

STB FINANCE DOCKET NO. 33388¹

CSX CORPORATION AND CSX TRANSPORTATION, INC.,
NORFOLK SOUTHERN CORPORATION AND
NORFOLK SOUTHERN RAILWAY COMPANY
--CONTROL AND OPERATING LEASES/AGREEMENTS--
CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION

Decision No. 109

Decided December 18, 1998

The Board: (1) adopts certain trackage rights and terminal operation proposals as set forth in this decision; and (2) denies (a) a motion to strike; (b) a request to require that certain trackage rights include an interchange at Beacon, NY; and (c) a request to assign an administrative law judge to supervise a mediation process.

BY THE BOARD:

This decision addresses the proposals, including the method of compensation, relating to the trackage/haulage rights that we imposed on behalf of the State of New York and the New York Department of Transportation (NYDOT) and the New York City Economic Development Corporation (NYCEDC) in connection with the transaction we authorized in *CSX Corp. et al. - Control - Conrail Inc. et al.*, 3 S.T.B. 196 (1998) (*Decision No. 89*).² In

¹ This proceeding also includes *Responsive Application - State of New York, By and Through Its Department of Transportation, and The New York City Economic Development Corporation*, STB Finance Docket No. 33388 (Sub-No. 69).

² In *Decision No. 89*, we approved, subject to conditions, the application by CSX Corporation and CSX Transportation, Inc. (collectively CSX), and Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively NS) under 49 U.S.C. 11321-26 for: (1) the acquisition of control of Conrail Inc., and Consolidated Rail Corporation (collectively Conrail); and

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our decision approving the primary transaction, we granted in part and denied in part the New York parties' responsive application in Sub-No.69. As pertinent here, in *Decision No. 89*, 3 S.T.B. at 388-89 (Ordering Paragraph No. 28), we stated:

CSX must attempt to negotiate, with CP, an agreement pursuant to which CSX will grant CP either haulage rights unrestricted as to commodity and geographic scope, or trackage rights unrestricted as to commodity and geographic scope, over the east-of-the-Hudson Conrail line that runs between Selkirk (near Albany) and Fresh Pond (in Queens), under terms agreeable to CSX and CP, taking into account the investment that needs to continue to be made to the line.

BACKGROUND

By letter filed November 10, 1998, Canadian Pacific Railway Company, Delaware and Hudson Railway Company, Inc., Soo Line Railroad Company, and St. Lawrence & Hudson Railway Company Limited (collectively CP) indicated that, because the parties have been unable to reach an agreement, CP was requesting that we institute a proceeding addressing the matter. After considering responses to CP's request, including responses from CSX and the New York parties, we established an expedited schedule requiring CP and CSX to submit simultaneous proposals with regard to the east-of-the-Hudson condition under shorter time frames than those advanced by the parties. *See, Decision No. 102*, 3 S.T.B. 831 (1998).

In its proposal filed November 30, 1998 (designated as CP-24), CP maintains that it should receive from CSX full-service trackage rights that includes access to all shippers,³ carriers, and yard facilities located on the east-of-the-Hudson line.⁴ On the north end, CP proposes trackage rights over three

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(2) the division of Conrail's assets by and between CSX and NS. NYDOT and NYCEDC are also referred to collectively as the New York parties.

³ Included in CP-24 were supporting statements by Fort Orange Paper Company, of Castleton, NY (approximately 10 miles southeast of Albany) and ADM Milling Company. Fort Orange Paper Company also filed comments (designated as FOPC-7) on December 10, 1998, in support of CP's request for access to all shippers located on the Hudson Line.

⁴ CP states that it is separately negotiating with Metro-North Commuter Railroad (Metro-North) in regard to trackage rights over that portion of the east-of-the-Hudson line owned by Metro-North between Poughkeepsie and High Bridge, NY. CP also indicates that it is separately negotiating with the State of New York for trackage rights on the Oak Point Link from High Bridge to CSX's Harlem River Yard. In conjunction with its trackage rights proposal over CSX, CP asks

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3 S.T.B.

CSX line segments respectively serving: Rensselaer and Schenectady, NY (referred to as Route 1); the Selkirk Yard (referred to as Route 2); and the Albany/Rensselaer industrial area via CP's Kenwood Yard (referred to as Route 3). On the south, CP seeks a carrier interchange at Fresh Pond Junction, or other appropriate locations, as well as access to the Harlem River Yard, Oak Point Yard, and Hunts Point Terminal and all customers served by those facilities. CP contends that alternatives such as haulage rights will not permit it to obtain the operational efficiencies available from trackage rights. As regards compensation, CP proposes to pay the same car-mile rate and switching fee, *i.e.*, \$0.29 per car-mile and \$250 per car fee, that applicants agreed to pay each other under their transaction agreement. CP maintains that, just as those rates enable applicants effectively to compete with each other, the same charges will allow CP to be an effective competitor with CSX on the line.

CSX's proposal (designated as CSX-167) includes a grant of overhead trackage rights between Selkirk and Fresh Pond, NY, with access to shippers and rail facilities in the Bronx and Queens, NY, including an interchange with the New York & Atlantic Railroad (NYAR) at Fresh Pond Junction and access to the Oak Point Yard.⁵ CSX indicates that such trackage rights substantially conform to the relief sought by the New York parties in their responsive application. As compensation for CP's use of the trackage rights and applicant's rail facilities in the Bronx and Queens, CSX proposes that CP pay a variable fee based on usage and a fixed annual fee based on 50% of the condemnation value of the involved trackage and yard property.⁶ CSX also seeks an override or cancellation of its October 20, 1997, settlement agreement with CP, on the ground that the settlement agreement is inconsistent with the additional relief CP will be obtaining in these proceedings.

In its reply (designated as CP-25) filed December 10, 1998, CP maintains that, to conform to the request by the New York parties for full-service rights on

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us to override, under our authority at 49 U.S.C. 11321, any CSX claim of exclusive right to provide freight service over these line segments. *See* CP-24 at 2, n.1.

⁵ CSX describes its proposal for access by CP to shippers and rail yards in the Bronx and Queens as a "terminal joint facility" where CSX will be the operator of the facility, but CP will have equal access and be able to run its line haul trains to and from Oak Point Yard, the Harlem River Terminal, and the interchange with NYAR at Fresh Pond Junction. In addition, CSX agrees to allow CP to terminate its financial obligations as to the joint facilities by giving CP the option of constructing its own terminal facilities in the metropolitan area.

⁶ CSX proposes that CP pay in monthly installments an "annual interest rental fee" of one-half of 10% of the fair market value of its rail line and yard property, with the value to be determined by an independent appraiser jointly selected by the parties.

the line and the Board's imposition of such a condition, its trackage rights between Selkirk and Fresh Pond Junction should be local, rather than overhead as advanced by CSX. CP also contends that CSX's proposal for a single overhead route via the Selkirk Branch (corresponding generally to CP's Route 3) would deprive it of 20% of the available traffic on the line and prevent it from using the most efficient routings to Canadian and Southern United States markets. As regards operations at the south end of the line, CP complains that CSX would deny it direct access to Hunts Point Terminal, parts of the Harlem River Yard other than the Trailvan Terminal, and new interchanges other than at Fresh Pond Junction with NYAR. According to CP, the condemnation methodology for compensation proposed by CSX has no place in this proceeding, and that CP's proposal conforming to *SSW Compensation*⁷ is based on established Board precedent and should be accepted. Finally, CP submits that CSX's effort to cancel the October 20, 1997, settlement agreement is unwarranted because CP has not breached any of its obligations thereunder and termination of the agreement would deprive CP of a number of pro-competitive rights that have nothing to do with the east-of-the-Hudson condition.⁸

In its reply (designated as CSX-169), CSX contends that its condemnation method of compensation should be accepted because the CSX/NS/Conrail transaction did not cause a lessening of competition which CP's trackage rights were designed to cure and, therefore, it is an "innocent" party entitled to full constitutional reimbursement for the taking of its property, *i.e.*, a one-half

⁷ *St. Louis Southwestern Railway Company--Trackage Rights Over Missouri Pacific Railroad Company--Kansas City To St. Louis*, 1 L.C.C.2d 776 (1985) (*SSW Compensation*).

⁸ The CP-25 reply includes a verified statement of Joseph J. Plaistow that attempts to demonstrate that CP's compensation approach is reasonable and that CSX's is not. CSX concedes that, insofar as the Plaistow statement attempts to demonstrate that CSX's compensation approach is not reasonable, it is legitimate rebuttal. See, CSX-170 (filed December 15, 1998) at 5 n.3 (lines 1-3). CSX insists, however, that, insofar as the Plaistow statement attempts to demonstrate that CP's compensation approach is reasonable, it is not legitimate rebuttal and should therefore be stricken. See, CSX-170 at 5 (lines 5-8) & n.3 (lines 3-5; the title of the CSX-170 motion notwithstanding, that motion does not in fact seek to strike the Plaistow statement in its entirety). Although we agree with CSX that, insofar as the Plaistow statement attempts to demonstrate that CP's compensation approach is reasonable, the Plaistow statement should have been included in CP's CP-24 opening submission, we will nevertheless deny the CSX-170 motion to strike. CSX contends that "[n]o harm would be done to CP by striking Mr. Plaistow's evidence; the Board can look to its precedents and establish a formula for the compensation CSX is entitled to receive for the rights the Board is granting." See, CSX-170 at 6. In this decision, however, we are not simply "establish[ing] a formula;" we are setting a compensation amount; and, to this end, we have had to rely on some of the data provided in the Plaistow statement. Thus, we are prepared to afford CSX, in the context of a petition for reconsideration, an opportunity to respond, if it is so inclined, to the Plaistow statement and to our calculations derived therefrom.

interest in the east-of-the-Hudson line and yard facilities in the Bronx and Queens. On the other hand, CSX complains that CP's proposed \$0.29 per car-mile rate and \$250 per car switching charge are not cost-based, nor are they mutually agreed to or reciprocal as in the case of charges applicants CSX and NS will assess each other. CSX further contends that CP's compensation proposal is deficient because it does not reimburse CSX for the loss of its exclusive freight rights over the portion of the line, between Poughkeepsie and Oak Point Link, owned by Metro-North. According to CSX, under the Final System Plan, Conrail acquired a fee remainder interest in Metro-North's 70-mile line, subject to a 60- to 90-year lease by New York Metropolitan Transportation Authority and its agent Metro-North. Although CSX argues that only the Special Court⁹ may determine whether Conrail's freight rights are exclusive, it concedes that the Board may override any rights Conrail may have in the line. If the Board overrides such rights, CSX insists that it should be fully compensated for the invasion of its exclusivity.¹⁰

CSX submits that, because the east-of-the-Hudson condition is designed to inaugurate competitive rail service on behalf of New York City, CP should not be granted local access to shippers located north of the municipality, including the Albany area. CSX insists that its proposal, which would provide CP with local access to all shippers and rail facilities in the Bronx and Queens and interchange with NYAR in Long Island, fully satisfies the Board's purpose in imposing the condition. In addition, CSX criticizes CP's request for three access routes to the Hudson line by maintaining that the proposal is unwarranted, overreaching, and will cause operating problems in the Albany area by CP.¹¹

NYCEDC and NYDOT submitted a joint reply (designated as NYC-23/NYS-32). The New York parties support the proposal advanced by CP and find fault in CSX's proposal, arguing that the condition gives CP full service trackage rights and thus CP should have access to all shippers located on the Hudson line. The New York parties contend that CSX's compensation proposal

⁹ The United States District Court for the District of Columbia has assumed the jurisdiction of the Special Court.

¹⁰ CSX, however, asks that we first permit the parties to negotiate this matter and not exercise our override authority at this time. CSX-169 at 21.

¹¹ Because of its concerns related to the three routes, CSX has offered CP two alternative routes: a route near CP's Kenwood Yard, but requiring the construction of a connection in the \$1 million plus range; or a route currently used by CP, via the Chicago Line, that does not require any improvements or construction expenditure. See, Downing R.V.S. at 7-8.

would create excessive costs to CP and is based on erroneous premises that CSX is an innocent party and that CP will be a co-equal owner of the rail properties.

RELATED MATTERS

Housatonic Railroad Company. In comments (designated as HRRC-14) filed December 10, 1998, Housatonic Railroad Company, Inc. (HRC) indicates that it connects with Metro-North's portion of the Hudson Line at Beacon, NY. HRC states that it currently has a trackage rights agreement with Metro-North to interchange traffic with all freight carriers operating over the Hudson Line. To preserve its interchange opportunities, HRC asks the Board to require that CP's trackage rights agreement with CSX expressly permit an interchange between CP and HRC at Beacon, NY.

Providence & Worcester Railroad Company. In a letter filed November 19, 1998, Providence & Worcester Railroad Company (P&W) requests that we assign an administrative law judge to supervise a mediation process relative to our requirement that CSX discuss with P&W "the possibility of expanded P&W service over trackage or haulage rights on the line between Fresh Pond, NY, and New Haven, CT * * *." See, *Decision No. 89*, 3 S.T.B. at 283-84, 389 (Ordering Paragraph No. 31). P&W complains that, other than mutually beneficial marketing proposals, CSX is unwilling to discuss substantive opportunities by P&W to compete with CSX over the New Haven route. Comments supporting P&W's request were filed by NYCEDC and NYDOT, in a joint reply (designated as NYC-22/NYS-31), and by Congressmen Jerrold Nadler and Charles E. Schumer in a letter filed December 10, 1998, on behalf of the 24 member New York-Connecticut Congressional delegation.

In a reply to P&W filed December 9, 1998, CSX contends that, in court and Board proceedings, P&W has repeatedly violated its August 6, 1997, settlement agreement with CSX. According to CSX, in exchange for valuable independent rate-making authority between New Haven and New York City, P&W pledged unconditional support for the Conrail transaction. Despite P&W's litigation, CSX states that it has continued to negotiate with P&W relative to mutually beneficial arrangements over the New Haven route. CSX asks the Board to clarify that unrestricted trackage rights on behalf of P&W, over CSX's objection, is not what the Board intended when it imposed the condition.

DISCUSSION AND CONCLUSIONS

Trackage Rights--Between Albany and New York City. The purpose of our east-of-the-Hudson condition is to restore to New York City some of the rail

competition that was lost when Conrail was created. In imposing the condition, our focus was not on entities or shippers located in other parts of the state, including those in the Albany area. Nor did we intend to assist particular rail carriers (CP, P&W, and HRC) vis-a-vis the applicants in the Conrail transaction. Further, CP has not shown that a grant of local rights along the entire east-of-the-Hudson route would enhance its ability to efficiently provide service to shippers within New York City. Accordingly, consistent with our intention of enhancing the competitive presence of a second carrier for New York City traffic, CP's prospective trackage rights will be limited to overhead traffic between Albany and New York City, and local access to industries situated between those points will not be permitted. We are not granting the relief HRC seeks. It has not made the case that the traffic it contemplates carrying would pass through New York City, and thus its request for an interchange with CP is not proximately related to the remedy we sought to impose through the east-of-the-Hudson condition.

We will also deny CP's request for three access routes to the Hudson Line at Albany. In view of CP's projected traffic volume (initially one train a day each way) and CP's existing extensive rail facilities in the Albany area, we do not believe that more than one access route is necessary.¹² We will authorize CP to use Route 1, as proposed by CP in CP-24, Exhibit 2, involving the use of the Chicago Main Line between Rensselaer and Schenectady. CSX takes no exception to this route. The route appears to make the best connection with the Hudson Line, does not involve Conrail's Selkirk Yard, and does not require complex switching movements or "backward shoves" as CSX witness Downing proposes. Its Schenectady connection makes use of CP's Mohawk Yard and provides CP with a direct connection for its northbound and southbound trains in handling New York Terminal traffic.¹³ It is a high-speed, double track line and, other than Amtrak trains, normally handles only Conrail local service trains. The forecast level of CP service of one train in each direction daily, even with the projection of a second train in Year Two, should not adversely affect Amtrak service.

New York Terminal Operations. CSX has agreed to CP's request for access to all yards, terminals, other facilities and shippers, present and future, located in the Bronx and Queens, and an interchange with NYAR at Fresh Pond Junction. But, this agreement is conditioned on CP bearing one half of the full

¹² Should CP's traffic volume increase substantially, we will reexamine the carrier's routing requirements under our oversight jurisdiction.

¹³ CP's access route in the Albany area will also be limited to overhead trackage rights.

ownership costs of all the track and facilities that would be associated with CP's operations. As discussed below, CSX's compensation proposal is unacceptable.

CP proposes that CSX provide it with traditional switching services where this would be the most efficient means of engaging in local service. CP also states that it needs to have the option of providing direct service to customers and facilities in the Bronx and Queens, so as to discipline the quality of switching services provided to CP by CSX. While CP has proposed a \$250 per car switching fee that should adequately compensate CSX for this service, including the limited use by CP of Oak Point Yard, CP has not proposed suitable compensation arrangements that would become necessary if it were to make more extensive use of CSX's New York City track and terminal areas, as would be required if CP were to provide direct service to customers and facilities in the Bronx and Queens.

CP will be permitted to access all shippers in the Bronx and Queens via a \$250 per car switch performed by CSX, including the use of Oak Point Yard as necessary to efficiently perform this switching service. With respect to the contemplated interchange between CP and NYAR: (1) CSX may perform a switching service and bring cars from Oak Point to Fresh Pond or from Fresh Pond to Oak Point for the \$250 "basic" switching fee; or (2) CP could use its trackage rights to interchange directly with NYAR at Fresh Pond, but only if CP enters into a suitable compensation arrangement with CSX for the use of the Fresh Pond yard. We will also grant CP's request that NYAR be given trackage rights from Fresh Pond to Oak Point for its interchange with CP, but only if CP enters into suitable compensation arrangements with CSX for this use of the Oak Point yard. CP failed to suggest any such compensation arrangements, other than the basic \$250 switching fee, for its contemplated uses of the Fresh Pond or Oak Point facilities, even though its proposal to interchange with NYAR at Oak Point would apparently involve no compensation to (i.e., no switching by) CSX.

Trackage or Haulage Rights--Between New Haven, CT, and New York City. P&W asks us to appoint an administrative law judge to supervise a mediation proceeding concerning the New Haven to New York condition we imposed in Ordering Paragraph No. 31. We are denying P&W's request because such a proceeding and the prospect of valuable commercial rights going to P&W, over CSX's opposition, are not what we intended when we asked the parties to negotiate the possibility of expanded P&W service over the New Haven route. Despite P&W's litigious posture, which might well be construed as a breach of the CSX/P&W settlement agreement, CSX has represented that, based on P&W's conduct to date, it will not cancel that agreement. The settlement agreement does comport with our pro-competitive goals and with our desire to

have CSX and P&W negotiate mutually beneficial arrangements to increase competition. Accordingly, CSX will be bound to its commitment not to cancel the agreement based upon P&W's conduct up to this point.¹⁴

Compensation. CSX's proposal that CP compensate it for the use of CSX's tracks between the Albany area and Fresh Pond, NY, and for all terminal facilities within the Bronx and Queens based on 50% of the ownership cost is unacceptable. As an initial matter, CP does not need, and we are not providing it with, physical access to, and use and control of, all of these facilities. CSX's proposal requiring CP to pay for 50% of the ownership cost would more than likely place either CP or CSX at a competitive disadvantage unless each carrier captured an equal share of the revenues available on the line. Any compensation established in this proceeding must put the tenant in the same competitive position as the owning carrier.¹⁵ In addition, as stated by CP, it appears that CSX is attempting to charge CP 50% of the ownership cost without giving CP all of the benefits associated with being an actual co-owner of the line, such as control of the facility, or full property rights in the assets.¹⁶

CP proposes that it: (1) pay a trackage rights fee of \$0.29 per car-mile for the use of CSX's line between the Albany, NY area and Oak Point Yard and pay CSX \$250 per car to perform switching; and (2) interline traffic with NYAR either at Oak Point Yard, allowing NYAR incidental trackage rights between Oak Point Yard and Fresh Pond at \$0.29 per car-mile, or at Fresh Pond via trackage rights between Oak Point and Fresh Pond.¹⁷ CSX argues that both the \$0.29 per car-mile rate and \$250 switching fee, which CP adopted from *Decision No. 89*, were established based on reciprocity between CSX and NS. CSX argues correctly that no such reciprocity is applicable here. *See, Union Pacific/Southern Pacific*, *Decision No. 47* (STB served September 10, 1996), at 18-19.

CP's Trackage Rights Fee. To support its \$0.29 number, CP developed a trackage rights fee of \$0.27 per car-mile using the capitalized earnings (CE) method established in *SSW Compensation*. Although the CE method established in *SSW Compensation* is appropriate for developing the trackage rights fee in

¹⁴ For the same reason, we are not granting CSX's request to cancel its October 20, 1997, settlement agreement with CP.

¹⁵ *See, SSW Compensation*, 1 I.C.C.2d at 786.

¹⁶ *Id.* at 790, where the ICC rejected this approach.

¹⁷ CP has not provided any specifics on its proposal to use CSX's facilities at Oak Point and Fresh Pond to interline traffic with NYAR. If CP desires to use CSX's yard facilities, it must first enter into a joint facilities agreement with CSX as indicated in this decision.

this proceeding,¹⁸ we find that CP's calculation contains several errors. We have therefore restated CP's estimate of the trackage rights fee for use in this proceeding. The trackage rights fee developed using the *SSW Compensation* method contains a pro-rata share of all the "below-the-wheel" operating costs¹⁹ as well as a pro-rata share of a rate of return element (referred to as interest rental).

CP's "below-the-wheel" cost calculation of \$0.13 per car-mile based on Conrail's 1995 Uniform Rail Costing System (URCS) system average data, appears to have been calculated in a reasonable manner. We accept CP's "below-the-wheel" cost. But CP's determination of the "interest rental" component of \$0.14 per car-mile contains several errors. Correcting CP's errors results in an interest rental cost of \$0.58 per car-mile. Thus, the total trackage rights compensation per car-mile, including "below-the-wheel" cost, would be \$0.71.²⁰ The difference between the \$0.71 trackage rights rental fee we have computed under *SSW Compensation* and the \$0.29 fee CP was prepared to pay will amount to less than \$30 per car for the segment of track over which CP will be operating as CSX's tenant. This small amount should not unduly impede CP's ability to compete for east-of-the-Hudson traffic.

CP computes the fair market value of road property using the *book value* relationship of road property to total road property plus equipment. See, *Plaistow V.S.* 12/10/98 Exhibit No. (JJP-2-1). We use the value developed by Price Waterhouse for allocating road and equipment property, shown in the

¹⁸ There are four methods for developing the "interest rental" portion of the trackage rights fee: the reproduction cost new, less depreciation method; the capitalized earnings approach (CE); actual appraised valuation of the line; and stand-alone cost. *St. Louis Southwestern Ry. Co. Compensation--Trackage Rights*, 8 I.C.C.2d 213 (1991). However, of the four methods, the CE approach is our preferred method for developing the rental component in trackage rights compensation cases because, among other things, it values the property as a going concern for railroad use, i.e., the use to which the property would actually be put. See, *Atchison, T. & S.F. Ry. Co.--Operating Agreement*, 8 I.C.C.2d 297, 304 (1992).

¹⁹ "Below-the-wheel" refers to all operating and maintenance costs associated with operating over the specific line segment at issue, other than the costs associated with equipment (fuel, crew costs, freight cars costs, etc.).

²⁰ In approving the \$0.29 per car-mile trackage rights fee agreed to by applicants, we made a preliminary assessment that actual application of the *SSW Compensation* method would result in a fee no lower than \$0.46 on Conrail track, since our means of computing this figure "understate[d] the fees that would be derived under the *SSW Compensation* method." *Decision No. 89*, 3 S.T.B. at 344-45.

NS/CSX statement (CSX/NS-177 Exhibit WWW-5) in the Conrail merger case.²¹ This results in a substantially higher number.

CP computes Conrail's earnings by taking its 1995 railroad earnings before taxes (\$571,781,000) and adding to that figure the total benefits that NS and CSX contend would derive from the merger (\$1,445,057,000). This produces a total earnings stream of \$2,016,838,000. CP's inclusion of these benefits is erroneous for several reasons. First, its figure overstates the benefits projected to be realized by NS and CSX by including various public benefits that will not be retained by those carriers. Second, the benefit numbers are for what was designated as a "normal" year, which would not be realized until after the third year following consummation of the merger. Third, and most significant, CP does not make any adjustment for merger benefits in its calculation of earnings for the line segment in question. This results in a significant understatement of the value of this particular line.

Therefore, we have excluded the merger benefits. In keeping with the procedure used in *SSW Compensation*, we have adjusted Conrail's 1995 earnings upward to account for inflation between 1995 and 1997. Using the change in the GDP deflator between 1997 and 1995 (4.461%), we have restated Conrail's earnings to be \$597,287,959.

CP does not make an adjustment to the earnings multiplier to separate earnings developed from road property from earnings developed from equipment. We reduced the earnings multiplier (to develop the road property earnings multiplier) to take into account the Price Waterhouse percentage of road property to total road property plus equipment. See, CSX/NS-177 Exhibit WWW-5.

After making these changes, we have increased the earnings multiplier from 6.26 developed by CP to 24.54. When multiplied by the line segment earnings developed by CP (\$592,490) increased for inflation by the 4.461% GDP deflator factor (\$618,921), we arrive at a value of the line segment of \$15,186,822, compared to CP's figure of \$3,710,105.

Finally, CP uses a 17.2% pre-tax cost of capital rate in its calculations. We calculate both the 1995 and 1997 pre-tax cost of capital rate for the railroad industry to be 17.5%. We have used this higher figure to compute an annual rental payment of \$2,657,694. When divided by 4,583,979 car-miles, this

²¹ We use the Price Waterhouse figures because they are the ones that CSX and NS are going to use to allocate Conrail's assets on their books. Thus, they represent the value of road and equipment that the purchasing railroads considered when they acquired Conrail.

produces an interest rental component of \$0.58 per car-mile. When added to the \$0.13 cost factor, the total *initial* per car-mile cost would be \$0.71.

Of course, trackage rights compensation is based on a retrospective determination of pro-rata shares of traffic between the owning and tenant railroads. Thus, the \$0.71 figure is merely a *starting* point for determining trackage rights compensation. Actual trackage rights compensation per car-mile should be adjusted periodically to reflect: (1) cost of capital rate for the specific period; (2) number of car-miles for the tenant and owning carriers for the specific time period; and (3) actual other "below-the-wheel" costs for the specific time period. In addition, as noted above, we will permit CSX to seek reconsideration based on its critique of any of the Plaistow evidence upon which we have relied here.

CP's Switching Fee. Absent any special studies of the actual switching cost per car in the New York Terminal Area, CP's \$250 appears to be a reasonable starting point. CP's evidence shows that CSX's 1995 URCS system average cost for switching is \$75.24 per car.²² Although CSX argues that CP's adoption of the \$250 switching charge from *Decision No. 89* is not appropriate because of the lack of reciprocity between CP and CSX, CSX has not provided any evidence that the \$250 fee would not cover the total switching cost here.²³ Further, CP shows that the average cost of 41 reciprocal switching fees it selected from CSX's Switching Tariff 8100 was \$251 (ranging from \$72 to \$390).

Because of the disagreement between the parties concerning this fee, and because CP's switching fee is not based on any specific cost relative to the actual operations in the New York Terminal Area, we will allow the parties, if either of them so desires, to invoke the right proposed by CP for a 6-month special switching study to determine a more precise switching cost. We reject, however, CP's proposed "cap" of \$250 if the study shows the switching cost is higher. Moreover, at the end of 5 years, the parties must renegotiate the fee to reflect costs as they exist at that time, just as is provided for in the National Industrial Transportation League settlement agreement.

CSX claims that it has inherited exclusive rights to operate freight service over Metro-North. On page 18 of its reply, CSX says that "Conrail and CSX interpret this as being an exclusive reservation of freight rights." CSX, however,

²² CP uses several incorrect URCS values in developing its CSX switching cost per car. Using the correct URCS data, we find the CSX switching cost per car to be \$76.97.

²³ CSX argues that the \$250 switching fee per-car established between CSX and NS is based on reciprocity.

cites no clear language from the Special Court decision or from the deed that requires or even supports that interpretation. In addition, Metro-North disputes CSX's claim by indicating that Conrail's trackage rights agreement with Metro-North clearly establishes that CSX will have no ownership or equity interest in the line. NYC-23/NYS-32, V.S. Bernard at 4. Although CP has asked us to exercise our preemption powers to override any exclusive freight rights claimed by CSX, it would not be appropriate or necessary for us to exercise that power at this time. Only if CSX is able to obtain a ruling from the Special Court that its freight rights were meant to be exclusive, and that Metro-North has contracted to give those rights to a second carrier, would preemption be necessary. With regard to compensation for these rights, we do not require compensation for the competitive or financial value of trackage rights, only the costs (including capital costs) of their use. No capital costs have been set forth by CSX for the portion of the track owned by Metro-North.

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

It is ordered:

1. The CSX-170 motion to strike is denied.
2. The HRRC-14 request to require that CP's trackage rights include an interchange with HRC at Beacon, NY, is denied.
3. The request by P&W to assign an administrative law judge to supervise a mediation process is denied.
4. The trackage rights and terminal operation proposals by CSX and CP are adopted to the extent set forth in this decision.
5. This decision is effective on December 18, 1998.

By the Board, Chairman Morgan and Vice Chairman Owen.