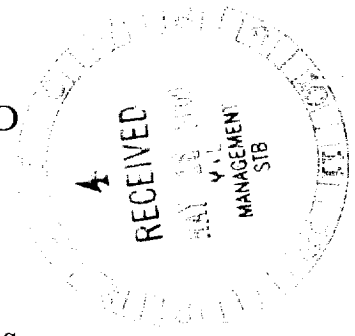


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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte 582 (Sub-No. 1)

Major Rail Consolidation Procedures



COMMENTS

submitted by

The National Industrial Transportation League

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The National Industrial Transportation League

The National Industrial Transportation League (“League”) respectfully submits these comments to the Surface Transportation Board (“STB”) in response to the Advance Notice of Proposed Rulemaking (“ANPR”) issued by the STB on March 31, 2000.

The League strongly agrees that the Board needs to consider changes to its policies and precedents governing rail mergers, and as discussed further below, to its rules and policies more generally. Since the passage of the Staggers Act in 1980, the rail industry has evolved from a system in which there existed numerous carriers, to a system today characterized by very few large rail systems. Indeed, today there exist two rail duopolies, one in the eastern United States and another in the West, each of which dominate the rail landscape in their respective regions. As this evolution has occurred, the rail-to-rail competition that existed in 1980 has been significantly reduced. The Board’s policies, however, have not kept pace with these developments. The League believes, therefore, that the Board should revise its policies “with an eye toward affirmatively enhancing, rather than simply preserving, competition.” ANPR, at 4.

ICC/STB merger policy, the League believes, has not maintained the level of competition envisioned by the Staggers Act. Rather, the Board's policy has taken a crabbed view of the kinds, extent and forms of rail competition, and has chosen to maintain only certain types. For example, the Board has determined to replicate the competition lost at "2-to-1" points through the use of trackage rights, but has failed to maintain competition in "3-to-2" situations or, much more importantly, in bottlenecks and over rail gateways. Accordingly, the League believes that the Board's revisions to its merger policy must become much more sensitive to the multiple hues of competition, and take steps during its consideration of rail mergers to ensure that those tones and tints are preserved. Thus, the League commends the Board for initiating this comprehensive examination of its rules.¹

I. Summary of League Recommendations

The League believes that the Board should make the following revisions to its merger and other rules:

- The Board should eliminate the "one case at a time" rule.
- With respect to the "one lump" theory, the Board should:
 - Overrule the presumption created by the Board's adoption of the "one lump" theory in past cases, thus placing the burden on applicant carriers to prove that a future end-to-end merger would not be harmful to vertical competition.
 - Undertake a study of the downstream effects of prior rail mergers, to have a factual basis for evaluating the effects of future vertical mergers.
- With respect to the claimed benefits of future mergers, the Board should:

¹ However, as noted in the League's letter to the Board of March 14, 2000 in Ex Parte 582, the League does not believe that it was either necessary or lawful for the Board to impose a moratorium on all major rail mergers.

- Examine such claims more critically than in the past;
- Require applicant carriers to include an analysis of the applicants' track record, by comparing the claimed benefits in each year following their immediate past mergers to the actual results of those prior mergers, in order to evaluate the credibility and accuracy of the applicants' current claims.
- The Board should completely revise its approach to reciprocal switching, to permit such switching within a specified distance of an interchange;
- The Board should require future merging carriers to maintain existing gateways both physically and economically, and should give shippers the right to challenge rates over such gateways that restrict competition or are otherwise unlawful.
- The Board should revise its bottleneck rules to require merger applicants to offer, upon request, contracts for the competitive portion of joint-line routes when the joint line partner has a bottleneck segment, and should require merger applicants to provide new through routes at a reasonable interchange point when they control a bottleneck segment, and the shipper has entered into a contract with another carrier for the competitive segment.
- The Board should revisit its approach to merger acquisition premiums.
- With respect to rail service, the Board should:
 - Revise its reporting requirements for merged carriers to better determine the level of rail service;
 - Require carriers to submit service plans detailing the service improvements expected, with measurable parameters for determining whether carriers have met their service goals, as well as contingency plans in the event that service disruptions occur;
 - Evaluate as part of its merger approval the likelihood of claimed service improvements, and condition the merger to assure that service improvements do in fact occur.

- The Board should revise its approach to paper barriers restraining competition by short line carriers, to eliminate such barriers in the future, and permit the selective amendment of past barriers on specified showings by the short lines.
- The Board should continue its use of Service Implementation Plans, and should continue to give the highest priority to rail safety.
- In cross-border mergers, the Board should require the submission of full-system operating plans.

II. Identity and Interest of the League

The National Industrial Transportation League is an organization of shippers that conduct industrial and/or commercial enterprises throughout the United States and internationally. The League is the oldest and largest nationwide organization representing shippers of all sizes and commodities. The League has over 600 separate company members, ranging from smaller shippers to some of the largest shippers in the country. The members of the League utilize all modes of transportation to move their goods in interstate, intrastate, and international commerce. Substantial volumes of commodities are shipped by League members via rail. Accordingly, the League's membership will be directly affected by the resolution of the issues raised in this proceeding. The League has participated actively in every rail merger proceeding for the past decade.

III. The Agency's Procedures and Analytical Approach to Rail Mergers Must Be Revised

In its ANPR, the agency set forth a number of areas on which the agency is seeking comments regarding the analytical framework within which it has conducted past

merger proceedings. The League desires to comment on four of these areas: the “one case at a time” rule; the use of the “one-lump” theory; the quantifying of merger benefits; and the agency’s policy on “3-to-2” situations. See, ANPR, at 5, 8, and 9.

A. The Board Is Correct in Eliminating the “One Case At A Time” Policy

The League strongly agrees with the Board’s determination to eliminate the “one case at a time” policy in 49 CFR §1180.1(g). That provision was promulgated nearly twenty years ago, when the rail industry was far less concentrated than now. The policy was established in order to keep proceedings within a manageable scope, and, given the number of potential subsequent combinations, because it was extremely difficult to “assess the impact of potential or hypothetical combinations or transactions.” 49 CFR §1180.1(g).

Such is not the case today. The rail industry has consolidated to such an extent that it is relatively easy to determine the few strategic responses to any particular major rail merger; and, while the effects of a future transaction are by their very nature uncertain, the range of uncertainty is much more circumscribed than at any time in the past. An analysis of “cumulative impacts and crossover effects” is necessary to determine the full range of effects of a particular transaction. The League, then commends the Board for proposing this change to its policies.

B. The Board Needs To Reevaluate The Basis for and Use of the “One Lump” Theory

In its ANPR, the Board sought comments on possible revisions to the application of the so-called “one lump” theory to rail mergers. The League believes that the agency’s adoption of this theory in 1982 has lead it into numerous errors of policy both inside and outside of the merger setting, and a re-examination of the Board’s

application of this theory is absolutely necessary for a rational revision of the Board's merger analysis.

The so-called "one lump" theory was first adopted by the Interstate Commerce Commission in Finance Docket No. 30,000, *Union Pacific Corporation, et al – Control – Missouri Pacific Railroad Company*, 366 I.C.C. 462 (1982) [UP/MP]. In that case, the ICC was evaluating the potential vertical effects of the proposed merger on coal transportation. The two carriers involved, the Union Pacific and Missouri Pacific railroads, each handled substantial volumes of coal traffic. Other carriers in the case argued that the merger of the MP (frequently, a destination carrier to coal-fired generating stations) with the UP would eliminate the MP as a "neutral" destination carrier, thus foreclosing competition from these other carriers for the origin part of the movement. *Id.*, 366 I.C.C. at 538.

The agency disagreed. In its decision approving the merger, the ICC stated that, after a utility plant is sited, "a utility will be captive to a railroad if the railroad has a monopoly over *any segment of the service route* . . . If only one carrier on the route has a segment monopoly, then that carrier will have an incentive, and will often have the ability, to keep *all available monopoly profits to itself*." *Id.*, 366 I.C.C. at 537 (emphasis added).² In other words, the agency reasoned that because a "segment monopoly" carrier has already "soaked up" all the monopoly profits available on a route, the merger of that monopoly carrier with a downstream carrier will not make the shipper any worse off. All subsequent discussions of this "one lump" theory in merger proceedings do little more than cite to the discussion of the theory in *UP/MP*. See, e.g., *Burlington Northern Inc., et*

² The name is derived from the concept that there is only one "lump" of monopoly profits on the movement, and the segment monopolist will keep the entire "lump" of profits for itself.

al -- Control and Merger -- Santa Fe Pacific Corporation, et. al, Finance Docket No. 32549, served August 23, 1995, slip op. at 70-77.

What strikes a reader today most forcefully about the ICC's discussion of the "one-lump" theory in *UP/MP* is the complete absence of any factual support for the theory in that decision. Indeed, one looks in vain in any of the discussions of the one-lump theory in later cases for factual analysis of rates, rate trends, etc.. When shippers in subsequent proceedings submitted evidence that tended to undercut the theory, the agency dismissed this evidence, not with evidence of carrier pricing behavior that countered the shipper's submission, but rather with general discussion and more theory: for example, that the evidence submitted by the shipper did not conclusively rule out other possibilities, or that the study was flawed for other reasons. See, *e.g.*, *CSX Corporation, et al -- Control and Operating Leases/Agreements -- Conrail, et al*, STB Finance Docket No. 33388, slip op. at 68; Finance Docket No. 32549, *Burlington Northern Inc., et al -- Control and Merger--Santa Fe Pacific Corporation, et al*, served August 23, 1995, slip op. at 72-76.

In fact, the theory clashes with the ordinary experiences reported by League members, who have negotiated with competitive "downstream" carriers prior to their merger with an upstream railroad, and who believe firmly that those negotiations resulted in real benefits to the shipper compared to the shipper's position post-merger (as the one-lump theory denies).

Beyond the fact that the agency's adoption of the one-lump doctrine appears to be a triumph of theory over experience, the theory is inconsistent with the Board's own policies and pronouncements in other contexts. Specifically, in the Board's

two decisions in STB Docket No. 41242, *Central Power and Light Company v. Southern Pacific Railroad Company* and consolidated cases, decisions served December 31, 1996 and April 30, 1997 (“*Bottleneck Decision I/II*”), the Board ruled that a shipper has no right to demand, and no right to challenge, any rate over a “bottleneck,” unless the shipper brings and wins a competitive access case. This rule was, however, subject to an important caveat: where a bottleneck carrier cannot serve both the origin and destination, and where a shipper secures a separately negotiated contract for the non-bottleneck segment of the route, the shipper may separately challenge a bottleneck rate. This “contract exception” was affirmed recently in *Union Pacific RR Co. v. STB*, No. 98-1058, 2000 U.S. App. LEXIS 2016 (D.C. Cir. Feb. 15, 2000). In that case, the court noted the Board’s recognition of the substantial benefits to shippers of the contract exception:

By permitting a shipper to enter into contracts that are beyond review of the Board, the Staggers Act entitles a contracting shipper to . . . “the benefit of its bargain.” Were its position to prevail, Union Pacific [the bottleneck carrier] would be in a position to recover for itself the “benefit of FMC’s bargain with CSX [the non-bottleneck contract carrier], as it could set a rate that allowed it to obtain the difference between a reasonable through rate and the FMC-CSX contract price.

But if the Board believes that the contract exception provides a benefit to shippers, then it cannot believe that the merger of a bottleneck carrier with a downstream competitor has no adverse effects on shippers. For in a vertical merger, the ability of a shipper to utilize the contract exception is completely lost, unless the shipper brings (and wins) a competitive access case. This is because, under the Board’s decisions in its “Bottleneck” case, the contract exception is inapplicable when the defendant carrier serves both the origin and the destination – which is exactly what happens when a bottleneck carrier merges with a “downstream” carrier.

In light of all of the above, the League believes that the agency should do two things. First, the Board should immediately overrule the presumption currently created by its adoption of the “one lump” theory in past cases. If applicant carriers in future mergers believe that a particular vertical merger will not eliminate downstream competition, they would need to submit actual evidence showing that in past mergers, the price to “downstream” shippers has not been affected when the upstream and downstream competitors merge.

Second, the Board should initiate a study of the downstream effects of prior rail mergers, so that there is a substantial factual basis for any consideration of downstream effects in future cases. At the present time, there should be a very significant body of data from the merger of BN with ATSF, of UP with SP, and with the split of Conrail to the NS and CSX, that the Board might examine in quantifying the effects of prior mergers on downstream competition. The Board should undertake a study of this data so that it may have a solid factual basis in evaluating the downstream effect of future mergers.

C. The Agency Should Revise Its Approach to Quantifying Merger Benefits

In deciding past merger applications, the ICC and the Board have frequently determined that the proposed merger would yield very significant public benefits to shippers. The League believes that the agency needs to take a far more critical look at claimed merger benefits in the future than it has in the past.

In late 1999, the League undertook a survey of its members.³ That survey found that the large majority of League members who responded believed that the service that they were receiving from the carriers now (i.e., post-merger) was the same or worse than the service that they received prior to those carriers’ mergers; many members

reported that the service was worse post- merger compared to pre-merger for the mergers of the BN/ATSF, UP/SP and Conrail/CSX/NS. For example, as of December 1999, fully one-third of the respondents to the League's survey reported that their service was worse on the merged UP/SP compared to service on the UP pre-merger (i.e., compared to service in the first half of 1996); and one-quarter of the respondents reported that their service was worse on the merged UP/SP even compared to service on the pre-merger SP (the carrier whose service was allegedly so inferior prior to the merger of the two carriers). In another case, as of December 1999 (the date of the survey), large majorities of shippers on the former Conrail reported that service was worse on NS and CSX post-transaction, compared to service on the former Conrail before the transaction was consummated.

In addition to the Board's undertaking a more searching analysis of the claimed benefits of a particular transaction, the League believes that, in all future merger proceedings, the Board should require the applicant carriers to include an analysis of the claimed benefits of the applicants' immediate past merger(s) (as long as they took place within the last eight years) with a comparison of the actual results of that prior transaction at the end of each of the five years subsequent to the consummation of the prior transaction. This would permit the Board to evaluate how realistic the current projections are in light of past experience, and provide a historical baseline as the Board exercises its oversight authority over implementation of the proposed merger.

³ That survey was submitted to the Board as an attachment to the League's statement in Ex Parte 582, *Public Views on Major Rail Consolidations*, and is incorporated here by reference.

D. A Review of the Agency's Policy on "3-to-2" Situations Is Not Meaningful When Few Origins Or Destinations Are Now Served by Three Class I Carriers

In its ANPR, the Board suggested that it might undertake a re-examination of its policies on so-called "3-to-2" situations in future mergers. While the League believes that -- assuming all other things are equal -- competition from three rail carriers is superior to that of only two carriers, a re-examination of this policy is probably not meaningful at the present time, given the fact that in the large majority of the country, there are no longer more than two rail carriers serving a particular point, and probably no area of the country that is served by more than two rail carriers whose networks or even a portion of whose networks extend over the same general rail corridors.

IV. The Board Should Consider A Variety of Steps to Preserve and Enhance Rail-To-Rail Competition

It is clear to the League that the evolution of the rail transportation marketplace has not been accompanied by needed changes in regulatory policy to accommodate a rail transportation marketplace that has already become consolidated, even without considering the consolidations that may take place in the future. It is important to note that many of these changes are already within the power of the Board, given the broad authority it has over rail mergers, as well as in other provisions of its authorizing legislation dealing with competitive access (49 U.S.C. §11102); through routes and joint rates (49 U.S.C. §10703); and rates and practices (49 U.S.C. §10702 and 10704).

The Board's current rules, policies and precedents are clearly not adequate to provide the necessary level of competition in the rail industry and protection from monopoly abuse. For example, its rules on Intramodal Rail Competition (49 C.F.R. Part 1144) are virtually unworkable: no shipper has ever succeeded in bring a "competitive

access” case under them, and the standards that have evolved from agency decisions pose an insuperable barrier to relief. The Board’s “contract exception” has provided only very limited relief in rail bottlenecks, and no relief whatsoever for movements within (as distinct from movements across) the eastern and western rail regions.⁴ And the uncertainties and expense of the Board’s “small shipper” reasonable rate rules have proved so daunting that they have never been used by a single shipper since they were promulgated. The Board’s approaches, then, need to be changed.

A. The Rules to be Reviewed and Changed Should Go Beyond the Regulations Promulgated Specifically for Rail Mergers

In the ANPR, the Board referred to its “merger rules” and defined such rules as the regulations found at 49 C.F.R. Part 1180.0–1180.9. ANPR, slip op. at 3, note 8. However, the serious issues raised by parties in Ex Parte 582 and highlighted by the STB require review of other regulations, as well as policies established through adjudication.

It is important for the Board to realize that, if it is going to “affirmatively enhance,” and not just preserve, competition, as the Board suggests in the ANPR, slip op. at 4, then it should act more broadly than simply in its narrowly-defined “merger rules.” For example, if the Board applies pro-competitive conditions only to merging carriers, then shippers not served by those merging carriers are at a competitive disadvantage. Thus, the Board needs to act both within and outside of its “merger rules” to provide for a truly competitive rail marketplace.

⁴ For example, while shippers may be able to obtain a contract from an eastern carrier for a movement from the western United States to the east, they have been generally unable to obtain a contract from one western rail carrier for a movement to the lines of another western rail carrier (and from one eastern carrier to another). Eastern and western carriers compete only tangentially, in a few places in the “seam” of the eastern and western systems. Carriers within a region, though, would open themselves to what they perceive as self-destructive retaliation if they were

B. The Board Should Revise Its Rules Applicable to Reciprocal Switching

One of the most important changes that the Board could make to its rules dealing with rail competition involves its rules relating to reciprocal switching. At the present time, the grant of reciprocal switching is governed by the standards set forth in 49 CFR Part 1144. These rules were promulgated in 1985. There have been basically six decisions at the agency or in the courts that have been decided involving the agency's competitive access rules pertaining to shippers: Midtec⁵; the Midtec court decision⁶; the decision by the court of appeals in the BG&E case in review of the agency's rules⁷; Vista Chemical⁸; Shenango⁹; and Golden Cat.¹⁰ Shippers have not won a single decision, and the agency has never granted a competitive access remedy in favor of the shipper.

But even worse than the "won-lost" record is the precedent that the agency has promulgated in coming to these decisions. Some of the statements and principles that have been developed in these decisions that can be argued to govern future cases include the following:

- The agency's rules are only intended to correct competitive "abuse," and not to introduce additional competitive rail service. Midtec, 3 I.C.C.2d at 173-74; BG&E, 817 F.2d at 114.. Relief is available only where there has been a demonstration of actual or threatened harm. Vista Chemical, 5 I.C.C.2d at 342.
- Whether or not "abuse" has occurred involves an antitrust-type inquiry. Midtec, 3 I.C.C.32d at 173-174. The agency's competitive access rules

to give a contract for a movement on their lines to a point on another carrier within the same region. Such contracts have not usually been offered.

⁵ *Midtec Paper Corp. v. Chicago and North Western Transportation Company*, 3 I.C.C.2d 171 (1986).

⁶ *Midtec Paper Corp. v. United States*, 857 F.2d 1487 (D.C. Cir. 1988).

⁷ *Baltimore Gas and Electric Co. v. United States*, 817 F.2d 108 (D.C. Cir. 1987).

⁸ *Vista Chemical Company v. Atchison, Topeka and Santa Fe Ry.*, 5 I.C.C.2d 331 (1989).

⁹ *Shenango, Inc. v. Pittsburgh, C & Y Ry.*, 5 I.C.C.2d 995 (1989), *aff'd sub nom. Shenango, Inc. v. ICC*, 904 F.2d 696 (3d Cir. 1990).

¹⁰ *Golden Cat Division of Ralston Purina Company v. St. Louis Southwestern Railway Company*, served April 25, 1996.

narrow the agency's discretion under the statute to grant competitive remedies. Midtec court decision, 857 F.2d at 1500; Vista Chemical, 5 I.C.C.2d at 335.

- Under the statute, the agency must consider intramodal, intermodal and geographic competition. Midtec court decision, 857 F.2d at 1505, 1513. Vista Chemical, 5 I.C.C.2d at 336.
- Where the claim is that the carrier's rates are too high, a finding of market dominance is required, and there needs to be an inquiry into rate unreasonableness. Midtec court decision, 857 F.2d at 1507; Vista Chemical, 5 I.C.C.2d at 336. However, a finding of market dominance is not sufficient to justify a grant of competitive access. Shenango, 5 I.C.C.2d at 1001.
- A complete analysis of rates and costs is required to determine the relative efficiency of a carrier's route. Vista Chemical, 5 I.C.C.2d at 341.
- Even the charging of rates above "Stand-Alone Cost" is not a sufficient basis for the grant of competitive access. Shenango, 5 I.C.C.2d at 1001.
- The determination of whether a "terminal area" exists requires a full inquiry into the nature and use of the facility, including switching or classification activities, the activities of other shippers, and other facts. Golden Cat, slip op. at 7-8.
- To obtain competitive access on the basis of poor service, the fact that the carrier's service is not to the shipper's satisfaction is not enough: service failures have to be severe. The shipper must also demonstrate that the accessing carrier would not interfere with the landlord carrier's ability to handle its own business. Golden Cat, slip op. at 9.

The above precedent presents insuperable obstacles to a grant of reciprocal switching. A shipper seeking such relief apparently has to present evidence on: (1) likely or actual antitrust-type competitive abuse, such as market foreclosure, price squeezes, refusal to deal, or monopolization or predation; (2) market dominance; (3) rate unreasonableness, including an inquiry into the carrier's costs and SAC; (4) the nature of the carrier's operations in the area to establish that there is a terminal area; and/or (5) severe service failures coupled with a showing that the operations of the carrier against whom relief is sought will not be impaired. Just the discovery requirements alone are

daunting. And because there has never been a successful case, no shipper can be sure of what, if any, evidence, would ever satisfy the standards.

In its *Bottleneck I* decision, the Board indicated that it rejected the proposition that its decisions under its competitive access rules “stacked the deck” against shippers. *Bottleneck I*, slip op. at 9. However, the above analysis clearly shows that the current rules, as interpreted by the Board, could certainly lead even the most dispassionate of observers to the conclusion that relief under the Board’s competitive access rules is unattainable.

The League believes, then, that the Board should change its rules to permit reciprocal switching within a specified distance of a terminal, with the fee for such switching determined by arbitration should the carrier and shipper fail to agree. It should be noted that the Board clearly has the discretion, not only to make such a change as part of its conditioning authority for merging carriers, but also to change its approach with respect to reciprocal switching under its Intramodal Rail Competition rules. These rules were promulgated by the ICC in 1986; can be changed by the Board now; and should be changed in view of the consolidation of the railroad industry since then. No change in the Board’s legislative authority is needed.

C. The Board Must Not Permit Mergers to Create New Bottlenecks

In order to preserve even the existing level of competition in the routing of traffic, it is imperative for the Board to alter its merger rules to require any merging carriers to maintain “open” gateways. For example, if a point today is served by both eastern carriers, traffic moving from the west (even from a single-served point on a western carrier) can at least take advantage of competition between the eastern carriers on the

movement from the interchange to the competitively-served eastern point. Indeed, the Board's "contract exception" to its bottleneck rules recognizes that shippers at such a point receive the benefits of such competition. *Union Pacific Railroad Company v. STB*, 202 F.3d 337, 342 (D.C. Cir. 2000). However, if a western carrier were to merge with an eastern carrier, the competition between the eastern carriers for their portion of the move beyond the interchange would be lost (as well as the shipper's right to challenge the rate under the "contract exception").

Thus, the Board must act to preserve the routing competition that now exists. This is going to mean not just preserving the physical ability to route traffic, but preserving the economic ability as well: routes can be "closed" not just by flatly restricting routing, but by pricing the traffic over the monopoly segment of the joint line route to economically prevent diversion to the competitor at the gateway. Thus, as discussed further below, the Board needs to insure that the shipper continues to have the ability to challenge the rate over the gateway should the shipper believe that it exceeds a maximum reasonable level; or if the carrier takes anticompetitive action to close the gateway; or takes otherwise unlawful action.

D. The Board's Bottleneck Rules Need to be Revised

If the Board is to "preserve" competition, much less "affirmatively enhance" it, the Board should review its bottleneck rules. Under the current rules as articulated in the Board's two Bottleneck Decisions, a shipper cannot demand or challenge a rate over a "bottleneck" as long as the bottleneck carrier can provide origin to destination service, unless the shipper brings and wins a competitive access case. As noted above, the agency's competitive access rules have been so narrowly construed that a complaining

shipper has never won a single case. Even if the bottleneck carrier cannot provide origin to destination service, the shipper cannot demand a rate over the bottleneck unless the shipper obtains a contract from the non-bottleneck carrier.

The Board needs to realize that its Bottleneck Decisions have literally changed the landscape with respect to end to end mergers. Before the Bottleneck Decision, shippers believed that an end to end merger was basically benign, because it could result in potential efficiencies with no loss of potential competition. This was because shippers believed that, if necessary, they could route traffic originating on the merged carrier over gateways to other carriers, if the merged carrier attempted to extend a bottleneck monopoly to the competitive segments beyond. After the Bottleneck Decision, however, this was no longer true: for the Board ruled in that decision that, if a carrier served both the origin and destination, it could lawfully preclude potential competition from other carriers that might exist over other segments of the movement. The adverse effects are also multiplied because, in a vertical merger, the shipper can no longer take advantage of the “contract exception” to discipline the merged rail carrier.

In a future vertical merger (practically speaking, the only kind of merger remaining), shippers will lose whatever rights they have had to route traffic over competing carriers, since the vertically-merging carriers will obtain the ability to provide origin to destination service to and from points served by each of them. In other words, under the Board’s bottleneck decisions, after a future vertical merger, a shipper will have no right to route its traffic over currently-competitive routes, much less routes now closed but which could be competitive if the bottleneck rules were changed.

In its ANPR, the Board has suggested requiring merger applicants to offer, upon request, contracts for the competitive portion of joint-line routes when the joint-line partner has a bottleneck segment. ANPR, slip op. at 7. The Board also suggested that it might require merger applicants to provide a new through route at a reasonable interchange point whenever they control a bottleneck segment and the shipper has entered into a contract with another carrier for the competitive segment. The League supports both of these approaches, and urges the Board to carefully examine whether other mechanisms are feasible for broadening the availability of rail competition.

E. Eliminating the Acquisition Premium

If the Board is to maintain effective regulatory oversight over rail carriers through its rate reasonableness authority, the Board needs to insure that the variable costs attributable to rail carriers are not affected by the premiums paid by rail carriers for their rail mergers. The League, then, believes that the Board should revise its approach regarding the treatment of so-called “acquisition premiums” in rail mergers, and should not permit such premiums to be used in calculating variable costs for jurisdictional threshold purposes or for determining a rail carriers’ revenue adequacy.

V. **Safeguarding Rail Service**

As noted in Section III.C above, NITL members have experienced significant service failures as a result of certain past rail mergers. The nature and extent of these service failures are well known to the Board, and will not be repeated here. The focus should be on the future: how to measure service; how to prevent service failures; and how to insure that service is restored and shippers are made whole as soon as possible. The League believes that there are several things that the Board should consider:

First, it is clear that the data available to the Board regarding service is not adequate for determining the extent, location and severity of service problems. Better “baseline” data is needed, to determine the degree of claimed service improvements from pre-merger levels. More importantly, the data being developed and submitted as a part of the Board’s oversight in the NS/CSX proceeding should be applied to all carriers and supplemented by information relating to the single most important indicator of acceptable service: the actual time taken to ship goods from the origin to the destination.

In this regard, the League would highly commend CSX Transportation Company for what appears to a promising initiative discussed at the most recent meeting of the Conrail Transaction Council, namely, the development of a prototype system which can summarize from a database the transit time, including standard deviation, between any one of over 80 areas within the eastern United States, to any other area. Such a program would appear to be a powerful tool to enable the railroad industry and shippers to analyze rail service. The League would be willing to work with CSX and other carriers, as well as the Board, to develop such a system further. Third party vendors may also be a source of expertise and data to develop this information.

Second, carriers in future merger proceedings should be required to submit service plans that would detail the service improvements that the merging carriers expect from the transaction, and contain measurable parameters for determining whether the carriers have in fact met their service goals. These should include transit times over major corridors, so that shippers potentially affected by the transaction can determine if the proposed transaction will provide service benefits or not. Finally, the service plan

should also detail the remedial steps that the carrier would take in the event that the transaction led to service disruptions.

Third, the Board's consideration of a proposed merger should evaluate the likelihood of the claimed service improvements, and that evaluation should be a factor in determining whether to approve a merger or not, or whether to impose conditions that would tend to assure that the promised service improvements are in fact delivered. Of course, the applicants' willingness to guarantee a certain level of service, and the applicants' willingness to provide expedited mechanisms to resolve service and claims disputes, should be a factor in this evaluation.

VI. The Board Should Review Its Approach to Paper Barriers for the Efficient Operation of Short Line and Regional Carriers

In a world where there are only two major carriers – the world that exists today in most parts of the country – the Board should be particularly careful to preserve and enhance all the present and potential rail competition that might be provided by non-Class I carriers. Thus, the Board needs to re-think its policy regarding so-called “paper barriers,” often created at the inception of the formation of a Class III carrier, that prevent that Class III carrier from interchanging with any carrier other than its “parent” carrier.

While these barriers may have had a purpose in the past in encouraging the formation of Class III railroads, it is time to reevaluate the desirability of these restrictions in today's world. First of all, the Board should closely scrutinize whether any type of competitive barrier should be permitted in future transactions. With respect to paper barriers created as a result of past transactions, the Board should develop procedures that would permit it to evaluate, upon application in a particular circumstance,

whether the Class I parent has already received the reasonable economic benefit of the restriction, such that further continuation of the competitive restriction is not appropriate.

VII. Safeguarding Rail Safety

In its ANPR, the Board noted that safety concerns remain a primary goal of its environmental review in railroad merger cases, and that these concerns are best aired on a case by case basis. The Board suggested that it did not see any reason to alter its merger rules in that respect. The Board also noted that in recent mergers it has required applicants to formulate Safety Integration Plans (“SIPs”), and that it intends to continue to require SIPs on a case by case basis until the SIP rulemaking that is now pending is completed.

The League agrees that safety remains a key issue in rail merger proceedings and in rail operations, and agrees with the Board that these concerns are best addressed on a case-by-case basis. The League believes that the SIPs process has been a salutary one, and supports the agency’s continued use of it.

VIII. Cross-Border Issues

In its ANPR, the Board asked for comment on potential cross-border issues in transactions involving a United States and a foreign (particularly Canadian) rail carrier. The market reach of any existing U.S. and Canadian carrier is already large, and the potential market reach of a merged U.S./Canadian carrier would be obviously even larger. Any such merger would have the potential to affect traffic flows of key commodities, both across the border and within the United States and Canada. If an application does not fully analyze traffic flows and changes in traffic flows on both sides

of the U.S./Canadian border, it may be very difficult to determine the full effects of a transaction on U.S. shippers. Thus, such applicants should be required to submit a full system operating plan, including rail operations outside of the United States, as well as an analysis of the competitive impacts of this transaction on both sides and across the U.S./Canadian border. Moreover, the applicants to a U.S./Canadian transaction should be required to separate the benefits and harms of a transaction that will accrue in the United States and Canada.

IX. Conclusion

The League respectfully requests the Board to take the above views into account as it develops proposals for its Notice of Proposed Rulemaking in this proceeding.

Respectfully submitted,

By:

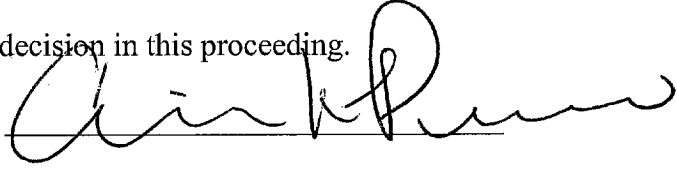

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Due and Dated: May 16, 2000

Certificate of Service

I hereby certify that I have served the above Comments on all parties of record, as required by the Board's rules and its decision in this proceeding.

A handwritten signature in black ink, appearing to be "A. K. R.", is written over a horizontal line.