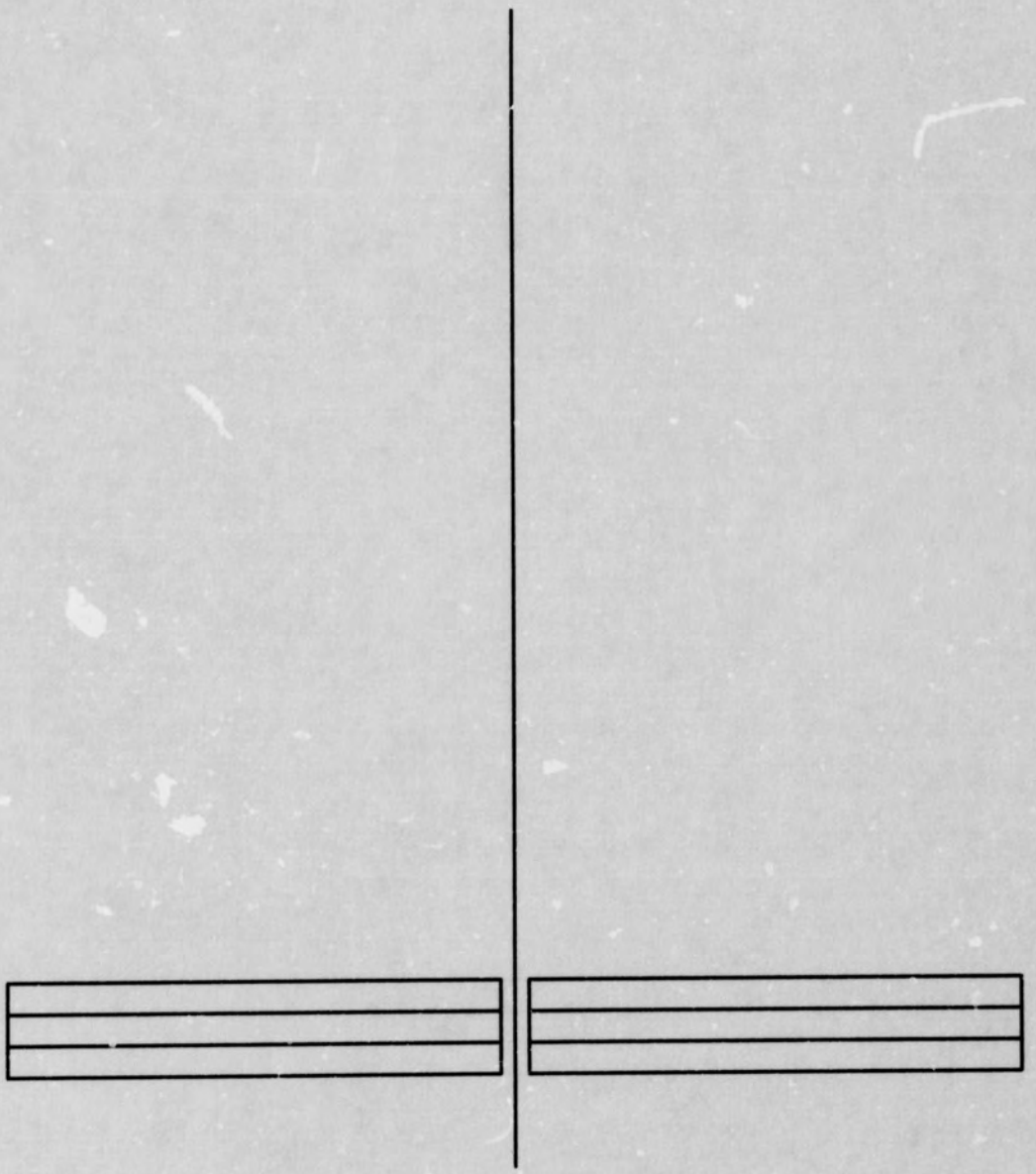
Restatement of Gilmore Exhibit 1



Carey R.V.S.

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33388
(Sub-No. 69)

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

REPLY VERIFIED STATEMENT OF
R. PAUL CAREY

My name is R. Paul Carey, and I am employed by Consolidated Rail Corporation as its General Manager – Contracts and have been employed in this capacity since September 1992. I have previously sponsored testimony before the Surface Transportation Board in Finance Docket No. 33388 and in other proceedings. I also gave a statement in CSX-169, in connection with the proceeding in this sub-number docket which led to the order (Decision No. 109) of which the Canadian Pacific Parties ("CP") seek reconsideration and clarification in their CP-28 filing.

I wish to address certain statements concerning the relationship between Conrail and Amtrak which appear in CP-28 and in its accompanying Verified Statement of Paul D. Gilmore. Those assertions contain numerous errors and give a completely distorted picture

of the relationship between Amtrak and Conrail concerning the line segments from Poughkeepsie to Stuyvesant, and from Stuyvesant on to Schenectady (and for some distance, not here relevant, beyond Schenectady, namely, to Hoffmans, NY).[1]

As to the segment between Poughkeepsie and Stuyvesant, at CP 124, there is no "lease" whatsoever between Conrail and Amtrak. P-H Amendment at 2-3. Thus, the assertion contained in CP-28 at 15 that "Conrail has leased to Amtrak its line between Poughkeepsie and Stuyvesant but has retained the right to operate over the line for certain payments to Amtrak" is false. I was Conrail's principal negotiator in the process that culminated in the Agreement of April 14, 1996, which CP has thus characterized.

As even the partial quotation from a Conrail/Amtrak agreement set forth in the Gilmore V.S. at 6-7 n.7 indicates,[2] the quoted material is a conjectural provision forming one element in a complicated relationship between Conrail and Amtrak. The payments in question are not presently being made, never have been made and will be made only if various things happen which have not and may never happen. They would be made only if Conrail or CSX leases the Poughkeepsie to Stuyvesant segment to Amtrak. Even if such a lease is entered into and the payments are made, they will not be payments for trackage

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[1] The governing provisions are set forth in an Amended and Restated Off-Corridor Operating Agreement, dated as of April 14, 1996, between Conrail and Amtrak ("Off-Corridor Ag.") and an Amendment thereto dated as of July 1, 1980 ("Amendment"), which (without appendices or exhibits except those referred to) are Exhibits hereto. The "Off-Corridor Ag." is a general provision covering all of Amtrak's operations on Conrail-owned lines while the "P-H Amendment" is specific to the segments between Poughkeepsie and Hoffmans, NY. Both co-exist with each other.

[2] The provision in question is captioned "Poughkeepsie – Hoffmans; Future Negotiations." See Off-Corridor Ag., § 9.12, at 32-33.

rights in the ordinary context. For one thing, the lease to Amtrak would be solely for the purpose of enabling Amtrak to perform all maintenance requirements on the line, and the consideration stated would be, in effect, compensation solely for such maintenance obligations to the extent they benefited Conrail. The lease would not carry freight rights or the power to grant such rights. Conrail or its successors would remain the fee owner.

It should be noted also that even under the proposed lease agreement set forth in the Gilmore quotation, Conrail would remain the owner of the line in question and Amtrak would be without power to grant freight trackage rights on it to anyone, that right being reserved solely to Conrail/CSX. Amtrak would have no ownership investment or right to enjoy or grant freight rights and hence no claim to an interest rental from Conrail or CSX. Thus, the assertion that trackage rights, including an interest rental, are going for $0.32 per car-mile on the line is a canard. If anything, the agreement suggests, for reasons I will develop shortly, that the "below the wheel" costs of maintenance determined by Plaistow ($0.13) even as revised by Whitehurst ($0.205) are still on the low side.

In any event, CP has mischaracterized the provision Gilmore cites. This provision reflects a bundle of selected terms, which were not intended to be all-inclusive, as can be seen by its closing sentence: "The foregoing provision shall not preclude the inclusion of other terms and conditions in said agreement." In other words, it is a partial scenario for a play not yet written or produced.

Conrail's intent with respect to this language was to seek full relief of the costs it incurred for Amtrak's benefit (such as the burdensome taxes assessed in many of the towns and other New York taxing authorities on this route). Since these costs are significant, and the value of any betterments (such as higher-speed track and signal systems suited for high-speed passenger operations) has the effect (in New York) of raising those taxes, we foresaw (in 1996) the need to isolate all our costs (not just the taxes) between Poughkeepsie and Hoffmans as part of the negotiating process that was then (in April 1996) contemplated as following soon thereafter.

The car-mile rate Gilmore cites had no bearing upon the cost characteristics of the Conrail lines between Poughkeepsie and Hoffmans. This was an arbitrary sum lifted at the negotiating table from another agreement (where Conrail operates over a short Amtrak line in Michigan). It was clear to the parties (Conrail and Amtrak) at the time that additional value had to be found to produce an equitable outcome. The evidence of this is in the reference to Performance Payments by Amtrak that would be foregone by Conrail if Amtrak were to assume all the responsibility of operating and maintaining (in all respects) the lines between Poughkeepsie and Hoffmans. The value of these Performance Payments in 1998 amounted to $860,601. Conrail operates approximately 2.5 million car-miles over this route annually, so the car-mile value of this factor alone is an additional $0.34 — on top of the $0.32 already mentioned.

CP also contends (CP-28 at 15-16) that CSX ought to absorb any charges that Amtrak may make in connection with CP's use of its trackage rights either on the segment between Poughkeepsie and Stuyvesant or that between Stuyvesant and Schenectady. Alternatively, CP asks to pay only whatever charges are made by Amtrak and to pay nothing to CSX.

At the present time, Conrail is not charged anything by Amtrak for its use of either the Poughkeepsie to Stuyvesant segment or the Stuyvesant to Schenectady/Hoffmans segment. To begin with the segment between Poughkeepsie and Stuyvesant, Conrail is the owner in fee of this segment, Amtrak is not a lessee, Conrail provides all maintenance services, and the relationship between Conrail and Amtrak is, in great extent, simply the ordinary relationship between Amtrak and any freight railroad where Amtrak is using the freight railroad's owned track for its passenger operations.

There is a complication as to this segment, however, but it does not seem to me to support what CP is asking for. There are two main line tracks on this segment between Poughkeepsie and CP 124, with the easterly of the two tracks called "Track 1" and the westerly "Track 2." Each is constructed and signaled so bi-directional movements can take place on either. The pattern of usage is that Conrail uses Track 1 and Amtrak uses both tracks, although Conrail, of course, has the right to use its Track 2. This arrangement effectively makes Track 2 between CP 124 and CP 75 (Poughkeepsie) solely passenger-related as the result of Amtrak's use. Pursuant to the Off-Corridor Agreement (at 10),

Section 4.2, "Maintenance of Rail Lines," the second paragraph says (in relevant part): "Amtrak will reimburse Conrail for any costs incurred by Conrail in maintaining those solely passenger related tracks as set forth in . . . Table 1, of Appendix IV." As can be seen at Appendix IV to the Off-Corridor Agreement (at 69), the Conrail Hudson Line, Track 2, between CP 124 and CP 75 is clearly defined as solely (Amtrak) related. Thus, in any month where there are no movements on Track 2 in this segment, the entire cost of maintenance is for Amtrak's account, requiring Amtrak to make a monthly payment of approximately $90,000 to Conrail.[3] Any use of Track 2 by Conrail or those claiming by, through or under Conrail (other than Amtrak) would thus result in a $90,000 loss of that monthly payment to Conrail or to its successor, CSX. It would seem appropriate that if CP's use of its trackage rights involves Track 2 in any month (and CSX's does not), CP should compensate Conrail's successor, CSX, for that loss.

I turn now to the portion of the line north of Stuyvesant and running west to Schenectady (in that stretch, called the "Chicago" or "Amtrak" line). Here, Amtrak in fact is a lessee of the line, but the terms of its leasehold are such as only to permit (and require) Amtrak to perform the maintenance of the track (but not of signals or structures) on the segment and to permit it to operate its passenger trains. P-H Amendment, §§ 2-6, at 2-4. However, under the lease, it was anticipated that Conrail's use of the line would be minimal. *Id.*, § 2, at 2. All of Conrail's through-freight trains traveling east at Hoffmans or

[3] $10,900 per track mile per year plus escalation from July 1, 1980. See P-H Amendment, § 7, at 4; § 9, at 5.

traveling west at Stuyvesant go off the Chicago and Hudson Lines and go on the Selkirk Branch. Conrail thus uses the Chicago and Hudson Lines between Stuyvesant and Hoffmans only for local trains. Thus, the arrangements under this "lease" are that all of the maintenance of track is paid for by Amtrak and that Conrail pays Amtrak nothing at all. Thus, the assertion at CP-28 at 15-16 that it would be equitable for there to be some sort of offset of payments is beside the point. There are no payments to Amtrak at the moment.

It should be noted that on this line as well, there is the possibility that CP's activity may cause incremental cost to Conrail's successor, CSX. Presumably, this will have to be borne by Conrail's successor since there is, and will be, no direct relationship between CP and Amtrak with respect to either of the segments I am discussing. In the first place, it is conceivable that Amtrak may urge that its agreement to the terms of the lease under which Conrail received a free ride on the line, without paying for the maintenance, was on the basis that Amtrak was dealing with a single railroad which used the Selkirk Branch as its main line between Hoffmans and Stuyvesant and made little use of this segment of the Chicago line. The Conrail/Amtrak agreements provide for redetermination of compensation under certain circumstances, and have an arbitration clause. Off-Corridor Ag., Art. V at 12-22, Art. VI at 22. But now CP will be using most of that segment, between Schenectady and Stuyvesant, for its main line operations to New York City. The response that Amtrak may make to that is not known. In addition, the increased traffic over

the Livingston Avenue Bridge over the Hudson River[4] may necessitate expensive repairs to the Livingston Avenue Bridge, which Amtrak may contend will have to be paid for by Conrail as expenses of maintenance of track structures, particularly that bridge. P-H Amendment at 3; but see Off-Corridor Ag. at 10 (exception noted by Conrail). It does not seem equitable to me that Conrail or its successor, CSX, which will maintain the Conrail operating plan under which the line between Hoffmans and Stuyvesant will be used only for local trains, should have to bear any such expense that Amtrak might claim as a result of CP's activities without reimbursement by CP.

[4] The Livingston Avenue Bridge is not used by any Conrail through-freight train movements; they go via the Selkirk Branch and over the Castleton Bridge.

VERIFICATION

I, R. Paul Carey, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this statement. Executed on January 26, 1999.

R. Paul Carey

AMENDED AND RESTATED
OFF-CORRIDOR OPERATING AGREEMENT
dated as of April 14, 1996
(WITH APPENDIX IV)

AMENDED AND RESTATED

OFF-CORRIDOR OPERATING AGREEMENT

between

CONSOLIDATED RAIL CORPORATION

("Conrail")

and

NATIONAL PASSENGER RAILROAD CORPORATION

("Amtrak")

Dated as of April 14, 1996

AMENDED AND RESTATED
OFF-CORRIDOR OPERATING AGREEMENT

THIS AGREEMENT is between National Railroad Passenger Corporation, a corporation organized under the Rail Passenger Service Act (hereinafter referred to as the "Act") and the laws of the District of Columbia (hereinafter referred to as "Amtrak"), and Consolidated Rail Corporation, a corporation organized under the laws of Pennsylvania (hereinafter referred to as "Conrail").

WHEREAS, Amtrak was organized pursuant to the Act for the purpose of providing modern efficient intercity rail passenger service within a national rail passenger system and to be managed and operated as a for profit corporation;

WHEREAS, Conrail was organized pursuant to the Regional Rail Reorganization Act of 1973 as a for-profit corporation;

WHEREAS, as of April 1, 1976, Conrail and Amtrak entered into the Off-Corridor Operating Agreement (hereinafter referred to as the "Basic Agreement") with respect to the provision of services and facilities for intercity rail passenger operations; and

WHEREAS, Section 7.2 of the Basic Agreement was superseded effective October 1, 1978, by the Liability Apportionment Agreement, and Article 5A was deleted and Section 5.1(b) was amended by the Settlement Agreement, effective as of December 31, 1982; and

WHEREAS, the Basic Agreement provided for redetermination of compensation payable to Conrail, by agreement or submission to the Interstate Commerce Commission pursuant to Section 402(a) of the Rail Passenger Service Act, upon request of either party; and

WHEREAS, Conrail and Amtrak have negotiated this Agreement (the "Agreement"), which amends certain provisions, adds additional provisions, and, upon the effective date of this Agreement, April 14, 1996, entirely supersedes the Basic Agreement and, except as specifically provided in this Agreement, other agreements with respect to Amtrak operations on the Rail Lines.

NOW THEREFORE, the parties, intending to be legally bound, agree as follows:

ARTICLE ONE

DEFINITIONS

Section 1.1. Definitions.

(a) "Rail Lines" means all of Conrail's rights of way and real properties appurtenant thereto which constitute its trackage in the United States, whether owned or leased or otherwise held by Conrail, and all of its rights to use such properties of others, together with the roadway structures thereon or appurtenant thereto used in connection with the actual or potential operation of Intercity Rail Passenger Trains, excluding, however, the Rail Lines described in Section 8.1. of this Agreement.

(b) "Intercity Rail Passenger Service" means all rail passenger service over the Rail Lines (including the movement of special trains), other than commuter and other short haul service in metropolitan and suburban areas, usually characterized by reduced fare multiple-ride commutation tickets, and by morning and evening peak period operations.

(c) "Intercity Rail Passenger Trains" means all trains operated in Intercity Rail Passenger Service.

ARTICLE TWO

EXCLUSIVE PASSENGER RIGHTS

Section 2.1. Exclusive Passenger Rights.

Conrail agrees that it shall not, without the prior written consent of Amtrak, operate or provide (or seek the common carrier authority to operate) any regularly scheduled Intercity Rail Passenger Service on its Rail Lines except pursuant to and in accordance with this Agreement, and shall not permit third parties to operate such service on Rail Lines used by Amtrak.

ARTICLE THREE

THE SERVICES

Section 3.1. Right to Services.

Subject to and in accordance with the terms and conditions of this Agreement, including Section 3.3, Conrail agrees to provide Amtrak, over the Rail Lines, with the services requested by Amtrak for or in connection with the operation of Amtrak's Intercity Rail Passenger Service, including the carrying of mail and express on Intercity Rail Passenger Trains to the extent authorized by the Act. The routes, schedules, and consists of Amtrak Intercity Rail Passenger trains operated on the Rail Lines shall be compatible with the physical capabilities of Conrail and its Rail Lines.

Section 3.2. Modification of the Services.

(a) Amtrak shall have the right from time to time to request, and subject to and in accordance with the terms and conditions of this Agreement including Section 3.3, Conrail hereby agrees to provide new, modified, additional, or reduced services. Unless otherwise agreed, such requests shall be made (except with respect to emergency services as set

forth in Subsection (b) below) by filing a written request with Conrail 30 days in advance of the date upon which such request is to become effective to permit adequate joint planning and joint preparation for the modified or additional services provided for in such request. The services sought in any such request shall be subject to the physical and financial capabilities of Conrail and shall give due regard to Conrail's speed, weight and similar operating restrictions and rules and safety standards and to the avoidance of unreasonable interference with the adequacy, safety and efficiency of Conrail's other railroad operations. In applying the foregoing, recognition shall be given to the importance of fast, reliable and convenient schedules and passenger comfort and convenience to the success of Amtrak's Intercity Rail Passenger Service.

(b) Amtrak shall have the right from time to time to request, and subject to and in accordance with the terms and conditions of this Agreement, Conrail hereby agrees to provide, emergency services over the Rail Lines or to arrange to the extent possible over the rail lines of another railroad, as necessary, required as a result of the Rail Lines (or rail lines of another railroad used in the operation of passenger trains by or on behalf of Amtrak) becoming impassable, unsafe or impractical for use in rail passenger service. Amtrak may request the performance or discontinuance of such emergency services orally; however, any request shall be made as far in advance as possible of the time the emergency services are required, and shall be confirmed in writing within twenty-four (24) hours after communication to Conrail. The emergency services requested shall be compatible with the physical capabilities of Conrail.

When said emergency services are provided on rail lines of another railroad, Amtrak shall indemnify and save Conrail harmless, irrespective of any negligence or fault of Conrail, its employees, agents, or servants or howsoever the same shall occur or be caused, from any and all liability for injury or death of any person or persons, other than

employees of Conrail, and from any and all liability for loss, damage, or destruction to any properties, which arise from the provision of said emergency services. Conrail agrees to use reasonable efforts to provide emergency services requested under this Agreement in an expeditious and efficient manner.

In the event an Amtrak train ordinarily operated over rail lines of other railroads is detoured over Rail Lines of Conrail, Conrail will (except as may otherwise be provided in other provisions of this Agreement) be reimbursed by Amtrak for all of Conrail's additional costs resulting from the detour, including crews and/or pilots. Except as provided in the foregoing sentence and except for incremental track maintenance and liability payments as specified in Items 6 and 15 of Appendix IV, Amtrak shall not be obligated to pay Conrail any additional amount for use of its Rail Lines in connection with such detours. Conrail shall not bill other railroads for any costs or charges in connection with such detours. Employees of other railroads who operate trains on behalf of Amtrak over the Rail Lines shall, while on such Rail Lines, be deemed employees of Amtrak for purposes of Section 7.2 of this Agreement.

Section 3.3. Standards of Performance.

(a) Conrail further agrees to provide and furnish all labor, materials, equipment and facilities necessary to the services to be provided under Section 3.1 and 3.2 (except as the same are provided by Amtrak), but shall not, except as otherwise provided in this Agreement or upon agreement with Amtrak, be required to purchase, construct, rebuild or replace Rail Lines, locomotives, cars, rolling stock or ancillary facilities (as defined in Section 3.8), or to provide commissary or maintenance of equipment services or any other services requiring the use by Conrail of ancillary facilities owned or leased by Amtrak.

(b) Conrail shall provide services hereunder in an economic and efficient manner and shall make reasonable efforts:

(1) To deliver each train to all scheduled stops on Conrail within its scheduled running time;

(2) To avoid delays to trains, and, consistent with safety, to make up delays incurred;

(3) Consistent with safety, to seek ways to reduce the scheduled running time between points on the Rail Lines and to make recommendations to Amtrak in that regard;

(4) Except where such services are performed by Amtrak, at locations where Conrail has qualified employees and necessary equipment and supplies, to perform routine running inspection, service, and maintenance on any locomotive or passenger car used in Amtrak service over the Rail Lines.

(c) The parties shall cooperate in good faith with each other in providing service and equipment which will contribute to the success of Amtrak's Intercity Rail Passenger Service. Amtrak may review Conrail's controls, practices, and procedures and their effect upon the efficiency and quality of the performance provided by Conrail. Consideration shall be given to Conrail's common and contract carriage obligations to its shippers and receivers.

(d) In the performance of services referred to in this Agreement, Conrail shall have sole control of the operation of Amtrak's Intercity Rail Passenger trains operated on Conrail Rail Lines.

Section 3.4. Coordination with Rehabilitation.

Upon request of Conrail, the parties shall confer in an effort to agree upon temporary modifications in the schedules of Amtrak trains to minimize interference with (i) the performance of maintenance, repair and rehabilitation on and to the Rail Lines, and (ii) construction, maintenance and repair of highways, utility lines and/or other facilities when such activity is ordered or is being performed in conjunction with a governmental body, public utility commission or similar entity.

Section 3.5. No Violation of Labor Agreements.

Each party agrees that it will not require the performance of services hereunder by the other in a manner which would cause the other to violate the terms of or incur penalties, unless reimbursed by the party requiring such performance of services, in connection with any then current labor agreements between that other party and any organization representing any of its employees. Neither party, however, shall be liable to the other party for any claims and/or costs resulting from such violation(s), unless advance written notice is first given to establish that such work action(s) would be in violation of the other party's collective bargaining agreements.

Section 3.6 (Reserved)

Section 3.7. Performance by Other than Conrail.

Upon sixty (60) days' prior written notice to Conrail, Amtrak shall have the right to use Conrail's tracks, and to require Conrail to perform all services necessary, in connection with operation by Amtrak, or others on its behalf, of Amtrak's Intercity Rail Passenger Trains in the use of such tracks, provided that any such use or services shall give due regard to Conrail's speed, weight, and similar operating restrictions and rules and safety standards and to the

avoidance of unreasonable interference with the adequacy, safety and efficiency of Conrail's other operations. In applying the foregoing, recognition shall be given to the importance of fast, reliable and convenient schedules and passenger comfort and convenience to the success of Amtrak's Intercity Rail Passenger Service.

All personnel rendering any services which involve responsibility for Conrail's operating facilities or for the handling or movement of any Intercity Rail Passenger Train shall be subject to the direction, supervision and control of Conrail, and any such services performed by or for Amtrak shall be governed by and subject to all then current operating and safety rules, orders, procedures and standards of Conrail with respect thereto. Conrail may, for cause, require that any person performing services under this Section be prohibited or removed from performance of such services, subject to the requirement that Conrail shall support any action defending such prohibition or removal and bear the cost of any claims growing out of any improper prohibition or removal.

Section 3.8. Ancillary Facilities.

In the event Conrail shall wish to dispose of fixed ancillary facilities or portions thereof, other than Rail Lines, such as but not necessarily limited to depots, platforms, canopies, and parking areas, which are owned or leased by it and which are at that time being used in and necessary to the services rendered by Conrail pursuant to Article Three hereof, Conrail will notify Amtrak, and on request of Amtrak, shall furnish a substitute facility reasonably equivalent in utility. Conrail shall give notice to Amtrak thirty (30) days prior to disposing of any passenger-related ancillary facility.

ARTICLE FOUR
RAIL LINES

Section 4.1. Rail Lines.

Except as permitted in the next paragraph, Conrail shall retain and not dispose of or abandon its Rail Lines used on April 14, 1996, in the operation of Amtrak's Intercity Rail Passenger Service or in any operation of such service initiated subsequent to that date for as long as such use continues or for the term of this Agreement, whichever period is the shorter, provided that seasonal changes or suspensions of service shall not be deemed discontinuance of use. Conrail shall not, without giving Amtrak at least thirty (30) days' prior notice, abandon, relinquish or otherwise dispose of any right, title or interest in any part of its Rail Lines. Nothing herein shall prevent Conrail from modifying, changing or relocating any facility or any segment of its tracks, provided that with respect to tracks covered by the first sentence of this paragraph the continuity of the tracks is retained.

Nothing herein shall be construed to interfere with Conrail's right to sell said Rail Lines for continued operation by another person, provided that Conrail shall demonstrate in writing that its obligations and rights hereunder are assigned to and specifically assumed by its successor.

Service upon Amtrak of a Notice of Exemption, Petition for Exemption, Application or other timely filing with the Surface Transportation Board (including its successors) shall be deemed sufficient notice for this provision after 30 days.

Section 4.2. Maintenance of Rail Lines.

The Rail Lines used in Amtrak's Intercity Rail Passenger Service pursuant to this Agreement shall be maintained by Conrail at no less than the class that will permit operation of

Amtrak trains at the speeds set forth in Appendix II and in such a way as to allow the accomplishment of the agreed upon schedules with a reasonable degree of reliability and passenger comfort.

Amtrak and Conrail agree that there is an incremental increase in the cost of maintaining Rail Lines used in Amtrak service which results from the operation of Amtrak trains (such costs hereafter referred to as "incremental costs"). Amtrak and Conrail further agree that such incremental costs are distinct from (and do not include any) costs which may be involved in maintaining Rail Lines at not less than the condition at which such Rail Lines were maintained as of April 14, 1996, or as of the date of first use in Amtrak service, whichever occurs later, rather than at some lower condition. Except for the Livingston Avenue Bridge (including superstructure, piers and supports) as described in the Notice of Insufficient Revenue dated October 28, 1983, Conrail agrees that it is obligated to bear without reimbursement the entire cost (except for incremental costs) of maintaining its Rail Lines used by Amtrak in no less than the condition at which such Rail Lines were maintained as of April 14, 1996, or as of the date of first use in Amtrak service, whichever occurs later. Amtrak agrees to the inclusion of reimbursement for the incremental costs caused by the operation of Amtrak trains in any compensation arrangement between Amtrak and Conrail whether negotiated by the parties or established by a third party pursuant to Section 5.1 of this Agreement. Amtrak will reimburse Conrail for any costs incurred by Conrail in maintaining those solely passenger related tracks set forth in Item 5, Table 1, of Appendix IV.

Notwithstanding the provisions of this Section 4.2, except for the Livingston Avenue Bridge as provided above, the Rail Lines covered by the following agreements shall be maintained as provided in those agreements, as they may be amended:

(a) the May 1, 1980 Agreement for Improvement of Trackage in Indiana, and

(b) the Agreement for Grade Crossing Improvement Program Along the Detroit-Chicago Corridor, dated September 15, 1968, among Amtrak, Conrail, and the State of Michigan.

(c) Amendment to Off-Corridor Agreement between National Railroad Passenger Corporation and Consolidated Rail Corporation, dated as of July 1, 1980, as modified.

Each of these agreements and their related leases (where leases are involved) shall continue in effect and shall remain in force for the term of this Agreement.

Section 4.3. Additional Maintenance and Improvements.

Subject to Conrail's obligations under Section 4.2, upon the request of Amtrak, Conrail shall as promptly as feasible modify its maintenance of Rail Lines, at the sole expense of Amtrak for any additional cost to the extent such additional cost is not reimbursed under Appendix IV, so as to permit the accomplishment of improved schedules over any part of such Rail Lines as specified in such request.

Amtrak shall have the right (i) at its sole expense, to the extent that the cost thereof is not reimbursed under Appendix IV, to require Conrail to improve or add to the Rail Lines as provided in such request, or (ii) subject to mutually satisfactory arrangements, to improve or add to the Rail Lines; provided that any such improvement or addition shall not unduly interfere with or unduly limit Conrail's other rail operations, that any such requested improvement or addition shall be made by Conrail as promptly as feasible, and that any increase in maintenance cost occasioned by such improvement or addition shall be paid by Amtrak to the extent that such increased cost is not reimbursed under Appendix IV.

ARTICLE FIVE
COMPENSATION

Section 5.1. Basis of Payment.

As full and complete compensation for the services and activities performed and the facilities and equipment made available to Amtrak under this Agreement, and for Conrail's provision of management and corporate resources necessary to enable Conrail to provide the services, activities, and facilities specified in an efficient manner, Amtrak will pay Conrail the amounts set forth or calculated in accordance with Subsections (a), (b) and (c), below, and other adjustments provided in Subsection (d), below.

(a) Cost of Original Services.

Amtrak shall pay Conrail the amounts specified in Appendix IV for trains operated by Conrail and/or the services and facilities provided by Conrail in connection therewith. For those items indicated as "actual", the term "fringe benefits" refers to provisions for vacation pay, holiday pay, health and welfare benefits, funded pensions, railroad unemployment supplemental annuity, and railroad retirement taxes. Fringe benefits will be computed, where applicable, as a payroll additive to labor elements included in Appendix IV. Fringe rates shall not include supervision, administration, use of tools, or other overheads.

(b) Cost of Modified or Additional Services.

With respect to any additional or modified services to be operated on the Rail Lines at the request of Amtrak pursuant to Section 3.2(a), Amtrak will specify proposed payments corresponding to those in Subsections (a) and (c) of this Section 5.1 for such trains. Such proposed payments shall be calculated using the methodology employed in calculating the costs in Appendix IV and shall be designed to provide Conrail with payment as nearly as

possible on the same basis as for comparable services being rendered at that time for its operation on the Rail Lines of other Amtrak trains then in service, taking into account, however, differences in routes, schedules, and consists, and any other relevant differences.

In the event Conrail considers that the payments proposed by Amtrak pursuant to this subsection differ in any significant degree from the basis of payments being made at the time for other trains operated on the Rail Lines, Amtrak and Conrail shall, at the request of either party, make joint application to the National Arbitration Panel for an order, to be retroactive to the date of the modified or additional service, prescribing the payment to be made for the train on the same basis as payments are made for other trains. During the pendency of any such proceeding, Conrail shall provide the services requested by Amtrak under the terms of this Agreement, and Amtrak shall pay Conrail the amount proposed by Amtrak or an interim amount set by the National Arbitration Panel. Any difference in the amount of an interim payment and a final payment established through arbitration or agreement pursuant to this subsection shall bear interest at the 90-day U.S. Treasury Bill rates applicable during the period as published in the Federal Reserve Bulletin. Appendix IV shall be appropriately amended to incorporate payments for additional or modified services established pursuant to this subsection.

(c) Performance Payments

In addition to the reimbursement paid to Conrail under this section, Conrail may earn additional payments for schedule adherence as set forth in Appendix V. With respect to any additional train requested by Amtrak to be provided by Conrail pursuant to Section 3.2(a), performance payments shall be consistent with those in Appendix V in connection with the operation of such train.

(d) Payment Adjustment

The amount of the payments stated to be payable by Amtrak under Subsection (a) of this Section 5.1, and the amounts which become effective for payment under Subsection (b) of this Section 5.1 shall be subject to further adjustments as follows:

(1) For the purpose of keeping the cost provisions current with Conrail's labor, fringe benefit, and material costs, certain fixed payments specified in Appendix IV shall be adjusted in accordance with the provisions set forth in Appendix III.

(2) The basis or the amounts of payment shall be appropriately adjusted whenever:

a) Conrail ceases or fails to commence performing any service or activity; or

b) The contents of Appendix IV or the provision of any service, activity, or facility hereunder are amended in accordance with Section 5.1 of this Agreement.

(3) Amtrak may notify Conrail that it no longer desires Conrail to perform or furnish specific services, activities, or facilities for which Amtrak compensates Conrail, and, consistent with the requirements of Conrail labor agreements and any applicable state or federal statutes, Conrail shall cease performing or providing the same on the date requested, which shall be not less than 30 days from the date of receipt of the notice. Such notice shall include a schedule of the services, activities, or facilities to be terminated, and upon the date requested for termination of performance, Amtrak shall no longer be required to make payment to Conrail with respect thereto, except as may be required pursuant to Section 7.3 of this Agreement. Amtrak agrees, however, to reimburse Conrail the avoidable costs for the activities

specified in Appendix IV which are incurred as a consequence of Conrail's orderly termination of the services, activities, or facilities, irrespective of the date incurred.

(4) If Amtrak and Conrail are unable to resolve any dispute regarding the amount of any charge or the basis of payment which is to be made pursuant to paragraphs 1 through 3 of this Subsection (d), either Amtrak or Conrail may apply to the National Arbitration Panel for an order prescribing the amount or basis of payment consistent with such paragraphs. Such order shall be effective on the date agreed by the parties or (in the absence of such agreement) upon the date set by the Panel. During the pendency of any such proceeding, Conrail shall provide the services requested by Amtrak under the terms of this Agreement and Amtrak shall pay Conrail the amount due for services provided by Conrail pursuant to the terms of this Agreement and not requested to be terminated in accordance with paragraph 3 above, or shall, for additional services requested, pay the amount proposed by Amtrak or an interim amount set by the Panel. Any difference in the amount of an interim payment and a final payment established through arbitration or agreement pursuant to this subsection shall bear interest at the 90-day U.S. Treasury Bill rates applicable during the period as published in the Federal Reserve Bulletin.

(e) Redetermination of Compensation

The foregoing shall be the basis for compensation for the services and activities performed and the facilities and equipment provided to Amtrak by Conrail hereunder from the effective date of this Agreement and continuing until the parties have reached a new agreement with respect to compensation or until the Surface Transportation Board or a successor agency (hereafter together the "STB") has issued an order fixing compensation pursuant to a joint application of the parties as hereafter provided. At any time after the expiration of three (3) years from the effective date of this Agreement, either Amtrak or Conrail may notify the other

that it wishes to negotiate as to a redetermination of the amount or method of computing the amount of payment for any service or activity performed or provided by Conrail hereunder. In such event, the other party shall promptly negotiate with respect to such a redetermination.

If, within ninety (90) days after the date of such notice, Amtrak and Conrail are unable to agree as to a new amount or basis of compensation, Amtrak and Conrail shall, at the request of either, jointly make application to the STB under Section 402(a)(1) of the Act (codified at 49 U.S.C. Sec. 24308(a)(2)) for an order for the provision of such services and such use of the facilities of Conrail by Amtrak as are provided for herein on such terms and for such compensation as the STB by order may fix as reasonable. Until a new basis of compensation is established, Amtrak shall continue to make periodic payments to Conrail in the manner and amount provided in this section.

Any agreement entered into or determination of compensation made shall take effect on a date which is six months after the date on which notice was first given pursuant to this section; provided, however, that unless the parties specifically agree to the contrary, no such agreement or determination shall apply retroactively for a period that exceeds 12 months (plus any amount of time that an application is pending in an active status before the STB pursuant to the first sentence of this paragraph or is pending review from a STB decision before a court). A redetermination of compensation payable by Amtrak pursuant to this section shall include, if requested by either party, a redetermination of the compensation payable by Conrail pursuant to the last sentence of Section 9.12.

(f) Revenues

Conrail shall allow Amtrak credit for incidental revenues includable in Accounts 102-109, and 133, and 143 of the Uniform System of Accounts prescribed by the STB

for railroad companies as of April 14, 1996, which are generated solely by Amtrak passengers or operations. When such revenues are also generated by other passengers and users, the revenues will be shared with Conrail, other passenger services, and other users on an equitable basis based on studies by individual locations.

(g) Trackage Agreements

Under the terms of this Agreement, and except as otherwise provided, Conrail shall not receive more than the incremental cost compensation specified in Appendix IV of this Agreement for all services, including use of facilities associated with the operation of Amtrak trains. To the extent possible, Conrail shall not bill any other railroad in connection with the operation of Amtrak trains by Conrail or such other railroad. In the event that charges payable by or to Conrail under existing joint trackage agreements are affected by operation of Amtrak trains by Conrail, Conrail shall credit to Amtrak the entire amount of increased payments received from another railroad (or reduced payments to another railroad) as a result of Amtrak operations, and Amtrak shall pay to Conrail any increase in the amount of payments Conrail is required to make to another railroad (or reduced payments to Conrail) pursuant to such agreements as a result of Amtrak operations; provided, however, that the amount of any payments for incremental track maintenance payable pursuant to Appendix IV of this Agreement with respect to trackage or facilities also covered by this subsection shall first be offset against the amount of any amounts determined to be payable by Amtrak pursuant to this subsection.

(h) Authorization Notices for Special Services

Except for emergency services pursuant to Section 3.2(b), Amtrak shall issue Authorization Notices (AN's) to specifically authorize Conrail to perform special services not covered by Appendix IV. When work or services other than maintenance of way work are

performed by Conrail at Amtrak's request under an AN, Amtrak shall pay Conrail the incremental cost (including fringe benefits added to direct labor costs) to the extent that such expenses are not reimbursed pursuant to Appendix IV. For special project maintenance-of-way or bridge and building work requested by Amtrak that is not covered by Appendix IV, Amtrak shall pay Conrail the actual cost of materials; a material handling fee equal to 15% of the material costs; the actual cost paid to subcontractors; the actual cost of direct labor; and an additive of 112.5% of the direct Conrail labor cost.

(i) Application of "Reciprocal" Additive

Amtrak and Conrail agree that the 15% and 112.5% additives referenced in paragraph (h) above shall be the additives applied to the costs incurred by Amtrak in performing maintenance-of-way work pursuant to the Interim Agreement Between Amtrak and Conrail for Maintenance Services, effective May 19, 1976.

Section 5.2. Billing and Payment.

(a) Timing.

Within forty-five (45) days after the last day of each calendar month, Conrail shall submit a statement of activities, charges, performance, and adjustments to Amtrak calculated for such month in accordance with the provisions of Section 5.1. Such statement shall be submitted in the form agreed upon by the parties. If Amtrak requests any additional information or modified methods of billing that significantly change the amount of work required by Conrail, the parties will negotiate revised compensation for such activity.

Within twenty (20) days after receipt of such statement, Amtrak shall pay Conrail the net amount due Conrail in accordance with Section 5.1. Amtrak shall wire transfer payments to Conrail.

(b) Right of Review and Audit.

Amtrak shall have a reasonable right to review and audit (in accordance with Generally Accepted Auditing Standards) Amtrak train operations, records, performance, and costs. The scope of such review and audit may be both financial and operational. Except as provided in Subsections 5.1(d), 5.1(e), and 5.2(e), neither party shall be entitled to have a change made in the amount of compensation specified in Appendix IV for a flat rated item, or in the method of calculating compensation specified in Appendix IV for any item.

(c) Conrail Records.

Conrail shall maintain supporting records with respect to accounting, operations, mechanical work, and any other related data as may reasonably concern the performance of services for Amtrak. All such records shall be retained for no less than 36 months. Such records shall be available for Amtrak inspection and copying during the regular business hours at the facilities where they are located. In the event that Amtrak requests a significant change in or addition to the records currently maintained by Conrail, compensation payable to Conrail in connection with the responsibility shall be appropriately revised.

(d) Audit Adjustment.

In the event either party believes it has made a payment which exceeds (or has received a payment which is less than) the amount required by the provisions of this Agreement or a settlement between the parties of a matter covered by this Agreement, such party shall submit its claim in reasonable detail to the other party. Undisputed audit adjustments shall be paid promptly by the other party. In the event that a party disagrees with a proposed audit adjustment, such party shall provide a written statement of the theory of its disagreement and the facts supporting that theory in a form which will permit the claiming party to evaluate the merits

of the other party's position. Any adjustment which is unresolved 90 days after having been presented shall, at the request of either party, be submitted to arbitration for resolution. If it is established by agreement or arbitration before the National Arbitration Panel more than 90 days after a claim is initially submitted to a party that an overpayment or underpayment has occurred, the amount of such excess or shortfall shall bear interest at the 90-day U.S. Treasury Bill rates applicable during the period as published in the Federal Reserve Bulletin, from the date on which the payment was originally made until the date the appropriate adjustment is made.

(e) Revision of Flat Rates.

If the amount of compensation specified in Appendix IV for a flat rated item varies clearly and substantially from the actual avoidable costs incurred by Conrail in connection with such item, and if the flat rate is inaccurate because of the existence of a material mistake of fact, the compensation with respect to such item shall be changed prospectively (from the date upon which notice of the discovery of such mistake is given) in order that it will reasonably reflect the avoidable costs incurred by Conrail which are covered by that item. For purposes of this provision, a material mistake of fact has occurred where there has been a significant factual understanding which was incorrect and (1) was relied upon by both parties without knowledge of its error, or (2) was relied upon by one party, where that party could not reasonably have known that it was incorrect, while the other party either knew it was incorrect or failed to take reasonable steps to determined its accuracy. For purposes of this provision, a variance between actual avoidable costs and the agreed-upon flat rate amount for that item as specified in Appendix IV which is less than 20% (unless such variance exceeds $25,000 per year for the item) will normally be deemed not to be substantial.

(f) Payments Required by Other Agreements.

As an administrative convenience, and notwithstanding the provisions of Section 4.2, the Parties will arrange net settlement for charges pursuant to this Agreement and will agree to honor net settlements pursuant to the following separate agreements, as amended:

(1) Agreement for Improvement of Trackage in Indiana, dated May 1, 1980, as amended by letter agreement of October 24, 1984 between F. Abate and W. Wieters.

(2) Payments required by the Trackage Rights Agreement dated April 1, 1976 between the parties concerning rail lines in Michigan and Indiana.

(3) Agreement for Grade Crossing Improvement Program Along the Detroit-Chicago Corridor, dated September 15, 1988, among Amtrak, Conrail, and the State of Michigan.

(4) Second Amended and Restated Northeast Corridor Freight Operating Agreement dated October 1, 1986.

(5) Interim Agreement between National Railroad Passenger Corporation and Conrail for Maintenance Services, dated May 19, 1976.

(6) Amendment to Off Corridor Operating Agreement dated as of July 1, 1980, for upgrading and maintenance of track between Poughkeepsie and Hoffmans, New York, as modified December 30, 1982.

Section 5.3. Net Contract Advance.

The parties acknowledge the existence of outstanding advances pursuant to the agreements in effect between the parties prior to the date of this Agreement. The net advance outstanding pursuant to this Agreement and those other agreements between Amtrak and Conrail as specified in Section 5.2(f) shall be adjusted at the time this Agreement takes effect to reflect the amount specified in Appendix I. The change in such net amount shall be promptly paid by

the owing party to the other party. This net contract advance shall be retained by the owed party until forty-five (45) days after the last day of the last month for which this Agreement provides the basis of payment. At that time, such advances shall be credited against any amount then properly owing between the parties under these Agreements and any remaining amount shall be refunded to the owing party, or the owing party shall pay the owed party the difference between the advance and the payments due and owing under the Agreements for the last month's operation, as the case may be. The amount of the net advance shall be appropriately adjusted to reflect escalation and deletions, additions, or modifications of Amtrak passenger operations over the Rail Lines, or of services required pursuant to the other agreements identified in Section 5.2(f), when such adjustment(s) requires a change to the advance exceeding $25,000. Any reconciliation hereunder shall be performed in a form consistent with Appendix I hereof.

ARTICLE SIX
ARBITRATION

Except as otherwise provided in this Agreement, any claim or controversy between Amtrak and Conrail concerning the interpretation, application, or implementation of this Agreement shall be submitted to binding arbitration in accordance with the provisions of the Arbitration Agreement dated April 16, 1971, among Amtrak and certain other railroads. This Agreement shall be deemed a "Basic Agreement" for purposes of Section 4.5 of said Arbitration Agreement.

ARTICLE SEVEN
GENERAL

[Section 7.1. Reserved]

Section 7.2. Risk of Liability.

(a) The parties agree that apportionment of the responsibility for liability for personal injuries and property damage that may result from activities conducted under this Agreement shall be in accordance with the terms and conditions of the Liability Apportionment Agreement, dated June 19, 1979, as amended, between Amtrak and Conrail.

(b) On or after December 31, 1998, or such earlier time as federal legislation pertaining to passenger train liability is enacted into law, either Amtrak or Conrail may request the other party to renegotiate in its entirety the risk of liability covered by this Section 7.2. In the event the parties are unable to agree with respect to any proposed change in such risk of liability, then and in that event either party may submit the matter to arbitration pursuant to Article Six thereof. Such arbitration shall be conducted by the National Arbitration Panel and the parties shall make all reasonable efforts to expedite such arbitration. During the period of negotiations or arbitration, the responsibility for such liability specified in this Section 7.2 shall remain in effect. Unless the parties otherwise agree, the effective date of any modifications to this Section 7.2 shall be six months after the initial renegotiation request.

(c) It is the parties' intent that because Conrail is willing to enter into this Agreement at a time in which issues of allocation of risk between Amtrak and the freight railroad industry are being actively considered, that Conrail be entitled to "most favored nation" treatment on this issue. Accordingly, in the event that Amtrak enters into an agreement with a freight railroad that provides solely for the operation of Amtrak trains on the rail lines and related facilities of such railroad, and if the indemnification and insurance provisions applicable to operations under such agreement are different than the provisions of this Agreement, Amtrak shall notify Conrail of the terms of such provisions. Conrail shall be entitled on a prospective

basis, commencing on the date that it makes such election in writing and Amtrak receives notice of such election, to have the indemnification and insurance provisions applicable to operations under such other agreement applied to and inserted in this Agreement in lieu of the provisions of this Section 7.2. For purposes of the portion of this Section 7.2(c) set forth above, Conrail must agree to accept all provisions in the corresponding provisions for allocation of risk of damage and liability and insurance requirements in the other arrangement that limit (or represent specific consideration for) the insurance and indemnity provisions, including provisions which are expressly recited as consideration for different risk of liability provisions from the terms of this Section 7.2, including provisions extending term, compensation for risk or for other services, and contractual rights and processes dealing with potential changes in the indemnification and insurance provisions. In the event Amtrak enters into an insurance pooling arrangement with two or more Class I freight railroads, Conrail shall be permitted to participate in such insurance pooling arrangement.

Section 7.3. Labor Protection Costs.

(a) Conrail shall provide fair and equitable arrangements to protect the interests of its employees affected by the discontinuance of Intercity Rail Passenger Service to the extent required by and on the terms and conditions set forth in Appendix C-1 to the Basic Agreement.

(b) In the event Conrail incurs employee protection costs as a result of the elimination or consolidation of any jobs that exist in performing the following services: Conrail's Michigan City Bridge Operators; NRPC Operations Staff - Contract Administration (Item 14, Appendix IV); or Livingston Avenue Bridge Operators (Item 13, Appendix IV), Conrail shall be solely responsible for such costs.

(c) In the event Conrail is required, subsequent to the effective date of this Agreement, pursuant to Section 3.2, and Section 3.3 insofar as such section implements Section 3.2, or pursuant to Section 4.3, to add job positions to perform Conrail's obligations, and Conrail thereafter incurs employee protection costs in accordance with Subsection 7.3(a) as a result of the elimination or consolidation of such increased job positions, Amtrak shall reimburse Conrail for the full amount of such costs to the degree such costs have been incurred by Conrail.

Section 7.4. Transportation Privileges.

(a) Company mail of Conrail may be transported by Amtrak without charge on any Intercity Rail Passenger Trains operated over the Rail Lines, provided that no extra or special personnel shall be required in connection with the handling thereof.

(b) Business cars of Conrail and Conrail officials and administrative personnel transported therein may be handled on Intercity Rail Passenger Trains, provided that the same may be done consistent with the safe and efficient operation of such trains and shall not cause any material delays in the operation thereof and that any additional cost resulting therefrom will be borne by Conrail.

(c) Conrail shall transport or deadhead passenger cars, passenger locomotives, and other materials such as parts and supplies. The cost of transporting Amtrak locomotives and other rolling stock is set forth in Item 10, Table 1, Appendix IV. The cost for transporting Amtrak materials and supplies shall be as specified in the contract rate agreement between the parties covering transportation, switching, and per diem charges dated October 25, 1979. The charges agreed to in the October 25, 1979 agreement have been and will be adjusted annually based upon the applicable AAR index and published in the Conrail Freight Tariff.

(d) Employees of Conrail designated by the NRPC Operations Officer shall be entitled to ride on Intercity Rail Passenger Trains, including locomotives subject to space limitations, without charge, whenever necessary in connection with the inspection, maintenance or operation of such trains on the Rail Lines.

(e) Transportation privileges, if any, with respect to business and personal travel of Conrail personnel shall be as determined by Amtrak.

Section 7.5. Information.

Either party hereto shall have the right to inspect the books and records of the other party pertaining to performance under this Agreement, including those relating to the employees and positions covered by Section 7.3, at its usual business hours, provided that neither Amtrak nor Conrail shall be obligated to retain books or records beyond the period specified in Section 5.2(b) hereof.

At any reasonable time Amtrak or its designated agents shall have the right, upon reasonable conditions and notice, to examine the tracks of Conrail used in performing Intercity Rail Passenger Service of Amtrak. Such examination may include the use by senior representatives of Amtrak's engineering staff, of highrail cars and track geometry cars with the understanding that such operation shall be subject to the limitations and conditions set forth in the last paragraph of Section 3.7. Conrail shall furnish, when reasonably requested by Amtrak, reports to Amtrak pertaining to the condition of the Rail Lines for rail passenger transportation use, which reports shall set forth the speed and load capacity of each line segment of the tracks.

Section 7.6. NRPC Operations Officer.

Conrail shall appoint an individual of appropriate rank to be NRPC Operations Officer and shall notify Amtrak. The NRPC Operations Officer shall have responsibility for the

performance by Conrail of its obligations under this Agreement. The NRPC Operations Officer shall report directly either to the Chief Executive, Chief Operating Officer, General Manager-Contracts, or Chief Transportation Officer of Conrail. Prior to the appointment of or change in the person who is the NRPC Operations Officer, Conrail shall notify Amtrak of the name of the succeeding NRPC Operations Officer and the effective date of his appointment.

The NRPC Operations Officer, to the degree possible, will seek to enhance the business relationship between the parties and prevent or minimize causes for dispute between the parties under this Agreement. Amtrak may, for cause, request Conrail's Sr. Vice President-Operations to replace the designated NRPC Operations Officer.

ARTICLE EIGHT

RESERVED

ARTICLE NINE
MISCELLANEOUS

Section 9.1. Force Majeure.

The obligations of the parties hereunder shall be subject to force majeure (which shall include lawful strikes, riots, floods, accidents, Acts of God, and other causes or circumstances beyond the control of the party claiming such force majeure as an excuse for non-performance), but only as long as, and to the extent that, such force majeure shall prevent performance of such obligations.

Section 9.2. Successors and Assigns.

All the covenants and obligations of the parties hereunder shall bind their successors and assigns whether or not expressly assumed by such successors and assigns. This Agreement and the rights set forth herein may not be assigned by any party to any other person, corporation, or entity without the express written consent of the other party.

Section 9.3. Interpretation.

The Article and Section headings herein are for convenience only and shall not affect the construction hereof. This Agreement shall be construed in accordance with and governed by the laws of the District of Columbia. All Appendices and Exhibits attached hereto are integral parts of this Agreement and the provisions set forth in the Appendices and Exhibits shall bind the parties hereto to the same extent as if such provisions had been set forth in their entirety in the main body of this Agreement. Nothing expressed or implied herein shall give or be construed to give to any person, firm or corporation other than Amtrak or Conrail any legal or equitable right, remedy or claim under or in respect of this Agreement. Neither this Agreement nor any of the terms hereof may be terminated, amended, supplemented, waived or modified

orally, but only by an instrument in writing signed by Amtrak and Conrail unless a provision hereof expressly permits either of said parties to effect termination, amendment, supplementation, waiver or modification hereunder, in which event such action shall be taken in accordance with the terms of such provision.

Section 9.4. Severability.

If any part of this Agreement is determined to be invalid, illegal or unenforceable, such determination shall not affect the validity, legality or enforceability of any other part of this agreement and the remaining parts of this Agreement shall be enforced as if such invalid, illegal or unenforceable part were not contained herein.

Section 9.5. Notices.

Any request, demand, authorization, direction, notice, consent, waiver, or other document provided for or permitted by this Agreement to be made upon, given or furnished to, or filed with one party by the other party, shall be in writing and shall be delivered by hand or by deposit in the mails of the United States, postage prepaid, if to Amtrak, in an envelope addressed as follows:

National Railroad Passenger Corporation
60 Massachusetts Ave., N.E.
Washington, D.C. 20002
Attn: Director, Contract Management

and if to Conrail, in an envelope addressed as follows:

Consolidated Rail Corporation
2001 Market Street - 14C
P.O. Box 41414
Philadelphia, PA 19101-1414
Attn: General Manager-Contracts

Each party may change the address at which it shall receive notification hereunder by notifying the other of such change.

Section 9.6. Counterparts.

This Agreement may be executed in any number of counterparts, each of which shall be an original.

Section 9.7. Relationship of Parties.

In rendering any service or in furnishing any equipment, materials or supplies hereunder, Conrail is acting solely pursuant to this Agreement with Amtrak made pursuant to the Act and not in its capacity as a common carrier by railroad.

Section 9.8. Term.

This Agreement shall become effective on April 14, 1996, and shall remain in effect until it is terminated on 12 months prior notice by either party to the other, provided that such notice may not be given prior to April 14, 2006.

Section 9.9. Equal Employment Opportunity.

Neither party shall discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. Conrail and Amtrak will comply with all applicable laws and regulations relating to the prevention of such discrimination.

Section 9.10. Termination of Other Agreements.

Upon the effective date of this Agreement and except as otherwise provided herein, the Basic Agreement and all other agreements inconsistent with this Agreement shall be terminated.

Section 9.11. No Appeal of Compensation Litigation.

The parties acknowledge that this Agreement is intended to resolve all issues raised by either of them or decided by the Interstate Commerce Commission (now Surface

Transportation Board) in the proceeding between them in Finance Docket No. 32467, subject only to the future rights of either party to seek a redetermination of compensation pursuant to Section 5.1(e) of this Agreement. The parties will not seek reopening or judicial review of any of the decisions of the Surface Transportation Board (formerly Interstate Commerce Commission (ICC)) in that proceeding, and (1) Amtrak agrees to dismiss with prejudice the Petitions For Review of the Surface Transportation Board decisions served on July 25, 1995, and January 19, 1996, that are currently pending before the United States Court of Appeals for the D.C. Circuit in Docket No. 95-1489 and Docket No. 96-1091, respectively, and (2) Conrail agrees to dismiss with prejudice the Petition For Review of the Surface Transportation Board decision served January 19, 1996, that is currently pending before the United States Court of Appeals for the D.C. Circuit in Docket No. 96-1090.

For the period January 1, 1996, through April 14, 1996, Amtrak shall pay Conrail $1.14 per train-mile for incremental track maintenance as provided in Item 6 of Article IV of this Agreement, and the other amounts established in Items 1 through 6 and Items 8 through 13 of the letter agreement dated November 27, 1995, from James J. Keating of Conrail to Richard D. Simonen of Amtrak.

Section 9.12. Poughkeepsie-Hoffmans: Future Negotiations.

If, in the future, the parties agree that Amtrak will lease Segment I between Poughkeepsie and Hoffmans, New York, from Conrail, thereby making Amtrak the lessee of all segments between Poughkeepsie and Hoffmans, and if the parties further agree that Amtrak will assume all the track maintenance and communications and signal maintenance for that entire territory (and no other services will be required of Conrail), the parties agree that the Performance Payments for operations between Poughkeepsie and Hoffmans under this

Agreement, as described in Section 5.1(c) and Appendix V, shall not apply to Amtrak operations over the entire leased territory after that date. The parties further agree that if the agreements described in the preceding sentence are reached, Conrail's sole payments to Amtrak for any Conrail freight operations conducted over the entire leased territory between Poughkeepsie and Hoffmans, beginning with the effective date of such agreement, shall be $.328253 per freight car mile, subject to escalation starting July 1, 1996. The foregoing provision shall not preclude the inclusion of other terms and conditions in said agreement.

IN WITNESS WHEREOF, Amtrak and Conrail have caused this Agreement to be executed by their respective officers hereunto duly authorized.

NATIONAL RAILROAD PASSENGER CORPORATION

By: _____

Title: President & Chairman

ate: 10 April 96

WITNESS:

By: _____

Title: Vice President Customer Serv.

Date: 10 April 96

CONSOLIDATED RAIL CORPORATION

By: _____

Title: GEN. MGR - CONTRACTS

Date: 4/10/96

WITNESS:

By: _____

Title: Assoc. General Counsel

Date: 4/10/96

APPENDIX IV

Cost Detail

Item 1. T&E Piloting and Emergency Crew Wages.

Amtrak shall reimburse Conrail the actual cost for work performed by Conrail train and engine crews, including pilots, used in Amtrak service, which costs shall include fringes, arbitraries, constructive allowances, meals, lodging, and transportation.

Item 2. Qualification Expenses.

Amtrak shall pay Conrail the actual wages, plus fringe benefits, and other direct expenses for Conrail Rules Examiners and Road Foremen who are assigned to test and qualify Amtrak employees for train and engine positions on Amtrak trains to be operated on Conrail's Rail Lines.

Item 3. Locomotive Fuel.

Amtrak shall reimburse Conrail for the cost of diesel fuel supplied to Amtrak trains. The cost of diesel fuel will be Conrail's actual fuel price when Conrail dispenses fuel at Harrisburg, PA. For all other locations, Conrail shall bill Amtrak at Conrail's system average price. Conrail is agreeable to charge Amtrak local fuel prices should Conrail begin fueling Amtrak locomotives at locations other than Harrisburg, PA, on a routine basis.

Amtrak shall pay Conrail $.03 per gallon for handling of diesel fuel supplied to Amtrak trains on an extraordinary basis. In the event routine fueling of Amtrak trains is performed by Conrail at any other location, the parties agree to determine an appropriate rate for such location.

Item 4. Locomotive Rental.

Amtrak shall pay Conrail $80 per hour (including diesel fuel) for maintenance and supplies for emergency use of Conrail's locomotives. The period of time for which Amtrak is chargeable shall commence with the time when the locomotive is set aside for use in Amtrak service until the locomotive is returned to Conrail. Amtrak shall have no obligation to return the locomotive to the point where it was initially delivered to Amtrak, but when locomotives are returned in Chicago, IL, Philadelphia, PA, or Rensselaer, NY, they shall be returned to Conrail's facilities at 51st Street (Chicago, IL); South Philadelphia, PA; or Selkirk, NY, respectively. Amtrak agrees to return the locomotive to Conrail in as good condition as when delivered to Amtrak, ordinary wear and tear excepted.

Item 5. Solely Related Facility Maintenance.

Amtrak shall reimburse Conrail for its actual expenses (including fringe benefits, vehicle expense, and material and supplies) required for maintenance of facilities (including tracks) identified herein that are solely used for provision of Amtrak service (see Appendix IV, Table 1), provided that an Authorization Notice must be obtained from Amtrak prior to performing a maintenance project that exceeds $1,000 in costs.

Item 6. Incremental Track Maintenance.

Amtrak shall pay Conrail $1.14 per train mile for the incremental cost of maintaining Rail Lines of Conrail in connection with the operation of Amtrak's Intercity Rail Passenger Service. The train miles used in this calculation shall be based upon the agreed to "One Way Mileage for M of W" as detailed in Table 2 of this Appendix IV multiplied by actual operations.

Item 7. Switching.

Amtrak shall pay Conrail for switching of rail passenger equipment, including wages and fringe benefits of yard crews, and for use of yard switch engines, maintenance and servicing of yard switch engines, yard switching fuel, supplies and other related expenses, at the rate of $150 per hour, measured from the dispatchment of the switch engine to perform such switching for Amtrak to its return to its normal location. In the event there is no crew on duty when required by Amtrak, the charge for switching shall be Conrail's actual crew cost plus a locomotive charge of $80 per hour of actual use.

Item 8. Disciplinary Investigations.

Amtrak will reimburse Conrail for the costs of administering formal investigations/ hearings of Amtrak personnel. Such costs shall include, but not be limited to, meals, lodging, and transportation for all Conrail personnel, meeting rooms, contract transcriber, machine rental, and wages (including fringe benefits) for agreement personnel only.

Conrail will reimburse Amtrak for costs of meals, lodging, and transportation of all Amtrak employees, and wages (including fringe benefits) of Amtrak agreement personnel only, when such employees are called by Conrail as witnesses in an investigation/hearing of Conrail personnel.

Amtrak and Conrail will each assume wage costs and travel expenses of their own personnel involved in joint investigations/hearings involving charges against employees of both Amtrak and Conrail. Administration costs of administering a joint investigation shall be shared 50% Amtrak and 50% Conrail.

Item 9. Clearing Wrecks.

Amtrak shall reimburse Conrail the amount of expenses incurred for clearing wrecks of Amtrak trains, including personnel costs (including fringe benefits) and equipment, materials, supplies, and other expenses which are includable in Account 415 of the Uniform System of Accounts prescribed by the Surface Transportation Board for railroad companies.

Item 10. Transportation of Amtrak Rolling Stock in Conrail Freight Trains.

Amtrak shall pay Conrail $.15 per unit mile for transporting Amtrak's passenger cars and locomotive units in Conrail freight trains. This rate does not apply to special train service.

Item 11. Miscellaneous Services.

Amtrak shall pay Conrail $10,127 per month for expenses for inspection, normal maintenance and FRA emergency repair of tracks, turnouts, signals, and station platform facilities used solely by Amtrak; emergency services not covered by Authorization Notices; electricity for two snow melters at Bridge Branch in Niagara Falls, NY, and one snow melter used exclusively by Amtrak at Schenectady, NY; utility costs solely related to the rail line in the Poughkeepsie-Hoffmans territory, including Post Road Connection; two PBX extensions at Rensselear, NY, and other costs not specifically identified and which are associated with the operation of Amtrak trains by Conrail. The flat rate for this item shall not be changed when functions are added, deleted or modified until the accumulated changes amount to a 10% or more revision of the flat rate and either party requests a modification. The new flat rate shall be effective prospectively from the date of such request.

Item 12. CP Virginia Interlocking.

Amtrak shall pay Conrail $2,000 per month for operation of Amtrak trains over CP Virginia Interlocking.

Item 13. Livingston Avenue Bridge Personnel and Utilities.

Amtrak shall pay Conrail $15,776 per month for Livingston Avenue Bridge personnel, utilities and other costs associated with Amtrak operations.

Item 14. NRPC Operations Staff - Contract Administration..

Amtrak shall pay Conrail $34,000 per month for the NRPC Operations Office, support staff, office materials, supplies, and other related business expenses.

Item 15. Liability Payment.

Amtrak shall pay Conrail the amount of $0.0734 per train mile with respect to liability, as specified in Section 17 of The Liability Apportionment Agreement. The train miles used in this calculation shall be based upon the agreed to "One-Way Liability Mileage" as detailed in Table 3 of this Appendix IV multiplied by actual operations.

Item 16. Material and Supplies.

Amtrak shall reimburse Conrail the amount of cost incurred for materials and supplies including watering of Amtrak trains, plus any applicable use and sales taxes. A 15% additive will be applied when materials and supplies are requisitioned from Conrail's inventory. Unless otherwise agreed, Conrail is not obligated to purchase or store equipment parts that are unique to Amtrak equipment.

Appendix IV

Table 1

(Solely Related Tracks/Facilities)

Tracks used solely for provision of Amtrak service as of April 14, 1996, are the following:

Bloom Connection Track	(0.3 miles)
Pittsburgh Station Tracks	(2 Tracks)
Amtrak Connection Track (Cleveland)	(0.5 miles)
*Niagara Branch (Chicago Street - CP7)	(5.6 miles)
Bridge Branch (CP25 - CP28)	(2.9 miles)
Syracuse Station Tracks	
** Hudson Line, No. 2 Track (CP75 - CP124)	(48.1 miles)
Conrail's Pittsburgh Line between CP Wing and CP Penn, in the event Conrail discontinues its operations over this segment of the of the Rail Lines.	(15.4 miles)

Station Facilities used solely by Amtrak that are maintained by Conrail at Amtrak's Expense as of January 1, 1996, are the following:

Waterloo, IN	Center Platform and Pedestrian Crosswalk
South Bend, IN	Pedestrian Crosswalk
Alliance, OH	Station Platform
Cleveland, OH	Station Platform and Pedestrian Crosswalk
Other Stations	Station Platforms and Pedestrian Crosswalks as required and requested by Amtrak.

* Maintenance costs are billable to Amtrak provided it is sole user for entire calendar month.

** If Amtrak is sole user for entire calendar month, Amtrak pays flat rate for maintenance for speeds up to 70 mph. Amtrak also pays flat rate for speeds over 70 mph regardless of usage.

AMENDMENT

dated as of July 1, 1980

("P-H Amendment")

AMENDMENT TO OFF CORRIDOR OPERATING AGREEMENT
BETWEEN
NATIONAL RAILROAD PASSENGER CORPORATION
AND
CONSOLIDATED RAIL CORPORATION

THIS AMENDMENT, dated as of July 1, 1980 to the Off-Corridor Operating Agreement between National Railroad Passenger Corporation, a corporation organized under the Rail Passenger Service Act and the laws of the District of Columbia (Amtrak) and Consolidated Rail Corporation, a corporation organized under the Regional Rail Reorganization Act of 1973 (Rail Act) and the laws of the Commonwealth of Pennsylvania (Conrail).

WHEREAS, Section 4.2 of the Agreement provides that Conrail is to maintain the Conrail rail lines in no less than the condition in which such rail lines were conveyed to Conrail under the Rail Act; and

WHEREAS, Section 4.3 of the Agreement provides that Amtrak shall have the right to require Conrail to improve or add to the Conrail rail lines and that any increase in maintenance costs occasioned by such improvements or additions shall be paid by Amtrak; and

WHEREAS, the State of New York, Amtrak and Conrail have agreed that certain lines in the State of New York should be upgraded to permit passenger trains to operate at higher speeds between Poughkeepsie and Hoffmans; and

WHEREAS, Conrail and Amtrak agree to the proposed upgrading of the line between Poughkeepsie and Hoffmans and to share in the cost of the maintenance thereof.

NOW, THEREFORE, the parties hereto and in consideration of the mutual promises, conditions, terms and obligations herein contained, do agree and covenant as follows:

1. The line between Poughkeepsie and Hoffmans will be divided into four segments for track maintenance purposes. These segments are defined as follows:

(a) Segment 1: Poughkeepsie (MP 75.7) to CP 123, (MP 123.8), on Track No. 1 and to CP 125 (MP 125.6), on Track No. 2.

(b) Segment 2: CP 123 (MP 123.8) to CP 2 (MP 142.5) on Track 1 and CP 125 (MP 125.6) to CP 2 (MP 142.5) on Track No. 2;

(c) Segment 3: CP 2 (MP 142.5) to CP 8 at Carman (MP 156.45); and

(d) Segment 4: Carman (MP 156.45) to Hoffmans (MP 168.3).

2. The parties agree that since Segment 1 is used predominantly by Conrail freight trains that it will be maintained by Conrail forces. Segment 2 tracks are used solely or predominantly by Amtrak and it is proposed that this segment will be leased to Amtrak which will thereafter be responsible for maintenance of the tracks. Segment 3 tracks are used solely or predominantly by Amtrak passenger trains and it is proposed that this segment will be leased

to and thereafter maintained by Amtrak. Segment 4 is used solely by Amtrak including the track between MP 161.5 and MP 168.3 which is owned by Amtrak. It is proposed that the track between Milepost 156.45 and Milepost 161.5 will be leased to Amtrak. After this track is leased by Amtrak Segment 4 in its entirety will be maintained by Amtrak. The parties agree that Conrail shall retain the maintenance responsibility for Segments 2, 3 and 4 until lease agreements for those segments are executed.

3. Conrail will be responsible for maintenance of the Hudson River Bridge between Albany and Rensselaer except for the railroad tracks located on the bridge which tracks will be maintained by Amtrak. Conrail will perform all communication and signal maintenance between Poughkeepsie and Hoffmans. The expense for this maintenance will be paid as follows:

(a) Maintenance of communication lines and facilities will be paid by Conrail;

(b) Maintenance of fixed cab signal facilities and grade crossing predictors will be paid by Amtrak;

(c) Maintenance of signal facilities, other than the pole-line and wires, on tracks used solely by Amtrak will be paid by Amtrak;

(d) Maintenance of the pole-line and wires between Schenectady (Milepost 159.5) and Hoffmans (Milepost 169.9) will be paid by Amtrak. All other pole-line and wire maintenance will be paid by Conrail.

(e) All other signal maintenance, including pole-line and wires, will be paid by Conrail.

4. Conrail will also maintain the signals on the Post Road connection including buried signal cable. This maintenance will be performed at Amtrak's expense.

5. Except as provided in Paragraph 6, it is agreed that the party which is responsible for maintaining the track will also be responsible for maintaining the right-of-way including control of weeds and brush adjacent thereto and maintenance of grade crossings and drainage ditches adjacent to and under the right-of-way.

6. It is further agreed that between CP 123 (MP 123.8) and CP 125 (MP 125.6); CP 2 (MP 142.5) to CP 4 (MP 143.6); CP 4 (MP 143.6) to Colonie, (MP 151.5); and MP 155.0 to MP 159.9 Conrail will be responsible for the control of weeds and brush and the provision of proper drainage on the side for which it is responsible for maintenance of the tracks and Amtrak will be responsible for control of weeds and brush and the provision of proper drainage on the side for which it is responsible for maintenance of the tracks.

7. The parties agree the annual maintenance cost to maintain the tracks between Poughkeepsie and Hoffmans to a maximum speed of 70 m.p.h., which was the maximum speed on April 1, 1976, is $10,900 per track mile as stated in July 1, 1980 dollars.

8. The parties agree that Amtrak will be financially responsible for the maintenance of the solely related passen-

ger tracks and for that portion of the maintenance relating to high speed service on all tracks subject to this Agreement, that is, for speeds over 70 m.p.h., but not exceeding 110 m.p.h. The over 70 m.p.h. maintenance expense for tracks between Poughkeepsie and Hoffmans is $7,535 per track mile annually, as stated in July 1, 1980 dollars.

9. The parties agree that the maintenance charges in Paragraphs 7, 8 and 10 will be increased or decreased annually on July 1st in accordance with the Association of American Railroads (AAR) Quarterly Indexes of Charge-Out Prices and Wage Rates of railroad material prices, wages and supplements (excluding fuel), Class I Railroads, Eastern District at the July 1, 1980 index level.

10. The parties agree that the following costing arrangements for maintenance of tracks between Poughkeepsie and Hoffmans shall be in effect from the time the parties agree that Conrail has upgraded the tracks in accordance with its agreement with the State of New York as inspected by track geometry car which would permit operation of intercity passenger trains at speeds in accordance with Exhibit 1. These costing arrangements will be in effect until January 1, 1983 after which date either party shall have the right to reopen negotiations on the costing provisions:

(A) Until lines are leased to Amtrak between Rensselaer and Hoffmans, Segments 3 and 4 will be maintained by Conrail. The parties agree that there are 19.9 miles of track with

speeds in excess of 70 m.p.h. and 15.55 miles of solely related passenger tracks thus requiring an annual payment to Conrail by Amtrak of $319,441.

(B) After lines are leased to Amtrak between Rensselaer and Hoffmans, the maintenance of Segments 3 and 4 will be performed by Amtrak, including 10.25 miles of main track used by both parties, requiring an annual payment from Conrail to Amtrak for maintenance to the 70 m.p.h. level of $111,725.

(C) Until lines are leased to Amtrak between Stuyvesant and Rensselaer, Segment 2 will be maintained by Conrail. The parties agree that there are 16.7 miles of track with speeds in excess of 70 m.p.h. on Track 1 and 11.4 miles of solely related passenger track on Track 1. The parties further agree that there are 15.9 miles of track with speeds in excess of 70 m.p.h. on Track 2 and 16.6 miles of solely related passenger track on Track 2. The annual payment to Conrail by Amtrak for Segment 2 will be $550,841.

(D) After lines are leased to Amtrak between Stuyvesant and Rensselaer, the maintenance of Segment 2 will be performed by Amtrak, including 7.6 miles of main track used by both parties, requiring an annual payment from Conrail to Amtrak for maintenance to the 70 m.p.h. level of $82,840.

(E) When tracks are upgraded in accordance with Exhibit 1 between Poughkeepsie and Stuyvesant, Conrail will maintain from Poughkeepsie (MP 75.7) to Stuyvesant (MP 123.8 on Track 1 and MP 125.6 on Track 2). The parties agree there will be

47.5 miles of track on Track 1 and there will be 49.3 miles of track on Track 2 with speeds in excess of 70 m.p.h. The annual payment due Conrail from Amtrak will be $729,388.

(F) Payments of the appropriate net annual amounts, determined in accordance with Subparagraph A through E herein, will be made monthly in 12 equal amounts.

11. The parties agree that Amtrak trains would operate on Conrail maintained trackage without further track maintenance payments. Conrail would operate on Amtrak maintained trackage without further track maintenance payments provided the annual tonnage does not exceed 1 million gross tons.

12. The parties agree that if slow orders are imposed on high speed tracks maintained by Conrail between Poughkeepsie and Hoffmans because of track conditions that Amtrak may withhold from its monthly payment a percentage of the payment for each track for high-speed maintenance. For purposes of this section "track" is defined as the following:

(a) Track 1 - Poughkeepsie to Rensselaer;

(b) Track 2 - Poughkeepsie to Rensselaer;

(c) Main Track - Rensselaer to Hoffmans.

The amount withheld will be computed separately for each track as follows:

$$W = (S - 0.05H) \times \$627.90$$

Definitions:

W	=	Amount withheld
S	=	Average number of slow order miles of track over 70 m.p.h.
H	=	Miles of track over 70 m.p.h. (Exhibit 1)
S and H	=	will be computed to the nearest 0.1 of a mile.

When the aggregate of slow orders on any track is greater than 50 per cent, no high speed payments will be made for that track. The procedure for determining the slow orders will be to determine the slow order condition as it exists at 12:01 P.M. on the first and fifteenth day of each month excluding all slow orders issued for the safety of passing track gangs and excluding any slow orders of less than 48 hours duration. The results of the 1st and 15th days slow orders will be averaged for each track, and the result will determine the cumulative miles of slow orders to be used in the foregoing computation. The results of the slow order review will be submitted to Amtrak on or before the 25th day of the month and any withholding will be made in the following month.

13. In the event that conditions require the detour of Conrail trains over otherwise solely related passenger tracks, such movements shall not be deemed to affect the status of the solely related passenger tracks, provided the

movements do not occur in excess of 15 days per month. Such detours shall be handled in accordance with the applicable Detour Agreements between the parties.

For special train movements (other than detours but including dimensional loads) over otherwise solely related passenger tracks, Amtrak will be compensated under the current GMA rates for special movements. Such movements will not change the status of solely related passenger tracks, provided such movements do not occur in excess of 15 days per month.

When movements referred to above exceed 15 days per month, the status of the track(s) will be changed to common for that month.

14. (a) In the event that Conrail shall cease to operate freight trains over any section of track between Poughkeepsie and Hoffmans that is presently used by both freight and intercity passenger trains, Conrail will notify Amtrak of the change and thirty (30) days after cessation of freight operations that section of track will be considered to be solely related to intercity passenger service and Amtrak shall be financially responsible for maintenance of that section at the below 70 m.p.h. maintenance level and payments under the contract will be adjusted accordingly.

(b) In the event that Conrail shall begin to operate freight trains over any section of track between Poughkeepsie and Hoffmans that is presently used solely by intercity

passenger service, except as specifically provided in Paragraph 13 above, Conrail will notify Amtrak of the change and thirty (30) days after such commencement of freight operations that section of track will be considered to be used by both freight and intercity passenger trains, and Conrail shall be financially responsible for maintenance of that section at the below 70 m.p.h. maintenance level and payments under the contract will be adjusted accordingly.

15. In the event the track structure is destroyed as the result of a natural disaster or any similar occurrence, excluding derailments, which would require the restoration of the line of railroad or any portion thereof between Hoffmans and Poughkeepsie, Conrail shall be obligated to restore the line only to the level required by the Conrail-Amtrak Off Corridor Operating Agreement. That basic Agreement between the parties is limited to the maintenance responsibility of the parties on April 1, 1976 and does not pertain to high-speed restoration of the rail lines. The parties agree that this Amendment Agreement will not impose an additional obligation on either Amtrak or Conrail to restore the track to FRA standards for speeds in excess of those required by the Off Corridor Operating Agreement of April 1, 1976.

16. Amtrak agrees that Conrail shall retain the right to serve all freight customers on the line between Poughkeepsie and Hoffmans and at Conrail's sole expense, install, retain or remove sidetrack connections relating to its freight

customers located adjacent to the tracks involved in this Amendment Agreement regardless of whether the tracks are maintained by Amtrak or Conrail and regardless of whether the tracks are owned or leased by Amtrak.

17. The parties agree that all other provisions of the Off Corridor Operating Agreement will remain in effect for operations between Poughkeepsie and Hoffmans as if all provisions of the agreement were specifically included herein.

18. That portion of the Memorandum of Understanding between Amtrak and Conrail dated March 25 and April 1, 1977 pertaining to the division of maintenance costs is hereby revoked and rendered invalid.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals this 30th day of October, 1980.

ATTEST:

T. P. DiFrancesco
ASSISTANT SECRETARY

CONSOLIDATED RAIL CORPORATION

By: Stuart M. Reed
PRESIDENT

ATTEST:

Edyse Warren

NATIONAL RAILROAD PASSENGER CORPORATION

By: Alan S. Boyd

Potter R.V.S.

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33388
(Sub-No. 69)

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

REPLY VERIFIED STATEMENT OF STEVEN A. POTTER

My name is Steven A. Potter. I am Assistant Vice President – Intercarrier Agreements for CSX Transportation, Inc. in Jacksonville, Florida. I have held this position for five years. In my 17-year career with CSXT and predecessor companies I have held a variety of positions in the Marketing, Finance and Strategic Planning Departments including heading the fertilizer marketing group and a district sales office. In addition to my intercarrier agreements duties, I am also responsible for planning for the Shared Assets Areas created by the Conrail Transaction.

The Intercarrier Agreements group, which I head, is responsible for joint facility contracts and their administration, interline switching arrangements and administration, and audit and field financial control functions. Included within joint facility contracts are trackage rights agreements, haulage agreements and terminal operating agreements.

I am familiar with the various types of trackage rights arrangements which CSXT enters into with other railroads and with the typical joint facilities arrangements customarily entered into between railroads sharing terminal facilities.

I was one of the members of the team responsible for negotiations with Canadian Pacific Railway Company and affiliates ("CP") over issues raised by that company in the CSX-NS-Conrail proceeding, which resulted in two settlement agreements I will describe below. I was involved in formulating CSX's position throughout, and participated in many of the face-to-face-negotiations. I have given Verified Statements earlier in the present sub-docket concerning the "East of the Hudson" rights granted by the Board in Decision No. 109, in CSX-167 and CSX-169, prior to the rendition of the Board's Decision No. 109.

My attention has been called to the Verified Statement of Paul D. Gilmore, a Vice President of Canadian Pacific Railroad Company (with its affiliates, "CP") in CP's Petition for Reconsideration of the Board's Decision No. 109, designated as CP-28. In that Verified Statement, Gilmore compares the amounts that were to be allowed to CSX as to "minimum revenue requirements" in connection with the independent ratemaking authority granted to CP in the "Ratemaking Agreement" of October 20, 1997, for movements to or from "New York City points in the Bronx or Queens or for points on Long Island that are interchanged to the New York & Atlantic at Fresh Pond Junction." See that Agreement, Exhibit 3 to my Verified Statement in CSX-176, § 5.A(ii). As noted above, I participated in the negotiations that led to that Agreement (the "October 1997 Settlement Agreement").

That Agreement was indeed a settlement agreement and in fact it required CP to support, on the date for filing comments in the overall proceeding, the acquisition of Conrail by NS and CSX pursuant to their Application, and not to seek conditions. October 1997 Settlement Agreement, § 2 at 2. In exchange for that undertaking, independent ratemaking authority was granted CP over various interchange points to and from a number of points served or to be served by CSX upon the acquisition of the Conrail routes. One of these was the quoted access to the Bronx and Queens and to other Long Island points via NY&A interchange.

Independent ratemaking authority permits the carrier having it to quote a joint line rate to a shipper without the particularized consent for the movement by the other carrier participating in the movement so long as the division gives the non-quoting carrier its "revenue requirement." The revenue requirement to be paid to CSX for its portion of those movements East of the Hudson was a concessionary rate, granted by CSX in order to buy peace in a major case in which a major railroad was an adversary seeking conditions. We anticipated, in developing the revenue requirements under the independent ratemaking authority, that the moves to and from the New York City and Long Island points would be performed, to a large part, simply by adding CP cars to CSX trains that would be moving in any event. Thus, the marginal costs to CSX would be relatively low, and CSX could grant the concessionary rate without substantial out-of-pocket loss and indeed at a modest profit, measured on a marginal basis.

Obviously, in planning an entirely new service for CSX, I would never confuse the full cost of running that new service with the cost, either to be exacted by CSX or which I would expect to pay to another carrier, for adding cars to another carrier's trains. Of course, I would generally not expect another carrier to carry CSX's cars on a competitive route unless there was some overriding benefit to that carrier, but in any circumstances in which that might be the case, I would realize that the marginal cost to the carrier of the operational move would be substantially less than its full cost, and in negotiating with that carrier, I would keep that in mind.

Gilmore's Verified Statement, as I see the matter, does not offer a proper competitive comparison, which would be a comparison of single carrier moves between Montreal on the one hand and the Bronx, Queens and the Fresh Pond interchange on the other. CSX's mileage on the Conrail line it is being allocated from Montreal to the Bronx is approximately 530 miles; Gilmore's mileage on CP's route over Saratoga from Montreal to the Bronx is 370.5. (I have not seen Gilmore's Exhibit 1, since it is highly confidential, but have inferred his methodology from his Verified Statement and from a redacted version of his Exhibit which deleted all the CP costs and all the totals including those costs.) His approach is truly "comparing apples to oranges" to compare the cost of an operation conducted by CP, on its own schedules using its own equipment and as to its own master plan, with a full-cost allocation, to a service provided by CSX as part of a settlement on the basis of CP adding cars to be pulled in CSX's own trains on CSX's schedules, at CSX's

marginal costs. While the CSX East-of-the-Hudson service will be a new service for CSX, the October 1997 Settlement Agreement was entered into at a time that CSX had contracted to acquire the route in question and to replace Conrail's service over it. Thus, the cars it might obtain from CP would be additional cars for an existing service, that is, one that it had already committed itself to supply.

I understand that Gilmore's methodology in his Exhibit assumes that there will be a 100-percent empty back haul on all movements. Thus, it is assumed that in the case of use of the trackage rights, cars will be taken back all the way to Montreal empty by CP and CP will, of course, have to pay a trackage rights fee for the CSX segments on the back haul, since trackage rights fees are paid for every haul, revenue-bearing or not. On the other hand, under the independent ratemaking arrangements, CSX would have the duty to return the car that it took in interchange from the Albany area to New York City to the point of interchange, and if no revenue back haul was available, CSX would be required to do so without additional charge to CP or its customers. On the other hand, if there was a revenue back haul involving the independent ratemaking authority (that authority is granted in either direction, "to or from," see October 1997 Settlement Agreement, § 5.A(ii), at 3), CSX would be entitled to its specified division of the revenues on the back haul. And, obviously, if on the trackage rights movements CP had a revenue-paying back haul from New York to Montreal, most of its revenue would fall to the bottom line since I understand that Gilmore's methodology in his comparison includes counting the cost of the loaded one-way

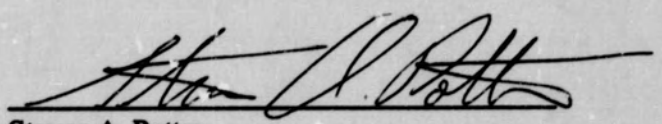
movement between Montreal and New York City twice. Thus, to the extent that revenue back hauls might exist, the claimed cost advantages of the independent rate-making authority over the use of the trackage rights would be negated.

I note that Gilmore believes that for trackage rights compensation purposes, articulated equipment used for intermodal traffic is defined as one "car" for every four axles. Gilmore V.S. at 5 n.6. At CSX, each "platform" or "well" constitutes a "car." That is also the standard used by NS and Conrail in their agreements with us and each other. A typical clause reads as follows:

> With respect to articulated units, the number of cars shall be determined by the AAR Car Type Code as defined in the UMLER Specification Manual. The second numeric in the Car Type Code field covering codes "Q" and "S" will be the factor in determining the car count for an articulated unit. For example, AAR Car Type Code "S566" would equate to a five (5) car count as these type cars have five wells capable of handling 40' to 48' containers in each well.

VERIFICATION

I, Steven A Potter, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this statement. Executed on January 25, 1999.



Steven A. Potter

CERTIFICATE OF SERVICE

I, Dennis G. Lyons, certify that on January 27, 1999, I have caused to be served a true and correct copy of the foregoing CSX-175, "Reply of CSX Corporation and CSX Transportation, Inc. to Canadian Pacific Parties' Petition for Reconsideration and Clarification of Decision No. 109" (CP-28), to the following parties, by first-class mail, postage prepaid, or by more expeditious means:

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The Honorable Jerrold Nadler
U.S. House of Representatives
Washington, D.C. 20515

DENNIS G. LYONS

STB FD 33388 (Sub 69) 1-27-99 D 193150

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D

193150

January 27, 1999

Hon. Vernon A. Williams, Secretary
Office of the Secretary
Case Control Branch
ATTN: STB Finance Docket No. 33388
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: *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*, Finance Docket No. 33388 (Sub-No. 69)

Dear Sir:

Enclosed are an original and twenty-five (25) copies of the Reply of the New York City Economic Development Corporation to Petition For Reconsideration and Clarification of Canadian Pacific Parties and Petition of Applicants CSX Corporation and CSX Transportation, Inc. For Reconsideration of Decision No. 109. An additional copy is enclosed for file stamp and return with our messenger. Please note that a copy of this filing is also enclosed on a 3.5 inch diskette in MicroSoft Word format.

Sincerely,

Charles A. Spitulnik

Enclosures

P17597-1

NYC– 24

Before the
Surface Transportation Board
Washington, D.C.

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

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

REPLY OF
THE NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION
TO PETITION FOR RECONSIDERATION AND CLARIFICATION OF
CANADIAN PACIFIC PARTIES AND
PETITION OF APPLICANTS
CSX CORPORATION AND CSX TRANSPORTATION, INC.
FOR RECONSIDERATION OF DECISION NO. 109

The New York City Economic Development Corporation ("NYCEDC" or "the City") hereby submits its Reply to the Canadian Pacific Parties' Petition for Reconsideration and Clarification (CP-28) and the Petition of Applicants CSX Corporation and CSX Transportation, Inc. for Reconsideration of Decision No. 109 (CSX-173), both filed on January 7, 1999.

The City's main objective here, as it has been throughout this proceeding, is to ensure that shippers on the east side of the Hudson River and

east of the New York Harbor have a competitive direct rail service alternative to the service proposed by CSX Transportation, Inc. ("CSX"). The Canadian Pacific Parties (as defined in CP-28) ("CP") have explained how the trackage rights and switching fees CP proposes will allow its operations, within the parameters established in Decision No. 109 in this proceeding, to provide that competition. CSX, on the other hand consistent with its commercial best corporate interests, appears to be using its best efforts to thwart that objective.

The Joint Reply of NYCEDC and the State of New York, by and through its Department of Transportation, to Opening Submissions of Canadian Pacific Parties and CSX Corporation and CSX Transportation, Inc. (NYC-23/NYS-32), filed on December 10, 1998, summarizes (at pages 3 - 6) the record the City and the State developed in this proceeding to support the request for competitive rail service east of the Hudson. In Decision No. 109, this Board confirmed its intention to provide a direct competitive option for shippers within the five boroughs of the City and on Long Island.[1] As clarified by CP's requests for clarification in CP-28, which NYCEDC supports, the remedy the Board imposed will provide an appropriate mechanism for that competitive option. However, this mechanism will work only as long as the fee CP must pay for its use of the line is in a range that allows it to compete effectively on

[1] While Decision No. 89 created some confusion as to the scope of the rights the Board intended to award CP with respect to shippers on the east-of-the Hudson Line north of the City, Decision No. 109 and more recent Decision No. 112 (Service Date January 22, 1999), clarify that the Board has decided to guarantee a direct competitive rail service option only to shippers within New York City and on Long Island.

the basis of price as well as geography for traffic originating or terminating in this market.

The Board's $.71 per car mile charge, however, removes the possibility of effective competition. In CP-28, CP has explained why the fee the Board ordered in Decision No. 109 is not only calculated incorrectly, but is set at a level that will prevent CP from becoming a meaningful competitor on the line east of the Hudson. CP's witness Paul D. Gilmore explains that $.71 per car mile trackage fee would impose a $53 per car differential for boxcar traffic on this line, and that "CSX would be able consistently to underprice CP for movements CP sought to handle by trackage rights, and eventually CP would have to withdraw from the market." Reconsideration V.S. Gilmore (attached to CP-28) at 4. Similarly, the $.71 per car mile charge would preclude CP from moving any of the short-haul intermodal traffic that the City has consistently recognized as an important segment of the market that would be reached by the competitive trackage rights operator. [2] *Id.*

If the $.71 per car mile charge is unworkable, the revised $1.21 proposed by CSX in CSX-173 is simply unreasonable. It is so far out of sync with other trackage rights fees agreed upon by parties engaged in arms-length

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[2] As NYCEDC explained in the pleadings in the initial phases of this case, its objectives for introducing competition on the east-of-the-Hudson line included reducing the volume of truck movements across the congested highways and bridges to the New Jersey intermodal terminals. *E.g.*, Comments of New York City Economic Development Corporation (NYC-9), filed October 21, 1997, at 15-16 and V.S. Michael Canavan (Attachment 3 to NYC-9) at 4; Joint Rebuttal Statement of the State of New York and the New York City Economic Development Corporation (NYS-24/NYC-17), filed January 14, 1998, at 24-25 and accompanying Rebuttal V.S. of John C. Guinan at 5 and Rebuttal V.S. of Seth O. Kaye at 2.

negotiations, including CSX and its partner in the transaction that is the subject of this proceeding, or in any other transaction, that it can only be regarded as inappropriate. It appears designed to accomplish precisely the result that CP has stated will occur – the prevention, not the introduction, of effective direct rail competition on the east-of-the-Hudson line. This may be reasonable from CSX's perspective, but is directly contrary to the policy advocated at every stage of this proceeding by NYCEDC and adopted by this Board in Decision No. 89.

On the other hand, CP has provided a rational explanation based on the Board's "SSW Compensation Formula"[3] for its conclusion that $.36 per car mile is the correct fee. According to CP's explanation, this trackage rights fee will satisfy the Board's dual objectives of providing for competition in this market and providing adequate compensation to CSX for CP's limited use of the line.

NYCEDC's position consistently has been that this Board, or the parties themselves, can and should find a way to prevent shippers on the east side of the Hudson from suffering from the competitive disadvantage that would be created by the division of Conrail's assets that CSX and Norfolk Southern proposed initially. The City consistently has and continues now to seek to work cooperatively with both CSX and CP to find a way to achieve the pro-competitive goal that has been the lodestar of its pleadings in this case. However, when faced with the position taken by CSX that would obstruct the

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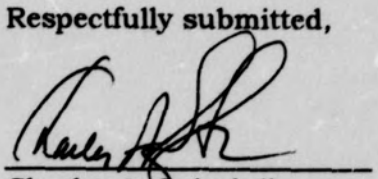
[3] This formula was described and clarified in *St. Louis Southwestern Ry. Compensation -- Trackage Rights*, 1 I.C.C.2d 776 (1984), 4 I.C.C.2d 80 (1991), 8 I.C.C.2d 213 (1991), *aff'd without opinion*, 978 F.2d 745 (D.C. Cir. 1992), *cert. denied*, 508 U.S. 951 (1993).

achievement of this important objective advocated by NYCEDC throughout this proceeding, NYCEDC has no choice but to oppose CSX's Petition and to support CP's.

For this reason, and in view of all of the foregoing and of all of the pleadings submitted by NYCEDC in this proceeding, NYCEDC supports each aspect of the Petition for Reconsideration and Clarification submitted by CP and requests that CSX's Petition for Reconsideration be denied.

Dated: January 27, 1999

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on January 27, 1999, a copy of the Reply of the New York City Economic Development Corporation to Petition For Reconsideration and Clarification of Canadian Pacific Parties and Petition of Applicants CSX Corporation and CSX Transportation, Inc. For Reconsideration of Decision No. 109, was served by hand delivery upon the following:

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193152

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BY HAND DELIVERY

The Honorable Vernon A. Williams
Secretary, Surface Transportation Board
Case Control Branch
ATTN: STB Finance Docket No. 33388
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423-0001

Re: 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

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

Dear Secretary Williams:

Enclosed for filing in the above-referenced dockets are an original and twenty-five copies of Canadian Pacific Parties' Reply in Opposition to CSX Petition for Reconsideration of Decision No. 109. Certain tables in the Plaistow Reconsideration Reply Verified Statement being submitted herewith contain highly confidential information, and accordingly are being filed under seal in a separately marked envelope. Also enclosed is a 3.5-inch diskette, formatted for WordPerfect 7.0, containing the pleading.

Thank you for your assistance.

Sincerely,

George W. Mayo, Jr.
Attorney for Canadian Pacific Railway Company, Delaware and Hudson Railway Company, Inc., Soo Line Railroad Company, and St. Lawrence & Hudson Railway Company Limited

GWM:jms
Enclosures
cc: Counsel for Parties Required To Be Served

193152

CP-29

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

CANADIAN PACIFIC PARTIES' REPLY IN OPPOSITION TO CSX PETITION FOR RECONSIDERATION OF DECISION NO. 109

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January 27, 1999

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BEFORE THE
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

CANADIAN PACIFIC PARTIES' REPLY IN OPPOSITION TO CSX PETITION FOR RECONSIDERATION OF DECISION NO. 109

The Canadian Pacific Parties 1/ hereby submit their evidence and argument in opposition to the CSX 2/ motion for reconsideration (CSX-173) of the Board's Decision No. 109.

1/ "Canadian Pacific Parties" or "CP" refer collectively to Canadian Pacific Railway Company ("CPR"), Delaware and Hudson Railway Company Inc. ("D&H"), Soo Line Railroad Company and St. Lawrence & Hudson Railway Company Limited.

2/ CSX Corporation and CSX Transportation, Inc. are collectively referred to as "CSX". CSX will operate the subject east-of-the-Hudson line pursuant to an operating agreement with New York Central Lines LLC ("NYC"), which will acquire the line from Consolidated Rail Corporation ("Conrail").

By various devices, including distorting the Board's 3/ SSW Compensation 4/ method for setting trackage rights compensation, CSX seeks to erect barriers to CP's operation of "east-of-the-Hudson" trackage rights with the objective of assuring that CP could not provide competitive service. The Board should:

(1) reject CSX's argument that the Board must impose a trackage rights charge of $1.215 per car mile; instead, the Board should set the rate at a competitive level no higher than $0.36 per car mile, with a rate of $.034 per car mile being most appropriate for the reasons explained in this submission;

(2) adhere to its denial of CSX's demand that the Board require CP to pay CSX for operating over the Metro-North trackage, for which CP will negotiate access terms with Metro-North; and

(3) refuse CSX's punitive effort to terminate the negotiated settlement agreement between CP and CSX.

3/ References to the Board include its predecessor the Interstate Commerce Commission.

4/ St. Louis Southwestern Ry. Compensation -- Trackage Rights, 1 I.C.C.2d 776 (1984) ("Compensation I"), 4 I.C.C.2d 668 (1987) ("Compensation II"), 5 I.C.C.2d 525 (1989) ("Compensation III"), 8 I.C.C.2d 80 (1991) ("Compensation IV"), 8 I.C.C.2d 213 (1991) ("Compensation V"), aff'd without opinion, 978 F.2d 745 (D.C. Cir. 1992), cert. denied, 508 U.S. 951 (1993) (collectively, "SSW Compensation").

PREFACE AND SUMMARY OF ARGUMENT

In its petition for reconsideration, CSX continues to pursue its strategy of trying to ensure that the terms governing CP's trackage rights operation over the east-of-the-Hudson line will be so onerous that CP simply could not compete with CSX for New York City traffic. CSX requests three changes to Decision No. 109 that, if granted, would leave CSX as the exclusive provider of rail freight service to the Bronx and Queens on the east side of the Hudson, and thereby negate the underlying purpose of the Board's grant of rights to CP in the first instance. The Board should deny all three requests.

First, CSX argues that the extraordinarily high trackage rights charge set by the Board in Decision No. 109 ($0.71 per car mile) should be increased to $1.215 per car mile. This rate would be more than four times the amount ($0.29 per car mile) CSX and NS agreed to charge each other for the various trackage rights they granted one another as part of the Conrail transaction. CP cannot compete with CSX at the $0.71 per car mile charge set by the Board, much less the $1.215 per car mile charge CSX now proposes. CSX is attempting to guarantee that CP will never move a single car of trackage rights traffic.

As explained in Part I below, CSX's proposed $1.215 per car mile trackage rights charge violates the principles underlying the Board's SSW Compensation methodology. A correct

application of those principles yields a trackage rights fee that does not exceed $0.36 per car mile; the most appropriate charge, based on CP's further analysis explained below, is $0.34 per car mile.

Second, not content to seek payment of its astronomical $1.215 per car mile charge on lines it owns, CSX contends that CP should pay CSX trackage rights compensation for CP's use of Metro-North's east-of-the-Hudson trackage. The Board ruled in Decision No. 109 that CSX would not be entitled to any trackage rights payments for Metro-North trackage unless CSX could establish before the Special Court 5/ that it possesses exclusive freight rights as to that trackage. It also held that if CSX succeeded in doing this, the Board would then consider overriding those rights. CSX continues to press arguments that the Board has considered and rejected.

In Part II below, we explain that CSX's claim to exclusive freight operating rights on Metro-North's line is entirely without merit. Conrail had no such exclusive rights and CSX can enjoy no greater rights than its predecessor.

5/ The Special Court, Regional Rail Reorganization Act of 1973, and its successor, the United States District Court for the District of Columbia (45 U.S.C. § 719(b)(2)), are referred to as the "Special Court".

Furthermore, even if Conrail had such exclusive rights, the Board can and should set them aside pursuant to 49 U.S.C. § 11321.

Third, despite the Board's earlier ruling to the contrary, CSX persists in arguing that the Board should override the October 20, 1997 settlement agreement between CP and CSX. In this agreement, CSX granted CP restricted haulage rights for a small portion of east-of-the-Hudson traffic, as well as haulage and other rights in other, unrelated markets, in return for CP's withdrawal of its responsive application in the Conrail transaction. CSX is now attempting to undo this agreement in its entirety, the many aspects that have no relationship at all with the east-of-the-Hudson line as well as the limited CP haulage rights that pertain to the line.

Plainly, there is no justification for overriding the agreement provisions that relate to other markets. And under the circumstances, the east-of-the-Hudson haulage arrangement should unquestionably be left in place. If the trackage rights terms proposed by CSX were adopted, CP would not be competitive for any east-of-the-Hudson traffic using these trackage rights, and the haulage arrangement established under the settlement agreement would be the only economically viable means by which CP could handle any east-of-the-Hudson traffic. If CSX succeeded in canceling the settlement agreement, it would achieve its goal of having no east-of-the-Hudson competition at all.

As explained in Part III below, CSX has established no basis for the Board to set aside the settlement agreement that was voluntarily negotiated between CP and CSX. CP has performed its obligation under the settlement, by withdrawing its responsive application, and CSX has obtained the benefit of CP's performance. CSX should not be allowed to deprive CP of its negotiated rights; neither should it be allowed to deprive the public of the pro-competitive benefits achieved under these rights, both east of the Hudson and elsewhere.

DISCUSSION

I. CSX'S PROPOSED CHANGES TO THE TRACKAGE RIGHTS CHARGE CALCULATION VIOLATE SSW COMPENSATION PRINCIPLES AND WOULD PREVENT CP FROM COMPETING WITH CSX FOR NEW YORK CITY TRAFFIC

CSX identifies what it claims are several errors in the Board's calculation of the east-of-the-Hudson trackage rights charge, which supposedly stem from the Board's incorporation of parts of CP witness Joseph Plaistow's SSW Compensation calculations. CSX witness William Whitehurst describes several changes to the calculations to "correct" these "errors".

CSX does not, however, propose that the Board establish the trackage rights charge that would result from Mr. Whitehurst's changes -- in fact, CSX does not even reveal what the trackage rights charge would be if Mr. Whitehurst's changes were made, presumably because it recognizes that the

result of its "corrections" is absurd. Taken as a whole, the changes CSX describes would inflate the trackage rights charge to $4.67 per car mile. This fact alone is enough to establish that something is terribly wrong with CSX's calculations. Several things are wrong, in fact, as discussed below.

A. CSX Ignores The Purpose Of The SSW Compensation Trackage Rights Calculation

CSX's motion for reconsideration attempts to manipulate the Board's SSW Compensation methodology in a way that would defeat the Board's primary purpose in developing the methodology. That purpose is to make it possible for the trackage rights tenant to compete with the landlord on an equal footing. As the Board explained in Compensation I:

> [T]he tenant railroad will enter the property of the ongoing, owning railroad to provide competitive service where we have found that competition to be required by the public interest. The purpose of this proceeding is to set compensation for the trackage rights which will put the tenant in the same position as the owning carrier
>
> * * *
>
> [W]e must be particularly sensitive in this proceeding to avoid overstating the value of the subject lines. The trackage rights have been imposed to remedy anticompetitive effects of the consolidation, and the tenant must be able to operate competitively.

1 I.C.C.2d at 786 (emphasis added). 6/

6/ Just a few days ago, the Board reiterated in this case that its purpose in ordering east-of-the-Hudson trackage rights was to

[Footnote continued]

Thus, the overriding goal to be served here in setting trackage rights compensation is to assure that CP can compete effectively with CSX. CP must be in a position to price its services at or below the price charged by CSX for comparable services. It would be impossible for CP to compete with CSX if the trackage rights charge were set at $4.67, or $1.215, or $0.71 per car mile. 7/ Trackage rights charges that are freely negotiated in the marketplace -- ones that allow the tenant railroad to compete with the landlord -- tend to fall into a range of $0.20 to $0.35 per car mile. 8/ Any application of the SSW Compensation formula that results in a charge several times higher than that must be suspect.

The SSW Compensation formula can produce a wide range of results depending upon the assumptions used in the calculation. This means that the formula cannot be used mechanically, without regard for the results produced. Rather, to be properly employed, the SSW Compensation approach needs to

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[Footnote continued]

encourage the "development of competition and traffic to and from New York City." Decision No. 112, at 3.

7/ See Gilmore Reconsideration R.V.S. (appended hereto); CP-28, Gilmore Reconsideration V.S.

8/ See, e.g., CP-25, Plaistow R.V.S. at 12, Ex. No. (JJP-3); CP-28, Gilmore Reconsideration V.S. at 5-6.

be applied thoughtfully to the facts of each particular case, to achieve its stated objectives. This is what the Board did in the five SSW cases, 9/ and in other cases where it has used this approach to determine trackage rights compensation.

Thus, in Compensation II, the Board explained that it was guided in its development of the trackage rights charge by the understanding that "terms so onerous to the tenant as to defeat the purpose of the trackage rights cannot be considered just and reasonable." 4 I.C.C.2d at 687-88 (quoting Union Pacific -- Control -- Missouri Pacific, 366 I.C.C. 459, 590 (1982)). The Board concluded that the refinements that it adopted to the SSW Compensation formula in that case "achieved our goal of assuring a competitive relationship between [UP and SP] on the line." 4 I.C.C.2d at 688.

9/ The five SSW Compensation cases show the Board's development of an appropriate methodology to determine trackage rights compensation that would serve the intended purpose under the facts of the case. Although the basic approach outlined in Compensation I was preserved in the subsequent cases, crucial details were modified or refined to better accomplish the Board's purpose. For example, in Compensation I, the Board decided that the interest rental should be based on usage of the line (1 I.C.C.2d at 791); in Compensation II, the Board decided that usage should be based on a three-year rolling average "to avoid extreme fluctuations in rental" (4 I.C.C.2d at 687); and in Compensation IV, the Board ruled that during the entire initial first three years of trackage rights operations, the calculation should use the average usage of the line over that 36-month period "to yield realistic interest rental values" (8 I.C.C.2d at 106).

Likewise, in Union Pacific Corp. -- Control & Merger -- Southern Pacific Rail Corp., Finance Docket No. 32760, Decision No. 47, 1996 WL 512020, *16 (I.C.C. Sept. 10, 1996), the Board set compensation terms for trackage rights granted to Tex Mex that "should permit Tex Mex to remedy any potential merger-related competitive harm at Laredo, as we intended when we granted its . . . applications."

In advancing its mechanistic interpretation of the SSW Compensation formula, CSX ignores the formula's fundamental objective: To create competition between CP and CSX east of the Hudson. Instead, CSX would have the formula serve the opposite purpose. The Board should reject CSX's demand that the trackage rights charge be made so onerous as effectively to foreclose CP from competing with CSX.

B. Whitehurst's Proposal To Use The URCS "Flow-Through Option" To Calculate "Below-The-Wheel" Costs Is Flawed

The Board reviewed and accepted as reasonable Mr. Plaistow's calculation of "below-the-wheel" costs at $0.13 per car mile. Decision No. 109, at 9. CSX witness Whitehurst argues that this figure is too low, because it was based on a "Constant Cost Markup Ratio"; Mr. Whitehurst advocates a "Flow-Through Option" method of calculation, which yields a result of $0.195 per car mile, i.e., $0.065 (or 50%) higher than the result accepted by the Board. Whitehurst V.S. at 2-4.

Mr. Whitehurst ignores the fact that the Board expressly approved the "constant cost markup ratio" methodology in SSW Compensation. 10/ Using the flow-through option for the purposes proposed by Mr. Whitehurst violates the Railroad Accounting Principles Board's ("RAPB") causality principle and is inconsistent with differential pricing of rail services. Plaistow Reconsideration R.V.S. (appended).

The flow-through methodology advocated by Mr. Whitehurst ignores elasticity of demand and the underlying purpose of the SSW methodology to allow the tenant and landlord to compete on an equal footing. On a lightly-used line like the east-of-the-Hudson line, the demand for rail services is comparatively low. Therefore, using differential pricing, the rates that CSX would charge in this market would not cover a pro rata portion of its entire system's constant costs, but CSX would make that differential up in other markets where the demand for rail services is stronger.

Mr. Whitehurst's flow-through option, however, would impose on CP's east-of-the-Hudson operations an inordinate share of system average constant costs. As a result, CP's ability to be price-competitive with CSX would be undermined.

10/ Compensation II, 4 I.C.C.2d at 701-02.

Even the Board's constant cost markup ratio method places CP at a competitive disadvantage to CSX, because it imposes a portion of system constant costs on CP's east-of-the-Hudson trackage rights, whereas CSX need not cover any of its system constant costs from its east-of-the-Hudson traffic. 11/ To put CP on true competitive equality with CSX, the constant cost component ($0.04 per car mile) of the "below-the-wheel" costs should be removed and only $0.09 used in calculating the trackage rights charge. Plaistow Reconsideration R.V.S. (appended). However, CP is not asking the Board to reduce the $0.13 "below-the-wheel" component approved in Decision No. 109.

C. Whitehurst's Proposal To Adjust Line Segment Earnings To Reflect The Board's Exclusion Of Selkirk Yard From The Trackage Rights Route Is Flawed

CSX witness Whitehurst claims to have corrected "errors" in Mr. Plaistow's calculation of east-of-the-Hudson line segment earnings in his first verified statement (Plaistow R.V.S., in CP-25) by removing movements that were not on the trackage rights route that the Board approved in Decision No. 109. Whitehurst V.S. at 4-6. In principle, such

11/ Given that CSX will price this traffic differentially, CP will not be able to compete effectively for east-of-the-Hudson traffic if, through the trackage rights charge, it is required to incorporate these costs into its price on a marginal per car basis while CSX is charging a lower price because it is capturing these costs in other markets.

an adjustment is necessary because Mr. Plaistow's original calculations were based on full-service trackage rights with three routes through the Albany area, whereas the Board has granted only overhead rights and a single route through Albany. 12/

However, Mr. Whitehurst's adjustments generate a fundamentally illogical result: Although these adjustments are supposed to take account of the fact that the Board has granted narrower trackage rights than those on which Mr. Plaistow based his calculations, Mr. Whitehurst's adjustments result in an increase in line segment earnings. In effect, Mr. Whitehurst claims that the overhead trackage rights that the Board granted are worth more than the more extensive rights that CP initially requested. That is obviously wrong.

Mr. Whitehurst's calculations are wrong because he only excludes from the revenue calculation 525 movements that had a negative contribution to line segment earnings. 13/

12/ In his Reconsideration Verified Statement (in CP-28), Mr. Plaistow adjusted line segment earnings to reflect the more limited trackage rights granted by the Board. However, Mr. Whitehurst's verified statement was filed on the same day as Mr. Plaistow's Reconsideration Verified Statement, and so Mr. Whitehurst's comments are directed only to Mr. Plaistow's original verified statement.

13/ Mr. Whitehurst also deleted 59 movements from Mr. Plaistow's Ex. No. (JJP-2.4) that did not move over the trackage rights

[Footnote continued]

There are 352 additional movements that need to be excluded, because they do not originate or terminate in the Bronx or Queens, to reflect the scope of the trackage rights granted by the Board in Decision No. 109. 14/ These movements could have been handled by CP under the full-service trackage rights that it originally requested, but they cannot be handled under the overhead rights granted by the Board. See Plaistow Reconsideration R.V.S. (appended).

In addition, Mr. Whitehurst's adjustments fail to take account of the fact that the Board-granted trackage rights are limited to Route 1 through the Albany area. The Plaistow calculations in CP-25 were based on the three Albany area routes that CP originally requested. As Mr. Plaistow explained in his Reconsideration Verified Statement (CP-28), the limitation of the trackage rights to Route 1 eliminates much of the mileage traveled by the movements that he used in his original calculations. Mr. Whitehurst not only included revenues from 352 movements that CP could not handle with the

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[Footnote continued]

line. Mr. Whitehurst concedes, however, that Mr. Plaistow had excluded those movements from his calculations, so deleting them had no effect on the trackage rights charge. Whitehurst V.S. at 5, 8.

14/ Mr. Plaistow eliminated three additional movements because of Costed Waybill Sample data problems.

overhead trackage rights that the Board granted, he included traffic over Routes 2 and 3 to which CP will not have access.

Mr. Whitehurst has selectively adjusted line segment earnings by making only adjustments that would tend to increase the trackage rights charge and ignoring adjustments that would reduce the trackage rights charge. The Board should not be misled by this result-oriented approach.

D. Whitehurst's Exclusion Of Switching Costs Is Flawed

"Nonsense!" says Mr. Whitehurst of Mr. Plaistow's treatment of switching costs in calculating the trackage rights charge. Whitehurst V.S. at 6. The $250 per car switching fee that CP is to pay CSX under Decision No. 109 "has no relevance" to the actual cost of switching, which is actually only $85.40, asserts Mr. Whitehurst. Id. at 7. If Mr. Whitehurst claims that CP should pay CSX $250 for a service that it costs CSX only $85.40 to provide, who is talking nonsense?

Mr. Whitehurst reluctantly concedes that it "might" be appropriate to "replace Conrail's URCS system average switching cost with a more accurate measure of Conrail's switching costs applicable to the trackage rights line segment . . . ." Whitehurst V.S. at 7. In fact, this is exactly what Mr. Plaistow did -- he replaced the system average switching cost with a more accurate measure of the switching costs on the east-of-the-Hudson line. The Board has accepted $250 per car as "a reasonable

starting point", in the absence of "any special studies of the actual switching cost per car in the New York Terminal Area." Decision No. 109, at 10 (emphasis added).

A switching cost study will decide what it actually costs to switch cars in this area. Decision No. 109, at 11. If the cost turns out to be close to the URCS system average cost of $85.40, then the $250 per car switching fee "starting point" will have been set way too high and will be reduced; at the same time, the "true-up" procedure will make the appropriate adjustment to the trackage rights charge. On the other hand, if the actual switching cost turns out to be close to $250, then a lesser adjustment will be required to both the switching fee and the trackage rights charge. 15/

However, until the switching cost study is performed, CP proposes, as a compromise, that a switching cost lower than $250 but higher than the system average be used in calculating the trackage rights charge. Because CSX agrees that the Bronx and Queens have high switching costs, Mr. Plaistow uses a switching cost 50% higher than the system average in his SSW

15/ Certainly the system average cost is likely to be too low. As CSX itself says, the Bronx and Queens are "notoriously an area of high costs", and that for this reason "only actual operating costs relating to the area in question should be used, not systemwide costs." CSX-173, at 11. Apparently CSX believes that system average costs should only be used where they result in higher charges to CP.

calculation. Using this compromise figure is likely to minimize the magnitude of the later adjustment of the trackage rights charge to reflect actual switching costs. 16/

E. Whitehurst's Proposed Method For Apportioning Revenue Is Flawed

Most of the relevant movements over the east-of-the-Hudson line originate or terminate (or both) beyond that line. It is therefore necessary to attribute a portion of the revenue of the total movement to the east-of-the-Hudson line segment. Mr. Plaistow did this on the basis of the proportion of line segment mileage versus total movement mileage. Mr. Whitehurst argues that revenues should be pro-rated based on 100-mile mileage blocks, with an extra block assigned to the origin and destination carrier, because "typically, more costs per mile are incurred by a railroad in originating and terminating a shipment than in line haul movement." Whitehurst V.S. at 9; see id. at 9-12.

The Whitehurst "refinement" sounds reasonable, but as Mr. Plaistow points out in his Reconsideration Reply Verified Statement, Mr Whitehurst offers no reason to suppose that it would yield a more accurate allocation of earnings than

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16/ Mr. Whitehurst is also incorrect in his assertion that Mr. Plaistow erred in the way he applied his switching cost adjustment to the calculation of the trackage rights charge. See Plaistow Reconsideration R.V.S. (appended).

Mr. Plaistow's method. Moreover, a mileage block method was not appropriate to the east-of-the-Hudson line where full-service rights over that line were being analyzed, because so many short hauls on trackage rights were involved. Plaistow Reconsideration R.V.S. (appended). Now that the analysis has shifted to consideration of overhead rights only, however, movements over the trackage rights line may be long enough to use Mr. Whitehurst's modified mileage block approach without severe distortion. Id. Mr. Plaistow therefore adopts this methodology for allocating revenues in his attached statement.

However, Mr. Plaistow uses a better procedure for allocating costs. Mr. Whitehurst acknowledged that the Board's Costed Waybill procedure is preferable to the mileage block procedure, but he did not have the "necessary data to apply" the better procedure. Whitehurst V.S. at 11-12. Mr. Whitehurst therefore applied a mileage pro-ration to both costs and revenues.

As described in Mr. Plaistow's Reconsideration Reply Verified Statement, he applied the Board's Costed Waybill Sample methodology (the necessary data was available in the Waybill Sample, where Mr. Whitehurst might also have found it) to allocate costs and the modified mileage block methodology to allocate revenues. In doing these calculations, he discovered and corrected several errors that Mr. Whitehurst (and he himself)

had made in various calculations. Plaistow Reconsideration R.V.S. (appended).

F. The Results Of CSX's "Corrections" Demonstrate The Flaws In CSX's Use Of The SSW Compensation Methodology; CSX's Proposal To Base Interest Rental On System-Average Values Would Not Solve The Problem

CSX "observes" that making the "corrections" advocated by Mr. Whitehurst "would produce a very substantial increase to the $0.71 figure derived by the Board . . ." (CSX-173 at 9), but neither CSX nor Mr. Whitehurst mentions what that increase would be. This is for good reason. Mr. Plaistow has calculated the increase that would result from Mr. Whitehurst's corrections; the result would be a trackage rights fee of $4.67 per car mile. Plaistow Reconsideration R.V.S. (appended).

Obviously, this result is absurd. Even CSX recognizes that a trackage rights charge that high would defeat "the Board's purposes here." CSX-173 at 10. CSX therefore proposes an alternative way of calculating the trackage rights charge, in order to come up with a number that it hopes will pass the laugh test. However, the resulting $1.215 per car mile charge would defeat the Board's purposes here just as effectively as would $4.67, and CSX's alternative methodology is also flawed, as is discussed below.

But the $4.67 charge that would result from the "corrections" that CSX advocates is instructive to show that

CSX's use of the SSW Compensation methodology is wrong in a fundamental way. Because this application of the methodology yields an unbelievable answer, CSX and Mr. Whitehurst should have made a "reality check" and compared their results with an estimate developed using an independent and objective procedure, such as comparison to trackage rights fees already being used in the free marketplace. If CSX had done that, of course, it would have found that $1.215 is also an absurd result. 17/

The real-world experience which led CSX to abandon (and indeed, not even to disclose) its $4.67 calculation should also have prompted it put aside its $1.215 figure. Neither can be squared with marketplace-based rates, as demonstrated by the $0.29 per car mile rate CSX and NS agreed to charge one another. And both are punitive, in the sense that their imposition would

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17/ If $1.215 per car mile were reasonable, CSX would have insisted that $1.215 be charged to NS for the use of CSX tracks (and NS would have insisted on charging CSX the same rate), instead of the $0.29 on which they did agree. It is no answer to say that the rates CSX and NS charge each other are reciprocal. It is still the case that one of the parties will end up being a net payor and one a net recipient of trackage rights charges, and given the scope of the operations that CSX and NS will conduct over each other's lines, the net car miles for which one will pay the other will be very substantial. Neither party could afford the risk that it would be subsidizing its principal competitor to the tune of $0.93 per car mile. Therefore, the $0.29 rate on which CSX and NS agreed -- not the much higher rate that CSX wants the Board to require CP to pay -- is indicative of the rate that would put the tenant and landlord on an equal footing, as SSW Compensation intends. See Plaistow Reconsideration R.V.S. (appended).

doubtlessly make it impossible for CP to price its services competitively with CSX.

But then the last thing CSX wants is competition from CP east of the Hudson. To achieve its purpose, CSX requires a charge that keeps CP noncompetitive. Since it knows that it could never convince the Board to impose a $4.67 per car mile charge, CSX parsed the SSW Compensation formula to produce a lower number -- $1.215 per car mile -- which is equally impossible for CP to bear, but has the presentational advantage of being only four times a market-based rate as opposed to fifteen times. Yet, as explained below, this $1.215 calculation suffers from critical infirmities unrelated to its being grossly out of step with prevailing trackage rights charges in the marketplace. 18/

18/ There is no precedent for application of the SSW Compensation formula producing a disparity of this magnitude between market-based rates and a rate derived through application of the formula. See, e.g., Union Pacific Corp. -- Control & Merger -- Southern Pacific Rail Corp., Finance Docket No. 32760, Decision No. 44, slip op. at 140-141 (served Aug. 12, 1996) ("UP/SP") (comparing the rate negotiated for BNSF trackage rights over UP/SP of 3.0 to 3.1 mills per gross ton-mile with the formula derived rate of 3.84 mills per gross ton-mile).

G. Whitehurst's Use Of System Average Value To Calculate The Interest Rental Is Not Justified In This Case; In Accordance With SSW Compensation, A Capitalized Line Segment Value Can And Should Be Used

Instead of applying a "reality check" and re-examining his calculations when they resulted in an incredible $4.67 per car mile trackage rights charge, Mr. Whitehurst decided to abandon the methodology that the Board endorsed in SSW Compensation for calculating the interest rental component. Rather than basing the interest rental component of the trackage rights charge on the value of the line segment over which CP has been granted trackage rights, Mr. Whitehurst proposes to "calculate [] [the interest rental portion] as a system average figure", claiming that "the STB has approved this alternative approach recently in FD No. 32760, the UP/SP merger proceeding." Whitehurst R.V.S. at 13.

In fact, the Board did not "approve" this departure from SSW Compensation principles in UP/SP. In the portion of Decision No. 44 in UP/SP that Mr. Whitehurst cites (slip opinion at 140-42), the Board was not even addressing the determination of a trackage rights charge; the Board was responding to claims by merger opponents that the already-negotiated charge for the trackage rights granted by UP/SP to BNSF was too high, and that as a result BNSF would not be able to replace the competition lost at "2-to-1" points as a result of the merger.

The opponents' arguments and the applicants' responses were both based on system-wide figures, and the Board naturally addressed the issue on system-wide terms. This is hardly surprising, because the issue was the overall effectiveness of trackage rights covering a substantial part of the UP/SP system, not the proper compensation for trackage rights over less than 100 miles of the huge Conrail system acquired by CSX. Nothing in Decision No. 44 even hinted that the Board was abandoning the line-specific approach required by SSW Compensation. 19/

Mr. Whitehurst also claims that Decision No. 27, at 18, in UP/SP supports abandoning SSW Compensation's line-specific determination of the interest rental component of the trackage rights charge. Whitehurst R.V.S. at 14. Again, he is wrong. In that decision the Board said nothing about changing its SSW methodology; all the Board did was to use the results of its previous calculation -- "a flat rate of 3.84 mills per GTM for all equipment" -- as a reasonable proxy for an SSW trackage rights charge, in the absence of record evidence on which an SSW calculation could have been made. Moreover, the Board found in

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19/ In fact, the Board criticized the merger opponents for basing their calculations on the value of SP alone, even though the trackage rights covered lines of both UP and SP, and UP's lines were more valuable than SP's lines (Decision No. 44, at 141), thus recognizing that it is important to consider the characteristics of the specific lines over which trackage rights are granted.

Decision No. 47 that the trackage rights charge it established "should permit Tex Mex to remedy any potential merger-related competitive harm at Laredo, as we intended . . . ." UP/SP, Decision No. 47, at 19-20. In contrast, the $1.215 per car mile charge Mr. Whitehurst calculates would preclude CP from using the east-of-the-Hudson trackage rights to compete with CSX -- as CSX undoubtedly desires.

Calculating interest rental on a system-wide basis would make sense if one were trying to establish a charge for trackage rights over the entire Conrail system (as discussed above, the Board was trying to test the reasonableness of a negotiated fee for trackage rights over much of the UP/SP system in UP/SP Decision 44). 20/ What Mr. Whitehurst is suggesting, however, makes no sense. He proposes using a system-wide interest rental for the east-of-the-Hudson line because line-specific interest rental on that line -- as he calculated it -- is too high. Whitehurst V.S. at 13. The analysis performed by Mr. Whitehurst supports the nonsensical proposition that trackage rights over the light density east-of-the-Hudson

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20/ If Mr. Whitehurst's calculation of a system-wide interest rental were correct, the interest rental component of a trackage rights charge over the entire Conrail system would be $1.01 per car mile (Whitehurst R.V.S. at 15), whereas CSX and NS have granted each other trackage rights at a total charge of $0.29 per car mile, less than 1/3 the figure Mr. Whitehurst calculates.

line are vastly more valuable -- by a factor of four -- per car mile than trackage rights over the entire Conrail system. 21/ The best rebuttal to the analysis is the analysis itself, which cannot be squared with reality.

The east-of-the-Hudson line segment is a prototypical light density line, and CSX has no great plans to expand its use; the traffic increases, cost saving. and other merger benefits that justified the price that CSX paid for its part of Conrail are not targeted on this line. The result of any valid calculation of the interest rental component of the trackage rights charge must reflect that reality.

H. A Revised Calculation Of The Trackage Rights Charge, In Accordance With SSW Compensation, Correcting Errors Made By Both Whitehurst And Plaistow In Their Previous Calculations, Confirms The Reasonableness Of A Market-Based Per Car Mile Charge Of Not More Than $0.36

In his Reconsideration Reply Verified Statement, Mr. Plaistow proposes what might be called a "fusion" calculation of the trackage rights charge, incorporating some refinements proposed by Mr. Whitehurst as well as some corrections proposed by Mr. Plaistow. These refinements and corrections include:

21/ Under Mr. Whitehurst's calculations, the interest rental on the east-of-the-Hudson line is $4.46 per car mile (See Plaistow Reconsideration R.V.S. at 1 n. 2 and Ex. No. (JJP-7)), whereas the interest rental on the entire Conrail system is $1.01 per car mile (Whitehurst R.V.S. at 15).

- Use of modified mileage blocks to allocate revenues, as proposed by Mr. Whitehurst;
- Correction of Mr. Whitehurst's allocation calculations to conform to the STB's User Guide for the Waybill Sample;
- Use of the Costed Waybill Sample methodology to allocate costs, identified by Mr. Whitehurst as the preferable methodology;
- Correction of erroneous east-of-the-Hudson mileages;
- Correction of an erroneous expansion factor for 60 movements interchanged with NY&A.
- Correction of the "Fair Market Value" of Conrail to conform with SSW Compensation principles;
- Correction of the "Annuity of Benefits" to reflect the NS errata to the Statement of Benefits and also to change the interest rate to conform to SSW Compensation. 22/

Taking all of these refinements and corrections into account, 23/ the resulting trackage rights charge for the east-

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22/ These errors in Mr. Plaistow's prior calculation were called to CP's attention by counsel for CSX. CP's counsel acknowledged them and advised CSX's counsel that they would be corrected through an errata filed with this reply. See the correspondence between counsel included as Attachment A.

23/ Most of these corrections and refinements are directly responsive to the calculations presented by Mr. Whitehurst in support of CSX's petition for reconsideration, or are errata to correct details of Mr. Plaistow's own calculations. A few, in particular the correction of the fair value of Conrail, is the result of the analyses that Mr. Plaistow made in preparing his response to Mr. Whitehurst's verified statement. All of these

[Footnote continued]

of-the-Hudson line in accordance with SSW Compensation is $0.34 per car mile. This result is generally consistent with CP's original request that the trackage rights charge be set at $0.29 per car mile, based on the rate negotiated between CSX and NS, and is also in line with the $0.36 per car mile charge endorsed by CP in its petition for reconsideration.

As the evidence in this case shows, the SSW Compensation methodology can be used to yield widely differing results depending on the assumptions and data employed in it. CP believes that Mr. Plaistow has used the best available data and most reasonable assumptions in reaching his $0.34 per car mile figure -- certainly far more reasonable data and assumptions than those that led to CSX's $4.67 and $1.215 per car mile figures.

Nevertheless, because the division of Conrail between CSX and NS results in such a dramatic restructuring of the railroad industry in the Northeast, it is difficult to be certain that particular assumptions are reasonable by comparing them to real world experience. This reinforces the need to compare the results of the methodology to the trackage rights charges that are negotiated in the marketplace, as CP has proposed throughout

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[Footnote continued]

changes and refinements should be of assistance to the Board in reaching its decision as to the trackage rights charge for the east-of-the-Hudson line.

these proceedings. It also supports the need for a "true-up" procedure to be carried out as soon as practicable, so that results of actual operations can be substituted for the assumptions input to the SSW Compensation formula.

II. THE BOARD SHOULD REJECT CSX'S DEMAND FOR TRACKAGE RIGHTS PAYMENTS ON THE METRO-NORTH LINE

CSX claims that it has the "exclusive" right to operate freight trains on the Metro-North portion of the east-of-the-Hudson line and that it should therefore receive trackage rights compensation for CP's operations over that segment. The Board rejected that contention in Decision No. 109, because "CSX . . . cites no clear language from the Special Court decision or from the deed that requires or even supports" that claim. Decision No. 109, at 11. CSX now asks the Board to reconsider that ruling, but in the five pages of argument it devotes to that issue, CSX still cites no language from any authoritative instrument that supports its claim.

The New York Parties 24/ are responding to this portion of CSX's motion, and CP endorses the arguments and evidence submitted by them. 25/

24/ The New York City Economic Development Corporation and the State of New York, by and through its Department of Transportation, are referred to as the "New York Parties."

25/ CSX's posture in regard to the Metro-North trackage is materially different from its posture in regard to the line between Schenectady and Stuyvesant it has leased to Amtrak. The

[Footnote continued]

In addition, CP notes that CSX's intransigence on this issue provides an additional reason why the Board should exercise its power to preempt CSX's claimed exclusivity rights in the Metro-North line. CSX makes clear that it intends to pursue its claim in the Special Court. In the absence of preemption, CP's ability to operate the east-of-the-Hudson trackage rights would be in doubt until those proceedings were concluded (presumably after appeal to the D.C. Circuit). Preemption would eliminate that uncertainty.

[Footnote continued]

Metro-North trackage is owned by a third party and subject to a 60 year lease to Metro-North; CSX's only rights as to this trackage are those accorded to a trackage rights tenant. Metro-North, not CSX, will grant trackage rights to CP, and CP will pay Metro-North compensation for those rights; CSX will be granting CP nothing over this trackage, and CP will accordingly owe CSX nothing. See CSX-173 at 12-13; NYC-23/NYS-32, Bernard V.S. at 4-5. By contrast, the Schenectady-Stuyvesant line is owned by Conrail, which has leased the line to Amtrak for passenger use only, and has reserved to itself the exclusive right to provide freight service over the line. See CP-25, Gilmore V.S. at 4; CSX-169, Downing R.V.S. at 2-3. CSX, as Conrail's successor, will be granting CP trackage rights over this line, and CP will owe compensation to CSX for those rights. Amtrak, however, maintains the line and CSX is required to pay Amtrak with respect to any trains that CSX runs over it; for these purposes, CP will be operating as though it were CSX, so CP would pay Amtrak as a result of those operations on the same basis that CSX would do so, and these CP payments to Amtrak would be deducted from the compensation that CP owes to CSX. Alternatively, CP could make the full trackage rights payment to CSX, which would then pay Amtrak for CP's use of the line.

III. THE BOARD SHOULD DENY CSX'S REQUEST THAT THE BOARD TERMINATE THE CP-CSX SETTLEMENT AGREEMENT

Despite the Board's earlier ruling to the contrary (which CSX disparages as "cursory", CSX-173 at 4), CSX persists in arguing that the Board should override the October 20, 1997 settlement agreement between CP and CSX. 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 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 asks the Board to set aside the entire agreement, or at a minimum the haulage rights pertaining to east-of-the-Hudson traffic.

CP responded to CSX's arguments in its original reply submission. CP-25 at 22-27. CP incorporates those arguments here by reference, and adds the following points.

CSX makes the remarkable claim that Board action to void the settlement agreement voluntarily entered into between CP and CSX would actually promote the Board's policy of encouraging voluntary settlements. CSX-173 at 18. In substance, CSX accuses CP of breaching the settlement by accepting the benefits of an "improved deal" -- the east-of-the-Hudson trackage rights --

obtained "at the behest of parties other than the settling party." Id.

But the settlement agreement was perfectly clear as to CP's obligations: CP was to withdraw its responsive application and support the Conrail transaction without seeking any conditions. 26/ CP and CSX did not agree that CP would refuse to accept conditions granted by the Board "at the behest" of others, although CSX and CP both knew at that time that the New York Parties were asking the Board to grant east-of-the-Hudson rights to an independent carrier. CSX is asking the Board to impose an obligation on CP that CSX and CP did not agree to include in the parties' voluntary agreement.

CP has performed its obligations under the settlement agreement, and CSX has obtained the benefits it sought, approval of the Conrail transaction without CP opposition. CSX cannot be allowed now to deprive CP of the benefits of the settlement.

CSX also argues that the settlement agreement "may undercut the purpose of the relief being awarded to CP." CSX-173 at 18. This is ridiculous. The purpose of the east-of-the-

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26/ CP's obligations are defined as follows: "CPR agrees to support by October 21, 1997 the acquisition of Conrail by NS and CSXT. CPR will not seek conditions against CSXT as described in CPR's Description of Anticipated Responsive Application, dated August 22, 1997 and filed with the Surface Transportation Board in Finance Docket No. 33388." CSX-167, Ex. 3 at 2.

Hudson trackage rights is to provide shippers in the Bronx and Queens with competition to CSX. If CSX thought that the settlement agreement would undercut that purpose, it would doubtlessly welcome that result. CSX's argument is the rankest speculation, unsupported by any evidence. The New York Parties, who really are concerned about competition east of the Hudson, have expressed no desire that the settlement agreement be terminated.

Finally, as an ostensible "fall-back" position, CSX argues that at least the east-of-the-Hudson portion of the settlement agreement should be terminated, "as even CP has noted would be appropriate." CSX-173 at 19. It is quite true that CP was willing to "forego" the right to quote rates on certain traffic moving over the east-of-the-Hudson line if the trackage rights terms that CP requested were granted. CP-25 at 26-27. However, CP is unwilling to forego those negotiated rights in return for trackage rights if the terms imposed would make it economically unfeasible for CP operate the trackage rights. See Gilmore Reconsideration R.V.S. (appended).

Under the terms established by the Board in Decision No. 109, and under the even more onerous terms proposed by CSX, CP would not be able to move any traffic using the trackage rights. CP would therefore be forced to decline to accept the

rights. 27/ Under those circumstances, the east-of-the-Hudson haulage arrangement established under the settlement agreement would be the only economically viable means by which CP would be able to provide a modicum of competition in this market, and now CSX wants to foreclose even this. 28/ It is understandable why CSX would want to achieve that result, but not why the Board should wish to see its hopes for east-of-the Hudson competition frustrated completely.

27/ CSX does not identify any statutory authority under which the Board can set aside a voluntary agreement because one party concludes that it has become "inequitable." Presumably, the Board could condition its grant of trackage rights to CP on CP foregoing overlapping benefits of the settlement agreement. If the Board did that, and the trackage rights were granted under the terms set out in Decision No. 109 or as proposed by CSX, CP would be forced to decline to accept the trackage rights.

28/ As Applicants explained, the east-of-the-Hudson haulage rights CSX now seeks to set aside were intended to provide "[i]mproved rail access to the area east of the Hudson," and to "permit shippers in New York City or Long Island, in many circumstances, to solicit independent competitive bids from at least two railroads." CSX/NS-176 (Vol. 1 of 3) at HC-129 to HC-130. The Board itself observed just a few days ago that "the privately negotiated settlement agreement with CP . . . would have provided new rail competition into and out of New York City and Long Island"; the trackage rights condition was imposed, not because the settlement agreement did not confer public benefits, but because it did not go far enough. Decision No. 112, at 3 n.3.

CONCLUSION

For the reasons set forth above, CSX's petition for reconsideration should be denied.

Respectfully submitted,

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January 27, 1999

ATTACHMENT A

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January 15, 1999
via facsimile and by hand

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HOGAN & HARTSON L.L.P.
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Re: **STB Finance Docket No. 33388 (Sub-No. 69)**

Dear Friends:

Our outside consultants have reviewed Mr. Plaistow's work paper (submitted to us by your letter of January 14, 1999) supporting calculation of the annuity of merger benefits, which were shown in line 5 of revised Exhibit No. (JJP-2.2). We have two follow-up requests for work papers in order to connect the number there presented to its derivation.

First, we would like detail of the amounts shown in the "Benefits" column of Mr. Plaistow's work paper by year. Upon reviewing the CSX Summary of Benefits Statement and the NS Summary of Benefits Statement from the Application and combining what we understand to be the items Mr. Plaistow included, we do not reach Mr. Plaistow's totals. Our comparison is shown below:

Source Reference	*Year 1*	*Year 2*	*Year 3*	*Normal Year*
CSX Summary of Benefits*	179.5	317.6	426.3	435.8
NS Summary of Benefits**	158.0	423.0	549.9	552.6
CSX plus NS	337.5	740.6	976.2	987.4
Plaistow's Work Paper Benefits Amount	164.5	547.6	938.3	909.5

* CSX/NS-18, Appendix A, Summary of Benefits, CSX/Conrail, Annual Net Revenue Gain plus Annual Total Operating Benefits by year.

** CSX/NS-35 (Errata to Primary Application), Appendix B, NS Summary of Benefits exhibit, Annual Subtotal Net Operating Benefits (for Operating Revenue and Operating Expenses) by year.

Second, Mr. Plaistow shows an interest rate of 12.2 percent. Footnote 1 to Exhibit No. (JJP-2.2) states that the 1997 After-Tax Cost To Capital for the Railroad Industry as published by the STB in Ex Parte 558 was used. That rate is 11.8 percent. Please provide the linkage between this 11.8 percent and the 12.2 percent shown on Mr. Plaistow's work paper.

With kind regards.

Sincerely yours,

Dennis G. Lyons

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January 19, 1999

BY TELECOPIER (202) 942-5999 AND FIRST CLASS MAIL

Dennis G. Lyons, Esq.
Arnold & Porter
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Re: 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

Dear Dennis:

This is in response to your January 15, 1999 letter inquiring about Mr. Plaistow's workpaper showing his calculation of the annuity of benefits in Line 5 of Revised Exhibit No. (JJP-2.2), CP-28.

With respect to the amounts shown in the "Benefits" column, Mr. Plaistow advises me that the principal reason for the difference between his numbers and those in your letter is that he used the original benefits from the Application, CSX/NS-18, Appendix A, for both CSX and NS and did not include the changes made by the NS errata (CSX/NS-35). Please see the enclosed workpaper, which incorporates the NS errata changes. There is still a slight difference between Mr. Plaistow's figure for Year 3 CSX benefits ($429.3) and yours ($426.3), which results in a comparable difference in the CSX+NS total for that year ($979.246 *v.* $976.2), and there is also a slight difference between his figure for Normal Year NS benefits ($551.6) and yours ($552.6), which does not result in any difference in the CSX+NS total. It is possible that your figures include typographical errors.

With respect to the interest rate, Mr. Plaistow advises me that the 12.2% interest rate was used in error. The enclosed workpaper corrects the calculation using an interest rate of 11.84%.

Canadian Pacific will reflect these corrections in a errata which we will file with our reply to CSX's motion for reconsideration.

Please call me if there is any further information that you require.

Sincerely,

Eric Von Salzen

EVS/ md

Enclosure: As stated

cc: George W. Mayo, Jr., Esq.
Mr. Joseph J. Plaistow

Total Benefits

Benefit Component	Year One	Year Two	Year Three	Year Normal
CSX / Conrail				
Total	395.5	533.6	645.3	651.8
Shipper Logistics	166.0	166.0	166.0	166.0
Highway Maintenance	50.0	50.0	50.0	50.0
Adjusted Total	179.5	317.6	429.3	435.8
NS / Conrail				
Total	223.9	598.6	769.6	771.2
Shipper Logistics	27.6	73.7	92.1	92.1
Competitive Pricing	24.6	65.6	82.0	82.0
Highway Maintenance	13.7	36.4	45.5	45.5
Adjusted Total	158.0	423.0	549.9	551.6
Total CSX + NS	337.504	740.562	979.246	987.417

	Benefits Adjusted	Benefits As Reported	Annuity Adjusted	Annuity As Reported
1	337,504	164,452	883,466	783,242
2	740,562	547,600	883,466	783,242
3	979,246	938,267	883,466	783,242
4	987,417	909,453	883,466	783,242
5	987,417	909,453	883,466	783,242
6	987,417	909,453	883,466	783,242
7	987,417	909,453	883,466	783,242
8	987,417	909,453	883,466	783,242
9	987,417	909,453	883,466	783,242
10	987,417	909,453	883,466	783,242
11	987,417	909,453	883,466	783,242
12	987,417	909,453	883,466	783,242
13	987,417	909,453	883,466	783,242
14	987,417	909,453	883,466	783,242
15	987,417	909,453	883,466	783,242
16	987,417	909,453	883,466	783,242
17	987,417	909,453	883,466	783,242
18	987,417	909,453	883,466	783,242
19	987,417	909,453	883,466	783,242
20	987,417	909,453	883,466	783,242

Calculations Adjusted	Calculations As Reported	
6,665,743	5,777,801	NPV Benefits
6,665,743	5,777,801	NPV Annuity
11.84%	12.2%	AT COC
883,466	783,242	Annuity

RECONSIDERATION REPLY VERIFIED STATEMENT
OF
PAUL D. GILMORE

RECONSIDERATION REPLY VERIFIED STATEMENT OF PAUL D. GILMORE

My name is Paul D. Gilmore. I am Vice President Eastern Operations of the Canadian Pacific Railway Company ("CPR"). 1/ I submitted two verified statements in the opening phase of this proceeding, one in the reply phase, and one in the opening reconsideration phase. In this reconsideration reply verified statement, I address CSX's contention that the trackage rights charge for CP's use of CSX's east-of-the-Hudson line should be set at $1.215 per car mile, explain that CP would not be competitive for movement of any traffic if it had to pay CSX this charge, and conclude that a charge at this level would effectively nullify the Board's trackage rights grant to CP.

As explained in my reconsideration verified statement, CP cannot be competitive with CSX at the $0.71 charge established by the Board. At this charge, CSX could systematically underprice CP for boxcar traffic (indeed, any boxcar traffic that required supplemental transportation beyond pick-up or delivery

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1/ This statement is being submitted on behalf of CPR, Delaware and Hudson Railway Company, Inc., Soo Line Railroad Company, and St. Lawrence & Hudson Railway Company Limited (collectively, including CPR, referred to as "Canadian Pacific Parties" or "CP"). I continue to use in this statement the abbreviated terms, such as CSX and east-of-the-Hudson line, defined in my earlier verified statements.

to a customer rail siding could not be priced to even cover CP's costs), and short-haul intermodal traffic could not be priced low enough so as to attract any of this traffic.

In its support for a charge almost twice as high as the unworkable charge set by the Board, CSX is either attempting to cast the Board's figure as a mid-point compromise number, in hopes that it can thereby distract the Board from taking into account CP's case that CP cannot compete with CSX at $0.71 per car mile, or CSX really wants the higher charge imposed with the intent of absolutely assuring that not a single carload of traffic will ever move over the east-of-the-Hudson trackage rights. In either case, the result is the same: at the $0.71 per car mile charge, CP will not be able to compete with CSX, and at the $1.215 per car mile charge, CP will not be able to compete with CSX.

As CP understands it, the Board's purpose in imposing the east-of-the-Hudson trackage rights as a merger condition was to achieve the public benefits that, as a result of such imposition, would flow from strong rail competition between CSX and CP. CP is committed to playing its part in this regard, and needs only to have the trackage rights charge established at a level (and certain related matters clarified, as set forth in CP's reconsideration petition) that will allow it to be

competitive. But it is pointless for CP to embark upon the responsibilities of serving New York City customers via the trackage rights where, because the trackage right charge is set so high, CP could only attract traffic if it were willing to price its services at below costs.

The $1.215 trackage rights charge sought by CSX, like the $0.71 charge established by the Board, will leave CSX without competition on the east-of-the-Hudson line. CP will simply not be able to compete with CSX at either of these charge levels.

The prospect that its east-of-the-Hudson trackage rights will not be viable (as a consequence of the trackage rights charge imposed) underscores the importance of preserving the east-of-the-Hudson haulage rights established under the October 20, 1997 settlement agreement between CP and CSX. Although only a limited universe of traffic can be moved under these haulage rights, at least there is no question that CP can effectively compete with CSX for this traffic through use of the rights.

CP's earlier willingness to forego its east-of-the-Hudson haulage rights was predicated on the assumption that the trackage rights granted it would, at a minimum, position CP to be at least as strong a competitor for New York City traffic as the haulage rights allow it to be. Developments to date in this

proceeding are fundamentally at odds with this assumption. If the trackage rights charge is to be set so high that CP cannot make effective use of the east-of-the-Hudson trackage rights, then the east-of-the-Hudson haulage arrangement should remain in place.

VERIFICATION

I, Paul D. Gilmore, declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief. Further, I certify that I am qualified and authorized to file this verified statement. Executed on January 25, 1999.

Paul D. Gilmore

RECONSIDERATION REPLY VERIFIED STATEMENT
OF
JOSEPH J. PLAISTOW

Reconsideration Reply
Verified Statement
of
Joseph J. Plaistow

I. Introduction and Summary

My name is Joseph J. Plaistow. 1/ The purpose of this statement is to reply to the Verified Statement of William W. Whitehurst testifying on behalf of CSX in their Petition for Reconsideration. Witness Whitehurst has performed calculations purporting to show the "correct" way to calculate a trackage rights fee for the east-of-the-Hudson line using the STB's SSW Compensation method. His calculations result in a trackage rights fee of $4.67 per car mile (see Exhibit No. (JJP-7)) 2/. I will show that Mr. Whitehurst made a number of errors that caused him to overstate the trackage rights charge. A correct application of SSW Compensation principles yields a trackage rights fee much closer to the $0.29 per car mile charge proposed by Canadian Pacific.

Witness Whitehurst doesn't recommend that the STB adopt the $4.67 per car-mile fee that results from his calculations. This is understandable. Presumably Mr. Whitehurst recognizes that this charge is excessive in light of such facts as:

- Revenues over the trackage rights line segment average only $2.98 per car-mile (see Exhibit No. (JJP-8)),
- Line segment earnings exclusive of the trackage rights fee average only $0.23 per car-mile (see Exhibit No. (JJP-8)), and
- Therefore, a trackage rights fee of $4.67 per car mile would prevent the STB from reaching its objective of restoring "...some of the rail competition that was lost when Conrail was created." (6th page of Decision No. 109).

Therefore, after discussing at length supposed errors in my (and the STB's) calculations of a trackage rights fee, Witness Whitehurst abandons the SSW Compensation approach of line-specific calculation of a trackage rights fee, because of "the substantial change in resulting interest rental rate produced by" his calculations (i.e., an increase to $4.67 per car-mile), in favor of a "system average calculation" that yields $1.215 per car-mile. 3/ I will

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1/ A statement of my qualifications is included in Section I of my December 10, 1998 Reply Verified Statement in this proceeding. I am a Vice President and principal of L.E. Peabody & Associates, Inc., an economic consulting firm in Alexandria, Virginia.

2/ Mr. Whitehurst does not disclose this result in his verified statement, but it is easily constructed from the following elements in his statement and exhibits and STB Decision No. 109: the STB's earnings multiplier of 24.54 (page 10 of Decision No. 109), $4,457,835 line segment earnings from WWW-15, the 17.5% pre-tax cost of capital, and 4,287,995 car-miles from WWW-15. Applying Mr. Whitehurst's methodology and these elements produces an interest rental component of $4.46 per car-mile. Adding this to Mr. Whitehurst's $0.205 per car-mile "below-the-wheel" costs (see Whitehurst V.S., page 4) produces a $4.67 per car-mile trackage rights charge. These calculations are laid out in Exhibit No. (JJP-7).

3/ Notice pages 12 and 13 of Witness Whitehurst's Verified Statement. As soon as Mr. Whitehurst completes all his "corrections" to my SSW Compensation calculations, he launches into his alternative "system average approach" without ever mentioning the results of his "correct" analysis: that is, a $4.67 trackage rights fee.

show that it is not necessary to throw out the line segment specific calculation in favor of a system average determination if the line segment determination is calculated correctly.

CSX says that the lower $1.215 fee "...would be acceptable to CSX...". 4/ This is hardly surprising, given that $1.215 per car-mile is more than four times the highest trackage rights fee charged by CSX and recorded in the CSXT AGREEMENTS portion of Exhibit No. (JJP-3) of my December 10, 1998 Reply Verified Statement, and more than three and a half times the highest fee charged by any railroad and compiled in my Exhibit No. (JJP-3).

Using SSW Compensation principles, I have refined my calculation of certain aspects of the trackage rights fee calculation. Where appropriate, I have incorporated portions of Mr. Whitehurst's analysis, and I have corrected some errors that I have recently discovered in my previous calculations. The result of these calculations is a trackage rights fee of $0.34 per car mile. I conclude that this figure, rather than the $0.36 per car mile trackage rights fee I proposed in my January 7, 1999 Reconsideration Verified Statement, represents the result of the proper application of the SSW Compensation methodology to the circumstances of this case. The $0.34 per car mile fee is appropriate for application to bridge, not full-service, trackage rights over the CSX portion of the east-of-the-Hudson line, using only Route 1 through the Albany area, in accordance with the Board's Decision No. 109.

The corrections I have made to Witness Whitehurst's calculations include the following:

- Correcting the calculation of "below-the-wheel" maintenance and operating costs at the full cost level;
- Removing traffic to which CP does not gain access according to Decision No. 109's trackage rights grant;
- Correcting the trackage rights miles for each movement;
- Removing earnings over the Stuyvesant-Selkirk-Schenectady line segment since the STB's grant did not include that line segment;
- Correcting Witness Whitehurst's treatment of switching costs;
- Correcting Witness Whitehurst's errors in his application of the mileage block pro-rate of revenues;
- Correcting Witness Whitehurst's determination of line segment costs by replacing his wrongly calculated mileage block pro-rate of total movement costs with costs determined specifically for the trackage rights line segment;
- Correcting Witness Whitehurst's determination of "Fair Market Value of Conrail";
- Correcting the determination of "Total Conrail System Earnings" by adding back CSX's "Statement of Merger Benefits" after removing those benefits to be realized by the public, not CSX;
- Correcting the determination of "Total Conrail System Earnings" by adding back NS's "Statement of Merger Benefits" after removing those benefits to be realized by the public, not NS; and
- Correcting the "Annuity of Merger Benefits" calculation to reflect NS's errata to the "Statement of Merger Benefits" and to correct the cost of capital.

I have structured these corrections in the order in which they are presented in Witness Whitehurst's January 7, 1999 Verified Statement. After the corrections to Witness Whitehurst are covered, I document my

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4/ CSX Argument, page 6, CSX-173 - Petition for Reconsideration, filed January 7, 1999.

calculation of the interest rental charge and the calculation of the SSW Compensation based line-specific trackage rights fees.

II. Responses To Witness Whitehurst's Comments On My Trackage Rights Calculations

A. Full Costs: Witness Whitehurst's "Flow-Through" Method of Allocating Constant Costs is Contrary to the STB Use of the "Constant Cost Markup Ratio" SSW Compensation and Would Defeat the Board's Competitive Objectives

At the ninth page of Decision No. 109, the STB states,

> "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."

Mr. Whitehurst takes issue with the STB's decision on this issue, and at page 3 of his verified statement argues that the "flow-through" method of allocating costs is superior to the "constant cost markup ratio" method, which I used and which the Board approved. Mr. Whitehurst ignores the fact that in SSW Compensation II (4 I.C.C. 2d, at pages 701 and 702,), the STB's predecessor the ICC accepted fully allocated costs developed using the "constant cost markup ratio", not Mr. Whitehurst's "flow-through" procedure. 5/

Any method of allocating full costs is arbitrary and in violation of the STB's and the Railroad Accounting Principles Board's (RAPB's) Causality Principle which holds that:

> "Costs shall only be attributed to cost objectives when a causal relationship exists (the cost would not have been incurred but for the requirements of the cost objective)....The Causality Principle only includes costs which vary with the decision activity, and therefore it discourages apportionment or allocation of joint costs among activities where the relationship between the incurrence of cost and the joint performance of activities is inseparable among the activities."

Railroad Accounting Principles Final Report, September 1, 1987, pages 9 and 10. The Causality Principle makes it clear that there is no economic basis for an arbitrary allocation of constant costs.

The STB has long advocated differential pricing which, in effect, allocates constant costs to various traffic movements in proportion to the shipper's elasticity of demand for the movement of his commodity. Mr. Whitehurst's "flow-through" method totally ignores the elasticity of demand. While there is no direct indicator of demand elasticity in this proceeding's record, the fact that the "east-of-the-Hudson" line is so lightly used suggests low demand for service. Consequently, differential pricing would suggest that CSX and CP may not be able to cover system average constant costs over this line segment. This fact along with the STB's desire to place the trackage rights tenant in the same competitive position as the owning carrier (8th page of Decision No. 109), suggests that since CSX will not be able to cover a large

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5/ At page 702, the ICC states, "The relationship of MP's 1979 constant costs to the variable costs for the post-consolidation traffic base (1979 base traffic plus diversion traffic) results in a percentage of 22.30 which was used to increase variable costs to the fully allocated level in replacement of MP's ton and ton-mile methodology." (Note: SP was applying the "constant cost markup ratio" here.) The ICC goes on to state on page 702, "We shall adopt SP's restatement of constant costs as the better evidence of record on that element."

portion of constant costs, CP's trackage rights fees should not be required to absorb any larger share. Doing so would put CP at a decided disadvantage.

As it stands, the STB's determination of the below-the-wheel portion of the trackage rights charge already puts CP at a competitive disadvantage compared to CSX. During competitive rate negotiations, CSX can always undercut CP, by pricing its services down to CSX's variable costs, but CP must price its services at the level of CSX full costs or higher (because CP must pay CSX "below-the-wheel" costs calculated at the level of CSX's full, not variable, costs). To put CP truly in the same competitive position as CSX, the constant cost portion of the $0.13 (that is, $0.04) should be removed from the "below-the-wheel" cost estimate to produce a "below-the-wheel" cost of $0.09 per car-mile. However, this would be a substantial departure from SSW Compensation.

Short of such a departure, the "below-the-wheel" costs accepted by the STB in Decision No. 109 most appropriately meet the goal of placing tenant and landlord on an equal competitive footing. Using the "flow through option" advocated by Mr. Whitehurst would interfere with that goal as well as depart from established SSW Compensation principles.

B. Witness Whitehurst Makes Several Errors in Calculating Line Segment Earnings

At page 4 of his verified statement, Witness Whitehurst says that the STB erred in accepting CP's determination of line segment earnings. Mr. Whitehurst claims I made several categories of errors in developing those earnings, and he undertakes to correct them. In fact, it is Mr. Whitehurst who is mistaken, not the STB or me. I will address each of Mr. Whitehurst's criticisms one-at-a-time.

i. Movements and Mileages Which Should Not be Included in Line Segment Earnings

At page 5 of his statement, Witness Whitehurst claims that my original calculation of line segment earnings should be corrected to exclude two categories of traffic movements:

- Movements having zero miles over the trackage rights segment, 6/ and
- Movements from or to Selkirk Yard.

Mr. Whitehurst's comments are directed at my December 10, 1998 Reply Verified Statement, which dealt with CP's request for full-service trackage rights with three routes through the Albany area. In Decision No. 109, the STB granted CP bridge trackage rights, not the full-service rights I was discussing on December 10. That Decision also granted trackage rights over only Route 1 through Rennsalaer and Albany and not over Routes 2 and 3 through Selkirk as CP had requested. Therefore, to some extent Witness Whitehurst is rebutting portions of my statement that became irrelevant after Decision No. 109 was issued on December 18, 1998.

6/ As Mr. Whitehurst concedes, I did not include these zero miles movements in my calculation of line segment earnings. Whitehurst V.S. at 5, n. 2. These movements were included only because the indicated origin or destination of the movement, as shown in the Waybill Sample, indicated that they might have involved the trackage rights line. Deleting this data does not affect the earnings calculation, and Mr. Whitehurst does so only to "clean up the totals". Id. at 8. I have no objection to this adjustment.

After the STB established the scope of CP's trackage rights, I adjusted my line segment earning calculations accordingly in my Reconsideration Verified Statement filed January 7, 1999. In Mr. Whitehurst's verified statement, filed on the same date, he claimed that he was making the necessary adjustments to line segment earnings to reflect the scope of the trackage rights granted by the STB, but he overlooked several necessary adjustments. Failure to reflect the full impact of Decision No. 109 contributed to producing Mr. Whitehurst's excessive $4.67 per car-mile trackage rights fee.

In addition to the zero mile moves and the Selkirk moves, Mr. Whitehurst should have eliminated any other traffic not originated or terminated in the Bronx or in Queens, because CP would not have access to such traffic through its overhead trackage rights. I did this in my Reconsideration Verified Statement filed January 7, 1999 (see my Exhibit No. (JJP-9)). However, of the 584 movements Mr. Whitehurst included in his calculation of line segment earnings, Ex. WWW-12, 352 of these are movements that do not originate or terminate in the Bronx or Queens, to which CP is denied access under the STB's Decision No. 109. These movements should all have been excluded. 7/

Mr. Whitehurst should also have adjusted the mileages of trackage rights movements to reflect the fact that the STB denied CP access to Routes 2 and 3 through Selkirk and limited CP to Route 1 through Rennsalaer. In my original data, mileage over Routes 2 and 3 was treated as trackage rights mileage in accordance with the scope of the rights that CP was requesting. With those routes eliminated, mileage over Routes 2 and 3 through Selkirk should have been excluded from the calculation, as I did in my Reconsideration Verified Statement. This is an important adjustment, because the bulk of the traffic on the east-of-the-Hudson line travels through Selkirk and never sees Route 1 north of Stuyvesant. But Mr. Whitehurst included for all 584 moves the mileage through Selkirk as though it was mileage through Rennsalaer on Route 1, which it was not. 8/ This error substantially overstated the mileage moved by the traffic on the trackage rights line.

By including in his line segment earnings calculations traffic and mileage that CP cannot serve under the trackage rights granted by the STB, Mr. Whitehurst inflates the value of the east-of-the-Hudson line and the resulting trackage rights fee.

ii Corrections to Witness Whitehurst's Treatment of Switching Costs

Columns (j) and (o) of Exhibit No. (JJP-2.4) in both my December 10, 1998 Reply Verified Statement and my January 7, 1999 Reconsideration Verified Statements treat switching costs specifically. I explained that to better approximate the costs attributable to traffic on the east-of-the-Hudson line, I replaced the system average URCS

7/ I eliminated three additional movements because of Costed Waybill Sample data problems.

8/ In footnote 3, page 5 of his January 7, 1999 Verified Statement, Witness Whitehurst acknowledges that the he is aware that the trackage rights do not include Selkirk. Footnote 3 states, in part, "The STB only authorized CP to use Route 1, as proposed by CP in CP-24, Exhibit 2; and further noted that this route does not involve Conrail's Selkirk Yard." Nevertheless, he failed to make the necessary adjustment to the trackage rights mileages.

cost with the STB-determined $250.00 per car switching charge, which better reflects the cost of switching in this area. See page 10 of my Reply Verified Statement.

At page 6 of his Verified Statement, Witness Whitehurst calls this adjustment nonsense. Witness Whitehurst advocates basing the earnings of the east-of-the-Hudson line on the URCS system average cost of $85.40 per car, even though the STB has determined that CSX should collect $250.00 per car from CP based on switch costs. 9/ This makes no sense. As CSX has stated, switching costs in the Bronx and Queens are significantly higher than system average. 10/ The STB has concluded that the best estimate available of switching costs in the relevant area is $250.00. If CSX disagrees, it should be asking for reconsideration of the $250.00 per car switching fee as well as of line segment costs.

Consistency is more important in this instance than the precise number chosen. Because CP was satisfied to pay a switching charge of $250.00 per car, I chose to use $250.00 per car as the switching cost. If the $85.40 system average switch cost were a better estimate of switching cost, then Mr. Whitehurst would be right to include only $85.40 in the line segment earnings calculation, and CSX should charge CP $85.40 per car switched. For present purposes, I will use an estimate of switching costs that lies between $85.40 and $250.00. It seems clear that the switching costs in the Bronx and Queens are higher than system average costs, so based on judgment I have estimated a switching cost (both terminal and interchange) 50% higher than the system average. After actual switching costs have been determined through the cost study contemplated by Decision No. 109, the trackage rights charge, as well as the switching fee, should be recalculated based on the actual cost.

At the bottom of page 7, Witness Whitehurst further criticizes my treatment of switching costs by saying that I should not have deducted URCS system average switching costs before allocating earnings to the trackage rights segment. He claims that the effect of my calculation is to subtract $5 switching per car and to add $250 switching per car for a net increase of $245 per car. This is incorrect.

In column (j) I calculated the URCS system average switching costs incurred on the trackage rights line segment and, therefore, 100% chargeable to the line segment. All other costs were placed in column (k). (Note: Column (k) was calculated after also deleting ROI). These costs were subtracted from revenue to produce adjusted earnings in column (l). Adjusted earnings were pro-rated to the line segment, and those adjusted earnings totally

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9/ At the tenth page of Decision No. 109, the STB states, "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." At the eleventh page, the STB states that it will allow either party "...to invoke the right proposed by CP for a 6-month special switching study to determine a more precise switching cost. ... Moreover, at the end of 5 years, the parties must renegotiate the fee to reflect costs as they exist at that time...".

10/ At page 11, CSX Argument, CSX states, "In particular, for example, in determining the costs for providing switching in the Bronx and Queens – notoriously an area of high costs, where extensive switching activities take place – only actual operating costs relating to the area in question should be used, not systemwide costs."

exclude trackage rights line segment switching costs. I added back 100% of the $250.00 switching charge because that switching charge is 100% chargeable to the trackage rights line segment.

Mr. Whitehurst assumes that the $85.40 URCS switching charge should have been pro-rated over the entire route of movement and that $5 is the trackage rights line segment's pro-rata share ($85.40*0.06 = $5). But Mr. Whitehurst is wrong. The $85.40 switching cost occurred on the trackage rights line segment and none of it should be spread to other portions of the movement. My calculation reflected trackage rights line segment specific switch costs and removed URCS system average switch costs ($250.00 switch charge added less $85.40 Conrail URCS switching cost deleted) for a net addition of $164.60, not the $245 of which Witness Whitehurst accuses me.

iii. Corrections to Witness Whitehurst's Line Segment Revenue and Costs

a) Allocation Procedure

I pro-rated revenues and costs to the "east-of-the-Hudson" line segment based on the proportion of line segment miles versus total miles between the origin and destination. At page 11, Witness Whitehurst asserts that my mileage pro-rate procedure "has understated revenues and hence earnings attributable to the trackage rights line segment". Mr. Whitehurst offers no proof of such understatement, only the observation that "[t]ypically, more costs per mile are incurred by a railroad in originating and terminating a shipment than in line haul movement." Whitehurst V.S. at 9.

Although Witness Whitehurst's observation about costs may be true, it is irrelevant. My mileage pro-rate procedure was applied to both costs and revenues. If a straight mileage pro-rate understates the costs as well as the revenues of originating and terminating movements, there is no reason to think -- and Mr. Whitehurst offers none -- that my procedure would produce any less accurate a measure of line segment earnings than the procedure that Mr. Whitehurst proposes. 11/

In my original verified statement, I did not use a mileage block allocation approach because the mileages of movements on the trackage rights lines were often so short. Witness Whitehurst's example on pp. 10-11 of his statement assumes that the originating carrier handles the move for 100 miles. He then adds one 100-mile mileage block to the originating carrier, giving it two 100-mile blocks or 2/10 of total revenues and costs. However, the movements over the trackage rights segment for which we are trying to determine revenues, costs, and earnings are never as long as 100 miles. In my December 10, 1998 Reply Verified Statement, trackage rights line segment miles varied between 7 and 78 miles long. For the 7-mile move, the STB mileage block methodology that Mr. Whitehurst claims to follow 12/ would treat that movement as if it were actually 200 miles (that is, one mileage block for the 7-

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11/ Mr. Whitehurst offers arguments why a mileage block methodology better reflects the costs associated with originating and terminating traffic. He does not, however, offer any argument why such a procedure more accurately reflects revenues earned by originating and terminating carriers. In fact, it seems likely that the mileage block methodology overstates actual revenue attributable to the line segment.

12/ I show later that Mr. Whitehurst did not follow the STB's procedure.

mile distance and one mileage block for a traffic origination) If total revenues were $2,000 per car, the origin carrier would be credited with $400 per car whether it had handled the car 7 miles or 100 miles. I concluded that while the STB's mileage block pro-rate procedure might be appropriate for some applications, the "east-of-the-Hudson" trackage rights fee determination was not one of them.

However, now that Decision No. 109 has limited the trackage rights to overhead movements north of New York, all the very short trackage rights movements were eliminated, which removes my primary objection to the procedure for this application. To eliminate what I regard as an unimportant disagreement with Witness Whitehurst, 13/ I will now allocate revenues to the line segment using his mileage block pro-ration.

Mr. Whitehurst identified the STB's costing procedure for the Costed Waybill Sample as the most accurate way to allocate costs, but he did not use that procedure because he "lack[ed] necessary data to apply" it. Whitehurst V.S. at 11-12. Instead, he allocated costs using the same mileage block procedure "as a surrogate" for the STB method. There is no need for a surrogate, because the data needed to apply the STB's procedure is available in the Waybill Sample. I will correct Witness Whitehurst's cost allocation approximations with direct cost determinations for every one of the traffic movements to which CP gains access. In determining costs, I have used costing procedures identical to those used by the STB in developing the Costed Waybill Sample.

b) Corrections to the Traffic Database

In the process of correcting Witness Whitehurst's line segment earnings calculations, I had to go back to the Costed Waybill Sample to select the additional parameters needed to carry out the detailed costing of each movement. The additional parameters I needed were car type, car ownership, spot-to-pull ratio, empty return ratio, and the make-whole adjustment. During this process I realized that my "east-of-the-Hudson" line segment mileages must be revised to reflect different mileages in the New York metropolitan area brought about by Decision No. 109's ruling regarding permissible access by CP to the area. (I now assume that CP will access all traffic at Oak Point Yard or in interchange from the NY&A at Fresh Pond Junction.) I also discovered that substantial mileage discrepancies existed between PCRail Version 4.0 and PCRail Version 5.0, 14/ so I had to revise my mileages north of Poughkeepsie. In my judgment, the mileage discrepancies between the two versions of the software were so large that I dropped PCRail as a source entirely and substituted mileages taken from Conrail's timetables. My exhibits now rely entirely on mileages taken either from the Costed Waybill Sample or from Conrail timetables.

13/ As discussed above, there is no reason to think that his methodology and mine, if each is properly applied to the same data, would yield significantly different earnings allocations for the trackage rights lines (although I do think that his methodology would tend to overstate revenues compared to costs). Mr. Whitehurst's line segment earnings are so inflated primarily because of his other errors that I discuss in this statement, not his use of a mileage block methodology.

14/ For example, for the distance between Stuyvesant and Schenectady via Selkirk, PCRail Version 4.0 says 37.5 miles, while PCRail Version 5.0 says 36.1 miles.

In re-accessing the Costed Waybill Sample database, I also discovered that for 60 movements interchanged with the NY&A I had used the wrong waybill sample expansion factor for carloads, tons, and revenue. My carloads, tons and revenues for those 60 movements now reflect the correct expansion factor. (This error had been masked in earlier calculations because of the much larger number of movements involved and because the resulting errors offset each other.)

c) Corrections to Witness Whitehurst's Line Segment ***Revenues***

The formula Witness Whitehurst used to calculate revenues is as follows:

"East-of-the-Hudson" Revenues = R*(X+100)/(N+200))

Where X = trackage rights miles,

N = total movement miles, and

R = total movement revenues

Witness Whitehurst purported to pro-rate revenues exactly as prescribed in the User Guide For The 1995 Surface Transportation Board Waybill Sample, a portion of which he reproduced and included in his Verified Statement at Exhibit WWW-14, but he failed to follow the STB prescribed calculations properly. Witness Whitehurst did not know that the STB and ALK Associates breaks this calculation into parts, treating each mileage block separately and rounding up to the next whole mileage block as each mileage block is considered. To illustrate: for the 53-mile trackage rights line segment movement that each CSX train travels, Mr. Whitehurst treats it as 53 miles, but the STB uses the following formula:

Number of Mileage Blocks = @ROUND(+X/100+0.5,0)

= 1 mileage block when X = 53.

Witness Whitehurst's formula for the same 53 miles produces 0.53, not 1. Both the STB and Mr. Whitehurst add one mileage block for originating the traffic. The STB's answer = 2 mileage blocks. Mr. Whitehurst's answer = 1.53 mileage blocks. Witness Whitehurst compounded this error by making the same mistake in calculating total movement mileage blocks and in calculating his approximation of variable costs.

d) Corrections to Witness Whitehurst's Line Segment ***Costs***

The formula Witness Whitehurst used to calculate costs is as follows:

"East-of-the-Hudson" Costs = V*(X+100)/(N+200))

Where X = trackage rights miles,

N = total movement miles, and

V = total movement variable costs

Witness Whitehurst made the same mileage block mistakes in calculating costs that he made when he calculated revenues. More importantly though, he should have calculated costs exactly as the STB would have for the line segment. That is what I have done in my Restated Exhibit No. (JJP-2.4). Mr. Whitehurst should not have

resorted to mileage block pro-rations. Witness Whitehurst stated that he used the mileage block pro-rate because, "Mr. Plaistow's workpapers provide the necessary data for the revenue adjustment but not the necessary data for the cost adjustment. (Mr. Whitehurst's Verified Statement, page 12)" Mr. Whitehurst should have gone back to the Costed Waybill Sample itself, just as I had to do.

iv. Corrections to the Determination of "Fair Market Value of Conrail"

In my December 10, 1999 Reply Verified Statement in this proceeding I used the figure for the fair value of Conrail that Witness Whitehurst had developed during an earlier phase of the Conrail proceeding, $16.243 billion. In the course of preparing this response to Mr. Whitehurst's January 7, 1999 comments, I have come to realize that this valuation does not fit the requirements of a fair value determination for purposes of an SSW Compensation evaluation of trackage rights fees.

In SSW Compensation I, page 787 (1 I.C.C. 2d, p. 787) the ICC states, "The purchase price for the company's assets, on the other hand, would be the stock purchase price (equity) plus all outstanding MPC debt on the date the company's stock was purchased." 15/ The corporate value for purposes of determining the earnings multiplier then is the amount of dollars paid by CSX and NS for Conrail's common stock plus the market value of Conrail's outstanding debt at the time of the merger. That amount is shown in Exhibit No. (JJP-10) to be $12.076 billion. For SSW Compensation purposes, that is the value that the market placed on Conrail at the time of the merger.

Even though Witness Whitehurst called his $16.243 billion a "fair value determination", it is not the same "fair value" that the STB seeks for SSW Compensation calculation purposes. The $16.243 billion is the value that Price Waterhouse, not the market, placed on Conrail's road property and equipment assets, not the acquired stock and long term debt. The $16.243 billion value includes assets funded by Deferred Income Taxes, which should not be included in value for SSW Compensation purposes.

> "The RAPB concluded that the funds provided by deferred taxes have zero economic cost. The portion of the railroad's assets funded by deferred tax credits are provided by the government, not debt holders or investors. Since the government does not charge interest on the deferred tax "loan," the railroads incur no cost of capital associated for that portion of the investment base funded by deferred tax credits."

Railroad Accounting Principles Board Final Report, September 1, 1987, page 43. Likewise, the STB does not include deferred tax credits in calculating the cost of capital since it has a zero cost and since the STB states, "The deferred taxes should, therefore, be deducted from the asset base." (See RAPB, p. 43) In URCS applications, deferred taxes are removed from the investment base for the purposes of making cost calculations.

15/ The ICC refined this valuation approach in the later SSW Compensation cases, but these refinements do not affect the analysis of this issue for present purposes.

I was wrong to think that Mr. Whitehurst's figure was appropriate to use for my purposes. In Restated Exhibit No. (JJP-2.1), I now reflect Conrail fair value as defined in SSW Compensation.

v. Corrections to the Determination of "Total Conrail System Earnings" by Adding Back CSX's and NS's "Statement of Merger Benefits" After Removing Those Benefits to be Realized by the Public

In my initial statement in this proceeding (CP-25), I explained why it is necessary in this case to take account of the merger benefits of the Conrail transaction in calculating the interest rental component of the trackage rights fee for the east-of-the-Hudson line. However, in its Decision No. 109, the STB concluded that my calculations were incorrect because 1) I had not excluded public benefits, 2) I had not taken account of the effect of realizing increasing cash flows in the early years and normal year merger benefits later, and 3) I did not make adjustments for merger benefits to be realized by the "east-of-the-Hudson" line segment.

In my January 7, 1999 reconsideration filing (CP-28), I addressed these criticisms and presented an "Annuity of Benefits" to be used in the interest rental calculation. However, in responding to a request from CSX for informal discovery with respect to my reconsideration statement, I discovered that NS's Statement of Benefits, as filed with the merger application itself, which I had used in the annuity calculation, had been modified by an "Errata to Primary Application", CSX/NS-35,. I also discovered that I had inadvertently used an incorrect interest rate in calculating the annuity.

These errors are corrected in Restated Exhibit No. (JJP-2.2). I have also refined the annuity calculation to reflect more accurately the effect of merger benefits on the capitalized earnings determination. 16/ In Restated Exhibit No. (JJP-2.2), on page 1 of 1 at line 9, I reflect an annuity equal to CSX and NS merger benefits which form an increasing stream of dollars realized over a 20-year period.

The "Annuity of Merger Benefits" is calculated in Exhibit No. (JJP-2.2.1). I deducted from overall merger benefits, those benefits to be realized by the public, not the railroads. The categories I removed were "Shipper Logistics", "Competitive Pricing", and "Highway Maintenance." Exhibit No. (JJP-2.2.1) reports the 20-year stream of cash flow benefits. I discounted those dollars at the 1997 pre-tax cost of capital rate of 17.5% corrected to remove the effect of inflation 17/. This inflation correction was made necessary because all the cash flows projected are in constant 1997 dollars.

Restated Exhibit No. (JJP-2.4) now reflects merger benefits in the line segment earnings determination. These adjustments will be described in the next section III.

16/ My restated calculations exclude the "One Time" category of benefit cash flows, because they are similar to extraordinary charges and should not be included in normalized annuity calculations.

17/ In my January 7, 1999 Reconsideration Verified Statement, I used the after tax cost of capital to develop the annuity. Since that time, I realized that in developing an annuity equivalent to an uneven cash flow stream, an analyst would have to consider the tax impacts on these cash flows. I also realized that the inflation adjustment refinement was also required.

III. Calculation of the Earnings Multiplier

The Earnings Multiplier calculated on Restated Exhibit No. (JJP-2.3) is the quotient of dividing the Fair Market Value of Rail Property from Restated Exhibit No. (JJP-2.1) by Conrail Earnings from Restated Exhibit No. (JJP-2.2). Conrail Earnings are discussed in the immediately preceding section; The determination of the "Fair Market Value of Conrail" is discussed in Section II.B.iv. The following discussion covers the determination of Fair Market Value of Rail Property from Restated Exhibit No. (JJP-2.1).

SSW Compensation III, 5 I.C.C.2d at page 529, addressed in detail the separation of value between road and equipment. Relying on the RAPB's "entity principle", the earnings multiplier was to be limited to the railroad, not the holding company, and to road property, not both road and equipment. Section B of Restated Exhibit No. (JJP-2.1) addresses the separation between the railroad and the parent company, while Section C of Restated Exhibit No. (JJP-2.1) addresses the separation between road and equipment.

In SSW Compensation III, 5 I.C.C.2d at page 532, the I.C.C. agreed with the RAPB findings that the relative weights of road, equipment, and other property should be determined using their current fair market values. In the instant proceeding, there is not adequate current market value information to make that determination, so the best substitute must be found. In Decision No. 109, tenth page, the STB calculated the fair market value of road property on the basis of the Price Waterhouse allocation of road and equipment property. My Restated Exhibit No. (JJP-2.1) doesn't use the Price Waterhouse splits, however, because Price Waterhouse valued road on replacement value and equipment on market value, which overstates the value of road in comparison with equipment. To avoid this "apples-and-oranges" comparison, my Restated Exhibit No. (JJP-2.1) uses the relationship between the book values of road and equipment properties as a better measure of the relative value of each. Neither Price Waterhouse values nor book values provide the market value comparison required by SSW Compensation III and the RAPB, but I believe that my Restated Exhibit No. (JJP-2.1) provides the most appropriate measure of relative value.

IV. Calculation of Line Segment Earnings

My line segment earnings reported in Restated Exhibit No. (JJP-2.4) corrects Witness Whitehurst's errors and recalculates the "east-of-the-Hudson" line segment earnings. The errors I corrected include:

- Reducing line segment earnings by removing 352 traffic movements.
- Reducing line segment earnings by correcting the route of movement of all the CSX traffic.
- Correcting Mr. Whitehurst's errors in his application of the STB's mileage block pro-rate of revenues.
- Correcting Mr. Whitehurst's line segment cost calculations by determining the variable cost of each traffic movement directly rather than using a mileage pro-rate of STB determined costs.

In my line segment earnings calculations, I have incorporated switching costs 50% higher than the system average, all CSX movements of 53 miles over the trackage rights line segment in way trains, and all CP movements of 79 miles in through trains. I have assumed that CP captures every third movement.

In Decision No. 109, the STB stated that I should have reflected merger benefits in my calculation of line segment earnings (see ninth page of decision). In my January 7, 1999 Reconsideration Verified Statement and in this Reconsideration Reply Verified Statement, I reflected CSX's projected traffic increases over this line segment from 12 million gross tons per year pre-acquisition to 13 million post-acquisition (see page 469 of CSX/NS-20, CR Traffic Densities – Estimated Changes in Millions of Gross Tons for Poughkeepsie to Stuyvesant).

My Restated Exhibit No. (JJP-2.4) now captures all these revisions including costing each traffic movement using Costed Waybill Sample procedures. Line segment earnings now total $340,420 in 1995 dollars or $355,606 in 1997 dollars. Line segment car-miles now total 1,567,112. Earnings per car-mile are $0.23.

V. Calculation of the Interest Rental Fee and the "East-of-the-Hudson" Trackage Rights Charge

The Earnings Multiplier reported in Restated Exhibit No. (JJP-2.3) is 5.33. Combining this with the line segment earnings of $355,606 just discussed, produces an "Adjusted Value of Trackage Rights Segment" of 1,895,381 as reported in Restated Exhibit No. (JJP-2.5). At a pre-tax cost of capital of 17.5% the "Annual Rental for Trackage Rights Line Segment" is now $331,692. (See Restated Exhibit No. (JJP-2.6).) Dividing that amount by the 1,567,112 line segment car-miles produces an interest rental charge of $0.21 per car-mile. Combining that with the $0.13 "below-the-wheel" cost accepted by the STB in Decision No. 109 (see ninth page of decision) produces an SSW Compensation method trackage rights fee of $0.34 per car-mile.

VI. Evidence from the SSW Compensation Calculations Should be Supplemented with Evidence Developed Using Other Independent Procedures and from the Marketplace Generally

A. CSX and NS Recently Negotiated Trackage Rights Fees to Apply to Themselves and Thereby Established the Most Important Trackage Rights Fee They Will Experience in Taking Over Conrail

The wide range of trackage rights fee estimates produced by small variations in inputs to the SSW Compensation formulae creates uncertainty. Businessmen in the free market deal with uncertainty every day. They do so by informing their judgment with information from a variety of sources and utilizing a number of independent estimation procedures. In the case of establishing a free market level of trackage rights fees, cost estimates and comparable trackage rights fees under similar transportation circumstances establish 2 points of reference. The businessmen at CSX and NS would have informed their judgment with these two indicators and probably used others also. Reality caused them to conclude that $0.29 per car-mile was the correct trackage rights fee to charge each other on a reciprocal basis.

The fact that the $0.29 per car-mile charge was to be applied on a reciprocal basis lends added credibility to its usefulness as an indicator of the free market estimate of reasonable trackage rights charges. This is so because both parties to the trackage rights fee negotiations had equal standing and bargaining power. Both had the objective of determining a trackage rights fee that they themselves could live with. Both had simultaneous motivations to place the tenant in the same competitive position as the landlord. The results of these negotiations between equals

provides prima facie proof that the level of trackage rights fee determined is valid for application to circumstances where these ideal "free-market" bargaining characteristics are not in evidence.

CSX dismisses the relevance and the importance of the $0.29 they charge each other. They observe that the $0.29 is applied on a reciprocal basis as if that establishes that neither CSX nor NS cares what the actual trackage rights fee ought to be or that neither truly believes that $0.29 is actually the right number. Nothing could be further from the truth. The trackage rights fees CSX charges NS will not exactly offset those NS charges CSX. One of the carriers will have to pay millions of dollars to the other at the end of the year to settle up their trackage rights balance. More importantly, CSX will compete against NS in innumerable commodity and origin-destination markets. Neither CSX nor NS could afford to compete against the other saddled with the punitive trackage rights fees CSX seeks to impose against CP. The fact that CSX and NS charge each other $0.29 is concrete proof that $0.29 is the free-market estimate of reasonable trackage rights fees.

Both CSX and NS expect their number one competitor to be NS and CSX, not CP. Both will compete against each other for billions of revenue dollars. Trackage rights car-mile fees between CSX and NS will dwarf amounts CP pays CSX. It defies belief that CSX didn't study the appropriate level of trackage rights fees as they apply to NS. It defies belief that CSX would not have considered both methods of estimating reasonable trackage rights charges – that is, 1) the comparable trackage rights fees under similar transportation circumstances and 2) the SSW Compensation formulae. CSX and NS businessmen fully understood the significance of the $0.29 charge. They knew that it would have much more financial impact on their bottom line than any trackage rights fee they could charge any other railroad.

The CSX businessmen chose $0.29 to apply to themselves, at the same time they choose $1.215 to apply to CP. The reasons for the disparity in fees are obvious. The $0.29 is the free market's estimate of the fee magnitude that places tenant and landlord on equal footing permitting vigorous competition. The $1.215 is a rate that CSX knows will prevent any new competitor from attracting any traffic. Never before had CSX determined that the exorbitant $1.215 establishes the reasonable level of trackage rights fees (see Exhibit No. (JJP-3) submitted December 10, 1998 in this proceeding), but CSX now claims it is reasonable.

B. Relying Solely on SSW Compensation to Quantify the Appropriate Level of Trackage Rights Fees is Not Appropriate Given the Sensitivity of the Procedure to Slight Input Variations and the Difficulty of Projecting Accurately the Required Information

The SSW Compensation formula produces a wide range of results even employing seemingly reasonable assumptions. Witness Whitehurst agrees. At pages 12 and 13, he makes it clear that the results he was deriving using SSW Compensation were so high that he wanted to ignore them and use the results of a system average calculation. This suggests that regulatory conclusions based on SSW Compensation calculations need to be corroborated using other, independent indicators. The principles behind the formulae are sound, and could produce sound free-market estimates if it were a perfect world with perfect and complete information having no underlying uncertainty and if witnesses could unerringly predict the future. These are unrealistic assumptions.

The SSW Compensation formulae hold that the free market establishes the value of an acquired property during the acquisition process. It assumes that the value established by the free market applies equally to all line segments. SSW Compensation also assumes that determining the "free market" value of a line segment is as simple as pro-rating overall Conrail value to any line segment based upon the relationship between line segment earnings and overall Conrail earnings. To have full confidence in the reliability of the SSW Compensation formula to accurately predict line segment values, line segment earnings predictions using system average unit costs must be accurate. But unit costs over the "east-of-the-Hudson" line segment probably do not meet that requirement since it is a light density line. Railroads are a high fixed cost industry with decreasing unit costs over a wide range of traffic volume increases. It is impossible to predict CSX's unit costs over this line segment. CSX unit costs will be higher or lower than system average depending on whether traffic volumes are lower or higher.

The wide range of results flowing from the SSW Compensation formulae suggest that a "true-up" procedure should be carried out as soon as practicable as I recommended in Section IV. "Adoption of a 'True-up' Procedure" of my January 7, 1999 Reconsideration Verified Statement. Results of actual operations should be substituted for the assumptions input to the SSW Compensation formulae.

VII. Summary and Conclusion

After evaluating Witness Whitehurst's trackage rights fee calculations, I determined that he made many errors in those calculations. I have corrected those errors and have now determined that an appropriate SSW Compensation trackage right fee is $0.34 per car-mile.

Development of Conrail Fair Market Value of Rail Property

(Dollars In Thousands)

Component (1)	Source (2)	Value (3)
A. Fair Market Value of Conrail		
1. Total Fair Market Value	Exhibit No. (JJP-10)	$12,076,000
B. Separation of Fair Market Value of Conrail between Rail Component and Non-Rail (Real Estate) Component		
1. CRC Properties, Inc.	R-1 Sch. 310, Line 14 (b)	22,105
2. Road Investment - gross book value	R-1 Sch. 200, Line 24 (b)	6,430,148
3. Railroad Equipment Investment Gross book value	R-1 Sch. 200, Line 25 (b)	2,078,827
4. Other Property Investment Gross book value	R-1 Sch. 200, Line 26 (b)	320,006
5. Total	Sum of Lines B.1 through B.4	$8,851,086
6. Rail Component Portion of Total	(Line B.2 + Line B.3) ÷ Line B.5	96.13%
7. Fair Market Value of Rail Component	Line A.1 x Line B.6	$11,609,240
C. Separation of Fair Market Value of Conrail Rail Component between Fixed Properties and Equipment		
1. Book Value of Rail Property		
a) Gross	R-1 Sch. 330, Line 30, Col. (h)	$6,430,148
b) Less Depreciation	R-1 Sch. 335, Line 30, Col. (g)	1,548,228
c) Net	Line C.1a - Line C.1b	$4,881,920
2. Book Value of Equipment		
a) Gross	R-1 Sch. 330, Line 39, Col. (h)	$2,078,827
b) Less Depreciation	R-1 Sch. 335, Line 40, Col. (g)	924,578
c) Net	Line C.2a - Line C.2b	$1,154,249
3. Road Portion of Total	Line C.1c ÷ (Line C.1c + Line C.2c)	80.88%
4. Fair Market Value of Rail Property	Line B.7 x Line C.3	$9,389,297

Development of Conrail System-Wide Earnings - 1997

(Dollars In Thousands)

	Component	Source	Value
	(1)	(2)	(3)
1.	Net Revenue From Railway Operations	1995 CR-1, Sch 210, Line 15(b)	$446,154
2.	Special Charges	1/	$283,412
3.	Adjusted Net Revenue from Railway Operations	Line 1 + Line 2	$729,566
4.	Other Income		
	a. Total Other Income	1995 CR R-1, Sch 210, Line 27 (b)	$177,463
	b. Revenue from property used in other than carrier operations	1995 CR R-1, Sch 210, Line 16 (b)	$4,687
	c. Other Income excluding non-carrier	Line 2(a) - Line 2(b)	$172,776
5.	Miscellaneous Deductions		
	a. Total Miscellaneous Deductions	1995 CR R-1, Sch 210, Line 36 (b)	$47,721
	b. Expenses of property used in other than carrier operations	1995 CR R-1, Sch 210, Line 29 (b)	$572
	c. Miscellaneous Deductions excluding non-carrier	Line 3(a) - Line 3(b)	$47,149
6.	Adjusted Net Revenue	Line 1 + Line 2(c) - Line 3(c)	$855,193
7.	Index to 1997 using GDP-IPD	STB Decision No. 109	4.461%
8.	Net Revenue Adjusted For Inflation	L4 x (1+L5)	$893,343
9.	Annuity of Merger Benefits	(JJP-2.21) P.1, Line 11, Col (3)	$866,645
10.	Total 1997 Conrail System Earnings	Line 6 + Line 7	$1,759,988

1/ Per 1995 CR R-1, Notes to Schedule 410, Special Charges consist of Asset Disposition Charges of $280,912,000 and $2,500,000 for Employee Separation Costs.

Calculation Of Annuity Of Merger Benefits

(Dollars In Thousands)

Item	Source	Amount
(1)	(2)	(3)
Merger Benefits		
1. Year 1	P.2 of 2, L12, Col(3)	$337,504
2. Year 2	P.2 of 2, L12, Col(4)	$740,562
3. Year 3	P.2 of 2, L12, Col(5)	$979,246
4. Year 4 through Year 20	P.2 of 2, L12, Col(6) x 17 yrs.	$16,786,089
5. Total Benefits	Lines 1 through 4	$18,843,401
6. Cost of Capital	STB Decision 109	17.5%
7. STB prescribed inflation for two years	STB Decision 109	4.461%
8. Implicit Annual Inflation	(1+L7)^0.5 - 1	2.206%
9. Cost of Capital Less Inflation	(1+L6) ÷ (1+L8) - 1	14.964%
10. NPV of Benefits	Calculated from L1 through L4 cash flows at L9 rate	$5,435,532
11. Annuity Value	L10, 20 years, L9 rate	$866,645

Calculation Of Annuity Of Merger Benefits

(Dollars In Thousands)

	Benefit Component	Source	Year 1	Year 2	Year 3	Normal Year
	(1)	(2)	(3)	(4)	(5)	(6)
	CSX/Conrail					
1.	Total Benefits	1/	$395,500	$533,600	$645,300	$651,800
	Adjustments:					
2.	Shipper Logistics	1/	166,000	166,000	166,000	166,000
3.	Highway Maintenance	1/	50,000	50,000	50,000	50,000
4.	Total Adjustments	L2 + L3	216,000	216,000	216,000	216,000
5.	Adjusted Total	L1 - L4	179,500	317,600	429,300	435,800
	NS/Conrail					
6.	Total Benefits	2/	223,885	598,645	769,550	771,221
	Adjustments:					
7.	Shipper Logistics	2/	27,630	73,680	92,100	92,100
8.	Competitive Pricing	2/	24,600	65,600	82,000	82,000
9.	Highway Maintenance	2/	13,651	36,403	45,504	45,504
10.	Total Adjustments	L7 + L8 + L9	65,881	175,683	219,604	219,604
11.	Adjusted Total	L6 - L10	158,004	422,962	549,946	551,617
12.	CSX and NS Adjusted Toals	L5 + L11	$337,504	$740,562	$979,246	$987,417

1/ Benefits reported in RR Control Application FD 33388, Volume 1 of 8, Appendix A
2/ Benefits reported in CSX/NS-35 p. 126-127

Development of Conrail Earnings Multiplier

(Dollars In Thousands)

Component	Source	Value
(1)	(2)	(3)
1. Fair Market Value of Conrail	Restated Exhibit No. (JJP-2.1)	$9,389,297
2. Conrail Earnings	Restated Exhibit No. (JJP-2.2)	$1,759,988
3. Earnings Multiplier	Line 1 ÷ Line 2	5.33

Restated Exhibit No. (JJP-2.4) contains highly confidential material and is being filed with the Board under seal

Development Of Line Segment Value Based On Earnings

Component (1)	Source (2)	Value (3)
1. Earnings Multiplier	Restated Exhibit No. (JJP-2.3)	5.33
2. Total Trackage Rights Line Segment Earnings	Restated Exhibit No. (JJP-2.4) Page 9 Column (13)	$340,420
3. Inflation Factor	STB Decision No. 109, 10th page	4.461%
4. Adjusted Value of Trackage Rights Segments	Line 1 x (Line 2 x (1 + L3))	$1,895,381

Development Of Trackage Rights Line Segment Rental Component

Component	Source	Value
(1)	(2)	(3)
1. Adjusted Value of Trackage Rights Line Segments	Restated Exhibit No. (JJP-2.5)	$1,895,381
2. Pre-tax Cost of Capital	STB Decision No. 109, FD 33388	17.5%
3. Annual Rental for Trackage Rights Line Segments	Line 1 x Line 2	$331,692

Development of Trackage Rights Line Segment Rental

Component (1)	Source (2)	Value (3)
1. Annual Rental for Trackage Rights Line Segments	Restated Exhibit No. (JJP-2.6)	$331,692
2. Total Car-Miles on Trackage Rights Line Segments	Restated Exhibit No. (JJP-2.4)	1,567,112
3. Trackage Rights Interest Rental Fee per Car-Mile	Line 1 ÷ Line 2	$0.21

Examples of Rates Per Car Mile in Trackage Rights Agreements

Rate Year (1)	Landlord (2)	Tenant (3)	Location (4)	Miles (5)	Rate Per Car Mile (6)	Comments (7)
CSXT AGREEMENTS						
1995	CSXT	SOO	IL-IN	65.7	$0.24 2/	Plus annual payment $408,894
1995	CSXT	BN	AL	9.4	$0.20 2/	
1995	BN	CSXT	AL	71	$0.16 2/	
1995	CSXT	BN	AL-FL	43.1	$0.27 2/	
1997	CSXT	NS	Various	Various	$0.29 5/	Merger agreement
1997	NS	CSXT	Various	Various	$0.29 5/	Merger agreement
OTHER RAILROAD'S AGREEMENTS						
1995	MP	ATSF	TX	59	$0.33 2/	
1995	SP	BN	OR	21.2	$0.32 2/	
1995	SP	BN	OR	49.4	$0.29 2/	
1995	ATSF	SP	TX	16.4	$0.29 2/	
1995	MP	ATSF	TX	196	$0.196 2/	Applicable to the first 200,000 cars
1995	BN	NS	IL	112.1	$0.141 1/, 2/	2.35 mills for first 3 million GTM's
1995	BN	NS	MS-AL	129	$0.135 1/, 2/	2.25 mills for first 3 million GTM's
1994	NS	SP	MO	25	$0.27 3/	
1995	BN/SF	UP	KS	139	$0.20 3/	
1994	UP	ATSF	TX	59.1	$0.3292 4/	
1994	UP	DME	IA	48.2	$0.34 4/	
1994	UP	CP	MN	10.3	$0.24 4/	
1995	SP	UP	CA	4.5	$0.29 4/	
1994	WC	UP	WI	107.85	$0.18 4/	
1994	METRA	UP	IL	4.15	$0.48 4/	In town Chicago
1994	SP	GWWR	IL	36	$0.1629 4/	Excludes rental charge
1994	BN	SP	MO-IL	465	$0.2728 4/	
1995	BN	SP	TX	412.4	$0.2088 1/, 4/	3.48 mills per GTM
1995	NS	SP	MO	25	$0.2694 4/	
1995	IC	NW	IL	98	$0.3175 2/	Applies to cars less than 265,000 lbs

1/ Conversion to car mile basis assumes: car tare of 30 tons, lading 60 tons, and 100% empty return. Total movement is 120 tons divided by 2 = 60 tons per direction.
2/ Source: UP/SP Rebuttal Verified Statement of John H. Rebensdorf, Exhibit JHR-4
3/ Source: UP/SP Merger Application (UP/SP-22) Volumn 1, page 306.
4/ Source: UP/SP Workpapers NO4 700010-700012.
5/ Source: CSXT/NS/CR Railroad Control Application (CSX/NS-25) Vol 8B, page 625.

Examples of CSXT Switching Charges
Switching Tariff CSXT 8100 - Section III - Reciprocal Switching

Tariff Item No. (1)	Location (2)	Service Performed (3)	Rate Per Car (4)
3315	Akron, OH	Reciprocal switching - WE	$250
3318	Alabama City, AL	Reciprocal switching - NS	$250
3330	Atlanta, GA	Reciprocal switching - NS	$250
3336	Bay City, MI	Reciprocal switching - LSRC	$250
		Reciprocal switching - CMGN	$250
3360	Birmingham, AL	Reciprocal switching - BN	$150
		Reciprocal switching - BS	$175
		Reciprocal switching - NS	$250
3400	Canada:	Reciprocal switching all locations	
	Chatham, ON	All Carriers Zone 1 (3.98 miles)	$210
	Windsor, ON	All Carriers Zone 2 (6.21 miles)	$225
	Sarnia, ON	All Carriers Zone 3 (12.43 miles)	$265
	Walkerville, ON	All Carriers Zone 4 (18.64 miles)	$345
3445	Cincinnati, OH	Reciprocal switching - NS	$250
		Reciprocal switching - WE	$250
		Reciprocal switching - CR	$390
3505	Detroit, MI	Reciprocal switching - NS	$250
		Reciprocal switching - CR	$390
		Reciprocal switching - CP	$97
		Reciprocal switching - CN (GTW)	$197
3575	Hagerstown, MD	Reciprocal switching - NS	$250
		Reciprocal switching - CR	$390
3600	Indianapolis, IN	Reciprocal switching - INRD	$230
		Reciprocal switching - CR	$390
3695	Memphis, TN	Reciprocal switching - NS	$250
		Reciprocal switching - BN	$150
		Reciprocal switching - IC	$390
		Reciprocal switching - MP	$72
		Reciprocal switching - SSW	$150
3755	New Orleans, LA	Reciprocal switching - NS	$250
		Reciprocal switching - IC	$390
		Reciprocal switching - MP	$214
		Reciprocal switching - KCS	$248
		Reciprocal switching - SP	$150
3870	Terre Haute, IN	Reciprocal switching - CR	$390
		Reciprocal switching - CPRS	$136
3875	Toledo, OH	Reciprocal switching - AA	$307
		Reciprocal switching - CR	$390
		Reciprocal switching - CN	$197
		Reciprocal switching - NS	$250
3880	Tuscola, IL	Reciprocal switching - IC	$285
		Reciprocal switching - MP	$136
	Simple Average		$251

Examples of CSXT Switching Charges
Switching Tariff CSXT 8100 - Section V - Industrial Switching

Tariff Item No. (1)	Location (2)	Service Performed (3)	Rate Per Car (4)
5060	General Charges	Intra-plant switching	$150
		Intra-terminal switching	$250
		Inter-terminal switching - Pvt cars	$193
		Inter-terminal switching - RR cars	$302
5140	Augusta, GA	Switching leased tracks to plant	$44
		Intra-terminal switching	$130
5145	Bay City, MI	Switching leased tracks to plant	$192
5155	Belpre, OH	Switching leased tracks to plant	$116
		Switching leased tracks to plant	$155
		Switching one plant to another plant same shipper - different city	$262
5160	Birmingham. AL	Inter-terminal switching - Pvt cars	$201
		Inter-terminal switching - RR cars	$314
5215	Catlettsburg, KY	Switching leased tracks to shipper terminal	$167
		Switching leased tracks to plant at a different location	$102
5230	Charlotte, NC	Switching leased tracks to plant	$130
5235	Chattanooga, TN	Intra-terminal switching - coke	$237
5250	Chillicothe, OH	Switching one plant to another plant	$222
		Switching plant to interchange trks of NS	$167
5255	Cincinnati, OH	Intra-terminal switching - Pvt cars - two different locations	$258
		Intra-terminal switching - RR cars - two different locations	$314
5320	Decatur, IL	Switching leased tracks to plant	$70
5335	Fernald, OH	Intra-terminal switching	$222
5431	Hemingway, SC	Switching leased tracks to plant	$201
		Switching leased tracks to plant	$130
5445	Jacksonville, FL	Switching leased tracks to plant	$130
5470	Knoxville, TN	Switching leased tracks to plant for NS move	$300
		Switching leased tracks to plant all others	$130
5490	Ludington, MI	Switching leased tracks to plant	$153
5516	Marshville, NC	Switching leased tracks to plant	$193
5520	Marysville, MI	Intra-terminal switching	$201
5635	Philadelphia, PA	Switching leased tracks to plant	$153
		Switching leased tracks to plant	$90
5670	Savannah, GA	Switching between two companies in the same city	$161
5700	Toledo, OH	Intra-terminal switching within port authority	$222
5750	Winchester, VA	Intra-terminal switching	$209
	Simple Average		$185

Development of Mr. Whitehurst's Trackage Rights Fee

Component	Source	Value
(1)	(2)	(3)
1. Earnings Multiplier	STB Decision No. 109	24.54
2. Total Line Segment Earnings (attributable to trackage rights)	WWW-15 p. 15 of 15	$4,457,835
3. Adjusted Value of Trackage Rights Segments	Line 1 x Line 2	$109,395,271
4. Pre-tax Cost of Capital	STB Decision 109, FD 33388	17.5%
5. Annual Rental for Trackage Rights Line Segments	Line 3 x Line 4	$19,144,172
6. Total Car-Miles on Trackage Rights Segments	WWW-15 p. 15 of 15	4,287,995
7. Trackage Rights Interest Rental Fee Per Car-Mile	Line 5 ÷ Line 6	$4.46
8. "Below the Wheel" Costs	Whitehurst V.S., p.4	$0.205
9. Mr. Whitehurst's Trackage Rights Fee per Car-Mile	Line 7 + Line 8	$4.67

Line Segment Revenue And Earnings Per Car Mile

Item	Source	Value
(1)	(2)	(3)
1. Car Miles	Restated Exhibit No. (JJP-2.4)	1,567,112
2. Line Segment Revenue	Restated Exhibit No. (JJP-2.4)	$4,463,224
3. Line Segment Revenue - 1997 Dollars	Line 2 x 1.04461	$4,662,328
4. Average Line Segment Revenue Per Car Mile	Line 3 ÷ Line 1	$2.98
5. Line Segment Earnings	Restated Exhibit No. (JJP-2.4)	$340,420
6. Line Segment Earnings - 1997 Dollars	Line 5 x 1.04461	$355,606
7. Average Line Segment Earnings Per Car Mile	Line 6 ÷ Line 1	$0.23

Exhibit No. (JJP-9) contains highly confidential material; these pages are being filed with the Board under seal

Calculation Of Conrail Fair Market Value

(Dollars In Millions)

Item	Source	Value
(1)	(2)	(3)
Value of Moneys Paid For Stock		
1. CSX purchase of 19.9% outstanding shares at $110 per share on October 16, 1996	STB FD No. 33388, Railroad Control Application, Vol. 1 of 8, p.14	$2,000
2. NS purchase of 9.9% outstanding shares at $115 per share on February 4, 1997	STB FD No. 33388, Railroad Control Application, Vol. 1 of 8, p.14	$1,000
3. CSX and NS purchase of remaining outstanding shares at $115 per share on May 23 and June 2, 1997	STB FD No. 33388, Railroad Control Application, Vol. 1 of 8 p.14	$6,900
4. Total Moneys Paid for CR stock	Line 1 + Line 2 + Line 3	$9,900
Value of Debt Assumed By NS and CSX		
5. Market Value of Conrail LT Debt at December 31, 1996 excluding Capital Leases	1996 CR 10-K, Note 6, p. 51	$1,685
6. Value of Capital Leases	1996 CR 10-K, Note 6, p. 51	$491
7. Value of Debt Assumed	Line 5 + Line 6	$2,176
8. Conrail Fair Market Value	Line 4 + Line 7	$12,076

VERIFICATION

COMMONWEALTH OF VIRGINIA)
)
CITY OF ALEXANDRIA)

JOSEPH J. PLAISTOW, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof and that the same are true as stated.

Joseph J. Plaistow
Joseph J. Plaistow

Sworn to and subscribed
before me this 14th day
of January, 1999.

Witness my hand and official seal.

Carol J. Walley
My Commission Expires July 31, 2001

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of January, 1999, I served by the means indicated below a copy of the foregoing Canadian Pacific Parties' Reply to CSX Petition for Reconsideration of Decision No. 109 on the following:

Counsel for CSX, NYCEDC and NYDOT
(by hand)

Counsel for all parties requesting a copy
(by first-class mail or by hand where
requested)

George W. Mayo, Jr.

STB FD 33388 (Sub 69) 1-27-99 D 193149

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January 27, 1999

BY HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
Case Control Branch
1925 K Street, N.W.
Washington, D.C. 20423-0001

Sub 69

Re: 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 (Sub. No. 69)

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding, please find the original and twenty-five (25) copies of the Reply of the State of New York to Petitions for Reconsideration of Decision No. 109 (NYS-34). Also enclosed is a Wordperfect 5.1 diskette containing this filing.

We have included an extra copy of the Reply. Kindly indicate receipt by time-stamping the copy and returning it with our messenger.

Sincerely,

Peter A. Pfohl

Peter A. Pfohl
An Attorney for
The State of New York

Enclosures

NYS-34

BEFORE THE
SURFACE TRANSPORTATION BOARD

CSX CORPORATION AND CSX TRANSPORTATION, INC., NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY COMPANY -- CONTROL AND OPERATING LEASES/AGREEMENTS -- CONRAIL, INC. CONSOLIDATED RAIL CORPORATION	Finance Docket No. 33388 (Sub-No. 69)

REPLY OF THE STATE OF NEW YORK TO PETITIONS FOR RECONSIDERATION OF DECISION NO. 109

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Attorneys for the State of New York

Dated: January 27, 1999

BEFORE THE
SURFACE TRANSPORTATION BOARD

CSX CORPORATION AND CSX TRANSPORTATION, INC., NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY COMPANY -- CONTROL AND OPERATING LEASES/AGREEMENTS -- CONRAIL, INC. CONSOLIDATED RAIL CORPORATION	Finance Docket No. 33388 (Sub-No. 69)

REPLY OF THE STATE OF NEW YORK TO PETITIONS FOR RECONSIDERATION OF DECISION NO. 109

The State of New York, acting by and through its Department of Transportation ("New York"), hereby submits its Reply to (1) the Petition of CSX Corporation and CSX Transportation, Inc. for Reconsideration of Decision No. 109 (CSX-173) ("CSX Petition"); and (2) the Canadian Pacific Parties' Petition for Reconsideration and Clarification of that same Decision (CP-28) ("CP Petition").

New York supports the relief requested by CP, respecting revision of the terms to govern implementation of the conditions imposed on behalf of New York and the New York City Economic Development Corporation ("NYCEDC") in Ordering Paragraph No. 28 of Decision No. 89, concerning pro-competitive trackage rights in favor of CP over the so-called Hudson Line between Albany/Selkirk and Fresh Pond, NY.

In its Petition, CP demonstrates that the trackage rights compensation findings in Decision No. 109 reflect certain computational errors and other more practical problems which, if not addressed, would severely hinder or limit the availability of effective, competitive railroad service over the Hudson Line as envisioned by the Board. New York submits that the relief described in the CP Petition is supportable as a matter of law, fully complies with Decision No. 89, and would provide CP with a bona fide opportunity to compete with CSX in the provision of rail service East of the Hudson River. In contrast, the CSX Petition seeks a significant increase in the trackage rights compensation set by Decision No. 109, and would otherwise increase CP's cost of using the Hudson Line to levels that would eviscerate the rights granted to CP by creating an economic barrier to service. The CSX Petition therefore should be rejected.

In this Reply, New York will focus on two (2) key issues relevant to the trackage rights ordered by the Board that are raised by CSX and CP in their separate Petitions. First, we will address the need for the Board to modify its prescribed compensation in the manner recalculated by CP, in order to allow the objectives of the Board's Ordering Paragraph No. 28 to be fulfilled. Second, New York will respond to CSX's specific allegation that it has a right to be compensated for CP's use of

the Metro-North Commuter Railroad Company ("Metro-North") line between Poughkeepsie, NY and Mott Haven Junction, NY.

I. The Board's Trackage Rights Compensation Terms Should Be Revised in the Manner Requested By CP

In Decision No. 109, the Board established an initial trackage rights fee of $0.71 per car-mile for CP operations over CSX's portion of the East-of-Hudson Line between Schenectady/Albany and Poughkeepsie, NY, and between Mott Haven Junction and Fresh Pond Junction, NY. This charge is excessive, as it both overcompensates CSX for the actual value of the operating rights granted to CP over the line, and unduly inhibits CP's ability to offer fully competitive rail service.

In its Petition, CP persuasively demonstrates why the Board's prescribed charge is excessive as a matter of market economics, and thus would frustrate the purpose of the condition imposed in Ordering Paragraph No. 28. Under the October 20, 1997 haulage settlement agreement between CSX and CP ("CSX-CP Haulage Agreement"), the parties negotiated a private arrangement to cover the movement of certain traffic to and from New York City and Long Island. One purported object of this agreement was to set economic terms for CP's beneficial use at a level whereunder the landlord carrier would be fully compensated for the tenant's use of its facilities, while not creating any economic disincentives for the tenant to move the subject traffic over the landlord's lines. However, as forcefully demonstrated in CP's Petition and the Reconsideration Verified Statement of CP's

witness Gilmore, a $0.71 per car-mile trackage rights charge over the Hudson Line would result in overall transportation costs significantly exceeding those produced by application of the terms of the negotiated CSX-CP Haulage Agreement. Mr. Gilmore calculates that under a $0.71 per car-mile charge, a representative CP boxcar movement between Montreal and New York City would bear total operating costs approximately $53 higher on a per-car basis than comparable transportation under the CSX-CP Haulage Agreement. See RVS Gilmore, at 3-4. Certainly, if one makes the reasonable assumption that the haulage fees negotiated by CP and CSX reflect each carrier's view of the "break-even" point for viable rail operations over the line, it becomes clear that CP will not present an effective transportation alternative if it must start at such a significant economic disadvantage.

Indeed, the Board in this proceeding has already acknowledged the difficulty that CP would have in competing even at the cost levels implicit in the CSX-CP Haulage Agreement. In New York and NYCEDC's Rebuttal Statement, evidence was offered showing that the compensation terms governing the CSX-CP Haulage Agreement were excessive from the standpoint of promoting effective, competitive access to New York City and Long Island rail customers. See NYS-24/NYC-17, at 29-34. In Decision No. 89, the Board respected New York/NYCEDC's evidence, concluding that "[o]ne deficiency in the CSX-CP haulage agreement may be the revenue factor CSX is to receive for this service, which the New York parties assert is considerably above their calculations of

Conrail's URCS variable cost or fully allocated cost for existing movements along the Hudson Line." Decision No. 89, at 82-83.

Particularly against the evidentiary background of this prior record evidence, it may be concluded that the costs of CP service under its 1997 Haulage Agreement represent the maximum charges that it can absorb and still have a reasonable prospect of offering an effective, competitive alternative to CSX. See RVS Gilmore, at 4. However, if CP is saddled with an additional $53 per car surcharge, as it would if the $0.71 per car-mile fee were imposed, it may be presumed that its ability to compete for boxcar, short-haul intermodal and other traffic which currently moves mainly by truck, and is the traffic most in need of reasonable and cost-effective alternatives,[1] would be squelched.

The Board's determination of the CP trackage rights terms also requires revision to the extent that it provides CSX with full service trackage rights compensation where CP will exercise overhead rights only. In Decision No. 109, the Board limited CP's direct rail access under Ordering Paragraph No. 28 to receivers within the boroughs of New York City, and denied CP

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[1] CP's planned East-of-Hudson traffic base consists principally of boxcar traffic, short-haul intermodal traffic and municipal waste. See RVS Gilmore, at 2. As attested by Mr. Gilmore with regard to the short-haul intermodal traffic, for example, CP cannot charge more than $1.00 per car-mile and still effectively compete with existing trucking rates for the traffic. Id. at 4-5. With a $0.71 per car-mile charge for movements over CSX's portions of the Hudson Line, CP would be unable to price the short-haul intermodal traffic at levels necessary to be competitive, which also undermines the public interest in removing truck traffic from congested highways. Id.

access to points north of Poughkeepsie. See Decision No. 109, at 6-7.[2] However, under the Board's prescribed compensation terms for the trackage rights, it failed to adjust the charge produced by what effectively is a full-service formula to reflect the strictly limited nature of CP's rights north of New York City.[3] The Board should recalculate and revise the trackage rights compensation appropriately to ensure that CP is not required to pay rent valued on the basis of rights that it cannot exercise.

For its part, CSX acknowledges in its Petition that "in light of the fact that the line segment in question is relatively lightly used for freight movements, and in light of the Board's purposes here" (i.e., the introduction of two-carrier service to New York City, and to points of connection elsewhere on Long Island), trackage rights compensation should be adjusted downward from what CSX claims otherwise would be produced under the Board's governing methodology. CSX Petition, at 10. However, CSX's newly revised calculations still produce an adjusted trackage rights fee of $1.25 per car-mile, an increase of over $.50 from the level set in Decision No. 109. Obviously, if CP cannot fully compete at $0.71 per car-mile, CSX's proposed revision must be rejected summarily as violative of the

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[2] The Board clarified that "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." Id. at 6.

[3] This issue is discussed in further detail in the Reconsideration Verified Statement of CP's witness Joseph Plaistow, at 4-5. See also CP Petition, at 7-8.

overriding purpose of Ordering Paragraph No. 28.

The revised compensation terms proposed by CP in its Petition provide for a charge set at no more than $0.36 per car-mile, a level which still exceeds trackage rights fees typically negotiated between competing rail carriers. See RVS Plaistow, at 9. CP's revised charge reflects the limitation imposed by the Board in Decision No. 109 on CP's trackage rights north of New York City, and as explained by CP's witness Gilmore, is consistent with the charge negotiated by Conrail with Amtrak for use of the same Poughkeepsie-to-Schenectady line on which CP has been granted trackage rights. See RVS Gilmore, at 5-7.

New York supports the CP revisions as fair and reasonable, especially given the special circumstances of this case. CP's charge would fully compensate CSX for the additional costs associated with CP's use, and provide CSX a fair return on its investment while not unduly impinging on CP's ability to compete for New York City traffic as envisioned by the Board in Ordering Paragraph No. 28. In contrast, CSX's proposed charge should be rejected as it effectively would price CP out of the market, and would nullify the legitimate pro-competitive relief advocated by New York and awarded by the Board in this proceeding. In sum, the Board should adopt CP's revised trackage rights compensation terms, and reject those proffered by CSX.

II. CSX Has No Basis to Collect a Return on Metro-North's Portion of the Hudson Line

In Decision No. 109, the Board addressed the issue raised by New York and NYCEDC concerning CP's rights to operate over the 70-mile Poughkeepsie, NY to Mott Haven Junction, NY (CP 75.8-CP 6.6) segment of the Hudson Line which is controlled by Metro-North.[4] In its Decision, the Board agreed with New York/NYCEDC and Metro-North that CSX is not entitled to be paid for CP's operations over that line, which CSX will use solely as a non-exclusive tenant under an agreement between Conrail and Metro-North that CSX will assume. See Decision No. 109, at 12.

In its Petition, CSX again argues that it will posses "exclusive" trackage rights for freight service over the line, and is therefore due compensation for the alleged diminution of those rights by CP as a result of Ordering Paragraph No. 28. See CSX Petition, at 12-17. CSX requests that the Board vacate its Decision insofar as it pertains to CSX's entitlement to interest rental for CP movements over the Metro-North portion of the Hudson Line, and to defer to some future court litigation before it decides the issue of compensation for the Metro-North segment.

The Board rejected CSX's arguments in Decision No. 109, and should do so again. CSX has provided no convincing evidence that it is entitled to compensation for CP movements over the Metro-North portion of the Hudson Line, or that the Board

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[4] Metro-North is a subsidiary of the Metropolitan Transportation Authority of the State of New York. See NYS-11/NYC-10, V.S. Nelson, at 1.

committed material error in reaching a contrary conclusion. As New York most recently demonstrated through the testimony of Metro-North Vice President Richard Bernard, Metro-North is the sole entity with authority over use, dispatching, and general management of the Poughkeepsie-Mott Haven Junction line. See NYS-32/NYC-23, V.S. Bernard at 3-5. Like Conrail at present, CSX will operate over these segments as a tenant, under rules, procedures and conditions set by bilateral agreements with Metro-North. See id. Likewise, CP operations over these lines incident to fulfillment of Ordering Paragraph No. 28 will be governed by terms agreed upon between CP and Metro-North, not CSX. Id. Mr. Bernard's testimony confirms the testimony of Donald Nelson, then-President of Metro-North, during the earlier evidentiary phase of this proceeding, who clarified that Conrail's trackage rights "are not exclusive and Metro-North remains the ultimate arbiter as to freight use of the line." NYS-32/NYC-23, V.S. Nelson, at 9.[5]

Despite an ample opportunity to do so, CSX has offered no testimony or other direct evidence to refute the testimony of the Metro-North officials. Rather, it relies on a cryptic reading of the 1972 Harlem-Hudson Lease Agreement which, it claims, "expressly reserved" for Conrail's predecessor (and thus for CSX as Conrail's successor) the "exclusive" right to operate freight railroad common carrier service." CSX-173, at 14.

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[5] Mr. Nelson's testimony was not refuted by the Applicants.

However, even a cursory review of the agreement in question shows no hint of such "exclusivity."

Appended to the Verified Statement of Mr. Nelson in the New York parties' Joint Responsive Application is an executed copy of the Trackage Rights Agreement entered into by Metro-North and other public parties[6] that own, operate, or control rail properties in the New York region, and Conrail. See NYS-12/NYC-11, V.S. Nelson, Exhibit ____ (DNN-02). The Agreement establishes the rights and responsibilities for continued freight and rail commuter passenger service on the parties' properties. Exhibit 1 to this agreement plainly labels, among other properties, the "Hudson Line," between mileposts 5.4 and 75.8, as being in the exclusive possession and control of the public parties, not Conrail.

Under Section 2.01 of the Agreement, CDOT and MTA expressly granted to Conrail, "for the purpose of performing Conrail's freight service, including such service operated by Conrail for others," the right to enter upon and utilize the Hudson Line, although Conrail's rights are expressly subject to certain use level restrictions.[7] Nowhere in the Agreement is

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[6] Along with Metro-North, the other public parties include Metro-North's parent, Metropolitan Transportation Authority ("MTA"), and Connecticut Department of Transportation ("CDOT").

[7] Under Section 3.02 of the Agreement, Metro-North also "retains the right to establish the overall policies governing the management and operational control of all rail service . . . including, but not, limited to, the dispatching and control of all trains" over the line.

there any reference or indication of any Conrail right to exclusively utilize the Hudson Line for freight service as claimed by CSX in its Petition. There would be no need for Conrail to enter into such a restrictive agreement if it already had the exclusive right to operate freight service on the Hudson Line.[8] As is demonstrated by this Agreement, the use of the Hudson Line for freight service is controlled by Metro North and the other designated public parties to the Agreement, not by Conrail or any of its successors.

CSX's assertion that it may be entitled to compensation for unspecified "capital costs" it incurred for the underlying rights it allegedly gained as a successor lessor under the Harlem-Hudson Lease Agreement likewise is without merit. To the extent that CSX might retain any property rights in the Hudson Line, such rights are not in any way impinged as a result of Ordering Paragraph No. 28. Paragraph 2 of the Harlem-Hudson Lease[9] granted to MTA all of Penn Central's property interests in (1) the land, including among others, any easements, buildings, facilities, riparian rights in land under water, and other land related rights, and in (2) rail facilities, including among

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[8] Under Section 2.03(d) of the Agreement, Conrail retained the right to permit other parties to use its own designated properties for rail purposes. However, no such right was claimed by Conrail for the use of the Hudson Line or any other of the properties not specifically designated as its own.

[9] A copy of the Lease is appended to the Verified Statement of witness Nelson in the New York parties' Joint Responsive Application See NYS-12/NYC-11, V.S. Nelson, Exhibit ____ (DNN-01).

others, any tracks, sidings, station houses, bridges, and all other facilities of any kind. The only property rights under the Lease retained by the lessor that CSX could possibly claim a right to as successor lessor are certain air rights, rights to specifically delineated property, and retained operating rights -- none of which are affected by CP's Hudson Line operations as directed by Ordering Paragraph No. 28.[10] In sum, CSX has no retained property right in the Hudson Line under the Harlem-Hudson Lease for which it may claim a compensatory right as a result of Ordering Paragraph No. 28.

Insofar as CSX's proposal implies or asserts a right to control CP operations over the Poughkeepsie-Mott Haven Junction segments, or recoup payments therefrom, it exceeds the limits of that carrier's authority and is unacceptably flawed. Accordingly, New York respectfully requests that the Board uphold Decision No. 109 as it pertains to rents due on the Poughkeepsie-Mott Haven Junction segment and reject CSX's suggestion that the Board hold this proceeding in abeyance until after some future litigation is brought by CSX before the federal district court.

For all the reasons set forth herein, New York supports adoption of the CP's Petition as consistent with the needs of the affected shipping public, and the rights of CSX, CP, and New York, and urges the rejection of CSX's Petition as contrary to

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[10] Under the Lease, MTA, as lessee, was also given the exclusive "right to sublet the leased premises or any portion thereof." See Lease, at 9, subparagraph 7.

the mandates of Ordering Paragraph No. 28.

Respectfully submitted,

THE STATE OF NEW YORK BY AND
THROUGH ITS DEPARTMENT OF
TRANSPORTATION

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Dated: January 27, 1999

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of January, 1999, I caused copies of the foregoing Reply of The State of New York to Petitions For Reconsideration of Decision No. 109 to be served upon counsel to CSX and CP by hand delivery, and to counsel to parties of record in this proceeding that have specifically requested copies, by first-class United States mail, postage prepaid.

Peter A. Pfohl

STB FD 33388 (Sub 69) 1-8-99 D 192941

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January 8, 1999

The Honorable Vernon A. Williams
Secretary, Surface Transportation Board
Mercury Building, Room 700
1925 K Street, N.W.
Washington, D.C. 20423

Re: **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 (Sub-No. 69)**

Dear Secretary Williams:

Enclosed are an original and twenty-five (25) copies of each of CSX-174, "Response of Applicants CSX Corporation and CSX Transportation, Inc. to Fort Orange Paper Company's Motion to Clarify 'Unrestricted' East-of-the-Hudson Trackage Rights Granted Canadian Pacific Railway," for filing in the above-referenced docket.

Please note that a 3.5-inch diskette containing a WordPerfect 5.1 formatted copy of this filing is also enclosed.

Kindly date stamp the enclosed additional copy of this letter and CSX-174 at the time of filing and return them to our messenger.

Thank you for your assistance in this matter. Please contact me if you have any questions.

ENTERED
Office of the Secretary
JAN - 8 1999
Part of
Public Record

Respectfully yours,

Dennis G. Lyons
Counsel for CSX Corporation and CSX Transportation, Inc.

Enclosures
via hand delivery

cc: All Parties on the Service List in Sub-No. 69

19294

CSX-174

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

RESPONSE OF APPLICANTS CSX CORPORATION AND CSX TRANSPORTATION, INC. TO FORT ORANGE PAPER COMPANY'S MOTION TO CLARIFY "UNRESTRICTED" EAST-OF-THE-HUDSON TRACKAGE RIGHTS GRANTED CANADIAN PACIFIC RAILWAY

Applicants CSX Corporation and CSX Transportation, Inc. (collectively, "CSX") hereby submit the following response to Fort Orange Paper Company's Motion to Clarify "Unrestricted" East-of-the-Hudson Trackage Rights Granted Canadian Pacific Railway, FOPC-8 (filed Dec. 23, 1998). This response is filed pursuant to 49 C.F.R. § 1104.13(a).

In Decision No. 109, the Board held that the "east-of-the-Hudson" trackage rights to be granted to Canadian Pacific Railway Company and its affiliates (collectively "CP") would be limited to overhead traffic between Albany and New York City, consistent with the Board's determination in Decision No. 89 to enhance the competitive presence of a second carrier for New York City traffic.[1] Fort Orange Paper Company ("Fort Orange"), a Conrail shipper located 10 miles southeast of Albany, New York, requests that the Board reconsider Decision No. 109 and allow CP to provide local service along that line, or to explain its alleged "change of position" in holding that such rights will be limited to serving overhead traffic.[2] FOPC's motion should be denied because the Board was very clear as to why CP's trackage rights should be limited and there was no change of position. Rather, the holding in Decision No. 109 was fully consistent with the Board's language and purpose in Decision No. 89.

The Board could not have been clearer in Decision No. 109 as to its purpose in granting trackage rights east-of-the-Hudson to a second carrier:

> 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 the Albany area.

Decision No. 109 at 6. Similarly, in Decision No. 89, the Board made clear its purpose "to restore a modicum of the competition that was lost in the financial crisis that led to

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[1] Decision No. 109 at 6.

[2] FOPC-8 at 6-7.

the formation of Conrail."[3] In context, the Board's discussion of east-of-the-Hudson makes clear that competition for New York City shippers was the Board's goal.[4] CSX has shown that – unlike the shippers in New York City who are the intended beneficiaries of the additional competition created by the grant of tracl ge rights to CP – shippers on the Hudson Line north of New York City, and in particular those in the vicini y of Albany, such as Fort Orange, were never served by two carriers even prior to the formation of Conrail.[5] Granting the relief sought by Fort Orange would turn a limited exception to the Board's "general policy of not attempting to significantly enhance parties' pre-merger competitive alternatives,"[6] based on unique circumstances, into a broad, standardless revision of that policy. We do not believe that the Board intended such a policy change in crafting the condition set forth in Decision No. 89.

Fort Orange is also incorrect in s.. gesting that when the Board referred, in Decision No. 89, to "haulage rights, not restricted as to commodity or geographic scope, or similarly unrestricted trackage rights,"[7] it meant that CP should be allowed to serve upstate shippers that had theretofore been solely served by Conrail and its predecessors. In context, it is clear that the Board felt that the commodity and geographic limitations in the CSX-CP Settlement Agreements did not go far enough in introducing new competition for shippers in New York City. Those agreements were limited to certain

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[3] Decision No. 89 at 83.

[4] See, e.g., id. at 53 ("We have either preserved competition or provided for new competition to and from New York City, Buffalo and Rochester, NY.").

[5] See, e.g., CSX-169, Vest R.V.S. at 2-3.

[6] Decision No. 89 at 79.

[7] Id. at 83.

truck-competitive movements.[8] Geographically, the October 1997 agreement was limited to movements originating or terminating at points not served by CSX, excluding such points as Chicago.[9] Similarly, the January 6, 1998 letter broadening the arrangements to include intermodal service was restricted to movements to and from Montreal.[10] Removing these geographic restrictions on CP's ability to serve New York City – not introducing a second carrier into the Albany area -- was the Board's clear purpose in Decision No. 89, and is confirmed in Decision No. 109. The Board's position has been consistent throughout and requires no further explanation.

Finally, it is worth noting that Fort Orange previously admitted that it "cannot establish that it will certainly suffer harm as a result of the Transaction."[11] Indeed, as CSX has explained, replacing Conrail with CSX, which can offer long-haul single-line service to Fort Orange for its raw materials, is likely to benefit Fort Orange.[12] Thus, while the Board stated in Decision No. 89 that the outcome of the CSX/CP negotiations it was ordering "may help" Fort Orange,[13] it did not prejudge the outcome of those negotiations. And, pertinently, the Board also stated that the oversight and monitoring process "is responsive to [Fort Orange's] concerns," inasmuch as they related to potential future rate increases or other effects not resulting from any loss of competition.[14] In light

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[8] See CSX-167 and Potter V.S., Exhibits 3 and 4.

[9] Id., Potter V.S., Exhibit 3

[10] Id., Potter V.S., Exhibit 4.

[11] FOPC-6 at 3, quoted in Decision No. 89 at 116.

[12] See CSX-169 at 23-24 n.14.

[13] Decision No. 89 at 116.

[14] Id.

of the lack of showing of harm by Fort Orange and the operational constraints on the line,[15] Fort Orange's request for a broad further expansion of CP's trackage rights is unjustified and should be denied.

CONCLUSION

The Fort Orange Motion is, in substance and effect, although not in form, a petition for reconsideration. It does not meet the standards for such a petition set forth in 49 C.F.R. § 1115.3(b); there is no "new evidence or changed circumstances," and the Board's action clearly involves no "material error." Accordingly, for the reasons stated, Fort Orange's Motion should be denied.

Respectfully submitted.

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January 8, 1999

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[15] See CSX-167, Downing V.S. at 4-5.

CERTIFICATE OF SERVICE

I, Dennis G. Lyons, certify that on January 8, 1999, I have caused to be served a true and correct copy of the foregoing CSX-174, "Response of Applicants CSX Corporation and CSX Transportation, Inc. to Fort Orange Paper Company's Motion to Clarify 'Unrestricted' East-of-the-Hudson Trackage Rights Granted Canadian Pacific Railway," to the following parties, by first-class mail, postage prepaid, or by more expeditious means:

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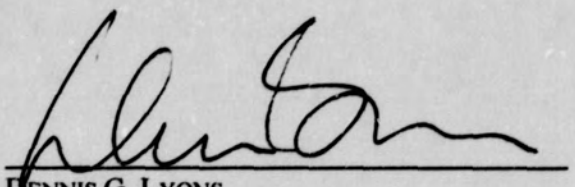

DENNIS G. LYONS

CP	CSX
6. Proportionate responsibility. Responsibility for damage exceeding $25 million will be allocated in proportion to the parties' fault/negligence. Art. 11(e). The $25 million figure may be adjusted every 5 years. Art. 11(e).	6. See Item 3 above. All damages not the sole responsibility of one of the parties will be borne 50-50.
7. Disputes as to the parties' comparative fault must be submitted to binding arbitration. Art. 11(e).	7. No comparable provision. Agreement contains general arbitration clause.
8. Each party must assume and bear all responsibility for damage caused by acts/omissions of its employees while under the influence of alcohol or drugs. Art. 11(f).	8. No comparable provision.
9. No comparable provision.	9. As to liability, CSX-furnished pilots are employees of CP while on board or getting on/off CP trains. Art. 13(f).
10. No comparable provision.	10. Work performed by CSX to construct, maintain, repair and renew connections pursuant to Art. 9(b)(ii) [sic: 8(b)(ii) was intended] is deemed performed for CP's sole benefit and CP is fully liable for all cost and expense of liability resulting thereto, unless caused by the sole negligence of CSX. Art. 13(g).
11. No comparable provision.	11. Loss/Damage to Lading. The parties must follow AAR's Freight Claim Rules, Principles, and Practices for loss/damage to Lading. Art. 13(j).

CP	CSX
L. **CLAIMS** (Article 12)	L. **CLAIMS** (Article 14)
1. The parties will determine the best arrangement for handling freight loss and damage claims. Art. 12(a).	1. The CSX Agreement has more detailed claims provisions. All claims must be investigated by the responsible party. Art. 14(a).
2. Each party is responsible for losses occurring to lading in its possession for the account of such party. Art. 12(a).	2. No comparable provision. But see Sec. 1(f) of the CSX JFA, which states that CP will assume responsibility for all loss and damage to cars and lading.
3. No comparable provision.	3. Each party will investigate and defend all freight loss and damage claims under 49 U.S.C. § 11706. Art. 14(b).
4. The parties must follow AAR rules in allocating losses of an undetermined origin or in railroad handled in interline service by or for the account of both parties. Art. 12(b).	4. See K.11 above.
5. No comparable provision.	5. Except freight loss and damage claims under 49 U.S.C. § 11706, neither party may settle any claim, exceeding $35,000, for which the other party has liability without the concurrence of that other party. Art. 14(e). This provision mirrors, or essentially mirrors, Sec. 6(m) in the Switching Agreements in Vol. 8C of the Application.

CP	CSX
6. No comparable provision.	6. Costs for defending claims will be included as costs and expenses in applying the liability provisions, in the Agreement. Salaries of full-time agents, full-time attorneys and other full-time employees will be borne by the appropriate party. Art. 14(d).
7. No comparable provision.	7. This Article does not affect the apportionment of liabilities under Art. 13(g).
M. **DEFAULT AND TERMINATION**	M. **DEFAULT AND TERMINATION**
1. **Either party** has the right to terminate the Agreement upon the default of the other party. Art. 13.	1. The provision applies only to default behavior on the part of CP and **gives only CSX the right to terminate the Agreement**. CSX may terminate the trackage rights and CP's use of the Subject Trackage in case of substantial uncured breach by CP. Art. 15.
2. Upon default, CSX does not have the express right to terminate CP's right to use the Subject Trackage. Art. 13.	2. Upon default by CP, CSX has the express right to terminate the Agreement and CP's use of the Subject Trackage. Art. 15.

CP	CSX
N. **REGULATORY AND OWNER APPROVAL**	N. **REGULATORY AND OWNER APPROVAL**
	(Article 16)
1. No comparable provision.	1. If STB approval or the approval of any non-party owner of the Subject Trackage is required, CP must initiate, pursue, and pay for an application. Art. 16(a). CSX will assist and support CP's efforts to secure STB approval. Art. 16(a).
2. No comparable provision.	2. CSX consents, as required by order of the STB, to a grant of rights by non-party owners of the Subject Trackage, as long as those rights impose no liability to CSX for CP operations on the line of such owners. Art. 16(a).
3. No comparable provision.	3. If the STB imposes any labor protective conditions on the arrangement contemplated under this Agreement or the Terminal Joint Facilities Agreement, CP will be solely responsible for such payments. Art. 16(b).
O. **ABANDONMENT OF SUBJECT TRACKAGE**	O. **ABANDONMENT OF SUBJECT TRACKAGE**
(Article 15)	(Article 17)
1. In the event there is more than one offer to purchase the Subject Trackage, the Agreement does not expressly state that CP's offer must meet requirements of 49 U.S.C. § 10904 as a condition for CSX's exclusion of other offerors.	1. A CP offer to purchase the Subject Trackage must meet the requirements of 49 U.S.C. § 10904 as a condition for CSX to exclude other offers and negotiate only with CP. Art. 17(b).

CP	CSX
2. No comparable provision.	2. If CP does not accept a proposed order establishing sale terms, and does not promptly file an application seeking approval to discontinue its operations over the Subject Trackage, CSX may be deemed to have CP's power of attorney and take such action on CP's behalf. Art. 17(c).
3. No comparable provision.	3. If CSX's abandonment application is denied, CP will withdraw any application it has filed seeking authority to discontinue operations over the Subject Trackage. Art. 17(f).
P. **TERM**	P. **TERM**
	(Article 18)
1. The CP Agreement has no Term provision. The Term provision in the CP Trackage Rights Addendum mirrors the CSX provision here.	1. The CP Agreement remains in effect for 25 years from the effective date, renewable if the NYC/CSX operating agreement renews. Art. 18(a).
2. No comparable provision. The Term provision in the CP Trackage Rights Addendum mirrors the CSX provision here.	2. CP may terminate the Agreement upon six month's notice. Art. 18(b).
Q. **ARBITRATION**	Q. **ARBITRATION**
(Article 16)	(Article 19)
1. The CP Agreement requires any dispute arising from the Agreement to be finally settled through arbitration. A version of the Transaction Agreement clause is used. Art. 16.	1. Irreconcilable disputes are submitted to arbitration. Art. 19. The provisions differ in form but generally not in substance except that the CSX version provides a venue (New York City) for the arbitration.

CP	CSX
2. All proceedings relating to arbitration, including testimony and submissions and award, are private and may not be disclosed to a third party, except as necessary.	2. No comparable provision. CP version would be acceptable to CSX if review by STB was an exception from non-disclosure.
3. No comparable provision.	3. The provision specifically excludes from arbitrator the power to determine criminal or antitrust violations. Art. 19.
4. Cites **no location** for the arbitration proceedings.	4. **Cites New York** as the location for the arbitration.
R. **SUCCESSORS AND ASSIGNS**	R. **SUCCESSORS AND ASSIGNS**
(Article 17)	(Article 20)
1. CP has the right to enter into interchange and other agreements in its sole discretion, for interchanging traffic with NY & A, and to grant NY & A "incidental trackage" rights over CSX, from Fresh Pond Junction to Oak Point Yard, Harlem River Yard, and Hunts Point Terminal for such purpose. Art. 17(a).	1. Conventional anti-assignment clause. No trackage rights granted to NY&A.
S. **GENERAL PROVISIONS**	S. **GENERAL PROVISIONS**
(Article 19)	(Article 20)
1. As to whom the Agreement confers benefits, the Agreement states that it does not address any rights that the State of New York and the New York City Economic Development Corporation may have. Art. 19(a).	1. No comparable provision.

CP	CSX
2. Neither party may disclose the provisions of the Agreement to a third party, excluding a parent, subsidiary or affiliate company, without the written consent of the other party. Art. 19(b).	2. No comparable provision. But see Sec. 15 of CSX JFA (Joint Facilities Agreement). Note that agreements are already in public files at STB.

II. Differences Between CP Trackage Rights Addendum and CSX Terminal Joint Facilities Agreement.

CP TRACKAGE RIGHTS ADDENDUM	CSX TERMINAL JOINT FACILITIES AGREEMENT
A. **DESCRIPTION**	A. **DESCRIPTION**
1. The CP Agreement does not grant CP rights to travel over MNCR and Amtrak lines or property owned or operated by the State and/or City of New York. Sec. 1. Because such lines are not included in the definition of Trackage Rights or Subject Trackage, CP will not pay a charge to use those lines. See Sec. 3 of CP Addendum. (CP pays $0.29 per car mile for the Trackage Rights (as defined in Sec. 1 (Description)).	1. The JFA provides no description of the trackage rights. But see Art. 1 and Art. 16 of the CSX Trackage Rights Agreement, which give CP permission to seek approval of owners to travel over their lines, in addition to granting the rights to the owned trackage.
2. CP has the right to serve future and existing customers located on NYC's Chicago Line and Hudson Line and in the New York metropolitan area. Sec. 1.	2. No comparable provision in the JFA or CSX Trackage Rights Agreement; the latter grants full access to all present and future customers in Bronx and Queens but prohibits CP's use of the Subject Trackage to perform local service elsewhere. See Art. 3.
3. CP has the specific right to use any branch line, spur track, industrial track and industrial siding, including the Claverak/Hudson Upper Industrial Track. [i.e., ADM facility] Sec. 1.	3. No comparable provision in CSX Trackage Rights Agreement or JFA.
4. CP may interchange with NY&A or any other railroad at Fresh Pond Jct. Sec. 1.	4. The CSX Trackage Rights Agreement gives CP the right to interchange with NY&A, but does not indicate that such rights extend to other railroads. Art. 3.
5. CP may enter into interchange agreements with other railroads.	5. No comparable provision.

CP TRACKAGE RIGHTS ADDENDUM	CSX TERMINAL JOINT FACILITIES AGREEMENT
6. To facilitate interchange, CP may grant other railroads "incidental trackage rights" between Fresh Pond Jct. and Oak Point Yard, Harlem River Yard, and Hunts Point Terminal. Sec. 1.	6. No comparable provision for use of the trackage rights by any other railroad.
B. **SCOPE OF USE**	B. **SCOPE OF USE**
1. CP has the right to pick-up and set-out bad order cars, repair and service equipment, and operate trains, cars or vehicles for inspection and management purposes. Sec. 2(a).	1. No comparable provision.
2. CP has the right to perform local freight service on the Subject Trackage. Sec. 2(a).	2. The JFA permits access to all facilities and industries within "The Terminal," that is, the entirety of CSX's rights in the Bronx and Queens. Recitals and Sec. 1. In other areas, no local service.
3. CP has the right to switch and classify its cars at immediate points on the Subject Trackage. Sec. 2(a).	3. Neither the JFA nor CSX Trackage Rights Agreement gives CP the right to classify cars at intermediate points. Art. 3 of the CSX Trackage Rights Agreement gives CP the right to make an intermediate stop at Harlem River Trailvan Terminal.
4. CP has the right to interchange cars with other carriers. Sec.2(a).	4. CP may interchange with NY & A. Sec. 1(b). No other carrier is specified.
5. CP has the right to use all yards and facilities located on the Subject Trackage. Sec. 2(a).	5. No comparable provision as to Trackage Rights Agreement. So provided in The Terminal.

CP TRACKAGE RIGHTS ADDENDUM	CSX TERMINAL JOINT FACILITIES AGREEMENT
6. If CP's single main track between the terminals of the Subject Trackage is insufficient to accommodate the combined volume of the parties, then a second main track will be constructed on the north side of the existing main track between the terminals. CP and CSX will share the costs equally. Post-construction, NYC will assume ownership of the north track and CP will assume ownership of the south track [which CSX acquired when it acquired its part of Conrail]. Sec. 2(b).	6. No comparable provision.
C. **COMPENSATION**	C. **COMPENSATION**
1. CP will pay $0.29 per car mile for trackage rights. Sec. 3(a).	1. CP will pay on a proportionate basis for all direct and associated expenses and an annual interest rental fee. Sec. 5(a) of JFA and Art. 5 of Trackage Rights Agreement.
2. No comparable provision.	2. For services within the Terminal, CP will pay on a proportionate usage basis for all direct and associated expenses, including O&M, supervisory and administrative costs. Sec. 5(b) of JFA.
3. No specific currency is required.	3. The JFA specifies payment in U.S. dollars. Sec. 5(d) of JFA.
4. No comparable provision; But see Art. 4(a) of CP Trackage Rights Agreement: CP must pay CSX within 30 days of billing date.	4. CP must pay CSX within 15 days of billing date. Sec. 5(d) of JFA.
5. No comparable provision.	5. Payment will be made pursuant to Standard Electronic Funds Transfer Authorization Agreement. Sec. 5(d) of JFA.

CP TRACKAGE RIGHTS ADDENDUM	CSX TERMINAL JOINT FACILITIES AGREEMENT
6. CP will pay a sum equal to the product of (a) $0.29; (b) number of cars; and (c) miles of Subject Trackage used. The number of cars will be determined by calculating the average number of axles where four axles will count as one car. Sec. 3(b).	6. No comparable provision; per car-mile computation is not provided, but proportionate cost-sharing of various uses and services.
7. CSX will bill CP on the 10th day of each month. Sec. 3(c).	7. CSX will render an itemized bill at the end of the month. Sec. 5(c) of JFA.
D. **REVISION OF CURRENT CHARGE**	D. **REVISION OF CURRENT CHARGE**
1. The $0.29 per car mile is subject to change on an annual basis. Sec. 4(a)-(b).	1. No comparable provision; the cost-based computations are self-adjusting.
2. The annual adjustment to the $0.29 charge will compensate, inter alia, for increases and decreases in material (excluding fuel).	2. No comparable provision. See above.
3. Revisions to the current trackage rights charge will be made based on the AAR's Annual Indices of Charge-Out Prices and Wages Rates. Sec. 4(c).	3. No comparable provision. See above.
4. Compensation may be renegotiated every five years. Sec. 4(d).	4. No comparable provision. See above.
E. **SWITCHING**	E. **SWITCHING**
1. CP and CSX will provide each other with suitable information necessary for handling cars switched.	1. Under the JFA, only CP has the duty to provide such information to CSX. Sec. 2(b).

CP TRACKAGE RIGHTS ADDENDUM	CSX TERMINAL JOINT FACILITIES AGREEMENT
2. For the first six months, CP will pay CSX $250/car for switching, after which CP and CSX may either demand a joint study to determine CSX's actual cost, and the agreed upon rate (not to exceed the NITL agreement switching rate) will be retroactive to the effective date of the Agreement; but the cost so determined shall not exceed that provided for in the December 1997 NITL settlement ($250 per car) plus adjustments permitted under NITL settlement. Sec. 5(f).	2. Completely cost based as are other Terminal services used by CP.

Certain Provisions Included in the CSX Terminal Joint Facilities Agreement ("JFA")
that are Not Included in the CP Trackage Rights Addendum:

1. Delivery and Receipt of Cars.

CSX may repair cars and adjust or transfer lading as necessary for safe transit; CP will reimburse CSX for such repairs and adjustments. Sec. 2(c) of JFA.

2. Inspection.

CSX is not responsible for making mechanical inspections on CP's cars. Sec. 3 of JFA.

3. Interruption, Delay.

If use of trackage or switching is interrupted, CP will not have a claim against CSX for resulting liability. Sec. 4 of JFA.

4. Additions, Retirements and Alterations of the Application.

CSX may, at its sole cost and expense, make changes to the Terminal Sec. 6(a). Additions and betterments become part of the Terminal and retirements are excluded. Such changes will modify the annual interest rental. Similar to Article 9 of Trackage Rights Agreement

5. Employee Claims.

Each party will assume and hold harmless the other party from employee claims arising under the Agreement.

6. Arbitration.

This section essentially mirrors the Arbitration provision in the CSX Trackage Rights Agreement (Art. 19).

7. Abandonment of Related Track.

If CSX abandons the Subject Trackage and CP acquires such trackage, and the JFA is in effect, then on notice to CSX within 30 days of CP's acquisition of the abandoned trackage, CP may acquire all of CSX's interests in the Terminal at fair market value. Sec. 11 of JFA.

8. Successors and Assigns.

This section essentially mirrors the Successors and Assigns provision in the CSX Trackage Rights Agreement. See Sec. 12(a) of JFA.

9. Notice.

This section essentially mirrors the Notice provision in the CSX Trackage Rights Agreement. See Sec. 13 of JFA.

10. General Provisions.

This section essentially mirrors the General Provisions provision in the CSX Trackage Rights Agreement. Sec. 14 of JFA.

11. Confidentiality.

During the term of the Agreement, and for three years thereafter, CSX and CP may not disclose information as to the Agreement to any party (excluding their parents, subsidiaries, affiliates and directors, officers, agents, employees, and attorneys) without prior written approval of the other party. Sec. 15 of JFA.

12. Force Majeure

CSX will not be responsible to CP for delays if such delays are caused by circumstances beyond its control. Sec. 17 of JFA.

Attachment 1
Potter Reply Verified Statement

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33388
(Sub-No. 69)

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

REPLY VERIFIED STATEMENT OF STEVEN A. POTTER

My name is Steven A. Potter. I earlier gave a Verified Statement in CSX-167 in this matter, which was the submission of CSX Corporation and CSX Transportation, Inc. (collectively, "CSX") as to the rights to be granted to Canadian Pacific Railway Company and its affiliate, Delaware and Hudson Railway Company, Inc. under compulsion of the Board's condition in Ordering Paragraph No. 28, Decision No. 89, served July 23, 1998. A statement of my employment history and qualifications is contained in that Verified Statement.

I have read the filing made by the Canadian Pacific Parties (collectively, "CP") in this matter, CP-24, entitled their "Opening Evidence and Argument" (the "CP Filing"), including the argument by counsel, the CP-proposed form of trackage rights agreement, the

two Verified Statements of Paul D. Gilmore, and statements by two shippers on the extreme northern portion of the Hudson Line.

My review of the CP Filing indicates, in the first place, that there is considerable agreement between CSX and CP on how the mandate of the Board in Ordering Paragraph No. 28 should be implemented:

1. Both parties agree that implementation should be through trackage rights, not haulage rights. The reasons expressed by CSX and CP are complementary to each other. To be sure, CP suggests at one point (page 10 n.4) that it would like to start out with haulage rights and then switch to trackage rights. CSX objects to this approach, for the reasons stated in my earlier Verified Statement and CSX's earlier filing. So, by its own terms, the CP proposal is to operate the trackage rights from Day One. (There are some real disputes as to the nature of the trackage rights, but I will address them later.)

2. The parties are in agreement, as CSX anticipated, that CP does not want to hire, train and maintain its own switch and yard crews in the Bronx and that they believe that the most efficient way to operate in the Bronx would be with CSX doing the switching for both parties. CP also believes that it should have access to all yards, terminals, and other NYC/CSX facilities, and to shippers, present and future, in the Bronx and Queens, and that CP should be permitted to interchange with the New York & Atlantic. CSX is in agreement with that as well, though there are some minor issues as to the details. A principal

difference is that CSX wants to call the terminal joint facility, about which the two parties seem to have agreed, by its right name, a Terminal Joint Facility. CP wants to have the area operated substantially in the same way as CSX, but does not want to have it called or paid for like a Terminal Joint Facility. The reason appears to have to do with money.

3. CSX expressed the view that the constraints on capacity on the Hudson Line imposed by the Metro-North passenger operations made it impracticable for both carriers to have access to shippers outside of the Bronx/Queens Terminal area. Accordingly, its proposal was that only CSX should operate or provide local service outside of the Bronx/Queens Terminal area. CP is somewhat in agreement with that in the sense that it does not propose to operate any local service except at the extreme north end of the line, where the eight-hour-a-day (rather, a night) constraint is not in effect and where, coincidentally, the two shippers who have made statements in CP's Filing are located, one of which is the largest shipper on the line north of the City limits. However, there is one disagreement: CP wishes to conscript CSX to operate local trains for its account south of that area, where CP is not willing to operate them. This is because CP wants to have theoretical access to all the shippers along the Hudson Line, so that it can have actual access to those near Albany, which are the only ones it proposes to serve. CSX does not believe that this is what the Board intended; it believes that the Board wished to provide competitive Class I rail service directly to the City of New York and Long Island, not to add competitive options in the Greater Albany area.

4. CP states as its principal purpose in making its proposal is that "CP seeks to insure that its service can be provided on an equal competitive footing with the service provided by CSX." CP Filing at 14; see also CP Filing at 16. CSX supports that goal as well, although it believes that the effect of the details of CP's proposal is to give CP an advantage over the position of CSX and create a competitive imbalance in CP's favor, not an equal basis of competition.

Those four are the broad areas of agreement.

The major areas of disagreement are primarily caused by the fact that while CSX and CP both are of the view that CP ought to offer a first-class service, through trackage rights and with terminal support in the Bronx and Queens from CSX, CP is not willing to pay the cost of first-class service and instead wants to use CSX's facilities and services on a highly discounted basis. There are some other overreachings in CP's proposal; many come from the desire of CP to aggrandize its commercial position in the Albany area. The Reply Verified Statement of R.R. Downing will discuss the extraordinary proposal of CP that it have access to three alternative routes to interconnect its lines in the Albany area to the Hudson Line, a sort of early Christmas wish list by CP. There are some other strange and overreaching requests along the way which I will touch on later. Many of these are hidden

in the presentation by CP. But the major point of difference is what CP will pay for the rights it is getting, under the constraint of the Board's order, from CSX.[1]

CP's Proposal to Pay an Economy-Class Fare for First-Class Rights

CSX's Statement in CSX-167 sets forth, and its Reply Statement in this filing underlines, the requirements of the pertinent statute, the Constitution, and the Board's and its predecessor's precedents where one carrier is directed by the Board to let another carrier use its facilities and services. The compensation required is cost-based. In both the case of sharing terminal facilities and of trackage rights, it starts with an interest rental, which provides the owner with a return on its capital investment, based on the percentage of the interests in the assets that are made available to, or used by, the other party. Next, in the case of terminal services, the costs of ownership (such as real estate taxes), operations, maintenance and administration of the terminal, including the compensation of personnel of the terminal operator, whether it be the owner or a third party, is allocated between the owner and the other party on a usage basis. On trackage rights, the approach is the same; the costs of ownership, maintenance and administration of the assets are shared on a usage

[1] There also, as suggested above, is a dispute as to whether the Board intended the rights to be "local" otherwise than in New York City. That should, in practical terms, relate only to whether CP would have the right to serve the two shippers who have provided it with supporting statements, one of which is relatively large. But because CP seeks access to all shippers on its three access routes to the Hudson Line, it has ramifications which are much broader. I understand that these will mainly be discussed in the Argument part of CSX's Reply Submission.

basis, though, of course, since the non-owner user will furnish its own line-haul crews, accordingly, only the labor costs of maintenance, dispatching and administration of the line would be allocated as far as labor costs were involved. This is the framework that the Board and its predecessor have applied in fixing compensation for joint facilities use and for trackage rights. In cases where the parties agree on compensation, the Board's review is limited to ascertaining, when the rights granted are granted to solve a problem caused by a transaction, that the negotiated levels of compensation are not in excess of the formulas just referred to.

It is this form of cost-based compensation that CSX has proposed. CP has completely ignored these requirements and instead suggests that compensation provided in other contexts on a voluntary, agreed-upon basis be applied in this case where CSX is being conscripted to provide services for, and its property being condemned for use by, CP.

In the area of trackage rights, CP proposes 29¢ a car mile for its cars moving over the lines owned by NYC and allocated for operation by CSX. (No compensation is provided for the loss of CSX's exclusivity of freight rights on the properties owned by the public authorities, which account for a majority of the line between Selkirk and Oak Point Yard in the Bronx.) Access to and use of all yards and terminals is, according to CP, to be included at no extra charge! (CP Proposed Trackage Rights Agreement, Addendum, Section 2(a))

The 29¢ per car mile fee is taken from the arrangements that CSX and NS made, between themselves, on a voluntary basis in the Primary Application in this matter. It was used there to define what each would pay to the other for trackage rights which were granted under the Application. The primary purpose of those cross-grants of trackage rights in the Application was to resolve 2-to-1 situations. Thus, the parties were acting to cure a competitive problem which they had created themselves in the Application. The pricing was reciprocal; in some cases, CSX would pay NS and in other cases NS would pay CSX. If the fees were below cost or if they did not reimburse the owner for its cost of capital, the problem would even out; at one time, CSX would be underpaying and on other occasions, it would be overpaying. At one place, it would be the payor, and at another, the payee. There is no such reciprocal element in the present situation; CSX is not acquiring terminal rights to CP's property anywhere or trackage rights anywhere over its lines. Nor is the access to be granted to CP an effort to correct a competitive problem created by the Transaction. As I understand it, it was imposed by the Board for entirely different reasons. The essential point, however, is that the 29¢ figure was an agreed-upon number; in the absence of agreement, a cost-based figure must be used, as CSX has proposed. There is no evidence in the record that equates 29¢ per car mile to the cost of capital being devoted by CSX to use by CP or to the expenses of ownership, maintenance and supervision/administration of the routes in question.

CSX proposes not a fixed number but a formula based on actual costs and based on the fair market value of the assets used in providing the trackage rights and the terminal services. The formula may produce a trackage rights figure that is less than, equal to, or greater than 29¢ a car mile. Whatever it is, it will be fair because it will mean that CP's costs "below the wheel" and CSX's costs "below the wheel" will be equal. Likewise, for the provision of terminal services, the figure will be equal to the costs allocable to the services and will assure that the costs to the two are equal. An arbitration process is provided to resolve disputes as to the costing and as to the determination of the interest rental. If the Board wishes to review the results of that arbitration process, either under the "*Lace Curtain*" standard or on some other standard that provides Board review while giving deference to the arbitration process, CSX certainly would have no objection.

COSTS ARE NOT STATIC

CSX's proposal recognizes that costs are not static and that there can be sharply increased per mile costs if there is increased use of the facilities in the Terminal in the Bronx and Queens Terminal areas or on the line to the Albany area. The limitations of the present facilities at Oak Point Yard and at the place of interchange with the NY&A at Fresh Pond are dealt with later in my statement. These suggest the need for capital improvements — for which CP has no intention of paying an appropriate interest rental. But there are also operating costs that can increase disproportionately with increased use. The primary example is the amount payable to Amtrak for use of "Track 2" in the segment

of the Hudson Line between Poughkeepsie and Rensselaer. That track is set aside for almost exclusive use of Amtrak and is maintained by it. It provides the only passing facility on the segment. Amtrak maintains that Track in the segment. Amtrak receives a fee if the freight railroads use it or use other lines in the Albany area maintained by Amtrak. The fee for using it is very high and with increased use of the Hudson line the amounts payable to Amtrak are likely to go up dramatically.

OVERREACHING ON THE RIGHTS OVER THE PASSENGER AND PUBLIC AUTHORITIES AND THE YARDS AND TERMINALS

If its total arbitrariness and failure to recognize the principles followed in these cases were all that was wrong with CP's trackage rights proposal, it would be bad enough, but there is a lot more.

First, CP seeks trackage rights only over the NYC-owned portions of the Hudson Line and the other routes involved, and proposes to make its own deal with the owners of other segments. To the extent that the trackage rights granted by those owners to Conrail, which pass to NYC in the transaction, are exclusive, it is asking the Board to override the exclusivity clause. While the Board has that power, the exercise of it would require compensation to be paid by CP as user, and, as developed in the Reply Argument in this filing, I understand that there are portions of the line, not to be owned by NYC, on which Conrail's, and hence CSX's, freight rights may be exclusive. These are developed in

CSX's Argument in this filing. CSX is entitled to compensation for the loss of its exclusivity.

Second, CP seeks full use of all terminals and yards on the track covered by the trackage rights, which would clearly include, given the trackage rights CP seeks, Oak Point Yard, Selkirk Yard and the West Albany Yard. These terminal and yard rights are to be granted without the payment of additional consideration over and above the 29¢ per car mile. See the CP-proposed Trackage Rights Agreement, Annex, Section 2(a). This is, again, part of an impossible list of what CP wants to have without paying for it.[2] Thus, for paying an arbitrary per car mile trackage rights fee on about 40% of a line of track that covers approximately 130 miles, CP wants the free use of at least two major yards at the beginning and end of that 130-mile line. These include the Selkirk Yard in the Albany area, the largest yard on the eastern part of the Conrail system allocated to CSX, which will perform a major role in CSX's service via the Water Level Line, and Oak Point Yard in the Bronx, currently the largest active rail yard facility in the City of New York. There is no reason for CP to have rights in Selkirk Yard at all, or in the West Albany Yard, which it wants also.

When we turn to the rights of CP within the terminal area proposed by CSX (and implicitly proposed also by CP), a similar disregard of the applicable rules for

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[2] It is not clear whether the Croton Yard, which is on the Hudson Line but at a portion where the line is not owned by Conrail, is included in the request.

compensation and an overreaching are experienced. As noted above, access to the yards and terminals is to be granted under the CP proposal without any contribution toward the cost of capital invested in the yards and terminals and without regard to the expenses of ownership (*e.g.*, real estate taxes), maintenance, operation and administration of the yards.

CP has deigned to offer payment for its switching movements in the Terminal area. Again, there is no effort by CP to have these moves performed on a cost-based compensation. A flat figure of $250 per car is proposed. There is no cost-based support for it. It is chosen because this was the pre-transaction figure for which NS and CSX did reciprocal switching for one another where reciprocal switching had been established between the two. But that number was, in its context, both mutually agreed to and reciprocal; if there was an overcharge or an undercharge, since payment flowed both ways between CSX and NS, it was likely to come out in the wash. The $250 switching charge was also used in various contexts in the prosecution of the Application to obtain support from objecting parties, pursuant to the Board's policy of encouraging voluntary settlements wherever possible, to provide amelioration in 2-to-1 situations (such as in Indianapolis), to effect the settlement with the National Industrial Transportation League, and the like. In each case, the use of the number for a switching charge was voluntary. It was reciprocal (between CSX and NS) or it was part of the bargain to obtain a settlement or to remove objections. There is no reciprocity and no agreement here; CSX has already made its settlement with CP in this case and obtained its support. Now, CP makes proposals to

obtain rights it never sought in the interparty negotiations and which are unsupportable under the established rules of compensation. To take that $250 number and use it even claiming it to be an appropriate cost-based switching charge, let alone the only charge payable for all of the terminal services which CP will require and use, particularly in a high-cost area like the Bronx, is simply outrageous. There has been no effort to justify it under the Board's precedents.

Ostensibly (on first reading) the $250 figure it tentative and can be adjusted (indeed, retrospectively) to a cost-based figure reflecting proportionate usage and cost. CP Addendum to Trackage Rights Agreement, Section 5(f). But that adjustment is a one-way street; it is "capped" by the figure in the NITL settlement (id.) which is, of course — $250! Section III.C., CSX/NS-176, Vol. 1, page 773 (Appendix B at B-5).

SOME MAJOR PETTY LARCENIES

By comparison with CP's insensitivity to the requirements of cost-based compensation and its proposal to use the yards and terminals without paying for them, the remainder of the operational and compensation-based overreachings may appear to be only petty larcenies, but they are very serious nonetheless. I list them only in summary form, by identification to the proposed trackage rights agreement in the CP Filing.

Article 2(b). CP gives itself the right here to use any part of the main line tracks owned by NYC and operated by CSX for the purpose of storing CP's cars and equipment.

This is more than the prerogative of a co-owner; it is more the prerogative of a sole owner. It should be remembered that the object of this proposed right on the part of CP is not only the No. 1 Line between Poughkeepsie and Rensselaer, where Amtrak has a right of use and will be owned by NYC, but on a segment of the NYC/CSX line at Selkirk, the Selkirk Branch, which connects with the River Line, the Chicago (Water Level) Line, the Boston and Albany Line, and the Hudson Line. What this may do to CSX's and Amtrak's operations can only be imagined. The provision also gives CP the right to store cars in Selkirk Yard and West Albany Yard, free of charge at that. These bizarre results were reached through someone substituting the words "may use" for the words "shall not use" in the standard form, presumably deliberately.

Article 7(a). If CSX makes additions and improvements on the trackage rights tracks for the mutual benefit of the two operators, CP makes itself entitled to use the improvements and does not have to pay anything extra. This makes the arbitrary imposition of the 29¢ charge even more arbitrary.

It should be noted that the Oak Point Yard is small, being severely constrained both as to length and number of tracks. I understand that except for moves to Hunts Point, all in and out moves must take place using the South End of the Yard, which is not efficient. If traffic growth occurs, as CSX and presumably CP hope it will, substantial improvements be necessary. CP proposes, under its draft agreement, to get them free.

A similar comment must be made as to the facilities at Fresh Pond Jct. The connection will have to be improved if traffic warrants it and once again CP's formulation is that CSX will have to put up the capital and not be compensated by an interest rent on it.

Article 11(a). CP generously provides that for purposes of inter-company liability, the liability of Amtrak is considered to be the liability of CSX. No comparable provision is made for those railroads, such as NY&A, which are given rights by CP as contemplated by CP's agreement form.

Article 17(a). CP here grants itself the right to permit the NY&A to use the tracks, from Fresh Pond Junction to Oak Point Yard, Harlem River Trailvan Terminal and Hunts Point Terminal, for the purposes of interchange. There is nothing whatsoever in the Board's order that furnishes a basis for this part of CP's Christmas list.

Addendum, Section 1. CP here grants itself the right to serve shippers on all of the three access lines in the Greater Albany area, as a byproduct of its notion that it should be afforded three simultaneous alternative routes of access to the north end of the Hudson Line. An explanation for this is not provided by CP.

Addendum, Section 2(b). If CP's single main track between the terminals of the Subject Trackage[3] is insufficient to accommodate the volume of the two parties, CSX is to build a second main track, and the two will share the cost equally. When the construction is

[3] Presumably in CP's usage meaning Poughkeepsie to Rennselaer.

done, NYC shall assume ownership of the new track and CP ownership of the old track. Thus, CP gets one track by paying the cost of half a track, and CSX gets one track for paying the cost of one and one-half tracks. (That is, the portion of its $4 billion paid to the Conrail stockholders allocable to the track in question plus its half of the construction cost of the new track.) No discussion of the rationale of this grossly overreaching proposal is furnished to the Board.

Addendum, Section 4(b). While the 29¢ charge is made subject to indexing, and while CP says that it was taking the charge from the Master Trackage Rights Agreement between CSX and NS in the Application, it did not see fit to take the formula used in that document (the RCAF-U) but proposes a different index, based on an amalgam of two AAR indices. No reason is given. The issue is, of course, irrelevant if cost-based compensation is paid, as it must be. When we come to the $250 switching charge, through some fancy footwork, CP uses the lesser of the RCAF-U index or the AAR indices. See Addendum, Section 5(f).

CP Should Pay Its Interest Rent on a Cost Basis That Reflects a Co-Equal Status With CSX

While the rights claimed by CP in its filing appear to make it somewhat better off than a co-owner – it would have equal, and in some cases better, rights than CSX itself, but it would be under no obligation to pay half of the cost of ownership, of the capital that was used to obtain ownership, or of its share of the operating expenses – presumably, the Board

will not be Santa Clause despite the season and will not grant CP all of its wishes. But if CP's rights are those which are contemplated by CSX's offer, it will be entirely fair to treat it as a 50-50 co-owner and to effect the allocation of the interest rental on the capital employed on the tracks and the Terminal facilities on a 50-50 calculation.[4] The CP Filing confirms this:

> Conrail currently operates one merchandise train seven days a week in each direction between Oak Point Yard and Selkirk. A municipal trash train is operated twice weekly in each direction. (Downing V.S., CSX-167, at 3) Under the operating plan in the CP Filing. CP will begin by operating one merchandise train a day each way also. Thus, starting out, the use of the line will be nine trains each way per week for CSX and seven for CP, a position of approximate equality. While it is anticipated that the trash trains will increase over time to two a day each way, there is no assurance as to which of the carriers will get that additional business – if the ultimate repository of the trash is to be in the southeastern United States, currently New York City's destination of choice, we may expect CP to offer an interchange movement with its friendly connection, NS – so there is no reason to hypothesize that these additional large volumes will go to one or the other of CSX or CP. CP itself projects that after a year or so, it will run a second merchandise train each way each day. All those trains must respect the eight-hour window on the Metro-North segment of the line. Accordingly, the situation that is projected is not light use by a tenant

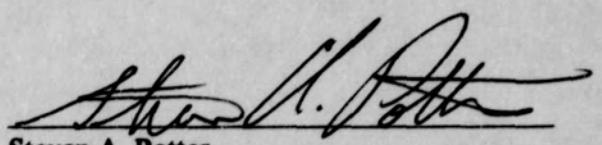
[4] The cost of operations is, under CSX's proposal, divided on a percentage use basis.

of a line heavily used by the owner, but one of equal and competitive use. The particular formulations of the required approach to compensation by way of "interest rental" for the use of capital assets that CSX has employed in CSX-167 contemplate this equality of use and equal opportunity of the two carriers. As to the operating and other expenses apart from the interest rental, of course, actual percentage of use will be the principle of division.

VERIFICATION

I, Steven A Potter, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this statement.

Executed on December 8, 1998.



Steven A. Potter

Attachment 2
Downing Reply Verified Statement

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33388
(Sub-No. 69)

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

REPLY VERIFIED STATEMENT OF
R.R. DOWNING

My name is R. R. Downing and I am General Manager-Service Delivery for Conrail's Albany Division, a position that I assumed in June, 1996. I began my railroad career with Conrail in 1977 in Philadelphia and since that time have held a variety of positions in Conrail's Transportation Department. In my current position, I have responsibility for transportation matters on Conrail's Albany Division which includes, among much else, the line between Selkirk Yard on the one hand and Oak Point Yard and Fresh Pond Junction in New York City on the other.

I provided a Verified Statement in connection with CSX's "Submission of CSX Corporation and CSX Transportation, Inc. As to the Rights to Be Granted to Canadian Pacific Railway Company and Affiliates With Respect to Line of Railroad Between Selkirk (Near Albany), NY, and Fresh Pond Jct. (in Queens)," CSX-167. Since then, I have had the

opportunity to read the "Canadian Pacific Parties' Opening Evidence and Argument," CP-24 (the "CP Filing").

The principal purpose of my present reply statement is to comment on the proposals of the Canadian Pacific Parties ("CP") for operations on the Hudson Line, and particularly with respect to the methods and routes of access by CP from its lines to the Hudson Line.

CP proposes that it simultaneously have the right to access the Hudson Line via three separate access routes. Since only one through train a day each way, increasing to two after a year or so, is contemplated initially by the operating statement of Mr. Paul D. Gilmore in the CP Filing, I cannot see why, from an operational standpoint, CP needs three separate access routes. This seems to me to be an unusual way to approach the grant of trackage rights.

I will now discuss the three CP access routes proposed in Mr. Gilmore's statement, one by one.

Access Route One involves a movement off the CP Montreal line at CP's CP 485 in Schenectady eastward onto the Conrail Chicago Line, a high-speed line used by Amtrak, capable of passenger movements at up to approximately 100 miles an hour.[1] This line then moves across the Livingston Avenue Bridge into Rensselaer and makes a progressive connection with the Hudson Line. The line is maintained by Amtrak while Conrail

[1] Gilmore's Exhibit 2 provides a schematic map.

presently maintains, and CSX in the future is to maintain, the signals. From an operational standpoint, the movements of CP on this line would not cause CSX any operating difficulties, since this particular segment of the Chicago line is used by Conrail, and is planned for use by CSX, only for local freight trains.

I note, however, that under the proposal of CP, CP is to receive local access to all shippers on the lines on which it is given trackage rights. CP is also to be entitled, it proposes, to free use of all yards and terminals on its trackage rights. There are a considerable number of shippers on this line segment, and Conrail's West Albany Yard is located on this segment.

Access Route Two proposed by CP involves a movement from a CP line, the Voorheesville Running Track, at Voorheesville, west of Selkirk, onto the "Selkirk Branch," which is a very heavily traveled double-track main line and which is used by Conrail, and will be used by CSX, for movements to and from a number of important main lines.[2] It handles movements to and from the Conrail River Line on the west side of the Hudson, to and from the Hudson Line on the east side of the Hudson, to and from the old Boston and Albany Line going through Massachusetts to Springfield, Worcester and Boston, and, via a connection at Hoffman, to and from the Chicago Line, which goes through Buffalo and, under CSX operation after the Split Date, will provide service to Chicago via Cleveland, the

[2] Gilmore Exhibit 3 provides a schematic map.

Greenwich, Ohio connection, and the rehabilitated B&O Line, and to St. Louis on the historic Conrail Line. Selkirk Branch is very strategically located and very heavily traveled.

There is an existing connection between the incoming CP line on the Voorheesville Running Track and so interchange is theoretically possible. Interchange would be complicated by the heavy use made of the Selkirk Branch by Conrail and projected by CSX. Four miles east of the Voorheesville connection, this CP-proposed access route passes through Selkirk Yard. Selkirk Yard is the largest classification yard on the Conrail system that is being allocated to CSX. It is going to be the principal classification yard for all of CSX's movements east and west to and from the Greater New York area and New England. It is very congested, and if there are other alternatives in terms of available movements for CP – which I believe there are -- it would be essential to avoid further use of the yard.

Once again, I understand that CP proposes that it should be given access, free of charge, to all yards and terminals on the trackage rights it is claiming, together with access to all shippers there. While there are no shippers on the four-mile run from Voorheesville to Selkirk Yard, this proposed access route then goes through the Selkirk Yard and, accordingly, it appears to me that CP is claiming the rights to use Selkirk Yard fully, as if it were a co-owner, and without compensation, as a result of its request to be given this access route. It also is claiming access to local shippers at the yard. There are numerous industries within the yard's limits, including General Electric, Owens Corning, and Air Products. There is also an automobile multi-level unloading facility in the yard where new

automobiles are unloaded. A daily train handled at that facility on average involves 72 modules, each with approximately 15 new autos on it.

After passing through Selkirk Yard, the CP access route No. 2 runs approximately 13 miles eastward, crossing the Hudson River on the Castleton Bridge, and joins the Hudson Line at Stuyvesant at approximately CP-125. There are numerous shippers on this segment, including the old Texas Eastern Gas facility, where propane gases are loaded into tank trucks, and the Powell & Minnock facility, which receives in-bound shipments of bricks.

Access route No. 2 poses capacity and operating difficulties because of the intense use of the Selkirk Branch, four miles of which would have to be traversed by the CP trains coming off or going onto the Voorheesville Running Track, and because of the congestion in Selkirk Yard itself. There is little or no room to park any cars in the Selkirk Yard.

In addition, access route No. 2, given the position taken by CP with respect to access to shippers and yard on its trackage rights lines, has enormous commercial implications due to the extensive number of shippers and other commercial facilities located in the yard and the claim of CP to use, as if it were a co-owner, the yards on its trackage rights lines.

Access Route Three involves a progressive connection with CP on CP's line coming southward from the Port of Albany and running into the Conrail/NYC "Albany Secondary" Line.[3] The movement then continues south on the Albany Secondary Line and enters

[3] Gilmore's Exhibit 4 presents a schematic map.

Selkirk Yard from the east, heading in a westerly direction. Since the ultimate purpose of the move is to go in an easterly direction rather than a westerly direction, CP's trains must be stopped in Selkirk Yard and a "run-around" effected, in which the locomotive of the train moves, on another track in the yard, to what was the back end of the train coming in and will be the head end coming out and is coupled there, while the appropriate safety devices are placed on what will now be the last car of the train. In a yard as congested as Selkirk, this run-around movement will take at best approximately two hours, during which the train will sit idle monopolizing a track in the yard. If the train were detained in the yard for more than 120 minutes without air supply attached, a fresh inspection of the train would be required under FRA rules, taking more time. The train would then head in an easterly direction out of the yard and pass over the Castleton Bridge, as in the movement in access route No. 2. The run-around movement would take place in similar fashion on movements incoming from the Hudson Line as on outbound movements.

Access route No. 3 creates enormous problems in the already congested Selkirk Yard, involving not simply a transit through the yard but a run-around movement and would be extremely burdensome from an operational standpoint.

In addition, given the CP commercial position as to access to shippers and yards, access route No. 3 has the same implications as access route No. 2 with respect to Selkirk Yard, the facilities and shippers there, and those on the 13-mile run to Stuyvesant.

The proposal CSX made in its November 30, 1998 submission in this case does not involve any of these difficulties. It provides for progressive connections near the Selkirk Yard but not using the yard. It uses the existing connection with Conrail's Albany Secondary Line, as is proposed in CP's access route No. 3. A new connection would have to be built to the Selkirk Branch near Selkirk, but the connection could be made where it would not pass through Selkirk and would connect with the Selkirk Branch to the east of the yard, allowing for a progressive move to access the Hudson Line at Stuyvesant, at approximately mile post 125, similarly to the CP access routes Nos. 2 and 3. This involves a much shorter movement on the congested part of the Selkirk Branch than CP proposal No. 2, since the most congested part ends about three miles east of the connection. This CSX proposal would involve an outlay by CP to put in two switches, some track and some signals. However, it would avoid use of the congested Selkirk Yard and would not, if the Board gave CP the total access to shippers on the access lines that CP demands, have the profound commercial implications that the three CP proposals have.

Perhaps CP is concerned about the cost of building the connection, which would be in the $1 million plus range. In any event, I am surprised that CP did not propose an existing access route which it uses at the present time, and which has no capacity problems and no substantial commercial implications. CP uses it to serve Troy, NY, on the Troy Industrial Line. It is shown very plainly on Gilmore's Exhibit 4. It works as follows: From the line coming south from Montreal through Rouse's Point through Saratoga Springs,

Ballston and Mechanicsville,[4] trains would enter Kenwood Yard, a principal CP yard in the Greater Albany area. The trains to the East of the Hudson Line would be assembled in the yard and would proceed going north in the direction of Mechanicsville but with the locomotive at the south end, "shoving." With the engine shoving, the train would move on to the Conrail/CSX Chicago Line, in a backward move, toward the West. When the train had cleared entirely onto the Chicago Line, it would head eastward across the Livingston Avenue Bridge into Rensselaer, where there would be a direct, progressive movement onto the Hudson Line. CP has existing rights to effect most of this move, and currently operates the major portion of the move to gain access to the Troy Industrial Line to Troy. Indeed, on Gilmore's Exhibit 4, the essential part of the connection, including the backward shove onto the Chicago Line, is clearly shown in red as "Existing CP Network." By CP's using this line, which is currently used by Conrail only to serve Fort Orange Paper Company at Castleton, there would be a minimal interference with CSX's movements and no commercial problems. Trains could be assembled in the Kenwood Yard, and the distance to the connection would be minimal. While the Chicago Line is used by Amtrak, windows are available which would mesh with the window that would be required on the Hudson Line south of Poughkeepsie. I cannot understand why CP has not put this access route forward, unless the reasons are of a commercial nature; commercial matters are, however, not my specialty.

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[4] That line is accessible from other CP lines in the Albany area, as Gilmore's Exhibit 4 shows.

* * * * *

I have been asked what the distance is between the northern starting point of the Hudson Line at CP 142 to the Fort Orange facility in Castleton and the Archer Daniels Midland ("ADM") facility in Hudson, NY. The respective distances are 7 miles and 26.5 miles (the latter to the spur line on which the facility is located). These facilities are thus really part of the Greater Albany area.

* * * * *

I have been asked to describe the facilities at Oak Point Yard and the interchange facilities at Fresh Pond Junction.

The Oak Point Yard is relatively small, consisting of two main tracks, the longer of which is 50 car-lengths, and 15 yard tracks of 10 to 45 car-lengths. It is theoretically possible to build a train of longer than 50 cars at the yard, but it would be very time-consuming and would occupy a considerable amount of the yard's resources. Except for movements to Hunts Point, all movements in and out of the yard are to or from the south end of the yard. Thus, if a train or a portion of it is moving on to Fresh Pond Junction after coming in to Oak Point, its locomotive must "run around" the train to take the Fresh Pond cars to their destination, unless a switching move is made with a switch engine. In any event, the incoming line-haul locomotives have to reposition themselves at the other end of the yard in order to haul a train back to the Albany area. So besides being small, the yard is

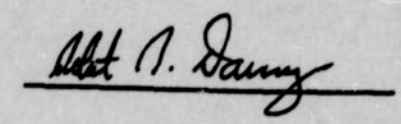
not efficient and considerable improvement would be required if the level of activity at the yard increased substantially.

The facilities for interchange at Fresh Pond are minimal. The facility there is a "wide place in the road." There are two tracks, a yard track and a main line track. If interchange movements increased substantially, improvements would, again, be necessary here.

Further the declarant says not.

VERIFICATION

I, R.R. Downing, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this statement. Executed on December 8, 1998.



Attachment 3
Vox Reply Verified Statement

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33388
(Sub-No. 69)

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

REPLY VERIFIED STATEMENT OF JERRY VEST

My name is Jerry Vest, and I am employed by CSX Transportation, Inc. in Jacksonville, Florida. My title is Director of Commercial Integration. I have been so employed since April 13 of this year. Before that, I had been employed by Conrail since 1986. While employed by Conrail, I held a number of positions in the marketing, sales, operations and strategy departments, including Director of Development (heading Conrail's Customer Development Group from 1996 to 1998) and Director, Strategic Analysis (managing acquisitions/joint ventures, business planning, and formation of the customer service group organization from 1993 to 1996). My duties as Director, Development and as Director of Strategic Analysis required me to become familiar with the general structure of railroad operations in the area of New York City and on the railroad lines immediately to the East of the Hudson River and in the Albany, NY, area and the operations of Conrail's predecessors in those areas.

I make this Verified Statement in connection with the proceedings before the Surface Transportation Board (the "STB" or the "Board") in STB Finance Docket No. 33388, Sub-No. 69.

I understand that there may be an issue in that matter as to the extent of competition between rail carriers in the area that I have just described in a certain historic period. That period, which I examined for this statement, is the period immediately prior to the merger of the Pennsylvania Railroad and the New York Central to form the Penn Central on February 1, 1968, in which period the New York, New Haven and Hartford Railroad (the "New Haven") was also an independent railroad; it will be recalled that its inclusion petition was granted and that it became part of the Penn Central at the beginning of 1969.

North of the City.—At the time indicated, there was no other freight railroad besides the New York Central in that part of New York State East of and along the Hudson River north of New York City to the Albany area other than an east-west New Haven line. That east-west New Haven Line ran across Connecticut from the City of New Haven, which crossed the Hudson River at Poughkeepsie on a bridge which was destroyed by fire in May 1974, during the Penn Central era. The primary purpose of that New Haven line was to serve as a link between the many railroads in Pennsylvania and the railroads of New England, across the Hudson River. It was part of the famous "alphabet route" that was comprised of several smaller lines which attempted to market their joint line route in competition with the New York Central. It would have been most unlikely that New York Central would have agreed to joint service to customers under those circumstances. I am

unaware of any stations served jointly by the New York Central and the New Haven line just mentioned, except perhaps Poughkeepsie where the lines crossed and the two roads interchanged traffic. While I have not had sufficient time to research that question and cannot testify that there were no jointly-served customers, I am relatively confident that, if there were any, they were very few in number.

More certainly, addressing the entire picture of rail service along the eastern bank of the Hudson River in the area north of New York City, starting with the formation in 1842 of the Hudson River Railroad by a group of Poughkeepsie businessmen, there has never been multiple freight access by shippers along that corridor. The ownership of the original Hudson River Railroad route changed from time to time, becoming part of the New York Central System in the late 19th century, then part of Penn Central in 1968, and then a part of Conrail in 1976. But the fact that this route was the only north-south rail carrier in the corridor never changed.

Approaching Albany.– In this territory East of the Hudson, north of Poughkeepsie and up to the Albany area, the only rail carrier then, as it is now, was the New York Central lines, having the same approximate (albeit now somewhat reduced) configuration as the present Conrail lines. I attach, as Annex 1, a map of the area from the Rand McNally 1948 Railroad Atlas of the U.S., as reprinted by Kalmbach Publishing Co.

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