STB FD 33388 (SUB 69) 9-22-99 C 30494

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SERVICE DATE - SEPTEMBER 22, 1999

SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 33388

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

STB Finance Docket No. 33388 (Sub-No. 69)

RESPONSIVE APPLICATION — STATE OF NEW YORK, BY AND THROUGH ITS DEPARTMENT OF TRANSPORTATION, AND THE NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION

Decision No. 132

Decided: September 21, 1999

This decision relates to certain of the conditions that the Board imposed in approving the "CSX/NS/Conrail" transaction in its Decision No. 89, served July 23, 1998.[1] The original proposal that the private parties negotiated among themselves divided Conrail's assets in a way that enhanced competition in several respects. Further, in approving the transaction, the Board imposed conditions that mitigated potential competitive harm and provided other public benefits.

One of these conditions made possible new competitive service for many New York City shippers and receivers that could formerly receive rail service only from Conrail. To permit that new competitive service, the Board granted trackage rights to Canadian Pacific Railway Company and its affiliates (collectively, CP) over the lines of CSX from Albany, NY, to Oak Point Yard in Queens, NY. These Board-imposed trackage rights made competitive rail service available to these shippers for the first time since the creation of Conrail more than two decades ago.

Of course, in crafting conditions to permit this new competition, the Board was careful not to create an unsafe, inefficient, or operationally infeasible railroad operating environment in the congested New York City area. For that reason, the Board placed certain restrictions on the new operating rights granted to CP, most notably that shippers be accessed by CP only through a cost-based switching service performed by CSX into and out of Oak Point Yard, rather than having CP

[1] The parties to that transaction were CSX Corporation and CSX Transportation, Inc., and their wholly owned subsidiaries (collectively, CSX); Norfolk Southern Corporation and Norfolk Southern Railway Company, and their wholly owned subsidiaries (collectively, NS); and Conrail Inc. and Consolidated Rail Corporation, and their wholly owned subsidiaries (collectively, Conrail).

itself also operate trains throughout this area. The Board imposed these restrictions because of its concern that giving CP physical access to all of the tracks and facilities used by CSX in the affected area could produce congestion and compromise safety within New York City, where rail freight operations must share limited track and other facilities with heavy commuter and other rail passenger operations. Further, property values in the city preclude the construction of the additional facilities that the evidence presented in the case indicated would be necessary to accommodate a second major freight carrier providing service directly to all shippers.

THE ISSUES RAISED

In a petition filed on July 27, 1999, CP asked the Board to direct CSX to permit CP to exercise two rights that it states derive from the conditions that the Board imposed in approving the transaction. First, arguing that the Oak Point Yard switching operations using CSX are inefficient for certain movements, CP asks that the Board direct CSX to permit CP to handle traffic to or from Harlem River Yard directly. Second, CP asks that the cost-based switching service that CSX was required to provide for CP at Oak Point Yard be construed as including certain traffic that moves through a CSX transload facility located at Hunts Point Terminal.[2]

In its reply statement filed on August 16, 1999, CSX states that CP's petition is in substance one to expand the rights that the Board previously gave to CP, rather than one to enforce existing rights. CSX also argues that the new Harlem River Yard operations that CP seeks to conduct could produce operational problems, and that the Hunts Point Terminal operations in which CP wants to participate are not the type of operations that were contemplated by the conditions giving CP access to shippers located within Hunts Point Terminal.

RESOLUTION

The Board is prepared to decide this matter promptly if necessary. In letters dated September 17, 1999, and September 20, 1999, however, counsel indicated that CP and CSX are engaging in negotiations in an effort to resolve the issues privately, and asked that Board action be withheld until November 1, 1999, in order to facilitate negotiations. Because the Board generally supports private resolution of disputes, and because cooperation among carriers is particularly critical to any venture, such as this one, in which track and terminal facilities are shared, the request to withhold action will be granted.

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

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[2] The State of New York and the New York City Economic Development Corporation filed a statement in support of CP's position. Congressmen James L. Oberstar and Jerrold Nadler submitted a supporting letter.

It is ordered:

1. Action on CP's petition will be withheld until at least November 1, 1999.

2. This decision will be effective immediately.

By the Board, Linda J. Morgan, Chairman.

Vernon A. Williams
Secretary

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SERVICE DATE - MAY 20, 1999

SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 33388

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

STB Finance Docket No. 33388 (Sub-No. 69)

RESPONSIVE APPLICATION — STATE OF NEW YORK, BY AND THROUGH ITS DEPARTMENT OF TRANSPORTATION, AND THE NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION

Decision No. 123

Decided: May 18, 1999

This decision addresses petitions for reconsideration of Decision No. 109, served December 18, 1998, in which we set initial compensation for the trackage rights imposed at the request of the State of New York and the New York Department of Transportation (NYDOT) and the New York City Economic Development Corporation (NYCEDC) (collectively, New York parties) in Decision No. 89, served July 23, 1998.[1] Petitions for reconsideration were filed on January 7, 1999, by CSX[2]

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[1] As pertinent here, in Decision No. 89, slip op. at 177 (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.

[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 (2) the division of Conrail's assets by and between CSX and NS.

and by Canadian Pacific Railway Company (CP).[3] Replies were filed on January 27, 1999 by CP and CSX, and by NYCEDC and NYDOT. On February 5, 1999, CSX filed a motion to supplement the record, to which CP replied on February 12, 1999. On February 8, the National Railroad Passenger Corporation (Amtrak) filed a motion for leave to file a verified statement, to which that statement was attached. CSX replied on February 16, 1999.

INTRODUCTION

In Decision No. 109, we established an initial trackage rights fee of $0.71 per car-mile for CP's use of CSX's line between Albany and Fresh Pond, NY, and an initial $250 per car switching fee for CSX's switching service in the New York City area. Both CP and CSX have filed petitions for reconsideration in which they have submitted new evidence supporting revised fees. CP has also sought clarification or expansion of the rights we previously granted. On reconsideration we are reducing those initial fees to a trackage rights fee of $0.52 per car-mile and a switching fee of $128.10 per car,[4] but are denying other relief in terms of clarification or expanded rights that CP has sought. These fees should permit CP to compete effectively with CSX for traffic moving to and from the Bronx and Queens.

THE TRACKAGE RIGHTS FEE. In our prior decision, we determined that any compensation determined in this proceeding must put the tenant in the same competitive position as the owning carrier, and that the capitalized earnings (CE) method established in SSW Compensation[5] is appropriate for that purpose here.

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[3] CP includes Canadian Pacific Railway Company, Delaware and Hudson Railway Company, Inc., Soo Line Railroad Company, and St. Lawrence & Hudson Railway Company Limited.

[4] These initial fees are subject to a retroactive readjustment ("true-up"). The switching fee will be revised if studies of CSX's actual switching costs yield higher or lower cost numbers. Unless the parties agree otherwise, the trackage rights fee would also be revised to reflect such things as the actual cost of capital ultimately determined for the year in which the traffic moves, any changes in maintenance of way expense incurred by CSX on the line, or any new investment CSX makes to the line. Moreover, the actual trackage rights fee per car-mile depends upon the actual number of car-miles that are moved during the year. The fee we have calculated merely allocates all relevant costs over the number of car-miles that we estimate, based on this record, that the line will carry. (Thus, the more successful CP and CSX are in diverting truck traffic to the line, the lower the per car-mile fee will be.)

[5] See St. Louis S.W. Ry. Compensation — Trackage Rights, 1 I.C.C.2d 776, 786 (1984) (SSW Compensation I); 4 I.C.C.2d 668 (1988) (SSW Compensation II); 5 I.C.C.2d 525 (1989); 8 I.C.C.2d 80 (1991); 8 I.C.C.2d 213 (1991); and Decision No. 109, at 9, n.17.

Trackage rights fees developed using the SSW Compensation method contain a pro-rata share of all the landlord's "below the wheel" operating and maintenance costs[6] as well as a pro-rata share of a rate of return element (referred to as "interest rental").

CP and CSX have now calculated widely divergent initial trackage right fees of $0.34[7] and $2.70[8] per car-mile, respectively, both using the SSW Compensation method. Based on our restatement of the parties' evidence, we find that the initial trackage rights fee should be revised to $0.52 per car-mile. Our evaluation of the parties' evidence is discussed below and our restatement is shown in Table 3.

A. Below-the-Wheel Cost Component. In Decision No. 109, we accepted CP's calculation of $0.13 per car-mile for below-the-wheel costs based on Conrail's 1995 URCS system average data.[9] In its current petition, CSX provides evidence and argument in support of a cost of $0.196. CSX argues that CP's $0.13 per car-mile number understates the below-the-wheel cost for Conrail's east-of-the-Hudson line segment because CP failed to include the total cost for all cost items. We agree with CSX that CP understates below-the-wheel cost by failing to include certain below-the-wheel cost items that URCS treats as 100% constant[10] and by using the URCS' Constant Cost Markup Ratio (Ratio) to bring variable cost to the full cost level.

According to CSX, use of the Ratio works well when all URCS cost categories are under consideration, but understates the total or fully allocated costs when only certain cost items, such as "below-the-wheel" costs, are involved. For example, the URCS variability percentage assigned to "Dispatching Trains," "Operating Signals," "Operating Drawbridges," and "Highway Crossings" costs is zero (or 100% constant). Thus, even though each of these is a component of "below-the-wheel" costs, when fully allocated costs are derived from variable costs using the Ratio approach, no costs for any of these activities are included. Further, when the Ratio is applied to below-the-wheel cost items, an incorrect total cost can result. This is because the Ratio is a composite of all

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[6] "Below the wheel" costs are those operating expenses and maintenance costs incurred by the landlord (CSX) to permit the tenant (CP) to conduct its operations over the specific line segment at issue.

[7] In its January 7, 1999 statement, CP calculated the trackage rights fee at $0.36 per car-mile. In its January 27, 1999, statement, however, CP advocated a fee of $0.34 per car-mile. CP indicates that it is willing to pay $0.36 per car-mile despite its development of the lower cost.

[8] Although CSX calculates the fee at $2.70, it states that it is willing to accept $1.21 per car-mile.

[9] CP's below-the-wheel cost calculation was the only evidence of record.

[10] CP failed to include any costs associated with dispatching trains, operating signals, operating drawbridges, and highway crossings.

railroad activities and may overstate or understate fully allocated costs for any individual or selected group of activities.

CSX uses the URCS Flow-Through Option, which computes all costs under the assumption that they are 100% variable. This method directly calculates total costs for each cost component without using the Ratio. The Flow-Through Option corrects for the fact that the variability percentages of many of the "below-the-wheel" cost components are less than the reciprocal of the Ratio. We conclude that this approach is the most accurate method available for calculating full costs for the selected group of activities (below-the-wheel costs) at issue.

Although we accept CSX's method of developing below-the-wheel costs, we have restated its estimate to $0.193 per car-mile.[11] The below-the-wheel cost is $0.202 per car-mile when indexed to the 1998 level.

B. Interest Rental Component. The interest rental component, which compensates the owner for the cost of capital in its investment, is developed by applying the railroad industry's cost of capital to the value of the line, and then spreading this fixed sum evenly over each car-mile the line is expected to carry. The most significant dispute in this record focuses on the parties' calculations of the value of the line.

Under the capitalized earnings (CE) approach -- which is our preferred method in SSW Compensation cases,[12] and which we are using here — the value of the line's road property is determined by first computing how much CSX has paid for Conrail's road property to obtain one dollar of Conrail's (pre-tax) earnings, and then applying this as a multiplier to the pre-tax earnings that are projected to be generated by operations over the line at issue for the year in which it was purchased. Thus, to obtain a valuation for the line, we divide the market value of (i.e., what CSX has paid for) Conrail's road property by Conrail's pre-tax earnings, and apply the resulting ratio — the "earnings multiplier" — to the net revenues (i.e., pre-tax earnings) applicable to the east-of-the Hudson line for 1997.

The total interest rental for the line is then computed by taking the value of the line and multiplying it by the most recent railroad industry cost of capital. In the final step in this process,

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[11] We restated CSX's cost of $0.196 to $0.193 to correct for what appears to be an inadvertent error. CSX incorrectly used a gross-ton-mile operating cost of $290,993,000, but Conrail's 1995 URCS gross-ton-mile costs are $282,995,000.

[12] 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).

the initial per car-mile interest rental is derived by dividing the total interest rental by the total car-miles projected for the east-of-the-Hudson line.

Although both the parties have applied the SSW Compensation method, there is a significant divergence in their calculations of (1) the market value of Conrail's road property and Conrail's pre-tax earnings (both of which are used in developing the earnings multiplier) and (2) the net revenues applicable to the east-of-the-Hudson line (to which the earnings multiplier is applied).

1. Market Value of Conrail's Road Property. In developing the market value of Conrail's road property, the parties have first estimated Conrail's total market value, then have calculated the ratio of road property to total market value.

a. Conrail Total Market Value. CP computes Conrail's fair market value to be $12.076 billion ($9.9 billion paid for Conrail stock plus $2.176 billion of Conrail long-term debt and capitalized leases as of December 31, 1996).[13] CSX uses the fair market value for Conrail developed by Price Waterhouse, which yields a somewhat higher confidential number. The difference between the parties' estimates seems to be attributable to assets funded by deferred income taxes. Citing the Railroad Accounting Principles Board (RAPB) Final Report, CP contends that the deferred income taxes should not be considered.[14] CP notes that the Board does not consider deferred taxes in its computation of the railroads' cost of capital rate and also subtracts accumulated deferred taxes from the railroads' investment base before computing return on investment (ROI).

Upon reconsideration, we agree with CP that the market value of Conrail should be limited to the value of its stock and assumed debt, so that assets funded by deferred taxes are not included. This is the procedure adopted in SSW Compensation I. And, as noted by CP, we also subtract the

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[13] CP cites SSW Compensation I, 1 I.C.C.2d at 787. There the Interstate Commerce Commission (ICC) stated that the "purchase price of the company's assets . . . would be the stock purchase price (equity) plus all outstanding debt on the date the company's stock was purchased." To determine Conrail's debt, CP uses Conrail's December 31, 1996 SEC Form 10-K report, the last such report that it filed. While this may not be the "final" value of Conrail debt assumed by NS and CSX, there is no evidence in the record to indicate a later value.

[14] In its September 1, 1987 report, on page 43, RAPB concluded that deferred taxes have a zero economic cost to the railroad.

value of accumulated deferred taxes when we develop our net railroad investment base used in computing ROI.[15]

Further, we have adjusted Conrail's market value to reflect the fact that we are considering only that portion of Conrail's assets purchased by CSX.[16] We restated the fair market value of that portion of Conrail acquired by CSX to reflect CSX's purchase of 19.9% of Conrail shares at $110 per share, and the balance (22.1%) at $115 per share. The restated value is $5.1139 billion as shown in Table 1 below.

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[15] Accumulated deferred taxes represent a zero-cost source of capital. To consider this zero-cost element properly, either the cost of capital rate must be adjusted to take into account the zero-cost of deferred taxes or the net investment base must exclude the value of assets associated with deferred taxes. Because we develop the cost of capital rate based on the cost of equity and debt only, and do not consider the zero-cost of deferred taxes, we necessarily subtract accumulated deferred taxes from the investment base in order to compute ROI properly.

[16] CSX and NS divided Conrail on a 42%/58% basis. Only 42% of the market value of Conrail can be attributed to CSX.

TABLE 1

Fair Market Value of CSX's Acquisition of 42% of Conrail (In Millions)

19.9% Conrail Shares @$110	$2,000.0
22.1% Conrail Shares @$115	2,200.0
42% of Conrail Long-term Debt 12/31/96	707.7
42% of Conrail Capitalized Leases 12/31/96	206.2
Fair Market Value of CSX's Portion of Conrail	$5,113.9

b. Conrail's Road Property Value as a Percentage of its Total Market Value. The total market value of Conrail consists of road property, equipment, non-rail assets, and construction work in progress. Because only road property is being rented to CP, the value of Conrail's road property as a percentage of its overall market value must be computed.[17] CP uses the relative percentage of net (after depreciation) book value of road property as reported in Conrail's 1995 Annual Report Form R-1 to develop a market value of road property. CP argues that CSX's (Price Waterhouse) valuation of road property at replacement cost and of equipment at market value overstates the relative value of road property. CSX adopts our computation of the ratio of road property to total property from Decision No. 109.[18]

We continue to believe that the percentage relationship between road property and total property developed by Price Waterhouse is a more appropriate basis for determinating relative value of road property and other property than is the pre-acquisition book value relationship. Conrail's book value of these road property assets reflects significant write-downs that occurred when the various predecessor railroads were first conveyed to Conrail in 1976, and these write-downs do not accurately reflect today's relative market values. The Price Waterhouse valuations more accurately reflect the current market values of Conrail property.[19]

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[17] See SSW Compensation II, 4 I.C.C.2d at 674.

[18] This was based on the Price Waterhouse determination of asset valuation after the acquisition, taking into account write-ups in the value of road property.

[19] While we are accepting the Price Waterhouse numbers, we note that they represent preliminary estimates and are subject to change after Conrail's assets are actually divided between CSX and NS and incorporated into those systems on Day One, now predicted to take place on June 1, 1999. Should there be differences between the final asset valuations and those included in the earlier submission that would significantly change the road property/total property ratio, we would be open to reconsideration of the calculation of the earnings multiplier to reflect those changes.

Dividing Conrail's road property valuation by its total value establishes that, overall, road property is 88.49% of total Conrail market value. Applying this percentage to the $5.1139 billion that we have determined to be CSX's share of Conrail's total market value results in a fair market value of road property for CSX's portion of Conrail of $4.5251 billion.

2. Conrail's Pre-tax Earnings. In our prior decision, we restated CP's evidence of Conrail's pre-tax earnings. CP had overstated the benefits projected to be realized by including various public benefits that would not flow back to NS and CSX. CP had also used benefits projected for a "normal" year, although such benefits would not be realized until after the third year following consummation.

CP has now excluded from its computations the public benefits not flowing back to the carriers. Although CSX continues to argue that inclusion of merger benefits is not appropriate or in accordance with ICC and Board procedures developed in SSW Compensation, it has developed its own calculations of additional, annuitized, merger-related earnings, making various adjustments to CP's method. Both parties have now annuitized additional merger-related earnings, to account for these earnings over a series of years, rather than just the "normal year."[20] Each of the parties added the annuitized earnings to Conrail's 1995 earnings. As discussed below, however, the parties' pre-tax earnings estimates are substantially different because they used different figures for Conrail's 1995 earnings and for its additional projected annuitized earnings.

a. Conrail's 1995 Earnings. The parties' determinations of Conrail's 1995 earnings (before including any annuitized additive for merger-related earnings) are substantially different because CSX used unadjusted earnings from Conrail's Annual Report. Those earnings reflected a $283.4 million one-time special charge that Conrail took in 1995. CP restated those earnings by excluding the special charge.

We accept CP's 1995 earnings estimate resulting from its treatment of this special charge. Special charges represent material transactions that distort operating results for a given year. The SSW Compensation procedure is based on expected earnings flows associated with the railroad being acquired, and one-time charges result in an understatement of such earnings because they are a departure from normal expectations.

b. Projected Annuitized Transaction-Related Earnings. Although in Decision No. 109 we rejected CP's initial attempt to increase Conrail's 1995 pre-tax earnings to include projected earnings resulting from the acquisition, we now have a more complete record that permits us to appropriately account for those earnings. An important consideration in our approval of the Conrail acquisition was the fact that substantial financial benefits would accrue to NS and CSX from the transaction. Those benefits justified payment of a significantly higher amount for Conrail stock than

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[20] CSX did not present any estimate of pre-tax earnings in pre-Decision No. 109 evidence.

would otherwise have been the case. The SSW Compensation procedure is not a static or fixed method[21] and the specific circumstances here justify a modification of that method to include additional earnings to be realized by CSX from the acquisition of the Conrail lines.

If such an adjustment is to be made, the parties do not agree on whether the "Summary of Benefits" or pro forma income statement data should be used,[22] and whether all or only a portion of the benefits should be included. CP uses "Summary of Benefits" data to estimate the annual incremental increase in earnings resulting from the Conrail acquisition. CSX argues that the pro forma income statement data is more appropriate because the Summary of Benefits statements do not consider additional depreciation and amortization expenses resulting from the revaluation of Conrail's assets. CSX states that use of the Summary of Benefits data overstates the additional net revenues expected to result from the acquisition.

We agree with CSX that CP's approach overstates the additional net revenues expected to result from the acquisition by failing to consider depreciation and amortization.[23] We have thus used the adjusted figures shown in the pro forma income statements as representative of the actual net revenue increases expected to result from the Conrail acquisition.[24]

We also agree with CSX's argument that only a portion of its increased earnings expected to result from the Conrail acquisition should be attributed to the Conrail lines CSX is acquiring, and that the remaining portion should be attributed to CSX's previously existing lines. CSX is correct that new earnings will be spread throughout its entire system, not just on the former Conrail lines it acquired. Thus, allocating all these earnings to the Conrail lines would be improper.[25] While the actual allocation ratio between Conrail and CSX lines is uncertain at this time, CSX's 50-50

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[21] In four major decisions, the ICC continued to refine the SSW Compensation methodology.

[22] Both the Summary of Benefits and pro forma income statement data are found in CSX/NS-18, in Appendix A (benefits) and Appendix C (pro forma statements).

[23] Depreciation and amortization are legitimate expense elements that should be considered when calculating net revenues from operations.

[24] We are using the operating income figures from the adjustment columns found in CSX/NS-18 Appendix D at 7-11. As is the case for our other inputs, we are limiting the adjustments to the CSX portion only.

[25] Moreover, CP's method yields the anomalous result that the more Conrail's lines are worth, the less this particular Conrail line is worth.

allocation is more realistic than CP's allocation of 100% of these projected earnings to the Conrail lines.[26]

As shown in Table 2 below, our restatement results in annual projected pre-tax earnings of $504.584 million for CSX's share of Conrail.

TABLE 2

Conrail Earnings Per 1995 R-1 (In Millions)	$571.781
One Time Special Charges	+283.412
Total Normalized Pre-Acquisition Earnings	855.193
	X 1.0461
Total Indexed Normalized Pre-Acquisition Earnings	893.343
	X .42
CSX's Share	375.204
Annuitized Merger-related earnings - CSX/Conrail (50/50 split)	+129.380
Total Normalized Post-Acquisition Earnings - CSX/Conrail	$504.584

3. Computing the Earnings Multiplier. The earnings multiplier is calculated by dividing the market value of the road property of the railroad by the expected earnings. In this case, dividing Conrail's road property market value of $4.5251 billion by its expected pre-tax earnings of $504.584 million produces an earnings multiplier of 8.97.

4. East-Of-The-Hudson Segment Net Earnings. The net earnings of the east-of-the-Hudson line segment are obtained by subtracting the line's transportation costs from the line's total revenues. The parties are now in agreement regarding the east-of-the-Hudson gross revenues[27] and line segment mileage, and both use our Uniform Railroad Costing System (URCS) Waybill Costing procedure to develop the cost associated with traffic moving over the line segment.

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[26] Both CP and CSX use a 20-year annuity. The first 3 years are from the tables contained in CSX/NS-18. Years 4 through 20 are based on the so-called "normal" year, also contained in those tables. Neither CP nor CSX makes any adjustment for inflation, instead using the same normal year number for each year after Year 3. Therefore, we restated the parties' annuity procedure to account for inflation in Years 5 through 20. We used the average annual GDP Deflator for 1995 through 1997, 2.2305%.

[27] In their initial petitions for reconsideration, the parties did not agree on this number, but they ultimately did agree on $4,463,224.

CSX argues, however, that CP has inappropriately included a cost per car associated with inter/intra train switching at Albany.[28] CSX states that Conrail does not switch cars moving from or to the New York City area at Albany. The parties agree there is little traffic moving from or to the east-of-the-Hudson line segment. Because it is unlikely that Conrail handles, or that CSX will handle, sufficient trainload traffic destined from or to the New York City area to avoid switching at Albany, CP's adjustment is appropriate. Therefore, we accept CP's development of net 1995 earnings for the line segment, $340,420. Using this figure, we have applied the GDP deflator for 1995-1997 to derive 1997 adjusted east-of-the-Hudson line segment pre-tax earnings of $355,606.

5. Computing the Interest Rental Component. The remaining steps in computing the interest rental component of the trackage rights fee for Conrail's east-of-the-Hudson line segment are set out on lines 4-9 of Table 3. Applying the earnings multiplier (8.97) to the adjusted 1997 pre-tax earnings of the east-of-the-Hudson line ($355,606) yields a market value for the line — under the capitalized earnings approach — of $3,189,787. Applying the railroad industry's 1998 pre-tax cost of capital (15.6%) to the line segment's value yields a total allowable pre-tax return on capital for that line segment of $497,607. Finally, dividing this figure by the projected total car-miles (1,567,112) for that line segment yields an interest rental component of $0.318 per car-mile.

[28] CSX refers to this switch as an interchange.

TABLE 3
Trackage Rights Fee

1	Line Segment Earnings - 1995	$340,420	CP's calculation - Exhibits JJP-2.4 and JJP-2.5, 1/27/99
2	Plus Inflation Factor for 1996 and 1997 (4.461%)	15,186	STB Decision No. 109 - GDP Deflator factor for 1995 through 1997
3	Equals Adjusted Line Segment Earnings - 1997	355,606	Line 1 plus Line 2
4	Times Earnings Multiplier	8.97	Developed in discussion above
5	Equals Value of Line Segment for Trackage Rights	3,189,787	Line 3 times Line 4. This line segment valuation is only for the traffic for which CP can compete.
6	Times 1998 Pre-Tax Cost of Capital	15.6%	Developed by the Board - Based on after-tax rate of 10.7% as determined in Ex Parte No. 558 (Sub-No. 2), Served May 17, 1999
7	Equals Allowable Pre-Tax Return on Line Segment	497,607	Line 5 times Line 6
8	Car-Miles on Line Segment	1,567,112	CP's Exhibit JJP-2.7, 1/27/99; Whitehurst's Exhibit WWW-34 at 6, 12.
9	Interest Rental Per Car-Mile	$0.318	Line 7 divided by Line 8
10	Operating & MOW Cost	$0.202	Restated CSX's Exhibit WWW-11, 1/7/99.
11	Total Trackage Rights Fee	$0.520	Line 9 + Line 10

PERIODIC UPDATES. In Decision No. 109, we recognized that the trackage rights fee established there was merely a starting point and it would be necessary for the parties to perform periodic updates. We did not set a specific time period, although this was requested by the parties. The parties have again asked us to establish a schedule for reevaluating the fee.

CP would initially reevaluate the fee after 6 months from the service start-up date, and annually thereafter. CSX proposes an initial "true-up" after 1 year from the "split date" and every 3 years thereafter. We believe at least 1 year is required from the service start-up date for the parties to develop sufficient data for an initial update of the fee. Beyond that initial update, we believe CSX's proposed 3 year update schedule appears reasonable. Only if there is a substantial change in the relationship between the parties relative to the cost and use of the line may either party request updates on a more frequent basis.

SWITCHING FEE. In Decision No. 109, we accepted CP's offer to pay CSX $250 per car for switching service in the Bronx and Queens, provided that these payments are adjusted retroactively when actual costs of that service are ultimately determined. CP now proposes an initial switching charge of $128.10 per car based on 150% of Conrail's 1995 URCS system average switching cost per car of $85.40. CP argues that this will minimize any "true-up" adjustments that will be necessary once actual costs are determined. Implicit in CP's argument is that the actual cost will turn out to be closer to $128 per car than to $250 per car.

CSX has not suggested a specific switching fee, nor has it specifically attacked the $128 initial fee that CP advocates. It merely notes that the Bronx and Queens are "notoriously an area of high costs where extensive switching activities will take place." We agree with CSX that actual switching costs in the Bronx and Queens would probably be higher than system average cost for that service. In Decision No. 109, we authorized either party to conduct a special switching study to determine the actual costs of switching in the area. Because switching in the Bronx and Queens may be higher than system average costs, we continue to believe a switching study is required. Until such a special switching study is completed, however, we will accept CP's proposed $128.10 per car fee. We think that the actual cost of switching is likely to be closer to $128 than to $250. Given the fact that CSX has not objected to $128, we think that this is a reasonable starting point.

CP COMPETITIVENESS. CP claims it will be unable to compete effectively with CSX for the movement of east-of-the-Hudson traffic if it has to pay CSX a trackage rights fee of $2.70, $1.211, or $0.71 per car-mile.[29] Indeed, CP goes so far as to say that it will not exercise any east-of-the-Hudson trackage rights if we set the trackage rights fee above the $0.71 level.[30] CP claims that a fee higher than $0.36 will make it difficult for CP to divert traffic from motor carriers.

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[29] As noted above, CSX claims that the fee should be set at $2.70 per car-mile under the SSW Compensation method, but states that it would be willing to accept a fee as low as $1.21 per car-mile. And, we established an initial fee of $0.71 per car-mile in Decision No. 109.

[30] Based on a comparison of costs from haulage rights it received as a component of its October 20, 1997 settlement agreement with CSX, CP attempts to show that for a boxcar movement between Montreal and New York City, CP's use of its trackage rights (and the $0.71 per car-mile charge) would cost it approximately $53 more per car than moving the same car under the haulage agreement. But, this haulage agreement was limited to traffic that CP, and not CSX, would be able to carry to and from the east-of-the-Hudson line. As we explained in Decision No. 89, while that haulage agreement was new competition, "numerous . . . restrictions significantly limit the movements to which this privately negotiated haulage agreement would apply." Indeed, these restrictions were the key reason for our grant of the trackage rights here. CP does not explain what relevance these comparisons have in terms of CP's competitive position vis-a-vis CSX. Nor is evidence submitted by CP of trackage rights rates negotiated by various railroads in other contexts relevant. The underlying costs and asset values of various lines tend to be quite different.

We have set an initial trackage rights fee of $0.52 applying the SSW Compensation principles, and using the best evidence of record. That fee, under which CP will share the costs of owning and operating this line with CSX, should permit CP to compete with CSX here on a reasonable footing. We realize that CP may have difficulty in competing with motor carriers over this line, but CSX will be faced with the same challenge. It would not be appropriate for us to establish charges giving CP an advantage over CSX in competing for this traffic, which we believe would be the result of a lower fee. If CP is not prepared to undertake this competitive challenge, it should inform us immediately so that we can arrange for another railroad to provide service over this corridor.

THE SCOPE OF THE TRACKAGE RIGHTS. CP notes that our prior decision makes no reference to use of the Harlem River Yard, through which CP's trains must pass moving to and from Oak Point Yard. CP had sought the right to use this yard for pickup, delivery, storage and any other purpose (subject to agreement with the yard's third-party operator). CSX had expressed its agreement with this proposal. The operator of the yard (who has leased it from New York State) has advised CP of its willingness to lease one and perhaps more tracks for car storage and switching.

CP now requests clarification: (1) that CP is entitled to use the Harlem River Yard for all purposes subject to working out appropriate arrangements with the yard's operator; (2) that CP traffic originating or terminating at the yard is not required to pass through Oak Point Yard; (3) that CP would not have to pay CSX any switching charge in regard to this traffic if CSX provides no switching services; and (4) that CP can directly serve customers sited at Harlem River Yard.

No clarification is necessary with regard to the first item, use of the Harlem River Yard. CSX does not own the Harlem River Yard. CP is free to work out whatever arrangements it can with the State of New York, which owns the facility. Our intervention in that process is not appropriate, or even within our authority.

Nevertheless, this does not obviate the necessity for CP's traffic to move through the Oak Point Yard. We have granted CP no direct access to shippers in the Bronx and Queens; we granted CP only trackage rights to and from Oak Point Yard, and reciprocal switching to permit CP to use that interchange point to receive and deliver traffic through that point to all parts of the Bronx and Queens. If CSX provides a switching service in connection with these movements, it is entitled to compensation. If it provides no such service, then no compensation is required.

CP also seeks "clarification" that CP is entitled to direct access to all customers and facilities in the Bronx and Queens if it should decide to exercise that right, subject to working out appropriate compensation. CSX correctly notes that we did not give CP the right to serve all facilities and shippers directly, without CSX switching, in the crowded Bronx and Queens area. Rather, we have given CP physical access to Oak Point Yard, from which it may serve New York area shippers, through reciprocal switching at an initial fee of $128.10 per car.

CP further requests that we retain jurisdiction over any "failures to agree" as to the matters in Decision No. 109. We stated that CP or NY&A would have certain rights to facilitate a CP-NY&A interchange, but only upon the working out of "suitable compensation arrangements with CSX." See Dec. No. 109, slip op. at 7-8. CSX concedes, and we agree, that we would have jurisdiction to make a determination in the case of such a failure to agree.

THE SEGMENT LEASED BY AMTRAK. Conrail has leased to Amtrak[31] its line between Poughkeepsie and Stuyvesant, but has retained the right to operate over the line. CP has negotiated an arrangement with Amtrak, which CP claims allows it to operate over this line on the same terms as does Conrail (and as will CSX). Since CP will be making payments to Amtrak for the use of this segment, CP argues it should not have to pay twice for the same access. CP proposes to deduct from its trackage rights payments to CSX any payments it has to make to Amtrak for use of the subject track, and seeks our endorsement that this deduction is appropriate. The record does not reveal what services or rights CP is obtaining from Amtrak for these payments. Nor is the record clear as to whether Amtrak, as a lessee, has the right to permit CP's use of the line. If Amtrak does have that right, then it is unclear why any payments would be due to CSX for use of these segments.[32] In its reply statement, CP did not even address issues relating to Amtrak. No adequate basis has been provided here for us to grant the relief that CP seeks.

THE METRO-NORTH SEGMENT. CSX claims it has the "exclusive" right to operate freight trains on the Metro-North portion of the east-of-the-Hudson line and that it, and not Metro-North, should therefore receive trackage rights compensation for CP's operations over that segment. We rejected that contention in Decision No. 109 at 12, because "CSX . . . cites no clear language from the Special Court decision or from the deed that requires or even supports" that claim. CSX asks us to reconsider that ruling. CP opposes that relief, and the New York parties endorse the arguments and evidence submitted by CP. We see no need to reconsider this issue now. CP apparently has a satisfactory agreement with Metro-North that permits its use of this line segment. The status quo is that CP has no interest rental obligation for this segment. If CSX ultimately prevails in establishing its claim that the agreement between Conrail and Metro-North provided for

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[31] Amtrak has filed a petition for leave to file a supplemental statement, and CSX does not object to that filing. We will accept Amtrak's pleading.

[32] The only exception to this would be out-of-pocket expenses that might be incurred by CSX under its contract with Amtrak. CSX has suggested that CP's use of these segments may result in such costs.

exclusive use by Conrail, then this issue will be ripe for our consideration and we will revisit it as necessary.[33]

THE CP/CSX SETTLEMENT AGREEMENT. CSX argues that we should override the October 20, 1997 settlement agreement between CSX and CP because CP has breached that contract. The settlement involved CP's responsive application, through which it was contending that the CSX acquisition of a portion of Conrail would have anticompetitive effects in several markets, unless competition-restoring conditions were imposed. CP agreed to withdraw the responsive application in exchange for CSX granting it restricted haulage rights (limited to a small universe of traffic) to quote rates on east-of-the-Hudson traffic, and haulage and other rights in other markets. CSX now asks us to set aside the entire agreement, or, at a minimum, the haulage rights pertaining to east-of-the-Hudson traffic.

CSX claims that CP has breached the settlement by accepting the benefits of an "improved deal," obtained "at the behest of parties other than the settling party." CP argues, however, that it has met its clear obligations under the settlement agreement. CP withdrew its responsive application and supported the Conrail transaction without seeking any conditions. CP notes that it did not agree that CP would refuse to become the beneficiary of any conditions we granted at the behest of others, although CSX and CP both knew that the New York Parties were asking us to grant east-of-the-Hudson rights to an independent carrier. We are reluctant to interfere with or to discourage settlement agreements that are freely negotiated between parties, and there is no reason to do so here. If the parties had so desired, this agreement could have accounted for the existence of conditions sought by other parties. But this particular agreement creates no contingencies based on what relief we granted or did not grant to others.

It is ordered:

1. Initial trackage rights fees are revised to $0.52 per car-mile.

2. Initial switching fees are revised to $128.10 per car.

3. CSX's and CP's petitions for reconsideration or clarification, except to the extent specifically granted in this decision, are denied.

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[33] CSX asks us to vacate language in Decision No. 109, slip op. at 12, where we suggested that even if its rights to operate over the Metro-North Segment are exclusive, no compensable costs for this section had been shown. If CSX is able to prevail in its exclusivity claim, CSX may then present evidence and argument in support of its claim for compensation with regard to that segment. In addition, CP argues that CSX's position on this issue justifies our preemption of CSX's claimed exclusivity rights in the Metro-North line. According to CP, preemption would eliminate any uncertainty. As noted in Decision No. 109, no need for preemption has yet been demonstrated.

4. CP shall inform us within 30 days of its intentions with regard to exercising these rights.

5. This decision will be effective 30 days from the service date.

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes.

Vernon A. Williams
Secretary

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SERVICE DATE - JANUARY 22, 1999

SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 33388

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. 112

STB Finance Docket No. 33388 (Sub-No. 69)

RESPONSIVE APPLICATION--STATE OF NEW YORK, BY AND THROUGH ITS DEPARTMENT OF TRANSPORTATION, AND THE NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION

Decided: January 21, 1999

This decision addresses the motion filed December 23, 1998 (designated as FOPC-8) by Fort Orange Paper Company (FOPC) to clarify a decision the Board issued in connection with the transaction authorized in Decision No. 89, served July 23, 1998.[1] In Decision No. 109, served December 18, 1998, upon considering respective proposals by CSX and by Canadian Pacific Railway Company, Delaware and Hudson Railway Company, Inc., Soo Line Railroad Company, and St. Lawrence & Hudson Railway Company Limited (collectively CP), the Board adopted certain trackage rights and terminal operation guidelines to implement the east-of-the-Hudson

[1] In Decision No. 89, the Board 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 (2) the division of Conrail's assets by and between CSX and NS.

condition imposed in the CSX/NS/Conrail transaction.[2] Among other conclusions by the Board in Decision No. 109, the Board found that, consistent with its intention to restore to New York City some of the rail competition that was lost when Conrail was created, CP's prospective trackage rights between Albany and New York City will be limited to overhead traffic, and that local access to shippers located between those points would not be permitted. Id. at 6.

FOPC contends that the Board's decision to limit CP's trackage rights to overhead traffic is contrary to the CSX/NS/Conrail transaction condition requiring CSX to negotiate an agreement with CP unrestricted as to commodity and geographic scope. FOPC also insists that the Board's ruling in Decision No. 109 precluding local access to industries on the Hudson Line, including FOPC's facility near Albany, is inconsistent with the Board's prior statement in Decision No. 89, slip op. at 116, that the east-of-the-Hudson condition "may help FOPC." While disagreeing with the limitation of CP's trackage rights in Decision No. 109, FOPC argues that the Board failed to provide an adequate explanation for these alleged inconsistencies.

According to CSX, the Board could not have been clearer in Decision No. 109 that its purpose was not to assist shippers such as FOPC, but rather to restore rail competition to New York City. CSX maintains that, unlike shippers in New York City who are the intended beneficiaries of CP's additional competition, shippers on the Hudson Line north of the city, such as FOPC, were never served by two carriers even prior to the creation of Conrail and were not the entities or locality the Board had in mind when it found that CP's settlement agreement with CSX did not go far enough toward introducing new competition to New York City. CSX indicates that FOPC has previously admitted that it cannot establish that it will be harmed by the CSX/NS/Conrail transaction. CSX contends that FOPC's motion is, in substance and effect, a petition for reconsideration that alleges no new evidence or changed circumstances and involves no material error and that it should therefore be denied.

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[2] We imposed the east-of-the-Hudson condition on behalf of the State of New York and the New York Department of Transportation and the New York City Economic Development Corporation. In our decision approving the primary transaction, we specifically 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." Decision No. 89, slip op. at 177.

DISCUSSION AND CONCLUSIONS

FOPC's motion will be denied. In Decision No. 89, when we said that the east-of-the-Hudson condition "may help FOPC," it is apparent that we did not know what the parties ultimately would agree to, or whether any agreement would be reached. The parties could have reached an agreement favorable to FOPC. The fact that such an agreement was not reached does not elevate the prospect of an outcome benefitting FOPC to a Board imposed condition. Specifically, we disagree with FOPC's position that the word "may" is the same as "will." Moreover, the reason we imposed the condition requiring CSX to negotiate an agreement with CP unrestricted as to commodity and geographic scope was because we had found that the CSX-CP settlement agreement was not sufficient with respect to development of competition and traffic to and from New York City. See Decision No. 89, slip op. at 82-83. We reiterate that the purpose of our east-of-the-Hudson condition is to restore rail competition to New York City. Although shippers located on the Hudson Line north of New York City may benefit from the increased rail competition into and out of the city, our intended relief was directed primarily to the city, not to shippers located in other parts of the state, including FOPC.[3] FOPC has failed to support its contentions.

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

It is ordered:

1. The FOPC-8 motion for clarification is denied.

2. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Clyburn.

Vernon A. Williams
Secretary

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[3] While FOPC suggests that our order requiring CSX to negotiate haulage or trackage rights with CP that are "not restricted as to commodity or geographic scope" means that we intended for those rights to encompass access to Albany-area shippers such as itself, this is simply not the case. Instead, it was our intent to build on the privately negotiated settlement agreement with CP that, absent our order, would have provided new rail competition into and out of New York City and Long Island, but largely and unduly restricted to truck-competitive traffic and to origins and destinations that would not compete with what would become long-haul and/or single-line CSX routings.

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KS DEPT OF TRANSP
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MYLES L TOBIN
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