, Paper and Allied Products.

interdependencies that did not exist thirty years ago. Due to particularly stringent requirements for fast and reliable transport in the furniture industry, North-South furniture traffic has gravitated away from inefficient interline rail routings to truck. As witness Kreyling indicates, the expanded single-system service of NWS should greatly benefit furniture shippers.[1]

Textiles and Apparel. Prior to World War II the old industrial northeastern states clearly dominated the textile-apparel industry, employing over 1.1 million workers, or almost double the number employed in the South.[2] (See Figure 11.) The Midwest (East North Central or Great Lakes region) was a minor producer of these commodities and hence was a substantial net "importer" of textiles and apparel from the producing states. This profile continued throughout the war and as late as 1950 the New England-Mideast area employed nearly 1.3 million workers in these industries.

After 1950, however, the textile industry plummeted in the Northeast and expanded rapidly in the Southeast. By the 1970's the pre-war employment positions of the Northeast and South had been almost completely reversed with the Southeast employing about 1.1 million in the textile industries and the Northeast only about 800,000. (The East North Central remained a minor producer of textiles and apparel.) Reflecting the increasing importance of foreign imports, employment in the southeastern textile industry fell slightly in the 1970's, but the much more vulnerable Northeast continued to decline sharply.

Implicit in these figures is a dramatic change in trade patterns. Prior to the 1950's the East North Central area, a substantial net consumer of

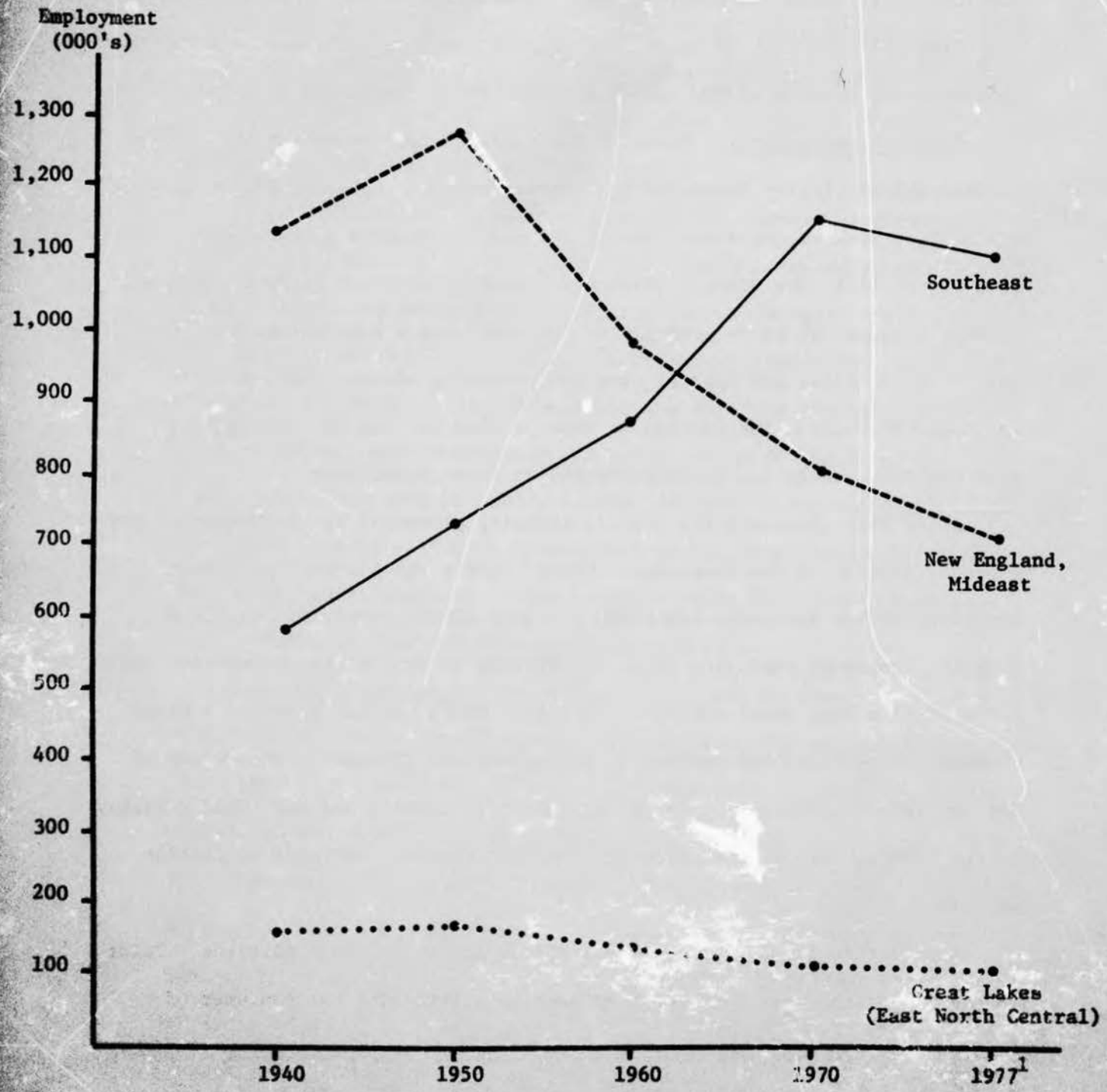
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[1] Kreyling V. S.

[2] For Department of Commerce regions, see above, p. 17, note 1.

Figure 11

EMPLOYMENT IN TEXTILE MILL AND
APPAREL INDUSTRIES, EASTERN U. S., 1940-1977



[1] Preliminary figures.

Source: U. S. Department of Commerce, Regional Employment By Industry, 1940-1970.
Bureau of the Census, The Census of Manufactures (1977).

textiles and apparel, would have obtained these products largely from New England and the Middle Atlantic. Available as transport alternatives were both a relatively well-developed highway system and a mature rail system encompassing numerous single-line, east-west carriers, among them the Pennsylvania Railroad, New York Central, Erie Lackawanna, Chesapeake & Ohio, Baltimore & Ohio, and Norfolk & Western.

By the 1970's, however, this situation had changed tremendously. Figure 12 displays a range of specific textile products consumed in the East North Central region and the eastern producing areas from which these commodities were received in 1972. The Figure demonstrates vividly that textile product flows from the South to the Midwest now far outstrip commodity flows from the traditional textile products producing states of the Northeast. For example, 65.6 per cent of men's, youths' and boys' clothing delivered to the East North Central region is transported either from the South Atlantic or East South Central regions.[1] For textiles there has clearly been revolutionary change in eastern commodity flow profiles.

Industrial Machinery. The conversion of the southeastern economy from an agricultural to a manufacturing base has naturally created a demand for a wide variety of industrial machinery and materials. Although a significant portion of such goods is manufactured in the South, many of these commodities have long been produced by specialized heavy industries in the East North Central region. The Southeast, in fact, receives a substantial share of its industrial machinery and equipment from the East North Central region, as shown in Figure 13. It is clear from these examples that despite its recent growth, the Southeast relies heavily on the East North Central for many

[1] The data include textiles transported within the East North Central region; thus the South's percentage of interregional flows would be even higher than the figures shown here.

Figure 12

THE EAST NORTH CENTRAL REGION
IS HIGHLY DEPENDENT ON THE
SOUTH FOR TEXTILE PRODUCTS

Commodity	Census Region From Which Received (Per Cent Total Tonnage Receipts)			East South Central
	New England	Middle Atlantic	South Atlantic	
Manmade Fiber and Silk Broadwoven Fabrics	10.0%	*	48.7%	*
Knit Fabrics	*	19.6	57.4	*
Floor Coverings	*	*	79.8	*
Thread and Yarn	*	5.7	48.4	20.2
Men's, Youth's and Boys' Clothing	*	11.5	40.1	25.5
Women's, Misses', Children's and Infants' Clothing	4.9	*	26.2	17.4
Misc. Fabricated Textile Products[1]	*	7.1	14.4	*

* Non-disclosed.

[1] 58.2 per cent of miscellaneous fabricated textile products are produced internally within the East North Central region.

Source: Bureau of the Census, The Census of Transportation (1972), Commodity Transportation Survey, Commodity Series: Textile Mill Products Including Apparel.

capital goods that are essential to its expanding and increasingly industrialized economy.

Construction. Economic expansion and population growth in the Southeast have spurred the region's construction industry. Contract construction employment in the Southeast had surpassed that of any other region in the East before 1960 and continued to rise steadily through 1970.[1] (See Figure 14.) Statistics for housing starts provide convincing evidence of this growth. Since 1960, the South has led the nation in housing starts with a rate of growth in new home construction that far surpassed that of any other region in the East.

Of particular relevance to this proceeding is the way in which the Northeast has contributed to the surge of housing construction in the South. A few examples will illustrate this point. In 1972, the East North Central and Middle Atlantic states accounted for 62.2 per cent of the nation's value-added by plumbing and heating products. They also contributed 59.7 per cent of the value-added by construction-related machinery and half of the value-added by household appliances.[2] These products are all essential, either to the actual construction of a home or its preparation for occupancy. In two of the three product groups the Southeast (East South Central and South Atlantic) accounted for less than 18 per cent of the total value-added (and 26 per cent of the third).[3]

It is evident from these statistics that although the South enjoys the major share of U. S. housing construction, it is still dependent upon the

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[1] Regions as defined by the Department of Commerce. See above, p. 17, note 1.

[2] Census of Manufactures (1972), General Summary at I-217, I-226/227, and I-237. Applicants have noted that the household applicance industry has particularly demanding service requirements, due largely to dealer inventory and sales practices, and that NWS should have an especially beneficial effect on such shippers. Kreyling V. S.

[3] Ibid.

Figure 13

THE SOUTHEAST OBTAINS A SUBSTANTIAL SHARE OF INDUSTRIAL-RELATED MACHINERY AND EQUIPMENT FROM THE EAST NORTH CENTRAL REGION

Commodity	Per Cent Of Total Consumed Provided By The East North Central To: South Atlantic	East South Central
Farm Machinery	34.3	52.6
Engines and Turbines	26.6	75.7
Const., Mining, Materials Handling Mach. and Equipment	61.6	57.8
Metal Working Mach. and Equip.	35.6	70.1
Industrial Mach. and Equipment	44.9	39.3
Refrig. and Service Ind. Mach.	36.5	42.1
Motor Vehicles and Equipment	50.1	51.8
Household Appliances	47.2	65.1
Communications Equipment	31.8	50.3
Elec. Component and Access.	52.4	32.8
Plumbing Fixtures and Heating Appl.	40.3	32.3
Bolts, Nuts, Screws, Rivets and Washers	39.8	51.0
Metal Stampings	83.7	78.0
Misc. Fab. Wire Products	30.8	42.7
Misc. Fab. Metal Products	30.0	48.4

Source: Bureau of the Census, The Census of Transportation (1972), Commodity Transportation Survey.

Northeast to provide many of the capital goods, components, and appliances which construction and completion of such homes requires.

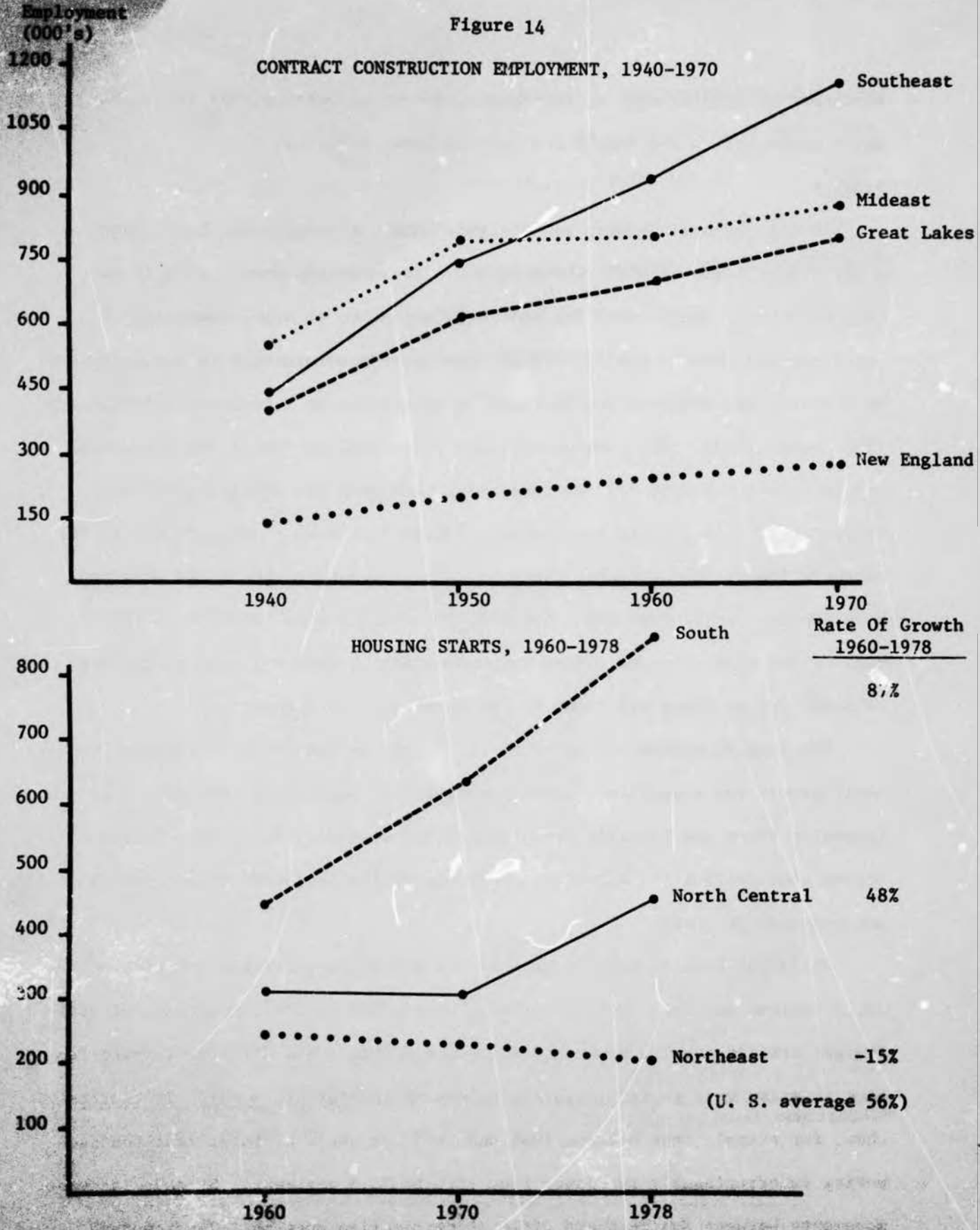
Summary

Through economic growth and diversification the Southeast has become a more significant economic force in the eastern United States than it was just over forty years ago. The southward migration of such industries as furniture and textile manufacturing, which were once centered in the Northeast or Midwest, has enhanced the Southeast's reputation as a producer and supplier of consumer goods. Yet, conversely, the industrialization of the Southeast has increased its need for the industrial machinery and capital goods that are produced primarily in the Midwest, making the South a valuable market for northern industrial products. In short, while economic growth has occurred more rapidly in the Southeast than elsewhere in the eastern United States, much of the capital input needed to produce that growth and many of the markets for its products are found in the Northeast and Midwest.

The interdependence of these three regions is essential to their economic growth and stability. It has created a fundamentally new pattern of commodity flows and transportation requirements within the eastern United States that reflect the enhanced importance of the Southeast as a producer and consumer of goods.

While the U.S. economy in general has become increasingly interdependent among regions and this trend is broadly manifested in the composition of rail freight traffic, rail movements between the Southern and Official territories have expanded most rapidly. Data provided in the Carload Waybill Statistics show, for example that between 1966 and 1978 the share of total rail tonnage moving interregionally increased from 15.6 to 23.3 per cent. Of this increase, movements between Southern and Official territories grew by 1.7 percentage

Figure 14



Source: U. S. Department of Commerce, Regional Employment By Industry, 1940-1970, The Statistical Abstract (1979).

points, considerably more than between any of the other defined rail territories.[1] As the next Part will detail, however, the railroads have found it more difficult than competing modes to adapt to such changes in transport patterns. The instant NWS application, and the recently approved CSX affiliation, represent appropriate attempts to improve rail transportation in the eastern United States, particularly in response to the interregional logistical requirements of contemporary shippers.

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[1] A similar situation exists for manufactured goods. Here interregional rail tonnage increased from 26.5 per cent of rail traffic in 1966 to 31.3 per cent in 1978, with Official-Southern traffic alone up by 1.6 percentage points -- more than for any other interregional combination.

III

RISE TO PROMINENCE OF THE NON-RAIL MODES IN THE NWS SERVICE AREA: SUCCESSFUL ADAPTATION TO ECONOMIC CHANGE

At least as significant as changes in the economy and in commodity flow patterns is the ascendant role of the non-rail transportation modes. The post-World War II acceleration of motor carriage, water transport, pipelines, and aviation -- at the expense of the railroads -- both nationally and in every region of the country, is a well-established fact.[1] Indeed the competitive effects of motor carriage have been particularly devastating east of the Mississippi where early completion of key Interstate Highway links greatly advantaged the truckers. The inland waterway mode has also excelled in the competition for major commodities. Part and parcel of the great success of the non-rail modes has been their ability to provide certain transportation characteristics which are highly valued by shippers and which have assumed growing importance in light of demographic and economic change.

One of the most critical developments in recent decades has been the forceful evolution of shipper demands for rapid, reliable, and often specialized transportation services. In part this has been a function of the

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[1] For a brief recapitulation see House Rep. No. 96-1035, 96th Cong., 2nd Sess. (1980) at 38. For a more detailed analysis see DOT § 902 Study at Ch. II.

changing commodity mix in the economy, which was discussed in Part II. In part it is also the result of changing theories of production and logistics management. These factors are addressed next.

"Total Cost" Approaches to Production and Logistics Management

Increasingly shippers have come to view transportation costs and services as one element among many in their business operations. The goal of most enterprises is profit maximization on total investment in capital, labor, inventory, and operations. In some instances this may require the lowest cost transportation, but in many other situations specialized equipment, highly reliable schedules, or particular services are far more critical to the firm's overall earnings than transport rates per se. As one representative of some major shippers (including Firestone, B. F. Goodrich, Kaiser Aluminum & Chemical, Bethlehem Steel, and Republic Steel) put it: "[T]he benefits [are] efficiency, not price. Service is so much more important than any nickel they could have saved...."[1] In a similar vein, Chairman Gaskins has recently emphasized the importance of "present[ing] the shipper with a package of transportation services designed as an integral part of the shipper's marketing and distribution strategy...."[2] The Commission's Motor Carrier Task Force Report is filled with examples of the great success which motor carriers have achieved in catering to these needs.[3]

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[1] Cited in Transport Topics (August 18, 1980) at 1.

[2] Darius W. Gaskins, Jr., Remarks before the Contract Carrier Conference (October 14, 1980) [hereafter Gaskins, CCC] at 5.

[3] Interstate Commerce Commission, Initial Report of the Motor Carrier Task Force (May 1979) [hereafter ICC Task Force Report].

Shipper endorsement of the importance of total cost strategies is virtually unconditional and widespread. For instance, recent testimony before the Joint Economic Committee by the General Traffic Manager of Westvaco Corp., provides a case in point:

> [T]he number of ... opportunities [for railroads] progressively diminishes as industry comes to reckon with inventory costs and with customer pressures to order and expect delivery of only the quantities needed for current operations. Rail is just not a practical choice when any kind of delivery constraint exists in the underlying commercial transaction.[1]

Reflecting an even broader framework for decision-making, a senior official at CPC North America (which has an annual transportation bill of $127 million) has stated the issue candidly as follows:

> Our concern goes beyond the improvement in the utilization of equipment and the resultant improvement on <u>that</u> capital investment, as it goes to the inventory value of the products transported, which exceeds anything we have mentioned up to this point. If we can reduce the static inventory dollars that currently result from a transportation service, which can be greatly improved through [railroad consolidation], then we will have taken a giant step forward toward improving the Nation's economy.[2]

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[1] Joint Economic Committee, <u>National Railroad Policy: Which Way is Up?</u> Hearings, 95th Cong., 2nd Sess., (1978) Part I at 170.

[2] Verified Statement of J. J. Clement, Director of Transportation, CPC North America, NWS App. Volume 1C [hereafter Clement V. S.]. Emphasis in original. See also Verified Statements of Robert Coyne, Field Traffic Manager, Magnavox Consumer Electronics Co., NWS App. Volume 1C [hereafter Coyne V. S.], and John K. Madsen, Director of Transportation, Brown & Williamson Tobacco Corp., NWS App. Volume 1C.

Transportation thus not only is a supportive activity in the sense of providing services for the movement of raw materials, semi-processed items, and manufactured goods demanded by the economy, but is also a factor manipulated by commercial and industrial managements as they pursue overall corporate profit and rate of return objectives. The more adaptive the transportation company and its services, the greater will be its likelihood of success in this environment and hence the greater the demand for its services. Single-system carriers in turn, almost by definition, will be more adaptive than those dependent on negotiating collaborative relationships with other carriers.

Railroads have begun to face up to the significance of this fact of life. One of the most cogent statements of the dramatic impact of contemporary shipper decision-making was made recently by a former Quaker Oats Co. executive and current member of the board of directors of Conrail:

> On the part of shippers there is a fast growing determination to look at the totality of costs in making transportation decisions, rather than considering the transport rate in isolation. There is a new ability to quantify accurately the value of service -- to cost out the effect of slow and erratic service and undependable equipment supply on the manufacturing, sales and distribution functions and on working capital requirements.
>
> [B]ecause of these attitudes which virtually guarantee continued acceleration in the velocity of change, there is an attitude on the part of shippers' senior managements that no longer is it of first importance to have someone who knows how to wade through ... reams of paper to find what the rate is now and what the service is supposed to be now. Instead, the perceived need is to determine -- or conceive -- what they should be and purchase or provide a customized package.[1]

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[1] Sam H. Flint, Remarks before the Transportation Club of Atlanta (August 19, 1980) at 12-13.

Flexibility, Reliability and Timeliness: The Keys to the Marketing of Transportation Services

In addition to the business theories discussed above, the continuing growth and expansion in the commodity mix of the economy has contributed heavily to demands for flexible, reliable, prompt, and tightly-controlled services. Reliable scheduling; flexibility in changing schedules and routings; specialized equipment and services; efficient tracing of shipments; minimization of loss and damage and of related claims and settlement costs; design of innovative rate/service packages, routinely and often on short notice; and facilitating shipper extension into new markets, are among the many qualities shippers demand and single-system transport companies in every mode are best situated to provide.[1] The following summarization is typical of many which could be drawn from the transportation literature:

> [S]hippers strongly prefer to minimize the number of carriers they deal with, and do so by selecting carriers providing the greatest route coverage compatible with shipping patterns. Such a practice minimizes interline connections (and therefore the potential for delay and loss of control of freight), interactions between shipper personnel and carriers, and congestion at the shippers' loading docks, as well as concentrating the shippers' economic clout on the carriers with whom they deal.
>
> In general, shippers prefer fast, reliable service compatible with their individualized needs.[2]

---

[1] A lengthy discussion of many of these factors is contained in Rail Services Planning Office, Rail Merger Study: Service As A Criterion for Evaluating Railroad Mergers, Issue Paper No. 1 (August 1, 1977) [hereafter RSPO Service Study].

[2] Senate Committee on Commerce, Science, and Transportation, The Impact on Small Communities of Motor Carriage Regulatory Revision, Committee Print, 95th Cong., 2nd Sess. (June 1978) at 109.

Indeed, shippers in increasing numbers have testified before this Commission, not only in this proceeding but in others, about the significance of these factors and their direct association with single-system transportation operations. The Commission quite recently confirmed the validity and significance of shipper preference for single-line service over the alternatives.[1]

The Growing Prominence of Regulated Trucking Operations Based in the South and Northeast

Regulated motor carriers based in the region to be served by NWS account for a substantial majority of the industry's tonnage nationwide. In 1976, the last year such figures were compiled by the American Trucking Associations, carriers based in the Central, Middle Atlantic, and Southern regions ranked first, second, and third, respectively, in Class I and II carrier tonnage.[2] These regions include nineteen states and the District of Columbia, of which all but two states (Delaware and New Jersey) would be served by NWS. Carriers based in these states moved 426 million tons of freight, or 62 per cent of Class I and II tonnage nationwide. While individual carriers are increasingly transcending regional boundaries (hence the discontinuance of this data series), the data provide a reasonable index of the potency of truck competition in the NWS region.

The continued dominance of eastern-based trucking operations is a product of two factors. First, the established industrial Central and Middle Atlantic

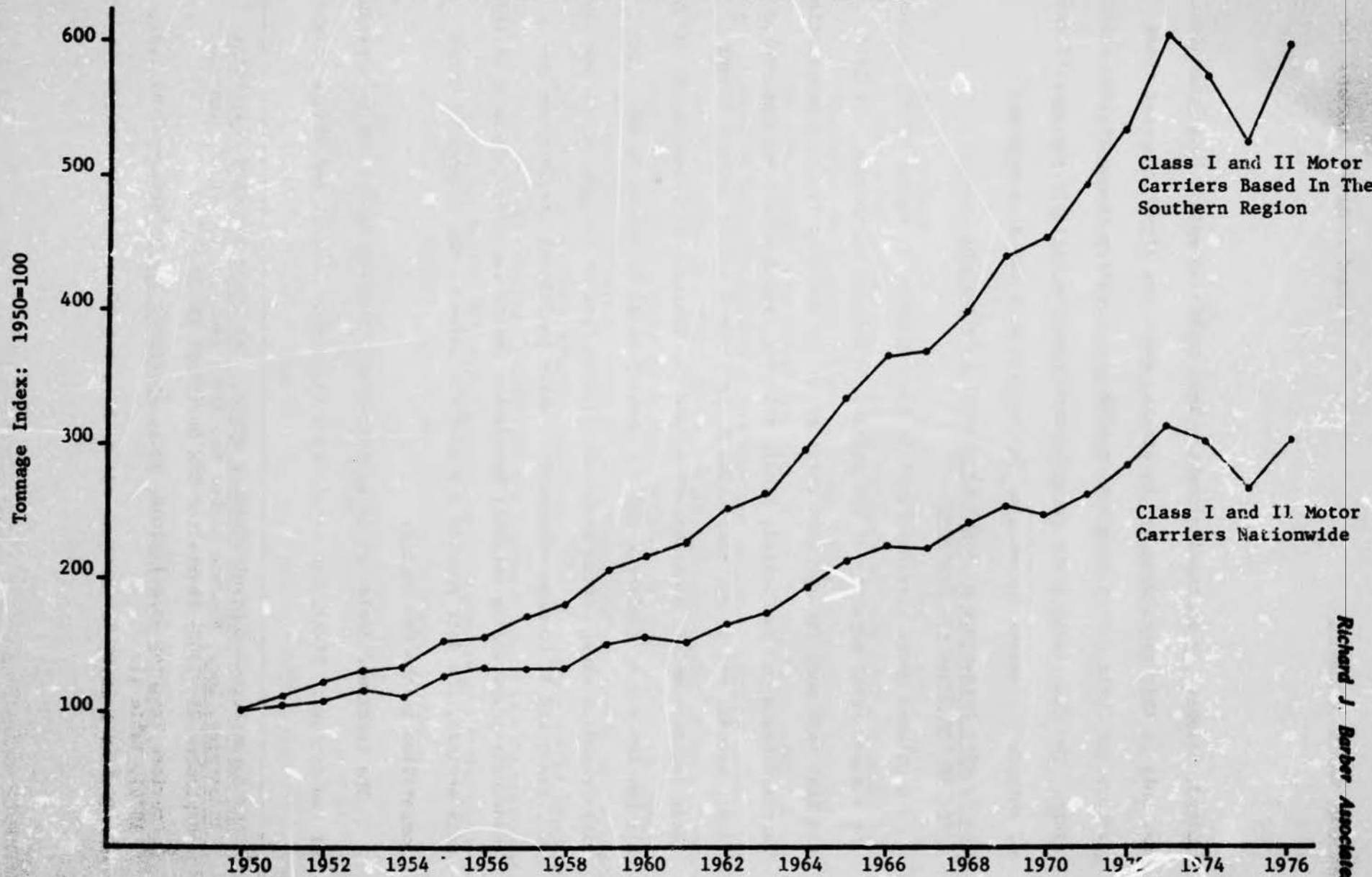
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1 CSX Corporation--Control--Chessie System, Inc., and Seaboard Coast Line Industries, Inc., Finance Docket No. 28905 (Sub-No. 1), et al. (served September 25, 1980) [hereafter CSX Decision] at 28 and 42.

2 American Trucking Associations, Inc., Intercity Truck Tonnage (Full Year, 1976), Table II.

Figure 15

MOTOR CARRIERS BASED IN THE SOUTH[1] HAVE DOUBLED THE TONNAGE GROWTH RATE OF THE INDUSTRY NATIONWIDE



[1] Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia.

Source: American Trucking Associations, Intercity Truck Tonnage (Full Year 1976), Table 1.

regions, despite gradual erosion of their prominence relative to the South and West, still account for an exceptional share of the nation's production and hence remain the largest base for trucking firms transporting such production. As noted above, the Central and Middle Atlantic regions still rank one and two in truck tonnage.

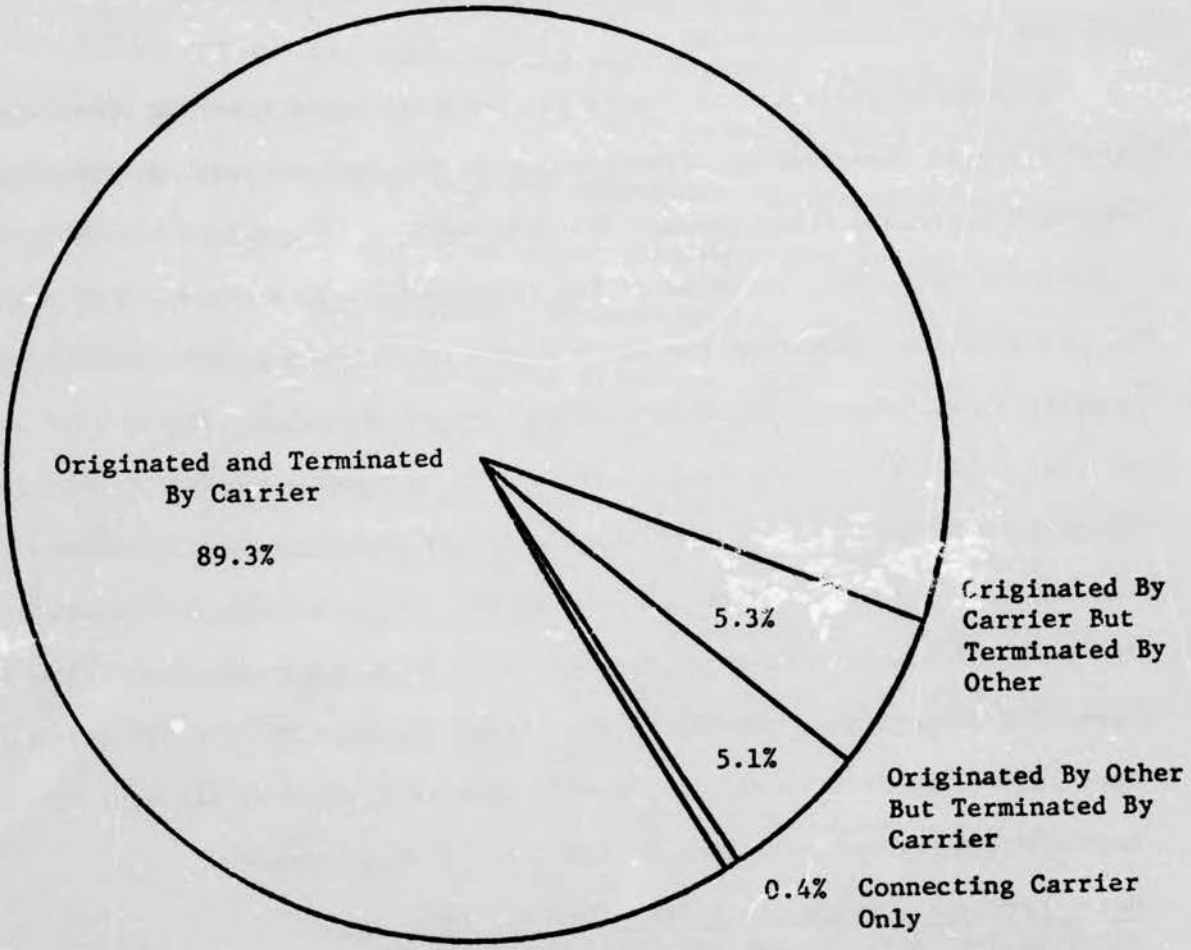
Second, as indicated in Figure 15, southern-based trucking operations have expanded their tonnage dramatically in the post-war period. Southern carriers increased their tonnage six-fold between 1950 and 1976, double the impressive three-fold increase of the regulated trucking industry as a whole. No other region approached the South's rate of increase, with the rapidly growing Rocky Mountain and Southwestern regions expanding traffic just over and just under five-fold, respectively. The incredible growth of trucking operations in the South is attributable to two factors -- the expansion of the region's industrial base and associated traffic growth, and extension of the reach of southern trucking carriers through mergers and acquisition of operating authorities, notably in the Middle Atlantic and Central regions. This latter trend, following increasing interdependence of the southern and northeastern regions, is discussed in the following section.

Motor Carriers Serving the Eastern United States Have Achieved High Service Standards Through Expanding Single-System Capabilities

It is common knowledge that the rail system moves a high percentage of its traffic in interline service, a practice which incurs significant penalties in terms of delayed transit times, loss of reliability, and division of transport responsibility. About 50 per cent of the tonnage, two-thirds of the ton-miles, and 70 per cent of the revenues of Class I railroads are

Figure 16

DISTRIBUTION OF TRUCK TRAFFIC, 1978
(Per Cent of Tons)



Source: American Trucking Associations.

accounted for by interline movements. In contrast, 89 per cent of regulated truck traffic is moved in single-system service and virtually no traffic involves as many as three carriers. (See Figure 16.) Virtually all private and exempt motor carriage is hauled on a through basis.

The basic reason for the vast discrepancy in single-system service capability between the railroads and even regulated trucking lies in the fact that ICC regulation of the truckers in recent years has been relatively permissive in granting mergers and extensions, acquisitions of operating authorities, and approval of irregular route applications tailored to the needs of particular shippers. Because of this, trucking companies have been able to follow trends in traffic flows and expand their single-line capabilities in traffic corridors meriting expanded service. Trucking firms, that is, are constantly adjusting their service territories to respond to changing commodity flow patterns, thereby achieving better congruence with shipper needs. The necessity of trucking companies to expand in this fashion in fact is almost considered an imperative for survival in the trucking business. As the ATA has summarized the issue:

> If a carrier does not have the necessary operating authorities to provide through service to where its customers' shipment is destined, it must interline the shipment with another carrier serving that point. Shippers are demanding faster service, and in order to better service these shippers, motor carriers are faced with either the need to obtain additional operating rights or the risk of losing the business to another carrier who can provide through service from point of origin to final destination.[1]

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[1] Cited in Ex Parte No. MC-121, Policy Statement on Motor Carrier Regulation, Comments of the Federal Trade Commission (February 5, 1979) at 36.

Figure 17

THE NUMBER OF TRUCKING FIRMS OFFERING
SINGLE-LINE SERVICE BETWEEN MAJOR NWS
CITY PAIRS HAS INCREASED SUBSTANTIALLY SINCE 1970

	BUFFALO	CHICAGO	CLEVELAND	COLUMBUS	DETROIT	FT. WAYNE	TOLEDO
ATLANTA	11/18	20/25	17/23	14/23	11/14	6/16	13/18
BIRMINGHAM	4/9	9/19	6/15	6/15	5/10	2/12	4/12
CHARLESTON, S.C.	6/11	8/14	10/15	9/15	6/8	4/11	8/11
CHARLOTTE	10/14	10/18	14/17	13/17	8/10	5/12	11/13
CHATTANOOGA	9/10	8/14	11/12	9/12	7/8	4/9	8/10
GREENSBORO	10/14	10/18	14/17	13/17	7/10	5/12	11/13
JACKSONVILLE	3/7	5/11	2/10	1/10	2/6	0/6	2/9
KNOXVILLE	6/8	5/11	9/10	9/10	5/8	3/9	6/8
RALEIGH	8/14	8/17	11/17	11/17	6/10	3/12	9/13

1970: Upper triangle.
1980: Lower triangle.

Source: American Motor Carrier Directory, Fall, 1970 and Fall, 1980.

As discussed below in Part V, the sweeping changes of the recently enacted Motor Carrier Act of 1980 have given trucking firms vast flexibility to expand or otherwise adjust their service areas in consonance with changing market conditions and structural changes in the economy.

The competitive impetus to expand service territories has been, and continues to be strong in the prospective NWS service area and has been an especially notable factor in north-south traffic corridors. While perhaps not widely appreciated, in the last ten years there has been a tremendous increase in the availability of single-line truck service between the North and the South. For common carriers of general freight alone, Figure 17 dramatically illustrates this point. Consistent with commodity flow trends, by 1970 many single-line trucking alternatives had already been established between most major production centers in the North and in the South. Between 1970 and 1980, however, single-line trucking options multiplied rapidly. In Ft. Wayne, for example, shippers in 1970 had access to no more than a half dozen trucking companies which directly served most key southern cities; by 1980, the number of carriers offering direct service between most of these cities and Ft. Wayne had at least doubled or trebled and in two instances (Jacksonville, Florida and Birmingham, Alabama) had increased by at least a factor of six. The same dramatic expansion of choices among trucking firms occurred for shippers located in Jacksonville, where a choice among one or two alternatives in 1970 had expanded to nine or more by 1980 in many cases. Even in cities such as Atlanta or Cleveland, where the number of single-line options was already substantial in 1970, there has been significant additional expansion. In fact, in all of the 63 city pairs displayed in Figure 17,

the choice among trucking carriers increased between 1970 and 1980. As is discussed in Part V, deregulation of the trucking industry has drastically reduced barriers to entry for both existing and new trucking companies, thus insuring that a multiplicity of single-line motor carriers will continue to serve all routes with significant traffic.

Historically, as noted above, single-line service in the trucking industry has expanded primarily through merger and acquisition of existing operating authorities from other carriers. The experience of Carolina Freight is illustrative of this procedure. Between 1970 and 1979, Carolina Freight increased its tonnage by 87 per cent, gross revenues by 257 per cent, and net income by 169 per cent (representing a reutrn on equity of 18.5 per cent).[1] By 1980 Carolina served 30 of the 63 city-pairs displayed in the preceding figure, compared with only 12 in 1970. Two-thirds of Carolina's 1979 tonnage was truckload (indicating direct competitiveness with rail) up from 59 per cent in 1969.[2] Carolina's substantial success in the 1970's was supported by no less than a dozen important acquisitions of local trucking concerns, routes, and operating authorities.[3]

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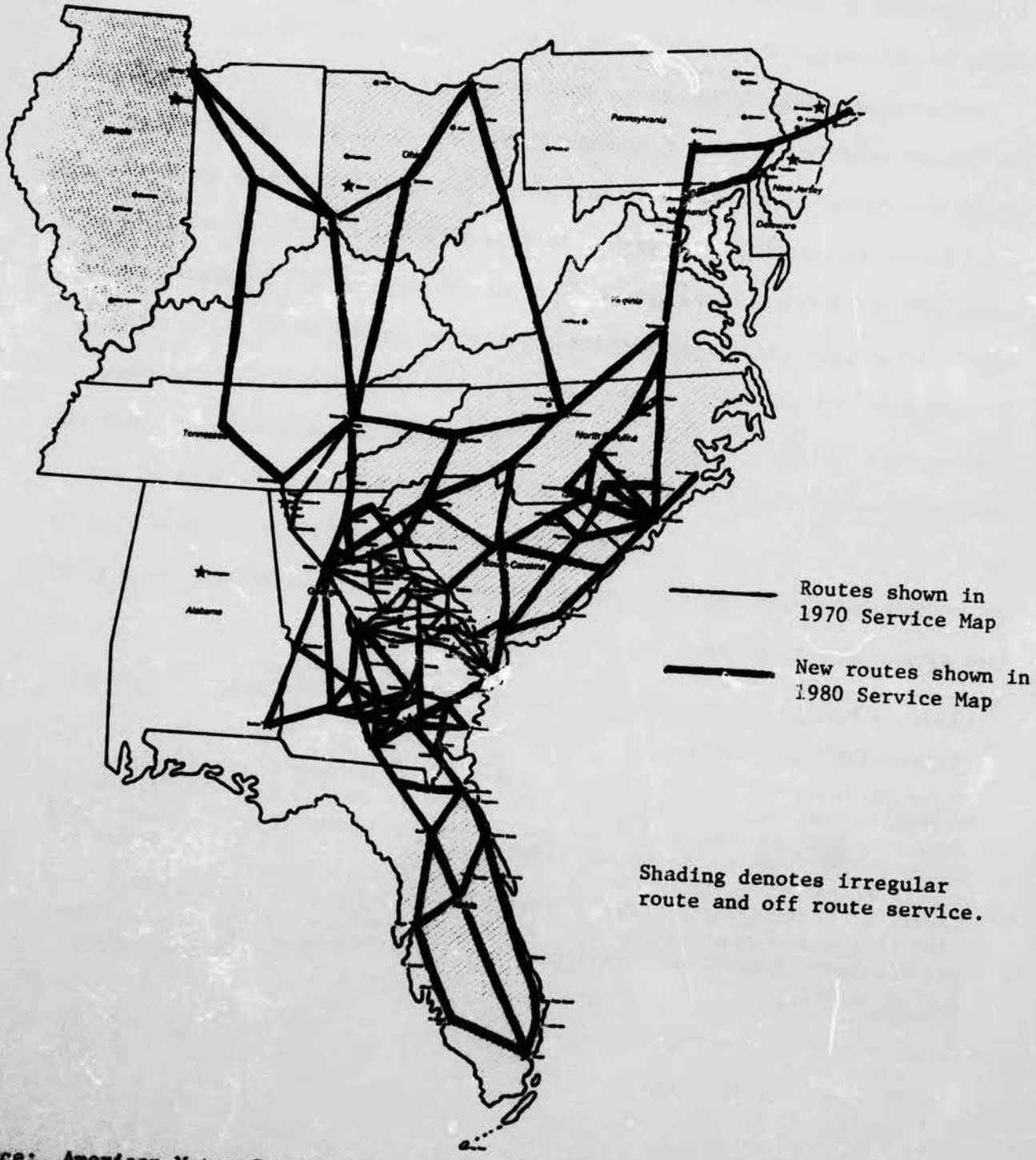
[1] Carolina Freight, 1979 Annual Report at 22-23, TRINC's (1980).

[2] TRINC's (1970 and 1980).

[3] Major Carolina extensions between 1968 and 1978 included the following: Wilson's Motor Transit (1968), Western New York State Lines (1971); Ovens Motor Freight and Hoag's Express (1972); Leonard Express (1973); Deerfield Motor (1973); various operating rights, Easton Motor (1974); Milwaukee to Peoria routes of OK Motor (1976); Nassau and Suffolk county rights of Byrnes L. I. Motor Cargo (1977); West Virginia rights of Perrow Motor (1977); Toledo-Detroit route of Indianhead Truck Line (1978); and Indiana and Michigan lines of National Transport (1978). Moody's Transportation Manual (1980).

Figure 18

BROWN TRANSPORT: GROWTH IN SERVICE TERRITORY, 1970-1980

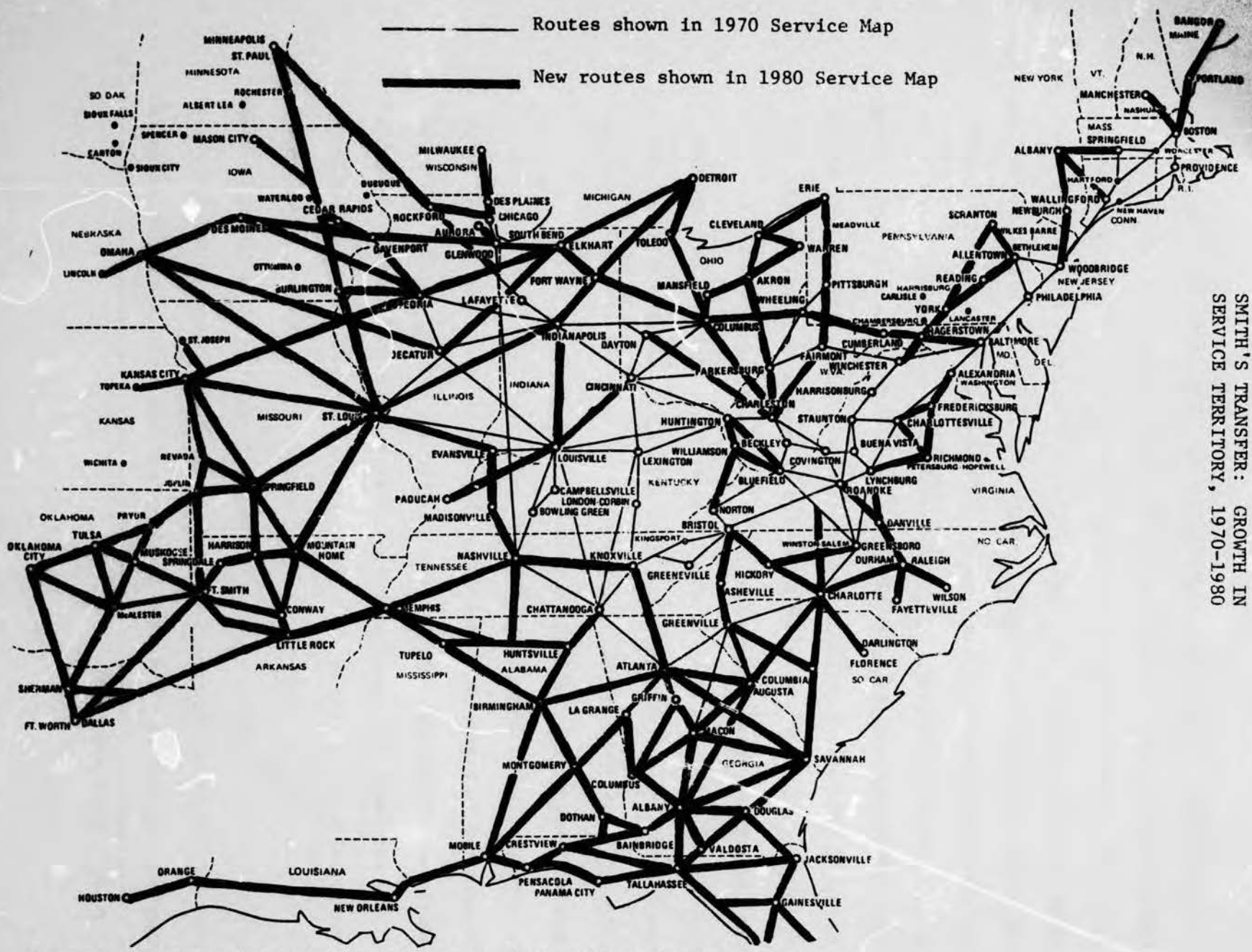


Source: American Motor Carrier Directory (Fall, 1970 and Fall, 1980).

Geographic expansion of trucking concerns throughout the prospective NWS service territory is also effectively demonstrated by an examination of individual carrier system maps over successive years. This point could be illustrated by virtually any random selection from among carriers serving the South. A particularly useful example is presented in Figure 18, showing the expansion of Brown Transport's service territory between 1970 and 1980. In 1970 Brown was primarily an intrastate Georgia trucking concern, serving only northeastern Georgia and a slice of eastern Tennessee. By 1980, though, its service territory extended from Chicago, Cleveland, and New York in the North to Miami in the South, with service throughout Georgia, Florida, and the Carolinas. Brown served none of the north-south routes shown in Figure 17 in 1970; in 1980, it served twenty-four. Between 1969 and 1979 Brown's freight revenues increased from $13 million to $101 million, with a 1979 return on equity of 52.3 per cent. Three-quarters of Brown's tonnage was rail-competitive truckload traffic.[1]

Only slightly less dramatic is the example of Smith's Transfer, as illustrated in Figure 19. In 1970 Smith's was already a significant north-south carrier serving routes between Atlanta and Chicago and New York, but it did not reach such major northern cities as Detroit, Toledo, Cleveland, and Pittsburgh, or such key southern points as Greensboro, Macon, Savannah, or Jacksonville, By 1980 all of these service points had been added, together with major route extensions into Wisconsin, Minnesota, Iowa, Nebraska, Missouri, Oklahoma, Arkansas, Texas, Louisiana, and Alabama. Smith's reach was extended from 12 of the previously identified north-south city-pairs to

[1] TRINC's (1970 and 1980).



Source: American Motor Carrier Directory (Fall, 1970 and Fall, 1980).

Figure 19

SMITH'S TRANSFER: GROWTH IN SERVICE TERRITORY, 1970-1980

Richard J. Barber Associates, Inc.

OP-STMT-481

48. Its revenues increased five times, from $50 million to $250 million. Some 59 per cent of Smith's 1979 business was truckload, with an average length of haul of nearly 700 miles.[1]

In summary, single-line service has become the pattern of trucking activity in the north-south corridors which would be served by the consolidated NWS system. In virtually any significant city-pair which might be served by the NWS system, a shipper which is in a position to ship either by rail or truck now has the choice of several single-line trucking companies -- in major city-pairs up to as many as two dozen. Such vigorously competing trucking companies provide shippers with numerous rate service package options. Since each of the trucking firms will have differing overall service routes, equipment types and availabilities, warehousing options, etc., the shipper is able to search for service arrangements particularly tailored to his needs (not only for a specific city-pair movement, but for a broad range of movements). The multiplicity of single-line traffic alternatives itself becomes a major competitive factor which transcends the simple availability of a particular direct service.

Length of Haul of Eastern Trucking Firms Now Exceeds Rail Carriers

Another index of the increased competitiveness of eastern-based trucking operations is the length of haul now enjoyed by the major interstate firms. So much has been said about the supposed competitive advantages of railroads for long-haul traffic that one would expect their average lengths of haul to exceed those of trucks. In fact, due in part to the substantial

[1] TRINC's (1970 and 1980).

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[1] TRINC's (1970 and 1980).

Figure 20

LENGTH OF HAUL OF EASTERN TRUCKING COMPANIES VERSUS RAIL CARRIERS: 1979

Johnson M. L.	724
Spector	712
Pilot	706
Smith's Transfer	680
Gordons	671
Carolina	657
Bowman	592
U. S. Rail System (incl. interline)	568[1]
Average of 14 Trucking Firms	566
Mason & Dixon	553
Interstate	530
Branch	450
Overnite	438
Brown Transport	431
Jones T. L.	417
CW Transport	364
Southern Railway	340
Norfolk and Western	335
Average Individual Rail Carrier	339[1]

[1] 1977 data.

Source: TRINC's (1980); Moody's (1980); TAA, Transportation Facts and Trends (January, 1980).

expansion of motor carrier operating authorities documented above, this is simply not the case.

Figure 20 illustrates this point, presenting data on fourteen eastern-based carriers which do not have transcontinental operating authority. Serving regions of approximately the same geographic scope as CSX and the proposed NWS system, these carriers have an average length of haul equal to the U. S. rail network average, <u>including</u> rail interline traffic. Moreover, <u>each</u> of the fourteen carriers has an average length of haul greater than that for individual U. S. rail carriers, and greater than that of the Southern Railway and Norfolk & Western, specifically. In addition, of course, most of the major transcontinental motor carriers, which often have average lengths-of-haul well over 1,000 miles, compete in the NWS service area.

There are literally thousands of short-haul trucking concerns that carry intrastate traffic and/or have limited interstate authority. These firms have come to dominate the local transport of commodities and this traffic weights down average length of haul statistics for the trucking industry as a whole. The preceding Figure demonstrates, however, that these statistics can be of little comfort to the rail industry. The major interstate trucking firms in the east (as elsewhere) are now longer-haul transporters than the railroads.

<u>Major Motor Carriers in the Prospective NWS Service Area Handle Large and Growing Volumes of Rail-Competitive Truckload Traffic</u>

It is generally acknowledged that full truckload (TL) traffic is more directly competitive to rail than is less-than-truckload (LTL) traffic.

Figure 21

MAJOR EASTERN MOTOR CARRIERS HANDLE LARGE AND GROWING VOLUMES OF TRUCKLOAD TRAFFIC

Carrier	Truckload Per Cent of Total Tonnage	
	1969	1979
Branch	51.3	57.1
Johnson M. L.	63.7	73.1
Spector	70.5	72.1
Pilot	59.3	61.2
Smith's Transfer	61.2	59.2
Gordons	45.3	67.2
Carolina	58.7	65.6
Bowman	73.5	74.7
Mason & Dixon	69.9	74.6
Interstate	65.2	80.8
Overnite	47.3	63.7
Brown Transport	53.9	76.0
Jones T. L.	61.3	67.2
CW Transport	78.2	75.6

Source: TRINC's (1970 and 1980).

Basically, the cost and service parameters of small shipment traffic are such that railroads simply have not been able to remain competitive, so that most LTL traffic must be regarded as permanently captured by the motor carriers.[1] A substantial share of motor carrier traffic, however, is truckload. Nationwide, TL traffic accounts for approximately 40 per cent of the revenue of regulated carriers of general freight.[2] This percentage has grown substantially in recent years, and for many categories of private, exempt, or specialized carrier traffic the TL percentage is considerably higher.

The 40 per cent TL share for regulated carriers of general freight is, moreover, misleadingly low because the data include carriers oriented toward local traffic as well as the longer-haul carriers. The major north-south carriers in the east (as well as generally) are substantially more reliant on truckload freight. Figure 21, displaying data on the fourteen eastern carriers discussed earlier, demonstrates this point. The volume of truckload traffic hauled by these carriers is typically two-thirds to three-quarters of total tonnage. In addition, it can be seen that reliance on TL traffic has indeed been increasing. Twelve of the fourteen carriers examined had a greater share of truckload traffic in 1980 than in 1970 -- in most cases, a substantially increased share. (On the other hand, the two cases of declining TL shares reflect minor changes.) The bulk of the traffic hauled by the major north-south carriers is, therefore, rail-competitive TL traffic.

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[1] Consolidation, by forwarders or shipper associations, however, may permit railroads to compete for such traffic.

[2] ICC Office of Policy and Analysis, An Analysis of Rates and Costs in the Motor Carrier Industry (April, 1980) [hereafter ICC Analysis of Rates and Costs] at 12.

The high and growing share of TL traffic in the consist of the major north-south motor carriers should not be surprising, since it relates directly to the trends described earlier. As motor carriers in the East have merged and obtained expanded operating authority, average length of haul has tended to grow, and as length of haul increases it becomes more important (and feasible) to concentrate commodities into full truckloads in order to maximize transport efficiency. Further, longer single-line hauls give trucking firms additional incentives to seek truckload traffic which might otherwise have been left to rail. Thus the dramatic structural changes in the eastern trucking industry over the last ten years have had the direct effect of increasing the similarity of the truck and rail traffic consists, thereby intensifying competition between the two modes.

The Scope of Eastern Trucking Operations is Expanding in All Segments of the Industry

The preceding discussion has focused on regulated carriers of general freight because data on their operations is most readily available. Despite the paucity of accurate statistics, however, both private and exempt carriers and so-called "specialized" regulated motor carriers clearly have come to occupy an increasingly important role in intercity freight transportation.

Private Carriers. Private and exempt carriers are vigorous competitors to both regulated motor carriers and the railroads. As James C. Springrose, Vice President-Transportation for Cargill, Inc. has stated, "the greatest competition to the for-hire carriers [all modes] today comes from the growth in private carriers."[1] TRINC has identified 400,000 private trucking fleets

[1] Cited in Clinton H. Whitehurst (ed.) Forming Multimodal Transportation Companies (1978) [hereafter Whitehurst] at 100.

Figure 22

PRIVATE/EXEMPT SHARE OF TOTAL TRUCK TONNAGE: SELECTED NORTH-SOUTH CORRIDORS, 1978 (ESTIMATED)[1]

Traffic Corridor	Total Truck Tonnage	Private/Exempt Tonnage	Per Cent Private/Exempt
To northern BEA's below, from:			
Greensboro	198,510	79,539	40.1
Charlotte	288,498	88,864	30.8
Asheville	84,286	14,331	17.0
Greenville	187,042	49,348	26.4
Atlanta	387,420	98,049	25.3
Chattanooga	478,846	100,434	21.0
Macon	52,616	11,685	22.2
Columbus (Ga.)	61,849	12,219	19.8
Knoxville	244,878	85,142	34.8
Total Northbound	1,983,945	539,611	27.2
To southern BEA's above, from:			
Youngstown	123,559	12,627	10.2
Cleveland	604,877	109,793	18.2
Lima	35,744	8,382	23.5
Toledo	290,297	46,464	16.0
Detroit	202,293	33,836	16.7
Saginaw	32,363	10,163	31.4
Chicago	935,118	162,412	17.4
Milwaukee	156,334	36,237	23.2
Total Southbound	2,380,585	419,914	17.6
Total Both Directions	4,364,530	959,525	22.0

[1] Primarily 1972 Census of Transportation data adjusted to estimated 1978 levels by production statistics.

Source: Reebie Associates, Inc., Transearch Traffic Flows (computer printout, dated August, 1980).

with five or more power units and expects to add at least another 100,000 to the list by the end of 1980.[1] Private fleets enable the fleet owner to lay out complex movement patterns tailored to the changing needs for both intracompany transportation (raw materials, intra-plant transfers of intermediate goods, etc.) and delivery to distributors and or consumers. Private truck transport can be utilized to handle base requirements with great efficiency, limiting for-hire carriage (truck or rail) to supplemented or peak demand.

Private and exempt fleet operations are often associated with long-haul agricultural movements by large agri-business concerns and cooperatives and with commodity movements of very large industrial firms. In fact, however, private fleets are now quite common for medium-sized firms, transporting a wide variety of products. Some indication of the pervasiveness of private and exempt operations in the NWS service territory is provided by Figure 22 which presents truck flow data between eight northern BEA's and nine southern BEA's.[2] These data indicate that some 27 per cent of northbound truck traffic and 18 per cent of southbound traffic is transported by private/exempt carriers. Moreover, the data displayed are in large part based on 1972 Census of Transportation data on modal splits (adjusted to 1978 production

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1 Robert A. Potts, Remarks before the Private Carrier Conference (October 13, 1980) at 7-8.

2 BEA's are regions used by the Department of Commerce to report economic and business information, and are referred to interchangeably as Bureau of Economic Analysis or Business Economic Area regions. BEA data contained herein reflects 1972 definitions of these regions, on which basis the continental United States is comprised of 171 BEA's. The Commerce Department has recently revised BEA definitions for current reporting.

levels).[1] Hence the volume of private-exempt traffic probably is understated as it does not take into account the continuing post-1972 trend toward private carriage.

Special Commodity Carriers. A major aspect of motor carrier competition to the railroads has been the growth and flexibility of irregular route carriers of so-called special commodities.[2] The designation "special" is misleading, however, because few of these carriers literally specialize in a single commodity, nor do they necessarily need specialized equipment. Rather, over time (within the existing regulatory system) they have skillfully penetrated lucrative long-haul, TL markets by expanding the number of commodities they carry and the range of points, states, and regions which they serve. Particularly in the 1970's, the ICC has been liberal in permitting extensions in response to carrier arguments focusing on full load opportunities to eliminate empty backhauls. The truckers succeed by combining particular market conditions, specific products, and particular geographic areas into service/rate packages that satisfy shippers/receivers and earn profits for the carriers.

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[1] The Reebie Associates Transearch data base employed in Figure 22 and elsewhere in this statement is based on four primary government sources: the 1972 Census of Transportation (Bureau of Census); the 1978 One Percent Waybill Sample, for all rail data (DOT/ICC); the 1976 Export-Import Census (DOT); and 1978 Fresh Fruit and Vegetable Unload Reports (Department of Agriculture). All data are adjusted to 1978 production levels through use of Federal Reserve Board Industrial Production Indices. See Reebie Associates, Transearch Reference Manual at 9-10 and 31-33.

[2] See, for instance, Paul O. Roberts, "Structure of the Nation's Future Freight System," in Transportation Research Board, State Transportation Issues and Actions (1980) [hereafter Roberts, TRB] at 61.

Figure 23

PARTIAL LISTING OF SPECIALIZED IRREGULAR ROUTE CARRIERS WITHIN THE NWS SERVICE AREA

Carrier	Commodities	States Served*
Alterman Transport	Refrigerated Solids	43
Anchor Motor	Motor Vehicles	All
Automobile Transport	Motor Vehicles	All
B&L Motor Freight	Various	43
Baggett Transportation	Explosives	43
Blue Ridge Transfer	General Freight	37
Boutell Driveaway	Motor Vehicles	28
Bowman	General Freight	24
Brada Miller	Iron & Steel, Auto. Metal, Brick	17
Bray Lines	Various	All Except New England
Builders Transport	Building Materials, Textiles, Paper	All
C&H Transport	Oilfield Equip., Contractors Equip. Other Heavy Commodities	All
Chemical Leaman	Chemicals, Petroleum Prod., Cement	All
Clay Hyder	Various	All
Commercial Carriers	Motor Vehicles	38
Complete Auto	Motor Vehicles	All
Continental Contract	General Freight	All
Crete Carrier	General Freight	All
Daily Express	Heavy Machinery, Building Materials	All
Dallas & Mavis	Heavy Machinery	All
DSI Transport	Liquid Petroleum, Dry Bulks	All
E&L Transport	Motor Vehicles	All
Fleet Carrier	Motor Vehicles	All
Fleet Transport	Liquid Petroleum Prod.	24
George Transfer & Rigging	Building Supplies & Heavy Equip.	21
Groendyke Transport	Liquid Petroleum Prod.	47
Herman Bros.	Bulks	24
[illegible]e Transportation	Heavy Machinery	All
Indianhead	Liquid Petroleum Prod.	28
J&M Transportation	General Freight	2[illegible]
Kenosha Auto Transport	Autos, Boats, Campers	4[illegible]1
Liquid Transporters	Liquids	All
Malone Freight	General Freight	[illegible]9
Mason and Dixon Tank Lines	Chemicals	All
McKenzie Tank Lines	General Freight	3[illegible]
Midwest Coast Transport	Refrigerated Solids	All
Miller Transporters	Liquids, Chemicals	38
Mitchell Transport	Cement	19
E. L. Murphy	Various	All
National Carriers	General Freight	All
National Freight	General Freight	35
Pre-Fab Transit	Building Materials	All
Quality Carriers	Bulks in Tanks	45
Refiners Transport	Liquid Petroleum	31
Rogers Cartage	Liquid Petroleum	41
Rose Truck Line	Oilfield Equip., Heavy Commodities	All
Ruan Transport	Liquid Petroleum, Cement	45
Sawyer Transport	Building Materials, Iron and Steel	All
Shaffer Trucking	Building Materials, Agricultural Commodities	All
Superior Trucking	Heavy Machinery	All
Tri-State	Explosives, Radioactive and Hazardous Commodities	All
Wales	Industrial Machinery, Pipe, Oilfield Equipment	All
Walker	Oilfield Equip., Heavy Machinery	All
Warren Transport	Heavy Machinery, Forest Prod., Building Materials	All
Watkins Motor Lines	General Freight and Refrigerated Solids	All
Willis Shaw Frozen Express	Refrigerated Solids	All

* "All" may exclude Alaska and Hawaii, generally includes District of Columbia; where less than thirty states are listed, at least half of states are in NWS service area and include states served by Southern and by NW.

Source: Moody's Transportation Manual, 1979.

Figure 23 lists some of the specialized carriers with extensive authority in the prospective NWS service territory, together with an indication of primary commodities carried. It is obvious that these carriers provide a very substantial additional north-south transport capability beyond that of the regulated general freight carriers and private/exempt carriers previously discussed.

The importance of the special and specialized commodity carriers (including contract carriers) nationally is illustrated by the fact that together they earned intercity freight revenues of $11.4 billion in 1979[1] and a composite return on equity of 16.3 per cent. Three of the special commodity groups themselves (petroleum products, refrigerated products and motor vehicles) each represented more than one billion dollar markets. Two of them -- automobiles and refrigerated products -- are strongly rail-competitive, as is the building materials segment (which is almost a billion dollar market).[2]

The specialized commodity group carriers have shown a steady rate of growth compared to the general carriers of freight and are capturing an increasing share of the market (with a reminder here that the statistics relate only to the roughly 40 per cent of the motor carrier market which is regulated;

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[1] Total comprised of roughly $9.7 billion for the commodity-grouped common carriers and $1.7 billion for contract carriers. TRINC's Blue Book of the Trucking Industry (1980 Edition) at S-4 and S-5.

[2] In 1979, intercity freight revenues for these groups were: petroleum products, $1,355 million; refrigerated products, $1,367 million; motor vehicles, $1,209 million; and building materials, $952 million. Ibid.

Figure 24

COMPARISON OF REGULAR AND
SPECIAL COMMODITY GROUP MOTOR CARRIERS

	(a) Regular Route Common Carriers Of General Freight		(b) Commodity Group Carriers[1]		Total (a + b)	
	Amount	Per Cent	Amount	Per Cent	Amount	Per Cent
1966						
Total Revenues ($ Millions)	5,673	67.1	2,779	32.9	8,452	100.0
Vehicle Miles (Millions)	5,899	55.9	4,659	44.1	10,558	100.0
Ton-Miles (Millions)	72,085	60.1	47,938	39.9	120,023	100.0
1979						
Total Revenues ($ Millions)	21,275	63.1	12,440	36.9	33,715	100.0
Vehicle Miles (Millions)	8,769	46.8	9,979	53.2	18,748	100.0
Ton-Miles (Millions)	114,261	49.8	115,383	50.2	229,644	100.0

[1] Excludes household goods carriers.

Source: TRINC's.

Richard J. Barber Associates, Inc.

the remaining 60 per cent, of course, belong to the severely rail-competitive private and exempt carrier classes). Figure 24 shows that more than half of regulated vehicle miles and ton-miles were supplied by the commodity group carriers in 1979, compared to shares of 44.1 per cent and 39.9 per cent respectively, in 1966. Their revenue share also advanced almost four percentage points so that the revenue split between general freight and commodity group carriers is approaching a ratio of 60:40.

Motor Carrier Traffic Now Dominates North-South Commodity Flows

The trucking industry in the eastern United States has progressively consolidated operations into numerous major competing carriers with extensive north-south single-system capabilities, has developed average lengths of haul as long as or often longer than those in the railroad industry, has greatly expanded truckload operations, and has evolved major private-exempt and specialized carrier capabilities to supplement regulated general freight carriers. The bottom line of these developments is that trucks have obtained a very substantial share of north-south traffic and, indeed, an overwhelming share in many discrete traffic corridors.

Figures 25 and 26 present the most recent and comprehensive available data on the truck share of traffic flows between the BEA's for which comparable data on city-pair single-line truck service was presented earlier. A total of 63 southbound and 63 northbound traffic flows are represented. While the data presented are the most comprehensive available (pending public release of the 1977 Census of Transportation and revision of this and other such data bases) it must be read with an understanding that truck flows are substantially

Figure 25

TRUCK SHARE OF TONNAGE FOR
SOUTHBOUND TRAFFIC BETWEEN MAJOR NWS BEA's

	BUFFALO	CHICAGO	CLEVELAND	COLUMBUS	DETROIT	FT. WAYNE	TOLEDO
ATLANTA	93.0	31.7	45.8	63.5	15.0	59.5	47.2
BIRMINGHAM	94.8	8.3	27.4	31.1	5.8	66.3	54.6
CHARLESTON, S.C.	71.8	79.1	64.2	100.0	53.0	100.0	93.7
CHARLOTTE	65.1	62.6	75.8	29.6	33.9	84.7	40.8
CHATTANOOGA	56.3	27.6	50.8	61.0	44.2	62.1	41.2
GREENSBORO	78.7	45.8	59.5	83.5	9.6	99.9	63.8
JACKSONVILLE	55.7	20.4	63.4	69.8	15.6	99.6	51.1
KNOXVILLE	85.5	61.4	74.4	71.1	99.9	71.6	55.1
RALEIGH	79.6	71.7	86.5	19.7	75.6	99.9	58.6

Source: Reebie Associates, Summary Terminal Area Reports, September 1980.

understated, due to limitations in data sources. Specifically, the truck data discussed here are estimated to represent only about 45 per cent of actual truck flows nationwide, whereas the rail data used with it are estimated to comprehend 95 per cent of rail flows.[1]

With the above limitation in mind, the truck share percentages in Figure 25 are indeed impressive. Southbound truck shares are above 50 per cent in 44 of the 63 BFA pairs (i.e., in 70 per cent of the pairs) and above two-thirds in 24 pairs. In only three of the pairs were truck shares below 15 per cent. Two of these pairs, Chicago-Birmingham and Detroit-Birmingham, represented traffic corridors dominated by large reported water or water/rail movements of iron ores -- evidently imported Canadian ore moving through Great Lakes ports -- and are clearly atypical. The remaining corridor with a low truck share, Detroit-Greensboro, represented a traffic flow dominated by a large movement of rail-carried automotive traffic (86 per cent of total traffic was automotive). Again, trucks were prominent in other traffic in this corridor. Clearly, these figures indicate that trucks are the major carriers for southbound traffic.

Figure 26 displays data for northbound traffic between the same BEA pairs. While truck shares are somewhat lower than for southbound traffic,

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[1] Reebie Associates, Transearch Reference Manual at 19-20. As indicated earlier, rail data are derived from the 1978 One Percent Waybill Sample. While this produces (when statistically expanded) nearly complete representation of rail traffic nationwide, it should be noted that the Waybill Sample was not stratified on a BEA-BEA basis. For specific BEA pairs involving small traffic volumes, the data base may understate or overstate rail traffic; rail traffic volumes will be more accurately represented for BEA's with larger traffic flows or for aggregations of BEA's.

Figure 26

TRUCK SHARE OF TONNAGE FOR NORTHBOUND
TRAFFIC BETWEEN MAJOR NWS BEA'S

	BUFFALO	CHICAGO	CLEVELAND	COLUMBUS	DETROIT	FT. WAYNE	TOLEDO
ATLANTA	52.7	56.0	56.9	99.9	48.0	94.6	25.8
BIRMINGHAM	28.4	34.4	25.1	36.0	33.7	18.4	24.9
CHARLESTON, S.C.	21.2	57.1	9.2	8.9	53.2	25.1	21.4
CHARLOTTE	64.7	54.8	72.7	12.2	60.5	75.8	79.4
CHATTANOOGA	64.6	65.9	68.3	70.4	47.5	98.9	23.2
GREENSBORO	67.4	47.8	82.6	91.6	64.4	99.9	56.8
JACKSONVILLE	14.6	18.6	23.8	7.5	31.8	6.4	9.4
KNOXVILLE	5.8	13.5	15.5	23.9	23.8	72.1	1.2
RALEIGH	57.0	29.3	56.4	24.4	65.8	21.6	27.4

Source: Reebie Associates, Summary Terminal Area Reports, September 1980.

the truck share is above 25 per cent in 41 of the 63 cases, and above 50 per cent in 28 cases. Relatively low truck shares from Knoxville result from inclusion of large movements of rail-hauled coal, which tonnage overwhelms all other commodities (where trucks are significant). Similarly, traffic data from Jacksonville are strongly influenced by large rail movements of pulp and paper products. In other words, where a relatively low truck share of traffic appears it tends to be a result of rail (or barge) prominence in some particular commodity which happens to move in large volumes in a particular corridor. On the other hand, high truck shares tend to be produced from truck prominence across a broad range of commodities. Even without these explanatory comments (and without acknowledging the systematic understatement of truck traffic in the data source), it is obvious that truck competition for northbound traffic in the NWS service area is quite formidable.

The presence of more high truck-share corridors southbound than northbound -- or, conversely, the presence of higher rail shares northbound and lower shares southbound -- is also a very suggestive reinforcement by aggregate data of the watershed problem discussed in detail in Part IV. The railroads which originate traffic in the South for delivery to northern destinations frequently have longer hauls on that traffic than do railroads originating traffic in the North for delivery to southern points. Not surprisingly, the northern roads look elsewhere for longer hauls and the trucks and barges capture larger relative traffic shares. Thus the data discussed here further substantiate the Commission's finding in CSX specifically with respect to north-south traffic:

> CSX has the opportunity to develop traffic heretofore often unattractive to northern carriers in joint-line operations because of the short-haul problem. Single-system service can be expected to overcome these inhibitions to a great extent. The affiliated carriers will be able to compete more effectively with truck and barge operations, which now provide shippers a multiplicity of single-carrier options.[1]

Equally as important, numerous shippers in this proceeding have submitted evidence of the devastating effects of motor carrier competition. Union Camp, for instance, has reported a shift in modal split over the last ten years of traffic from its Franklin, Virginia mill from 60 per cent rail and 40 per cent truck to 40 per cent rail and 60 per cent truck.[2] A Union Camp bag plant at Savannah, Georgia that used to ship 70 per cent rail has completely reversed those shares in favor of motor carriage; trucking has also made gains at rail's expense in paper and pulpboard shipments from Savannah and in paper products from Montgomery, Alabama.[3] The modal split on newsprint produced by Bowater Southern Paper currently is 56 per cent rail, 40 per cent truck, and 4 per cent barge. Bowater has testified that absent initiation of single-system service from the South to Missouri, Iowa, and other parts of the Midwest, the rail share may decline.[4]

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[1] CSX Decision at 38. Emphasis supplied.

[2] Verified Statement of James P. Deehan, General Manager, Distribution and Transportation, NWS App. Volume 1C [hereafter Deehan V. S.].

[3] Ibid. Union Camp uses barge-truck operations to serve New York, New Jersey, Pennsylvania, and Connecticut receivers from Savannah, and shortly expects to develop barge service to reach Midwest markets from Montgomery.

[4] Verified Statement of C. A. Johnpeter, Manager of Transportation & Distribution, NWS App. Volume 1C [hereafter Johnpeter V. S.]. Bowater has the largest newsprint and groundwood paper manufacturing plant in North America at Calhoun, Tennessee.

Seven years ago roughly three-fourths of the traffic from National Starch and Chemical's Indianapolis plant to the South was carried by rail. Today 80 per cent moves by truck, "notwithstanding the fact that [the] plant is better suited for shipment by rail."[1] Over the same time period General Tire and Rubber changed from a two-thirds rail and one-third truck ratio to one-third by rail and two-thirds by motor carrier.[2]

It is clear that motor carriers have become acutely competitive throughout the NWS service area. As has been pointed out by the Chairman of the Board of Metals Engineering Company in this proceeding: "Motor carriers do offer single-line service.... If the Commission really wants to encourage intermodal competition, it must expand single-system rail coverage."[3]

Federal Policies Have Aided the Motor Carriers

The trucking industry has benefitted immensely from a less rigorous regulatory burden than the railroads and a huge and continuing Federal highway construction program. The significant deregulation of the industry in the Motor Carrier Act of 1980 is discussed in Part V.

Over the years, and particularly in the post-World War II period, Federal and State programs have put in place a modernized and elaborate network of highways, culminating with the 42,500-mile Interstate system. As of 1977 more than $106 billion[4] had been spent by government for the construction of

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1 Verified Statement of Henry G. Kavanagh, Traffic Director, NWS App. Volume 1C.

2 Verified Statement of Joseph S. Vatalaro, Corporate Director of Transportation, NWS App. Volume 1C.

3 Verified Statement of Robert Austin, NWS App. Volume 1C [hereafter Austin V. S.].

4 U. S. Federal Highway Administration, Highway Statistics (annual) and statistical releases.

Figure 27

THE INTERSTATE HIGHWAY SYSTEM
IN THE EASTERN UNITED STATES



highways that have provided motor carriers with a right-of-way that greatly contributes to the efficiency of their operations.

Figure 27 shows the Interstate highways that permeate the areas served by NW and SRS. Along the north-south axis Interstate highways (from east to west) 95, 85, 81, 75, and 71 link up principal points in the northern tier of states with those throughout the South. Similarly, for east-west movements Interstate roads 70 and 80 (in the North), 64 (across the central belt), and 10, 20, and 40 (in the South) connect the key traffic hubs and thereby facilitate truck competition for intra- as well as inter-regional shipments.

State highway department traffic counts indeed show that on the Interstate system in the eastern U. S. heavy trucks (i.e., truck/trailer combinations) often account for upwards of a fifth of all vehicular movements. In Virginia, for example, traffic counts on I-95 near Doswell show that trailer-truck combinations averaged 7,400 units a day in 1978, equal to about a fifth of all vehicles using the road.[1] Not infrequently heavy trucks account for an even larger share of total traffic. In Kentucky the state highway department has reported that on I-75 (near London) and on I-64 (west of the West Virginia state line) truck/trailer combinations made up 29 per cent of total traffic in 1978.[2]

That the patterns of economic growth and change, aided by technological innovation and changes in business requirements, have advantaged the motor carriers is undeniable. Government financial assistance, however, has been a prerequisite to their success vis-a-vis the railroads.

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[1] Virginia Department of Highways and Transportation, Average Daily Traffic Volumes on Interstate, Arterial and Primary Routes (1978) at 58.

[2] Kentucky Department of Transportation, 1978 Interstate and Parkway Traffic Counts (1979).

Figure 28

MAP OF WATERWAYS IN THE
EASTERN UNITED STATES



Source: Tennessee Valley Authority.

The Continuing Competitive Challenge of Water Carriage in the NWS Region

The Norfolk & Western and the Southern not only face strong and pervasive competition from the trucking industry, but also from the inland water mode which is a major transporter of freight commodities in and between the areas served by the two railroads. Figure 28 shows the extent to which large navigable waterways surround and penetrate vast reaches of the twenty state area in which the two carriers operate. The Mississippi River and its sprawling interconnected network of numerous feeder rivers provide a key transportation artery which links the northern states of the Norfolk & Western with the region to the south served by the Southern Railway. Other major rivers -- the Ohio and Tennessee to the east, the Illinois to the north, the Missouri to the west, and their tributaries -- combine to form a far-reaching waterway grid over the separate territories of the two railroads. From such major freight traffic points on the NW as Pittsburgh and Chicago in the north and Omaha and Kansas City in the west, to such key locations on the Southern as St. Louis and Memphis in the west and New Orleans and Mobile in the south, the two railroads thus are bounded by a single system of major interstate water transportation routes.

The extensive Mississippi River System -- a term which includes the main channels and all tributaries of the Mississippi, Illinois, Missouri, and Ohio Rivers -- is the largest inland waterway system in the country, accounting for more than half of all freight ton-miles carried on the waterways of the United States.[1] The most recent data compiled by the U. S. Army Corps of Engineers

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[1] U. S. Army Corps of Engineers, Waterborne Commerce of the United States [hereafter Waterborne Commerce] Part 5 (1977) at 28.

Figure 29

MISSISSIPPI RIVER SYSTEM TRAFFIC
BY COMMODITY, 1978

Commodity Group	Tonnage (Millions)	Per Cent Of Total River System Tonnage
Coal and Lignite	106.0	29.8
Petroleum and Coal Products	68.0	19.1
Nonmetallic Minerals	48.9	13.8
Farm Products	45.0	12.7
Chemicals and Allied Products	25.4	7.2
Food and Kindred Products	10.4	2.9
Primary Metal Products	7.3	2.1
Subtotal: Above Groups	311.0	87.5
Total: All Commodities	355.4	100.0

Source: Waterborne Commerce, Part 2 (1978) at 148.

show that, in 1978, the Mississippi River System carried over half a billion tons of inland, coastwise, and import/export freight traffic over 200 billion ton-miles -- volumes far larger than those of either the NW or the Southern.[1] Figure 29 indicates that not only is the Mississippi River System moving huge volumes of inland traffic in the NWS service region, but it is hauling many of the same commodities as the two railroads as well.

The past decade has witnessed a tremendous growth in inland traffic over the Mississippi River System. Between 1969 and 1978 tonnage on the System increased by almost a fourth and ton-miles by more than half. Moreover, several individual waterway components of the System expanded even more rapidly. (See Figure 30.)

The tremendous surge in barge traffic throughout the NWS area has been facilitated by a number of factors in addition to the economic growth of the region. These include Federal aid to the inland waterway system, technological advances in the barge industry, the absence of Federal regulation of most waterborne traffic, and the industry's provision of through services across geographic regions now served separately by the two railroads.

Federal aid to the inland waterway system has been especially significant. New and larger locks (as along the Ohio River), deeper channels and what amount to essentially new waterways (as with the McClellan-Kerr), combined with ongoing maintenance support, have made it possible for barge carriers to make maximum use of their technologically-improved fleets of barges and towboats. Federally financed until very recently without any form of user charge,

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[1] Id., Part 2 (1978) at X.

Figure 30

INLAND WATERWAY TRAFFIC IN THE NWS SERVICE AREA
HAS INCREASED DRAMATICALLY DURING THE PAST DECADE

Waterway	1978 Tons (Millions)	Percentage Increase Since 1969	1978 Ton-Miles (Millions)	Percentage Increase Since 1969
Mississippi River System[1]	355.4	24	176,484	55
Mississippi River	215.5	46	118,165	69
Missouri River	7.0	37	1,529	45
Ohio River	152.6	21	38,030	39
Tennessee River	31.6	29	4,417	32
Cumberland River	12.4	170	989	78
Black Warrior and Tombigbee Rivers	14.5	38	3,972	47
Illinois River	37.3	17	7,684	18
Gulf Intracoastal Waterway (Mobile-New Orleans segment)	22.6	40	2,071	43

[1] Inland traffic on the main channels and all tributaries of the Mississippi, Illinois, Missouri and Ohio Rivers.

Source: U. S. Army Corps of Engineers, Waterborne Commerce of the United States, Part 2 (calendar years 1969 and 1978).

Richard J. Barber Associates, Inc.

waterway construction expenditures, along with operational and maintenance outlays, have involved a cumulative Federal cost in excess of an estimated $15 billion.[1]

Moreover, the Federal government continues to spend heavily on continued expansion of the waterway system. For example, one of the largest inland waterway additions currently underway is the construction of the Tennessee-Tombigbee Waterway (Tenn-Tom) in the state of Mississippi. Described as the "largest earth-moving project in the U. S.,"[2] the Tenn-Tom will forge a new 232 mile link between the Tennessee and Tombigbee Rivers to create another north-south waterway route paralleling the Mississippi River and connecting the heart of the NWS service area to the Gulf Coast. Expected to cost at least $1.76 billion in Federal construction funds, the Tenn-Tom will link the Midwest to the Gulf with a water route which is some 800 miles shorter and six days faster than the present barge route. Coal is expected by far to be the principal southbound commodity on the new water link.[3]

The inland water mode of freight transportation in the NWS service area has also benefitted enormously from the lack of Federal regulation of most waterway traffic. While the railroads have historically been closely regulated

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[1] DOT § 902 Study, Appendix Table 12. In addition to providing such extensive aid for the system itself, the Federal Government also provides financial assistance for the equipment to haul freight over the waterways. As of October 1980, the Federal Maritime Administration had received applications totalling $146 million for its program of providing financing for construction of barges with Federal loan guarantees at below-market rates of interest. These applications would finance over 600 new barges. See Business Week (November 3, 1980) at 38.

[2] Coal Age (July 1978) at 126.

[3] Ibid.

by the Federal Government in their provision of freight rates and services, less than ten per cent of the domestic freight ton-miles moving on the Nation's waterways is subject to Federal economic regulation.[1] The barge industry has enjoyed much greater market freedom than the NW and the Southern in terms of setting rates, adjusting them -- sometimes daily -- in response to barge supply and demand conditions, and working closely with individual shippers, often under long-term contracts, to tailor rate and service packages to specific transportation needs.

In addition to such factors as Federal aid, technological innovation, and freedom from regulation, the fact that these waterways are interconnected means that shipments can be made in through barge service between points that neither applicant carrier can now serve on a single-system basis (e.g., grain from points along the Missouri River to points on the Tennessee, fertilizer from along the Gulf Intercoastal Waterway-East to Illinois River terminations, or steel products from the Chicago area to receivers on the Tennessee).

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[1] Waterborne Commerce, Part V (1977) at 94.

IV

THE INADEQUATE COMPETITIVE RESPONSE OF RAIL SERVICE

As discussed above, the non-rail modes have succeeded at the expense of the railroads in large measure because their corporate and territorial structures were adaptable to the needs of the modern economy. There is little doubt, therefore, that important structural modifications must be made if the railroads are to make themselves more efficient, more relevant to the transportation requirements of our economy, and financially self-sustaining, as measured by returns sufficient to yield profits and to attract adequate capital. Failure to make structural changes invites continued long run erosion of the industry. More important, given evidence of actual railroad liquidation, bankruptcy, and recent restructuring initiatives by major railroads, carriers which fail to take steps to improve their market posture will be vulnerable to competitive stagnation or to accelerated decline.

The fact that substantial structural adjustment has become critical to a viable private sector railroad system has been increasingly recognized. The Task Force on Railroad Productivity put it concisely several years ago:

> Profound changes during the past century -- in the character of freight demand, in the extent of truck competition, and in rail technology -- all argue for a distinctly different corporate structure for the industry than that which survives today.[1]

The Department of Transportation, after assessing the redundancy and lack of fit between the railroads' fixed plant network and the requirements of the late-twentieth century U. S. economy, confirmed that evaluation:

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[1] Task Force at 231.

> Most railroad facilities were constructed in an earlier, expansionary era, under vastly different market conditions, and with very little competition from other modes. There are now too many miles of track and other facilities of the wrong kind or in the wrong location to survive in the new competitive climate. The railroad industry must make substantial changes in its economic and physical structure.[1]

Much of the network laid out between 1830 and 1920 is still in place and is not well tuned to contemporary needs. But at least as important, and perhaps more so, is that the corporate territorial boundaries of the railroads today remain largely what they were 50 years ago and are equally incongruent with the requirements of today's transport markets. If the railroads are to reach a position from which they can compete on a more nearly equal footing with their powerful modal rivals and among themselves, and thereby contribute meaningful public benefits in transportation, substantial redesign and restructuring is a vital prerequisite. As DOT has observed, "It is generally agreed that restructuring of the nation's rail system would in the long-run provide a more efficient mix of transportation service."[2] Recent Commission approval of CSX, the merger of Burlington Northern and the Frisco, acquisition of the Tucumcari line by Southern Pacific, and numerous adjustments related to the Rock Island and Milwaukee bankruptcies illustrate that such a restructuring process is well underway.

The key impediment for the railroads is that, unlike their truck and barge competitors, they have often been unable to offer reliable and efficient single-system service from origin to destination. The Commission appears to have

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[1] Department of Transportation, A Prospectus for Change in the Freight Railroad Industry (October 1978) [hereafter Prospectus] at 5.

[2] Innovation Versus Nationalization: Proposals for Change in the Nation's Rail System (January 1979) at 24.

accepted this fact, observing in a recent proceeding that in order to increase the rail system's intermodal competitiveness, it may be that single-line carriers will obtain most of the traffic.[1] In its CSX decision the Commission effectively spelled out the numerous practical advantages of single-line and single-system service vis-a-vis interline service.[2] Even correcting for the regulatory handicaps borne by the railroads, their inability to compete traces directly to the industry's fragmented organizational character.

The Hard Fact of Balkanization

Limited as they are by corporate territorial boundaries established decades ago, most individual rail carriers are not able to handle a large portion of longer-haul traffic in single-line service. As of 1978, half of the Class I railroads had an average length of haul per ton of less than 300 miles, while 76 per cent of the carriers provided freight service that on the average was less than 400 miles per ton. (The averages for Southern Railway System and Norfolk & Western, respectively, are 340 and 335 miles.) Of all reporting railroads, the longest average per ton movement amounted to just over 691 miles. Given these operating strictures, the only significant way in which a railroad today can participate in longer hauls is by interlining traffic with one or more other rail carriers. As noted earlier, the extent of interlining in the railroad industry as a whole is startling. On a system-wide basis, 42 per cent of all rail carloads are handled by two or more railroads.[3] For all Class I

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[1] Ex Parte No. 282 (Sub-No. 5), Rulemaking Concerning Traffic Protective Conditions in Railroad Consolidation Proceedings (July 7, 1980) at 5. See also CSX Decision at 42.

[2] See, for instance, CSX Decision at 1, 27-29, and 39.

[3] Prospectus at 54.

carriers, interlined traffic accounts for about 70 per cent of total revenues.[1] On the Southern Railway System and the Norfolk & Western, 54 per cent and 56 per cent, respectively, of total tonnage carried is interlined.[2]

As shown in Part III, the other transport modes are unimpeded by such artificial geographic boundaries. Almost 90 per cent of the tonnage moved by regulated trucks -- many of which have average lengths of haul well over 1,000 miles -- is in single-line service. (Private and exempt truck operations, of course, are carefully tailored to single-line service.) On the inland waterways, single-line barge service is commonplace, not just for bulk commodities but for manufactured goods as well (e.g., steel from Chicago to Texas). In fact, most of the major barge carriers have operating authorities virtually congruent with the entire waterway systems on which they operate.

Under these conditions, the competitive disadvantage caused by the railroads' fractured pattern of territorial alignments is severe. Pointing to the extensive amount of interlined rail traffic, the Task Force on Railroad Productivity properly characterized the corporate structure of the railroads as "Balkanized."[3] In noting that this Balkanization phenomenon adversely impacts individual carriers, both by preventing them from developing and expanding their traffic base as well as by inhibiting their ability to expedite existing shipments efficiently, the Productivity Task Force called attention to a fundamental irony:

> Balkanization handicaps the railroads most in handling long, inter-regional shipments that must be interchanged between two or more railroads. Yet the comparative advantage of the railroads and their greatest traffic potential is in just this type of traffic.[4]

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[1] AAR, 1980 Schedule C.

[2] Interstate Commerce Commission, Freight Commodity Statistics (Calendar Year 1979).

[3] Task Force at 238.

[4] Id. at 274.

It is this contrast between the physical or geographic configuration of the railroads, on the one hand, and the markets which they can best serve, on the other, that led the Task Force to conclude that "[t]he railroad industry and its regulators should turn ... to market considerations in developing a proper merger strategy."[1] The Commission's explicit indictment of Balkanization in its recent BN-Frisco decision -- as a roadblock to development of single-line service, innovative ratemaking, development of new shipper markets, and other public benefits -- is an encouraging sign that the value of just such a strategy has been recognized.

The Shipper Benefits of Single-System Service

That Balkanization has a serious negative effect on both the day-to-day operations of the railroads and on their longer-term financial and investment strategies is hardly open to question. Usually when railroads interchange traffic, total handling costs are increased and service quality is impaired relative to the potentials offered by single-system service. Higher operational costs (car switching, yard crews, and the like) and additional administrative outlays (waybill processing, allocation and settlement of claims, etc.) are inevitably incurred as a consequence of interlining.

Of equal if not greater importance are the detrimental effects on service. While a loss in transit time is often the most obvious consequence of interlining, quality of service is also negatively affected because the originating carrier, losing control of the shipment after interchange, is circumscribed

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[1] Id. at 257.

from taking any action to assure its prompt delivery to the ultimate receiver. DOT has described these "negative effects" succinctly:

> Use of multiple railroad handlings for a significant portion of rail traffic ... has a number of negative effects. Since no single company can control a shipment from beginning to end, service reliability is unsatisfactory [and] [t]ime delays result from poorly coordinated operations....[1]

The effect of the instant consolidations should be to minimize and overcome this sort of friction and to concentrate on maximizing the benefits of single-system operation.

The inability of the railroads to offer adequate single-line service deprives them of an attribute highly prized by shippers. Research conducted by the Rail Services Planning Office (RSPO) indicates that shippers, who increasingly are emphasizing speedier and more reliable deliveries as a way of controlling their logistical costs and/or their total productions costs, will elect single-line over multiple railroad service more than nine to one. Indeed, "[shippers] emphasized that end-to-end mergers and single-line control could produce the same benefits enjoyed by motor and water carriers; namely, relatively little intramodal interchange."[2] This is crucial to full development of new market opportunities for the railroads and for their shippers.

Shipper frustration with the rail industry's poor car supply record -- a logistical problem exacerbated by the frequency of interlining and the resultant loss of assured scheduling -- is well-illustrated by this complaint:

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[1] Prospectus at 54.

[2] RSPO Final Report at 31. Emphasis supplied.

> Of the many activities of an industrial traffic manager, the most irksome, frustrating and aggravating is arranging a supply of empty rail cars for company use. I can unequivocally state that not one of Westvaco's numerous shipping points--plants, factories, warehouses, or whatever--not one of them receives all the cars it needs all the time. Not one. It is equally and unfortunately true that not even most of the installations receive most of the cars they need most of the time. The alternative again is usually trucking, and it is routinely feasible to make arrangements with the types of truck carrier mentioned earlier [irregular route common, contract, and private carriers] that are readily available and will provide a dedicated fleet of trucks and trailers.[1]

To correct this critical deficiency and thereby aid in establishing more competitive rail service, single-system control over equipment and scheduling becomes vital.

Similarly, a major reason for the failure of TOFC/COFC to achieve its theoretically potential benefits is the inability of a railroad participant literally to assume total responsibility for a shipment from shipper to receiver:

> TOFC service is a complex business with many participants who, at times, have conflicting interests. In addition, few participants depend entirely on TOFC for their major source of revenue, and at times this line of business is subordinated to others. The result of this complex series of interrelationships is often an uncoordinated, uncontrolled transportation service, highly prone to failure.[2]

The coordination problems involved in integrating the rail and truck elements of an intermodal movement are greatly compounded by the presence of multiple rail carriers.

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[1] Cited in Whitehurst at 101. See also RSPO Service Study at 38.

[2] Transamerica Interway, Piggyback: The Efficient Alternative for the 80's (March 1980) at 21.

It is the perceived inability of the railroads to provide adequate control over interline movements that so frustrates shippers:

> Another benefit to shippers would be the ability to control and trace shipments through one railroad where the shipments are being handled in single-line service. Shippers are attracted to a sole source of carrier responsibility for loss and damage, along with single carrier responsibility for expediting shipments when necessary.[1]

In contrast, one telephone call to a trucker is all it takes to assure complete control of a movement by motor carrier; as detailed in Part III, shippers have been selecting this alternative in droves for many years, even when it has meant paying higher rates.

The availability of single-system service also often spells the difference which enables shippers to expand into new markets, particularly when the possibility of extending into new regions is at issue.[2] Single-system responsibility -- to a profit oriented shipper which is sensitive to the requirements of its customers as well as its own needs -- frequently means the likelihood of tighter control over the availability and condition of equipment; over schedule frequency, routing, rerouting, and switching; and over adjustments for seasonal or other special demands. Interline partners find it hard to compete on this basis, regularly and broadly, with single-system carriers. Shippers inevitably select single-system alternatives, a point compellingly established in testimony presented by Cargill, Inc., a shipper of agricultural commodities with major regional, national, and international transportation requirements:

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[1] Burlington Northern Inc.--Control and Merger--St. Louis-San Francisco Railway Company, 360 I.C.C. 788, 940 (1980). See also CSX Decision at 29.

[2] See, for instance, Verified Statements of Charles W. Hall, Corporate Director of Transportation, Armco, Inc., NWS App. Volume 1C, and J. D. Middleton, General Partner, Genex Terminal Co., NWS App. Volume 1C [hereafter Middleton V. S.].

> [E]xperience has taught us that the reliability of rail service, the sensitivity to our particular needs, is better and more disciplined over single line or single system routes than over routes of non-affiliated carriers. We attribute the distinctions we have drawn over time as the nature of the system rather than neglect in any individual segment of the rail industry.
>
> [W]e have concluded that even the best of historic rail service is inadequate for some of our needs. Therefore, we have often been required to opt for trucks -- a conscious decision to pay a premium price in many cases for a reliable service.
>
> [I]t is not unreasonable to expect dedicated single system railroad service--unit train or otherwise--to produce more reliable service. This in turn will provide Cargill and its competitors with more confidence to reduce their reliance on trucks, to reduce their inventory costs, and to risk capital more willingly in rail oriented facility expansion....[1]

With interlining so widespread, it cannot be lightly dismissed as an occasional or trivial matter which can be more or less routinely resolved through cooperative arrangements of one kind or another.

As in any industry, individual railroads do not necessarily have the same commercial, financial, or operating objectives at the same points in time. One may be seeking to expand service aggressively at a time when another -- a key connection, say, faced with immediate cash flow problems -- has decided to retrench a bit, defer some equipment and plant maintenance, and reduce expenses. Both carriers may be exercising good judgment from their respective points of view, but the former's expansion plans will be seriously eroded and the targeted traffic probably lost.

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[1] Verified Statement of James C. Springrose, Union Pacific Corp., Pacific Rail System, Inc., and Union Pacific RR Co.--Control--Missouri Pacific Corp. and Missouri Pacific RR Co., et al., Finance Docket Nos. 30000 and 30000 (Sub-No. 1), Verified Statements of Shippers in Support of Applications (September 15, 1980) [hereafter PRSI Shipper Statements], Part 1, No. 4 at 6-7.

Shippers repeatedly attest to the impossibility of consistently overcoming practical interlining problems, even among well-managed railroads. The following, for instance, is a revealing statement in this context:

> As a purchaser of transportation for over thirty years, I have experienced many frustrations that can be traced to the fact that our Nation's rail transportation system involved many individual railroads. The need to negotiate with each one for the desirable service, equipment, and equitable cost, quite often defeated the most skilled of operators and resulted in poor assets utilization.[1]

It is not always clear why interline arrangements cannot be negotiated among carriers and, in turn, by them with a shipper. The Southern Hardwood Traffic Association (SHTA) has cited the example of a shipper seeking a joint-line rate for moving veneer from Indiana to Virginia. The originating carrier wanted to restrict the rate to 50 foot box cars or less (or raise the rate for longer cars to a point at which the traffic would not move). The terminating carrier wanted to use longer cars. Since the two carriers could not agree, the railroads did not move the traffic. As the Vice President of SHTA has stated: "It is always difficult getting two carriers whose interests are not identical to act and speak with one voice. Yet, unless the carriers, party to a route, are in agreement, there is little for us to negotiate."[2]

Even when cooperative interline arrangements are established by railroads they frequently cannot be sustained for any length of time. Metals Engineering Co. of Greenville, Tennessee, emphasizing the importance of reliable service,

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[1] Clement V. S.

[2] Verified Statement of Paul G. McQuiston, NWS App. Volume 1C [hereafter McQuiston V. S.].

has testified about the failures of cooperative arrangements short of single-system service:

> [O]ver the long term, reliability is not maintained on joint-line movements even when run-through trains or other attempts at "coordinations" are made. Thus, for example, MECO relies mainly on truck for movement of its goods to the Chicago area. This traffic would be a prime candidate for diversion to rail if reliable, single-system service is made available. However, MECO is not about to divert this traffic to any so-called "coordinated" joint-line haul.[1]

Evaluating its unsatisfactory experience with joint-line rail service, and a subsequent switch to private and common carrier trucking, Magnavox reached a harsh conclusion:

> We would not even consider returning to TOFC for this traffic unless a reasonably direct, single-system route were available. We have been burned before by unreliable joint-line service, and we don't believe cooperation or coordination between two railroads can be an adequate substitute for single-system service over the long term.[2]

Similarly, Norwich-Eaton Pharmaceuticals gave up on rail service between its facilities at Toledo and Chicago in the North and Greenville, South Carolina in the South, and switched to single-system motor carriers, because of "the vagaries connected with interline or multiple line rail services."[3]

The fact is that, on a single-system railroad "carrier responsibility is more centralized; this facilitates services like car tracing and increases carrier incentives to provide good service (since the effort can't be negated

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[1] Austin V. S. See also Verified Statements of William A. Brandt, President, Lafayette Coal Company, NWS App. Volume 1C, and Kenneth S. Fletcher, Director of Corporate Traffic and Transportation, Volkswagen of America, NWS App. Volume 1C [hereafter Fletcher V. S.].

[2] Coyne V. S. See also Verified Statements of John E. Harvey, Vice President, Bartlett Agri Enterprises, Inc., NWS App. Volume 1C [hereafter Harvey V. S.], and Van L. Hayes, Southern Company Services, Inc., NWS App. Volume 1C.

[3] Verified Statement of Vincent E. Gallagher, Director of Physical Distribution, Norwich-Eaton Pharmaceuticals, NWS App. Volume 1C.

by the poor performance of others)."[1] The critical factor is control and the ability to exercise it independently in the service of demanding shippers:

> The principal advantage that single-system service has in common with single-line service is that it places responsibility for service with a single company. With only one enterprise responsible for the movement, the customer knows to whom to address complaints. The carrier will have a greater incentive to provide better service because it will know that its efforts to improve service will not be thwarted by other non-affiliated carriers participating in a joint-line haul.[2]

On interline movements, too many things can and do go wrong: "As a result of ... dependence on multicarrier rail transportation, ... shippers regularly encounter difficulties in obtaining agreement among the several competing carriers on transportation plans, delays due to interchanges, and problems with accountability and reliability resulting from the inability of any one carrier to handle the entire shipment."[3]

Even unit train efficiencies can be compromised on interline movements, a point developed in testimony by Union Electric Co. of St. Louis, a large utility system which relies on unit trains for large-scale coal deliveries:

> [A] unit train is really not much different than any other train consist when several different carriers are involved in its movement. Delays at interchange points can occur, and coordination between carriers is often a problem. Where a single carrier or a single system is responsible for the entire move, however, these problems can disappear.[4]

In a similar vein, the <u>future</u> prospects of inconsistent or contradictory corporate policies arising among partners after a service has been instituted is a serious risk factor inhibiting the development of innovative interline

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[1] Verified Statement of Lee I. Sparling, <u>CSX Corporation-Control-Chessie System, Inc. and Seaboard Coast Line Industries, Inc.</u>, Finance Docket No. 28905 (Sub-No. 1) et al. at 47.

[2] CSX Decision at 29. See also <u>id.</u> at 30.

[3] Verified Statement of A. Krygsman, Port Director of the Port of Stockton, PPSI Shipper Statements, Part 1, No. 21 at 2.

[4] Verified Statement of Maurice E. Gatewood, Vice President, Union Electric Co., <u>id.</u>, Part 2, No. 59 at 2.

service. Prudent rail managements must be concerned about major up-front financial investments or commitments of physical and personnel resources to any project which is subject to substantial control or influence by an independent party if the project is to be successful. Therefore, innovative interline arrangements (such as run-through service) are likely to be made -- even when railroad philosophies appear compatible -- only when the prospects for mutual profitability are exceptionally high. Conversely, where such prospects are only moderately attractive, interline arrangements will be made only if they require modest commitments on the part of both railroads. This represents rational economic behavior on the part of independent firms -- virtually a form of opportunity cost analysis made by each firm -- but is a suboptimal result from the perspective of the rail network as a whole. However, since independent firms are quite properly the decision-makers in a private rail network, the prospect that interline arrangements can substantially overcome the inhibitions of Balkanization is simply illusory.

It is an awareness of these facts which underlies widespread shipper support for railroad restructuring, as in the case of the following statement endorsing the CSX merger specifically and rationalization of Class I railroad systems generally:

> An important part of the restructuring ... [in my opinion] is a reduction in the number of business entities that make up the railroad system, particularly by merging or otherwise combining the number of so-called Class I railroads (approximately 55) into substantially fewer than their present number. The proposal of Chessie and Seaboard Coast Line Industries into CSX Corporation ... would place a common management over what are basically "Eastern Territory railroads" (Chessie) and "Southern Territory railroads" (Seaboard). That kind of restructuring could implement an elimination of the "balkanized"

> territorial structure of the industry, a structure that neither enhances the public benefit nor facilitates the internal relationships of the industry....
>
> Our support for the CSX proposal is not unique to it but rather is support for a restructuring of the large (Class I) railroads into smaller numbers particularly where a major inter-territorial system is one of the results.[1]

The "Watershed" Problem

From the standpoint of marketing and traffic solicitation in particular, the fragmented structure of the industry inhibits competition. Given the loss of responsibility and control associated with interlined traffic, railroads quite understandably lack the incentive to undertake marketing initiatives in areas beyond the geographical confines of their own track network. The most severe marketing constraint -- denominated by the Rail Services Planning Office as the "gateway watershed" problem[2] -- is encountered where an origin or destination point of one rail carrier is located close to its interchange point with another railroad. Since the carrier serving the site near the gateway receives only the short-haul of what might be a considerable long-distance movement, its share of a competitive rate may be insufficient to warrant its participation even though as a whole the revenue could be remunerative. Quite apart from revenues, as discussed in the testimony of Southern Railway witness Kreyling, factors such as a given movement balancing the traffic flows of one of the potential interline partners but increasing an imbalance for the other can prevent mutual agreement. In any event neither the short-haul nor the long-haul

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[1] William K. Smith, Vice President and Director of Transportation, General Mills, Inc., Comments of General Mills, Inc., CSX Corp.--Control--Chessie System, Inc. and Seaboard Coast Line Industries, Inc. (April 2, 1979) at 2-3.

[2] RSPO Final Report at 32.

railroad benefits from the traffic and the shipper turns to another mode or form of transportation.

While it sometimes has been suggested that the "watershed" problem can be overcome by revised interline revenue divisions, this view does not stand the test of proper economic theory. The marketing resources of a railroad company must be treated as scarce economic resources to be devoted to maximizing the profits of the firm as an independent entity. If a railroad has alternative single-line traffic opportunities on its own line which are moderately profitable -- say, hypothetically, a 5 per cent profit on a 600 mile haul with a $1,000 tariff, or a profit of $50 per carload -- there may be no division which would persuade it to devote resources to developing a short-haul interline move and still leave a reasonable profit for its long-haul partner. For example, if the interline move involved a 600 mile-$1,000 haul with a seven per cent overall profit -- or $70 profit -- the long-haul carrier might have to share five-sevenths of that profit with the short-haul carrier (the $50 which could be obtained from alternative traffic) as an incentive to develop the move. The $20 remaining to the long-haul carrier would be equivalent to a mere two per cent profit on any alternative $1,000 move on its own lines, and would be a strong incentive for that carrier to concentrate on developing such other traffic, even at three, four or five per cent profit levels. Thus despite the possibility that the interline movement could generate a greater percentage profit than single-line alternatives, the independent profit strategies of the potential interline partners may prohibit its development. This is particularly so since the marketing and other management resources entailed on the part of both railroads in developing joint-line traffic are likely to be greater than for single-line alternatives due to the necessity for inter-railroad negotiation and coordination.

The geographic juxtaposition of the SRS and NW presents a classic example of a system-to-system watershed problem. The NW is basically an east to west railroad located in part just about at or near the boundary separating Official Territory from the South; SRS is heavily oriented to north to south traffic flows. As a consequence, NW has been concerned principally with maximizing its long-hauls to and from the West and East while SRS looked to north-south traffic.[1] The incentives for carriers with such diverse traffic patterns to work closely together in areas where their systems are contiguous have been slim, for reasons well understood by the Commission:

> While many of the service benefits are at least theoretically possible without consolidation.... [t]here is a limit to what two independent railroads will agree upon in service improvements. Each railroad generally seeks to obtain its own long haul, to maximize its own earnings, and to be in charge of a movement.... [T]hese considerations inhibit the establishment of cooperative services between railroads.[2]

An important north-south shipper (Union Camp) directly affected by this situation in the NWS service area has described it in these terms: "A historical bias in the rail structure towards East-West traffic has never facilitated the North-South requirements."[3] Without approval of north-south consolidations like NWS and CSX, Union Camp foresees further deterioration of rail service; with such single-system carriers, it anticipates a significant enhancement of its marketing capabilities.[4]

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[1] The carriers effectively reflect the pattern discussed earlier in aggregate terms; namely, lower southbound rail shares of traffic from northern points relative to originations of northbound traffic by southern carriers. See Part III, p. 46 and 70-72, below.

[2] CSX Decision at 31.

[3] Deehan V. S.

[4] Ibid.

The widespread incidence of watershed inhibitions is further illustrated by the substantial annual savings in car-miles and ton-miles which can be achieved by re-routing of traffic -- north-south and east-west -- made possible by the combination of SRS and NW. Applicants' operating plan discusses these savings in considerable detail.

Service under single-system control is superior to joint-line run-through train service; contract rate-making creates serious strains for interline partners; and significant divisions agreements are in practice very difficult to negotiate, especially in watershed situations, because the agreement "must take into account not only the actual costs of delivering the traffic, but also the opportunity costs of foregoing possible movements over other routes which would give the carrier its longest haul and possible greater control over its own car fleet."[1] The economic, financial, and operating realities of railroading place very practical constraints on the capability of cooperative agreements to achieve the efficiencies and service quality inherent in single-system railroad operation. Moreover, as discussed in Part V, the rapid deregulation of motor carriers and the nature of the more limited changes recently authorized in modifying rail regulation make attempts to compete through greater cooperation even more marginal.

The testimony of applicants and shippers in this proceeding provides numerous examples of the watershed problem and other deficiencies of interlining. The modal share data discussed earlier in Part III, which showed lower southbound rail shares, have also illustrated the powerful effect of

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[1] CSX Decision at 31, note 29.

Figure 31

RAIL TRAFFIC SHARES IN SELECTED
NORTH-SOUTH CORRIDORS: 1978

Traffic Between 12 Southern BEA's* And:	Average Per Cent of Traffic Moving By Rail**	
	Southbound (Short-Haul For Originating Carrier)	Northbound (Long-Haul For Originating Carrier)
Philadelphia, Pa.	29.0	40.7
Harrisburg, Pa.	33.8	44.0
Baltimore, Md.	32.9	45.0
Lafayette, Ind.	29.9	37.0
Indianapolis, Ind.	16.3	24.8
Anderson, Ind.	10.8	20.6
Dayton, Oh.	15.3	49.7
Columbus, Oh.	21.7	57.8
Pittsburgh, Pa.	36.3	55.6

* Charlotte, N.C.; Asheville, N.C.; Greenville, S. C.; Columbia, S.C.; Florence, S.C.; Charleston, S.C.; Augusta, Ga.; Savannah, Ga.; Macon, Ga.; Columbus, Ga.; Atlanta, Ga.; Birmingham, Ala.

** Simple average of per cent moving by rail between the named northern BEA and each southern BEA above.

Source: Reebie Associates, Inc., Summary Terminal Area Reports (September 1980).

these phenomena. Southern Railway witness Duncan presents data which demonstrate the advantages in north-south grain traffic enjoyed by single-system carriers as compared to an interline-dependent carrier like SRS. Similar evidence was submitted in the CSX proceeding; for example, the testimony of Continental Grain Co. regarding the necessity of single-system delivery to make its interline-dependent Taylorville, Illinois soybean facility competitive in Southeast consumer markets and at Southeast ports.[1]

The watershed problem therefore is not a mere theoretical construction, but rather is strongly evident in the extant traffic patterns and experiences of the railroads. A further statistical appreciation of the watershed problem may also be gained from available data on modal traffic shares in specific north-south corridors, as reflected in Figure 31.

The Figure examines rail traffic share percentages between nine northern BEA's which lie just beyond the reach of the southern rail carriers and twelve BEA's in the heart of the Southern and Family Lines service territories. In total the Figure is based on 108 southbound BEA-to-BEA traffic corridors and an equal number of northbound corridors -- hence, a substantial volume of traffic and a considerable variety of discrete commodity movements is reflected. For southbound traffic from the designated northern BEA's, most rail traffic will move only a relatively short distance over the originating carrier to the nearest gateway interchange point and then be carried by either Southern or Family Lines to its destination. For northbound traffic from the designated southern

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[1] Verified Statement of Rodman Kober, Corporate Vice President-Transportation, F.D. 28905 (Sub-No. 1f) (April 16, 1979) at 5.

Figure 32

SOUTHERN AND FAMILY LINES TRAFFIC
REVENUES BETWEEN ILLINOIS AND
OHIO AND SOUTHEASTERN STATES

	Illinois		Ohio	
	FL	SOU	FL	SOU
Alabama	10,439,044	6,371,775	7,775,491	7,211,171
Florida	31,197,069	5,288,559	16,549,795	6,758,428
Georgia	16,004,405	17,940,387	8,072,407	24,704,646
North Carolina	5,984,087	9,435,620	5,158,517	10,004,397
South Carolina	3,263,058	3,219,983	3,299,727	4,128,611
Tennessee	9,887,010	7,343,548	7,774,889	6,309,514
Total	76,774,673	49,599,872	48,630,826	59,116,767

Source: Finance Docket No. 28961 (Sub-No. 1),
Southern Exhibit 12.10.

BEA's, however, either Southern or Family Lines would have a substantial haul from the origin to the gateway interchanges before passing the traffic to a northern carrier for short-haul delivery. If the watershed theory is valid the rail carriers serving the northern BEA's would have considerably less incentive to develop southbound traffic than would carriers serving the southern BEA's in developing northbound traffic. One would expect, therefore, that between these selected BEA's southbound rail shares should be significantly lower than northbound rail shares.

In fact, this is precisely what Figure 31 demonstrates. In every example, the average southbound rail share is lower than the reverse flow. The highest southbound average rail share from any of the nine northern BEA's affected by the watershed situation is 36 per cent, whereas rail shares for the reverse flows are above 36 per cent in seven of the nine cases. Moreover, the northbound versus southbound rail share differences are substantial, and in the cases of traffic to and from both Dayton and Columbus quite dramatic. Given the uniformity of these results across a substantial variety of corridors and commodity flows, the data lend strong support to the proposition that the railroads are less effective competitors for southbound traffic involving these BEA's. The economic disincentive faced by a short-haul originating carrier is the most obvious and logical explanation for these results.

The Importance of Single-System Service in Overcoming Balkanized Route Structures Is Illustrated By Family Lines' Services Between Chicago and the South

The practical importance of single-system service capabilities is underscored by the example of Family Lines' key route from Chicago to the South. Figure 32 compares Family Lines and SRS traffic involving Illinois and Ohio.

Figure 33

AS INTERLINING CARRIERS SOUTHERN AND NW ARE FACING SUBSTANTIALLY INCREASED SINGLE-LINE COMPETITION FROM BOTH RAIL AND MOTOR CARRIERS

	1970		1980	
Selected City-Pairs	Single-Line Rail Options	Single-Line Motor Carrier Options	Single-Line Rail Options	Single-Line Motor Carrier Options
Chattanooga-Columbus	None	9	CSX	12
Chattanooga-Detroit	None	7	CSX	8
Knoxville-Toledo	None	6	CSX	8
Knoxville-Chicago	L&N*	5	CSX	11
Raleigh-Ft. Wayne	None	3	None**	12
Raleigh-Chicago	None*	8	CSX	17
Greensboro-Buffalo	None	10	None**	14
Greensboro-Cleveland	None	14	None**	17
Charlotte-Cleveland	None	14	CSX	17
Charlotte-Chicago	None*	10	CSX	18
Atlanta-Columbus	None	14	CSX	23
Atlanta-Cleveland	None	17	CSX	23
Birmingham-Toledo	None	4	CSX	12
Birmingham-Detroit	None	5	CSX	10
Charleston-Columbus	None	9	CSX	15
Charleston-Buffalo	None	6	CSX	11
Jacksonville-Ft. Wayne	None	None	None**	6
Jacksonville-Chicago	None*	5	CSX	11

* Seaboard Coast Line completed acquisition of Louisville and Nashville stock and L&N merged the Monon Railroad into its system in 1971, expanding single-line access to and from Chicago as of that year.

** CSX does not reach Ft. Wayne or Greensboro directly but reaches stations in near proximity to both cities.

Source: Railroad Service Maps and Figure 17.

It can be seen clearly that Family Lines earns significantly larger revenues than Southern between Illinois and the South, traffic flow corridors in which Family Lines provides single-system service and SRS is dependent on interlining. The Figure also shows, however, that on flows between Ohio and the South -- where each carrier is dependent on interlining traffic through Cincinnati -- the relationship is far more evenly matched.

Family Lines' advantage in the Illinois to Southeast corridors, as expressed by the data on comparative revenues, reflects two aspects of single-system service: first, as the Commission concluded in CSX, these "market shares [are] an indication that shippers prefer single-system to interline service,"[1] and second, the longer-haul available to Family Lines (i.e., on a given haul SRS must share revenues with an interchange carrier, but Family Lines would receive all, or a larger portion of, the revenues because of its more extensive system). Thus, Family Lines' prominent position in Illinois north-south traffic is a result of both the attractiveness of single-system service and the greater reach of the system per se.

Competitive Advantages of the Single-System CSX

The CSX affiliation will, of course, result in the extension of Illinois-type situations to many more north-south traffic corridors. Indeed, Figure 33 shows rather dramatically the impact of CSX on eighteen major city pairs served by SRS or NW. Prior to approval of the CSX consolidation, only one of these corridors received single-system rail service. With approval, CSX reaches fourteen of them directly and has stations in close proximity to the remaining

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[1] CSX Decision at 42.

four. The Figure also demonstrates, for comparative purposes, the impressive gains in single-system motor common carrier options in these corridors between 1970 and 1980. (These figures are significantly understated because they do not include the rapid growth of private, exempt, and specialized trucking.)

Southern Railway and Norfolk & Western can expect to lose traffic to CSX as a result of the traffic diversion potential of single-system service.[1] It can be anticipated that the newly-merged CSX system will give greater attention to previously divided corridors and conduct traffic development more aggressively in the pursuit of maximizing total system revenues. On the other hand, carriers which remain dependent on interlining over the same corridors are equally likely to retain a sub-optimal marketing perspective and tend to pursue profit maximization elsewhere. However rational that decision might be from a business point of view, it would not necessarily be in the best long-run interests of shippers. They would benefit more if, via establishment of NWS, a single-system alternative were created to offer head-to-head competition on a comparable basis.

Analysis of shipper statements submitted in this proceeding reveals that many indeed are concerned about a CSX monopoly over single-system rail services in the region and welcome the competitive response which the NWS proposal represents.[2] Fearing undue dependence on CSX, one of them has summarized the situation as follows:

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[1] Absent unification, NW and SRS have estimated their diversion losses from consolidations approved by the Commission to be approximately $120 million at 1979 traffic and revenue levels.

[2] See, for instance, Middleton V. S. and Fletcher V. S.

> If there was only the CSX as a single line North-South rail system, its operating efficiencies would soon capture additional business activity to the detriment of both the Norfolk and Western and the Southern Railway. It is important ... that we do have available the services of the NWS system to compete with CSX as well as Conrail.[1]

Several shippers have flatly stated that given a choice between CSX and alternative joint line service, they will predominantly select the former[2] -- each, of course, would much prefer a competitive single-system NWS alternative.

The net effect of approval of CSX is to intensify for NW and SRS, and their shippers, the deficiencies inherent in Balkanization, in watershed situations, and in continuing dependence on interlining. Furthermore, from a competitive point of view, these deficiencies will become an even greater handicap given implementation of many of the new provisions of the 1980 Rail Act. As is discussed in Part V, realization of the most important flexibilities in the new Act is much more likely to occur on extensive single-system networks than on those dependent on interline arrangements.

Other Disadvantages of Territorial Fragmentation

Viewed over a longer-range perspective, Balkanization also distorts railroad investment decisions and attenuates marketing efforts. In an effort to minimize costs, individual railroads naturally find it in their interest to utilize rolling stock in a way that may be less than ideal from the perspective

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[1] Deehan V. S. See also Verified Statements of Phillip C. Yeager, President, Hub City Terminals, NWS App. Volume 1C; John L. Mesker, Traffic Manager, Standard Oil Co., NWS App. Volume 1C; William A. Brandt, President, Lafayette Coal Co., NWS App. Volume 1C; Ray Carter, Vice President, Ralston Purina, NWS App. Volume 1C; Robert L. Graves, Director of Traffic, Growmark, Inc., NWS App. Volume 1C; Joseph Murphy, Vice President, Murphy Motor Express, NWS App. Volume 1C; Joseph B. Dempster, Director of Traffic Distribution, R. J. Reynolds Tobacco Co., NWS App. Volume 1C; and E. Morgan Massey, President, A. T. Massey Coal Co., NWS App. Volume 1C [hereafter Massey V. S.]

[2] See, for instance, Clement V. S.; Johnpeter V. S. and Verified Statement of George T. Reaves, Director of Traffic and Transportation, Collins and Aikman Corp., NWS App. Volume 1C [hereafter Reaves V. S.].

of the rail industry as a whole. Uncoordinated responses by different carriers inhibit the productive use of both available equipment and of modern computerized scheduling, car identification, car locator, and car control systems, with the ultimate effect either of requiring additional investment from all-too-limited capital budgets or putting up with inadequate equipment availability, poorer service to shippers, and a less than optimal scale of operations. Conversely, full control over cars and locomotives can result in faster transit times, reduced turnarounds, enhanced use of a carrier's heavy investment in equipment, greater equipment availability for shippers, and the introduction of standardized fleet and plant maintenance programs. Railroad company Balkanization thus artificially limits full and effective utilization of expensive railroad assets at a time when -- given high inflation and interest rates -- every possible effort must be made to maximize asset potential. Moreover, Balkanization slows realization by the railroad industry of the potential benefits inherent in the most advanced technology.

Shippers, too, are affected over the long-term by territorial fragmentation. In particular, shippers are very alert to transportation factors when choosing sites for new plant investment. It is well-established that access to single-system transportation services is a major criterion in their selection process. Consequently carriers dependent on interlining are definitely disadvantaged.

A. E. Staley has testified in this proceeding that its decision to invest in a new plant in the NWS service area was based on anticipation of approval of the proposed unification.[1] Adolph Coors Co.,[2] A. T. Massey Coal,[3] and

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[1] Verified Statement of Reeder C. Miller, Director of Corporate Transportation, NWS App. Volume 1C [hereafter Reeder Miller V. S.].

[2] Verified Statement of John Betz, Director of Transportation, NWS App. Volume 1C.

[3] Massey V. S.

Cargill, Inc. [1] also have testified at some length about the importance of reliable single-system service in making plant location decisions. Thus in the highly important competition to attract new shipper investment the Commission's CSX Decision automatically carried with it an intrinsic benefit for the merging Chessie System and Family Lines' carriers. In fact, extensive railroad restructuring actually will generate a form of longer term national competition among railroads as shippers ponder where to locate their next generation of plant or other traffic generating facilities, taking total demographic, economic, materials supply, marketing, financial, and transportation considerations into account. The ability of the Southern Railway System and Norfolk & Western to compete effectively on this dimension with CSX and with other merged or merging systems will be compromised absent approval of the NWS application.

Summarizing all of these constraining factors with the observation that "the railroads are not developing the potential market in long-haul freight and are not serving the existing long-haul market with maximum efficiency," the Task Force on Productivity placed fundamental blame on "the corporate structure" of the industry and "the effect of the structure on the industry's behavior and performance."[2] Only if the railroads are restructured in a way that will permit them to break out of their historic, limited confines can they position themselves to provide shippers with the type of longer-haul single-system service offered by the other modes and the Nation with an effective rail transportation system in the private sector.

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[1] PRSI Shipper Statements, Part 1, No. 4 at 5-7. See also Verified Statement of the Pillsbury Company, id., Part 1, No. 18 at 4-7.

[2] Task Force at 246.

V

DEREGULATION: A REVOLUTIONARY CHANGE IN TRANSPORTATION

The proposed unification is the first consolidation application submitted to the Commission since enactment of both the Motor Carrier Act of 1980[1] and the Staggers Rail Act of 1980.[2] The two pieces of legislation represent fundamental breaks with the past, particularly the former. It is commonly accepted that the modifications made in the economic regulation of the railroads are much less liberating and much more ambiguous in their outcome than the relatively clear-cut, comprehensive, new freedoms and flexibilities specified in the Motor Carrier Act (or those granted to air cargo and passenger carriers in the Airline Deregulation Act of 1978).

The strong trend to less regulation in transportation represents a revolutionary change in the transportation marketplace. Old rules of the game are being swept away, new commercial and competitive relationships vis-a-vis shippers and other transportation firms are being formulated, and a freer market -- with its uncertainties, efficiencies, and penalties -- is in the process of defining itself in the transportation sector of the economy.

The impact of these developments on the railroad industry and the national rail system -- Chairman Gaskins has said that it "is literally falling apart"[3] -- is crucial. In this context, the relationship of

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[1] P.L. 96-296 [hereafter 1980 M. C. Act] was enacted July 1, 1980.

[2] P.L. 96-448 [hereafter 1980 Rail Act] was enacted October 14, 1980.

[3] Darius W. Gaskins, Jr., Remarks before the American Mining Congress (May 6, 1980) at 1.

transportation deregulation and the merger movement in railroading is of acute relevance and warrants careful examination.

In this Part, I shall establish that the Motor Carrier Act of 1980 has effectively unleashed the full force of the efficiencies and strengths of single-line/single-system motor carriage, thus greatly intensifying competition within the trucking industry and concomitantly generating powerful incentives to truckers to seek more traffic from railroads (and to retain the substantial shares of traffic which they have won in the post-war period). I concur fully in the observation that "the 1980 Motor Carrier Act is going to break the old regulatory psychology wide open."[1]

Next, it will be seen that the somewhat more limited and circumscribed changes in rail regulation have created, at least in theory, a zone of relaxation from restrictions whose potential benefits -- for shippers and railroads alike -- can only be significantly gained through application by single-line or single-system railroad networks. As developed above in Part IV, however, the national rail system in fact is now characterized by extensive Balkanization. This inherited structural fact of life will significantly inhibit full realization of the potentials of the 1980 Rail Act. If these inhibitions are to be alleviated, rail consolidation becomes a logical imperative.

Finally, the range of exemptions and relaxations contained in the 1980 Motor Carrier Act promise to widen even further the comparative advantage -- in terms of freedom from regulation -- which motor carriage has long enjoyed

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[1] Gaskins, CCC at 5.

relative to railroads. As a result of the new legislation this regulatory gap has been widened, rather than reduced or even held constant, and absent rail realignment its effects will be detrimental to the railroads (and ultimately to shippers as competitive rail alternatives are weakened). Again, single-system rail networks capable of maximizing the relaxations of the 1980 Rail Act stand the best chance of compensating for the regulatory gap and offering effective competition to single-system trucking and barge operations.

The Motor Carrier Act of 1980 Strengthens the Single-System Characteristics Inherent in Trucking

The goal of the Motor Carrier Act of 1980 is to maximize competition in a free market setting. As the President said in signing the bill:

> The heart of the Motor Carrier Act of 1980 is its call for prompt and sweeping change of the regulations that have insulated the trucking industry from competition since 1935....
>
> The [Act] will bring the trucking industry into the free enterprise system, where it belongs....
>
> [T]he purpose of the legislation is clear: protective and wasteful regulations are to be replaced wherever possible by competition and the discipline of the free market.[1]

The operative words are "competition" and "marketplace," and the Act does an admirable job of casting away many of the barriers to free market competition which had been established in 1935 and subsequent years.

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[1] The White House, Statement by The President (July 1, 1980) at 1-2. See also House Rep. No. 96-1069, 96th Cong., 2nd Sess. (1980) at 12.

> The significance of this legislation for our motor carrier transportation system and its users cannot be overestimated.... [T]his bill is meant to return the trucking industry to the competitive marketplace and reduce governmental interference with the business decisions of these companies.
>
> The Act heralds a return to competition in the motor carrier transportation system -- a fundamental shift which will benefit the trucking industry and all those who use its services.[1]

The bold scope of the Act's relaxations and outright elimination of long-sanctioned regulatory controls over trucking is quite startling. Among the myriad changes which it authorizes are fast and simplified entry for common and contract carriers, "to make it easier for new trucking companies to enter the market and existing companies to expand their operations;"[2] greater pricing flexibility; significantly broadened commodity and territorial authorizations; and elimination of route restrictions and "the last vestige of 'gateways' -- common service points that have been in existence for the past 50 years,"[3] in exchange for blanket permission for "any regular-route motor common carrier to use any available routing to serve any authorized points."[4] The Act also provides for encouragement of loaded backhauls; elimination of the rule of eight for contract carriers; much greater

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[1] Darius Gaskins, Jr., Opening Statement at the ICC News Conference on the Motor Carrier Reform Act (July 2, 1980) at 1-2.

[2] Art Pape Transfer, Inc., Ext. -- Commodities in End-Dump Vehicles, 132 M.C.C. 84, 92 (1980).

[3] "ICC Issues Proposed Rules to Eliminate Gateways and Remove Route Limitations for Trucking Companies," ICC News (September 16, 1980) at 1.

[4] Ex Parte No. MC-142, Elimination of Gateway Restrictions and Circuitous Route Limitations, 132 M.C.C. 174, 176 (1980).

scope for intercorporate hauling; shipment of regulated and unregulated commodities in the same vehicle; elimination of restrictions on types ... equipment; increased access to regulated traffic for agricultural cooperatives; liberalized pooling arrangements; and approval of dual operations. Combined, they represent a stunning array of measures for exploiting to the fullest the intrinsic single-system capabilities of motor carriers. The new authorities give truckers a unique opportunity directly to reinforce the single-system attributes which have been so critical to the development of their already considerable competitive prowess.

Implementation of the Act Is Proceeding At a Rapid Rate. The Commission had been urging reduced regulation for many months prior to passage of the new legislation. Not surprisingly it has moved with great diligence to carry out the Act's provisions, starting with the very ambitious implementation program involving over 25 new and modified rulemakings which was announced on July 2, 1980. It is apparent that the trucking industry will be encouraged by the Commission to confront what Commissioner Trantum has called "the stark reality of the marketplace"[1] as rapidly and as completely as possible.

The Commission's intentions are of direct relevance to the railroads because, for instance, Commission reticence in implementation could delay achievement of the goals of motor carrier deregulation or mute their impact. The record to date shows that the trucking industry is being given every conceivable opportunity and inducement to begin exploiting the advantages

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[1] Thomas A. Trantum, Remarks before the Private Truck Council of America (April 11, 1980) [hereafter Trantum, Private Truck Council] at 4.

made available by the Act. The Commission's policy is crystal clear:

> [T]he public interest demands efficient, vigorous competition in the motor carrier industry. This, indeed is the mandate of the Commission....[1]

Expanding upon this "mandate" theme the Commission has said that: "As we read the new legislation, Congress has endorsed our recent initiatives in the area of motor carrier entry [and] has given us a mandate to move even further...."[2]

The direction in which the Commission is moving is unambiguous: maximum freedom of action for carriers and shippers on the broadest possible scale. For instance, as the Chairman has stated, "[i]t is our intention to make all contract carrier permits nationwide in scope, so that [the carriers] will be able to serve new points on demand for [their] customers."[3] The Commission is also seriously considering a significant relaxation of the truckers' common carrier obligation. As Commissioner Trantum has put it: "It makes absolutely no economic sense to free up entry without freeing up the common carrier obligation, and we have that authority."[4] The sweep of the Commission's vision of the transport market and competition is very comprehensive. Arguing in favor of expansive grants of both commodity and

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1 Continental Contract Carrier Corp. Ext.-Modification of Permit, 132 M.C.C. 141, 146 (1980).

2 132 M.C.C. 84, 93 (1980). See also Ex Parte No. MC-142 (Sub-No. 1) Removal of Restrictions from Authorities of Motor Carriers of Property, 132 M.C.C. 114, 116-119 (1980), and Ex Parte No. MC-9 (Sub-No. 1) Filing of Contracts by Contract Carriers by Motor Vehicle (served September 3, 1980) at 2-3.

3 Gaskins, CCC at 2.

4 Cited in Journal of Commerce (October 16, 1980) at 2. See also Reginald E. Gilliam, Jr., Remarks before the Board of Directors of the Common Carrier Conference-Irregular Route (October 14, 1980) [hereafter Gilliam, CCC] at 17.

territorial authority for truckers, for instance, the Commission recently stated that:

> Broad grants of authority ... take cognizance of technological modifications, changing industrial patterns, and future needs, and allow carriers to meet changing needs of shippers and receivers, market demands, and the diverse requirements of the shipping public.[1]

The Commission obviously is seeking to posture motor carriers to respond flexibly to the needs of the economy and of shippers on a long-term basis, and it is encouraging the sort of individualized carrier-shipper, day-to-day relationships which single-system truckers have been developing successfully for years. The basic idea is to have "market conditions compel one carrier to differentiate its rates and service from those of another...."[2] These two concepts: close and rapid interrelations between carrier and shipper, and the ability to adjust to changes in the economy and in transport requirements over time, are of central importance to all transportation companies. The Motor Carrier Act of 1980 has vastly increased the trucking industry's opportunity to put them into practice.

Competition in the Trucking Industry is Intensifying and Generates Additional Competitive Pressure on the Railroads

Already, as a result of the new Act and Commission implementation, motor carriers increasingly are being forced to fight it out more aggressively in the rough and tumble of the marketplace. Current Commission

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[1] 132 M.C.C. 84, 96 (1980).

[2] Thomas A. Trantum, Remarks before the Annual Meeting of the Southern Traffic League, Inc. (September 9, 1980) [hereafter Trantum, STL] at 1.

decisions are replete with references to two controlling decision-making criteria: (1) "a finding of inadequacy of existing service is not an essential condition to a finding of a public need for additional, competitive motor carrier service,"[1] and (2) "injury through competition becomes relevant only where there is a corresponding injury to the public."[2] Thus, as the Commission has argued, even if a protestant suffers "complete diversion of traffic ... and concurrent loss of revenues,"[3] it will not receive regulatory protection absent a commanding demonstration that there is a public loss in addition to the private loss incurred by the carrier. The correct response by the aggrieved carrier, in the Commission's view, is not a resort to regulatory appeals, but rather a reaction to the spur of competition in the form of improved service for shippers at competitive rates.

> [T]he policy of protecting the common carrier ... has been replaced by a policy which fosters, encourages, and enhances competition between carriers and between modes.[4]

Those which cannot respond competitively will fail, or as Commissioner Trantum has stated it: "Let us be frank; the emerging regulatory order, like any commercial environment, will produce its own winners and losers."[5]

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[1] Liquid Transporters, Inc., Ext.--Petroleum Products, No. MC-112617 (Sub-No. 429)F (served July 18, 1980) at 4. Emphasis supplied.

[2] Ibid. See also Liberty Trucking Co., Ext.--General Commodities, 131 M.C.C. 573, 576 (1979).

[3] 132 M.C.C. 84, 98 (1980).

[4] Ex Parte No. MC-9 (Sub-No. 1) at 2. See also Purolator Armored Inc., Ext.--Currency, No. MC-114896 (Sub-No. 73)F, (served July 18, 1980) at 3.

[5] Trantum, STA at 2.

Quite apart from Commission action, of course, trucking companies had begun to position themselves to take advantage of the new legislation well before it was enacted. For instance, just six motor carriers -- important tank carriers -- had almost 700 applications for new operating authority in the queue at the Commission as of mid-May 1980.[1] Many others had carefully developed marketing, pricing, and expansion strategies for use in the new environment.[2] As the Commission has acknowledged, expansion of well-established, highly competitive carriers can be expected to flourish, breaking through a logjam which had restricted some of the most economically efficient and competitive possibilities:

> [P]robably a majority of the applications granted in the last few years were limited either to service at the facilities of a single shipper or to the transportation of a very narrow class of commodities, or both. We have deplored this trend, but have felt compelled by events to accept it.[3]

Now the regulatory environment has been substantially altered, and, as Commissioner Clapp has observed, "[t]he potential for enormous increases in authority exists."[4] This fact has been widely perceived. Over 70 per cent of the operating rights applications now being received at the Commission

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[1] Darius W. Gaskins, Jr., Remarks before the National Tank Truck Carriers (May 20, 1980) at 6.

[2] See, for instance, Business Week (March 24, 1980) at 55; Traffic World (May 12, 1980) at 28-29. New York Times (July 9, 1980) at D1; Traffic World (September 22, 1980) at 31; and Wall Street Journal (October 15, 1980) at 35.

[3] 132 M.C.C. 114, 118 (1980).

[4] Id. at 125.

are unopposed and decisions are being handed down on the average in about 100 days from date of filing.[1]

Consolidated Freightways (CF), the largest regular route common carrier in the United States (and predominantly LTL) has discussed forming new special commodities operations to compete for truckload freight. According to CF's Vice President: "[T]here's going to be a big shift--a battle between irregular route carriers, contract carriers, private carriers and the railroads for truckload traffic."[2] Professor Roberts has spoken of a competitive "death struggle" between TL trucking and the railroads,[3] while Professor Wyckoff has predicted "radical change" in the trucking industry as a result of deregulation and "savage" competition for truckload traffic.[4] A senior executive of Transcon -- a predominantly truckload carrier -- has recently explained one of the reasons why:

> The ICC has been allowing a lot of owner-operators in and made it easier for smaller companies to get into the business. So a lot of freight in the backhaul has shifted to private and contract carriage. That puts more pressure on the general commodities carriers to get TL freight.[5]

The new legislation is also a boon to private trucking -- a major source of rail competition -- in part because of the Commission's policy permitting

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[1] Gilliam, CCC at 12.

[2] Cited in Dun's Review (October 1980) at 131.

[3] Roberts, TRB at 65.

[4] Cited in Traffic World (May 26, 1980) at 45.

[5] Cited in Journal of Commerce (August 7, 1980) at 3.

private carriers to hold common carrier authority and in part because of the increased scope given to intercorporate hauling in the 1980 Act.[1] The following remarks about the future role of Combustion Engineering's trucking subsidiary (C-E Transport) are directly on point:

> [W]e ... know what our costs are, and we will apply those costs to those of the other forms of transportation in making the determination of what we carry in C-E Transport. In the past, we have not been selective. In the future, we [will be.] In the past, C-E Transport has not been 'creaming the freight.' For the future, I do not know how to answer that.... If we can haul it for less, we are going to haul it. This means that freight is going to be diverted, first from the railroads and secondly from the over-the-road common carriers.[2]

The service advantages of truckers are well-established. Perhaps less widely appreciated is their growing rate competitiveness vis-a-vis rail for truckload traffic, a development which was gaining momentum prior to enactment of the 1980 Motor Carrier Act. This is persuasively illustrated in testimony by a major paper products shipper with annual sales over $1 billion:

> In the 1960's for the most part truckload freight rates were considerably higher than the corresponding rail rates. Industrial traffic managers could make rational choices. You pay low rates and get slow and uncertain rail service; you pay high freight rates and secure "premium" truck service.
>
> As a result of rail rates having been increased since those days at a much more rapid pace than the rates of companies which specialize in truckload transportation, more and more current truckload rates are at levels that are below -- or are at --

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[1] As of November 7, 1980, 348 companies representing many of the largest shippers in the country, had filed notices to establish exemptions as intercorporate carriers. See Traffic World (November 17, 1980) at 73.

[2] J. Robert Morton, Vice President, Combustion Engineering, Inc., "Challenges and Opportunities: Trucking in the 1980's," NAM National Joint Conference (August 20/21, 1980) at 6. Emphasis supplied.

> or are but slightly higher than the corresponding rail rate. Today, when such a balance exists, there is no choice.
>
> Put somewhat differently, there are enormous quantities of freight which are now entirely economic to move by truck that never would have been in that position a few years ago.[1]

The same shipper has likewise indicated that "[i]n general, the costs of loading, packaging, and damage are also less for truck shipments than for rail."[2]

A similar point was made recently by a major national distributor of chemicals, industrial supplies, salt, paper, and other products which ships in boxcars, tank cars, and TOFC service and also operates a large and growing private truck fleet, noting that "[r]ailroad rates are increasing far more than private trucking costs."[3] Witness Coyne has testified that "the combination of increasingly unreliable joint-line rail service and lowered truck rates ... has resulted in a substantial diversion of traffic to over-the-road trucking."[4]

The new legislation is expected to facilitate even greater rate competition from motor carriers and add to their competitive attractiveness vis-a-vis rail. The Congressional Budget Office, for example, has estimated that given deregulation, truck rates would fall by an average of about 15 per cent.[5] The Commission's study of the general freight segment of the industry estimated rate decreases in the 20-34 per cent range,[6] pointing to "a substantial

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[1] Statement of C. L. Worth, General Traffic Manager, Westvaco, Joint Economic Committee, National Railroad Policy: Which Way Is Up?, Hearings, 95th Cong., 2nd Sess. (1978) [hereafter Worth, Joint Economic Committee] at 168 and 171.

[2] Whitehurst at 101.

[3] Verified Statement of Fred H. Tolan, PRSI Shipper Statements, Part 1, No. 29 [hereafter Tolan V. S., PRSI] at 13-14.

[4] Coyne V. S.

[5] Congressional Budget Office, "Inflation Impact Statement," S. 2245 (March 26, 1980) at 1-3.

[6] ICC Analysis of Rates and Costs at iv, 11, and 14.

body of evidence suggesting that excess rates ... exist in the truckload sector as well as in [LTL] hauling, and that excesses in the former are at least as large as in the latter."[1] Numerous other analyses have reached similar conclusions.[2] Chairman Gaskins predicted rate reductions[3] after enactment of the bill and in recent months significant rate decreases -- in the range of 10-20 per cent -- in fact have been reported.[4] Indeed, Boeing Aircraft began to put substantial amounts of its surface transportation tonnage out for bids after enactment of the Act and has achieved rate reductions as high as 40 per cent.[5] Whatever the causes of rate reductions -- the recession, deregulation itself, or other factors -- it is clear that the new provisions of the 1980 Act facilitate rapid rate changes in response to market conditions as perceived by shippers and truckers.

Competition within the motor carrier industry is intensifying enormously. The economic implications of this fact for the railroads are readily apparent. As truckers compete more aggressively with one another, their incentive to seek traffic elsewhere -- especially from the railroads -- is correspondingly increased. Already a potent competitor to the railroads, the Motor Carrier Act of 1980 has greatly increased the opportunity and stimulus for trucks to gain even larger traffic shares.

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[1] Id. at 13. See also Journal of Commerce (October 27, 1980) at 2.

[2] For a review of relevant studies see W. Bruce Allen, "Keep on Trucking-- For A Free Market," Perspective (June 4, 1980) at 1-7.

[3] Cited in New York Times (July 3, 1980) at D3.

[4] See, for example, Traffic World (May 12, 1980) at 27-28; Journal of Commerce (July 21, 1980) at 1, and (September 8, 1980) at 7; Trantum, STL at 4; Johnpeter V. S.; Verified Statement of Hubert Thompson, Georgia Kaolin Co., NWS App. Volume 1C; Railway Age (October 27, 1980) at 24-27; and J. Robert Morton, "New Opportunities: A Shippers Prospective of Truck Regulatory Reform," Remarks before Law and Business, Inc. (October 23, 1980) at 7-8.

[5] Cited in Journal of Commerce (September 7, 1980) at 2.

From an economic and transport point of view, enhanced competition in the transportation sector is a positive development, "other things being equal;" however, relative parity in terms of a given mode's ability to compete with the alternative modes is an important factor in determining whether in fact other things are more or less equal. It is well-established that trucking has long enjoyed the advantage of being substantially freer from regulation than the railroads:

> Railroads are 100 percent regulated.... The overall effect of that regulation has meant that railroads have been severely handicapped in their ability to compete with other modes of transportation.[1]

Or, as Professor Paul Roberts has rephrased the issue and its consequences:

> [R]ail has been the only mode to lose a market share. All the other modes have gained a market share at rail's expense.... [I]t is clear that the regulatory process has ... allowed the other modes ... to erode [the railroads'] market base.[2]

The Motor Carrier Act of 1980 has added a massive increment of freedom and flexibility for truckers. The 1980 rail legislation must be appraised carefully in this context.

The Limitations of Recent Modifications in Railroad Regulation

The Staggers Rail Act of 1980 made some potentially important modifications in the economic regulation of railroads. Not all, however, were in the direction of greater freedom from regulation despite Congressional findings that:[3]

- today, most transportation within the United States is competitive;
- many of the Government regulations affecting railroads have become unnecessary and inefficient;

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[1] House Rep. No. 96-1035, 96th Cong., 2nd Sess. (1980) at 38.

[2] Roberts, TRB at 61.

[3] 1980 Rail Act, § 2.

- nearly two-thirds of the Nation's intercity freight is transported by modes of transportation other than railroads;

- earnings by the railroad industry are the lowest of any transportation mode and are insufficient to generate funds for necessary capital improvements;

- by 1985, there will be a capital shortfall within the railroad industry of between $16,000,000,000 and $20,000,000,000; [and]

- failure to achieve increased earnings within the railroad industry will result in either further deterioration of the rail system or the necessity for additional Federal subsidy.

Indeed, some important freedoms authorized in the Railroad Revitalization and Regulatory Reform Act of 1976, such as demand sensitive rates and capital incentive rates, were repealed.

Deep and detailed Commission involvement in numerous aspects of the new Act is required -- e.g., establishing the cost recovery percentage methodology; administering complicated rate flexibility provisions; developing new policies for the determination of market dominance and applying those policies; developing and applying an inflation index mechanism; developing new standards and procedures for determining adequate revenue levels; establishing procedures to be used in requesting variable cost and revenue data relating to surcharged routings; adjudicating § 229 complaints from shippers;[1] and presiding over adjustments in railroad rates on recyclables.

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[1] Under the terms of § 229, during the six months following the effective date of the Act any rate that is in effect on the effective date may be challenged in a complaint alleging that the rail carrier has market dominance and the rate is not reasonable.

The subject matter is complex; the proceedings will be numerous and strenuously contested among many interested parties. Without passing judgment on the substance of any of these issues here, they are not a convincing demonstration or representation of significant deregulation.

"Independent Action" Is the Thread Running Through the Rail Act's Modifications

Stating that "greater reliance on the marketplace is essential,"[1] the 1980 Rail Act incorporates a package of changes that together tend to emphasize more individualized and independent efforts on the part of rail carriers in providing their services to shippers.

Rate-setting modifications in effect exclude rates below specified thresholds from any Commission review; make investigation or suspension of others more difficult; permit a prescribed zone of rate flexibility; and permissively authorize inflationary cost recovery (at ICC discretion). Authority to engage in contract ratemaking is included. The Act also exempts certain actions from serving as grounds for rate discrimination complaints, i.e., rates may differ if they are caused by different rail services. With one major exception -- preservation of port relationships -- contracts, surcharges, separate rates for distinct rail services, and rail rates for different routings may no longer be the basis for a claim of rate discrimination. At the same time, general rate increases are effectively proscribed and a schedule is set for sharply reducing collective rate bureau activity.

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[1] 1980 Rail Act, § 2. See also House Rep. No. 96-1430 (1980) at 93.

The fundamental idea here is to induce railroads increasingly to think in individualized shipper-specific, movement-specific terms and to avoid more generalized treatment of commodities and classes of shippers. Indeed the Act states that it is now U. S. policy "to require rail carriers, to the maximum extent practicable, to rely on individual rate increases...."[1] This in turn reflects the judgment of the Congress that: "Pricing decisions which are related to the individual movements involved are critical to the competitive success of the industry."[2]

The Act thus has opened a zone or window of relaxation from regulation for carriers which can effectively engage in individualized marketing and pricing and provide the necessary service through effective operations. Of course, every railroad is by definition a single-system railroad within its territorial boundaries; but as was detailed in Part IV, contemporary traffic flows do not respect rail company boundaries. Instead, interlining is the norm and interlining unavoidably creates impedances to effective individualized decision-making. As a result, single-line and single-system competitors inevitably can be expected to score gains at the expense of multi-line operations.

The Structural Implications of Modifications in Railroad Regulation

Particularly with respect to ratemaking, the railroad which has to discuss with potential interline partners what response to make to one or more changing market factors is frequently going to lose out to a trucker, barge operator, or single-system rail competitor who can act directly.

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[1] Id., § 101(a).

[2] House Rep. No. 96-1035 (1980) at 40.

As one major paper and pulp manufacturer has observed:

> Quite frankly, under the new Staggers Rail Act of 1980, competitive single line rail service will be essential for quick action and response. In the past, the rail lines have suffered a loss of business in some cases due to the delay in response of joint line movements partners in arriving at a competitive rate or service. At the same time, the shippers were unable to advise their own sales and marketing management, or purchasing, as to the probable transportation cost on joint line movements due to the delays always involved in having the parties reach an agreement. Marketing, purchasing and other opportunities would then be lost or not fully explored due to the failure of a prompt action or response.
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> More and more, with deregulation, truckers are obtaining authority to provide single-line service and avoid these difficulties. There is no reason the rail industry should not have expanded single-system service to be able to respond and to reach quick agreement with a shipper.[1]

Thus if the 1980 Act's ratemaking improvements are to have much effective meaning, it will be through application on single-system carriers.

In addition, many shippers believe that the significant reduction in permissible rate bureau activities will place a greater premium on doing business with single-system transportation companies rather than with firms dependent on interline arrangements. For instance, the Nation's fourth largest brick manufacturer -- and a shipper to 25 states -- has testified that given restrictions on rail rate bureaus, "it is more important than ever before to be served by a large railroad system capable of independently publishing competitive rates ... rather than being dependent upon several rail carriers concurring in joint line rates."[2]

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[1] Deehan V. S.

[2] Verified Statement of Richard H. Bickerstaff, President and Chief Executive Officer, Bickerstaff Clay Products Corp., NWS App. Volume 1C. See also Reaves V. S.

The central economic advantage of freer ratemaking authority is the reduction in transaction costs -- that is, to a large extent, the minimization of time spent in deciding what to do when market conditions change. The Commission in particular feels the new rate provisions will be a great help because the costs of seeking Commission approval will be reduced. As Chairman Gaskins has said:

> The first theme ... is innovation. Regulatory reform, above all, means a license to innovate -- to do them quickly and flexibly without playing "Mother, may I" with the ICC.[1]

But reduction of ICC involvement addresses only part of the problem. The heavy burden of seeking agreement on rate changes among interline partners remains. Dissatisfaction with the problems of getting rapid responses from such carriers has led shippers consistently to prefer single-system carriers whenever possible -- clearly a rational, least-cost economic decision on their part:

> [R]ate adjustments can be more quickly implemented with central direction of both marketing and pricing activities for the entire system. The [consolidated] system will have more flexibility in establishing contract and unit train rates for movements within the system, and rate arrangements with other carriers will similarly be simplified by the unified rate policies of the single system. Reduced regulation of railroads ... will create opportunities for more rapid and innovative ratemaking and shippers will be able to take advantage of new rate methodologies and marketing innovations on a system wide basis rather than being required to deal with each of the ... carriers individually.[2]

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[1] Gaskins, CCC at 1-2.

[2] Verified Statement of Ralph P. Hill, Vice President, Lamb-Weston, PRSI Shipper Statements, Part 2, No. 48 at 3. Lamb-Weston produces and distributes food products nationally.

As a practical matter of economics and logistics, transactions between shippers and transporters involve reaching agreement on rates, services, and obligations. Frequently, then, a "response to changing market conditions" is much more than a snap decision to raise or lower a rate by, say, fifteen cents a ton. The ability to develop responsive rate/service packages promptly in fact is a distinguishing feature of successful transportation companies in the contemporary marketplace. Chairman Gaskins is substantially correct in emphasizing that "[b]oth carriers and shippers will have to learn to operate in a new, less regulated environment where negotiation strategies [between the parties] will prove more important than regulatory advocacy strategies."[1] Likewise Commissioner Trantum has advised traffic managers that "[a] wider range of price/service options will permit custom designing a transportation system to fit unique requirements,"[2] as an overall part of shipper planning and marketing strategy. Successful negotiations in day-to-day commercial settings, though, are much more likely to occur, and to result more rapidly, when the number of negotiators involved is small, preferably one on a side. Single-line and single-system railroads, motor carriers, and barge lines can meet this criterion easily. When interlining railroads are involved, however, the carriers must first negotiate among themselves. It takes only one slow, or hostile, or disinterested, or otherwise committed partner to nix an opportunity. Frequently they will not be able to agree, or will be beaten to the punch by single-system rail and non-rail competitors.

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[1] Darius W. Gaskins, Jr., Remarks before the American Short Line Rail Association (September 23, 1980) at 1. Emphasis supplied.

[2] Trantum, Private Truck Council at 9. Emphasis supplied.

Interlining Vitiates the Potential of Contract Rates. The interlining limitation is particularly significant for contract ratemaking. Contract rates have virtually become the symbol of the 1980 Rail Act modifications and are widely perceived to be of major importance to the railroads. Chairman Gaskins, for instance, has said that "contract rates may turn out to be the most significant weapon for railroads since the invention of steel rail."[1] But as with all ratemaking situations, railroads and other transportation companies dependent on interline arrangements are definitely handicapped.

This fact is amply illustrated by shippers' testimony in this proceeding and elsewhere. The following examples are extremely important:

> We ... feel there are significant opportunities for contract rates with the combined carriers not present if we are forced to deal with two or more carriers who would be involved in specific movements. Having already demonstrated our interest in innovative contract rate making with our service-oriented contract rate in conjunction with the ICG, we are most interested in pursuing further this method of ratemaking. We feel the combination of these two railroads [NW and SRS] would provide a unique opportunity to pursue this concept further....[2]
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> * * * * * *
>
> The negotiation of contract rates for multiple line movements is extremely difficult. However, we would anticipate an easier time dealing with one carrier not having conflicting interests with itself. We have had difficulty ... working out rates and service packages with interlining railroads.[3]

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[1] Darius W. Gaskins, Jr., Remarks before the Association of ICC Practitioners (June 25, 1980) at 4.

[2] Reeder Miller V. S.

[3] Verified Statement of John A. Guglielmi, Vice President, Holly Farms Poultry Industries, Inc., NWS App. Volume 1C. See also Verified Statement of M. E. Petruccelli, General Traffic Manager, PPG Industries, Inc., NWS App. Volume 1C, and Massey V. S.

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Deregulation is another factor tending to make single system service attractive to a shipper. Both the Interstate Commerce Commission and Congress are encouraging shipper-carrier efforts to institute innovative service/rate packages - contract rates, for example - which would benefit both parties. PG and E expects that any development of unique rate or operating arrangements is far more likely to occur when negotiations take place with only one carrier, rather than two or more. Not only reaching an agreement, but also the subsequent determination of responsibilities and accountability, are much more complex when two or more carriers are involved.[1]

* * * * * *

[O]ur experience shows that railroads cannot accomplish what we need by simple cooperation. For example, since the spring of 1980, we have been trying to work out 1,000,000-ton annual volume rates for a joint Missouri Pacific-Southern movement of grain in unit trains from the Missouri River to mills in SFA Territory.... We have been unable to get anywhere having to negotiate with two railroads, but believe that we could get a contract made if we only had to negotiate with one railroad.[2]

* * * * * *

We believe that the existence of single-system service will greatly facilitate the discussion of contract rates, since we will only have to negotiate with one party across the table.[3]

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[1] Verified Statement of John A. Sproul, Executive Vice President, Pacific Gas and Electric Company, PRSI Shipper Statements, Part 2, No. 50 at 3.

[2] Tim Mehl, Manager of Rates and Commerce, Seaboard Allied Milling Corp., NWS App. Volume 1C [hereafter Mehl V. S.].

[3] Harvey V. S.

> There are several obvious advantages to single system service.... Of special interest to coal shippers is the prospect that the carriers will be able to function as a single entity for purposes of negotiating rate and service packages. Negotiations for coal contract rates will be facilitated in dealing with a commonly controlled system rather than several non-affiliated carriers.[1]
>
> * * * * * *
>
> [T]he Commission's recently revised position on contract rail service is enhanced by the proposed consolidation. In the contract rail service arena, little if any activity has been consummated involving more than one railroad.[2]

In light of the above, it is not surprising that of 31 rail contracts recently identified at the ICC, over four-fifths were negotiated between a shipper and a single railroad.[3]

Even in the realm of fresh fruits and vegetables, where the railroads benefit from a unique (for them) exemption from all regulation, interline carriers are at a disadvantage with single-line competitors;

> On exempt perishables, our experience ... since last year has been that single-line rates are much easier to negotiate and maintain than two-line rates.... As the railroad system is deregulated or goes more to contract rates, the need for single-line service will increase.[4]

As the Commission found in CSX, interline arrangements fall short of the service capabilities of single-system railroads; the practical difficulties noted in

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[1] Verified Statement of W. G. Heckman, Chairman and Chief Executive Officer, Arch Mineral Corp., PRSI Shipper Statement, Part 2, No. 32 at 2. See also id., Nos. 47 at 2 and 56 at 13.

[2] Verified Statement of Bruce T. Gordon, Manager, Transportation Services, B. F. Goodrich Co., NWS App. Volume 10.

[3] See ICC Contract Advisory Service Selected Rail Contracts (Other Than Typical Annual Volume Contracts) (July 31, 1980), and Traffic World (October 6, 1980) at 29.

[4] Tolan V. S., PRSI at 15. Emphasis supplied.

the following statement would apply with particular severity in situations where the interline carriers also hoped to negotiate contract rates with shippers:

> If contractual arrangements were implemented on a scale sufficient to approach the level of benefits of a consolidation, they would require intricate contractual relationships, would continue the separation of ownership from responsibility, and would require a high degree of cooperation among carriers.[1]

There is little doubt that the full potential of contract rates and other rate freedoms will not be effectively realized except on single-system railroads.

Quite apart from the practical limitations on contract ratemaking which are imposed by the realities of interlining, the 1980 Rail Act has placed some other significant restrictions on railroad use of this potentially promising technique.[2] For example, individual shippers may file complaints that a railroad's contracts are compromising its common carrier obligation to that shipper; beyond that, the Commission can conclude that a carrier's contract commitments overall are impairing its ability to meet its common carrier obligations generally and forbid further contracting with all shippers. Ports may claim "unreasonable discrimination" against any rail contract, and the historical record shows that ports have been very active in initiating litigation at the ICC to protect and preserve their positions.[3]

In addition, § 208 of the new Act carves out a set of privileges for shippers of agricultural commodities, forest products, and paper. Rail contracts must be offered on the same terms to any other shipper of these products

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[1] CSX Decision at 31.

[2] 1980 Rail Act, § 208.

[3] See, for example, Rail Services Planning Office, Rail Rate Equalization To and From Ports: A Preliminary Report (July 1978) at 5-11.

who requests it, on grounds of non-discrimination; these classes of shippers may also file complaints against rail contracts as destructive competitive practices (and the Commission must "consider the difference between contract rates and published single car rates"[1] in reaching its decision); and the Act also sets specific limits on the amount of equipment which individual railroads can commit to contract delivery of these commodities.

The imposition of these restrictions for agricultural, forest, and paper products -- three major market sectors in which the railroads face severe intramodal and intermodal competition -- is not a representation of free market economics. Although it may be "preferable to let carriers and shippers win and lose on the merits of their own decisions than on the summary decisions of the federal bureaucracy,"[2] and to encourage "rates which correspond to market conditions, and discourage ... rates which do not bear a true relationship to economic costs,"[3] the 1980 Rail Act has declared otherwise, at least for rail carriers, in these major competitive markets. Competition for paper products is rife. As one major paper shipper recently testified: "During the past several years, there has been a significant diversion of traffic -- in my company, in the paper industry, and in industry in general -- from rail to truck."[4] Competition for forest products is also keen. The Southern Hardwood Traffic Association, whose 220 members in 30 states -- including 19 of the 21 states in the NWS service area -- ship logs, lumber, and wood products nationwide,

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[1] Ibid.

[2] Trantum, STL at 3.

[3] Id. at 5.

[4] Worth, Joint Economic Committee at 168. See also p. 84 above, Deehan V. S. and Johnpeter V. S.

estimates that 65 to 70 per cent of their tonnage moves by the non-rail modes, principally contract and irregular route common carriers and private truck fleets.[1] And railroads have been consistently losing agricultural commodity market shares to water and barge competition. For instance, noting that rail grain originations had fallen from 62 per cent in 1974 to 43 per cent in 1977, the House Commerce Committee correctly concluded that "railroads no longer dominate grain traffic."[2] In 1970 over half of all grain received at Chicago was rail-delivered; by 1977 the motor carriers had captured four-fifths of this vital market.[3] The Commission itself recently observed that in view of demonstrated barge and truck capabilities action was needed "to enable [the railroads] as a group to compete more effectively as well as constructively with motor and barge competition for the grain traffic."[4] Indeed, the 1980 Rail Act restraints on farm commodity rail contracts, combined with the repeal of demand sensitive ratemaking -- while the motor carrier and barge competition is free to engage in both commercial practices -- may represent more rather than less regulation for the railroads.

In contrast, recall the above-mentioned Commission consideration of effectively reducing the common carrier obligation for truckers; of removing numerous restrictions on geographic area coverage, commodities, routings, equipment, etc.; of making contract carrier permits nationwide in scope as

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[1] McQuiston V. S.

[2] House Rep. No. 96-1035, 96th Cong., 2nd Sess. (1980) at 38.

[3] Chicago Board of Trade, Annual Statistical Reports.

[4] Investigation of Railroad Freight Rate Structure--Grain and Grain Products, 345 I.C.C. 2975, 2977 (1979).

well as setting these carriers "free forever from the rule of eight;"[1] and generally using the Motor Carrier Act of 1980 as "a springboard for innovation."[2]

The Practical Meaning of Transport Deregulation for the Railroads

The railroads, on balance, appear to have been further disadvantaged by the recent surge of regulatory reform in transportation. Clearly the scope of liberalization of the 1980 Motor Carrier Act has exceeded that of the 1980 Rail Act. If anything, the regulatory gap between the two modes has widened as a result of the new legislation, leaving the railroads with an even greater relative regulatory burden than before. Moreover, as we have seen, the Motor Carrier Act has begun to intensify competition within trucking and will spur the motor carriers to compete with even greater vigor for rail traffic.

Within the railroad industry, several effects are evident. First, the somewhat circumscribed area of relaxation in rail regulation will have relatively modest effects outside of single-system railroads. Indeed to tap seriously the potential of the 1980 Rail Act, for both shippers and carriers, the extension of single-system railroads is virtually imperative. The viability of alternatives short of merger have become more tenuous than ever because the thrust of the new Act is toward individualized action, not collective action, and the rewards for transportation companies in the new regulatory environment will go to those which are quickest to act and can make and guarantee their service commitments. Interline railroads will be more vulnerable than ever to single-system motor carriers, barges, and rail carriers.

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[1] Gaskins, CCC at 2.

[2] Ibid.

VI

CREATION OF THE SINGLE-SYSTEM NWS IS PROCOMPETITIVE

It is apparent from the discussion in preceding Parts of this analysis that creation of the single-system NWS has many procompetitive features. This Part first summarizes a number of the more salient public benefits of the consolidation, then examines their basically procompetitive features, and, finally, closes with a discussion of several important factors such as increased capital productivity, efficiency, financial strength, and long-term adaptability to changing economic conditions, which are critical to the future competitive viability of a privately operated national railroad network.

A Single-System NWS Will Provide Substantial Public Benefits

As we have seen, the proposed unification would enable the two carriers efficiently to match up on a single-system basis with the commodity traffic flows and transportation requirements generated, interdependently, by the regional economies of the North and the South in the eastern half of the United States. In particular the consolidation will erase the inefficiencies and inhibitions of the watershed barrier which has confronted the applicants for decades and has significantly interfered with their ability to adjust fully to changing economic realities.

Similarly, establishment of a single-system NWS rail network would enable the consolidating carriers to respond effectively to the continuing challenge

of truck and barge competitors which have been flourishing in north-south markets. The recent significant reduction of motor carrier regulation will further stimulate truck competition and greatly extend the single-system capabilities of trucking operations. Competitive pressures on railroads will be intense.

Of special importance to competitive considerations, NWS would also be in a position to provide shippers with the only feasible single-system rail competition to CSX:

> [CSX] will have greatly expanded single-system capabilities which shippers find attractive. No other railroad at present can equal those capabilities in direct competition with CSX.[1]

NWS is postured specifically to offer such a competitive response, as well as confronting trucks and barges, with its enhanced capabilities. I can think of no alternative short of consolidation, or of any other realistic merger combinations for SRS and for NW, which would have the competitive potential vis-a-vis CSX of the NWS unification.

It is also evident that NWS, as a system, would be much better placed than the two carriers separately -- and shippers better served as a result -- to take full advantage of such relaxations in economic regulation as have been made available in the 1980 Rail Act. The consolidated system will have the ability to act more flexibly, more rapidly, and with greater independence from interline constraints in its negotiations with shippers, and in competing with other railroads, motor carriers, and barges. NWS will likewise be a strong competitor for the attraction to its service area of new investment by shippers in production and other traffic generating facilities.

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[1] CSX Decision at 39-40. Emphasis supplied.

In parallel with its favorable competitive implications the proposed NWS consolidation also offers substantial public benefits stemming from the operational savings it makes possible and the service improvements it will facilitate. As a single system, NWS will be in a position to reroute traffic in ways that are more efficient and to develop service arrangements that will contribute to enhanced economic efficiency while also strengthening its competitive potential. These favorable attributes, described fully in the application and in the verified statements of carrier witnesses, demonstrate that the NWS consolidation will have a clearly beneficial impact upon transportation services.

To be stressed is that while these benefits are likely to aid the participating carriers, they also represent unmistakable public benefits. Indeed, in a market-oriented environment -- of the sort which the 1980 legislation seeks to promote for rail transportation -- benefits accruing to carriers (i.e., private benefits) can be expected typically to reflect the public's (e.g., shippers) evaluation of the service which they provide. Given this fact, the practical value of attempting to distinguish between "private" and "public" benefits is thus open to considerable question; the salient fact is that the discernible benefits of the NWS consolidation are properly denominated as being in the public interest. NWS will be able to offer better through service to more shippers over a wider geographic area -- an indisputable public benefit. Its ability to compete more effectively with other railroads (notably CSX) and other modes, will be improved -- also a public benefit of considerable consequence. From an operational standpoint the consolidated system will be able to achieve significant economies, through reroutings and better equipment utilization and in other ways, that likewise will benefit the public. All told, therefore, the public benefits of the NWS consolidation are substantial and demonstrate why it should be approved.

Figure 34

PROFILE OF COMBINED SOUTHERN AND NW
STATE-TO-STATE TRAFFIC FLOWS: 1979

	State-To-State Pairs	Southern Tonnage (Exclusive of NW Interlines)	Norfolk & Western Tonnage (Exclusive Of Southern Interlines)	Total (Tons)	Per Cent Of Total Combined Tonnage
(1) No Southern or NW Traffic	1,589				
(2) Little Southern or NW Traffic (Under 100,000 Tons Per Year)*	276	3,349,963	2,766,134	6,116,097	2.1
(3) All Joint Southern-NW Tonnage**	-	-	-	8,430,608	2.9
(4) Traffic Flows Where One Carrier Dominant:					
(a) 100 Per Cent Southern	221	57,684,206	-	57,684,206	20.1
(b) 100 Per Cent NW	795	-	11,151,670	11,151,670	3.9
(c) 80-99 Per Cent Southern	402	51,535,579	2,337,128	53,872,707	18.8
(d) 80-99 Per Cent NW	366	3,116,821	89,182,506	92,299,337	32.2
SUBTOTAL	3,649	115,686,579	105,437,438	229,554,625	80.1
(5) All Remaining Traffic	72	26,772,626	30,218,345	56,990,971	19.9
TOTAL	3,721	142,459,205	135,655,783	286,545,596	100.0

* Excludes state-to-state pairs covered in line (5), below.
** Includes Southern-NW interline traffic from all categories.

Source: Southern Railway and Norfolk & Western.

Richard J. Barber Associates, Inc.

NWS Generates Single-System Benefits Without Adverse Competitive Effects

While a consolidated NWS will provide significant alternative single-system capabilities for shippers in the Southeast and the North Central tier of states in the East, and thereby raise the level and quality of competition, the Commission is also charged with considering any significant potential adverse competitive effects of proposed consolidations. I have examined relevant data on this issue and have found no basis for a finding of such effects with respect to the NWS proposal.

State-To-State Traffic Flow Data Reveal Little Direct Parallel Competition Between SRS and NW. In assessing the competitive implications of the SRS-NW consolidation, it is helpful to examine the combined state-to-state traffic flows of the two railroads. Figure 34 arranges these flows into several summarized categories which cover all possible combinations of traffic flows between 61 states and Canadian provinces.[1] (Each state or province originates or terminates at least some tonnage that moves over either the SRS or NW system.) The Figure first isolates state-to-state pairs with no or few relevant traffic flows (items 1 and 2, Figure 34); second, it shows the tonnage which SRS and NW interline in cooperation with one another (item 3, Figure 34); and third, it displays state-to-state corridors in which each of the railroads now participates, arranged on the basis of which of them has a significantly larger traffic volume in the corridor (item 4, Figure 34). It can be seen from item 4 of the Figure that the vast majority of the diverse traffic flows in which Southern and/or NW participate are heavily dominated by one or the other carrier (i.e.,

[1] All further references to "state-to-state" traffic data in this section include the Canadian provinces.

where SRS or NW accounts for 80 per cent or more of 1979 tonnage, exclusive of traffic interlined with the other). Consolidation of the two railroads effectively can have no adverse competitive impact in these corridors. Analysis of two major categories of traffic substantiates this conclusion.

First, a considerable number of traffic flows involve only Southern or, conversely, only NW (see items 4(a) and (b), Figure 34). For instance, 221 state-to-state combinations involve only Southern Railway. These states account for fully one-fifth of combined SRS and NW tonnage (or 40 per cent of SRS tonnage exclusive of that interlined with NW). Norfolk & Western participates solely in even more state-to-state traffic flows -- 795 distinct combinations -- which involve about four per cent of the combined total tonnage of the carriers (or eight per cent of NW tonnage).

Second, another substantial set of state-to-state traffic flows almost exclusively involves NW or SRS (items 4(c) and (d), Figure 34). Eighty per cent or more of combined Southern and NW traffic in 402 state-to-state combinations is carried by Southern without interlining with NW (this traffic accounts for 19 per cent of combined SRS-NW tonnage). Similarly, in another 366 state-to-state flows (comprising 32 per cent of combined SRS-NW tonnage), NW carries 80 per cent or more of their total traffic.

Summarizing the above two categories, there are 623 state-to-state flows exclusively or heavily involving SRS relative to NW which account for 109 million tons of Southern traffic -- 38 per cent of the combined SRS-NW total or 77 per cent of all SRS traffic.[1] Similarly, there are 1,161 state-to-state

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[1] Exclusive of traffic interlined with NW.

flows exclusively or heavily involving NW, accounting for 100 million tons of NW traffic -- some 35 per cent of the SRS-NW total or about three-fourths of all NW traffic.[1] Obviously, the bulk of each system's traffic involves state-to-state combinations where the other railroad is a minor factor.

Finally, state-to-state flows in which SRS and NW each separately participate to a significant extent account for less than a fifth of the combined tonnage of the two lines (item 5, Figure 34). These aggregated state-to-state figures, however, do not represent a true index of overlap in service routes of Southern and NW, as they include a multiplicity of individual points to which one or the other carrier provides no service or negligible service. Moreover, it is noteworthy that of the 57 million tons of traffic moving in state-to-state corridors where both Southern and NW are significant independent participants, fully 30.2 million tons is comprised of coal traffic from the state of Virginia (well over half of this is export coal shipped by NW for onward movement through Hampton Roads). As described in detail in the verified statement of witness Cukor, this coal traffic is not competitive between the two carriers. Adjusting for this Virginia-originated coal traffic, state-to-state corridors in which SRS and NW each participate materially thus account for only 9.3 per cent of the combined traffic of the two lines.

As well, of the 57 million tons identified above (Figure 34), some 48 million tons (or 84 per cent) is traffic to or from the states of Virginia and North Carolina. Traffic in this area is fully discussed in the applicants'

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[1] Exclusive of traffic interlined with SRS.

Figure 35

MAJOR STATE-TO-STATE PAIRS WHERE LESS THAN 80 PER CENT OF TRAFFIC IS CARRIED EXCLUSIVELY BY SOUTHERN OR BY NW: 1979[1]

State-Pair	O-D Served By: CSX	By: NWS	State-Pair	O-D Served By: CSX	By: NWS	State-Pair	O-D Served By: CSX	By: NWS	State-Pair	O-D Served By: CSX	By: NWS
AL-VA	Yes	Yes	NC-IN	Yes	Yes	MI-NC	Yes	Yes	OH-TN	Yes	Yes
FL-IL	Yes	Yes	OH	Yes	Yes	TN	Yes	Yes	PA-FL	Yes	Yes
IN	Yes	Yes	VA	Yes	Yes	IL-FL	Yes	Yes	NC	Yes	Yes
OH	Yes	Yes	WV	Yes	Yes	KY	Yes	Yes	TN	Yes	Yes
VA	Yes	Yes	WI	Yes	No	MS	Yes	Yes	VA	Yes	Yes
GA-MD	Yes	Yes	SC-OH	Yes	Yes	TN	Yes	Yes	WI-NC	Yes	No
VA	Yes	Yes	VA	Yes	Yes	IN-CA	No	No	WV-AL	Yes	Yes
KY-NY	Yes	Yes	TN-OH	Yes	Yes	FL	Yes	Yes	NC	Yes	Yes
SC	Yes	Yes	VA	Yes	Yes	IN	Yes	Yes	BC-VA	No	No
LA-IL	Yes	Yes	TX-IN	No	No	TN	Yes	Yes			
IN	Yes	Yes	VA	No	No	TX	No	No			
OH	Yes	Yes	VA-AL	Yes	Yes	WI	Yes	No			
VA	Yes	Yes	FL	Yes	Yes	MD-NC	Yes	Yes			
MO-AL	Yes	Yes	KY	Yes	Yes	NY-IN	Yes	Yes			
IN	Yes	Yes	NC	Yes	Yes	VA	Yes	Yes			
NC	Yes	Yes	NJ	No	No	OH-AL	Yes	Yes			
TN	Yes	Yes	PA	Yes	Yes	FL	Yes	Yes			
VA	Yes	Yes	SC	Yes	Yes	GA	Yes	Yes			
MS-OH	Yes	Yes	TN	Yes	Yes	LA	Yes	Yes			
VA	Yes	Yes	VA	Yes	Yes	NC	Yes	Yes			
NC-IA	No	Yes	MI-FL	Yes	Yes	SC	Yes	Yes			

[1] State-to-state pairs reflected in line 5, Figure 34. Excludes those pairs in which combined SRS and NW traffic is under 100,000 tons.

Source: Southern Railway and Norfolk & Western.

response to Issue II of the Commission's October 1, 1980 order. Among other things, the response establishes that all major routes in the area will remain open and that the proposed affiliation will have no adverse competitive effect in these corridors in view of rail and non-rail alternatives. Moreover, SRS and NW traffic consists tend to differ substantially -- for example, from North Carolina to Virginia clay brick is Southern's biggest tonnage category as compared with malt liquors for NW. Aside from Virginia and North Carolina traffic, state-to-state pairs in which SRS and NW are significant participants account for only 3.3 per cent of the combined traffic of the two roads. Those traffic corridors encompass a great variety of commodities and specific point-to-point routings for which one carrier is frequently a negligible factor.

Equally as important as the limited overlap between these SRS and NW traffic flows is the fact that the traffic corridors in which SRS and NW are material participants overwhelmingly involve flows where NWS will face abundant single-system motor carrier and CSX competition. Indeed, Figure 35 shows that CSX will provide single-system service between virtually all of the identified state-to-state pairs.[1] (In only one of them, North Carolina-Iowa, would NWS provide single-system service where CSX does not.)

NW traffic in the corridors shown on the Figure moves, for the most part, over SRS or Family Lines. Southern traffic in these corridors moves predominantly over Chessie or Conrail. Southern and NW traffic between these states is thus highly vulnerable to expanded competition from the new single-system CSX. The removal of Chessie as a friendly connection to Southern and

[1] The movements identified in Figure 35 are those reflected in item 5, Figure 34.

Figure 36

SOUTHERN AND NW CARLOADINGS
BETWEEN JOINTLY-SERVED POINTS: 1979

Jointly-Served Points	Carloadings to All Other Jointly Served Points[1] Southern	NW
Bristol	3	271
Cincinnati	615	673
Danville	15	12
Durham	66	3
East St. Louis	50	36
Lynchburg	103	74
Martinsville	-	19
Norfolk	408	2,081
St. Louis	143	2,220
Winston-Salem	52	748
Total Carloadings Between Jointly-Served Points	1,455	6,137
Total Carloadings	2,522,399	2,189,.04
Per Cent Carloadings Between Jointly-Served Points of Total Carloadings	0.06%	.28%

[1] E.g., Bristol to Cincinnati, Danville, Durham, etc.

Source: Southern Railway and Norfolk & western.

of Family Lines as a friendly connection to NW virtually mandates a competitive response. As Figure 35 indicates so dramatically, the creation of NWS is the most direct competitive option available.

While SRS and NW independently participate in certain north-south traffic corridors, largely in interline service with CSX carriers which have now become each system's most powerful competitor, they engage in negligible competition between jointly-served points. As Figure 36 indicates, SRS and NW traffic moving between jointly-served points amounts to much less than one per cent of either carrier's traffic -- only 0.06 per cent in the case of SRS and 0.28 per cent for NW. Moreover, the Figure in fact substantially overstates the extent of such movements. For example, movements to jointly-served points from Cincinnati include Cincinnati to Durham, between which SRS moved 210 cars and NW none, and Cincinnati to Winston-Salem, between which NW moved 109 cars and SRS only 14. There were only four specific traffic lanes in which each carrier moved as many as 100 carloads in 1979.[1] All of these were east-west corridors in which NW traffic was dominant and truck-competitive TOFC/COFC shipments of miscellaneous commodities were prominent. In the largest movement between jointly-served points in these corridors (between Norfolk and Winston-Salem) 525 of NW's 828 carloads consisted merely of empty trailers and containers. By any standard, the degree of competition among Southern and NW between jointly-served points is insignificant.

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[1] Cincinnati-Norfolk (SRS, 197; NW, 391), Cincinnati-St. Louis (SRS, 127; NW, 160), Norfolk-Winston-Salem (SRS, 346; NW, 828) and St. Louis-Cincinnati (SRS, 104; NW, 198).

NWS Will Have No Significant Adverse Effect on Source Competition at Commonly Served Points. While SRS and NW traffic moving between points served in common is negligible, a somewhat larger volume of traffic moves to commonly-served points from all originations. This is to be anticipated, since certain of the common points are significant consumption centers -- notably St. Louis, Cincinnati, Norfolk, and Winston-Salem. Given the size of these centers, a surprisingly small volume of Southern Railway traffic terminates at common points with NW -- only 56,018 carloads, or 2.2 per cent of total SRS carloadings. Common points are more significant for NW, comprising 209,474 carloads or 9.6 per cent of NW carloadings. Over one-third of this volume, however, is to Norfolk and in large part is destined for export. Excluding Norfolk, traffic to common points with Southern comprises 6.3 per cent of NW carloadings. Some 80 per cent of the remaining NW common point traffic is destined to St. Louis and Winston-Salem, where in both instances NW deliveries outweigh those from SRS by more than ten to one. Hence, the bulk of NW deliveries to cities served in common with Southern is to three points where Southern is a quite minor delivering carrier.

In addition, none of the top five commodities delivered by each carrier to St. Louis is identical; coal and leaf tobacco are among the top five which each delivers to Winston-Salem -- SRS coal deliveries are only one per cent of NW's volume and tobacco is fifth on both lists; and soybeans are the only common commodity in the top five delivered by each carrier to Norfolk, and NW's soybean traffic exceeds SRS deliveries by a factor of five.[1]

The largest common receiving point without highly imbalanced traffic flows as between NW and SRS is Cincinnati where, in 1979, NW terminated 470,613

[1] In 1979 NW and SRS delivered a total of 514,707 cons of soybeans to Norfolk, most of which was presumably for export. During that year total soybean exports from Atlantic and Gulf Ports amounted to 20,898,000 tons. U. S. Department of Agriculture, Grain Market News (March 21, 1980) at 7 (data converted to tons).

tons and Southern 892,343 tons. To place this combined volume of approximately 1.4 million tons in perspective, however, approximately 31 million tons of freight have been estimated to have been delivered to the Cincinnati BEA from all other BEA's in 1978.[1] Of the top five commodities delivered by each carrier (comprising about 50 per cent of each road's deliveries), none were identical. Given the modest traffic volumes involved and the lack of identical commodities transported, there could be no reduction in source competition to Cincinnati resulting from the merger of SRS and NW. The same conclusion would hold for other common points where traffic volumes were smaller and/or highly imbalanced between the two carriers.

The data discussed in this section indicate clearly that approval of NWS generates no significant adverse competitive effects. On the contrary, in responding to CSX, it would promote competition through creation of another single-system alternative for shippers.

Increased Efficiency and Productivity

The march of economic events makes it increasingly important that railroads take, and be permitted to take, action which will enhance their efficiency and improve their productivity. By doing so they can strengthen their financial posture and better position themselves to compete and better serve the shipping public, all in keeping with the expressed goals of the 1980 rail legislation.

In recent years, and particularly during the 1970's, when inflation so powerfully asserted itself, the railroads have been beset with conditions which

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[1] Reebie Associates, Transearch Data Base.

have slowed the gains in productivity previously experienced in the post-World War II period. This is a matter of considerable importance since it is gains in efficiency, as reflected in productivity improvement, which significantly influence their competitive and financial vitality.

In the early post-war years, extending into the later 1960's, by most measures productivity in the rail industry increased.[1] Considering rail labor productivity, one important study found average annual growth of 3.7 per cent for 1947-1970.[2] Labor productivity growth for the entire private domestic economy was about 3.0 per cent to 3.1 per cent for the same years.[3]

Similarly, in terms of rail capital productivity, studies show that improvements took place through 1970.[4] In the Southern District,[5] data for the decade of the 1960's show that physical output (originated tonnage and revenue ton-miles) increased more than did net investment (i.e., output per average unit of capital investment was on the increase).[6] Net revenue yields per

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[1] Productivity is defined in general terms to be output per unit of input. Three significant types are labor, capital, and total factor productivity.

[2] Task Force at 74. See also Meyer and Morton at 477.

[3] Ibid.

[4] For example, the Senate Commerce Committee staff found that nationwide rail ton-miles per net dollar of investment grew at 3.0 per cent per year from 1960 through 1970, and originated tonnage per dollar of net investment increased at 1.8 per cent per year. Senate Committee on Commerce, The Penn Central and Other Railroads, Committee Print, 92nd Cong., 2nd Sess. (December 1972) at 257.

[5] Because of data complications stemming from the problems in the Northeast, use of Southern District data may be more indicative of productivity trends.

[6] From 1960 to 1970 net investment in the Southern District increased 22 per cent, but ton-miles rose 60 per cent and originated tonnage was up 40 per cent. AAR Annual Fact Books.

dollar of net investment were also rising; the railroads in this district were financially rewarded by obtaining increasing returns from the additional capital commitments they were making.

As was true for rail labor and capital productivity, studies attempting to measure rail total factor productivity found significant increases prior to about 1970.[1]

By the early 1970's, however, the rates of gain in rail productivity appear to have slowed, regardless of whether labor, capital, or total factor productivity are considered.[2] In the case of rail capital productivity in the Southern District, for example, during the 1970's net investment increased more rapidly than either traffic volume or net revenue (NROI less fixed/contingent charges) -- unlike the experience of the 1950's.[3] Inflation was clearly a factor, resulting in rapidly escalating prices for capital assets and increasing the associated cost of capital. The capital pay off margin was thus narrowing and capital productivity was tending to fall.

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[1] For example, John Kendrick reported rail total factor productivity growth of 5.2 per cent annually for 1948-66. National Bureau of Economic Research, Postwar Productivity Trends in the United States (1973) at Chapter 5 (cited in Task Force at 62 and 64). Meyer and Morton (at 479) reported rail total factor productivity growth as either 2.4 per cent or 1.5 per cent annually -- depending on the weighting technique used -- from 1947 through 1970, compared to 2.5 per cent for the entire economy. A more recent study concludes that from 1951 to 1974 rail total factor productivity increased at an average rate of 1.5 per cent per year. D. Caves, L. Christensen, and J. Swanson, "Productivity in U. S. Railroads, 1951-1974," Bell Journal of Economics (Spring 1980) at 167 and 177.

[2] For example, Caves, Christensen and Swanson (at 167) report that rail total factor productivity grew at an average annual rate of only 0.4 per cent from 1966 through 1973. For labor productivity, the Bureau of Labor Statistics' rail production worker index on the average grew only about three-quarters as much from 1970 through 1979 as it did from 1947 through 1970. BLS, Office of Productivity and Growth (June 11, 1980).

[3] Southern District net investment in 1979 was 31 per cent higher than 1970, but ton-miles were up only 18 per cent and originated tonnage was up by ten per cent.

By increasing efficiency -- through improved use of rolling stock and improved routings -- end-to-end combinations, as proposed in the application here under consideration, hold out the potential for increasing labor, capital, and total factor productivity and thus for counteracting the most recent trends. This necessarily will help strengthen the carriers, both by improving their return on investment and by improving the quality of the service they can offer. As such, therefore, end-to-end carrier consolidation can help move toward fulfillment of the declared purposes of the 1980 rail legislation.

NWS Will Be Positioned To Respond More Flexibly to Future Long-Run Changes in the Economy and the Competitive Transportation Environment

In their physical manifestations railroads radiate an aura of permanence -- indeed, their track structures, bridges, yards, and other fixed plant facilities often have life spans measured in decades. Yet their function as freight transporters places them squarely in a vast sea of economic, technological, and demographic change over which the railroads -- individually and collectively -- have but limited influence. Accordingly there is an unavoidable tension between, on the one hand, long-lived, essentially fixed carrier investments and, on the other, shifts in the level, composition, and directional flow of demand for goods which the railroads and the other modes vie with one another to transport. These shifts may be relatively short-term in duration or they may reflect more fundamental structural adjustments in the economy. In both instances, the railroads have found it increasingly difficult to adapt successfully. Continuing adaptational failures would, of course, be severely detrimental to shippers, the public, and the national economy because a significant transport alternative would be eliminated or unduly weakened.

As noted in Part V above,[1] I am very much impressed by the Commission's recent recognition of the importance of economic change, evolving technological developments, shifts in industrial patterns, changing market demands, and the diverse and changing requirements of shippers in establishing the working environment in which transportation companies must operate. Directly relevant, the new emphasis on competition in a freer transport marketplace significantly intensifies and accentuates the exposure of transportation companies to all these manifestations of change and uncertainty. Quite properly, Commission implementation of the 1980 Motor Carrier Act is being guided by the proposition that a healthy motor carrier industry is one postured to respond flexibly to the needs of the economy and shippers, and to its competitors' changing capabilities, on a continuing basis, i.e., over the long-term. It is crucially important that the same frame of reference be brought to bear on the railroad industry. It is my opinion, based on extensive analysis of the rail industry, that consolidations such as that proposed in the NWS application, are essential to positioning the railroad industry to respond effectively to a changing future.

Just looking back over the roughly three decades since the end of World War II -- a period which is shorter than the expected life of much new carrier investment (e.g., a classification yard, bridge, tunnel, or newly CTC-equipped main line) -- it is easy to recall numerous significant factors which essentially shaped the market for rail freight service.

As noted elsewhere in this statement, major shifts in the location of industry and disparate rates of growth by region have greatly altered the spatial distribution of freight shipments. Some of the most pronounced changes have occurred -- and continue to occur -- in the composition of freight

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[1] See p. 84 above.

traffic. This shift in mix, of course, reflects the varying rates of growth in the industries which make up the American economy. Coal, for example, occupied a kingpin role in the Nation's energy picture in 1947, when the railroads originated more than half a billion tons; but then it went into pronounced decline (in the early 1960's the railroads originated little more than 300 million tons), as the United States shifted massively to oil and natural gas. Only after 1973 has coal begun to climb back toward a prominent position. In relative terms other sectors -- such as mining and forestry -- also lost ground, exhibiting rates of growth below the average. Since these sectors, like coal, had long been large users of rail service the railroads were adversely impacted despite their continuing capacity (built up over the decades) to accommodate such traffic.

No less dramatic has been the shifting make-up of manufacturing. In recent years new products, indeed whole new industries (like computers), have emerged, displacing many (though not all) of the older sectors as significant traffic and revenue generators. Relative to the rate of growth in output in manufacturing as a whole the steel, food product, textile mill, and lumber industries, among others, have expanded at a rate below the average. Meanwhile, other industries -- and certain sub-sectors of the older groups -- have had gains in output well above the average, as illustrated by chemicals, synthetic fibers, frozen foods, a number of paper products, plastics, and certain categories of electrical machinery.[1] For the railroads this has spelled a

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[1] See, for instance, Department of Commerce, Long-Term Economic Growth: 1860-1970 (June 1973) at 86-87.

marked change in the composition of their merchándise traffic and increased competition (particularly from trucks, well suited to the transportation of many of the newer products). The surge to prominence of trucks, barges, or pipelines in virtually every commodity and service category needs no further elaboration here. These changes, it warrants re-emphasis, have taken place over a span of years that is relatively short by comparison with the extended lives of many categories of rail assets.

By no means, of course, does the ebb and flow of economic-demographic change affect only the railroads (and other transporters). It also impacts shippers and receivers -- reducing, increasing, or altering in numerous ways the nature of their demands for freight transportation. A given plant may be shifted from the manufacture of one product to another, the geographic market which it serves may be changed, or the source (and even the type) of inputs may be recast. These changes often may be unforeseeable at the time of a plant's construction, but may become necessary as responses to shifting market forces. In evaluating his logistical requirements and in deciding where to locate, a shipper understandably is concerned with a carrier's capability, over the long-term, to adjust to such changes.

It is of paramount importance not only to recognize the tremendous changes which have occurred since 1920, or 1950, but to anticipate that such change -- however shaped and expressed -- will be a constant and critical factor in the decades ahead. Given the inevitability of change, the railroads, as freight generalists so to speak, must seek to establish themselves so as to be able to respond and adapt over the long run to the unknown and the unpredictable. This is important to the carriers themselves, in justifying and protecting

their long-lived plant investments, but it is also of great value to those they serve. Simply put, it is publicly advantageous for railroads to "generalize" their operations by expanding the geographic scope of the areas they can effectively serve, thereby making themselves more nearly congruent with the present and future marketplace. End-to-end carrier consolidation, like that of NWS, achieves this objective.

Indeed, the more flexible and responsive the railroad network can become, the greater is the likelihood that the overriding objectives of the national transportation policy, the 4-R Act, and the 1980 Rail Act will be met on a sustained, long-term basis. In this light, the proposed NWS consolidation contributes meaningfully to the achievement of safe, adequate, economical, and efficient transportation; the encouragement of sound economic conditions in transportation and among carriers; the growth of a viable railroad industry in the private sector of the economy, capable of attracting capital investment in railroads and rail-service-related enterprises; and the enhancement of effective competition throughout the transportation sector, to the benefit of shippers specifically and the public generally. Moreover, there is no harmful diminution of essential services; indeed, the establishment of a single-system capability significantly increases the service potential of the consolidating carriers. From an economic-transportation point of view, therefore, NWS provides an excellent opportunity to make solid progress toward the realization of all these critical goals of national policy.

VERIFICATION

District of Columbia)) ss:

Richard J. Barber, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true as stated.

Richard J. Barber

Subscribed and sworn to before me this 24th day of November, 1980

Barbara Ann Kosoff
Notary Public, D. C.

My Commission expires My Commission Expires June 30, 1985

Before the
SURFACE TRANSPORTATION BOARD

Finance Docket No. 36522

NORFOLK SOUTHERN RAILWAY COMPANY
—PETITION FOR DECLARATORY ORDER

EXHIBIT I

ORIGINAL

Before the

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 29430 (Sub-No. 1)

NWS ENTERPRISES, INC.
– CONTROL –
NORFOLK AND WESTERN RAILWAY COMPANY AND
SOUTHERN RAILWAY COMPANY

APPLICATION - VOLUME 4

LABOR DATA - EXHIBIT 10
OPERATING PLAN - EXHIBIT A-17
SYSTEM MAP - EXHIBIT 8

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920 15th Street, N.W.
Washington, D. C. 20005

DATED: December, 1980

NW • SOUTHERN • NW • SOUTHERN • NW • SOUTHERN • NW • SOUTHERN
OP-STMT-587

(viii) Norfolk, Virginia

Norfolk is one of the principal terminals of the NW system and is also an important traffic generating point for SR. NW's east-west main line terminates at Norfolk, while SR serves Norfolk via a secondary main line from the south. NW customers at Norfolk now have direct rail service to the northeast and midwest, and SR customers have direct access to the southeast. As a result of consolidated Norfolk operations, traffic originating or terminating on SR lines in eastern Virginia will be routed via Norfolk over NW's main line to points in the northeast and midwest. Conventional interchange between NW and SR at Norfolk will be eliminated. NW and SR road trains will operate directly to and from NW's Portlock Yard, reducing delays and improving efficiency.

NW's Present Operations

Norfolk is the eastern terminus for NW's double track, automatic block signalled main line from Roanoke. NW's Norfolk-area tracks and facilities are shown on the map marked "Norfolk, Virginia" at the end of this subsection. NW's principal facility for handling merchandise traffic in the Norfolk area is Portlock Yard, located adjacent to NW's main line in Chesapeake about eight miles south of NW's coal and merchandise piers at Lamberts Point. The immediate Portlock Yard area is shown on the map marked "Norfolk

(Chesapeake), Virginia" at the end of this subsection. Portlock Yard is a 41-track flat classification yard which includes a large intermodal facility, a light car repair facility, locomotive servicing facilities, and NW's agency. Yard crews from this yard serve industries located adjacent to NW's lines within the Norfolk terminal area.

NW normally operates two time freight trains daily in each direction in and out of Portlock Yard. In addition, unit grain trains and extra sections of merchandise trains are operated as needed. Coal trains and coal empties as necessary to and from Lamberts Point run by Portlock Yard on the main line. Typically a total of twenty trains per day move into and out of the Norfolk area on NW's main line.

Interchange between NW and VM is conducted at Coleman Place, north of Portlock Yard on NW's Sewells Point Branch. Interchange between NW and NPB is conducted on interchange tracks along NS's main line near NS Junction about one mile north of Portlock Yard. Interchange between NW and SR is as described below.

SR's Present Operations

Norfolk is the eastern terminus for SR's Norfolk Southern Railway line from Raleigh and Chocowinity, North Carolina via Elizabeth City, North Carolina. This line is

single track, timetable-train order territory. SR's Norfolk area tracks and facilities are shown on the map marked "Norfolk, Virginia" at the end of this subsection. SR operates its trains into and out of Carolina Yard, a ten track flat classification yard located on SR's main line about 0.6 miles east of and roughly parallel to Portlock Yard. The immediate Carolina Yard area is shown on the map marked "Norfolk (Chesapeake), Virginia" at the end of this subsection. SR has at Carolina Yard a station building housing its agency and clerical forces, a circus style TOFC ramp, a car and locomotive light repair shop, and locomotive servicing facilities. Yard crews from Carolina Yard serve industries located adjacent to SR's lines (including SR's Virginia Beach and Camden Heights lines, which SR Yard crews reach via NW's Sewells Point Branch).

SR normally operates one through freight train to and from Raleigh, North Carolina daily and one local train to and from Elizabeth City, North Carolina daily. Interchange between NW and SR is effected on interchange tracks at NS Junction, where an extension of SR's line intersects NW's Lamberts Point line about one mile north of Carolina Yard. Interchange between S.. and VM and between SR and NPB is conducted at Coleman Place and along SR's line near NS Junction respectively, similar to NW's interchange with these roads.

Proposed Operations

Within the first year after NW/SR affiliation, SR will consolidate its Norfolk area operations and personnel with those of NW at Portlock Yard under NW supervision. An agreement governing the joint operation is submitted as part of Exhibit 9 in Volume 3. SR will retire its Carolina Yard facility, including ten tracks, its yard office and station building, its intermodal facility, its car and locomotive repair shops, and its locomotive servicing facilities. SR will retain an office building which will continue to house certain non-operating offices. SR will move its base radio station and mobile agent's base station to Portlock Yard. The combination of forces will result in labor savings at Norfolk.

It is proposed that a new connection be constructed at Carolina Junction between SR's line and NW's Sewell's Point Branch to enable SR road trains to operate directly into and out of Portlock Yard. Use of the new connection will avoid an inefficient runaround movement which would otherwise be required for SR trains to reach Portlock Yard. Details of this construction are described in Finance Docket No. 29430 (Sub No. 3) in Volume 7 of this application. NW will grant trackage rights to SR for approximately one-half mile over its line between Carolina Junction (MP V-4.6) and Portlock

Yard (MP N-3.48) to permit SR's direct operation into Portlock Yard. The trackage rights agreement can be found in Exhibit 9 in Volume 3. The level of road train operations by the two railroads into and out of Norfolk is expected to continue essentially as current operations except that NW will operate one additional time freight train into and out of Portlock Yard daily. The Lamberts Point complex will not be affected.

Interchange between the consolidated roads and VM and NPB will be handled by consolidated yard crews in the same manner as NW interchange is now handled with those carriers. Industrial work currently handled by SR will be handled by consolidated yard crews operating out of Portlock Yard. Costs and savings are shown below.

Before the
SURFACE TRANSPORTATION BOARD

Finance Docket No. 36522

NORFOLK SOUTHERN RAILWAY COMPANY
—PETITION FOR DECLARATORY ORDER

EXHIBIT J

(aaa) Qume Corporation, 2350 Qume Drive, San Jose, California 95150.
(bbb) Radio y Television, Inc., 9221 Quivira Road, Overland Park, Kansas 66212.
(ccc) The Research & Review Service of America, Inc., 6213 La Pas Trail, Indianapolis, Indiana 46268.
(ddd) The O. M. Scott & Sons Company, 333 North Maple Street, Marysville, Ohio 43040.
(eee) The Sheraton Corporation of America, 60 State Street, Boston, Massachusetts 02109.
(fff) Sheraton Supply Company, 60 State Street, Boston, Massachusetts 02109.
(ggg) Southern Wood Piedmont Company, New South Park, Spartanburg, South Carolina 29304.
(hhh) Sylvan Shipping Company, Inc., 1177 Summer Street, Stamford, Connecticut 06904.
(iii) Thor Mining Company, Berkeley Springs, West Virginia 25411.
(jjj) UAD, Inc., 81 Elm Street, Biddeford, Maine 04005.
(kkk) U.S. Telephone and Telegraph Corporation, 67 Broad Street, New York, New York 10004.
(lll) Vann Industries, Inc., One Valley Square, Charleston, West Virginia 25301.
(mmm) Western Automotive Warehouse Distributors, Inc., 3260 East 26th Street, Los Angeles, California 90023.
(nnn) Wil-jar Corporation, One Valley Square, Charleston, West Virginia 25301.

1. The parent corporation is Johns-Manville Corporation with its principal place of business at Ken-Caryl Ranch, Denver, Colorado 80217.

2. The wholly-owned subsidiaries which will participate in the operations are as follows:

(a) Johns-Manville Sales Corporation, Ken-Caryl Ranch, Denver, Colorado 80217; and
(b) Manville Forest Products Corporation, P.O. Box 488, West Monroe, Louisiana 71291.

1. Parent corporation and address of principal office: Warner-Lambert Company, 201 Tabor Road, Morris Plains, New Jersey 07950.

2. Subsidiaries, and addresses of their respective principal offices:

(a) All Orthopedic Appliances, Inc., 75 N.E. 74th Street, Miami, Florida 33138.
(b) American Optical Corporation, 14 Mechanic Street, Southbridge, Massachusetts 02150.
(c) Cool-Ray, Inc., 359 Beacham Street, Chelsea, Massachusetts 02150.
(d) The Deseret Company, 9450 South State Street, Sandy, Utah 84070.
(e) Entenmann's, Inc., 1724 Fifth Avenue, Bayshore, New York 11706.
(f) Entenmann's Bakery of Florida, Inc., 3325 N.W. 62nd Street, Miami, Florida 33140.
(g) Entenmann's Bakery of Pennsylvania, Inc., 690 East Lincoln Highway, Exton, Pennsylvania 19341.
(h) Good & Plenty Manufacturing Co., 2901 Grant Avenue, Philadelphia, Pennsylvania 19114.
(i) Hudson Processing Corp., Star Route 9, Hudson, New York 12534.
(j) Magor Mold, Inc., 1044 E. Edna Place, Covina, California 91724.
(k) Nuclear Medical Laboratories, Inc., 8700 Stemmons Freeway, Dallas, Texas 75247.
(l) Parke, Davis & Company, 201 Tabor Road, Morris Plains, New Jersey 07950.
(m) Warner-Lambert Inc., Eastern Airlines Building, 8th Floor, Santurce, Puerto Rico 00911.

Agatha L. Mergenovich,

Secretary.

[FR Doc. 80-40790 Filed 12-31-80; 8:45 am]

BILLING CODE 7035-01-M

[No. MC-F-14484]

NWS Enterprises, Inc.—Control—Southern Region Motor Transport, Inc.; Motor Carrier Operating Rights Application

AGENCY: Interstate Commerce Commission.

ACTION: Application accepted for consideration.

SUMMARY: The Commission is accepting the above entitled application for consideration and setting a schedule for the proceeding.

DATES: Written comments must be filed with the Commission by February 17, 1981.

ADDRESSES: An original and 10 copies of all statements should be sent to: Interstate Commerce Commission, Section of Finance, Room 5417, Washington, DC 20423.

FOR FURTHER INFORMATION CONTACT: Ellen Hanson, (202) 275-7245 or Ernest B. Abbott, (202) 275-3002.

SUPPLEMENTAL INFORMATION: In MC-F-14484, NWS ENTERPRISES, INC. (NWS) filed an application on December 4, 1980 under 49 U.S.C. §§ 11343 and 11344 seeking authorization for NWS to acquire indirect control of SOUTHERN REGION MOTOR TRANSPORT, INC. (SRMT) through the ownership of the capital stock of SOUTHERN RAILWAY COMPANY (SR). SRMT is a wholly-owned subsidiary of the CENTRAL OF GEORGIA RAILROAD COMPANY, which is a wholly-owned subsidiary of SR.

The operating rights sought to be controlled include general commodity authority (with the usual exceptions) over regular routes between points in AL, GA, and TN, restricted to service which is auxiliary to, or supplemental of, rail service, as authorized in Certificate No. MC-105632 and subnumbers thereunder. No duplicating authority is sought by the application.

The application is directly related to the control application filed by NWS, SR, and the NORFOLK AND WESTERN RAILWAY COMPANY under 49 USC §§ 11343 and 11344. Notice of the control and other related applications is published separately in this edition of the **Federal Register** under Finance Docket No. 29430 (Sub-1-6). The time limits established for Finance Docket No. 29430. (Sub-1) will be applied to this motor carrier application, and the applications shall be consolidated for hearing. Comments supporting or opposing the application are due by February 16, 1981. The original and 10 copies of these comments should be filed with the Commission at the address shown above, and should be served on applicant's representatives: Nancy S. Fleischman and David J. Kaufman, P.O. Box 1808, Washington, D.C. 20013.

We have reviewed the application and find it to be complete.

It is ordered:

1. The application in Docket No. MC-F-14484 is accepted for consideration.

2. This decision is effective on January 2, 1981.

Dated: December 22, 1980.

By the Commission, Division 2, Commissioners Trantum, Gresham, and Gilliam.

Agatha L. Mergenovich,

Secretary.

[FR Doc. 80-40793 Filed 12-31-80; 8:45 am]

BILLING CODE 7035-01-M

NWS Enterprises; Application To Control Norfolk and Western Railway Co. and Southern Railway Co.

AGENCY: Interstate Commerce Commission.

ACTION: Applications accepted for consideration.

SUMMARY: In the matter of NWS Enterprises, Inc.—Control—Norfolk and Western Railway Company and Southern Railway Co., Finance Docket No. 29430 (Sub-1), Southern Railway Co.—construction and operation of a connection at Winston-Salem, NC, Finance Docket No. 29430 (Sub-2), Southern Railway Co.—construction and operation of a connection at

Chesapeake, VA, Finance Docket No. 29430 (Sub-3), Norfolk and Western Railway Co. and Southern Railway Company—construction and operation of a connection at Hurt, VA, Finance Docket No. 29430 (Sub-4), Norfolk and Western Railway Co.—construction and operation of a connection at Muncie, IN, Finance Docket No. 29430 (Sub-5), NWS Enterprises, Inc. issuance of securities, Finance Docket No. 29430 (Sub-6), Norfolk and Western Railway Company—abandonment—Lynchburg, VA, Docket No. AB-10 (Sub-23F), Norfolk, Franklin and Danville Railway Co.—abandonment—between South Hill, VA and Blanche, NC, Docket No. AB-216 (Sub-1), NWS Enterprises, Inc.—control—Southern Region Motor Transport, Inc., Docket No. MC-F-14484. The Commission is accepting for consideration the application of NWS Enterprises to control the Norfolk and Western Railway Company and the Southern Railway Company. The Commission is also accepting related applications by these parties and subsidiaries to construct and operate connections, to abandon trackage, to control a motor carrier and to issue securities. A schedule is set for the consolidated proceeding.

DATES: Written comments must be filed no later than February 17, 1981. Applications for inclusion, inconsistent applications and any other responsive applications must be filed no later than April 2, 1981.

FOR FURTHER INFORMATION CONTACT: Ellen Hanson, (202) 275-7245 or Ernest B. Abbott, (202) 275-3002.

ADDRESS: An original and 10 copies of all statements should be sent to: Section of Finance, Room 5414, Interstate Commerce Commission,. Washington, DC 20423.

SUPPLEMENTARY INFORMATION: On December 4, 1980, NWS ENTERPRISES, INC. (NWS), NORFOLK AND WESTERN RAILWAY COMPANY (NW) and SOUTHERN RAILWAY COMPANY (SR) jointly filed an application under 49 U.S.C. §§ 11343 and 11344 seeking authority for NWS to control NW and SR.[1] A number of related applications were also filed on December 4, 1980, including four construction and operation applications (two by SR, one by NW and one jointly by SR and NW) and an application for approval of the issuance of securities by NWS. These applications are accepted for consideration and have been assigned Finance Docket No. 29430 (Sub-Nos. 1-6), respectively.

Also filed on December 4, 1980 were two related abandonment proceedings: Docket No. AB-10 (Sub-23F) by NW and Docket No. AB-216 (Sub-1) by the NORFOLK, FRANKLIN AND DANVILLE RAILWAY COMPANY (NFD), an NW subsidiary.

Additionally, on December 4, 1980, NWS filed an application seeking approval of control of a motor carrier in Docket No. MC-F-14484. Acceptance of this application is published elsewhere in today's edition of the **Federal Register.**

All of the applications have been consolidated for handling by the Commission.

These applications were filed under our current consolidation regulations, 49 C.F.R. Part 1111, as modified in Ex Parte No. 282 (Sub-3), Railroad Consolidation Procedures, 363 I.C.C. 200 (1980). Applicability of these regulations was established in our decision served October 1, 1980, published at 45 FR 66911 (October 8, 1980). These regulations, subject to the waivers granted in our October 1, 1980 decision and in a decision served November 28, 1980, published at 45 FR 79590 (December 1, 1980) apply to all other persons who may become parties to these proceedings.

We are accepting these applications for consideration because they substantially comply with the applicable regulations and the waivers granted in this proceeding.

By decision of October 1, 1980, published at 45 FR 69299 (October 20, 1980), we directed applicants to file certain additional information concurrently with their application. Applicants have complied with our requirement.

The Commission's Energy and Environment Branch has reviewed applicants' Environmental Report, and found it to be complete. The Branch and the Commission reserve their rights under 49 CFR 1108(7)(e) and 1111.4(c)(2)(v) to request additional information.

The applications and exhibits are available for inspection in the Public Docket Room at the offices of the Interstate Commerce Commission in Washington, DC.

Description of the Transaction

The proposed transaction involves the acquisition of control, through stock ownership of NW and its subsidiary companies and of SR and its consoldiated system companies, by NWS, a newly incorporated non-carrier holding company. As noted in the publication of applicants' Notice of Intent, 45 FR 60501 (September 12, 1980), the proposed consolidation is a "major" transaction within the meaning of 49 CFR 1111.3(c), Ex. parte No. 282 (Sub-3), *Railroad Consolidation Procedures,* 363 I.C.C. 200 (1980). The application involves the proposed control of at least two class I railroads, as defined by the Commission, and as such is subject to the criteria of 49 U.S.C. 11344(b) and the time limits of 49 U.S.C. 11345(b) as those sections are modified by Section 228 of the Staggers Rail Act of 1980, Public Law 96-448, October 14, 1980. Under the proposed transaction the rail carriers will not be merged, although certain operating efficiencies among the carriers are proposed. The carriers will continue to operate in the states and over the lines described below, subject to certain abandonments and coordinated operations described in the application.

The rail carrier subsidiaries of NW and the SR consolidated system carriers are set forth in the appendix.

NW operates a system comprised of 7,454 miles of railroad in IL, IN, IA, KY, MD, MI, MO, NE, NY, NC, OH, PA, VA and WV, and in the Province of Ontario, Canada. NW also operates in KS pursuant to trackage rights.

The principal lines of NW extend from the eastern points of Norfolk, VA, Hagerstown, MD, and Buffalo, NY, westward to Kansas City, KS, and Omaha, NE and serve Detroit, MI, Cleveland, Toledo, Akron, Columbus and Cincinnati, OH, Ft. Wayne, Muncie, and Indianapolis, IN, Chicago and Decatur, IL, St. Louis, MO, and Pittsburgh, PA. NW also provides north-south service between Chicago and St. Louis, between the upper midwest and western VA and through the Shenandoah Valley of VA.

SR operates a system comprised of 10,215 miles of railroad in the states of AL, DC, FL, GA, IL, IN, KY, LA, MS, NC, OH, SC, TN and VA.

The principal lines of SR extend from Alexandia, VA through Atlanta, GA, and Birmingham, AL, to New Orleans, LA and from Cincinnati, OH, and East St. Louis, IL, through Chattanooga, TN, and Atlanta to Jacksonville, FL. SR serves numerous points in the southeast including Norfolk, VA; Charlotte, NC; Columbia and Charleston, SC; Savannah and Macon, GA; Mobile, AL; and Memphis, TN.

DH's independently operated rail properties are located in NY, PA and VT. DH also operates in NJ, MD and VA and in DC pursuant to trackage rights. The rail properties of DH are not involved in the proposed transaction.

Principal points of interchange between NW and SR are Alta Vista,

[1] The DELAWARE AND HUDSON RAILWAY COMPANY (DH) is also an applicant by virtue of its control by Dereco, Inc., a wholly-owned subsidiary of NW.

Danville, Lynchburg, Norfolk and Norton, VA; Bristol, TN-VA; Durham and Winston-Salem, NC: Cincinnati, OH; and St. Louis, MO-East St. Louis, IL.

Applicants propose to conduct operations as a single system.

Participation in the Proceeding: Comments

Any interested person may participate in this proceeding by submitting written comments regarding the applications. An original and 10 [2] copies must be filed with the Section of Finance, Room 5414, Interstate Commerce Commission, Washington, DC 20423, no later than February 17, 1981. Written comments shall be concurrently served by first-class mail on the United States Secretary of Transpoortation, the Attorney General of the United States, and the applicants' representatives:

Donald M. Tolmie, General Counsel, Norfolk and Western Railway Company, 8 North Jefferson Street, Roanoke, VA 24042

R. Allan Wimbish, General Solicitor, Southern Railway Company, 920 15th Street, N.W., Washington, DC 20005

Richard J. Flynn, Sidley & Austin, 1730 Pennsylvania Avenue, N.W., Washington, DC 20006

Written comments must also be served upon all parties of record within 10 days of service of the service list by the Commission. We plan to issue that service list by February 26, 1981. All persons who file timely written comments may be considered as parties of record, but only if they so indicate in their comments. In this event no petition for leave to intervene need be filed.

Written comments must contain:

(1) the docket number and title of the proceeding;

(2) the name, address and telephone number of the commenting party and its representative upon whom service shall be made;

(3) the commenting party's position, i.e. whether it supports or opposes the proposed transactions;

(4) a statement of whether the commenting party intends to participate formally in the proceeding or merely comment upon the proposal;

(5) a list of all information sought to be discovered from applicant carriers;

(6) an initial list of specific protective conditions sought; and

(7) any request for oral hearing that the commenting party will make with reasons supporting the request.

Particular attention should be given to Ex Parte No. 282 (Sub-No. 3A), *Railroad Consolidation Proceedings, Expedited Processing,* ———I.C.C. (served December 17, 1980), 45 FR 84803 December 23, 1980).

Additionally, we encourage parties filing comments to include an analysis of the issues relating to the underlying statutory criteria and antitrust policy the Commission must consider in this proceeding. Particular attention should be given to the proposed Ex Parte 282 (Sub-No. 6), *Railroad Consolidation Procedures, General Policy Statement,* 363 I.C.C. 241 (1980), 45 FR 61335 (September 16, 1980).

We are waiving on our own motion the requirements found in our regulations that railroad filing written comments file as part of those comments copies of existing preferential solicitation agreements and a list of run-through train operations, 49 C.F.R. 1111.4(d)(1)(G)(1-2). Where such information is relevant, we believe commenting ralroads will have every incentive to file such information voluntarily. Where it is not relevant, we do not need such information. Railroads filing comments must still comply with 49 C.F.R. 1111.4(d)(1)(G)(3), as described below.

Preliminary comments from the Secretary of Transportation and the Attorney General must be filed with the Commission by March 3, 1981.

Responsive Applications

Prefiling Requirements: Because we have determined that this proceeding constitutes a major transaction within the meaning of Ex Parte No. 282 (Sub-3), railroads filing written comments must, in addition to the information described above, state whether the commenting railroad intends to file inconsistent applications, petitions for inclusion, trackage rights applications, or any other affirmative relief requiring an application to be filed with the Commission as set forth in 49 C.F.R. 1111.4(d)(1)(G)(3). THIS WILL BE CONSIDERED A PREFILING NOTICE EITHOUT WHICH THE COMMISSION WILL NOT ENTERTAIN APPLICATIONS FOR THIS TYPE OF RELIEF.

Filing Requirements: Parties wishing to modify any of their requested specific protective conditions must file a second list of protective conditions no later than March 20, 1981. PARTIES SHALL NOT BE PERMITTED TO SEEK ANY PROTECTIVE CONDITIONS OTHER THAN THOSE REQUESTED IN WITHER THEIR FIRST OR SECOND LIST OF PROTECTIVE CONDITIONS.

Parties wishing to file responsive applications must do so no later than April 2, 1981. Responsive applications include inconsistent applications, petitions for inclusion, and any other affirmative relief that requires an application to be filed with the Commission (such as trackage rights, purchase, purchase of a portion, acquisition, extension, construction, operation, pooling, terminal operations, abandonment, et cetera).[3] Any such applications are presumed under our regulations to be major and must conform to the requirements for a major application unless an advance ruling has been given by the Commission that the responsive application is not major.

Responsive applications must be serve upon the persons set forth at 49 C.F.R. 1111.4(c)(5).

The traffic impact of any relief sought in responsive applications must be estimated. Any traffic studies and data submitted shall relate to the calendar year January 1, 1979 to December 31, 1979, the latest full calendar year preceding the filing of the primary application, 49 C.F.R. 1111.2(b)(3)(i). We strongly encourage any person filing traffic studies as part of a responsive application to study not only its own traffic but to submit market impact analyses which will address fully the potential competitive impacts in markets served as a result of the responsibe application. These analyses may include traditional traffic studies using traffic appearing in the primary applicants' sample if that traffic can be reasonably expected to be diverted upon a grant of the responsive application. See Finance Docket No. 28583 (Sub-1F) *Burlington Northern, Inc.—Control and Merger—St. Louis San Francisco Railway Company* (not printed), decided July 20, 1978 at sheet 3. The analyses should also address the impact of the proposal on the essential services provided by all competing carriers and on the competitive alternatives available to shippers. See Finance Docket No. 30000, *Union Pacific Corp.—Control—Missouri Pacific Corp.* (not printed), decision served December 17, 1980. The parties requesting protective conditions or filing responsive applications must explain in detail how their requests are both relevant and material to issues of

[2] We are waiving the requirement at 49 CFR 1111.4(a)(3) that 20 copies of all documents in major proceedings be filed with the Commission.

[3] While trackage rights applications are not normally subject to environmental analysis, since any responsive trackage rights applications which may be filed herein will be related to the consolidation proposal, we request that any party filing a trackage rights application indicate: (1) the location and length in miles of track over which trackage rights are sought, (2) the annual number of cars and trains to be added to the proposed route and (3) the net change in gross ton-miles and in energy consumption expected as a result of the trackage rights proposal. This information will facilitate our environmental analysis. See *Union Pacific Corp.—Control—Missouri Pacific Corp.* (not printed), decision served December 17, 1980.

competition and essential transportation service raised by applicants' proposed consolidation.

Each responsive application filed and accepted (if acceptance is required) will be consolidated with the primary applications in this proceeding.

Petitions for extensions of time to file responsive applicatins will not be granted. Petitions for extension of up to 90 days to complete an application (setting forth the specific portions of the application for which an extension is requested) and petitions for waiver, petitions for clarification and petitions seeking to rebut the presumption of a major market extension must be filed no later than February 17, 1981.

Procedural Information

Applicants are directed to respond no later than March 20, 1981, to any information requests contained in the written comments of other parties. We encourage response to discovery requests as soon as possible in order to expedite the proceeding. Applicants' responses should indicate what information will be voluntarily supplied and reasons why the remainder will not be voluntarily supplied. We warn parties now that the Commission will not tolerate dilatory tactics in response to reasonable discovery requests designed to elecit relevant evidence. A refusal voluntarily to supply information will be treated as an objection to the request for discovery. Responses should be served upon all parties of record, and 20 copies of those responses should be concurrently filed with the Commission.

The original and 10 copies of all documents in this proceeding should be filed directly with the Section of Finance, Office of Proceedings, Interstate Commerce Commission, Room 5414, Washington, DC 20423.

On March 31, 1981, a preliminary conference will be held to discuss, among other things, disputes concerning the discovery and production of information. Administrative Law Judge George P. Morin, who has been assigned to conduct prehearing matters and any oral hearings found necessary during the course of these proceedings, will preside. The conference will begin at 9:30 a.m. in Hearing Room B at the Interstate Commerce Commission, 12th Street and Constitution Avenue, NW, Washington, DC.

Any interlocutory appeals from rulings by the Judge will be considered by Division 1. Such appeals must be filed within 5 days after the date on which the ruling appealed from was made. Replies must be filed within 3 days after the appeal is filed.

By statute, the evidentiary phase of the proceeding must be concluded by January 2, 1982. Service of an initial decision will be waived, and determination on the merits of the applications will be made in the first instance by the entire Commission under 49 U.S.C. § 11345.

It is ordered:

1. The applications in Finance Docket No. 29430 (Sub-1–6) and Dockets Nos. AB–10 (Sub-23) and AB–216 (Sub-1) are accepted for consideration.

2. The parties shall comply with all provisions as stated above.

3. This decision is effective on January 2, 1981.

Decided: December 22, 1980.

By the Commission, Division 2, Commissioners Trantum, Gresham, and Gilliam.

Agatha L. Mergenovich,

Secretary.

Appendix A.—Southern Railway Company's Consolidated Subsidiaries

Class I

The Alabama Great Southern Railroad Company
Central of Georgia Railroad Company
The Cincinnati, New Orleans and Texas Pacific Railroad Company

Class II

Georgia Southern and Florida Railway Company
Norfolk Southern Railway Company

Class III

Atlantic and East Carolina Railway Company
Birmingham Terminal Company
Camp Lejeune Railroad Company
Chattanooga Station Company
The Georgia Northern Railway Company
Interstate Railroad Company
Live Oak, Perry, and South Georgia Railway Company
Louisiana Southern Railway Company
New Orleans Terminal Company
St. Johns River Terminal Company
State University Railroad Company (54%)
Tennessee, Alabama & Georgia Railway Company
Tennessee Railway Company

Other Companies

Airforce Pipeline, Inc.
The Atlanta and Charlotte Air Line Railway Company
Atlanta Terminal Company
Blue Ridge Railway Company
Charlotte-Southern Corporation
Chattanooga Terminal Railway Company
Danville and Western Railway Company
Durham and Southern Railway Company
The Georgia Midland Railway Company
High Point, Randleman, Asheboro and Southern Railroad Company (86%)
Macon Terminal Company
Memphis and Charleston Railway Company
Mobile and Birmingham Railroad Company (78%)
Norfolk Southern Industrial Development Corp.
The North Carolina Midland Railroad Company (97%)
Southern Region Motor Transport, Inc.
The Southern Western Rail Road Company (99.8%)
Transylvania Railroad Company (97%)
Virginia and Southwestern Railway Company
Yadkin Railroad Company (74%)

Note.—Control 100% or as indicated.

Appendix B.—Norfolk and Western Railway Company's Railroad Subsidiaries

Class III

The Akron, Canton & Youngstown Railroad Company
Chesapeake Western Railway
The Lorain & West Virginia Railway Company
New Jersey, Indiana & Illinois Railroad Company
Norfolk, Franklin and Danville Railway Company

Terminal Company

The Lake Erie and Fort Wayne Railroad Company

Other Railroad Companies

The Scioto Valley and New England Railroad Company
The Toledo Belt Railway Company
Wabash Railroad Company
The Wheeling and Lake Erie Railway Company

[FR Doc. 80-40792 Filed 12-31-80; 8:45 am]
BILLING CODE 7035-01-M

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731-TA-25 (Final)]

Anhydrous Sodium Metasilicate From France

Determination

On the basis of the record[1] developed in investigation No. 731–TA–25 (Final), the Commission unanimously determined, pursuant to section 735(b)(1) of the Tariff Act of 1930 (19 U.S.C. 1673d(b)(1)), that an industry in the United States is threatened with material injury by reason of imports of anhydrous sodium metasilicate from France, provided for in item 421.34 of the Tariff Schedules of the United States (TSUS), which the Department of Commerce has determined is being, or is likely to be, sold in the United States at less than its fair value (LTFV).[2]

[1] The record is defined in sec. 207.2(j) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(j)).

[2] Section 207.25(d)(3) of the Commission's Rules of Practice and Procedure requires a finding as to whether material injury by reason of the less-than-fair-value imports would have been found but for the suspension of liquidation of entries of the merchandise by the Department of Commerce. There is insufficient information to support a determination that there would have been material

Footnotes continued on next page

OP-STMT-597

Before the
SURFACE TRANSPORTATION BOARD

Finance Docket No. 36522

NORFOLK SOUTHERN RAILWAY COMPANY
—PETITION FOR DECLARATORY ORDER

EXHIBIT K

NORFOLK SOUTHERN

Norfolk Southern Corporation
Law Department
Three Commercial Place
Norfolk, Virginia 23510-2191

(804) 629-2813
Writer's Direct Dial Number

Nancy S. Fleischman
Senior General Attorney

December 13, 1990

VIA AIRBORNE

Mr. Sidney L. Strickland, Jr., Secretary
Interstate Commerce Commission
Attn: Mail Room (Room #1324)
12th Street and Constitution Avenue, N.W.
Washington, D. C. 20423

Re: Finance Docket No. 31791 -- Southern Railway Company -- Control -- Norfolk and Western Railway Company

Finance Docket No. 31792 -- Southern Railway Company -- Assumption of Liabilities -- Notice of Exemption

Dear Mr. Strickland:

Enclosed for filing with the Commission in the captioned proceedings are an original and ten copies of a Notice of Exemption. Also, enclosed is a check for $650.00 to cover the filing fee.

Please acknowledge receipt on the enclosed copy of this letter and return it to me in the self-addressed, stamped envelope.

Yours truly,

Nancy S. Fleischman

FILED
DEC 14 1990
INTERSTATE COMMERCE COMMISSION

DEC 14 2 47 PM '90
MOTOR OPERATING UNIT

NSF/fms

Enclosures

cc: Mr. J. H. Dettmar

0-351F007

BEFORE THE

INTERSTATE COMMERCE COMMISSION

FINANCE DOCKET NO. 31791

SOUTHERN RAILWAY COMPANY
-- CONTROL --
NORFOLK AND WESTERN RAILWAY COMPANY

FINANCE DOCKET NO. 31792

SOUTHERN RAILWAY COMPANY
-- ASSUMPTION OF LIABILITIES --

FILED
DEC 14 1990
INTERSTATE
COMMERCE COMMISSION

DEC 14 2 49 PM '90
MOTOR OPERATING UNIT

NOTICE OF EXEMPTION

Nancy S. Fleischman
Senior General Attorney
Norfolk Southern Corporation
Three Commercial Place
Norfolk, Virginia 23510-2191
(804) 629-2813

Counsel for
SOUTHERN RAILWAY COMPANY
NORFOLK AND WESTERN RAILWAY COMPANY

Dated: December 14, 1990

OP-STMT-600

BEFORE THE

INTERSTATE COMMERCE COMMISSION

FINANCE DOCKET NO. 31791

SOUTHERN RAILWAY COMPANY
-- CONTROL --
NORFOLK AND WESTERN RAILWAY COMPANY

FINANCE DOCKET NO. 31792

SOUTHERN RAILWAY COMPANY
-- ASSUMPTION OF LIABILITIES --

NOTICE OF EXEMPTION

DEC 14 2 49 PM '90
MOTOR OPERATING UNIT

COME NOW Southern Railway Company (SR) and Norfolk and Western Railway Company (NW) and hereby submit to the Interstate Commerce Commission (Commission) this Notice of Exemption to engage in transactions found by the Commission to be presumptively exempt from Commission regulation. This notice is filed pursuant to 49 USC § 10505, the Commission's Railroad Consolidation Procedures at 49 CFR Part 1180, and the Commission's Securities Issuance and Assumption of Obligations Regulations at 49 CFR Part 1175.

The exempt transactions are (1) direct control through stock ownership of NW by SR and indirect control by SR of NW's rail carrier subsidiaries; and (2) guarantee by SR of NW's

obligations in respect of certain mortgage bonds and debentures. SR will assume ownership of all issued and outstanding common stock of NW on December 31, 1990. SR's guarantee will take effect simultaneously with or as soon as practicable after the acquisition of control.

Section 10505, as amended, directs the Commission to exempt a transaction when the Commission finds that the transaction satisfies certain statutory criteria. Those criteria are (1) that application of Subtitle IV of Title 49 of the United States Code to the transaction is not necessary to carry out the national transportation policy and (2) that (a) the transaction or service is of limited scope or (b) continued Commission regulation is not needed to protect shippers from the abuse of market power. After due consideration of the statutory criteria, the Commission determined that certain types of transactions, set forth at 49 CFR § 1180.2(d) and § 1175.1, shall be presumed exempt.

Among the transactions presumed exempt are "[t]ransactions within a corporate family that do not result in adverse changes in service levels, significant operational changes, or a change in the competitive balance with carriers outside the corporate family" (49 CFR § 1180.2(d)(3)). The Commission also adopted a presumptive exemption from regulation under 49 USC § 11301 for "the issuance of securities and/or the assumption of liabilities" (49 CFR § 1175.1(a)). The Commission's regulations at § 1180.4(g)(1) and § 1175.2(a)

provide that, to avail itself of such exemptions, a rail carrier must file a verified notice of the transactions.

In accordance with the requirements of 49 CFR § 1180.4(g) and § 1175.2(a), SR and NW hereby file the required notice of exempt transactions and state as follows:

I. **Description of the Control Transaction**
49 CFR § 1180.6(a)(i)-(iii) and § 1180.6(a)(5);

This notice is filed on behalf of the following common carriers by rail:

Southern Railway Company
Norfolk and Western Railway Company
Three Commercial Place
Norfolk, Virginia 23510-2191.

Counsel for SR and NW is:

Nancy S. Fleischman, Esq.
Norfolk Southern Corporation
Three Commercial Place
Norfolk, Virginia 23510-2191.

Norfolk Southern Corporation (NS Corp), a noncarrier holding company, controls through stock ownership numerous rail carriers operated as a single rail system extending throughout the southeastern and midwestern United States. *Norfolk Southern Corp.-Control-Norfolk & W. Ry. Co.*, 366 ICC 173 (1982). Among the rail carrier subsidiaries of NS Corp are SR and NW, both Class I rail carriers. NW also controls through stock ownership Chesapeake Western Railway, a Class III carrier, and The Toledo Belt Railway Company and Wabash Railroad Company, both operated by NW.

Pursuant to authority granted by the Commission in *Norfolk Southern, supra.*, beginning in June 1982, certain facilities and functions of the rail carrier subsidiaries of NS Corp were consolidated. In particular "various traffic functions such as sales, marketing, pricing, and industrial development [were coordinated] at the holding company level", and sales activities were consolidated within NS Corp "to achieve shipper awareness of system operations and system sales and marketing policies." *Norfolk Southern, supra.*, at 214. At the same time the Commission recognized that NS Corp's individual rail carrier subsidiaries would "continue as active railroad entities responsible for daily operations." *Id.*

SR and NW have their own operating employees, have separate tariff listings, and are shown as separate entities in routings, waybills, and freight bills. NS Corp keeps separate revenue, car, and other accounts for SR and NW. This separation of accounts results in considerable duplication of effort to route and exchange traffic with NW and SR.

Many customers and connections have urged NS Corp to simplify its billing, settlement, and payment procedures to permit doing business with NS Corp's rail carrier subsidiaries as a single entity. In light of the growing public perception of a single Norfolk Southern rail system and the potential efficiencies and economies, NS Corp decided to adopt single system accounting for the operations of its rail carrier subsidiaries, beginning in January 1991.

To facilitate single system accounting and comply with applicable securities regulations, certain changes in corporate structure and relationships among NS Corp rail carrier subsidiaries will be required. These transactions are the subject of this notice and are summarized as follows:

1. The corporate name of Southern Railway Company will be changed to **Norfolk Southern Railway Company**. Approval for the change in corporate name will be sought at a special shareholders' meeting on December 14, 1990.
2. NS Corp will make a contribution to the capital of SR which will consist of all issued and outstanding common stock of NW. As a result, SR will obtain direct control of NW and indirect control of NW's rail carrier subsidiaries.

The corporate changes covered by this notice will not result in any change in rail operations or service to customers. Therefore, no effects upon employees are anticipated. The interests of rail employees will be addressed adequately by imposition, pursuant to 49 U.S.C. § 10505(g) and § 11347, of standard labor protective conditions, as set forth in, *New York Dock Ry.-Control-Brooklyn Eastern Dist.*, 360 ICC 60 (1979), as clarified by *Wilmington Terminal R.R.-Pur. & Lease-CSX Transp.*, 6 ICC 2d 799 (1990).

II. Description of Assumption of Obligations
49 CFR § 1175.2(a)

In connection with SR's direct control of NW and subject to the concurrence of the staff of the Securities and Exchange Commission (SEC), it is proposed that detailed financial reporting to the SEC for NW will cease, and certain summarized financial information for NW will be included in the consolidated financial statements of its parent corporation, SR. As a condition to its concurrence, the SEC likely will require that SR guarantee certain NW debt obligations.

Subject to obtaining SEC concurrence, SR proposes to assume liabilities and obligations, as guarantor, in respect of the following NW debt securities (collectively, NW Debt Securities): (i) Norfolk and Western Railway Company First Consolidated Mortgage 4% Bonds due October 1, 1996; (ii) Norfolk and Western Railway Company 4.85% Subordinated Income Debentures due November 15, 2015; and (iii) The Virginian Railway Company 6% Subordinated Income Debentures, due August 1, 2008. The total aggregate principal amount of the NW Debt Securities is approximately $34 million. It is proposed that SR will unconditionally guarantee the payment of principal of, premium (if any) on, and interest on the NW Debt Securities. To provide for the guarantees, SR and NW will enter into supplemental indentures with the respective trustees under the indentures governing the NW Debt Securities. The supplemental indentures will modify certain terms of the NW Debt Securities as originally

issued by NW or its predecessors; however, no new securities will be issued by NW. The purpose of the proposed assumption of obligations and liabilities in respect of and changes relating to the NW Debt Securities is to facilitate the corporate restructuring described in this notice.

III. Exhibits
49 CFR § 1180.6(a)(5) and § 1180.6(a)(7)(ii)

Attached to this notice as Exhibit 1 is the system map of NS Corp's rail carrier subsidiaries. No written agreement was or is intended to be entered into to reflect the changes in corporate structure.

IV. SR's Direct Control of NW, Indirect Control of NW's Rail Carrier Subsidiaries, and Guarantee of Certain NW Obligations Are Appropriate for Presumptive Exemption from Regulation

The corporate family transaction which is the subject of this notice fits within the definitions at § 1180.2(d) of an exempt transaction and satisfies the statutory requirements of § 10505. The transaction involves only rail carrier subsidiaries of NS Corp already commonly controlled and operated as part of a corporate family. The changes in corporate structure will not result in changes in rail service or operations. There will be no change in the competitive balance with carriers outside the corporate family. Guarantee by SR of obligations under NW Debt Securities is consistent with and in furtherance of the proposed corporate family transaction.

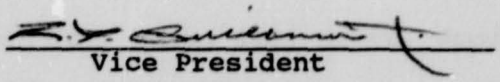
As required by § 10505(a)(1), assertion of Commission jurisdiction over these transactions is not necessary to carry out the national transportation policy. 49 USC § 10101(a). Consistent with the structural nature of these transactions, most factors addressed in the national transportation policy will be unaffected. However, exemption of the transactions from regulation will minimize the need for Federal regulatory control (49 USC § 10101(a)(2); promote a sound rail system with continued effective competition (49 USC § 10101(a)(4)); and foster sound economic conditions in transportation (49 USC § 10101(a)(5)).

The transactions also are of limited scope, changing the relationship between two members of a corporate family from affiliates to parent and subsidiary. No change in access to rail service for customers of SR, NW, or any NS Corp rail carrier subsidiary will result. No potential exists for increase in or abuse of market power by SR, NW, or any NS Corp rail carrier subsidiary, all of which will continue to serve their respective customers and markets.

SR and NW considered the potential impact upon the environment and energy consumption of the transactions; no significant effects were identified. The transactions do not require or justify exercise of Commission jurisdiction and are the proper subject of exemptions pursuant to 49 USC § 10505 and 49 CFR § 1180.2(d) and § 1175.1.

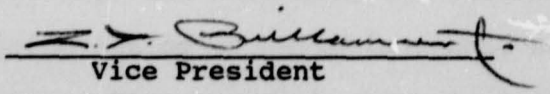
Respectfully submitted,

SOUTHERN RAILWAY COMPANY



Vice President

NORFOLK AND WESTERN RAILWAY COMPANY



Vice President

Of counsel:

Nancy S. Fleischman, Esq.
Senior General Attorney
Norfolk Southern Corporation
Three Commercial Place
Norfolk, Virginia 23510-2191
(804) 629-2813

Dated: December 14, 1990

VERIFICATION

COMMONWEALTH OF VIRGINIA)
) SS:
CITY OF NORFOLK)

L. I. Prillaman, Jr., being duly sworn, deposes and says that he is Vice President and Controller of Norfolk and Western Railway Company and Southern Railway Company; that he is authorized to sign, verify, and file with the Interstate Commerce Commission the foregoing Notice of Exemption; that he has carefully examined all of the statements contained in said Notice of Exemption; that he has knowledge of the matters set forth therein; and that the same are true and correct to the best of his knowledge, information, and belief.

L. I. Prillaman, Jr.

Subscribed and sworn to before me
this 13th day of December, 1990.

Jeanie B. Davis
Notary Public

My commission expires:
June 16, 1991

[SEAL]

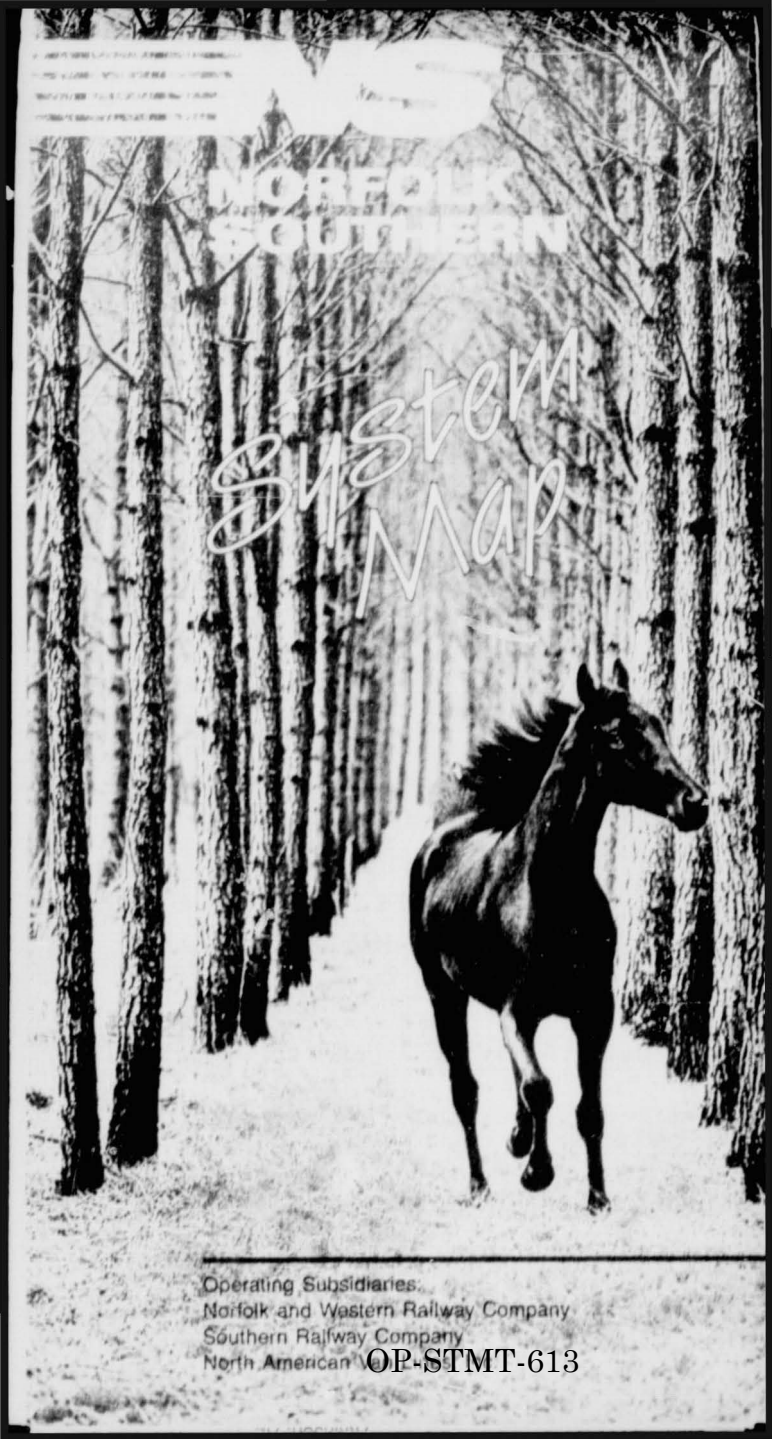
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Exemption was served upon the Governors, public service commissions, and Departments of Transportation of Alabama, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Missouri, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Virginia, and West Virginia, the designated environmental agencies of Alabama, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maryland, Michigan, Missouri, Mississippi, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Virginia, and West Virginia (with the letter in compliance with 49 CFR § 1105.11), the U.S. Department of Transportation, the Attorney General, and the Federal Trade Commission by first class mail, postage prepaid, this 13th day of December 1990.

Nancy S. Fleischman

Nancy S. Fleischman

EXHIBIT 1



Operating Subsidiaries:
Norfolk and Western Railway Company
Southern Railway Company
North American Van Lines

OP-STMT-613

NORFOLK SOUTHERN

Norfolk Southern Corporation
Law Department
Three Commercial Place
Norfolk, Virginia 23510-2191

Nancy S. Fleischman
Senior General Attorney

Writer's Direct Dial Number
(804) 629-2813

December 13, 1990

Administrator
Georgia State Clearinghouse
Room 608
270 Washington Street, S.W.
Atlanta, GA 30334

Re: Finance Docket No. 31791 -- Southern Railway Company -- Control -- Norfolk and Western Railway Company

Finance Docket No. 31792 -- Southern Railway Company -- Assumption of Liabilities -- Notice of Exemption

Sir or Madam:

Simultaneously with this letter, Southern Railway Company (SR) and Norfolk and Western Railway Company (NW) are filing with the Interstate Commerce Commission a Notice of Exemption for (1) direct control through stock ownership of NW by SR and indirect control by SR of NW's rail carrier subsidiaries; and (2) guarantee by SR of NW's obligations in respect of certain mortgage bonds and debentures. The purpose of this letter is to raise relevant environmental and energy matters.

Areas of concern, which you and other interested State and local agencies are invited to address, include but are not limited to the following:

(1) Local land use plans.

(2) The existing transportation system including alternative transportation modes.

(3) Energy consumption.

(4) Air emissions, ambient conditions, and relevant Federal, State, and local standards.

(5) Bodies of water and overall water quality.

(6) Terrestrial and aquatic ecosystems, limited to unique resources and threatened or endangered species.

Operating Subsidiaries: Norfolk and Western Railway Company / Southern Railway Company / North American Van Lines, Inc.

(7) Ambient noise levels.

(8) Existing or potential safety hazards.

(9) Cultural, historic, or archaeological sites listed or eligible for inclusion in the National Register of Historic Places.

(10) Potential for use for other public purposes or any property proposed for abandonment, including rights-of-way. A request for a public use condition under 49 U.S.C. 10906 must be in writing and set forth: (1) The condition sought; (2) the public importance of the condition; (3) the period of time for which the condition would be effective; and (4) justification for the imposition of the time period. A copy of the request shall be mailed to the applicant.

(11) Prospective use of the right-of-way for interim trail use and rail banking under 16 USC 1247(d) and 49 CFR 1152.29.

We are providing this notice so that you may inform interested State and local agencies of the proposal, and so that you or they may investigate the affected area and provide the Commission with necessary information in timely fashion. This request for environmental information, however, is not related to any agency's rights to file administrative protests or appeals, which are governed by separate procedures.

Because the applicable statutes impose stringent deadlines for processing this action, response within three weeks would be appreciated. Please address the original of any comments directly to the Section of Energy and Environment, Room 4143, Interstate Commerce Commission, Washington, DC 20423.

The information provided will be considered by the Commission together with other material received in evaluating the overall environmental and energy impact of the contemplated action. If there are any questions concerning the affected area or other matters related to the proposal, please contact me directly.

Questions regarding the form or content of any response to the notice should be referred to the Section of Energy and Environment at the above address. In any communication please refer to the docket numbers assigned to these actions: Finance Docket Nos. 31791 and 31792.

Yours truly,

Dana S. Fleischman

cc: Mr. Sidney L. Strickland, Jr.
Secretary
Interstate Commerce Commission
Washington, D. C. 20423

Section of Energy and Environment
Interstate Commerce Commission
Room 3115
Washington, D. C. 20423

Before the
SURFACE TRANSPORTATION BOARD

Finance Docket No. 36522

NORFOLK SOUTHERN RAILWAY COMPANY
—PETITION FOR DECLARATORY ORDER

EXHIBIT L

190518 . FD-33648

ENTERED
Office of the Secretary

AUG 13 1998

Part of
Public Record

RECEIVED
AUG 13 1998
MAIL
MANAGEMENT
STB

NORFOLK SOUTHERN

Norfolk Southern Corporation
Law Department
Three Commercial Place
Norfolk, Virginia 23510-9241

James A. Squires
General Attorney

Writer's Direct Dial Number

(757) 629-2845
Fax (757) 629-2607

0/0/176500 4

August 12, 1998
CO77.S9-NW.1

FEE RECEIVED
AUG 13 1998
SURFACE
TRANSPORTATION BOARD

FILED
AUG 13 1998
SURFACE
TRANSPORTATION BOARD

VIA AIRBORNE EXPRESS

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

Dear Secretary Williams:

In accordance with 49 C.F.R. § 1180.4(g), enclosed for filing with the Surface Transportation Board are the original and ten copies of a Notice of Exemption which is submitted on behalf of Norfolk Southern Railway Company (NSR) and Norfolk and Western Railroad Company (NW).

The additional ten copies of Exhibit 1 which are required by 49 C.F.R. § 1180.6(a)(6) are being mailed by an Airborne Express mail tube. Because NSR and NW are included within the Norfolk Southern corporate family, the transaction will be an exempt transaction pursuant to 49 C.F.R. § 1180.2(d)(3). The Board has assigned Finance Docket No. 33648 to this matter.

Also enclosed is a check for $1,100 to cover the required filing fee. Please date-stamp the enclosed copy of this letter and return it to me in the enclosed, self-addressed stamped envelope as proof of filing.

Very truly yours,

James A. Squires

Enclosure

cc: Certificate List

190518

BEFORE THE

SURFACE TRANSPORTATION BOARD

RECEIVED
AUG 13 1998
STB

ENTERED
Office of the Secretary
AUG 13 1998
Part of
Public Record

FINANCE DOCKET NO. 33648

NORFOLK SOUTHERN RAILWAY COMPANY - MERGER EXEMPTION -
NORFOLK AND WESTERN RAILWAY COMPANY

FILED
AUG 13 1998
SURFACE
TRANSPORTATION BOARD

NOTICE OF EXEMPTION

FEE RECEIVED
AUG 13 1998
SURFACE
TRANSPORTATION BOARD

James A. Squires
Norfolk Southern Corporation
Three Commercial Place
Norfolk, Virginia 23510-9241
(757) 629-2845

Counsel for Norfolk Southern
Railway Company and Norfolk
and Western Railway Company

Dated: August 12, 1998

BEFORE THE

SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33648

NORFOLK SOUTHERN RAILWAY COMPANY - MERGER EXEMPTION -
NORFOLK AND WESTERN RAILWAY COMPANY

NOTICE OF EXEMPTION

NOW COME Norfolk Southern Railway Company ("NSR") and Norfolk and Western Railway Company ("NW") and state as follows:

This is a notice of intent to engage in a transaction found by the Surface Transportation Board's ("Board's") predecessor, the Interstate Commerce Commission ("Commission"), to be presumptively exempt from Board regulation pursuant to 49 U.S.C. § 10502. The exempt transaction is a merger of NW with and into NSR. It is expected that NW will be merged into NSR effective on or after September 1, 1998.

In Ex Parte No. 282 (Sub-No. 3), Railroad Consolidation Procedures, 363 I.C.C. 200 (1980) and 366 I.C.C. 75 (1982), the

Commission determined that certain types of transactions, set forth at 49 C.F.R. § 1180.2(d), are presumed exempt: among them, "[t]ransactions within a corporate family that do not result in adverse changes in service levels, significant operational changes, or a change in the competitive balance with carriers outside the corporate family" (49 C.F.R. § 1180.2(d)(3)).

The Board's regulations at § 1180.4(g)(1) provide that, to avail itself of such an exemption, a rail carrier must file a verified notice of the transaction. Accordingly, pursuant to the requirements of § 1180.4(g)(1), NW and NSR hereby file this notice and submit the following required information:

I. Description of Merger Transaction

A. 49 C.F.R. § 1180.6(a):

(i) A brief summary of the proposed transaction, the name of applicants, their business address, telephone number, and the name of the counsel to whom questions regarding the transaction can be addressed.

This notice is filed on behalf of Norfolk Southern Railway Company and Norfolk and Western Railway Company, each a Virginia corporation and each having a business address at Three Commercial Place, Norfolk, Virginia 23510-9241. The name, address and telephone number of the parties' counsel to whom questions may be addressed is:

James A. Squires
Norfolk Southern Corporation
Three Commercial Place
Norfolk, Virginia 23510-9241
(757) 629-2845

NSR is a Class I railroad that, together with its rail subsidiaries (including NW), operates approximately 14,300 miles of railroad in 20 states. NW is a Class I railroad that, together with its rail subsidiaries, operates over 5,849 miles of road in 13 states and Canada.

NSR is controlled through stock ownership by Norfolk Southern Corporation ("NS"), a non-carrier holding company. NW is a wholly owned direct subsidiary of NSR.

The proposed transaction, which is designed to further the goal of corporate simplification, will be accomplished as a direct merger of NW with and into NSR pursuant to the statutory short-form merger provisions of the laws of the Commonwealth of Virginia.

NW and NSR have entered into an Agreement and Plan of Merger a copy of which is attached hereto as Exhibit 2 ('Merger Agreement") which provides, among other things, that, subject to necessary regulatory approval or exemption, NW will be merged with and into NSR. All shares of the capital stock of NW will be canceled and retired, and no consideration will be paid in

respect of such shares.

At the effective time of the merger, NW will be merged with and into NSR and the separate corporate existence of NW will cease. NSR, as the surviving corporation, will succeed to ownership of all the assets of NW and will be responsible for all the debts and obligations of NW.

The proposed merger transaction will not result in any significant change in rail operations over the properties owned by NW. Service levels and customers' access to rail service will not be affected by the transaction.

No effects on employees are anticipated. The interests of rail employees will be addressed adequately by imposition, pursuant to 49 U.S.C. § 10502(g) and § 11326, of standard labor protective provisions, as set forth in New York Dock Ry. - Control - Brooklyn Eastern Dist., 360 I.C.C. 60 (1979), as clarified by Wilmington Terminal R.R. - Pur. & Lease - CSX Transp., 6 I.C.C.2d 799 (1990).

(ii) The proposed time schedule for consummation of the proposed transaction.

NW and NSR expect to consummate the proposed merger on or as soon as practicable after September 1, 1998.

(iii) The purpose sought to be accomplished by the proposed transaction, e.g., operating economies,

eliminating excess facilities, improving service, or improving the financial viability of the applicants.

The principal purpose of the proposed merger is to eliminate NW as a separate corporate entity, thereby simplifying the corporate structure of NSR and the NSR system, and eliminating costs associated with separate accounting, tax, bookkeeping and reporting functions.

B. 49 C.F.R. § 1180.6(a)(5)-(7):

NSR and its consolidated railroad subsidiaries own or operate lines of railroad in the States of Alabama, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Missouri, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Virginia and West Virginia. NW owns or operates property located in Illinois, Indiana, Iowa, Kentucky, Maryland, Michigan, Missouri, New York, North Carolina, Ohio, Pennsylvania, Virginia and West Virginia.

A map showing the lines of railroad owned by NW in relation to the NSR rail system is attached as Exhibit 1.

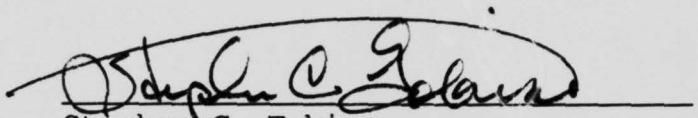
A copy of the proposed Merger Agreement is attached as Exhibit 2 hereto.

II. Other Matters

The proposed corporate family transaction will not have a

significant effect on the quality of the human environment or on the consumption of energy. Because the proposed merger involves only a change in ownership or similar changes not involving a change in carrier operations, no environmental reports or documentation are required under 49 C.F.R. Part 1105.

Respectfully submitted,



Stephen C. Tobias
Vice President, Norfolk Southern Railway Company, and Vice President, Norfolk and Western Railway Company

Of counsel:

James A. Squires
Norfolk Southern Corporation
Three Commercial Place
Norfolk, Virginia 23510-2191
(757) 629-2845

Dated: August 12, 1998

VERIFICATION

COMMONWEALTH OF VIRGINIA)
)ss
CITY OF NORFOLK)

Stephen C. Tobias, being duly sworn, deposes and says that he is Vice President of Norfolk Southern Railway Company and Vice President of Norfolk and Western Railway Company; that he is authorized to sign, verify and file with the Surface Transportation Board the foregoing Notice of Exemption; that he has carefully examined all of the statements contained in said Notice of Exemption; that he has knowledge of the matters set forth therein insofar as those matters relate to Norfolk Southern Railway Company and Norfolk and Western Railway Company; and that all such statements made and matters set forth with respect to Norfolk Southern Railway Company and Norfolk and Western Railway Company are true and correct to the best of his knowledge, information and belief.

Stephen C. Tobias

Subscribed and sworn to before me
this 10th day of August, 1998.

Susan Montgomery
Notary Public

My commission expires: FEBRUARY 28, 2002

CERTIFICATE OF SERVICE

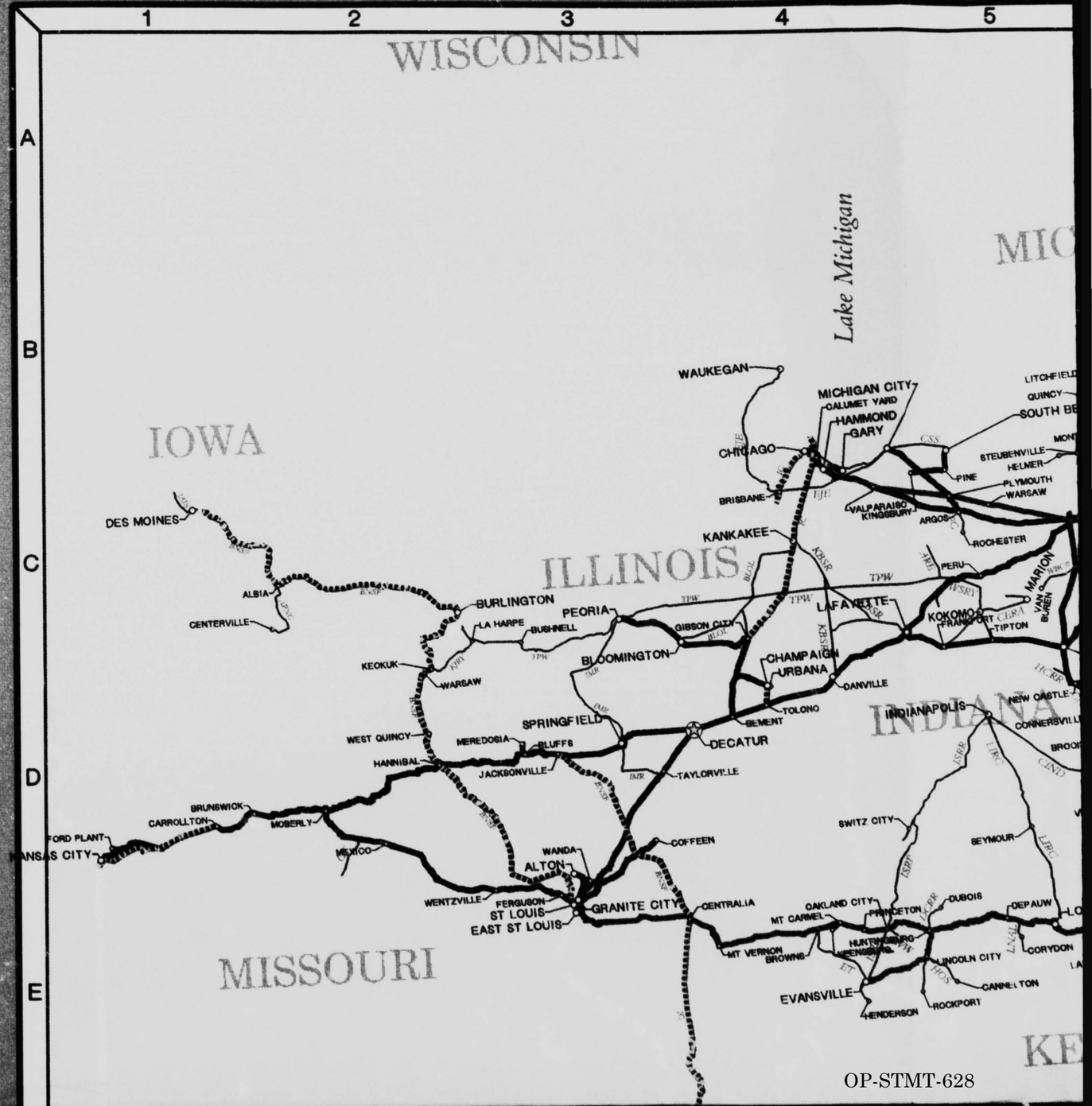
The undersigned hereby certifies that the attached Notice was served this day by first-class mail, postage prepaid, on the Governor, public service commission, and department of transportation of the states of Alabama, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Missouri, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Virginia and West Virginia, and on the U.S. Department of Transportation, the Attorney General of the United States and the Federal Trade Commission.

James A. Squires

Dated: August 12, 1998

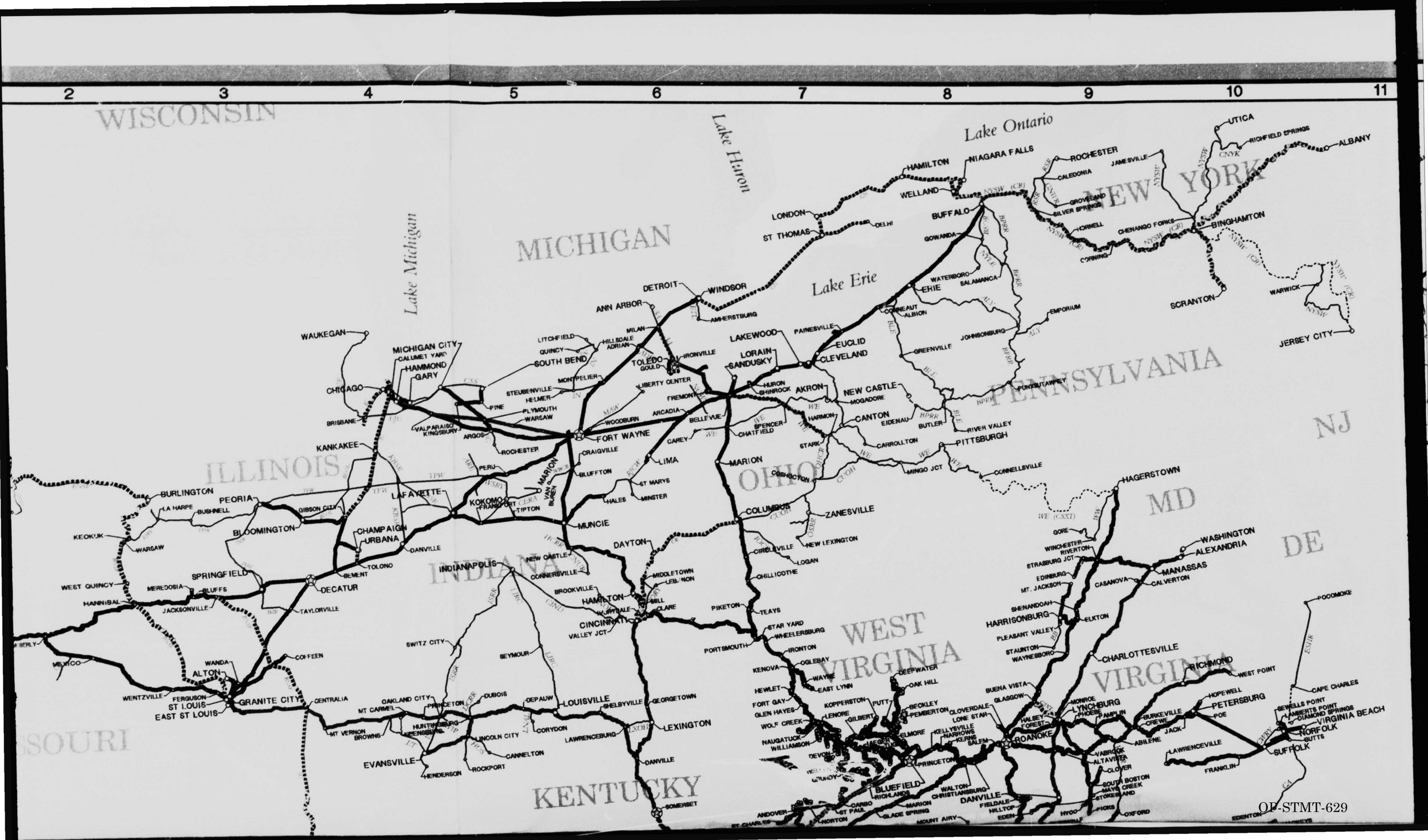
STATION LOCATION INDEX

ABBEVILLE,AL	I6	DEMOPOLIS,AL	I5	KINGS CREEK,SC	F8	PUNXSUTAWNEY,PA	B8
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ADEL,GA	I7	DES MOINES,IA	C1	KINGVILLE,SC	G8	QUINCY,MI	B5
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CASANOVA,VA	D9	HARRIMAN,TN	F6	NEWBERRY,SC	G8	TRENTON,SC	G8
CAYCE,SC	G8	HARRISONBURG,VA	D9				



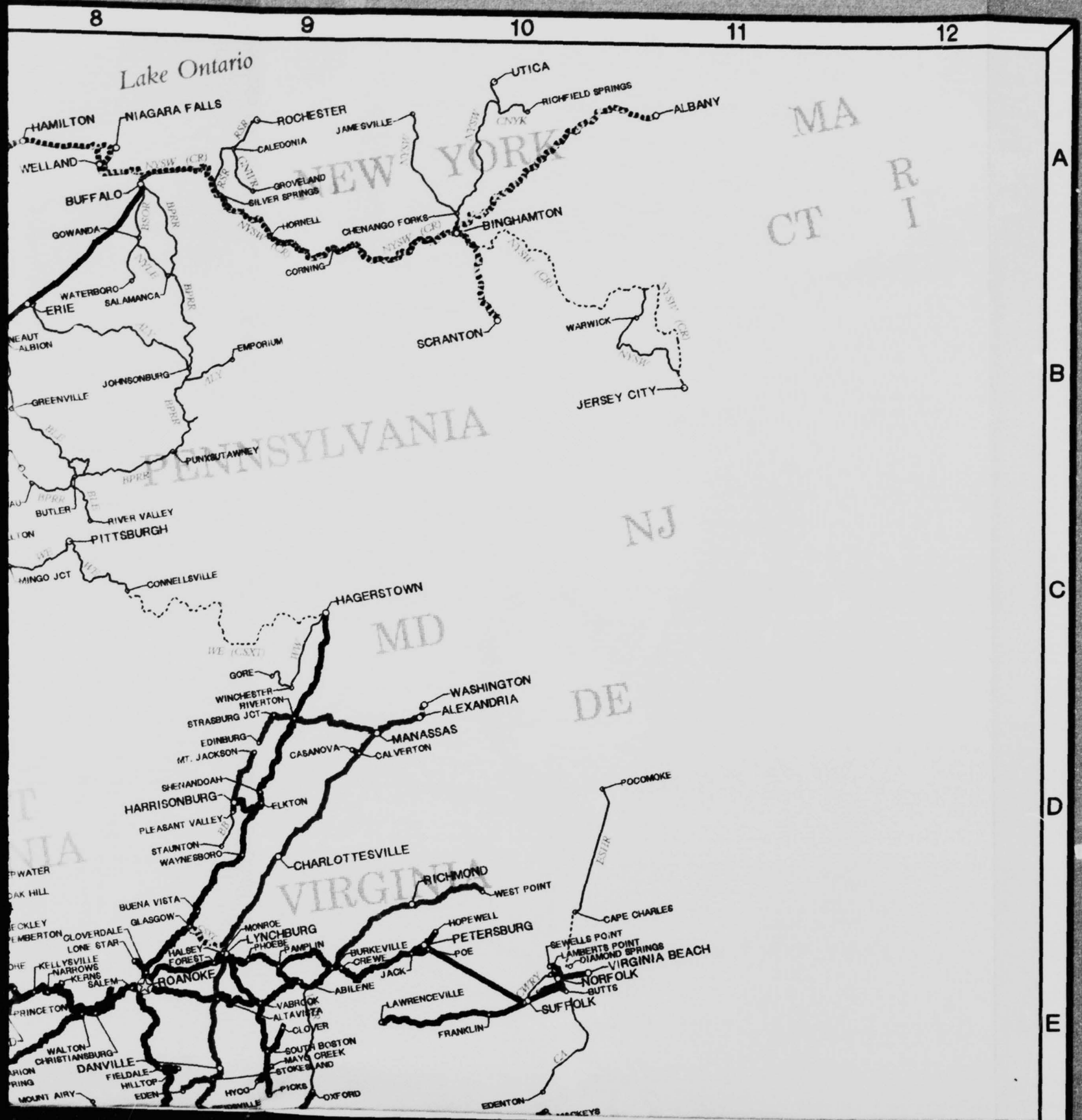
OP-STMT-628

2 3 4 5 6 7 8 9 10 11



OP-STMT-629

EXHIBIT 1



The Thoroughbred of Transportation.



Norfolk Southern's Corporate Vision

Be the safest, most customer–focused and successful transportation company in the world

Return Corrections, Comments To:

Engineering Systems
99 Spring Street, Box 139
Atlanta, Georgia 30303

MAP LEGEND

OP-STMT-630

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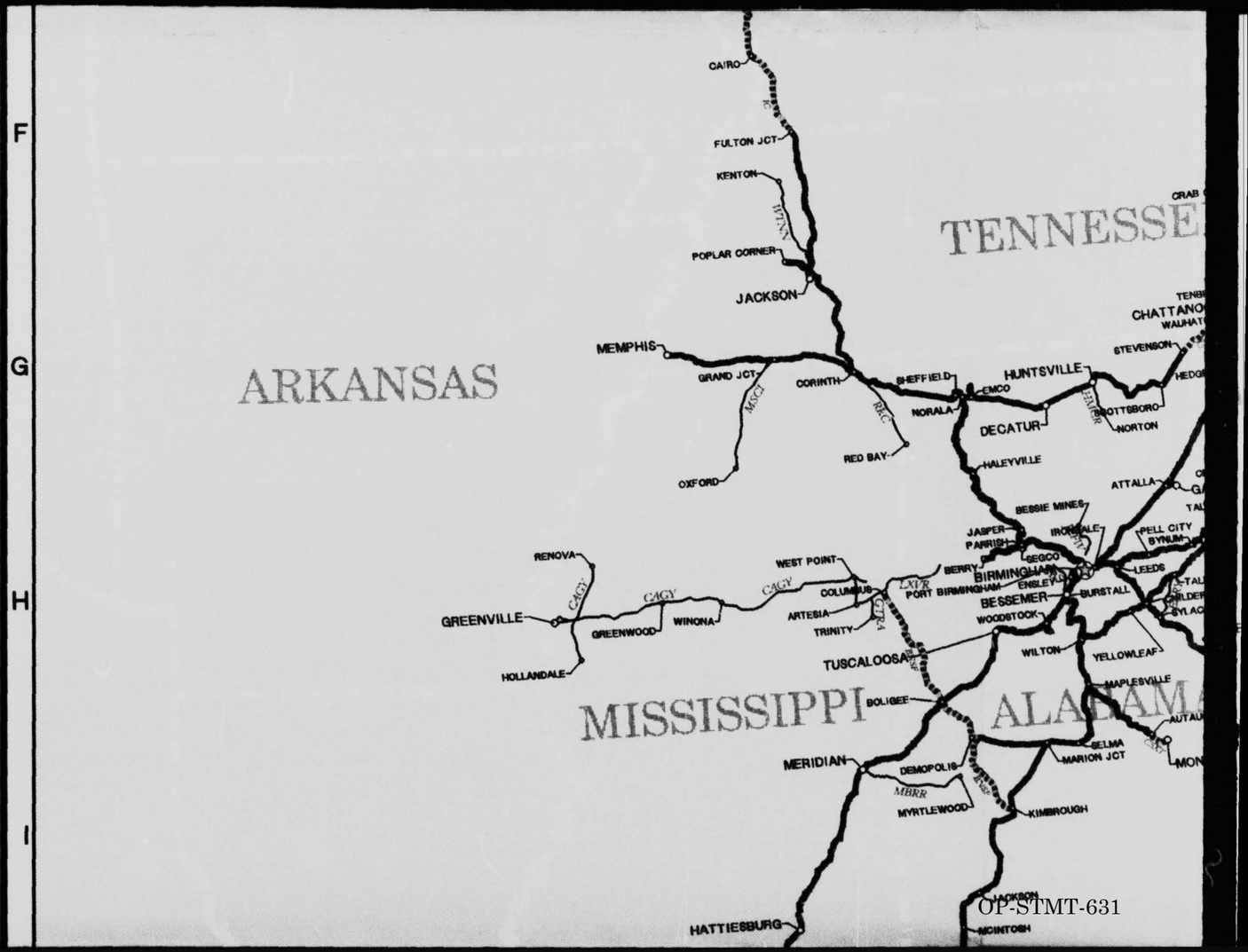
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WANDA,IL D3
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WRENS,GA H7
WYATT,VA E7,K11

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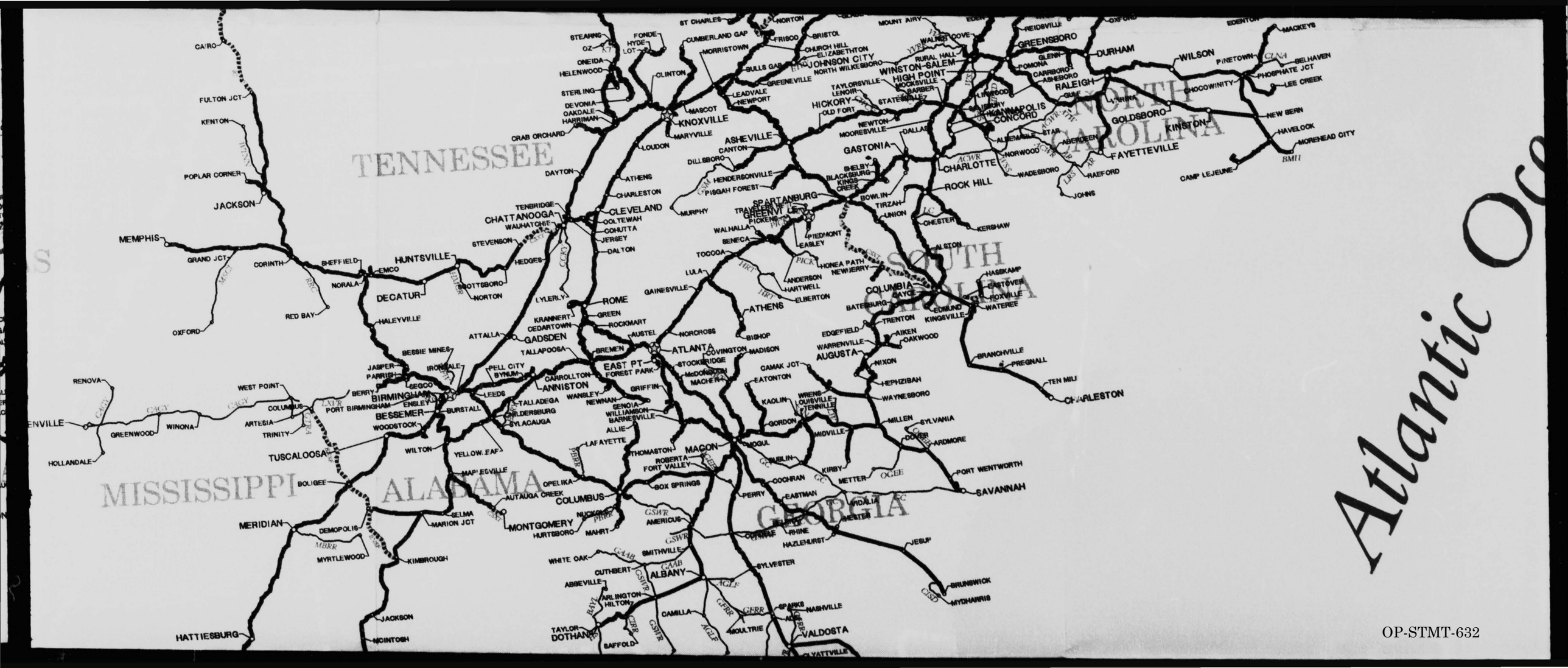
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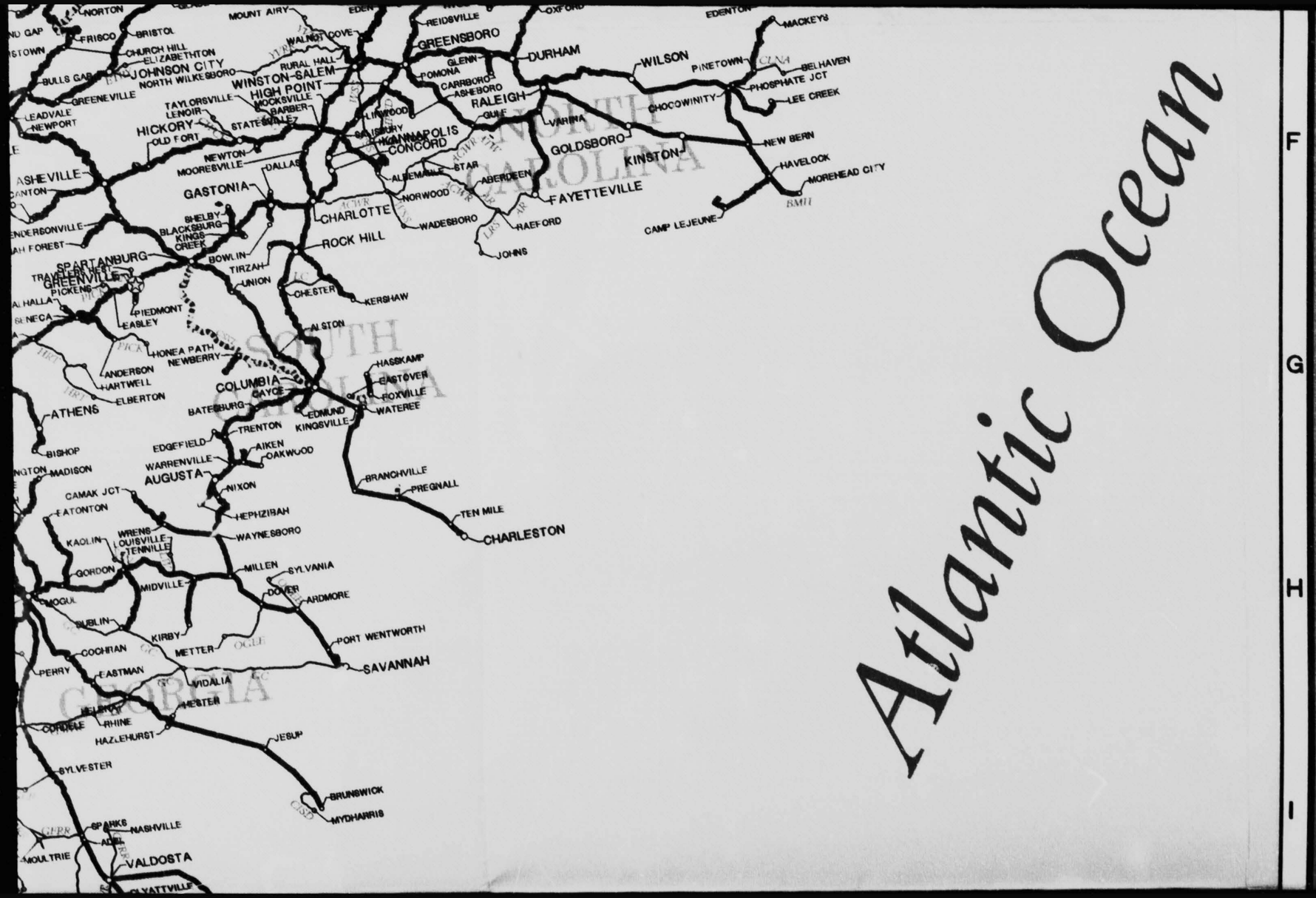
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IAIS	IOWA INTERSTATE RAILROAD	C1
IMR	ILLINOIS MIDLAND RAILWAY	D3
IN	INDIANA NORTHEASTERN RAILROAD CO	B5,B6,C5
INOH	THE INDIANA & OHIO RAIL CORP	D6
IOCE	INDIANA & OHIO CENTRAL RR INC	



OP-STMT-631


TENNESSEE
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GRAND JCT
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DILLSBORO
HENDERSONVILLE
PISGAH FOREST
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MOUNT AIRY
WALNUT COVE
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HIGH POINT
MOCKSVILLE
BARBER
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LENOIR
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TENNILLE
GORDON
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HEPHZIBAH
WAYNESBORO
MILLEN
SYLVANIA
DOVER
ARDMORE
BRANCHVILLE
PREGNALL
TEN MILE
CHARLESTON
PORT WENTWORTH
SAVANNAH
JESUP
BRUNSWICK
MYDHARRIS
DUBLIN
COCHRAN
KIRBY
METTER
OGEE
PERRY
EASTMAN
VIDALIA
HAZLEHURST
RHINE
CORDELE
SYLVESTER
OP-STMT-632



NORFOLK & WESTERN

NORFOLK SOUTHERN

REGIONAL CONNECTION

● DIVISION HEADQUARTERS

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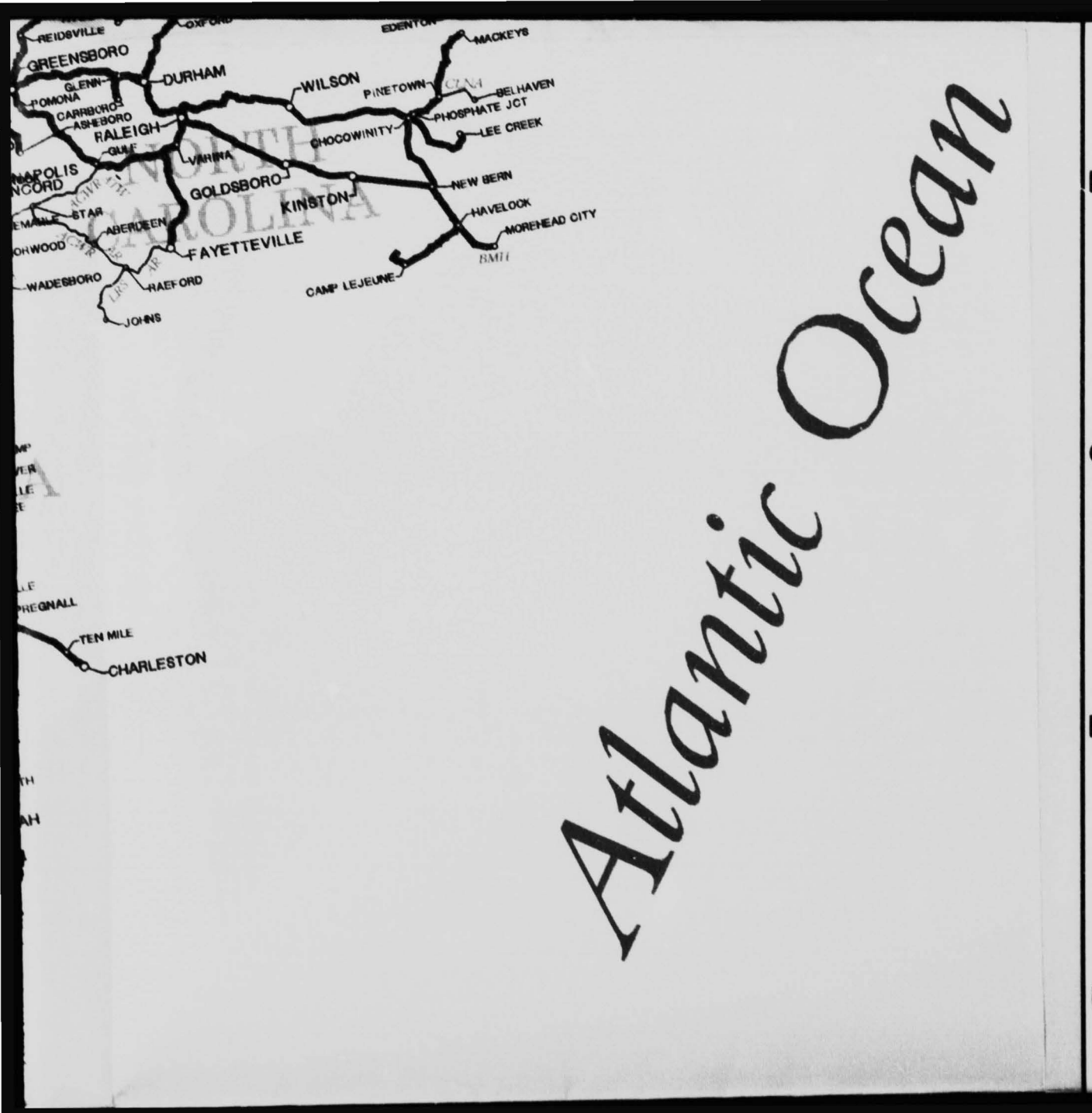
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N & W LINES OF NORFOLK

OP-STMT-633



NORFOLK & WESTERN

NORFOLK SOUTHERN

REGIONAL CONNECTION

* DIVISION HEADQUARTERS

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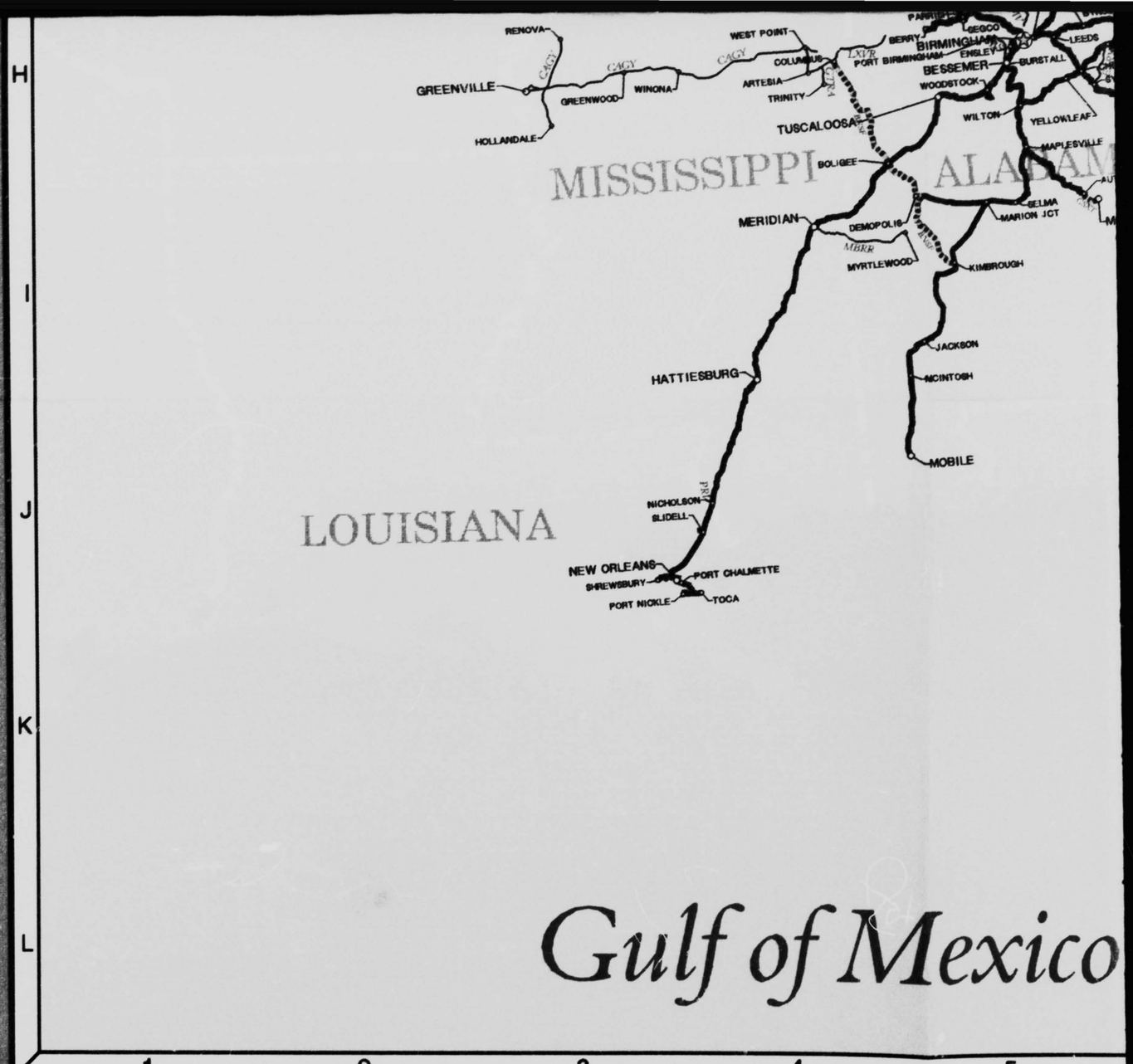
N & W LINES OF NORFOLK

OP-STMT-634

CREWE,VA	E9	
CUB CREEK,WV	E7,K11	
CUMBERLAND GAP,TN	F8	
CUTHBERT,GA	I6	
DALLAS,NC	F8	
DALTON,GA	G6	
DANVILLE,IL	D4	
DANVILLE,KY	E6	
DANVILLE,VA	E9	
DAYTON,OH	D6	
DAYTON,TN	F6	
DAYTONA BEACH,FL	J9	
DECATUR,AL	G5	
DECATUR,IL	D4	
DEEPWATER,WV	D8,J12	
DELHI,ON	A7	
JOHNSON CITY,TN	F7	
JOHNSONBURG,PA	B8	
KANKAKEE,IL	C4	
KANNAPOLIS,NC	F8	
KANSAS CITY,MO	D1	
KAOLIN,GA	H7	
KEENSBURG,IN	E4	
KELLYSVILLE,WV	E8,K12	
KENOVA,WV	J10	
KENTON,TN	F4	
KEOKUK,IA	D2	
KERN6,VA	E8	
KERSHAW,SC	G8	
KIMBALL,WV	E8,K12	
PINNACLE CREEK,WV	E8,K12	
PISGAH FOREST,NC	F7	
PITTSBURGH,PA	C8	
PLEASANT VALLEY,VA	D9	
PLYMOUTH,IN	C5	
POCOMOKE,MD	D10	
POE,VA	E10	
POMONA,NC	F9	
POPLAR CORNER,TN	G4	
PORT NICKLE,LA	J9	
PORT WENTWORTH,GA	H8	
PORTSMOUTH,OH	D7	
PREGNALL,SC	H8	
PREMIER,WV	E7,K11	
PRINCETON,IN	E4	
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PT CHALMETTE,LA	J8	
WILLIAMSON,WV	E7,K11	
WILSON,NC	F10	
WILTON,AL	H5	
WINCHESTER,VA	D9	
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WINONA,MS	H8	
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WOLF CREEK,WV	E7,K11	
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ALY	ALLEGHENY & EASTERN RAILROAD	B8,B9
APNC	APPANOOSE COUNTY COMMUNITY RAIL	C2
AR	ABERDEEN & ROCKFISH RAILROAD	F9
ARC	ALEXANDER RAILROAD	F8
ARE	A & R LINE, INC	C5
AWW	ATLANTIC AND WESTERN RAILWAY	F9
AWW	ALGERS WINSLOW & WESTERN	E4
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CIND	CENTRAL RAILROAD CO OF INDIANA	D5
CIRR	CHATTAHOOCHEE INDUSTRIAL RR	I6
CISD	COLONELS ISLAND RAILROAD CO	I8
CLNA	CAROLINA COASTAL RR	F10
CNOR	C & NC RAILROAD CORP	D5
CNYK	CENTRAL NEW YORK RAILROAD	A10
CSS	CHICAGO SOUTHSHORE & SOUTH BEND	B5
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CWCY	CALDWELL COUNTY RAILROAD	F8
CWRY	COMMONWEALTH RAILWAY INC	E10
DCRR	DUBOIS COUNTY RAILROAD CO INC	E5
EARY	EASTERN ALABAMA RAILWAY	H5
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HMCR	HUNTSVILLE & MADISON COUNTY RR	G5
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WTNN	WEST TENNESSEE RAILROAD	F4
WW	WINCHESTER & WESTERN RAILROAD	C9
YVRR	YADKIN VALLEY RAILROAD COMPANY	F8



Engineering


Atlan
PRELIMINARY
Gulf of Mexico
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WINONA
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WEST POINT
COLUMBUS
ARTESIA
TRINITY
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NORFOLK SOUTHERN

ENGINEERING DEPARTMENT

Engineering Systems
Geographic Information Systems

OP-STMT-637

AGREEMENT AND PLAN OF MERGER

THIS AGREEMENT AND PLAN OF MERGER ("Agreement"), dated as of July 15, 1998 between NORFOLK SOUTHERN RAILWAY COMPANY, a Virginia corporation ("NSRC"), and NORFOLK AND WESTERN RAILWAY COMPANY, a Virginia corporation ("NW") and a subsidiary of NSRC.

WITNESSETH:

WHEREAS, the authorized capital stock of NW as of the date of this Agreement consists of 60,000,000 shares of Common Stock, par value $8.33⅓ per share, 33,683,996 of which are issued and outstanding ("NW Common Stock");

WHEREAS, as of the date of this Agreement NSRC owns all of the issued and outstanding NW Common Stock;

WHEREAS, this Agreement has been approved and adopted by the Boards of Directors of NSRC and NW;

WHEREAS, the transaction contemplated by this Agreement is intended to constitute a liquidation of NW within the meaning of sections 332 and 337 of the Internal Revenue Code of 1986, as amended.

NOW, THEREFORE, in consideration of the mutual covenants and agreements set forth herein, NSRC and NW hereby agree as follows:

1. The Merger. (a) Subject to the terms and conditions contained in this Agreement, at the Effective Time (as

hereinafter defined), NW shall be merged with and into NSRC (the "Merger") in accordance with Virginia Code Ann. § 13.1-719, the separate existence of NW shall cease, and NSRC shall continue as the surviving corporation under the laws of the Commonwealth of Virginia (the "Surviving Corporation"). The name of the Surviving Corporation shall be Norfolk Southern Railway Company. The principal office of the Surviving Corporation shall be located in Norfolk, Virginia.

(b) The Merger shall be effective upon the later of: (i) the issuance by the State Corporation Commission of the Commonwealth of Virginia of a certificate of merger pursuant to Virginia Code Annotated § 13.1-720; or (ii) such later time as may be specified in the documents filed or issued under (i) of this subsection (b) (the "Effective Time"). At the Effective Time, the Merger shall have the effects stated in Virginia Code Ann. § 13.1-721.

2. Conversion of Shares. (a) At the Effective Time, each then outstanding share of NW Common Stock shall be canceled and retired, and all certificates theretofore representing shares of NW Common Stock shall be canceled and cease to represent any interest in NW. No payment shall be made with respect to the NW Common Stock and no shares, securities or obligations convertible

into shares shall be issued or delivered with respect to the NW Common Stock.

(b) Each share of stock of NSRC outstanding immediately prior to the Effective Time shall remain outstanding after the Effective Time as an identical share of NSRC, and no shares, securities or obligations convertible into shares of NSRC shall be issued or delivered as a result of the Merger.

3. Assumption of Obligations. Pursuant to the Merger, NSRC will assume each and all of NW's obligations, including but not limited to obligations in respect of the NW 4.85% Subordinated Income Debentures due November 15, 2015 and The Virginian Railway Company 6% Subordinated Income Debentures due August 1, 2008 (collectively the "Debentures"). NSRC expressly agrees to assume the due and punctual payment of the principal of, and premium, if any, and interest on, the Debentures, according to their tenor, and the due and punctual performance of all of the covenants and conditions of each and all indentures and supplemental indentures entered into in connection with the Debentures.

4. Articles of Incorporation and Bylaws; Officers and Directors. The Merger will not effect any changes in the terms or provisions of the Articles of Incorporation or Bylaws of NSRC. The provisions of the Articles of Incorporation and the Bylaws of

NSRC in effect immediately prior to the Effective Time shall be the provisions of the Articles of Incorporation and the Bylaws of the Surviving Corporation. The officers and directors of NSRC holding office immediately prior to the Effective Time shall be the officers and directors of the Surviving Corporation, and they shall serve until their successors are duly appointed or elected.

5. Conditions to the Merger. The obligations of NSRC and NW under this Agreement are subject to and shall be conditioned upon the satisfaction, or waiver (in whole or in part) in writing, of each of the following conditions:

(i) NSRC and NW shall have obtained any necessary approval and authority (without unusual conditions) of the Surface Transportation Board (the "STB") and any other regulatory agency having jurisdiction, or shall have obtained, or shall have complied with such requirements as necessary to avail themselves of any, exemption from regulation by the STB and any other regulatory agency having jurisdiction. Each of such approvals, authorities and exemptions shall remain in full force and effect at the Effective Time and such approvals, authorities and exemptions, and the transactions contemplated hereby, shall not have been contested by any

Federal or state governmental agency by formal proceeding; and

(ii) No one or more of NSRC or NW shall be subject to any order, decree or injunction of a court or agency of competent jurisdiction which enjoins or prohibits the consummation of the Merger.

6. Termination. Anything in this Agreement to the contrary notwithstanding, this Agreement may be terminated and the Merger provided for herein may be abandoned any time prior to the Effective Time by mutual agreement of NSRC and NW.

7. Modification of Agreement; Waiver. This Agreement may, subject to applicable law, be amended by action of the Boards of Directors of NSRC and NW and any provision of this Agreement may be waived at any time by the party which is entitled to the benefits thereof.

8. Counterparts. This Agreement may be signed in one or more counterparts, each of which shall be deemed an original.

IN WITNESS WHEREOF, each of the parties hereto has caused this Agreement to be executed on its behalf by its officer thereunto duly authorized as of the day and year first written above.

NORFOLK SOUTHERN RAILWAY COMPANY

ATTEST:

By: _____
Stephen C. Tobias, Vice President

_____
Secretary

NORFOLK AND WESTERN RAILWAY COMPANY

ATTEST:

By: _____
Stephen C. Tobias, Vice President

_____
Secretary