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December 10, 1998

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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

Sub 69 D

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 Evidence and Argument. Certain tables in the Plaistow R.V.S. 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

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CP-25

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 EVIDENCE AND ARGUMENT

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INTRODUCTION

The Canadian Pacific Parties 1/ hereby submit their reply evidence and argument in support of Board establishment of terms and conditions to govern CP full-service trackage rights over the CSX 2/ "east-of-the-Hudson" line between Schenectady/Albany, NY, and Fresh Pond Junction, NY.

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

[Footnote continued]

The trackage rights proposal submitted by CSX is deficient in three fundamental respects:

- First, offering CP access to only a single routing on the north end of the east-of-the-Hudson line with the further limitation that CP would receive overhead rights only, CSX disregards the Board's directive that the rights be "not restricted as to commodity or geographic scope" (Decision No. 89 at 83); limitations CSX proposes on CP's rights on the south end of the line similarly violate this directive.

- Second, CSX proposes a trackage/terminal rights compensation methodology -- a methodology entirely divorced from the standard methodology employed by the Board in setting merger-condition trackage rights compensation -- structured to produce such high charges to CP that it could never price its services competitively with CSX.

- Third, having proposed a compensation methodology that would make it impossible for CP to compete with CSX and thus having effectively nullified the limited trackage rights grant it advances, CSX goes the next step and proposes that the October 20, 19[illegible] settlement agreement between CSX and CP be set aside, thereby eliminating not only CP's limited haulage rights under

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[Footnote continued]
New York Central Lines LLC ("NYC"), which will acquire the line from Consolidated Rail Corporation ("Conrail").

that agreement for east-of-the-Hudson traffic but also CP's rights relating to Buffalo, Philadelphia and west-of-the-Hudson/northern New Jersey traffic.

If CSX's strategy were to succeed, it would emerge from this proceeding no only with less competition on the east-of-the-Hudson line than it had going in, but also would rid itself of settlement concessions made to CP unrelated to east-of-the-Hudson service. Obviously this result cannot be squared with the Board's objective in awarding east-of-the-Hudson rights to CP: to "restore a modicum of the competition that was lost in the financial crisis that led to the formation of Conrail." Decision No. 89 at 83.

For the reasons explained below, the Board should reject CSX's effort simultaneously to emasculate the east-of-the-Hudson trackage rights and gain commercial advantage in other markets in the process.

In Part I below, we address what the scope of CP's east-of-the-Hudson trackage rights should be. We explain that while CSX's proposal in regard to the south end of the line appears to conform in broad concept with CP's own proposal, it in fact is significantly more limited. As to CSX's proposal for the north end of the line -- restricted to overhead rights over a single routing through Selkirk Yard and with no right to use the CSX line between Poughkeepsie and Schenectady (described as Route

1 in CP's opening submission) -- it would block CP from having access to 20% of the traffic on the line and prevent CP from using the most efficient routing to Canadian points; it would also deprive CP of the most efficient routing to southern U.S. markets (described as Route 2 in CP's opening submission).

In Part II, we discuss the compensation CP should pay CSX for trackage rights and switching services. We explain that the "condemnation" compensation methodology proposed by CSX has no place in this proceeding, and demonstrate that the compensation proposed by CP -- 29 cents per car mile for trackage rights and up to $250 per car for switching charges -- is appropriate.

In Part III, we address CSX's effort to withdraw from its October 20, 1997 settlement agreement with CP. We note that this effort is not premised on any alleged breach by CP (which has performed all of its obligations under the agreement). We also explain that the termination CSX proposes would serve to end a number of pro-competitive CP rights established under that agreement that have nothing to do with east-of-the-Hudson service.

In Part IV, we compare the trackage/terminal rights agreements advanced by CSX with the trackage rights agreement proposed by CP. Where there are material differences, we explain

why particular terms proposed by CP should be adopted by the Board.

I. CP'S DESCRIPTION OF TRACKAGE RIGHTS SCOPE SHOULD BE ADOPTED

The full-service trackage rights proposed by CP are consistent with rights initially proposed to the Board by the New York State Department of Transportation ("NYDOT") and the New York City Economic Development Corporation ("NYCEDC"),3/ and conform to the Board's directive that they be "not restricted as to commodity or geographic scope" over the entirety of the east-of-the-Hudson line. Decision No. 89 at 83. By contrast, CSX's proposed scope of CP's rights is out of step with the NYDOT/NYCEDC condition request and the Board's decision in two major respects.

First, CSX proposes significantly to restrict the rights by "not giv[ing] local access to CP on the line between the Albany area and the New York City limits." CSX-167 at 10. In support of this fundamental departure from the Board's requirement that CP be given full-service rights, CSX claims that there was no pre-Conrail rail competition in this area, that the

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3/ NYDOT/NYCEDC requested imposition of full-service trackage rights "to serve all shippers and distribution centers located between the NY&A interchange at Fresh Pond, NY, and the CP/D&H interchanges at Selkirk and Schenectady, NY." NYS-24/NYC-17 at 3, 37.

limitation would deprive CP of access to only a de minimis 20% of the traffic on the east-of-the-Hudson line, and that the roughly 75 miles of line owned by the Metro-North Railroad ("Metro-North") is congested.

Yet CSX's claim of no pre-Conrail competition is unsupported by any evidence and firmly rebutted by NYDOT testimony submitted over a year ago demonstrating that there was active rail competition throughout the east-of-the-Hudson area between Albany and New York City prior to Conrail's creation. 4/ In ordering east-of-the-Hudson relief, the Board expressly acknowledged that there was east-of-the-Hudson "competition that was lost in the financial crisis that led to the formation of Conrail." Decision No. 89 at 83. CSX is seeking to reargue an issue the Board has already decided.

As to CSX's de minimis argument, the Board should listen to the shippers whose traffic makes up the 20% that CSX would deprive of competitive access to CP. They consider this result to be unacceptable, as for example, the Fort Orange Paper Company has made clear from the outset of this proceeding 5/

In regard to CSX's expressed concerns over congestion on that part of the east-of-the-Hudson line owned by Metro-North,

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4/ See Banks V.S. at 7-11, NYS-10.

5/ See Decision No. 89 at 115-16; Luizzi V.S., CP-24.

CP is not here seeking any rights as to the Metro-North ownership and will separately negotiate trackage rights with Metro-North over this line. Metro-North testimony submitted earlier in this proceeding demonstrates that its line can accommodate CP's proposed trackage rights operation, and the Board has made a finding to this effect. 6/ In sum, there is no justification for CSX's proposal to deny CP full-service trackage rights on the north-end portion of the east-of-the-Hudson line.

Second, CSX's proposal does not provide CP with any rights to use either (1) that part of the east-of-the-Hudson line between Schenectady and Stuyvesant (described in CP's opening submission as Route 1) that would permit the most efficient routing of traffic between Canadian points and east-of-the-Hudson points, or (2) the route through Delanson, CP "VO", and Selkirk Yard (described in CP's opening submission as Route 2) that would afford CP with the most efficient routing for movement of traffic between southern U.S. markets and New York City/Long Island markets. The only rights CSX offers are those which are generally coextensive with what CP designated in its opening submission as Route 3, the route that would allow CP to effectively serve local Albany/Rensselaer shippers, but CSX would

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6/ Nelson V.S. at 7-8, NYS-12; see Decision No. 89 at 83 n. 130.

make these rights overhead only and thereby deny CP access to local shippers.

In their responsive application, NYDOT/NYCEDC requested trackage rights both at Schenectady and at Selkirk. 7/ The Board's award of these rights described them generally as being "over the east-of-the-Hudson line from Fresh Pond to Selkirk (near Albany)" (Decision No. 89 at 83); nothing in this description excluded either the Route 1 or the Route 2 rights CP needs to be an effective competitor with CSX over the line. 8/

As the map of Route 1 reveals, 9/ CP's main line to Montreal connects with the east-of-the-Hudson line at Schenectady. For movements to and from Canada, this routing

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7/ In relevant part, NYDOT/NYCEDC requested Board imposition of the following:

> 1. Full service trackage rights . . . over the lines of Conrail between points of connection with the Canadian Pacific Railway/Delaware & Hudson Railroad at CP-160 near Schenectady, NY and Selkirk Yard near Selkirk, NY, and [the beginning of Metro-North ownership of the east-of-the-Hudson line], together with sufficient rights on tracks within the Selkirk Yard to permit the efficient interchange of freight with CP/D&H.

NYS-24/NYC-17 at 3.

8/ The discussion in Part I below relies significantly (but generally without citation) upon the Reply Verified Statement of Paul Gilmore being submitted herewith, together with his operating verified statement filed as part of CP's opening submission.

9/ See Gilmore V.S.(operating), Exhibit 2, CP-24.

avoids the significant circuitry problems presented by the CSX routing (CP Route 3), which are exacerbated by the fact that traffic using the CSX routing has to transit the congested yards in Albany (Kenwood) and Selkirk.

The Route 1 line between Schenectady and Stuyvesant has been leased by Conrail to Amtrak; Amtrak maintains the line and is its principal user. Conrail conducts a limited local service operation over the line (and presumably CSX will do the same), and compensates Amtrak for such usage. CP has worked out an interim arrangement with Amtrak for use of the line. 10/ CP will compensate Amtrak for such use on the same terms as does Conrail; to the extent that CP makes payments to Amtrak for use of the line, these payments should be offset against the trackage rights payment CP makes to CSX for use of the same line. 11/

As for the Route 2 line, 12/ CP seeks this route as the best route for handling through traffic moving to and from

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10/ CP seeks no relief in this proceeding vis-à-vis Amtrak, and will address any open issues with Amtrak through negotiations. CP does, however, seek Board imposition upon CSX of trackage rights over the Route 1 line. Award of such rights will assure that, insofar as CSX is concerned, CP will be entitled to use the line as a trackage rights tenant.

11/ CP's interim arrangement with Amtrak encompasses CP's right to use the Hell Gate Bridge, which is owned by Amtrak. CP understands that Conrail owns a line that runs over the bridge; accordingly, CP still need trackage rights from CSX to utilize this line.

12/ See Gilmore V.S.(operating), Exhibit 3, CP-24.

southeastern U.S. points. CSX's proposed routing (CP Route 3) is approximately 57 miles more circuitous than Route 2, and requires passage through the congested Kenwood and Selkirk Yards. Route 2 is substantially more efficient for southeastern movements that Route 3.

The Route 3 trackage 13/ proposed by CSX is indeed very important to CP. It is needed to provide local service in the Albany/Rensselaer area, and would be used in conjunction with CP's Kenwood Yard in Albany and CSX's Selkirk Yard. Of course the local service use for which the route is particularly well suited is the very use for which it would not be available under the overhead restriction CSX proposes. Rather, CSX would have CP devote the line to through service, a use for which it is not well suited.

Apart from the material deficiencies in the scope of rights CSX is offering CP on the north end of the east-of-the-Hudson line, the CP rights being proposed by CSX on the south end of the line are also inappropriately narrow. CSX would limit CP to operating trains to Oak Point Yard, the Harlem River Trailvan Terminal, and the interchange with the New York & Atlantic Railway Company ("NY&A") at Fresh Pond Junction. It would only allow CP access to customers in the Bronx and Queens by means of

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13/ See id., Exhibit 4, CP-24.

what CSX characterizes as a terminal joint facility in which CSX would do all the switching. See, e.g., CSX-167 at 8-9.

To compete effectively with CSX, CP will need the right of direct access to all customers and facilities in the Bronx and Queens. For example, there is no justification for CSX's apparent effort to deny CP access to parts of the Harlem River Yard other than the Trailvan Terminal 14/ or to deprive CP of direct access to the Hunts Point Terminal. In addition, CP will need the right to establish and effect new interchanges, a right CSX would apparently deny it.

CP does not propose to conduct its Bronx and Queens operations inefficiently or to interfere with CSX's operations. Indeed, CP proposes that CSX provide it with traditional switching services where this would be the most efficient means of engaging in local service (and will pay a reasonable fee to CSX in exchange). 15/ But CP needs to have the option of itself providing direct service to customers and facilities in the Bronx

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14/ In this regard, the operator of the Harlem River Yard has expressed a willingness to lease CP one and perhaps more tracks for car storage and switching. There should be no limitations in the trackage rights award that would inhibit CP's ability to lease and use such tracks.

15/ CP's description of the geographic area to which CSX's switching services would extend inadvertently made reference only to the Bronx; it should also include Queens. See CP-24, Attachment A, Addendum at A-8.

and Queens, so as to discipline the quality of switching services provided to CP by CSX.

Because full service trackage rights normally include direct customer access and/or landlord switching services, it is puzzling why CSX ignores these standard access mechanisms and resorts instead to its unprecedented proposal that the Bronx and Queens areas be treated as a terminal joint facility (which they have never been). In this and past merger proceedings, trackage rights tenants have been given access to local customers directly, through provision of switching services by the landlord carrier, or by a combination of the two (as CP seeks here); Board establishment of a terminal joint facility has properly had no role in this regard. 16/

CSX is apparently advancing its proposal in the belief that CP might have to pay greater charges for use of a terminal

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16/ See, e.g., Decision No. 89 at 44 (Sub-No. 25), 46 (Sub-No. 34), 93-94 (Indianapolis); STB Finance Docket No. 32760, Union Pacific Corp. -- Control & Merger -- Southern Pacific Rail Corp., Decision No. 44, slip op. at 105-106, 121-24, 132-40 (served Aug. 23, 1996) ("UP/SP") (discussing trackage rights and switching services afforded by UP/SP to BNSF under the BNSF Settlement Agreement, which the Board imposed as a condition to the merger, including affording BNSF the option of directly serving a customer or doing it via switching); Finance Docket No. 32549, Burlington Northern Inc. -- Control & Merger -- Santa Fe Pacific Corp., Decision No. 38, 1995 WL 528184, at *66-*73 (I.C.C. served Aug. 23, 1995)("BNSF") (discussing trackage rights and switching services provided by BNSF to UP and SP under the NITL Agreement, which was imposed as a condition to the transaction; the tenant carriers in various circumstances were given the option of directly serving a customer or doing it by switching).

joint facility than for switching, which in turn would make CP less competitive with CSX. In Part II below, CP addresses CSX's compensation arguments at length; suffice it to say that CSX's terminal joint facility proposal is a litigation gambit that should be rejected in its entirety.

In sum, on the south end of the east-of-the-Hudson line, CP requests the Board to grant it trackage rights affording direct access to all customers and facilities, together with the right to use switching services provided by CSX so that local service can be conducted efficiently.

II. TRACKAGE RIGHTS AND SWITCHING COMPENSATION SHOULD BE SET AT THE LEVELS PROPOSED BY CP

In its opening submission, CSX disregards the trackage rights and switching charges already endorsed by the Board in this proceeding (respectively, 29 cents per car mile and up to $250 per car, the charges that CP requests be adopted for the east-of-the-Hudson rights). In fact, CSX offers no charges whatever. Instead, it invites the Board to embark on an extended new compensation proceeding to establish these charges based on a legal theory and valuation methodology that have no relevance here. The Board should decline the invitation.

CSX attempts unsuccessfully to transform itself from a primary applicant in one of the largest railroad mergers of this century into an "innocent third party," a "conscript," and a

"non-applicant." CSX-167 at 18. CSX's design is apparently to argue, albeit without foundation, that the Board's exclusive jurisdiction in regard to the east-of-the-Hudson rights is to impose terminal trackage rights under 49 U.S.C. § 11102(a).

Despite its forensic efforts to the contrary, the truth is that CSX was an applicant for acquisition of control of Conrail, and the Board's approval of that transaction was appropriately conditioned, in standard fashion, upon award to CP of east-of-the-Hudson rights to ameliorate competitive problems associated with the transaction. CSX suggests that the Board's conditioning authority is somehow diminished because the competitive problems the Board sought to correct through this condition grew out of "the competition that was lost in the financial crisis that led to the formation of Conrail" (Decision No. 89 at 83), and not out of the transaction itself. CSX is plainly wrong.

First, CSX itself knew from the outset that any railroad acquiring Conrail would be required to restore rail competition in the Northeast and Midwest that was lost when, by governmental intervention in the mid-1970's, Conrail was created through the consolidation of assets held in the bankrupt estates of railroads that had formerly competed with one another. As explained by CSX's Chairman, Mr. Snow, although CSX embarked upon

a solo acquisition of Conrail, it realized that it and NS 17/ "would have to sit down at the table to reach a common solution," that their objective would have to be "ensuring balanced competition in the Northeast and Midwest," and that a division of Conrail between CSX and NS was "the logical culmination of the reorganization of the northeastern rail system that began in 1970's. Snow V.S. at 308, 310, CSX/NS-18.

Second, where CSX and NS did not themselves take steps to restore particular pre-Conrail rail competition, it was entirely appropriate for the Board to do so. The east-of-the-Hudson rights awarded CP are but one example of the Board using its "broad conditioning authority to preserve or enhance service and competitive opportunities for areas in the Northeast that lost significant competitive alternatives in the railroad bankruptcies that led to the formation of Conrail in the 1970's." Decision No. 89 at 53. As CSX's Mr. Snow recognized, this proceeding constituted the final step in the Final System Plan. The Board properly viewed itself as being responsible for ensuring that this final step was also a complete one.

Just as in any rail merger in which conditions are imposed, CSX had the option of proceeding with the merger and complying with the conditions, or foregoing the merger. Here,

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17/ Norfolk Southern Corporation and Norfolk Southern Railway Company are collectively referred to as "NS".

CSX has chosen to go forward with the transaction, and hence has no standing to argue now that, for purposes of a merger condition imposed on it, it should be treated as a "non-applicant," a "conscript," or an "innocent third party." There will be no condemnation occasioned by the award to CP of full-service trackage rights on CSX's east-of-the-Hudson line; rather, CSX's ownership (through NYC) and use of that line is merely being regulated consistent with public interest requirements. 18/

In conditioning its primary application approval upon award to CP of the east-of-the-Hudson rights, the Board was not exercising its terminal trackage rights authority under 49 U.S.C.

18/ CSX asserts in support of its proposal to base trackage rights and switching charges on a "condemnation" standard that "the Board's condition is in substance a condemnation". CSX-167 at 17. If CSX is suggesting that the Board's imposition of the east-of-the-Hudson condition constituted a regulatory taking of its property, its argument ignores the fundamental principles of eminent domain jurisprudence. As the Supreme Court observed in Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978), whether a regulatory taking has occurred depends, inter alia, on "the extent to which the regulation has interfered with reasonable investment-backed expectations . . . ." Therefore, "[t]hose who do business in the regulated field cannot object" to changes in the regulatory scheme (Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211, 227 (1986) (quoting FHA v. The Darlington, Inc., 358 U.S. 84,91 (1958)), or claim that some exercise of regulatory authority deprives them of reasonable investment-backed expectations. CSX bought its interest in the Conrail system knowing that the Board had broad powers to condition CSX's ultimate control and division of Conrail. Implementation of the east-of-the-Hudson condition does not interfere with any expectation that CSX could reasonably have held when it made its investment.

§ 11102(a) 19/; indeed, it had no need to resort to that authority. Unlike the cases relied upon by CSX where the Board invoked its jurisdiction to impose terminal trackage rights on a party that itself was not seeking relief before the Board, here the party whose lines would be made subject to trackage rights is a merger proceeding primary applicant and the Board has explicit jurisdiction to impose trackage rights conditions pursuant to 49 U.S.C. § 11324(c).

Whereas the statutory standard for establishing terminal trackage rights compensation prescribes that it shall be based upon "the principle controlling compensation in condemnation proceedings" (49 U.S.C. § 11102(a)), the statutory standard for setting compensation related to merger-condition trackage rights makes no mention of condemnation principles. Rather, "trackage rights and related conditions imposed to alleviate anticompetitive effects of the transaction shall provide for operating terms and compensation levels to ensure that such effects are alleviated." 49 U.S.C. § 11324(c).

19/ In the alternative, CSX predicates its claim that a condemnation standard should govern the calculation of the charges to be paid by CP based on the language of 49 U.S.C. § 11102(a), which specifies that if the carriers cannot agree on compensation, "the Board may establish conditions and compensation for use of the facilities under the principle controlling compensation in condemnation proceedings."

In the SSW Compensation cases, 20/ the Board established the three component costs that should be captured in setting compensation for trackage rights imposed as a merger-related condition: "(1) the variable costs to the landlord resulting from the tenant's use of the track; (2) a portion of total annual maintenance costs for the relevant rail properties based on a pro-rata usage of those properties by the landlord and the tenant; and (3) a return element on the value of relevant rail properties used, again based on a pro-rata usage." Decision No. 89 at 140-41 (citing the SSW Compensation cases).

As discussed below, the compensation proposed by CP -- 29 cents per car mile for trackage rights and up to $250 per car for switching -- satisfies these requirements. 21/ These charges

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20/ St. Louis Southwestern Ry. Compensation -- Trackage Rights, 1 I.C.C.2d 776 (1984), 4 I.C.C.2d 668 (1987), 5 I.C.C.2d 525 (1989), 8 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)(the "SSW Compensation cases")

21/ CP should not have to make any payment to CSX for trackage rights over the Metro-North ownership of the east-of-the-Hudson line or the Oak Point Link owned by New York State. CP will not be using any CSX-derived rights in order to obtain access to these lines, and CSX has no exclusive operating rights over the lines. By contrast, CP would make trackage rights payments to CSX for use of the Schenectady-Stuyvesant line Amtrak has leased from CSX (see discussion above), since CP retains ownership of this line as well as operating rights over it; however, any payments CP makes to Amtrak for use of the line would be offset against CP trackage rights payments due CSX for the same use. This also holds true in regard to CP's use of the CSX track that runs across the Hell Gate Bridge, owned by Amtrak.

will "put [CP] on an equal footing with [CSX]" (BNSF, Decision No. 38, 1995 WL 528184, at *75), and afford CP "a realistic opportunity to compete" (SSW Compensation, 4 I.C.C.2d at 669). By contrast, the methodology proposed by CSX for calculating the payments to be made by CP would not.

CSX is demanding that CP pay for using the east-of-the-Hudson line as though CP were a joint owner of the line. But CSX does not propose to give CP the rights of an owner.

Thus, CSX claims that its proposal would treat Conrail's railroad operating properties in the Bronx and Queens as a joint facility (CSX-167 at 11-12), of which "CP will have the status of an owner . . . ." Id. at 15. Therefore, CSX argues, as an "owner" of the "joint facility", CP should pay an interest rental on one-half the value of the facility. Id., Ex. 1 at 6. Similarly, CSX claims that with respect to CP's trackage rights over the line from Selkirk/Albany to New York City, "CP's position . . . will be substantially that of a co-owner, and compensation as a co-owner will be appropriate for it . . . ." Id. at 20.

But the Bronx/Queens area will not be a CSX/CP joint facility, and CP will not be an owner of that "terminal" or of the east-of-the-Hudson line. CP will have no voice in the control of the "terminal" or the line; it will have no control over dispatching of trains; it will not decide how the yards,

lines, and other facilities will be maintained or improved; it will have no role in the acquisition of material, equipment, or other property. All such decisions will be made solely by CSX.

Contrast what CSX proposes for the east-of-the-Hudson line with what it has agreed to with NS with respect to the Shared Assets Areas, which are true "joint facilities", owned and controlled jointly by CSX and NS, through their joint ownership of Conrail:

- The Conrail Board, made up of equal numbers of CSX-appointed directors and NS-appointed directors (CSX/NS-25, Vol. 8B at 48-49) manages each of the SAAs (CSX/NS-25, Vol. 8C at 73, 113, 153), and Conrail is required to "perform all of its obligations . . . on an impartial and non-discriminatory basis as between CSXT and NSR, giving no preference to either of them . . . in any . . . way whatsoever." Id. at 74, 114, 154.

- The Conrail Board appoints a General Manager, who "shall perform his or her responsibilities on an impartial and non-discriminatory basis as between CSXT and NSR" and can be removed for non-impartiality (id. at 73-74, 113-14, 153-54).

- The jointly-owned and jointly-controlled Conrail controls dispatching (id. at 78, 118, 158), procurement (id. at 79, 119, 159), maintenance (id. at 80, 120, 160), and capital improvements (id. at 82-85, 122-25, 162-65).

CP will have none of these indicia of ownership of the east-of-the-Hudson line. What CP will have is a right of use, and that -- and only that -- is what CP should pay for. The Board's precedents and railroad industry practice establish the way to determine what one railroad should pay for using another railroad's facilities under circumstances like these. CP's proposed 29 cents per car-mile trackage rights fee and up to $250

per car switching charge satisfy these criteria; CSX's "condemnation" proposal does not.

The attached Reply Verified Statement of Joseph J. Plaistow 22/ demonstrates that CSX's "condemnation" proposal for trackage rights and switching charges is inconsistent with railroad industry practice; Mr. Plaistow further shows that the trackage rights fee and switching charge proposed by CP are reasonable and in accordance with Board precedent.

Mr. Plaistow applies the Board's SSW Compensation methodology to the facts of record in this case and finds that it yields a trackage rights fee of 27 cents per car-mile, closely approximating the 29 cent rate proposed by CP. 23/ He also finds that the $250 per car switching charge proposed by CP is consistent with fees charged by CSX to other railroads under a variety of operating conditions and would provide a generous profit to CSX in this case.

Accordingly, the Board should adhere to its own precedents and railroad industry practice in determining the trackage rights fee and switching charge to be paid by CP to CSX

22/ Mr. Plaistow, Vice President and Principal of Snavely King Majoros O'Connor & Lee, Inc., is a transportation economics analyst with 26 years' experience.

23/ In this case, the Board evaluated the same trackage rights fee, as proposed by CSX and NS, using a somewhat different methodology and concluded that it was reasonable. Decision No. 89 at 140-42.

for east-of-the-Hudson rights. The 29 cents per car car-mile charge is not only the trackage rights fee CSX and NS negotiated with one another, it is also a fee firmly supported by the SSW Compensation methodology. Similarly, the $250 per car switching charge is consistent with both the NITL settlement in this proceeding and CSX's switching charges in the marketplace. These are the charges the Board should adopt to govern CP's trackage rights operations on the east-of-the-Hudson line.

III. THE OCTOBER 20, 1997 SETTLEMENT AGREEMENT BETWEEN CP AND CSX SHOULD NOT BE SUPERSEDED

By entering into its October 20, 1997 settlement agreement with CP, CSX facilitated its objective of obtaining Board approval of its primary application. Now that this objective has been achieved, CSX is attempting here to undo its contractual obligations. Seeking to lower a veil of respectability over its self-interested design, CSX asserts that the east-of-the-Hudson rights now before the Board should be considered to supersede the settlement agreement, and if not that, then at least they make the continued enforceability of the agreement inequitable. Both assertions are meritless. 24/

Significantly, CSX makes no claim that CP has in any way breached its obligations under the settlement agreement;

24/ The discussion in this Part III is directly supported by the accompanying Gilmore R.V.S.

indeed, it could not advance such a claim. CP's obligations were "to support [by October 21, 1997] the joint acquisition of Conrail by NS and CSXT and not to seek conditions against CSXT" (Potter V.S. at 4 & Ex. 3 at 2, CSX-167) -- obligations which CP satisfied.

Moreover, the matters settled between CSX and CP in the agreement extended well beyond east-of-the-Hudson issues. As CP indicated in its August 22, 1997 Description of Anticipated Responsive Application (CP-10), in order to remedy specific anticompetitive effects of the proposed acquisition and division of Conrail, CP was committed to seeking Board conditions that would (1) afford CP with reciprocal switching rights in the North Jersey Shared Assets Area, the South Jersey/Philadelphia Shared Assets Area, the Buffalo-Niagara Frontier terminal area, and the Baltimore terminal area; (2) eliminate particular restrictions contained in CP's existing trackage rights over Conrail lines which were an outgrowth of restrictions imposed by the Final System Plan; (3) and impose not only full-service trackage rights on the east-of-the-Hudson line, but also overhead trackage rights on the west-of-the-Hudson line.

By virtue of its settlement with CSX (and NS), CP did not pursue these condition requests. Under the October 20, 1997 agreement, which has a five year term (with CP having the right to renew for five successive terms of five years each), CP did in

fact obtain the right to quote rates on certain traffic interchanged by CP to CSX at Albany and then moving over CSX's east-of-the-Hudson line to the Bronx, Queens or interchange at Fresh Pond Junction; and CSX in turn obtained the right to quote rates on certain traffic interchanged by CSX to CP at Albany and then moving over CP's lines to Montreal. Potter V.S., Exhibit 3 at 3, CSX-167.

But the agreement also gave CP the right to quote CSX rates on certain traffic (1) interchanged between CP and CSX at Albany which originated or terminated on points on the Philadelphia Belt Line Railroad Company via a Shared Assets Area company; (2) interchanged between CP and CSX (or the Shared Assets Area company) in Philadelphia; (3) interchanged between CP and CSX at Niagara Falls or Buffalo for transportation to and from all points on the CSX lines acquired from Conrail in the Buffalo metropolitan area that are open to reciprocal switching pursuant to an identified Conrail tariff; 25/ and (4) moving to or from the Express Rail facility in New Jersey (import/export marine containers) over CSX's west-of-the-Hudson line to Albany and there interchanged between CSX to CP for movement to or from Montreal/Toronto. Id., Exhibit 3 at 3-4 & Exhibit A, CSX-167.

25/ CSX appears to overlook the fact that the Board imposed this element of the settlement agreement as a condition to its approval of the primary application. Decision No. 89 at 86, 88.

Unlike the May 29, 1998 agreement between CP and CSX (id., Exhibit 4), the October 20, 1997 agreement did not give CSX a termination right in the event that NYDOT/NYCEDC failed ultimately to support CSX's application to acquire the east-of-the-Hudson line or the Board imposed conditions unacceptable to CSX in regard to the line. 26/ Indeed, under the October 20, 1997 agreement both parties are bound unless they both agreed to terminate. In effect, CSX's supercession argument asks the Board to rewrite the October 20, 1997 agreement so as to afford CSX a termination right the agreement itself does not provide.

CSX claims that, by granting the supercession it requests, the Board will serve its policy of encouraging voluntary settlement of disputes. Nothing could be further from the truth. Using the present situation as a case in point, CP would have been foolish to abandon pursuit of its responsive application in exchange for a settlement agreement if CSX could later dissolve the agreement because, for reasons unrelated actions taken by CP, the ultimate outcome of the regulatory proceeding was not totally to CSX's satisfaction.

In the past, the Board has had occasion to impose conditions that served to afford new rights to a merger

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26/ As CSX notes, it terminated the May 29, 1998 agreement. CSX-167 at 21 n.22. As for the January 8, 1998 CSX letter regarding intermodal service, CP understands that CSX also terminated this, as was its right.

protestant that had earlier settled, and the Board's action properly did not effect a termination of the settlement agreement to which it related. See, e.g., UP/SP, Decision No. 44, slip op. at 106-06, 226 (discussing additional conditions being imposed by the Board beyond the competitive relief agreed to by UP/SP in the BNSF Settlement Agreement). The same rule should apply here.

The Board should reject CSX's post-hoc effort to secure a regulatory rewriting of its settlement agreement with CP. That agreement, which addresses many matters unrelated to east-of-the-Hudson issues, should remain in force pursuant to the terms negotiated between the parties.

Having said this, CP is willing to forego the right, established under Section 5.A.(ii) of the agreement, to quote rates on traffic interchanged by CP to CSX at Albany and then moving over CSX's east-of-the-Hudson line to the Bronx, Queens or interchange at Fresh Pond Junction. 27/ This part of the agreement, unlike its other parts, relates to rights that overlap with the trackage rights CP is to be awarded here. But CP is only willing to give up these overlap rights on the understanding that the trackage rights to be granted it will be full-service in

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27/ CP is also willing to leave in place the companion right that CSX has, under Section 5.A.(iii) of the agreement, to quote rates on traffic interchanged from CSX to CP at Albany for delivery to points in the Montreal metropolitan area that are directly served by CP and subject to the other terms of the agreement.

scope, and that the trackage rights (and switching) charges adopted will permit CP to be an effective competitor with CSX.

IV. THE BOARD SHOULD ADOPT THE TRACKAGE RIGHTS AND SWITCHING TERMS PROPOSED BY CP

In Attachment A, CP provides a comparative analysis of the trackage rights (including switching) agreement it proposes with the trackage rights and terminal joint facility agreements proposed by CSX. As review of the two sets of agreements makes clear, both parties used as their starting point in drafting the Master Trackage Rights Agreements submitted by CSX and NS to govern their primary-application-related awards of trackage rights to one another. 28/ See CSX/NS-25 (Vol. 8B) at 220-60, 608-28 (the "CSX/NS trackage rights agreements"). However, as explained in Attachment A, in a number of instances CSX departed without explanation from the language contained in the CSX/NS trackage rights agreements, where adherence to that language would have been far preferable. 29/

28/ See CP-24 at 13 (explaining that CP based its proposed trackage rights agreement on the applicants' Master Trackage Rights Agreement).

29/ In certain discrete instances, CP modified language in the CSX/NS trackage rights agreements. As detailed in Attachment A, these modifications were generally designed to assure neutrality by CSX in controlling operation of the east-of-the-Hudson line, and to establish mutuality in the parties' rights and obligations under the agreement.

As for the terminal joint facility agreement advanced by CSX, that agreement appears to have been based in substantial part upon the switching agreements CSX and NS entered into with one another. See, e.g., CSX/NS-25 (Vol. 8C) at 454, 477, 501, 526. The switching provisions contained in CP's proposed trackage rights agreement are derived from the same source. See CP-24 at 15-16 & n.10. What is a mystery is why CSX did not propose a conventional switching arrangement (like that proposed by CP) for handling local traffic in the Bronx and Queens, and instead chose to present what is tantamount to a switching proposal as a terminal joint facility agreement. The answer, as discussed above, seems to be that CSX thought it could obtain some litigation advantage by doing so.

In fact, there is no basis for treating the lines and rail facilities on the south end of the east-of-the-Hudson line as a terminal joint facility. There is no joint ownership of these properties; there is no agreement under which the properties are operated at cost; indeed, the properties have none of the attributes of a terminal joint facility. 30/ Accordingly, apart from considering its switching elements, CSX's terminal joint facility agreement should have no role in this proceeding.

30/ See discussion in Part II above. See also, e.g., Des Moines Union Ry. Switching, 231 I.C.C. 631, 636 (1939)(terminal joint facility jointly owned by one or more rail carriers and operated for mutual benefit of the owners, with personnel employed by facility being joint employees of the owners).

In setting terms and conditions to govern CP's east-of-the-Hudson operations, the Board should adopt contractual provisions that accomplish two key objectives: (1) establish the full-service trackage rights awarded to CP for use of CSX's east-of-the-Hudson line; and (2) establish CP's right to obtain switching services from CSX so as to most efficiently provide local service to customers in the Bronx and Queens. The trackage rights agreement proposed by CP achieves both objectives; alternatively, if the amendments to the CSX draft agreements discussed in Attachment A are adopted, those agreements can also be made to satisfy both objectives.

CONCLUSION

For the reasons set forth above, the Board should reject the trackage rights scope, compensation methodology, and agreement terms and conditions proposed by CSX, and instead

should adopt the trackage rights scope, compensation, and agreement terms and conditions proposed by CP.

Respectfully submitted,

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December 10, 1998

ATTACHMENT A

ATTACHMENT A

COMPARATIVE ANALYSIS OF CP AND CSX PROPOSED AGREEMENTS

In the discussion below, CP compares the terms and conditions proposed in CSX's Form of Trackage Rights Agreement ("CSX TRA") and Form of Terminal Joint Facilities Agreement ("CSX TJFA") (Potter V.S., Exhibits 1 & 2, CSX-167) with the terms and conditions set forth in the CP Proposed Trackage Rights Agreement ("CP TRA") (CP-24, Attachment A). Where the CSX and CP proposals are inconsistent with one another as to an issue of material importance, CP explains why its language should be adopted.

The analysis begins with review of the CSX TRA, and addresses in order each provision in that draft agreement. The CSX TJFA is then analyzed in the same fashion. If the changes identified below were made to the CSX TRA and CSX TJFA, then those agreements, in CP's view, would be appropriate to govern CP's operations on the east-of-the-Hudson lines.

A. Analysis of CSX TRA

- Identification of Parties to Agreement -- CSX identifies CPR as the appropriate CP party to the agreement, whereas CP identifies D&H. D&H should be the party to the agreement on behalf of CP, since it is the entity that will be providing trackage rights service on the east-of-the-Hudson line. (Note, however, that as indicated in the discussion of the assignment clause below, CP wants D&H to have the right to assign

the trackage rights to another entity within CP if this should become appropriate.)

- Precatory Language - The CSX TRA and CP TRA have different precatory language, but since this language is explanatory rather than a binding part of the agreement, the language differences are not of material importance. Nonetheless, CP takes issue with the last paragraph of CSX's precatory language (CSX TRA at 2-3), which substantially and inappropriately limits the scope of the trackage rights that should be afforded CP.

- ARTICLE 1. GRANT OF TRACKAGE RIGHTS -- CSX's description of the trackage rights granted to CP is too narrow. It omits Routes 1 (generally Schenectady to Poughkeepsie) and 3 (Selkirk area rights) that CP is seeking on the north end of the east-of-the-Hudson line, and the description of CP's rights on the south end of the line is too narrow (for example, making no mention of Harlem River Yard and Hunts Point Terminal, and only passing reference to Oak Point Yard). Although CSX's description includes references to trackage rights on the lines owned by Metro-North and the State of New York (Oak Point Link), CP understands that CSX has no ability to grant CP rights over these lines. CP urges the Board to adopt its description of the trackage rights (CP TRA, Addendum at 1-2) in lieu of the description proposed by CSX.

• ARTICLE 2. USE OF SUBJECT TRACKS --

• Subsection (a) of the CSX TRA (at 5) is virtually identical with subsection (a) of the corresponding Article 2 in the CP TRA (at 3), and hence is acceptable to CP.

• Subsection (b) of the two agreements differ from one another, with CSX's draft prohibiting CP (except where CSX specifically permits it) from using the subject trackage for switching, storage or servicing of cars or equipment, the making or breaking up of trains, and service to an industry, whereas CP's draft gives CP these rights. CP urges that its language be adopted, consistent with the full-service nature of the trackage rights it seeks.

• Subsection (c) of the CSX TRA (p. 5) corresponds with subsection (d) of the CP TRA (p. 4), and employs materially the same language (CSX's language adds that it dispatches the subject trackage, which is acceptable to CP 1/).

• Subsection (d) of the CSX TRA (p. 5) does not have a counterpart in the CP TRA. It provides that CP's right to use the subject trackage shall not be limited as to the number of trains until the combined demands of CP and CSX exceed the freight capacity of the line, in which case CP and CSX shall each have the right to use 50 percent of the freight capacity of the line. This provision is acceptable to CP if the following clause is added at the end: "; provided, however, that if the freight

1/ CSX implies that it will dispatch the Metro-North ownership of the east-of-the-Hudson line. CP understands that Metro-North in fact dispatches its own line.

capacity of the line is exceeded but one party is using less than 50 percent of such freight capacity, then the other party can use more than 50 percent so long as the first party does not use the full 50 percent to which it is entitled."

- The CSX TRA omits the provision contained in the CP TRA (at 4) that describes CP's right to enter and exit the subject trackage. This provision should be included in the agreement so that these rights are clearly stated.

- ARTICLE 3. RESTRICTION ON USE -- This article in the CSX TRA serves significantly to limit CP's rights, including a restriction that CP can handle bridge traffic only. The corresponding provision in the CP TRA (Addendum at A-4 to A-5, entitled "SECTION 2. SCOPE OF USE") takes the opposite tack, specifying the full-service scope of the trackage rights, and also establishing a procedure for construction of a second line if significant capacity problems are experienced. CP urges that its provision be adopted in lieu of that proposed by CSX.

- ARTICLE 4. MISCELLANEOUS SPECIAL PROVISIONS -- Subparagraphs (a) through (c) of the CSX TRA (at 6) correspond exactly with subparagraphs (a) through (c) of the CP TRA (at 4-5). Subparagraph (d) of the CSX TRA (at 7) -- dealing with CP's obligation to provide CSX with loaded and empty cars in Electronic Data Interchange -- does not have a counterpart in the CP TRA, but CP has no objection to it.

- ARTICLE 5. COMPENSATION -- In this article, CSX sets forth the methodology it proposes to govern the trackage

rights compensation to be paid by CP. For reasons explained by CP in its opening and reply argument, this CSX provision should be rejected, and the compensation provisions included in the CP TRA (Addendum at A-5 to A-7, at Sections 3 and 4) should be adopted.

- ARTICLE 6. PAYMENT OF BILLS -- This CSX provision and the corresponding provision in the CP TRA (at 6) are virtually identical. The CP provision provides for payment within 30 days rather than the 15 days proposed by CSX, 30 days being the payment schedule governing the CSX/NS trackage rights agreements. CP requests that the 30 day schedule be adopted. CP is agreeable to CSX's proposal that payment be made in accordance with standard Electronic Funds Transfer Authorization Agreement, that records be kept for only 2 year after billing (CP had proposed 3 years), and the other modest differences between the CSX language and the CP language.

- ARTICLE 7. MAINTENANCE OF SUBJECT TRACKAGE -- This provision and the corresponding provision in the CP TRA (at 6-7) are almost exactly the same. The only material difference is that CP's provision includes a requirement that CSX shall maintain the subject trackage to a minimum standard of FRA Class III. CP urges the Board to adopt this requirement so as to assure that CP can use the line to provide shippers with a reasonable standard of service.

- ARTICLE 8. CONSTRUCTION AND MAINTENANCE OF NEW CONNECTIONS -- Subsection (a) of the CSX TRA (at 9) is exactly

the same as subsection (a) of the corresponding article of the CP TRA (at 8). The subsection (b) language of the two draft agreements, however, is different. The CSX language does not allow CP to create any new connections to the subject trackage without CSX's approval, whereas CP's language (taken from the CSX/NS trackage rights agreements) allows CP to create new connections or upgrade connections using the subject track so long as CP pays for the project and its maintenance. CP urges the Board to adopt its subsection (b) in lieu of that proposed by CSX, in the interest of assuring that CP can effectively utilize the full-service trackage rights it is seeking.

- ARTICLE 9. ADDITIONS, RETIREMENTS AND ALTERATIONS -- Subsection (a) of the CSX TRA (at 10) is the same as subsection (a) of the corresponding article of the CP TRA (p. 9), except that the CSX provision adds a new concluding sentence which states that, "Additions, betterments and retirements will modify the annual interest rental basis, which will be adjusted per agreement of the parties or by arbitration hereunder." CP opposes adoption of this sentence given that the Board will be setting trackage rights compensation in this proceeding, and such a provision could lead to an almost immediate dispute as to the level of compensation. The language in subsection (b) of the draft agreements is close to the same, except that the CP language adheres to the language of the CSX/NS trackage rights agreements and the CSX language does not. The difference is that, under the CP language, the parties must agree

that changes in, or additions and betterments to, the subject trackage are required as a consequence of CP's operations before CSX can undertake to make the changes, additions or betterments at CP's expense; under the CSX language, CSX can do this unilaterally and without agreement by CP. To avoid any potential for abuse by CSX, the CP language should be adopted.

- ARTICLE 10. MANAGEMENT AND OPERATIONS --

- Subsection (a) of the CSX TRA (at 11) is the same as subsection (a) of the corresponding article in the CP TRA (at 10), except CSX proposes that only CP be required to comply with the referenced federal and state laws governing operation, condition, inspection and safety, whereas CP proposes that both parties bear this obligation. CP urges that its language, placing both parties under the same statutory compliance obligations, be adopted on grounds that it is fairer and more balanced.

- Subsections (b) to (e) of the two draft agreements are exactly the same.

- Subsection (f) -- CSX and CP use the same language in the first sentence of Subsection (f); CP then adds (at 13) two additional sentences (taken from its existing trackage rights agreements with Conrail) that elaborate upon CSX's obligations not to discriminate against CP, to cooperate with CP, and to keep CP informed. CP urges the Board to adopt CP's language to assure that CSX does not exercise its authority to dispatch, manage and control the subject trackage in a way

that is unfair or prejudicial to CP, an exposure that is particularly acute as to time-sensitive traffic.

- Subsection (g) -- CSX and CP use the same language in subsection (g) except that the CSX language deals exclusively with what happens if a CP train is forced to stop on the subject trackage, whereas the CP language applies equally to train stops by both CP and CSX. CP urges the Board to adopt CP's language in the interest of achieving a balanced treatment of the issue.

- Subsections (h) and (i) -- These provisions of the two draft agreements are exactly the same.

- The CP TRA has two provisions not contained in the CSX TRA. Subsection (j) (at 15) allows each party to fix the schedules for its trains, but requires consultation to minimize conflicts; CP urges adoption of this provision to minimize the potential for schedule-related disputes. Subsection (k) (at 15) provides CP police with access to, and police powers in regard to, the subject trackage; CP urges Board adoption of this provision so as to permit CP adequately to protect its property and that of its customers.

- ARTICLE 11. MILEAGE AND CAR HIRE -- This article (at 14) and the corresponding article of the CP TRA (at 15) are exactly the same.

- ARTICLE 12. CLEARING OF WRECKS -- This article (at 14) and the corresponding article of the CP TRA (at 15) are exactly the same.

- ARTICLE 13. LIABILITY -- For reasons that are not clear, CSX abandons entirely the liability provisions contained in the CSX/NS trackage rights agreements, and substitutes an entirely different provision. CP urges the Board to adopt the liability provision contained in the CP TRA (at 16-20), which verbatim follows the liability provision in CSX/NS trackage rights agreements, except where the CP provision appropriately adds that for liability purposes CSX trains shall be treated as including Amtrak trains and the trains of other third parties admitted to the subject trackage by CSX. Use of the CP provision will assure consistency between it and the CSX/NS trackage rights agreements.

If the Board chooses instead to adopt the CSX liability provision, there are certain critical ambiguities in the provision that need to be addressed. Subsection (a) is ambiguous in providing that, "If a Loss occurs while the Subject Trackage is being used solely by the trains and locomotives of either CSXT or CPR, then the using party is solely responsible for the Loss, even if caused partially or completely by the other party." The trackage could be in use by both parties simultaneously while the loss only involved the equipment of one party, the other party was in no respect involved in the loss, and hence the party whose equipment was involved should bear the loss alone. The provision would be significantly improved if liability were triggered by the party whose train was involved in the loss, the approach employed in the liability provision of the

CSX TJFA (at 8). Thus amended, the provision would begin, "If a Loss occurs involving solely the trains and locomotives of either CSXT or CPR. . . ." A conforming amendment needs to be made to subsection (b) to clarify the analogous ambiguity there.

Additionally, subsection (h) of the CSX TRA (p. 17) should be amended so that it does not provide exclusively for CP indemnity of CSX. Each party should indemnify the other for the responsibilities borne under the agreement, for reasons of fairness and mutuality of obligation.

- ARTICLE 14. CLAIMS -- Like the liability provision, the claims provision of the CSX TRA (at 18-19) is entirely different from the claims provision in the CSX/NS trackage rights agreements, which CP follows verbatim. CP urges the Board to adopt the claims provision contained in the CP TRA (at 20-21) for purposes of consistency.

- ARTICLE 15. DEFAULT AND TERMINATION -- The language in the CSX TRA (at 20) is the same as that in the corresponding article of the CP TRA (at 21-22), except that the CSX language gives only CSX a termination right in the event of CP's substantial failure of performance, whereas the CP language gives each party the right to terminate if the other party fails substantially to perform. CP urges the Board to adopt its provision for reasons of mutuality of rights, balance and fairness.

- ARTICLE 16. REGULATORY AND OWNER APPROVAL -- The language proposed in subsection (a) of the CSX TRA (at 20) is

different from that proposed in the CP TRA (at 22), but is acceptable to CP. However, the language proposed by CSX in subsection (b) -- to the effect that CP should bear all costs of labor protection conditions imposed by the Board in connection with the trackage rights -- is not acceptable to CP. Responsibility for costs associated with Board-imposed labor protection conditions should be in accordance with the conditions themselves.

- ARTICLE 17. ABANDONMENT OF SUBJECT TRACKAGE -- The provision in the CSX TRA (at 21-23) is the same as the provision in the corresponding article of the CP TRA (at 25-27), except the CP agreement does not contain the last two sentences in CSX's Subsection (e) and does not contain any of the language in Subsection (f). Subsection (f) is acceptable to CP. CP opposes inclusion of the language at the end of Subsection (e) unless it is made clear that CP has no obligation to pursue regulatory discontinuance of its trackage rights except where the line will be withdrawn from continued rail use; if the line will remain in rail use, regardless of the owner, CP's trackage rights should remain in place.

- ARTICLE 18. TERM -- This provision of the CSX TRA (at 24) differs somewhat from the term provision in the corresponding article of the CP TRA (Addendum at A-10), which was taken from the CSX/NS trackage rights agreements. CP is agreeable to the CSX provision if it is amended to read, like the CP provision, that after the conclusion of the 25-year term of

the agreement, it will remain in effect until terminated upon 6 months notice by CP, and further that if the CSX Operating Agreement (with NYC) is terminated, NYC will succeed to CSX's benefits, duties and obligations under the agreement. CP urges the Board to make the trackage rights continuous; there is no valid basis for CSX's apparent position that they should have only a 25-year term.

- ARTICLE 19. ARBITRATION -- The arbitration provision in the CSX TRA (at 24-25) is different from the arbitration provision in the CP TRA (at 25-26), which adheres to the arbitration provision in the CSX/NS trackage rights agreements. CP urges the board to adopt the CP provision, for purposes of consistency. If the CSX provision is adopted, it should be amended to eliminate the requirement in the first sentence that disputes must be "jointly submitted" to arbitration; a single party should be able to initiate arbitration, and not first have to obtain agreement from the other party with which it is in dispute and which would have an incentive not to give its consent. In addition, it should be made clear, as in the CP provision, that the arbitrator has jurisdiction, among other things, to require specific performance and to afford injunctive relief.

- ARTICLE 20. SUCCESSORS AND ASSIGNS -- The provision in the CSX TRA (at 25) is significantly different from the provision in the corresponding article of the CP TRA (at 27-28), which adopts the language (with the modifications explained

below) in the CSX/NS trackage rights agreements. The CP modifications are (a) including as permissible assigns not only a controlled subsidiary (allowed in the CSX/NS trackage rights agreements), but also a parent and an affiliate in the same corporate family so as to give CP the assignment flexibility it requires, and (b) the right to enter into interchange agreements with NY&A and to grant NY&A incidental trackage rights from Fresh Pond Junction to Oak Point Yard, Harlem River Yard, and Hunts Point Terminal so as to ensure that CP will have an effective interchange with NY&A. CP urges the Board to adopt its successors and assigns provision in lieu of that proposed by CSX.

- ARTICLE 21. NOTICE -- This article (at 25) and the corresponding article in the CP TRA (at 28) are exactly the same.

- ARTICLE 22. GENERAL PROVISIONS -- This article (at 26-27) is the same as the corresponding article in the CP TRA (at 29-30), except that subsection (a) of the CP agreement makes clear that the "no third-party benefit" provision does not address any rights NYDOT or NYCEDC may have by virtue of Board imposition of the trackage rights condition at issue in this proceeding. In addition, the CSX agreement appropriately drops the confidentiality provision set forth in subparagraph (h) of the CP agreement; CP agrees that there is no need for this provision. CP urges the Board to include the clarification that NYDOT and NYCEDC retain whatever rights they may have by virtue

of the Board' award of the condition they requested in this proceeding.

- INDEMNITY COVERAGE -- The CSX TRA omits the indemnity coverage provision included at Article 20 of the CP TRA (at 31), which is taken verbatim from the CSX/NS trackage rights agreements; interestingly, CSX includes this provision in the CSX TJFA (at 18). For purposes of consistency, the provision in the CP agreement should be adopted.

B. Analysis of CSX TJFA

The CSX TJFA purports to establish rights and responsibilities for a terminal joint facility covering rail operations in the Bronx and Queens, when in fact such a terminal joint facility does not exist and there is no warrant for the Board's creation of such an entity. Rather, CP should be given access to customers in the Bronx and Queens in the way such access is normally afforded in connection with a grant of full-service trackage rights -- either directly or through switching services provided by the landlord railroad.

In the CP TRA, CP proposes terms that would give it direct access to facilities and customers where required to allow CP to compete effectively, and also that would require CSX to provide it with switching services where this would be the most efficient means for CP to access customers (CP TRA, Addendum at A-7 to A-9). 2/

2/ The first sentence of subsection (a) of the CP switching provision reads "or any other rail facility in the Bronx Borough of New York City" (Addendum at A-8); it should read "or any other

If the CSX TJFA is to have a role in this proceeding, it should be revised so that it becomes a stand-alone switching agreement that incorporates the switching terms set forth in the CP TRA. Either through amendment of the CSX TJFA or by outright adoption of CP's proposed switching provision, the board should impose switching requirements upon CSX to support CP's trackage rights operation.

In the discussion below, CP addresses the modifications that should be made to the CSX TJFA to convert it to an appropriate switching agreement.

- Identification of Parties to Agreement and Precatory Language -- See discussion of these matters above in regard to the CSX TRA.

- SECTION 1. INDUSTRY & INTERCHANGE SWITCHING --

  - Subsection (a) of the CSX TJFA (at 3) is consistent with subsection (a) of the switching provision in the CP TRA (Addendum at A-7 to A-8), assuming that CSX's term "The Terminal" is defined to include all rail facilities in the Bronx and Queens (which it appears to be).

  - Subsection (b) of the CSX TJFA (at 3), providing for CSX handling of CP cars in interchange with NY&A, does not have a counterpart in the CP TRA, but is acceptable to CP.

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rail facility in the Bronx Borough or Queens Borough of New York City."

- Subsection (c) of the CSX TJFA (at 3) does not have a counterpart in the CP TRA. Its scope is quite limited, only giving CP sufficient trackage in Oak Point Yard for arrival and departure of trains. CP should have direct access to all rail facilities in the Bronx and Queens, so as to assure its ability to compete effectively with CSX. It is CP's intention not to utilize such access fully, and instead to use switching provided by CSX where this would be the most efficient means of serving customers.

- Subsections (d) and (e) of the CSX TJFA (at 3) are the same as subsections (b) and (c) of the CP TRA (Addendum at A-8).

- Subsection (f) of the CSX TJFA (at 4), providing for CP to assume liability for all loss and damage to cars in its account and lading, does not have a counterpart in the CP TRA, but is acceptable to CP.

- SECTION 2. DELIVERY AND RECEIPT OF CARS --

- Subsection (a) of the CSX TJFA (at 4) is the same as subsection (d) of the CP TRA (Addendum at A-8).

- Subsection (b) of the CSX TJFA (at 4) is the same as subsection (e) of the CP TRA (Addendum at A-8 to A-9), except that the CP provision makes the obligation to provide switching-related information reciprocal, and thus should be adopted in lieu of the CSX provision. CP will need information from CSX as to how CSX is handling cars just as CSX will need information from CP as to how CP wants them handled.

- Subsection (c) of the CSX TJFA (at 5) does not have a counterpart in the CP TRA. The provision allows CSX to make repairs to cars being switched to assure safe transit, and to make adjustments to loads in particular circumstances; CP would be responsible for all associated costs. This provision is acceptable to CP if it is modified to require CSX to confer with CP before taking any of the actions described in the provision and AAR standard billing rates are charged for the repairs.

- SECTION 3. INSPECTION -- This section of the CSX TJFA (at 5), providing that CSX has no responsibility for inspecting cars in CP's account that CSX is switching, has no counterpart in the CP TRA. It is acceptable to CP.

- SECTION 4. INTERRUPTION, DELAY -- This section of the CSX TJFA (at 5), providing that CP will have no claim against CSX in the event use of trackage in performing switching services is interrupted or traffic delayed, has no counterpart in the CP TRA. This provision is acceptable to CP if it is modified to provide that it does not apply in the event that the interruption or delay is associated with CSX favoring the movement of its traffic over that of CP. Unless CSX is neutral in its provision of switching services, CP will not be an effective competitor.

- SECTION 5. COMPENSATION -- This section of the CSX TJFA (at 5-7) sets forth the methodology CSX proposes should govern calculation of the charges to CP. CP explains in its opening and rely argument why this methodology should be rejected, and why the compensation provisions set forth in the CP

TRA (Addendum at A-9) -- providing for switching charges of up to $250 per car -- should be adopted. In addition, as discussed above, in regard to the CSX TRA, payments for switching services should be due within 30 days of billing, not 15 days as proposed by CSX.

- SECTION 6. ADDITIONS, RETIREMENTS AND ALTERNATIONS -- See discussion above of Article 9 of the CSX TRA, which contains the same language as this provision of the CSX TJFA.

- SECTION 7. LIABILITY -- This provision in the CSX TJFA is different from the liability provision in the CSX TRA, and also different from the liability provision in the CP TRA (which is taken from the CSX/NS trackage rights agreements). See discussion above. CP urges that the liability provision in the CP TRA govern CSX's provision of switching services to CP.

If the Board chooses instead to adopt the CSX liability provision, there are certain provisions that require modification or clarification. Subsection (e) of the CSX TJFA (at 11) is drafted so that only CP has a continuing responsibility to meet its accrued liability responsibilities after termination of the agreement; both parties should be subject to this provision for reasons of fairness and mutuality. Subsection (f) (at 12) should be clarified so that the last line reads "defending any such action in CPR's [in lieu of 'its'] name, or on behalf of CPR"; this change is necessary so that this particular provision does not require CP to indemnify CSX for actions taken in defending

CSX. The last sentence of subsection (g) does not make sense, and needs to be modified or deleted. Subsection (i) provides that, "Locomotives shall be considered as performing switching services on behalf of CPR when such locomotives are coupled to a train containing CPR cars"; it should be amended to provide that if the locomotives are coupled to a train containing both CP and CSX cars, then the locomotives shall be considered as performing services on behalf of both parties.

- SECTION 8. EMPLOYEE CLAIMS -- This section of the CSX TJFA (at 13-14), providing generally that each party indemnifies the other in regard to claims for its own employees, has no counterpart in the CP TRA. The provision is acceptable to CP.

- SECTION 9. ARBITRATION -- See discussion above of Article 19 of the CSX TRA, which contains substantially the same language as this provision of the CSX TJFA.

- SECTION 10. TERM AND TERMINATION -- See discussion above of Article 18 of the CSX TRA, which contains substantially the same language as this provision of the CSX TJFA.

- SECTION 11. ABANDONMENT OF RELATED TRACKAGE -- This section of the CSX TJFA (at 15-16) in effect incorporates the abandonment provision of the CSX TRA; in regard to the latter, see discussion above of Article 17 of the CSX TRA.

- SECTION 12. SUCCESSORS AND ASSIGNS -- See discussion above of Article 20 of the CSX TRA, which contains

substantially the same language as this provision of the CSX TJFA.

- SECTION 13. NOTICE -- See discussion above of Article 21 of the CSX TRA, which contains substantially the same language as this provision of the CSX TJFA.

- SECTION 14. GENERAL PROVISIONS -- See discussion above of Article 22 of the CSX TRA, which contains substantially the same language as this provision of the CSX TJFA.

- SECTION 15. CONFIDENTIALITY -- This section of the CSX TJFA (at 18) is similar to the confidentiality provision included in the CP TRA (at 30); the CSX TRA does not include such a provision. As discussed above, given the Board's public review of the subject agreements, this section of the CSX TJFA should probably be deleted.

- SECTION 16. INDEMNITY COVERAGE -- This section of the CSX TJFA (at 18) is very similar to the provision regarding indemnity coverage included in the CP TRA (at 31), but not included in the CSX TRA. See discussion above. CP believes that this provision is appropriate.

- SECTION 17. FORCE MAJEURE -- This section of the CSX TJFA (at 18-19) has no counterpart in the CP TRA. CP has no objection to the provision so long as it is revised so that the force majeure protection applies to both parties, and not just CSX. This revision is appropriate for reasons of fairness and mutuality of rights and obligation.

REPLY VERIFIED STATEMENT OF
PAUL D. GILMORE

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 related to operating matters and the other to environmental issues. In this reply verified statement, I address certain significant operating problems growing out of restrictions that CSX proposes to place on CP's east-of-the-Hudson trackage rights, and I explain why there is no justification for CSX's assertion that the October 27, 1997 settlement agreement between CP and CSX should be set aside.

I. The CSX Proposal Would Significantly Constrain CP's Ability To Be an Effective Competitor

In my opening verified statement on operating matters, I described the full-service trackage rights CP is seeking so as to make it an effective competitor with CSX on the east-of-the-Hudson line. I identified the rights CP is seeking on the north end of the east-of-the-Hudson line, breaking those rights down

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1/ This statement is being submitted on behalf of CPR, Delaware and Hudson Railway Company, Inc. ("D&H"), 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 ast-of-the-Hudson line, defined in my opening verified statement relating to operating matters.

into three routes. Route 1, through Rensselaer and Schenectady, is the most efficient routing for movement of traffic between Canadian markets and New York City/Long Island markets; Route 2, through Delanson, CP "VO", and Selkirk Yard, is the most efficient routing for movement of traffic between southern U.S. markets and New York City/Long Island markets; and Route 3, which utilizes some of the same track as Route 2 but does not establish an efficient through routing to the connection with CP's line at Delanson, involves rights in the Selkirk Yard area, allows utilization CP's Kenwood Yard at Albany together with CSX's Selkirk Yard, and is the route that CP would use in handling traffic to or from the local Albany/Rensselaer area.

I also discussed the rights CP is seeking on the south end of the east-of-the-Hudson line. I explained that CP needs to have direct access to all customers and facilities in the New York City area (which encompasses the Bronx and Queens), the right to establish and effect interchanges anywhere on the line, and switching services provided by CSX so that local service can be accomplished most efficiently.

The rights proposed by CSX are substantially more restricted that those sought by CP. On the north end of the east-of-the-Hudson line, CSX would only give CP rights to use the tracks included in CP Route 3, and would make the rights overhead only. This would have three effects.

First, CP would be prevented from using the most efficient routing -- Route 1 -- for traffic to and from Canada. Traffic in this corridor would instead have to be routed using the route specified by CSX (CP Route 3). This route is significantly more circuitous, and service would be negatively impacted because traffic would have to transit the congested yards in Albany (Kenwood) and Selkirk.

Second, by denying CP access to the tracks included in CP Route 2, CSX would prevent CP from efficiently handling traffic to and from the southeast. CSX's proposed route (CP Route 3) is approximately 57 miles more circuitous than Route 2, and requires passage through the congested Kenwood and Selkirk Yards.

Third, CSX's route proposal -- which provides overhead rights only -- is at odds with the Board's directive that the rights given CP should be full service in nature. In CP's view, customers on the north end of the east-of-the-Hudson line are just as entitled to competitive rail service as customers on the south end of the line. The route proposed by CSX, essentially CP's Route 3, is the best route to service local customers south of Stuyvesant on the Hudson Line. 2/ Oddly, CSX is proposing to

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2/ CP could also use the route to access local customers north of Stuyvesant. Alternatively, CP could serve these customers via CP's "Bull Run" access from CP's Colonie Main Line (near Kenwood Yard in downtown Albany) to CSX's Hudson Line at MP 143.6, using CP's existing trackage rights over the Hudson River's Livingston

[Footnote continued]

give CP trackage rights over the route that is the least efficient for through service but critical for provision of local service, and yet CSX would deprive CP of all local service rights.

As to Route 1, it is difficult to see why CSX should object to CP operating over this route. Conrail has leased the majority of this line (between Schenectady and Stuyvesant) to Amtrak, while retaining the right to operate over the line and compensating Amtrak for doing so. Amtrak is the predominant, and on some segments exclusive, user of the line; Conrail uses it only for local service. CP has worked out an interim arrangement with Amtrak for CP to use the line. CP will compensate Amtrak for use of the line on the same terms as does Conrail; accordingly, to the extent that CP makes payments to Amtrak for use of the line, these payments should be offset against the trackage rights payments CP makes to CSX for use of the line. 3/

Turning to the CP rights suggested by CSX for the south end of the line, CSX appears to propose that CP be granted direct

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[Footnote continued]
Avenue Bridge, and using arrangements negotiated with Amtrak to access local customers between Rensselaer and Stuyvesant on the Hudson Line.

3/ CP has also worked out an arrangement with Amtrak under which Amtrak agrees to CP's use of the Hell Gate Bridge, which is owned by Amtrak. As CP understands it, Conrail owns a line that runs over the bridge, and hence CP still needs a trackage rights grant to utilize this line.

access only to the Oak Point Yard, the Harlem River Trailvan Terminal, and the interchange with NY&A at Fresh Pond Junction. Under CSX's proposal, CP would obtain indirect access to customers in the Bronx and Queens through switching provided by CSX, under the auspices of what CSX describes as a terminal joint facility arrangement. It appears that CSX would not permit CP to create or effect any interchanges other than the existing interchange with NY&A.

The structure that CSX creates is one that will fundamentally impair CP's ability to compete for traffic. CP seeks the right of direct access to all customers and facilities so that it can provide direct service where this would be most efficient. 4/ This will also create an incentive for CSX to provide CP with effective switching services where it makes sense for only one carrier to directly serve a customer or facility (but where CSX might be inclined to favor its own traffic over CP's traffic absent the threat that CP could initiate its own service by way of response). Additionally, CP seeks the right to create and effect new interchanges so that it can compete effectively with CSX.

4/ For example, the operator of the Harlem River Yard has expressed a willingness to lease CP one and perhaps more tracks for car storage and switching. There should be no limitations in the CSX trackage rights that would interfere with CP's ability to lease and use such tracks.

The terminal joint facility structure proposed by CSX does not make sense to me. The south end of the east-of-the-Hudson line is not a terminal joint facility. For example, it is not under joint ownership, and it is not subject to an agreement that calls for the property to be operated at cost on a shared basis. To me, a standard switching arrangement, as proposed by CP, is the most appropriate vehicle for CSX to afford CP with access to customers in the Bronx and Queens.

II. The October 20, 1997 Settlement Agreement Between CP and CSX Should Not Be Set Aside

On October 20, 1997, CP and CSX entered into a settlement agreement. CP agreed not to pursue a responsive application in this proceeding and to express its support for the primary application, and the parties agreed to exchange certain rights that bore upon the relief that CP had planned to seek before the Board. As I understand it, CSX is now proposing that the entire settlement agreement be set aside in light of the trackage rights to be awarded CP in this proceeding. CSX disregards the fact that the settlement dealt with many issues unrelated to east-of-the-Hudson service, and that the relief requested by CSX would eradicate pro-competitive rights CP secured under the agreement in regard to a number of unrelated markets.

At the outset, I should make clear that CP fully lived up to its obligations under the October 20, 1997 settlement

agreement. CP advised the Board that it was supporting the acquisition of Conrail by CSX and NS, and it did not seek any conditions against CSX in the proceeding (although CP had indicated that it intended to do so in its August 22, 1997 Description of Anticipated Responsive Application (CP-10)).

In its Description of Anticipated Responsive Application, CP provided notice that it would be seeking Board conditions (1) affording CP with reciprocal switching rights in the North Jersey Shared Assets Area, the South Jersey/Philadelphia Shared Assets Area, the Buffalo-Niagara Frontier terminal area, and the Baltimore terminal area; (2) eliminating particular restrictions contained in CP's existing trackage rights over Conrail lines which were an outgrowth of restrictions imposed by the Final System Plan; (3) and imposing not only full-service trackage rights on the east-of-the-Hudson line, but also overhead trackage rights on the west-of-the-Hudson line.

Under the settlement agreement, CP obtained the right to quote rates on certain traffic interchanged by CP to CSX at Albany and then moving over CSX's east-of-the-Hudson line to the Bronx, Queens or interchange at Fresh Pond Junction. CSX obtained a corresponding right to quote rates on certain traffic interchanged by CSX to CP at Albany and then moving over CP's lines to Montreal.

CP also obtained the right to quote CSX rates on certain traffic (1) interchanged between CP and CSX at Albany which originated or terminated on points on the Philadelphia Belt Line Railroad Company via a Shared Assets Area company; (2) interchanged between CP and CSX (or the Shared Assets Area company) in Philadelphia; (3) interchanged between CP and CSX at Niagara Falls or Buffalo for transportation to and from all points on the CSX lines acquired from Conrail in the Buffalo metropolitan area that are open to reciprocal switching pursuant to an identified Conrail tariff; and (4) moving to or from the Express Rail facility in New Jersey (import/export marine containers) over CSX's west-of-the-Hudson line to Albany and there interchanged between CSX to CP for movement to or from Montreal/Toronto.

The settlement agreement has a five year term. However, CP has the right to renew the agreement for five successive terms of five years each.

It appears that CSX now wants to terminate its settlement agreement with CP. Yet the agreement does not give CSX a termination right. This is for good reason. CP would never have agreed to give CSX a termination right; to do so would leave CP with no consideration for having foregone the extensive relief it planned to seek in its responsive application.

CP did not take any affirmative steps to become the carrier designated by the Board to provide competitive east-of-the-Hudson service. In following through on its designation to do so, CP should not be required to sacrifice the pro-competitive benefits it achieved in its settlement with CSX.

Notwithstanding the foregoing, CP is willing to give up the right, established under Section 5.A.(ii) of the agreement, to quote rates on traffic interchanged by CP to CSX at Albany and then moving over CSX's east-of-the-Hudson line to the Bronx, Queens or interchange at Fresh Pond Junction. 5/ This, however, is contingent upon Board award of the full-service rights contemplated in this proceeding, and adoption of trackage rights (and switching) charges that will permit CP to be an effective competitor with CSX.

5/ CP is also willing to leave in place the companion right that CSX has, under Section 5.A.(iii) of the agreement, to quote rates on traffic interchanged from CSX to CP at Albany for delivery to points in the Montreal metropolitan area that are directly served by CP and subject to the other terms of the agreement.

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 December 9, 1998.

Paul D Gilmore

Paul D. Gilmore

REPLY VERIFIED STATEMENT OF JOSEPH J. PLAISTOW

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REPLY VERIFIED STATEMENT OF JOSEPH J. PLAISTOW

I. QUALIFICATIONS

My name is Joseph J. Plaistow, Vice President and principal of Snavely King Majoros O'Connor & Lee, Inc. (hereinafter, "SK") with offices at 1220 L Street, NW, Suite 410, Washington, DC 20005. I graduated in 1967 from Michigan Technological University with a Bachelor of Science Degree in Metallurgical Engineering. In 1972 I graduated from the University of Minnesota with a Masters Degree in Business Administration. I was employed by Burlington Northern Railroad for 15 years as Director of Costs and Economic Analyses in the Finance Department, as Director of Equipment and Service and Director of Planning and Equipment in the Food and Manufactured Products Business Unit of the Marketing Department from 1972 to 1987. In 1987 and 1988, I was employed by FMI, Inc. as a Vice President managing the efficient operation of refrigerated boxcars. In 1988, I joined Snavely King & Associates (now known as Snavely King Majoros O'Connor & Lee, Inc.).

I am a Past President of the Washington Chapter of the Transportation Research Forum. I am also the national Secretary of the Cost Analysis Chapter of the Transportation Research Forum.

In 1976 I was admitted to practice before the Interstate Commerce Commission as a non-attorney practitioner. I am a member of the Association for Transportation Law, Logistics and Policy. I am familiar with practice before the Commission, and I have testified before the Board and the predecessor Interstate Commerce Commission many times on cost and economic issues. Throughout my 26-year career in transportation, I have studied the economics of providing transportation services by private and public transportation companies.

II. INTRODUCTION

I have been asked by Canadian Pacific Railway Company (CP) to respond to the Novermber 30,1998 Submission of CSX Corporation and CSX Transportation, Inc. (CSX) with respect to the compensation to be paid by CP for the use of trackage rights over CSX's ex-Conrail "east-of-the-Hudson" line between Schenectady/Albany and Fresh Pond Junction, NY, and associated switching services. These trackage rights do not include the portion of the line between Poughkeepsie, NY, and High Bridge, NY. (Trackage rights over the Poughkeepsie to High Bridge, NY segment are being separately negotiated with Metro North, the line segment owner). Maps of the trackage rights being sought were included as Exhibits 1-5 attached to CP Witness Paul D. Gilmore's November 30, 1998 operating verified statement submitted as part of CP-24.

CP is requesting that the Board reaffirm that CSX is to grant CP:

- Full-service, not overhead right
- Trackage, not haulage, rights, and
- Terms and conditions, including compensation terms, proposed by CP.

CP's proposed compensation terms include a trackage rights fee of $0.29 per car-mile and a reciprocal switch charge of $250 per car payable by CP to CSX.

CSX proposes that CP pay for trackage rights fee and switching services based on "condemnation" principles, although CSX does not indicate the amount of the charges that would result from applying these principles.

I conclude that the CSX approach is inappropriate under the circumstances of this case and would be inconsistent with established ICC/STB precedent and railroad industry practice. In contrast, the charges proposed by CP are consistent with ICC/STB precedent and industry practice.

In Part III.A., below, I apply the ICC/STB's "SSW Compensation Formula" to the known facts of this case. I conclude that this formula would support a trackage rights fee of $0.27 per car-mile, which approximates the $0.29 per car-mile fee proposed by CP.

In Part III.A., below, I also compare CP's proposed trackage rights charge to other such charges by CSX and other railroads and reach the conclusion that these precedents also suggest that CP's proposed $0.29 charge is economically reasonable.

In Part III.B., I examine switching charges reflected in CSX's published tariffs and conclude that the $250 per car charge proposed by CP is comparable to rates that CSX charges to a number of other carriers and customers under a variety of operational conditions. I also examine the costs that CSX would incur in providing switching services to CP and conclude that CSX would enjoy a very generous profit from providing such services at $250 per car.

In Part IV, I examine the compensation provisions proposed by CSX. Building, in part, on the analyses that are described in Parts III.A. and III.B., I conclude that CSX's methodology is flawed conceptually and is inconsistent with Board precedent and railroad industry practice.

Therefore, in Part V, I summarize my conclusions that CP's proposed trackage rights fee ($0.29 per car mile) and switching charge ($250 per car) are economically

reasonable, and CSX's proposed "condemnation" based charges are not economically reasonable.

III. ECONOMIC REASONABLENESS OF CSX'S CHARGES FOR TRACKAGE RIGHTS AND SWITCHING

A. Trackage Rights Fees

i. The SSW Compensation Formula

In Compensation I[1], the Board ruled that

> "...trackage rights compensation will be calculated in three parts: (a)variable costs of operations, (b) a percentage share of all maintenance and operations expenses and taxes based upon tenant's actual usage, and (c) an interest rental component representing return on investment and determined using the capitalized earnings approach."

In Compensation II[2], the Board said that

> "An owning carrier was found entitled to recovery of costs and rent. Rent is based on an allocated share of return on the value of the property. Valuation of the property should be based on current fair market value. ... In determining value, we rejected valuation methods based on replacement costs and book value and adopted a capitalized earnings approach."

The Board went on to state that

> "In order to provide a realistic opportunity to compete, the trackage rights tenant should operate over the involved lines under economic conditions similar to the landlord's. ...any terms so onerous to the tenant as to defeat the purpose of trackage rights cannot be considered just and reasonable."[3]

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[1] St. Louis Southwestern Railway Company – Trackage Rights Over Missouri Pacific Railroad Company – Kansas City to St. Louis, STB Finance Docket No. 30,000 (Sub-No. 16), decided August 20, 1984, 1 I.C.C. 2d (Compensation I), page 776

[2] St. Louis Southwestern Railway Company – Trackage Rights Over Missouri Pacific Railroad Company – Kansas City to St. Louis, STB Finance Docket No. 30,000 (Sub-No. 16), decided December 18, 1987, 4 I.C.C. 2d(Compensation II), page 669-670.

[3] Ibid, page 669.

In Compensation IV[4], the Board said that

> "In developing a formula by which a dollar valuation might be placed upon the interest rental component, we needed to adopt a compensation formula low enough to permit SP to offer an effective competitive alternative if UP were to engage in monopolistic pricing practices. On the other hand, the compensation formula could not be set too low. The compensation formula also had to be high enough so as not to eliminate UP's incentive to maintain the route in first class operating condition. That would not be fair to UP, and might even undercut the effectiveness of UP's own operations.

In the instant proceeding, the Board stated its purpose as follows:

> "...[the Board] must forcefully use this opportunity to restore a modicum of the competition that was lost in the financial crisis that led to the formation of Conrail."[5]

CP must be given a realistic opportunity to compete, so the trackage rights fee it pays CSX for the use of the "east-of-the-Hudson" line should place CP in economic circumstances similar to the CSX's. Every step of my trackage rights compensation calculation is carried out with this objective in mind.

ii. The Variable Cost of Operations and a Proportionate Share of Maintenance and Operation Expenses Based on the Tenant's Usage of the Facility

My Exhibit No. (JJP-1) applies the Board's methodology prescribed to recover

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[4] St. Louis Southwestern Railway Company – Trackage Rights Over Missouri Pacific Railroad Company – Kansas City to St. Louis, STB Finance Docket No. 30,000 (Sub-No. 16), decided August 15, 1991, 8 I.C.C. 2d (Compensation IV), page 86.

[5] CSX and NS – Control and Operating Leases/Agreement – Conrail, STB Finance Docket No. 33388, Decision No. 89, Decided July 20, 1998, page 82.

> "...full compensation for all variable costs incurred by the landlord as a result of the tenant's trackage rights operations. Further, the landlord should be entitled to recover an allocated share of its fixed costs relating to the involved trackage." (Compensation IV, p. 86)

Exhibit No. (JJP-1) calculates the "below-the-wheel" variable cost plus an allocated portion of the fixed costs caused by CP running over the CSX/CR "east-of-the-Hudson" line. The exhibit is self-explanatory and details the sources of each cost and statistic component. Total full costs excluding return on investment (ROI) is $0.13 per car-mile. To this number we must add rent based on an allocated share of return on the value of the property. which in turn is based on current fair market value. The rent component is determined in the next section.

iii. The Rental Component Representing Return on Investment and Determined Using the Capitalized Earnings Approach

CSX should be entitled to earn an appropriate ROI on the value of its investment (determined using the capitalized earning approach) in the trackage rights line segment. Because the line segment in question was part of Conrail, and we know Conrail's current fair market value, we can determine the fair market value of the investment in the "east-of-the-Hudson" line segment. To make this determination, the following steps have to be followed:

1) Determine Conrail's current fair market value.

2) Determine corresponding Conrail earnings.

3) Determine earnings multiplier by dividing 1) by 2).

4) Determine line segment earnings.

5) Determine line segment value by multiplying 3) times 4).

6) Determine line segment rental component by multiplying the appropriate cost of capital times 5).

7) Convert the rental component to a cost per car-mile to permit pro-rating of the rental component based on the relative line segment usage by CSX and CP.

Each of these steps requires some explanation.

Step 1) Determine Current Fair Market Value

The current fair market value of an acquired railroad should be calculated by adding the value of the stock purchased to the value of the acquired railroad's long term liabilities assumed by the purchaser. Because Conrail was just acquired jointly by CSX and NS, we know the current fair market value of the property from information provided in the acquisition proceeding. This calculation is carried out in Exhibit No. (JJP-2.1). Exhibit No. (JJP-2.1) refines the overall value of Conrail to a) eliminate the non-rail component of Conrail's market value and b) eliminate the equipment component of Conrail's market value.

Step 2) Determine Corresponding Conrail Earnings

The earnings of the acquired Conrail property is the stream of net cash flows that CSX and NS jointly acquired.

I determine Conrail earnings at the pre-tax, pre-fixed charges level (Adjusted Income Available for Fixed Charges from Conrail's 1995 Schedule 210 Results of Operations). Step 4) calculates line segment earnings at that same level.

Exhibit No. (JJP-2.2) calculates earnings by adding Conrail's 1995 earnings before interest and income taxes to the net benefits CSX projected plus the net benefits that NS projected. Collectively, these earnings support the purchase price that CSX and NS were willing to pay.

Step 3) Determine Earnings Multiplier

Dividing the results of Step 1) by the results of Step 2) calculates the dollars of asset value supported by a dollar of earnings, that is, the earnings multiplier. This calculation is shown in Exhibit No. (JJP-2.3).

Step 4) Determine Line Segment Earnings

Just as Conrail's value to CSX and NS depended upon projected net cash flows, the "east-of-the-Hudson" line segment's value depends upon its projected net cash flows.[6] Exhibit No. (JJP-2.4) details the calculations I made to determine the earnings on the "east-of-the-Hudson" line segment.

[6] Because the procedural schedule is so compressed, it was not possible to identify the projected changes in historical traffic flows that CSX and CP are expecting over the line segment. That would have required time-consuming discovery that was not provided for in the Board's stipulated procedural schedule. However, it would be reasonable for the Board to use available data to quantify the value of the line segment's projected net cash flows. It is unlikely that CSX intends to place a high priority on expanding its "east-of-the-Hudson" business.

First, I identified the traffic that would be moving over the line segment. This traffic would be comprised of traffic originated or terminated on the line plus any overhead traffic using the line. In the time available, the only practical traffic data source was the 1995 STB costed waybill file.

The only significant source of overhead traffic originates on the New York & Atlantic (Long Island Rail Road's former freight operations). Virtually all the traffic originated or terminated on the NY&A also uses all or most of the "east-of-the-Hudson" line segment. Only NY&A local traffic or NY&A traffic interchanged with the New York Cross Harbor does not use our line segment, and there is very little of either of those traffic categories.

The costed waybill file reports each traffic movement's revenues and costs, but it does not report revenues and costs for the "east-of-the-Hudson" trackage rights line segment. Our trackage rights line segment's portion of those revenues and costs must be calculated. The results of these calculations are reported in Exhibit No. (JJP-2.4).

I began with determining the total earnings of each movement. The STB costed waybill file calculates system average variable costs including capital costs and income taxes. The Conrail earnings calculation that we made in Step 1) was based on full costs excluding capital costs and income taxes. In Exhibit No. (JJP-2.4) I factored up the URCS variable costs by the constant cost markup ratio to determine full costs. I then removed the ROI portion of the URCS costs which had the effect of eliminating the URCS allowance for capital costs and taxes.

Next, I had to determine the portion of each traffic movement's earnings that was attributable to the trackage rights "east-of-the-Hudson" line segment. Exhibit No. (JJP-2.4) does this using a mileage pro-rate of earnings. First the miles over the trackage rights line segment was determined for each traffic movement. That amount was then divided by the traffic movement's total miles. The resulting percentage represented the portion of the total movement's earnings that was attributable to the trackage rights line segment.

In the time available, it was not possible to determine the precise earnings of each piece of traffic. However, I did adjust for the difference in actual switching costs versus URCS system average switching costs. This is an important adjustment because for each piece of traffic originated or terminated on the "east-of-the-Hudson" line segment and transported by CP, a $250 switching charge will have to be paid. To make this adjustment, I removed the URCS system average switching cost (see Exhibit No. (JJP-2.4), page 24 of 24 for the calculation of this cost), and I added back the actual cost to CP of $250 per car. I assumed that CP would transport 20% of the traffic originated or terminated on the trackage rights line segment.[7]

The sum of the trackage rights line segment earnings on each piece of traffic included in Exhibit No. (JJP-2.4) equals the "line segment earnings" of Step 4).

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[7] CP's 20% market share is based upon CP running one train per day (see V.S. Paul D. Gilmore's operating statement, page 6, filed with CP-24 on November 30, 1998) and CSX running six trains per day (see CSX/NS-20, F.D. 33388, Volume 3A of 8, filed June 1997, V.S. John W. Orrison, Att. 13-6, p. 8). Adjusting for projected CP traffic growth, a 20% market share was assumed.

Step 5) Determine Line Segment Value

The "east-of-the-Hudson" line segment's value is determined by multiplying Step 3)'s earnings multiplier by Step 4)'s line segment earnings. This calculation is shown in Exhibit No. (JJP-2.5).

Step 6) Determine Line Segment Rental Component

Step 5)'s line segment value times the 1995 STB determined pre-tax cost of capital of 17.2% (from Ex Parte 523 (Sub-No. 1)) equals the line segment rental component of costs that CSX is entitled to recover from all the traffic on the line segment. These calculations are shown in Exhibit No. (JJP-2.6).

Step 7) State the Line Segment Rental Component on a Car-Mile Basis

Dividing Step 6)'s line segment rental component by the corresponding "east-of-the-Hudson" trackage rights line segment car-miles converts the total line segment rental component to a per car-mile basis. This permits the total line segment rental component to be attributed to CSX and to CP based on their respective usage of the line segment. The rental component of the appropriate trackage rights compensation fee is $0.14 per car-mile. Exhibit No. (JJP-2.7) shows this calculation.

iv. The Trackage Rights Compensation Fee

In Section ii, I determined the variable cost of operations and a proportionate share of maintenance and operating expenses to be $0.13 per car-mile. In the preceding Section iii, I determined the rental component to be $0.14 per car-mile. The total SSW Compensation formula determination of the trackage rights compensation fee is then $0.27 per car-mile. This establishes the economic reasonableness of CP's proposed $0.29 per car-mile trackage rights fee. In the next section, I will further establish the reasonableness of CP's recommended trackage rights fee by comparing it to other trackage rights fees across the country.

v. Comparable Trackage Rights Fees Across the Country

Exhibit No. (JJP-3) lists examples of trackage rights fees per car-mile in effect throughout the country. The range of trackage rights fees included in other CSX trackage rights agreements is $0.16 - $0.29 per car-mile. CP's proposed $0.29 per car-mile charge is reasonable when compared with these.

Exhibit No. (JJP-3) also lists examples of other railroads' trackage rights agreements. The range of trackage rights fees included in these other agreements is $0.14 - $0.48 per car-mile. CP's proposed $0.29 per car-mile charge is also reasonable when compared with these agreements.

B. Switching Charges

i. Discussion of CP's Proposed $250 Per Car Switching Charge

CP's proposed $250 per car switching charge recognizes the utilization of CSX's properties as well as specific services performed by CSX for CP. The CP agreement calls for the $250 to be paid for each loaded car switched to or from a customer. In the next few sections, the reasonableness of the $250 charge is compared to CSX's published system-wide switching charges to other railroads and shippers and to the costs that CSX incurs in providing these services.

In theory, the cost of providing reciprocal switching services is less important than the level of the charge because both railroads perform the same service at the same rate per car, in the same location. Therefore, if there is a loss or profit per car switched, both carriers participate equally and neither has a relative advantage. However, this assumes that each railroad switches the same volume of cars. In general, switching volumes of the participating carriers are seldom equal, so the relationship of rate to cost is economically important.

In the case of CSX switching cars for CP east of the Hudson, I assume that no reciprocity is involved and that CSX will be switching for CP, but CP will not switch for CSX.

ii. Comparable Reciprocal Switching Charges

The latest available version of CSX's switching tariff, CSXT 8100, was the source I used to find out how much CSX assessed other railroads for various switching services. I reviewed charges to a variety of railroads at a variety of locations.

Exhibit No. (JJP-4) reports reciprocal switching charges extracted from Section IIIA of tariff CSXT 8100. The reciprocal switching rates included in Exhibit No. (JJP-4) are only examples and do not represent all locations, railroads, or rates. They do, however, illustrate the widespread use of the $250 compensation level. There are several locations and railroads that pay amounts well below the $250 level of compensation that CP has proposed. The simple average of the charges listed in Exhibit No. (JJP-4) is $251 per car.

I conclude that the $250 per car switching charge proposed by CP is reasonable when compared to rates CSX charges other railroads for similar services at a variety of locations across their system.

iii. Comparable Industrial Switching Charges

The switching tariff CSXT 8100 also includes the charges associated with performing several different classifications of industrial switching. Samples of CSX switching charges have been extracted from Section V of CSXT 8100 and are included as Exhibit No. (JJP-5).

The data in Exhibit No. (JJP-5) include charges for intra-plant switching, intra-terminal switching, and inter-terminal switching. Certain of the charges pertain to particular shippers, specific point-to-point movements, and distinct commodities. While these categories of industrial switching will be used less often than reciprocal switching, they, nonetheless, provide a useful comparison to the level of charges CSX considers reasonable.

The simple average of the charges listed in Exhibit No. (JJP-5) is $185 per car. I conclude that the $250 per car switching charge proposed by CP is reasonable in comparison.

iv. Switching Charges Compared to Costs

Exhibit No. (JJP-6) calculates the underlying cost (that is, operating expenses and depreciation/leases at the full cost level and excluding ROI) to CSX performing the switching services for CP at $75 per car. I conclude that the $250 per car charge proposed by CP is generous.

v. The Reasonableness of the Switching Charges Proposed by CP

I conclude that the $250 per car switching charge proposed by CP is economically reasonable.

IV. CRITIQUE OF CSX'S PROPOSALS:
A) CSX's TRACKAGE RIGHTS AGREEMENT AND
B) CSX's TERMINAL JOINT FACILITIES AGREEMENT

A. The Compensation Aspect of CSX's Proposed Trackage Rights Agreement

CSX does not propose a specific trackage rights fee. Rather, they vaguely outline the cost categories to be included in compensation calculations (see Article 5. Compensation, of Exhibit 2 attached to CSX-167, filed November 30, 1998). Without a specific quantification of CSX's proposed trackage rights compensation fee, it is impossible to evaluate the economic reasonableness of the maintenance and operating expense portion of CSX's compensation proposal.

Even without quantification, I can state unequivocally that CSX's methodology for determining the rental component of compensation is in clear violation of the Board's Compensation I-IV decisions because it bears no relationship to usage. CSX requires CP to pay 50% of the rental component even if CP's usage is significantly lower, as it is expected to be. On this basis alone, I conclude that the CSX trackage rights compensation proposal is economically unreasonable.

B. CSX's Proposed Terminal Joint Facilities Agreement

CSX has proposed a Terminal Joint Facilities Agreement (Agreement) to apply instead of the switching arrangement proposed by CP with its $250 per car switching fee. CSX's proposed Agreement primarily relates to CP's access to traffic originating or terminating at stations currently served by Conrail in the Boroughs of the Bronx and

Queens, New York City. This Agreement also pertains to cars delivered to the NY&A at Fresh Pond Junction. For interchange with the NY&A, CP also has the option to deliver the cars directly to the NY&A.

CSX's proposed Agreement does not fit the circumstances surrounding CP's access to traffic east of the Hudson. In most instances when a facility or operational subdivision is referred to as a joint facility or joint agency it has certain characteristics, operational responsibilities, and cost allocations applied.

Its users usually own a joint facility whether or not a neutral agency operates or administers the facility. It is usually designed for the mutual and equal benefit of all its owners/users. A joint management team designated and selected by the owners normally controls the operations within the facility.

The train operations and movements conducted within the facility by the owners/users are given equal priority in terms of dispatch preference. The coordination and control of operational functions within the facility are to be free of prejudice regarding one carrier's train movements over those of another. The operations are in most instances conducted on a predetermined schedule that allows for the orderly dispatch of train movements within the area under control of the joint facility management team.

In return for the services performed in the joint facility, each owner is usually responsible for expenses in proportion to usage. The basis or bases of assigning financial responsibility is identified and mutually agreed to by all owners.

When the circumstances surrounding CP's new access are compared to those that surround the usual joint facility arrangement, it is obvious that CSX's proposed Agreement is inappropriate. The rights and economic obligations placed by the proposed CSX Agreement on CP are totally unreasonable.

The "Terminal" is to be controlled solely by CSX. CP entry into and movements within the Terminal are restricted. CSX controls the entry to and exit from the trackage between Selkirk Yard and the Terminal area. Under CSX's proposal, CP can only access the terminal area after requesting and receiving confirmation from CSX. Notice must also be given by CP when it has cleared the trackage (including the Terminal) covered by CSX's proposal. There are also restrictions placed on CP after entering the Terminal. Regarding local traffic that originates or terminates within the Terminal, CP must spot or pull cars only from designated tracks in Oak Point Yard. All industry switching is to be performed by CSX based on their operating schedule.

From an economic perspective, CSX's Agreement does not meet reasonableness tests in that CP must pay 50% of the rental component of the Terminal's fair market value without regard to CP's usage of the Terminal.

In summary, CSX's proposed Agreement is inappropriate, unreasonable operationally, and unreasonable economically. CP is not attempting to assume the role of co-landlord of these properties. CP is attempting to be a tenant on CSX's properties while paying its fair share of the related costs and providing the additional competition called for in the Board's Decision No. 89.

V. CONCLUSIONS

CP's proposed $0.29 per car-mile trackage rights compensation fee meets the requirements of and is only slightly higher than the SSW Compensation formula's $0.27 per car-mile. CP's proposal is, therefore, economically reasonable.

CP's proposed $250 per car switching charge is economically reasonable compared with CSX reciprocal switch charges to other railroads, CSX industrial switching charges to other railroads and shippers, and CSX costs of performing the switching services for CP.

CSX's rental component of its proposed trackage rights compensation fee is not based on usage and is, therefore, economically unreasonable.

CSX's proposed Terminal Joint Facilities Agreement is operationally unreasonable. The Agreement is also economically unreasonable because the rental component of its proposed charges are not based on usage.

Development of Variable and Fully Allocated Costs Caused by CP Running over CSX/CR Tracks
For Trackage Rights Compensation Calculation

Item	Source	1995 Conrail GTM Related
(1)	(2)	(3)
Operating Expense		
1. Maintenance of Way per GTM	URCS D1L157C10	0.00063
2. Dispatching, Etc.	URCS D3L169C25	0.09317
3. Total Direct Train Mile	URCS D3L172C25	0.65527
4. Ratio Dispatching to Total	Line 2 ÷ Line 3	0.14219
5. Total Train Mile	URCS D3L191C25	0.90827
6. Dispatching Total	Line 4 x Line 5	0.12915
7. Gross Ton Miles	URCS A1L122C01	193,501,984
8. Train Miles	URCS A1L104C01	35,878
9. Gross Ton Miles per Train Mile	Line 7 ÷ Line 8	5,393
10. Train Mile Related Costs per GTM	Line 6 ÷ Line 9	0.0000239
11. Subtotal Less Overheads	Line 1 + Line 10	0.0006583
12. Operating Overhead Ratio	URCS D8L607C01	1.18134
13. Variable Trackage Rights Related Expense	Line 11 x Line 12	0.00078
Depreciation and Leases		
14. Roadway Depreciation	URCS D1L234C10	0.0004630
15. Depreciation/Leases Overhead Ratio	URCS D8L608C01	1.12444
16. Variable Trackage Rights Related Depr/Leases	Line 14 x Line 15	0.0005206
Total Variable Trackage Rights Costs		
17. Total Costs Related to Trackage Rights	Line 13 + Line 16	0.0013006
18. Total Gross Ton Miles / Trailing GTM	A1L123C01 ÷ A1L122C01	1.09641
19. Cost Incurred by CSXT	Line 17 ÷ Line 18	0.0011862
Full Costs		
20. Total Variable Costs	Line 19	0.0011862
21. Constant Cost Markup Ratio	D8L617C01	1.43676
22. Total Full Costs Associated with Trackage Rights	Line 20 x Line 21	0.0017043
23. Trailing Gross Tons per Car	A1L122C04 ÷ A1L114C01	76.12
24. Total Full Costs on a Car-Mile Basis	Line 22 x Line 23	$ 0.13

Exhibit No. (JJP-2.1) contains highly confidential material and is being filed with the Board under seal

Development of Conrail System-Wide Earnings - 1995

Component (1)	Source (2)	1995 Value (000) (3)
1. Net Revenue from Railway Operations	1995 CR R-1, Sch 210, Line 15 (b)	$ 446,154
2. 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
3. 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
4. Adjusted Net Revenue	Line 1 + Line 2(c) - Line 3c)	571,781
5. CSXT Statement of Benefits	RR Control App - FD 33388 Vol 1 of 8, Appx A, page 124	651,800
6. NS Statement of Benefits	RR Control App - FD 33388 Vol 1 of 8, Appx B, page 127	793,257
7. Total Conrail System Earnings	Line 4 + Line 5 + Line 6	$ 2,016,838

Development of Conrail Earnings Multiplier - 1995

Component (1)	Source (2)	1995 Value (000) (3)
1. Fair Market Value of Conrail	Exhibit No. (JJP-2.1)	$ 12,629,210
2. Conrail Earnings	Exhibit No. (JJP-2.2)	2,016,838
3. Earnings Multiplier	Line 1 ÷ Line 2	6.26

Development of Trackage Rights Segment Earnings

The trackage rights line segment earnings were developed in a three step process:

1) Identify the potential traffic on the line;

2) Calculate the total earnings for the subject traffic; and,

3) Calculate the earnings associated with the trackage rights segment.

Each of these steps is described below with the calculations shown on the following pages of this exhibit.

1. Identify the potential traffic on the line

We identified the potential traffic on the line by reviewing CP's East of the Hudson schematic (Exhibit No. 1 attached to CP witness Paul D Gilmore's November 30, 1998 operating verified statement submitted as part of CP-24), the Conrail system map, and the Official Open & Prepay Station List to gather the universe of FSACs on the trackage rights segment of the line.

Using the 1995 Costed Waybill Sample we extracted all traffic either originating or terminating at any of the FSACs on the trackage rights line. Local traffic (traffic that appeared as both originated and terminated) was only included once. To this we added all traffic that originated or terminated on the NY&A as this traffic almost always uses the "East of the Hudson" trackage rights line. NY&A traffic interchanged with the New York Cross Harbor was eliminated.

2. Calculate the total earnings for the subject traffic

The Costed Waybill sample includes total revenues and total variable costs for each move. These costs include Operating Expense, Depr/Leases and Return on Investment. To develop earnings for this traffic on a basis comparable to Conrail's system earnings, we calculated full costs, excluded return on investment and then subtracted this adjusted cost from revenues.

Development of Trackage Rights Segment Earnings

3. Calculate the earnings for the trackage rights segment

The earnings calculated in 2 above represent the total earnings for each move. To develop the amount applicable to the "East of the Hudson"segments we applied a mileage pro-rate. We first developed the trackage rights miles for each movement. We then applied to the earnings a ratio of the trackage rights miles to the total miles of the movement. In some instances we found that the traffic we had identified did not traverse the trackage rights line at all. Data from these movements are excluded in our calculations.

The mileage along this route was estimated by using PC RAIL®. CSX owned tracks up to Poughkeepsie and trackage between High Bridge and Fresh Pond junction were included in the estimation. The section between Poughkeepsie and High Bridge (owned by Metro North and subject to other trackage rights) was deducted from the total where it was applicable.

In addition to the mileage pro-rate, we adjusted earnings to reflect the terminal switch fee of $250 per car proposed by CP. This adjustment was accomplished by deducting Conrail's system average switching costs and replacing that with the $250 per car charge that CP will actually have to incur.

Exhibit No. (JJP-2.4) at pages 3-24 contains highly confidential material; these pages are being filed with the Board under seal

Development of Segment Value Based on Earnings

Component (1)	Source (2)	Value (3)
1. Earnings Multiplier	Exhibit No. (JJP-2.3)	6.26
2. Total Line Segment Earnings (attributable to Trackage Rights)	Exhibit No. (JJP-2.4), page 24	592,490
3. Adjusted Value of Trackage Rights Segments	Line 1 x Line 2	3,708,987

Development of Trackage Rights Segment Rental Component

Component	Source	Value
(1)	(2)	(3)
1. Adjusted Value of Trackage Rights Segments	Exhibit No. (JJP-2.5)	$ 3,708,987
2. 1995 Pre-tax Cost of Capital	Ex Parte No. 523 (Sub-No. 1)	17.2%
3. Annual Rental for Trackage Rights Line Segments	Line 1 x Line 2	637,946

Development of Trackage Rights Segment Rental
On A Per Car-Mile Basis

Component	Source	Value
(1)	(2)	(3)
1. Annual Rental for Trackage Rights Line Segments	Exhibit No. (JJP-2.6)	$ 637,946
2. Total Car-Miles on Trackage Rights Segments	1/	4,583,979
3. Trackage Rights Interest Rental Fee per Car-Mile	Line 1 ÷ Line 2	$ 0.14

1/ Total Carloads from Exhibit No. (JJP-2.4) - column (e) times miles over trackage rights Exhibit No. (JJP-2.4) - column (m) x 2.0 (100% empty/return).

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	CA	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
3338	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
388[illegible]	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 Switching Cost
Per Car Excluding ROI and Car Cost
Based On 1995 CSXT URCS

Item/Cost Element	Source	Variable Unit Cost	Service Units	Full Cost
(1)	(2)	(3)	(4)	(5)
1. Swtch Mins - Industry	E2L101C25		5.36137	
2. Ratio Spot to Pull (T/L)	100% Empty		2.0	
3. Total Swtch Mins	Line 1 x Line 2		10.72274	
4. SEM Oper Exp	E1L111C1	$2.96456		
5. SEM D and L	E1L111C2	$0.25297		
6. CL Clerical Oper Exp	E1L109C1	$17.42323	1.0	
7. CL O/T Clerical Oper Exp	E1L106C1	$2.38458	1.0	
8. Constant Cost Markup	D8L617C1			1.38544
9. SEM Full Oper Exp	Line 4 x Line 8			$4.1072
10. SEM Full D and L	Line 5 x Line 8			$0.3505
11. Total SEM Cost Per Min	Line 9 + Line 10			$4.4577
12. CL Clerical Full Oper Exp	Line 6 x Line 8			$24.14
13. CL O/T Clerical Full Oper Exp	Line 7 x Line 8			$3.30
14. Total SEM full Cost Per Car	Line 11 x Line 3			$47.80
15. Toyal Full Cost Per Car	Line 12 + Line 13 + Line 14			$75.24

VERIFICATION

DISTRICT OF COLUMBIA

Joseph J. Plaistow, being duly sworn, deposes and says that he has read the foregoing statement concerning STB Finance Docket No. 33388 (Sub-No. 69), knows the contents therein, and that the same are true and correct.

Joseph J. Plaistow

Subscribed and sworn to before me
this 9th day of December, 1998

My Commission expires March 30, 2003.

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of December, 1998, I served by the means indicated below a copy of the foregoing Canadian Pacific Parties' Reply Evidence and Argument 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)

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December 10, 1998

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

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**

Dear Secretary Williams:

Enclosed are an original and twenty-five (25) copies of CSX-169, "Reply 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)," 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-169 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.

Respectfully yours,

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

Enclosures
via hand delivery

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

CSX-169

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

Reply 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)

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December 10, 1998

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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

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RESPONSIVE APPLICATION – STATE OF NEW YORK, BY AND THROUGH ITS
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**Reply 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)**

Pursuant to Decision No. 102, served November 20, 1998, CSX Corporation and CSX Transportation, Inc. (collectively, "CSX") submit this reply statement concerning their offer of rights to Canadian Pacific Railway Company and its affiliate, Delaware and Hudson Railway Company, Inc. (collectively, "CP"), required by that Decision No. 102 and pursuant to Decision No. 89, served July 23, 1998, Condition No. 28, at 177, to reply to the proposal made by the Canadian Pacific Parties in their "Opening Evidence and Argument," CP-24 (the "CP Filing").

INTRODUCTION – THE AREAS OF AGREEMENT

As described in the Reply Verified Statement of Steven A. Potter ("Potter R.V.S.") in more detail, the CP Filing shows a considerable agreement between CSX and CP on the basic, general way in which the mandate of the Board in Ordering Paragraph No. 28 should be implemented:

First, both CSX and CP agree that implementation should be through trackage rights, not haulage rights.[1] (There are some major disputes as to the nature of the trackage rights; they will be discussed below.)

Second, the parties are in agreement, as CSX anticipated, that CP does not want to hire, train and maintain its own switch crews in the Bronx and that the most efficient way to operate in the Bronx would be with CSX, which will operate the Oak Point Yard, performing the switching for both parties. See Section 1, Terminal Joint Facilities Agreement, Potter V.S. Ex. 1, and CSX-167, Potter V.S. at 10-11. CP also believes that it should have access to all yards, terminals, other facilities, and shippers, present and future, in the Bronx and Queens, and that it should be permitted to interchange with the New York & Atlantic. CSX is in agreement with that as well, though there are some major issues as to the operating details (and a large issue about money).

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[1] CP suggests at one point (page 10 n.4) that, if CSX agreed, CP might want just haulage rights for a while, and then trackage rights. CSX does not agree to that proposal.

Third, CP states as its principal purpose in making its proposal that "CP seeks to ensure 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. CSX also believes that an undisclosed but fairly evident purpose of CP's proposal is to improve CP's commercial position in the Greater Albany area.

THE POINTS OF DISAGREEMENT

While many of the points of disagreement between CSX and CP will be obvious even on a cursory reading of the two filings, other points are more concealed – perhaps artfully concealed. For example, CP seeks forced access to CSX's Selkirk Yard, the largest Conrail classification yard being allocated to CSX, without compensation (except for switching charges) and to serve all the shippers within the yard limits. One would have thought that a claim that expansive would have been clearly stated in the CP Filing. Not so. Buried in CP's form of trackage rights agreement (Addendum, Section 2(a)), it is provided that the trackage rights granted at 29¢ a car mile give the right to use all yards, terminals and other facilities on the trackage in question and to serve all shippers thereon. The description of the trackage rights themselves, in the metes and bounds set forth in CP's Addendum, Section 1, includes not only the entirety of Conrail's ownership of the Hudson Line and the Conrail lines in the Bronx and Queens that lie East of the Hudson, but also the three simultaneous alternative routes which CP puts forward as its accesses of choice to the

northern entrance to the Hudson Line. Two of these three access routes go through the Selkirk Yard and another touches the Conrail/CSX North Albany Yard. CP thus claims access to both those yards and to all the shippers on them, as well as the many shippers outside the yards but on the complex of the three alternative routes from various portions of CP's lines onto the Hudson Line. All of these lie West of the Hudson. It is necessary to read **very** carefully to grasp what CP is proposing.

Once these various hidden balls in the CP Filing are uncovered, the following points of disagreement are exposed:

First, there is CP's extraordinary claim that it should receive three simultaneous and alternative "West of the Hudson" routes of access to the Hudson Line in the Albany area – this, when CP projects only one or two trains each way each day and otherwise has no need for multiple routes. This is dealt with herein (part III) and in the Downing Reply Verified Statement ("Downing R.V.S.") at 2-7. Closely allied with this is a series of issues arising out of what appears to be an attempt by CP to aggrandize its properties (by conscripting NYC/CSX's properties) in the Greater Albany area. CP uses its access to the Hudson Line, which the Board has ordered to furnish the means for a second Class I freight rail carrier to access New York City directly, to vault itself into an improvement of its commercial position in the Albany area.

CP wants the Board to increase its access to Albany area shippers and to provide it free access to the large and extremely busy Selkirk Yard and another Conrail/CSX yard in the Albany area. It would have been expected that an attempt by a non-owning carrier to

obtain access to a major classification yard owned by another carrier and to use all the facilities and to serve all the shippers located therein – without regard to what compensation would be paid – would be the subject of a major, heavily-contested proceeding involving considerable effort by the parties and by the Board. Instead, this and many other "grabs" by CP are presented, stealthily, in an abbreviated proceeding based on two ten-day filings, having as its subject the provision of access to a city 130 miles away. The extensive plans of CP for the Albany area raised as an issue in this case for the first time on November 30, 1998, have never been even suggested throughout the period of over a year and a half that this case has been pending.

Second, a large point of disagreement revolves around 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 full shipper access in the Terminal area in the Bronx and Queens and with terminal support there from CSX, CP is not willing to pay the cost of first-class service and wants to use CSX's facilities and services on the cheap. This is treated herein (parts I and II) and in the Potter R.V.S. at 5-12.

Third, in passing and without any statement of its rationale, CP's Filing (page 2 n.1) asks the Board to override any exclusivity in the grant of freight rights by the public authority owners (or long-term lessees) of portions of the Hudson Line or the other routes requested by CP, without provision for CP paying any compensation to CSX for the loss of the portion of its capital investment in Conrail that relates to those routes to the extent that Conrail had exclusive freight rights on them. No basis is given for not including

compensation for what is taken from CSX, and not requiring CP to pay compensation would be improper and unlawful. While the Board has the power to, in effect, grant trackage rights over CSX's freight rights, just as it has the power to grant others trackage rights over NYC/CSX's ownership rights, the property taken must be paid for, as an element in the overall trackage rights compensation over the line. We discuss this below, in part I.3.

Fourth, there is the dispute as to whether the Trackage Rights are to be local or overhead on the Hudson Line south to the New York City line. That is mainly dealt with below (part II), but there is some material on it in the Potter R.V.S. at 14. It is interrelated with the aggrandizing forced access efforts of CP in Albany referred to in point *First* above. When the latent implications hidden in CP's proposal are studied, it is plain that the few shippers on the Hudson Line north of the Bronx to which CP openly seeks access are small potatoes to the many shippers in the Greater Albany area to which CP more stealthily seeks access. The tail here is larger than the dog.

Fifth, there are a number of overreachings by CP in the details of the rights as it proposes them. both trackage rights and rights in the Terminal in the Bronx and Queens. While these are detailed and technical and are treated primarily in the Potter R.V.S. (pages 12-15) and the Downing R.V.S. (pages 2-7), they are of great importance. Here again, the Devil is in the details. They are another reason why the CSX forms of agreement should be ordered by the Board, not the CP forms.

I. THE BASIS OF COMPENSATION

Our Argument in CSX-167 sets forth 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.[2] The compensation required is cost-based. In the case of 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. CSX-167 at 15-16; see *St. Louis Southwestern Rwy. Co. – Trackage Rights*, 1 I.C.C.2d 776, 779-80, 786-90 (1984) ("*SSW Compensation*"); *Missouri-Kansas Texas R.R. Co. v. Kansas City Terminal Rwy. Co.*, 198 I.C.C. 4, 9-11 (1933) ("*MKT*"). Then, in the case of terminal services, the costs of 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, are allocated between the owner and the other party on a usage basis. *MKT* at 12; CSX-167 at 15 and portions of Potter V.S. there cited; *cf. SSW Compensation* at 779-80. On trackage rights, the approach is the same to the costs of maintenance and administration and depreciation of the assets, though, of course, the non-owner user is furnishing its own line-haul crews and, 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 uniformly applied in fixing compensation for joint facilities use and for trackage rights. It has its origin in

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[2] See generally the discussion in CSX-167 at 14-20.

Section 3(4) of the Interstate Commerce Act, added by the Transportation Act of 1920, and has been on the statute books ever since, now as 49 U.S.C. § 11102(a). 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. See Decision No. 89 in the present case at 140-42; *UP/SP*, Decision No. 44, served August 12, 1996, at 140-44.

It is this form of cost-based compensation with compensation by "interest rental" for capital investment 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.

1. The CP Proposal for Trackage Rights Compensation. As to the trackage rights, CP proposes 29¢ a car mile for its cars moving over the Conrail lines to be owned by NYC and allocated for operation to CSX. Access to, and use of, yards and terminals is, according to CP, to be included at no extra charge. CP thus gains use of Selkirk Yard, the largest yard in the eastern portion of the Conrail system allocated to CSX, for free. It also, under its proposal, gains access to all of the shippers at Selkirk Yard and to the other facilities in the yard, including new automobile unloading facilities, as set forth in the Downing R.V.S. There is no reason for CP to have access to Selkirk Yard or those shippers at all. Of course, CP will have access to Oak Point Yard under the CSX proposal, but CP should have to pay for it, as CSX's proposal contemplates.

The 29¢ per car mile fee is said by CP to be taken from the arrangements that CSX and NS made, between themselves, on a voluntary basis in the Primary Application in this matter. CP Filing at 14. It was used 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. CSX/NS-19, Vol. 2A, at 146-50, Hart V.S. at 10-13; CSX/NS-18, Vol. 1, at 545-49, McClellan V.S. at 43-47. See also Decision No. 89 at 51. Thus, the parties were acting in the Application to cure a competitive problem which they had created themselves. 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 in some instances or did not provide a proper return on capital, the problem would even out; at one time, CSX would be underpaying and on other occasions, it would be overpaying; and sometimes it would be receiving and at other times giving.[3] There is no such reciprocal element in the present situation; CSX is not being granted any access to CP's customers, yards, or terminals.[4]

Neither is the access to be granted to CP an effort to correct a competitive problem created by the Transaction. It was imposed by the Board for entirely different reasons. The Applicants demonstrated that the bringing of competition to Northern New Jersey – where the great bulk of the rail traffic in and out of the Greater New York area is, and for the

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[3] See McClellan V.S., cited in text above, p. 47, Vol. 1 at 549: "each [of CSX and NS] will hold reciprocal power over the other."

[4] The Board's analysis of reciprocal switching in Decision No. 89 at 57-58 is certainly pertinent here by close analogy.

foreseeable future will continue to be, handled -- through the Shared Assets Area there, would have a constraining effect on prices and service in the East of the Hudson area, where only CSX would be operating. CSX/NS-177 at 233-47 (Kalt R.V.S.). The Board agreed. Decision No. 89 at 81. And the Board made it plain that its ordinary rule was that a rail combination transaction did not have to increase the competitive options for shippers or otherwise deal with existing conditions. Id. at 70-71, 78, 79. The Board also very correctly held that the existing conditions, from at least as far back as the 1976 creation of Conrail, were that there was only one rail freight carrier serving in New York City east of the Hudson and connecting it with any other part of the United States except Long Island.. Id. at 81, 83. The Board also noted that the CN and CP agreements made by CSX by way of settlement "will increase rail transport options for shippers" East of the Hudson and bring them "new competition." Id. at 82. However, all this was not enough new competition for the Board; it stated its belief that it "must forcefully use this opportunity to restore a modicum of the competition that was lost in the financial crisis that led to the formation of Conrail." Id. at 83.[5] The Board stated that the purpose of its condition was the bringing of a second rail freight carrier to New York City east of the Hudson for "competition in and out of the City." Id.

The Board's cases dealing with the compensation for trackage rights in rail combination cases sometimes make a distinction in the method of competition between

[5] As the Carey R.V.S. demonstrates, the only places where it could be said that there was any direct rail competition in the area of the Hudson Line prior to "the financial crisis that led to the formation of Conrail" would be the Bronx and Queens only.

(i) cases where the party seeking to be compensated was an applicant whose application caused a lessening of competition which the trackage rights were designed to cure, and (ii) cases where the party on whom the trackage rights were to be imposed was "innocent."[6] In other cases, the Board has used the broader "condemnation" method of compensation, even with respect to applicants whose application has created competitive problems that must be rectified by the trackage rights grants. For example, the calculations made in UP/SP by the Board to determine the reasonableness of the fixed-fee trackage rights compensation agreed upon there to solve massive two-to-one problems included an interest rental feature and the other elements of "condemnation" compensation. See *UP/SP*, Decision No. 44, served Aug. 12, 1996, at 140, applying *SSW Compensation*.

But even if a distinction is to be made between the "innocent" parties, entitled to the full compensation provided for by 49 U.S.C. § 11102(a) and those deserving of a lower range of compensation, CSX stands in the ranks of the "innocent." Its Application did not create any competitive loss for the East of the Hudson shippers and, in a number of ways, improved their situation. That the Board could not tolerate an existing situation where the City of New York itself did not have direct rail service by two major rail carriers and made CSX the vessel for changing that pre-existing condition of a generation's duration, does not mean that CSX should be put in a position where less than the constitutional "condemnation" form of compensation is due to it.

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[6] See the discussion of Decision No. 47, served Sept. 10, 1996, in UP/SP, at pages 18-19 of CSX-167.

In Decision No. 89, at pages 141-42, as a check on the reasonableness of the 29¢ trackage rights fee negotiated between CSX and NS in connection with the reciprocal trackage rights granted between them as part of the Application, the Board indicated that it had, using the pertinent 1995 URCS total costs, computed a system-wide cost of 29¢ per car mile for CSX, 46¢ per car mile for Conrail, and 40¢ per car mile for NS. *Id.* at 141. The Board noted that "these numbers all understate the fees that would be derived under the *SSW Compensation* method, which uses replacement cost of track to develop a rate of return factor, while the 29 cents, 46 cents, and 40 cents per mile numbers all reflect only the lower URCS book value." *Id.* at 141 n.215. Quite clearly, those calculations give no support for the imposition of a 29¢ per car mile figure on CSX here. In the first place, all the costs in the Board's study were system-wide costs. In the second place, what is involved here is a historic Conrail route, and the Conrail cost reported by the Board was 46¢ per car mile. Moreover, the rate of return factor was based on Conrail's historic costs, presumably on its emergence from the bankruptcies of its predecessors. A large part of the record in Finance Docket No. 33388 was devoted to demonstrating that following the auction bidding between them, CSX and NS paid considerably more than the historic book cost of Conrail's assets for Conrail. See *id.* at 62. Finally, URCS costs only include a return on a portion of capital investment, not the whole of it. *Id.* at 64 n.95. Thus, using replacement costs or an allocation of the price actually paid as a result of the auction to construct the capital value for the required return ("interest rent") on the specific Conrail assets involved here, it might

be expected that a total cost figure considerably in excess of 46¢ per car mile would be appropriate.

The odds of the 29¢ turning out to be fair compensation, based on the considerations just recited, seem to be nil. CP does not even allege that 29¢ is a proper cost-based compensation including an "interest rental." The essential point in terms of the issue before the Board is that the 29¢ figure used in the Primary Application was an agreed-upon number; in the absence of agreement, a cost-based figure must be established and used, as CSX has proposed. There is no scrap of 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" (including in each case the cost of capital) will be equal. Likewise, for the provision of terminal services, discussed further below, the CSX-proposed figure will be equal to the costs allocable to the services and will assure that the costs to the two carriers 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"[7] standard or on some other standard that provides a review while giving deference to the arbitration process, CSX certainly would have no objection.

The Board need not be concerned that CSX has not quantified in dollars and cents what a proper cost-based trackage rights fee, including an interest rental, would be on a per car/per mile basis in dollars and cents or produced similar figures for the interest rental and usage charges for various facilities and services in The Terminal. Obviously, that sort of calculation could not be performed within the time parameters of the present proceeding. It involves capital cost allocations and other accounting work. As is usual in cases of this nature, the Board need only accept that the principles it has previously adopted should be applied to this case, approve CSX's forms of Agreement, provide for an interim compensation until the calculations are determined, and order the parties to make a "true-up" once the final calculations are established. Except for the interest rental, the cost-based numbers change from time to time as costs change (and the interest rental will change at least with betterments and retirements). It is permissible for the Board, under 49 U.S.C. § 11102(a), to permit CP "to use the facilities of another rail carrier under this section" even though the compensation has not been paid so long as it is "adequately secured." See Southern Pac. Transpor. Co. v. ICC, 736 F.2d 708, 723-24 (D.C. Cir. 1984), cert. denied, 469 U.S. 1208 (1985). An order from the Board directing the Canadian Pacific Parties to be

[7] *Chicago & North Western Transp. Co. – Abandonment*, 3 I.C.C.2d 729 (1987), *aff'd sub nom. Int'l Brotherhood of Elec. Workers*, 862 F.2d 330 (D.C. Cir. 1988).

jointly and severally liable for the charges that may be determined would, in CSX's view, constitute adequate security, as discussed in the decision just cited.

2. *Terminal Rights Compensation Is Ignored By CP and the Switching Fee CP Proposes Is Unsupportable*. CP seeks full use of all terminals and yards on the trackage rights, which would clearly include, given the trackage rights CP seeks, Oak Point Yard, Selkirk Yard, and West Albany Yard, without the payment of additional consideration over and above the 29¢ per car mile. Thus, for paying an arbitrary per car mile trackage rights fee on about 40% of line of track that covers approximately 130 miles, CP wants the use of at least two major yards at the beginning and end of the 130-mile line and another yard. The only compensation for terminal facilities or services proposed by CP is for switching. This aspect of CP's proposal shows a similar disregard of the applicable rules for compensation and overreaching to that already identified. As noted above, under CP's proposal, access to the yards and terminals is to be granted without any contribution toward the cost of capital invested in the terminal and without regard to the expenses of ownership (*e.g.*, real estate taxes), maintenance, operation and administration of the yards.

CP has, however, deigned to offer payment for its switching movements in the Bronx/Queens terminal area. Again, there is no effort by CP to have even these moves performed on a cost-based compensation basis. The figure of $250 is proposed as a cap.[8]

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[8] This is another fairly well concealed point by CP. The $250 figure, under Section 5(f) of CP's Addendum to Trackage Rights Agreement, is presented as a tentative number until one party or the other demands a cost-based fee, pertaining only to the switching, of course. But the result of that calculation can only move the figure down, as the Potter R.V.S. points out, since it is capped under

footnote continued on next page

There is no cost-based support for it. It was chosen by CP because this was the pre-transaction figure for which NS and CSX performed reciprocal switching for one another where reciprocal switching had been established between the two prior to the Conrail transaction. CP Filing at 15 n.8. That number was both mutually agreed to and reciprocal; if there was an overcharge or an undercharge, because payment flowed both ways, it was likely to come out in the wash.[9] There is nothing "reciprocal" in CP's proposal; CP has not provided CSX any such reciprocal rights as to any CP customer or major terminal area in the United States or Canada. 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 policies of encouraging voluntary settlements wherever possible, to provide amelioration in 2-to-1 situations (such as Indianapolis) and the like. In each case, the use of the number for a switching charge was voluntary. CSX/NS-176, Vol. 1, at 29-30; 54. To take that number and use it even as an appropriate cost-based switching charge, let alone the only charge payable for all of the terminal services which CP will require is without basis. There is no effort by CP to justify it under the Board's precedents and the statute.

The Potter R.V.S. demonstrates (pages 15-17) that the "50-50" assumption for the division of the capital cost of the Terminal facilities and the main line tracks, contained in

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footnote continued from previous page
CP's Section 5(f) by the cap in the NITL settlement, which is $250! And of course the NITL settlement covers only reciprocal switching between CSX and NS, even as broadened by the Board (Decision No. 89 at 57). CP's proposal manages to utilize simultaneously two great maxims of cynicism: "Heads I win, tails you lose" and "No good deed goes unpunished."

[9] See the Board's excellent analysis of the nature of reciprocal switching in Decision No. 89 at 57-58.

the CSX proposal, is appropriate given the operating plan of CP. Thus, "50-50" will be appropriate in allocating the amount of "interest rental" to be paid in the pertinent charges.

3. No Compensation Is to Be Provided by CP for CSX's Loss of Exclusive Freight Rights. CP seeks trackage rights only over the NYC-owned portions of the Hudson Line and the other routes involved. It says it will make its own deal with the owners of the other segments, and to the extent that the trackage rights granted to Conrail, which pass to NYC in the transaction, are exclusive, it is asking the Board to override the exclusivity provisions. CP Filing at 2 n.1. While the Board has that power (and CSX has consented under compulsion of Ordering Paragraph No. 28 to that power's use), the exercise of it would require compensation to be paid by CP as user, and, as developed in the discussion below, there is a portion of the line, not to be owned by NYC, on which Conrail's, and hence CSX's, freight rights are deemed to be exclusive. CP contends that it will not have to pay an interest rental for cost of capital relating to the portion of the Conrail price paid by CSX for the freight rights on this segment. But CSX is entitled to compensation for the loss of its exclusivity.

The bone of contention is the "Metro-North" segment, between the Oak Point Link and Poughkeepsie, covering a very considerable portion of the Hudson Line. The segment has a complex history.[10] In the early 1970s (1970 and 1972), the trustees of the Penn

[10] A useful account of the history is provided in Judge Friendly's opinion for the Special Court established under the 3 R's Act of 1973 in *Consolidated Rail Corp. v. Metro-North Commuter Railroad Company, et al.*, No. 83-14, decided Nov. 23, 1984 ("Spec. Ct. No. 83-14"). A copy of that decision is attached as part of Exhibit A hereto.

Central entered into long-term leases with the New York Metropolitan Transportation Authority ("MTA"), essentially arrangements to compensate MTA for providing various improvements on Penn Central lines useful for the provision of commuter services. Spec. Ct. No. 8314 at 5-10. A cash rent was also to be paid to Penn Central by the Lessee. Under the lease agreement pertinent to the Hudson Line, a document called the "Harlem-Hudson Lease Agreement," Penn Central leased the segment in question (and certain other properties) to MTA for sixty years with six renewal periods of five years each. The Harlem-Hudson Lease Agreement reserved to Penn Central the freight rights as well as the passenger rights. The reservation of the freight rights was in the following terms:

> Reserving further from the leased premises, the right, which continues to remain with Lessor (A) to operate upon the leased premises (the "Trackage") a railroad common carrier service to the extent (i) authorized under the Interstate Commerce Act, or any future law of like import, or (ii) otherwise permitted by law, including the right: (a) to operate over the Trackage freight trains, cars and locomotives; (b) to provide through and local freight service (including mail and express) at any point (exclusive of passenger station areas other than Grand Central Terminal) along the Trackage; . . . .

Form of Lease, pp. 3-4 (other specifications omitted).[11] This was not a sale or long-term lease with a grant-back; it was a carve-out by Penn Central from that which it was leasing to MTA. And, as noted, the right so reserved was one which "continues to remain with Lessor"; that is, the rights which the "Lessor" (Penn Central) had as fee owner. Conrail and CSX interpret this as being an exclusive reservation of freight rights.

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[11] The full text of the Harlem-Hudson Lease Agreement is in Exhibit A, except for exhibits containing schedules and the like.

Thus, Penn Central in its bankruptcy remained the passenger and freight operator of the segment in question and a 60- to 90-year lease had been entered into with MTA as lessee. At the conclusion of the Penn Central bankruptcy and the creation of Conrail, the freight and passenger rights went to Conrail under the Final System Plan. Spec. Ct. No. 83-14 at 10-12. The Northeastern Rail Service Act of 1991 ("NERSA") required (Section 1136, 95 Stat. 647) that Conrail be relieved from its obligations to operate commuter service by January 1, 1983. Accordingly, responsibility for commuter operations was assumed by Metro-North, which was created by the New York authorities for these purposes. *Id.* at 12-15. The freight rights were left in Conrail, though not without controversy; the litigation in Special Court No. 83-14 was necessary to resolve the point. The outcome of that litigation, and Conrail's freight rights, were memorialized in a "Trackage Rights Agreement" entered into in 1991 but dated as of January 1, 1983, following that litigation. MTA, the 60- to 90-year lessee, and Metro-North acknowledged "Conrail's continuing right to use":

> (1) the freight trackage rights reserved to Penn Central in the Harlem-Hudson Lease Agreement, as amended, and in the MTA Purchase and Lease Agreement, as amended; and transferred to Conrail pursuant to the Final System Plan (affirmed by Special Court Action No. 83-14) subject to the use levels set forth in Appendix III-A of said Agreements, without payment for such use; . . . .[12]

Thus, Conrail's present rights, which are allocated to CSX, (a) are those "reserved to Penn Central in the Harlem-Hudson Lease Agreement" and hence exclusive by reason of the

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[12] Trackage Rights Agreement at 3-4. (Presented in Exhibit A.)

language of the reservation quoted above to the effect that the right was one "which continues to remain with Lessor," that is, the right which the Lessor (Penn Central) would have had as fee owner; and (b) were those transferred to Conrail "pursuant to the Final System Plan (affirmed by Special Court Action No. 83-14)" and hence, as products of the 3 R's Act and amendments thereto, including those made by NERSA, and accordingly capable of definitive interpretation only by the Special Court (or its successor).

CP may, and apparently does, dispute the exclusivity. See CP Filing at 2 n.1. But the Board cannot resolve that dispute. Since the rights were granted pursuant to the Final System Plan and NERSA and to an order of the Special Court, only the Special Court (now the United States District Court for the District of Columbia) may construe them and determine whether they are exclusive or non-exclusive. 45 U.S.C. § 719(e)(1)(F), § 719(e)(2). As the Board has acknowledged in Decision No. 89, its powers do not extend to making such an interpretation. Decision No. 89 at 106. While the Board (and CSX) are of the view that the Board may override any exclusivity provision in the trackage rights, express or implied (*id.* at 106), the Board may not determine or decide the question whether exclusivity exists.

If it is determined that the freight rights are exclusive, CSX should be compensated for the invasion of its exclusivity, just as it would be compensated on a Conrail line held in fee and allocated to it for the loss of exclusivity occasioned by the imposition of trackage rights. In that case, a party entitled to exercise every right of use and/or ownership – the fee owner or sole lessee – receives an interest rental from the recipient of trackage rights to

share the cost of the capital used to purchase or construct the line in question. In this case, a portion of the purchase price of Conrail would be fairly allocable to the acquisition of the freight rights on the New York City to Poughkeepsie segment of the Hudson Line. The effect on the exclusive freight rights holder, as to its rights, is the same as on the fee owner, though the rights taken may be less valuable. The question of the consequences of exclusivity need not be decided by the Board; that can be left to the process of ascertaining the appropriate cost-based interest rental to be paid for the trackage rights, and if that is not worked out by agreement and it becomes necessary to have the arbitrator determine it, the issue of whether the rights were exclusive as originally granted can be submitted to the Special Court for a determination, or the parties by mutual consent might choose to make it the subject of a special submission to arbitration. There is no reason for the Board to decide the issue now, even if its powers extended to deciding it.

II. CP SHOULD NOT BE GRANTED LOCAL ACCESS TO SHIPPERS OUTSIDE OF NEW YORK CITY

The Board's order in the condition imposed in Ordering Paragraph No. 28 did not expressly state that the East of the Hudson trackage rights to be granted to CP were either "overhead" or "local" but simply said that they are to be "unrestricted as to commodity and geographic scope." CSX believes that this language was employed because the settlement agreements with CP in the period October 1997 through May 1998, discussed in and appended to CSX-167, had restrictions as to the commodities involved and as to the places on CP's line where the movements receiving the benefits of the agreements might originate

or terminate. In particular, the movements that were the subject of the privileges given CP in the October 1997 settlement could not be to or from places which CSX also served - Chicago is a vivid example. In the January 8, 1998 and June 2, 1998 letters[13] as to intermodal traffic, the intermodal moves had to be to a point on the Toronto/Montreal corridor, again, so that CP could not run an intermodal train via the D&H to Buffalo and from there through the Ontario Peninsula to Detroit and Chicago and have it enjoy the benefit of the agreement. These restrictions were criticized by the New York Parties, and the Board accepted their views. See Decision No. 89 at 83: "numerous other restrictions significantly limit the movements to which this privately negotiated haulage agreement would apply." So the Board wanted no part of restrictions like that on movements to and from New York City.

CSX believes that the Board's intent was to provide CP with an ability to serve New York City, through the existing and future facilities of Conrail/CSX east of the Hudson in the Bronx and Queens, without restriction as to commodities and without restriction as to whether the origination or destination point on the historic CP line was competitive with CSX or not. CSX does not believe that the intent of the condition was to provide shippers located north of New York City – in realistic terms, at the moment, those in the Greater Albany Area and the area immediately east and south of it – with two-carrier rail service of a sort which they have not had since the Hudson Line was constructed in 1842. See Vest R.V.S. at 2-3. Certainly, there was no case made, and there was no intent on the part of the

[13] Both are found in Exhibit 4, Potter V.S., CSX-167.

Board to provide shippers not even on the Hudson Line, indeed in the Greater Albany area, with additional direct competitive access.

The presentation of CP shows at least as much interest in expanding CP service in the Greater Albany Area as in the Greater New York City Area. In order to run one or two trains a day each way up and down the Hudson Line, CP claims it needs simultaneous trackage rights over three different, alternative routes from its lines in the Albany area to the Hudson Line. Local trackage rights are sought on all three of the new connecting routes. Because of CP's expansive definition of what trackage rights entail – the right to access and to serve all shippers on the trackage rights, including those giving it the sought-after triple access to the Hudson Line – CP's request is, in essence, a request for access to a very considerable number of shippers in the Greater Albany area not located on the Hudson Line. CP's focus appears to be on those shippers, rather than the shippers on the Hudson Line. CP does not propose to run local trains on the Hudson Line anywhere south of Poughkeepsie but will run a single local train in the northern reaches of the Hudson Line, obviously to serve the ADM mill on a branch line, the Claverak/Hudson Upper Industrial Track, which intersects the Hudson Line 26.5 miles from Selkirk, and the Fort Orange Paper Company at Castleton, seven miles from Selkirk. Downing R.V.S. at 8.[14] These shippers, the only local

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[14] In Decision No. 89, the Board observed that, with respect to Fort Orange Paper Company, the condition in Ordering Paragraph No. 28 "may help FOPC." Decision at 115-16. The Board also expressed the view that the "extensive 5-year oversight and monitoring process" of the Board would be "responsive to FOPC's concerns." Id. at 116. We suggest that the Board not impose dual access for the purpose of assisting FOPC but leave the protection of FOPC to the monitoring process. FOPC, according to the evidence in the case as summarized in Decision No. 89 at 289-90, uses rail only for the receipt of raw materials (kaolin clay and scrap paper), to the amount of between 50 and

footnote continued on next page

"East of the Hudson" shippers north of the New York City metropolis who have ever supported a second rail service East of the Hudson in this case, have never had alternative rail options. Vest R.V.S. at 2-3; Carey R.V.S. at 5-6.

The New York City metropolis is the largest in the country, and CSX understands the motivation of the Board in imposing Condition No. 28, even though the transaction did not adversely affect competition in the New York City area but increased it both west and east of the Hudson. The Board determined to install a second rail carrier to directly serve the City of New York. But the Board never treated the Albany area as one requiring attention in this case, and no one raised any issue as to service to Albany in the case in the entire 13 months it was pending before the Board or in any of the reconsideration petitions. Instead, the sole purpose of the Board's action was, we submit, to provide a second Class I rail freight carrier with access to New York City and Long Island. Use of the Hudson Line from the north to the City provides a means of solution to that issue, but is not an issue itself.

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footnote continued from previous page

100 carloads per year (one or two cars a week). It has repeatedly expressed dissatisfaction with Conrail's rates and service. CSX understands that the bulk of FOPC's clay comes from origins in the Deep South, and thus, what was a north/south interchange movement for Conrail, a movement which was generally not interesting to Conrail, will become a long-haul, single-line movement for CSX. Service and pricing should be favorably affected. As the Board pointed out (*id.* at 289 n.475), FOPC's plant is located on a stretch of the Hudson Division that is primarily a passenger main line "because freight trains running over the Hudson Division between the Albany area and the New York City area generally cross the Hudson River south of Castleton-on-Hudson" (*i.e.*, on the Castleton Bridge rather than the Livingston Avenue Bridge). Thus, even if the Board meant to impose a local service condition as part of Ordering Paragraph No. 28, there was no assurance that it would benefit FOPC since it is not on the principal freight line by which the movements from the Hudson Line access the Selkirk Branch. Thus, it would not seem to disappoint any realistic expectations for the Board to leave FOPC to the monitoring process set forth in Decision No. 89 at 116, given also the increased attention that this shipper with a need of service from the Deep South will receive from CSX.

The Hudson Line is congested, and the central part of it constrained by an eight-hour, nocturnal window limitation on freight operations. CP does not even purport to offer local service along most of the Hudson Line. CP is to be afforded, under the CSX proposal, full access to all shippers who can be reached by the lines to be allocated to CSX in the Bronx and Queens, and elsewhere on Long Island – from Brooklyn to Montauk Point – via interchange with NY&A. There is no reason for the Board to take CSX's property for which it has paid substantial sums in order to aggrandize CP's position in the Greater Albany area, an area which has not been the focus of any issue in this case.

III. THE TRIPLE ACCESS TO THE HUDSON LINE SOUGHT BY CP IS UNWARRANTED, WILL CAUSE OPERATING PROBLEMS, AND IS A COMMERCIAL GRAB BY CP

CP proposes that it be granted local trackage rights, with authority to access, free of additional charge, all yards and terminals and shippers on them, over three alternative but simultaneous access routes in the Greater Albany area to the Hudson Line. It claims that it is making this request because different forms of merchandise and products all leave the Albany area in different directions on CP's lines, and the three routes correspond to these directions. One route is said to be devoted to shipments moving between Canadian markets and New York City/Long Island markets, involving "grain, food products, forest products, pulp and paper" "among other things"; another to shipments moving between the southern United States markets and New York City/Long Island markets and involving "municipal solid waste, food and manufactured products and other shipments"; a third is said to involve

local moves, including "grain, chemicals and paper products among other things." Gilmore V.S. (Operational) at 4-5.

Since CP's proposal is to run only one train a day each way at the beginning, later growing to two, and since, as the schematic maps presented in the Gilmore V.S. show, CP has a well-developed network of lines in the Albany area, all of which can easily access its Kenwood Yard, the suggestion that CP has to have a number of access routes each handling traffic from a different direction on the CP system seems pretextual. CP's route and yard system in the Albany area, as the maps (particularly Exhibits 1 and 4) attached to the Gilmore V.S. in CP-24 demonstrate, are well-integrated and completely competent as they now exist to move traffic from all sources on the CP System over a single access route onto the Hudson Line. The gross operational difficulties for CP itself that some of the access routes themselves create – such as "running around" a train in a crowded yard with a minimum delay of two hours – confirm this impression; the routes are sought not to access the Hudson Line but for other purposes. A more likely explanation is that these connecting routes, over which CP would have the rights of a co-owner, if not a super co-owner, are intended to expand CP's rail network in the Greater Albany area. This is particularly so given CP's provision for access to all shippers on its proposed trackage rights lines, including the three access lines.

Through the ploy of the triple access lines, CP also gets full access, without cost beyond the fixed trackage rights and switching fees, to the West Albany Yard of CSX and to

Selkirk Yard, the former Conrail east/west classification yard serving the Greater New York and New England areas.

These points are developed in the Downing R.V.S. That statement and the Vest R.V.S., at 4-6, demonstrate that each of the three access routes brings CP, in varying degrees, substantial new commercial rights unrelated to its access to New York City and that two of the three routes cause operational difficulties either on the heavily used Selkirk Branch or in Selkirk Yard itself, or both.

CSX made a proposal for CP's access to the Hudson Line in CSX-167. It avoids the use of Selkirk Yard, and is convenient to CP's Kenwood Yard.[15] It does require the construction of a connection which would cost CP in the $1 million plus range. Most Class I railroads would consider access to New York City to be well worth that. However, if CP does not, the Downing R.V.S. proposes an alternative routing, which is currently in actual use by CP and which is shown on the schematic maps in the Gilmore V.S., which is available now without construction. CSX tenders that as an alternative proposal to CP, if CP does not wish to construct the connection proposed in CSX-167. (If CP wishes to construct the connection proposed in CSX-167, the CSX alternative proposal could be used until construction was completed.)

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[15] There are some Conrail shippers on this access route; CSX's position is that CP should not have access to them, which CP would not have under the CSX form of trackage rights agreement. See also Vest R.V.S. at 5-6.

IV. THE CP TRACKAGE RIGHTS AGREEMENT CONTAINS NUMEROUS OTHER OVERREACHING PROVISIONS AND THE CSX AGREEMENTS SHOULD BE ADOPTED

The Potter R.V.S. analyzes the trackage rights agreement proposed by CP and points out numerous ways in which it is guilty of gross overreaching, by requiring such bizarre results as creating a situation in which, if the trackage rights lines are to be double-tracked, CP need only pay for the cost of one-half of a line and get full use and ownership of one line and CSX will have to pay for one and one-half lines but get the use and ownership of only one line. It contains a provision permitting CP to park and store cars on the operating main tracks of the Hudson Line and on its access routes to the Hudson Line — including major CSX routes and yards — in the Albany area. There are more provisions like these: We recommend a close reading of this analysis in the Potter R.V.S.[16] Those examples of overreaching show the same propensity to use CSX's property unfairly and without just compensation that the remainder of CP's proposal reveals. We urge the Board to review them carefully. The Board should not adopt the CP form of agreement in any respect, but should adopt the CSX forms of agreement.

CONCLUSION

As noted above, the parties are together on the basic principles of equality of service to New York City "East of the Hudson"; on the concept that that can only be given through

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[16] We also present, as Exhibit B, a section-by-section comparison of the CP form of Trackage Rights Agreement with the CSX forms of Trackage Rights Agreement and Terminal Joint Facilities Agreement. It shows in summary fashion even more interesting items than the Potter R.V.S. had room for without going to unbearable length.

trackage rights and equal access to the line between the Albany area and New York City, and equal access to the Conrail facilities in the Bronx and Queens with interchange rights to the NY&A; on the proposition that the provision of local service on the line north of the City generally is constrained and difficult and cannot be furnished in its entirety by more than one carrier.[17]

When CP goes beyond those agreed-upon principles, we find that the CP proposal ignores the principles of compensation established by the Board and its predecessor; seeks rights which far transcend those of equal ownership; gratuitously and improperly seeks to expand CP's position in the Greater Albany area without cause and by using CSX's rail lines, yards and facilities; overreaches on a score of other issues; and, perhaps seeking to take advantage of the expedited nature of these proceedings, presents some of its most important and harmful proposals in a stealthy manner for the first time at the end of a massive, lengthy proceeding.

The CSX proposal in CSX-167 should be adopted by the Board and the CP proposal in CP-24 should be rejected. The CP-proposed agreement forms contain a number of land mines and should not be used; the CSX forms should be employed. CP tenders to the Board, in addition to its access route proposal in CSX-167, the alternative access route proposal set forth in the Downing R.V.S.

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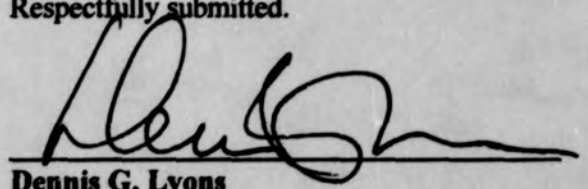
[17] As to the last point, see Potter R.V.S. at 3.

The compensation system proposed by CP is arbitrary, ignores the Board's precedents, the statute, and the Constitution, and leaves important uses of services and facilities uncompensated. CP's proposal for a "quick fix" must be rejected. The parties should negotiate or arbitrate under the Board's established principles as set forth in CSX's proposal. Compensation on an interim basis with a true-up should be ordered. If the Board wishes, if the application of the cost-based compensation contemplated by the CSX filing has to be resolved through an arbitration, the Board might provide itself with an opportunity to review the decision of the arbitration process in an appropriate manner.

Respectfully submitted.



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December 10, 1998

CERTIFICATE OF SERVICE

I, Dennis G. Lyons, certify that on December 10, 1998, I have caused to be served a true and correct copy of the foregoing CSX-169, "Reply 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)," to the following parties, by first-class mail, postage prepaid, or by more expeditious means:

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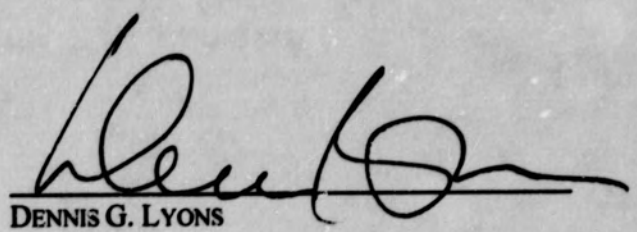

DENNIS G. LYONS

US OFFICE PRODUCTS

Exhibit A-1

Opinion of Special Court,
No. 83-14

SPECIAL COURT
REGIONAL RAIL REORGANIZATION ACT OF 1973

FILED

NOV 23 1984

JAMES F. DAVEY, Clerk

CONSOLIDATED RAIL CORPORATION, NATIONAL RAILROAD PASSENGER CORPORATION, Plaintiffs, v. METRO-NORTH COMMUTER RAILROAD COMPANY, METROPOLITAN TRANSPORTATION AUTHORITY, and CONNECTICUT DEPARTMENT OF TRANSPORTATION, Defendants, v. UNITED STATES OF AMERICA, Counterclaim Defendant.	General Panel C.A. No. 83-14

Ralph G. Wellington, Margaret S. Woodruff, Philadelphia, Pennsylvania (Jerome J. Shestack, Schnader, Harrison, Segal & Lewis, Bruce B. Wilson, Donald A. Brinkworth, Philadelphia, Pennsylvania, Of Counsel), Attorneys for Plaintiff, CONSOLIDATED RAIL CORPORATION.

Stephen C. Rogers, Paul F. Mickey, Jr., David J. Carol, Washington, D.C., Attorneys for Plaintiff, NATIONAL RAILROAD PASSENGER CORPORATION.

Robert M. Lustberg, Walter E. Zullig, Jr., (Steven Polan, General Counsel, Metropolitan Transportation Authority, New York, New York), Attorneys for Defendants, METROPOLITAN TRANSPORTATION AUTHORITY and METRO-NORTH COMMUTER RAILROAD COMPANY.

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Robert S. Burk, Acting General Counsel, Kathleen V. Gunning, Attorneys for Intervenor, INTERSTATE COMMERCE COMMISSION.

FRIENDLY, Presiding Judge:

The plaintiffs in this action are Consolidated Rail Corporation (Conrail) and National Railroad Passenger Corporation (Amtrak). The defendants are Metro-North Commuter Railroad Company (Metro-North), Metropolitan Transportation Authority (MTA), and Connecticut Department of Transportation (CDOT). Metro-North and MTA are public benefit corporations of the State of New York; CDOT is an agency of the State of Connecticut, acting at all times relevant to this proceeding through the Connecticut Transportation Authority (CTA). In a counterclaim the defendants have impleaded the United States as a defendant.

The Facts

The controversy concerns trackage rights reserved by the Trustees of the Penn Central Railroad in certain sale and lease agreements with MTA and CTA dated October 27, 1970 and June 1, 1972. Plaintiffs contend these rights have devolved upon them

and remain in full force and effect. Defendants' primary contention is that they lapsed when Conrail, on January 1, 1983, ceased to furnish the commuter services over the railroad lines on which the trackage rights were reserved which were provided for in agreements entered into simultaneously with the purchase and lease agreements.

The rail lines involved in this controversy were originally owned by the New York Central and the New Haven railroads and became part of the Penn Central as a result of the Pennsylvania-New York Central merger and the compelled inclusion of the New Haven. The former New York Central lines start from Grand Central Station in New York City, proceed under or over Park Avenue to the north, and cross the Harlem River. At Mott Haven in the Bronx the former Hudson Division diverges to the west and proceeds north to Poughkeepsie and Albany, whence the former main line of the New York Central continues to the west over what had been known as the Central's Water Level Route. The former New York Central Harlem Division line proceeds east from Mott Haven to Woodlawn Junction, New York. There it diverges to the north, serving many suburban communities as far as Dover Plains, New York; the former New Haven line proceeds from Woodlawn Junction to the east. At Shell Interlock, near New Rochelle, New York, it is joined by the former Pennsylvania line coming from Pennsylvania Station in New York over the Hell Gate Bridge. The former New Haven line crosses the New York-Connecticut border just east of Port Chester, New York, and proceeds to New Haven, other points in Connecticut and ultimately

to Boston. The lines from Washington, Baltimore and Philadelphia to Pennsylvania Station, and thence to Shell Interlock and beyond New Haven to Boston are owned or leased by Amtrak.

On November 25, 1969, Penn Central Transportation Company, MTA and CTA signed a Memorandum of Intent, 29 pages in length, outlining the business terms of a proposed contractual arrangement among MTA, CTA and Penn Central with respect to Penn Central's New Haven Division West End passenger service (the Service) operating from Grand Central Terminal to New Haven, including the New Canaan, Danbury and Waterbury branches. The memorandum recited the intention of the two agencies, with state and federal aid, to provide new rolling stock and other additions and improvements for the Service. In order to protect the public investment so contemplated and to comply with the conditions of state and federal aid programs, MTA and CTA would "either purchase or lease from Penn Central the railroad rights-of-way upon which the fixed facility improvement work will be done (giving back to Penn Central appropriate trackage rights)." Memorandum of Intent, at 1. They would also lease from Penn Central the Grand Central Terminal (GCT) with its approaches from Woodlawn Junction for $1 a year "and on other terms intended to continue the substance of the arrangement under which the former New Haven Railroad used the terminal and Penn Central's facilities north to Woodlawn, subject to Penn Central's continued right, through the medium of a sublease, to use the terminal and approaches for its operations;" and would lease to Penn Central "all of the rolling stock involved in the program." Id. at

1-2. The Service would be operated under a Service Contract to be entered into between MTA and CTA, on the one hand, and Penn Central, on the other, under which Penn Central would commit itself "for the term of the arrangement (5 years, renewable at MTA/CTA option) to refrain from utilizing the train discontinuance procedures of the Interstate Commerce Act with respect to the Service." Id. at 2. The Memorandum elaborated on this under four headings:

> I. MTA Purchase of Former NHRR Transportation Properties in New York State
>
> II. CTA Lease of Former NHRR Transportation Properties in State of Connecticut
>
> III. Lease of Grand Central Terminal Access to MTA
>
> IV. Service Contract

There is no need to go into further detail about the Memorandum, which was executed as a basis for securing regulatory approvals, since it was superseded by the more detailed agreements dated October 27, 1970.

The first of these was the MTA Purchase and Lease Agreement between MTA and the reorganization trustees of Penn Central. Its essential provisions were as follows:

> 1) MTA was to pay Penn Central $7,200,000, and Penn Central was to convey to MTA all properties comprising the main line of the New Haven between Woodlawn Junction and the New York-Connecticut border by a deed substantially in a form attached. § 201.

2) In the deed Penn Central was to "reserve those trackage rights required by it to operate its railroad common carrier passenger and freight service over the properties conveyed therein to MTA thus permitting Penn Central to operate the Service as well as to continue its non-suburban passenger and freight operations." § 301.

3) Penn Central's utilization of the reserved trackage rights was to be limited to levels set forth in an appendix, but MTA would consent to usage in excess of those levels provided this did not unduly interfere with the Service. §§ 302, 303.

4) Penn Central promised to pay MTA a reasonable charge for all electric power used by it in its exercise of the reserved trackage rights, a fair and reasonable charge for any additional non-Service operations in excess of those specified levels to which MTA might consent, and, commencing 60 years after the date of the agreement, a fair and reasonable charge for the reserved trackage rights. § 401.

5) If a major structural repair was required, MTA or CTA had the right to terminate the Service Contract on 30 days notice. § 702.

The form of deed from the Penn Central Trustees to MTA made a reservation of trackage rights consistent with the provisions of the Purchase and Lease Agreement.

The second agreement, styled the CTA Lease Agreement, was between the CTA and the Penn Central Trustees. It provided that Penn Central would lease to CTA all properties of the former New Haven Railroad between the New York-Connecticut boundary, on

the one hand, and New Haven, Waterbury, Danbury and New Canaan, on the other, for a term of 60 years, at a quarter-annual rental equal to 1-1/4% of the average Aggregate Appraisal Value for such quarter, see § 201, and that so long as the lease remained in effect, CTA had an option to purchase any of the leased properties at the appraisal value. § 202. It contained provision for Penn Central's reservation and utilization of trackage rights without any payment for 60 years save for charges for excess utilization and electric power similar to those provided for in the MTA Purchase and Lease Agreement.

The third agreement was entitled the GCT Joint Facilities Agreement. It provided that MTA/CTA should have a defined basic Service access to GCT, and an additional Service access so long as this did not "unduly interfere with Penn Central's other railroad services which use the trackage between Woodlawn Junction and GCT ... or materially increase the costs of operating Penn Central's other railroad services into GCT." § 202. Of some significance to the present controversy is a provision, § 301, which established different payment procedures for GCT's net operating revenues and expenses "so long as the Service Contract remains in effect." The term of the agreement was to be 60 years.

The fourth agreement was a Service Contract between CTA and MTA, on the one hand, and the Penn Central Trustees, on the other. Penn Central agreed to operate a commuting service between GCT and points in Connecticut detailed in an appendix at Service fares set forth in another appendix, all of which MTA/CTA

had the right to amend subject to the limitations on access to GCT specified in the GCT Joint Facilities Agreement. MTA and CTA were to lease to Penn Central equipment specified in a further appendix. All profits of the Service were to inure to and all losses to be borne equally by MTA and CTA. Penn Central was to receive only a $100,000 annual fee "[a]s compensation for its contributed expertise." § 407. So long as neither CTA nor MTA was in default Penn Central would not exercise its rights under § 13a of the Interstate Commerce Act, 49 U.S.C. § 13a, to discontinue any Service trains. The term of the agreement was to be five years but MTA/CTA had the right to renew this for 11 additional consecutive five year terms. MTA and CTA each had the right to terminate the agreement on 18 months' notice. Any party had the right to terminate for failure of another to cure a default or when granted such right under any of the three other agreements. Upon expiration or termination Penn Central was to pay MTA and CTA each $150,000 for materials and supplies. Also MTA/CTA had "the right to substitute another carrier to operate the Service and Penn Central [had to] surrender without further compensation its right to operate the Service to such substituted carrier." § 706. Absent such substitution, the full responsibility for the operation of the Service would remain with Penn Central.

We turn now from the West End to the Harlem-Hudson properties. These were dealt with preliminarily in a Letter of Intent dated October 12, 1970 and definitively in a Harlem-Hudson Lease Agreement dated June 1, 1972 between MTA and the Penn Central Trustees.

The Lease Agreement provided for a 60 year lease, with a provision granting MTA an option to renew for six additional consecutive five year terms, by the Trustees to MTA of the GCT buildings, of Penn Central's transportation properties used in its suburban passenger service from GCT including the Harlem River lift bridge and the property north of the bridge to Poughkeepsie, New York, on the Hudson Division, and to Dover Plains, New York, on the Harlem Division. The lease was subject to existing leases and agreements, including an agreement dated April 16, 1971 between the Trustees and Amtrak. The lease reserved "all rights necessary to enable [Penn Central] to perform its obligations, and National Railroad Passenger Corporation to exercise its rights, under the Amtrak Agreement." Harlem-Hudson Lease, at 3. In accordance with Article III of the Agreement, the lease also reserved to Penn Central "the right, . . . (A) to operate upon the leased premises (the "Trackage") a railroad common carrier service to the extent (i) authorized under the Interstate Commerce Act, or any future law of like import, or (ii) otherwise permitted by law, including the right: (a) to operate over the Trackage freight trains, cars and locomotives; (b) to provide through and local freight service ...; (c) to operate long-haul (through) passenger trains, cars and locomotives ... to and from points north of Poughkeepsie or Dover Plains, New York, through or via Poughkeepsie or Dover Plains, over the Trackage ... [and,] (d) to operate over the Trackage suburban railroad passenger services, as they may from time to time be constituted." Id. at 3-4. The agreement

contained provisions as to the level of operations over the Trackage (other than Penn Central's Harlem-Hudson Service and its New Haven Service) similar to those in the West End Agreements.

The Harlem-Hudson Service Agreement was quite similar to the West End Service Contract. Penn Central was to operate suburban passenger service in a quantity and at fares specified by MTA, which was to lease certain of the equipment used in the Service. All income should inure to and deficits be borne by MTA. Penn Central was to receive an annual fee of $125,000. The term of the agreement was five years, but MTA had the right to renew for up to 17 additional five-year terms. MTA had the right to terminate the agreement at any time on 18 months' notice except that during the initial five year term it might not do this without substituting another carrier. Either party could terminate for uncured defaults or when granted such rights by the Lease Agreement or upon the expiration of the Lease or the Lease Agreement. In the event of expiration or termination of the agreement, MTA had the right to substitute another carrier for Penn Central. If it did not do so, the full responsibility for operating the Service remained with Penn Central.

After the agreements became effective, the Penn Central Trustees operated the Service as contemplated by the West End and Harlem-Hudson Agreements, and exercised the reserved trackage rights, making no payments therefor except as stipulated.

Section 303(b)(2) of the Rail Act preserved the West End and Harlem-Hudson Agreements by providing that the conveyances to be ordered by this court should be

> subject to such leases and agreements as shall have previously burdened such properties or bound the owner or operator thereof in pursuance of an arrangement with any State, or local or regional transportation authority under which financial support from such State, or local or regional transportation authority was being provided on January 2, 1974 . . . .",

this being the effective date of the Rail Act. 45 U.S.C. § 743(b)(2).

The Final System Plan (FSP), Vol. I, p. 264, as amended by the Official Errata Supplement, p. 14, designated to Conrail the following properties of Penn Central as transferor:

> Trackage rights reserved by transferor for freight and passenger service under the West End Agreement with the Connecticut Transportation Authority and Metropolitan Transportation Authority.
>
> Trackage rights reserved by transferor for freight and passenger operations under the Hudson/Harlem lease agreement and an operating easement in all properties used exclusively for freight service on lines covered by the agreement.

Section C of the FSP designated to Conrail for purchase, lease or other acquisition by Amtrak various properties in the Northeast Corridor (NEC),[1] including:

> Such trackage rights of transferors which are necessary to operate

> Amtrak services on rail lines which have been purchased or leased by public authorities.

1 FSP, at 323. Since only the "intercity" trackage rights were necessary to operate Amtrak services on the West End segment of the NEC, Conrail retained the "commuter" and "freight" trackage rights. After the conveyances on April 1, 1976, Conrail, in accordance with § 303(b)(2) of the Rail Act and the provisions of 1 FSP 45, provided the commuting services which Penn Central had furnished under the West End and Harlem-Hudson Agreements.[2] Conrail and Amtrak continued to exercise the trackage rights reserved in those agreements for freight and long distance passenger service.

In 1981 Congress adopted the Northeast Rail Service Act of 1981 (NRSA). Section 1133(2) declared one of the purposes of Congress to be a "transfer of Conrail commuter service responsibilities to one or more entities whose principal purpose is the provision of commuter service." 45 U.S.C. § 1102(2). Section 1136 provided:

> Notwithstanding any other provision of law or contract, Conrail shall be relieved of any legal obligation to operate commuter service on January 1, 1983.

45 U.S.C. § 744a. Section 1137 added to the Rail Passenger Service Act (RPSA) a new Title V entitled Amtrak Commuter Services. Section 501 directed the establishment of a wholly-owned subsidiary of Amtrak to be known as Amtrak Commuter

Services Corporation (Amtrak Commuter). Section 504 provided in relevant part:

> (a) Amtrak Commuter is authorized to operate commuter service under an agreement with a commuter authority. Effective January 1, 1983, any commuter service operated by Amtrak Commuter under an agreement with a commuter authority shall be operated solely pursuant to the provisions of this section.
>
> (b)(1) Amtrak Commuter shall operate commuter service which Conrail was obligated to provide on the effective date of this title under section 303(b)(2) or 304(e) of the Regional Rail Reorganization Act of 1973, and may operate any other commuter service, if the commuter authority for which such service is to be operated offers to provide a commuter service operating payment which is designed to cover the difference between the revenue attributable to the operation of such service and the avoidable costs of operating such service (including the avoidable cost of any capital improvements necessary to operate such service) together with a reasonable return on the value.
>
> * * *
>
> (f) Amtrak Commuter shall not be subject to any lease or agreement with a commuter authority under which financial support was being provided on January 2, 1974, for the continuation of rail passenger service, except that the Corpporation and Conrail shall retain appropriate trackage rights (for passenger and freight operations respectively) over any rail properties owned or leased by such commuter agency. Compensation for such trackage rights shall be just and reasonable.

> (g) Notwithstanding any other provision of this section, Amtrak Commuter is not obligated to provide commuter service if a commuter authority operates the service itself or contracts for the provision of such service by an operator other than Amtrak Commuter. In any such case, Amtrak Commuter shall, where appropriate, provide the commuter authority or such other operator with access to rail properties needed to operate such service.

45 U.S.C. § 584. Section 506 provided that not later than April 1, 1982, each commuter authority shall notify Amtrak Commuter and Conrail whether it intends to operate its own commuter service or to contract with Amtrak Commuter for the operation of such service. Other provisions of the section detail how agreements shall be made between Conrail and either Amtrak Commuter or a commuter authority for the transfer to one or the other of all of Conrail's commuter services in the Northeast Corridor and any rail properties useful for the operation of the commuter services, such transfer to occur not later than January 1, 1983.

MTA and CTA elected not to accept the service of Amtrak Commuter. Instead MTA organized a wholly-owned subsidiary, Metro-North Commuter Railroad Company (Metro-North). Commencing January 1, 1983, Conrail, in compliance with § 1136 of NRSA but over the objection of MTA and CDOT, ceased operating the Harlem-Hudson and New Haven commuter services, which have been operated since that date by Metro-North. However, Conrail and Amtrak have continued to exercise the trackage rights, largely free up to a

certain level of service, provided in the MTA Purchase and Lease Agreement, the CTA Lease Agreement, and the Harlem-Hudson Lease Agreement. MTA and CDOT challenged their right to such free exercise and demanded the payment of a reasonable fee.

In consequence, Conrail and Amtrak brought this action against Metro-North, MTA and CDOT, seeking a declaration that the trackage rights reserved in the West End and Harlem-Hudson Agreements continued in effect. The defendants filed an answer seeking dismissal of the complaints. They also asserted counterclaims against the plaintiffs and against the United States as an impleaded defendant. These counterclaims requested declarations that from and after January 1, 1983, neither Conrail nor Amtrak had any right to use the rail lines here in question save as such rights may have been created by § 504(f) of the Rail Passenger Service Act, quoted above; that if this court finds that such rights were created, plaintiffs and the United States are liable to defendants for the payment of just compensation for such use; and that the court should establish a methodology for the computation of such compensation. The counterclaims also sought a declaration that the creation of any trackage rights by § 504(f) of RPSA was an act of eminent domain for which the United States was bound to pay just compensation.

Conrail has moved for summary judgment that the above described trackage rights remain unchanged and fully enforceable "including their use without compensation by Conrail subject to the terms and levels in [the West End and Harlem-Hudson] agreements, and were not altered or abrogated by Section 1137 of

the Northeast Rail Service Act of 1981, which amended Section 504(f) of the Rail Passenger Service Act, or by the assumption of commuter rail service by MTA and CDOT as of January 1, 1983." Amtrak has moved for summary judgment seeking a similar declaration with respect to trackage rights for intercity passenger service over the West End lines.[3] Defendants have moved for summary judgment dismissing the complaints and granting the relief sought in the counterclaims. The United States has moved to dismiss the counterclaims against it. Briefs have been submitted and the court has heard argument.

DISCUSSION

In opposing plaintiffs' motions for summary judgment and supporting their own, defendants rely on two separate although related arguments. The first is that, as a matter of contract interpretation, Penn Central's reservation of what for simplicity we shall call free trackage rights was dependent on its performance of the obligation to provide commuter service under what the defendants contend to have been terms advantageous to them and was therefore lost when Penn Central's successor, Conrail, abandoned that service in compliance with § 1136 of NRSA on January 1, 1983. The other is that § 504(f), quoted above, which was added to the Rail Passenger Service Act by NRSA, contemplates the payment of compensation for the trackage rights or that if it does not, there was a taking of trackage rights by Conrail, Amtrak, or the United States for which this court should award compensation under § 1152(a) of NRSA.[4]

I

Defendants contend that their losses from having to furnish the commuter services themselves rather than having them supplied by Conrail, even on a fully subsidized basis, are very substantial. First, they claim they were entitled to a $1.837 million dollar annual credit from Conrail under the GCT Joint Facilities Agreement and to an annual credit for approximately 4-1/2% of certain administrative costs attributable to passenger train service into GCT from both the Harlem-Hudson and West End lines, which are no longer being paid. Second, they claim to have lost the benefit of significant economies of scale when Conrail ceased to provide administrative services for the commuter service and the agencies had to furnish the needed services themselves. Metro-North estimates that this has increased annual costs by approximately $11 million in the areas of data processing, accounting, purchasing, and labor management alone. Third, the transportation authorities claim to be disadvantaged by the necessity of financing Metro-North's operating deficit on a current basis, rather than financing Conrail's deficit on a quarterly arrears basis as required by the Service Contracts. Finally, they assert that since Conrail is no longer obligated to maintain the New Haven right-of-way for commuter service, the responsibility has fallen to them. Conceding that under the Service Contracts they were obligated to reimburse Conrail for such maintenance, they claim it is an

additional burden to be required not only to pay for the maintenance but also actually to perform it. Plaintiffs neither admit nor deny the accuracy of these figures and we express no opinion about them. Plaintiffs' contention is rather that the entire issue of whether the defendants have suffered a loss as a result of termination of the Service Contracts is irrelevant to the continued existence of their free trackage rights.

Plaintiffs rest their case on what they consider to be the plain language of the reservation of trackage rights in the deed executed pursuant to the MTA Purchase and Lease Agreement, in the lease executed pursuant to the CTA Lease Agreement, and in the lease executed pursuant to the Harlem-Hudson Lease Agreement. The language governing the reservation of trackage rights is indeed unequivocal and without conditions, precedent or subsequent. They fortify this argument by pointing to clauses in the lease and purchase agreements specifying that particular provisions shall apply only so long as the Service Contract for the same rail property is in effect;[5] in contrast there is no such linkage either in the contract provisions or in the deed or leases reserving the free trackage rights.[6] The language being entirely plain, plaintiffs perceive no justification for resorting to extrinsic evidence, although they maintain that in fact such evidence would operate in their favor, as developed below.

Defendants' chief response to this is that, as evidenced by the Letter and Memorandum of Intent and cross-references in the various contracts, the agreements were a

"package deal", so that a serious breach of any would avoid them all. Conceding the interrelationship as they must, plaintiffs answer that the contracts were carefully drawn and that when breach or lapse of one agreement was to affect another, the draftsmen said so, see note 5 supra; they point out further that defendants are not seeking a complete rescission of the agreements but wish to retain the conveyed fee and leasehold interests from which the trackage rights were carved, while excising those rights. They rely also on representations made by the Penn Central Trustees to Penn Central's reorganization court, with defendants' knowledge, that an important consideration to Penn Central for its lease of the Harlem-Hudson properties was its receipt of free trackage rights for 60 years, see Plaintiffs' Jt. App., Exhibit 10, at 3. Moreover, in a deposition in the valuation proceedings before this court, Robert R. Prince, then secretary and general counsel of MTA and formerly its chief negotiator for the West End Purchase and Lease Agreement and Service Contract, stated that Penn Central had been demanding $14 million for the properties conveyed by the MTA Purchase and Lease Agreement and had been induced to reduce this to $7.2 million by an argument of MTA that the capitalized value of the reserved trackage rights amounted to some $6 million. See Plaintiffs' Jt. App., Exhibit 5, at 136-40. Defendants attempt to answer that the dominating interest of Penn Central was to rid itself of the deficit laden commuter operations and that the precise sale or rental price was a matter of small consequence.

Recognizing the limitations on the "plain meaning" rule, see Pacific Gas & Electric Co. v. G.W. Thomas Drayage & R. Co., 442 P.2d 641, 644 (Calif. 1968) (Traynor, J.); Restatement of Contracts 2d § Reporter's Note, comment b, we think this is preeminently a case for applying it. The contracts were drawn with meticulous care, providing for contingency after contingency. If the draftsmen had intended that Penn Central's free trackage rights should cease in the event of a default by it with respect to the Service Contracts, they would have said so. In fact, as we have noted, certain provisions of the West End Purchase and Lease Agreements and of the Harlem-Hudson Lease Agreement are expressly conditioned on the continuance of the Service Contracts, see note 5 supra. The failure of the draftsmen to condition the reservation of trackage rights in a similar fashion affords strong proof that the parties did not so intend. Construction of the contract in accordance with its terms produces no harsh or unjust result. The transportation authorities continue to enjoy the fee and leasehold interests granted by the Purchase and Lease Agreements, and plaintiffs retain the trackage rights reserved to them. It is not likely that draftsmen who took care of many small contingencies would have failed to provide that a default under the Service Contracts would terminate the reserved trackage rights, if that had been their intent. Under the agreements as drawn, repudiation of the Service Contracts by Penn Central would have given the transportation authorities a cause of action for damages but would not have affected Penn Central's exercise of free trackage

rights any more than a failure of the transportation authorities to make subsidy payments for the commuter services would have entitled Penn Central to rescind the sales and leases.

II

Any difficulty in this case arises from § 504(f) of the Rail Passenger Service Act, as added by § 1137 of NRSA. It is worth quoting this again:

> (f) Amtrak Commuter shall not be subject to any lease or agreement with a commuter authority under which financial support was being provided on January 2, 1974, for the continuation of rail passenger service, except that the Corporation and Conrail shall retain appropriate trackage rights (for passenger and freight operations respectively) over any rail properties owned or leased by such commuter agency. Compensation for such trackage rights shall be just and reasonable.

45 U.S.C. § 584(f).

Plaintiffs would have us dismiss § 504(f) on the simple ground that the section would apply only if defendants had sought to have commuter service furnished by Amtrak Commuter. Since they did not, deciding rather to furnish the service themselves, as, we understand, all commuter authorities did, plaintiffs argue that § 504(f) has no bearing on this case. Defendants respond that if the first sentence had been broken into two, with a period replacing the words "except that", § 504(f) would have

conveyed an intention that Amtrak and Conrail should pay just and reasonable compensation for retained trackage rights and that the words "except that" make no sense anyway since the retention of trackage rights is not an exception to the freeing of Amtrak Commuter from obligations under the Service Contracts. Putting the argument in another way, the objective of the first clause of the first sentence was to free Amtrak Commuter from any burdensome service agreements made by a commuter authority with Conrail. There was no need to extend similar protection to a commuter authority which decided to undertake the service itself, since such action would bring any service agreement with the previous provider to an end. On the other hand, Congress wished to be sure that Amtrak and Conrail retained necessary trackage rights over properties that had been sold or leased to commuter authorities, whether the authorities selected Amtrak Commuter or operated the service themselves. In either event Congress intended that the trackage rights should be paid for.

As we explained in a previous opinion where we recounted the story, the legislative history of NRSA is unusual, see Railway Labor Executives' Ass'n v. SEPTA, 534 F. Supp. 832, 844 n.14 (1982). Section 504(f) had no counterpart in S. 1100, the original version of the Northeast Rail Service Act, introduced by Senator Packwood. However, the bill reported by the House Committee on Energy and Commerce, H.R. 3559, see H.R. Rep. No. 97-153, 97th Cong., 1st Sess., contained a section 504 similar to that finally enacted in some respects but different in others. Notably § 504(g) of the bill, the counterpart of § 504(f) of the act, read as follows:

> (g) If a commuter authority fails to offer a commuter service operating payment pursuant to subsection (b)(2) of this section, then any lease or agreement under which financial support was being provided on January 2, 1974, for the continuation of rail passenger service shall not apply to Amtrak Commuter, but the Corporation and the Consolidated Rail Corporation shall retain appropriate trackage rights (for freight and passenger operations respectively [sic]) over any rail properties owned or leased by such commuter agency. Compensation for such trackage rights shall be fair and equitable.

H.R. 3559, 97th Cong., 1st Sess. (1981). The Committee Report elaborated somewhat on this:

> Subsection (g) provides that if no commuter service operating payment is offered by a commuter agency pursuant to a lease or agreement, such lease or agreement shall not apply to Amtrak Commuter. In such event, Amtrak and Conrail are to retain appropriate trackage rights for passenger and freight operations over any rail properties owned or leased by such commuter agency. Compensation for such trackage rights is to be fair and equitable. In particular, compensation for freight operations should take into account industry-wide average compensation for freight trackage rights and any additional costs imposed on the commuter agency as a result of freight operations over passenger lines.

H.R. Rep. No. 97-153, supra at 23 (1981). The subsequent

legislative history sheds no light on why the language of the House bill was changed.[8]

However, even if we were to engage in the dubious course of reading § 504(f) as having the same meaning as § 504(g) of the House bill, we would not agree that Congress imposed a liability on Conrail and Amtrak to pay for the free trackage rights reserved in the West End and Harlem-Hudson Agreements. Whatever realism there might or might not be in assuming that the concerned members of Congress were aware of the provisions of the FSP designating the trackage rights held by Penn Central to Conrail and Amtrak, it would be pressing too far to believe that even such members were aware of how long such rights endured or that Penn Central was not obliged to make payment for them to the transportation authorities up to a certain level of use. What Congress desired to make clear was that its freeing of Amtrak Commuter from the obligations of the West End and Harlem-Hudson Agreements, to which Conrail had been made subject by the Rail Act, should not deprive Amtrak and Conrail of trackage rights needed for the operation of their respective passenger and freight services. The direction, "Compensation for such trackage rights shall be just and reasonable," should be read as applying only when compensation is due; if a person is legally entitled to use something free, requiring him to pay any compensation is not "just and reasonable". We can think of no reason why Congress, which was looking forward to a sale of Conrail, see 45 U.S.C. § 761(a), should have wished to impose costs on Conrail that it had no obligation to bear. We have been cited to nothing to

indicate that the defendants made known to the Congress that enacted NRSA their present position that freeing Conrail from its obligations under the Service Contracts would be detrimental to them. On the contrary Congress had every reason to believe that all the commuter agencies were as glad to get rid of Conrail as Conrail was to be free of responsibility to them. As said in the House report, supra, at 11:

> The commuter agencies (along with Conrail and Amtrak) contend that labor costs are too high and work rules too restrictive. But the institutional arrangements impede those most concerned with costs -- the commuter agencies -- from exercising control over the costs.[9]

We thus conclude that § 504(f) did not impose a statutory obligation on Conrail and Amtrak to pay for what the West End and Harlem-Hudson Agreements entitled them to retain free.

What we have just said suffices to dispose of defendants' arguments that NRSA constituted a taking of trackage rights over their properties for which we should award compensation under § 1152(a)(4). If NRSA took anything from the defendants, it was not the trackage rights, to which Conrail and Amtrak were entitled as successors to Penn Central, but rather the benefit of Penn Central's Service Contracts which had been imposed upon Conrail. Defendants have not pleaded any such claim and we intimate no view with respect to its merit.

Plaintiffs' motions for summary judgment are granted, and defendants' motions for summary judgment are denied. The motion of the United States to dismiss defendants' counterclaim is granted with leave to the defendants to file, within 20 days from the entry of judgment, an amended counterclaim for the loss of the benefits of the Service Contracts brought about by MRSA. If the parties cannot agree on a form of judgment, this should be settled on ten days' notice.

HENRY J. FRIENDLY
Presiding Judge

JOHN MINOR WISDOM
Judge

ROSZEL C. THOMSEN
Judge

November 23, 1984

1. This includes the properties covered by the West End Agreements, with the exception of the segment of track linking Woodlawn Junction with the Shell Interlock, but not those covered by the Harlem-Hudson Agreements.

2. The defendants point out that the presence of § 303(b)(2) and the related § 304(e)(3) was by no means accidental. The Rail Act, as originally drafted, provided generally that the conveyances from the transferors were to be "free and clear of any liens or encumbrances." S. 2676, 93d Cong., 1st Sess. (1973). Dr. William J. Ronan, then chairman of MTA, brought to the attention of the Senate Committee on Commerce the fear of MTA that this might have the effect of transferring to Conrail some of the properties here at issue which had been leased to MTA and on which it had spent large amounts of money, without any assurance that Conrail would provide commuter service. While MTA would share in a condemnation award for the taking of its property, it was far more interested in the continuation and improvement of commuter service. He therefore urged that the bill be revised "to insure that Metropolitan Transportation Authority's rights under the several leases and agreements embodying our financial support arrangements with Penn Central covering these three lines be respected in any such transfer to the core-system operating company." Hearings on Northeast and Midwest Railroad Transportation Crisis Before

the Senate Committee on Commerce, 93d Cong., 1st Sess., at 1000 (1973) (statement of William J. Ronan). When the Committee failed to respond to this suggestion, Senator Javits offered what is now § 303(b)(2) as a floor amendment. 119 Cong. Rec. S40736-37 (daily ed. Dec. 11, 1973) (statement of Sen. Javits). Consistent with this, § 304(e)(3) provided that passenger service under arrangements described in § 303(b)(2) should continue as provided in such arrangements rather than by the general provisions of § 304(c)(2)(A) and (C).

3. Amtrak concedes that it is not entitled to free trackage rights for intercity passenger service over the line from GCT to Poughkeepsie since this is not within the Northeast Corridor. It has applied to the Interstate Commerce Commission in Finance Docket No. 30426 under 45 U.S.C. § 562(a) to fix appropriate compensation for it to pay MTA for the use of this line. By a Memorandum-Order dated July 23, 1984, we denied a motion by MTA to stay the Commission proceeding. On October 29, 1984, the Commission issued an interim decision upholding its jurisdiction under 45 U.S.C. § 562(a) and directing further proceedings.

4. That section gives this court original and exclusive jurisdiction over any civil action:

> (1) for injunctive, declaratory, or other relief relating to the enforcement, operation, execution, or

> interpretation of any provision of or amendment made by this subtitle, or administrative action taken thereunder to the extent such action is subject to judicial review;
>
> . . .
>
> (4) seeking judgment upon any claim against the United States founded upon the Constitution and resulting from the operation of any provision of or amendment made by this subtitle.

45 U.S.C. § 1105(a).

5. MTA Purchase and Lease Agreement, §§ 106, 402, 501; CTA Lease Agreement, §§ 402, 501; Harlem-Hudson Lease Agreement, §§ 402, 501.

6. Plaintiffs make other arguments that are less convincing. They point to the fact that the reservation of free trackage rights was for 60 years whereas the Service Contracts were for only five, ignoring the provisions giving the transportation authorities options to renew the Service Contracts for successive five-year terms aggregating a total of 60 years in the case of the West End Service Contract and 90 years in the case of the Harlem-Hudson Service Contract. They point also to provisions in the Service Contracts that granted the transportation authorities the right to substitute another operator and to terminate the Service Contracts in the event that structural repairs were required. These rights, which rest in the volition of the transportation authorities, are quite different from a breach by Penn Central.

7. Subsection (b)(2) required Amtrak Commuter to operate commuter service if a commuter authority made a service operating payment pursuant to a lease or agreement under which financial support was being provided on January 2, 1974, for the continuation of rail passenger service. This phrase covered the Service Contracts here at issue.

8. After the provisions of H.R. 3559 were incorporated verbatim into H.R. 3982, the Omnibus Reconciliation Act of 1981, a House and Senate Conference Committee resolved any differences between the provisions of the bill and those of S. 1377, the Senate version of the Omnibus Budget Reconciliation Act, which had incorporated the terms of S. 1100. The only comment in the Conference Committee Report concerning the changes in what had been § 504(g) of H.R. 3559 is a general statement that "[t]he House and Senate provisions for the transfer of commuter services and related properties are combined." 127 Cong. Rec. S9057 (daily ed. July 31, 1981) (Explanatory Statement of the House and Senate Conferees with Respect to Subtitles E, F, and G of Title XI of the Omnibus Reconciliation Bill).

9. The report elaborates this in some detail.

Exhibit A-2

Harlem-Hudson Lease Agreement
dated as of June 1, 1972

HARLEM-HUDSON LEASE AGREEMENT

BETWEEN

METROPOLITAN TRANSPORTATION AUTHORITY

AND

THE TRUSTEES OF
PENN CENTRAL TRANSPORTATION COMPANY

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APPENDICES

HARLEM-HUDSON LEASE AGREEMENT

AGREEMENT, dated as of June 1, 1972, between the METROPOLITAN TRANSPORTATION AUTHORITY, a corporation of the State of New York (hereinafter referred to as "MTA") and GEORGE P. BAKER, RICHARD C. BOND, JERVIS LANGDON, JR., and WILLARD WIRTZ jointly as they are Trustees of the property of PENN CENTRAL TRANSPORTATION COMPANY, Debtor, a railroad corporation of the Commonwealth of Pennsylvania in reorganization under Section 77 of the Bankruptcy Act, 11 U.S.C. Section 205, and not individually (hereinafter referred to as "Penn Central").

RECITALS OF THE PARTIES

In a Letter of Intent, dated October 12, 1970, the parties hereto outlined the business terms of a proposed arrangement concerning the suburban passenger train service on Penn Central's Harlem and Hudson lines.

This Agreement sets forth the Harlem-Hudson Lease Agreement portion of the arrangement, proposed in Part 1 of the Letter of Intent (as herein modified) and is being executed concurrently with the Harlem-Hudson Service Agreement.

NOW, THEREFORE, in consideration of the mutual promises herein contained the parties hereto agree as follows:

ARTICLE ONE

DEFINITIONS AND PROVISIONS OF GENERAL APPLICATION

SECTION 101. *Definitions.*

"GCT Joint Facilities Agreement" means the Agreement entitled "GCT Joint Facilities Agreement", dated as of October 27, 1970, among the State of Connecticut, acting through its duly authorized agency, the Connecticut Transportation Authority of the Department of Transportation, MTA and Penn Central, as originally executed or as it may from time to time be amended or supplemented.

"Harlem-Hudson Costs" are defined in Section 403 of the Harlem-Hudson Service Agreement.

"Harlem-Hudson Lease" means the lease described in Section 201 of this Agreement, a form of which is attached hereto as Appendix II-A.

"Harlem-Hudson Revenues" are defined in Section 402 of the Harlem-Hudson Service Agreement.

"Harlem-Hudson Service" is defined in Section 201 of the Harlem-Hudson Service Agreement.

"Harlem-Hudson Service Agreement" means the Agreement entitled "Harlem-Hudson Service Agreement", dated as of the date hereof, between MTA and Penn Central as originally executed or as it may from time to time be amended or supplemented.

"MTA" means the person named as "MTA" in the first paragraph of this Agreement.

"Major Structural Repair" means any major structural repair in the ordinary sense. If either party is of the opinion that a Major Structural Repair is required hereunder, it may so notify the other party and the party so notified shall promptly reply stating whether or not it concurs in such opinion.

"New Haven Service" means the service defined as the "Service" in Section 201 of the Service Contract, dated as of October 27, 1970, among the parties hereto and the State of Connecticut acting through its duly authorized agency, the Connecticut Transportation Authority of the Department of Transportation.

"Penn Central" means the persons named as "Penn Central" in the first paragraph of this Agreement.

SECTION 102. *Notices.*

Any request, demand, authorization, direction, notice, consent, waiver, or other document provided 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 registered mails of the United States, postage prepaid, in an envelope addressed as follows:

If to Penn Central:

Penn Central Transportation Company
466 Lexington Avenue
New York, New York 10017

Attention: The Individual Named in Section 503 of the Harlem-Hudson Service Agreement

If to MTA:

Metropolitan Transportation Authority
1700 Broadway
New York, New York 10019

Attention: Chairman

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

SECTION 103. *Governmental and Court Approval.*

Whenever under the terms hereof either party hereto is required to act or cease to act, and such act or cessation is subject to the approval or consent of a governmental agency not a party to this Agreement or of a court, the party required to act or cease acting shall be deemed to have complied with such requirement if prior to the expiration of the time when it was to have acted or ceased acting, it shall have applied to such governmental agency or court for such approval or consent and shall continue to use its best efforts to achieve such approval or consent without delay.

SECTION 104. *Force Majeure.*

The obligations of the parties hereunder shall be subject to Force Majeure which shall include labor troubles.

SECTION 105. *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.

SECTION 106. *Interpretation.*

The Article and Section headings herein and the Table of Contents are for convenience only and shall not affect the construction hereof. 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 both of the parties hereto, unless a provision hereof expressly permits one party to effect termination, amendment, supplementation, waiver or modification hereunder, then in accordance with the terms of such provision. This Agreement shall be construed in accordance with and governed by the laws of the State of New York. All Appendices attached hereto are integral parts of this Agreement and the provisions set forth in the Appendices 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.

ARTICLE TWO

HARLEM-HUDSON LEASE

SECTION 201. *Harlem-Hudson Lease.*

Upon the effective date hereof, Penn Central shall lease to MTA by lease substantially in the form of the Form of Harlem-Hudson Lease attached hereto as Appendix II-A (which lease as executed and delivered is hereinafter referred to as the "Harlem-Hudson Lease") the properties described in the Harlem-Hudson Lease.

ARTICLE THREE

TRACKAGE RIGHTS

SECTION 301. *Reservation of Trackage Rights.*

In the Harlem-Hudson Lease Penn Central shall reserve as therein provided (a) all rights necessary to enable Penn Central to perform its obligations, and National Railroad Passenger Corporation to exercise its rights, under the Amtrak Agreement referred to therein, and (b) those trackage rights required by it to operate its railroad common carrier passenger and freight service over the properties leased by MTA therein, thus permitting Penn Central to operate the Harlem-Hudson Service and the New Haven Service as well as to continue its non-suburban passenger and freight operations.

SECTION 302. *Limitations on Other than Harlem-Hudson Service and Other than New Haven Service Operations.*

Except as otherwise provided in Section 303 hereof, Penn Central's utilization of the trackage rights reserved by it in the Harlem-Hudson Lease for its operations other than its Harlem-Hudson Service and other than its New Haven Service shall be limited to the levels set forth in Appendix III-A. Penn Central shall report to MTA within 45 days following the end of each calendar quarter Penn Central's actual utilization for its operations other than its Harlem-Hudson Service and other than its New Haven Service of such trackage rights during said calendar quarter.

SECTION 303. *Additional Other than Harlem-Hudson Service and Other Than New Haven Service Operations.*

MTA shall consent to Penn Central's utilization for its operations, other than its Harlem-Hudson Service and other than its New Haven Service, of the trackage rights reserved by it in the Harlem-Hudson Lease in excess of the levels set forth in Appendix III-A provided such excess utilization does not unduly interfere with the Harlem-Hudson Service or the New Haven Service as they are then constituted.

SECTION 304. *Penn Central Improvements for Railroad Operations.*

Upon written notice to MTA, Penn Central shall have the right, at its own expense and for the purpose of improving its other than Harlem-Hudson Service railroad operations, to improve the properties north of the Harlem River lift bridge leased by MTA in the Harlem-Hudson Lease, provided that at no time shall any such improvement unduly interfere with the operation of the Harlem-Hudson Service as it may from time to time be constituted or with MTA's enjoyment of those properties as then improved and provided further, that should any such Penn Central improvement subsequently interfere unduly with the operation of the Harlem-Hudson Service as it may then be constituted, or should any such improvement subsequently be abandoned, Penn Central shall remove such improvement.

SECTION 305. *Right to Make Structural Repairs.*

Should the lack of any Major Structural Repair substantially impair the trackage rights reserved by Penn Central in the Harlem-Hudson Lease, Penn Central shall have the right at its own cost and expense, to make such Major Structural Repair, but Penn Central's exercise of its right to make such Major Structural Repair shall not operate to cancel any right which MTA might have, pursuant to Section 702 hereof, to terminate the Harlem-Hudson Service Agreement.

ARTICLE FOUR

PARTICULAR COVENANTS OF THE PARTIES

SECTION 401. *Certain Payments by Penn Central.*

Penn Central hereby promises to pay to MTA: (i) a fair and reasonable charge for all electric power used by Penn Central in its exercise of the trackage rights reserved by it in clause A of the Reservation paragraph of the Harlem-Hudson Lease, such charges to be computed in accordance with the specific provisions of Appendix IV-A hereof; and (ii) a fair and reasonable charge for any additional other than Harlem-Hudson Service and other than New Haven Service operations permitted under Section 303 hereof.

SECTION 402. *MTA Maintenance Obligation.*

MTA shall maintain the properties leased by it in the Harlem-Hudson Lease at a level of utility which shall permit the operation of a suburban mass transit service and shall permit Penn Central to operate the types of freight and passenger trains which were considered conventional on January 1, 1969 (which shall not be deemed to include Metroliners or Turboservice trains) thereon at speeds prevailing and to the load capacities existing as of January 1, 1969, subject to the right of MTA: (i) Subject to the last sentence of paragraph 4 of the Harlem-Hudson Lease, to reduce the capacity of all or any part of, to convert to different forms of power, or to abandon completely the power supply and distribution system; and (ii) if the Harlem-Hudson Service Agreement has been terminated pursuant to Section 702 hereof, to avoid undertaking any Major Structural Repair.

SECTION 403. *Penn Central Maintenance Obligation.*

Notwithstanding MTA's obligations set forth in Section 402 hereof, any of the properties (including any facilities thereon or hereafter added thereto) leased by MTA in the Harlem-Hudson Lease which are required solely for Penn Central's other than Harlem-Hudson Service and other than New Haven Service operations shall be maintained by Penn Central at its own cost and expense. Penn Central shall bear the entire risk of damage, loss or liability with respect to said properties required solely for Penn Central's other than Harlem-Hudson Service and other than New Haven Service operations and shall indemnify and save harmless MTA for all losses, damages, charges, expenses, costs and liabilities of any kind whatsoever, including all costs incurred by MTA in defending or compromising claims, which arise with respect to said properties not required for the operations of the Harlem-Hudson Service, or the New Haven Service. Where other than Harlem-Hudson Service and other than New Haven Service operations require additions to, or the upgrading of, properties or facilities also used by the Harlem-Hudson Service, MTA shall be obligated under Section 402 hereof to maintain only such properties or facilities as would otherwise be sufficient for the requirements of the Harlem-Hudson Service and the New Haven Service and any excess cost and expense incurred by MTA as a result of such additions or upgradings shall be borne by Penn Central.

SECTION 404. *Additional Penn Central Obligation.*

Upon the written request of MTA and until otherwise notified by MTA in writing, Penn Central shall: (i) perform the obligations set forth in Section 402 hereof to be performed by MTA; and (ii) provide MTA with the information needed by it to make the determination and certification required by Section 1277 of the New York Public Authorities Law or any similar provision enacted after the date hereof. The entire cost and expense thereby incurred by Penn Central under this Section 404 shall be borne by MTA.

SECTION 405. *Management of Properties.*

Until otherwise notified in writing, Penn Central shall manage the properties leased by MTA in the Harlem-Hudson Lease (other than areas specifically reserved in such Lease to Penn Central and its assigns) and shall use its best efforts to cause such properties to

generate maximum net revenues. No sublease, easement, license or other agreement shall be entered into by Penn Central with respect to any of such properties without the prior approval of MTA.

ARTICLE FIVE

Amounts Charged to the Harlem-Hudson Service

Section 501. *Harlem-Hudson Revenues and Costs.*

So long as the Harlem-Hudson Service Agreement remains in effect all revenues accruing to MTA: (i) under the Harlem-Hudson Lease; and (ii) pursuant to the provisions of Section 401 hereof, shall be Harlem-Hudson Revenues under Section 402 of the Harlem-Hudson Service Agreement. Similarly so long as the Harlem-Hudson Service Agreement remains in effect all costs incurred by MTA: (i) under the Harlem-Hudson Lease, including any rental payable to Penn Central thereunder; and (ii) pursuant to the provisions of Article Four hereof, shall be proper Harlem-Hudson Costs under Section 403 of the Harlem-Hudson Service Agreement.

ARTICLE SIX

Arbitration

Section 601. *Settlement of Disputes.*

Both of the parties hereto shall make every reasonable effort to settle any dispute arising out of this Agreement without resorting to arbitration.

Section 602. *Arbitration Procedure.*

Any claim or controversy between MTA and Penn Central relating to the meaning of this Agreement or any provision hereof or relating to an alleged breach hereof which cannot be resolved pur-

suant to the provisions of Section 601 hereof shall be submitted by MTA and Penn Central to binding arbitration as follows: (i) either MTA or Penn Central shall notify the other of its intention to arbitrate; (ii) such notice shall include a detailed statement of the subject matter of the arbitration and shall designate one arbitrator; (iii) within 15 days after such notification, the notified party shall designate a second arbitrator and shall notify the party seeking arbitration of such designation; (iv) within 15 days after the designation of the second arbitrator, the two arbitrators so designated shall appoint a third arbitrator, except that if a second arbitrator has not been designated as provided in clause (iii), no arbitrator other than the first named need be designated (in the event of the failure of the two arbitrators thus named to agree upon a third within 20 days after their appointment, then the third arbitrator may be named by the Chief Judge of the United States District Court for the Southern District of New York); (v) the arbitrators, or under the circumstances set forth in clause (iv), the arbitrator, shall promptly hear and decide the issue or issues submitted to them giving to each party reasonable notice of the time and place of hearing; (vi) the arbitrators, or a majority of them, shall promptly make their decision and award in writing, serving a copy on both of the parties, and such decision shall be final and binding upon the parties; and (vii) such decision shall also provide which of the parties is, or if to be apportioned, in what proportion the parties are to bear the expenses of the arbitration, such decision to be based upon the merits of the positions taken by the parties with respect to the matter or matters in dispute.

SECTION 603. *Arbitration Awards.*

Any arbitration award hereunder shall be limited to an award of damages, or a declaration of the rights of the parties hereunder, or both. No award shall enjoin either party hereto or otherwise operate in such a way as to require specific performance by either party hereto of any act or of any obligation hereunder.

SECTION 604. *Enforcement of Awards.*

Either party hereto may enforce any arbitration award hereunder in any court of general jurisdiction of the State of New York or any United States District Court located in the State of New York.

ARTICLE SEVEN

Duration of the Agreement

Section 701. *Effective Date.*

The provisions of this Agreement shall become effective as of June 1, 1972.

Section 702. *Harlem-Hudson Service Agreement Termination.*

In the event a Major Structural Repair is required hereunder, MTA shall have the right, notwithstanding the right of Penn Central set forth in Section 305 hereof, to terminate the Harlem-Hudson Service Agreement upon 30 days notice to Penn Central.

Section 703. *Harlem-Hudson Lease and Lease Agreement Termination.*

Unless MTA shall, pursuant to the provisions of Section 705 of the Harlem-Hudson Service Agreement, substitute another carrier to operate the Harlem-Hudson Service, then upon the expiration or termination of the Harlem-Hudson Service Agreement for any reason, including termination based on default of MTA, this Agreement and the Harlem-Hudson Lease shall terminate without further act. Upon the expiration or termination of the Harlem-Hudson Lease for any reason, including termination based upon the default of MTA, this Agreement shall terminate without further act.

Either party hereto shall have the right to terminate this agreement 30 days after notifying the other party of such other party's default in the payment of money payable hereunder or 90 days after notifying the other party of such other party's default (other than a default in the payment of money) hereunder, and such notified party's failure to cure such default in the payment of money or such other default prior to the expiration of such 30- or 90-day period.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed and attested, all as of the day and year first above written.

METROPOLITAN TRANSPORTATION AUTHORITY

By WILLIAM J. RONAN
WILLIAM J. RONAN, Chairman

SEAL

ATTEST:

ROBERT R. PRINCE
ROBERT R. PRINCE, Secretary

GEORGE P. BAKER, RICHARD C. BOND, JERVIS LANGDON, JR. AND WILLARD WIRTZ, AS TRUSTEES OF THE PROPERTY OF THE PENN CENTRAL TRANSPORTATION COMPANY, DEBTOR

By GEORGE P. BAKER

WITNESS:

ROBERT D. BROOKS
General Solicitor

FORM OF HARLEM-HUDSON LEASE

LEASE, dated May 26, 1972, by and between George P. Baker, Richard C. Bond, Jervis Langdon, Jr., and Willard Wirtz jointly as they are Trustees of the property of Penn Central Transportation Company, Debtor, a railroad corporation of the Commonwealth of Pennsylvania, in reorganization under Section 77 of the Bankruptcy Act, 11 U.S.C. Section 205, having an office at Six Penn Center Plaza, Philadelphia, Pennsylvania 19104, and not individually, hereinafter referred to as the Lessor, and Metropolitan Transportation Authority, a public benefit corporation of the State of New York, having its principal office at 1700 Broadway, New York, New York, hereinafter referred to as the Lessee, pursuant to the terms of the Harlem-Hudson Lease Agreement, a copy of which is attached and made a part hereof.

For and in consideration of the covenants and agreements hereinafter contained, Lessor does hereby lease to Lessee, and Lessee does hereby hire from Lessor (a) the Grand Central Terminal station building in New York City (which shall include the arcades and passageways shown on the Grand Central Terminal Main Station Building Existing Conditions Maps identified in Schedule A hereto delivered to each other by the parties hereto upon the execution and delivery of this instrument) and the land on which it is situate, (b) all Lessor's transportation properties (which includes land upon which they are constructed but excludes land above the same) used in whole or in part in its suburban passenger service from and including Grand Central Terminal, New York City, to and including the Harlem River lift bridge, and (c) the property north of said bridge to Poughkeepsie, New York, on the Hudson division and Dover Plains, New York on the Harlem division, shown on the Lessor's valuation plans identified in Schedule A hereto delivered to each other by the parties hereto upon the execution and delivery of this instrument; and including all easements and rights held by Lessor in passenger stations and facilities and all riparian rights in land under water and all rights in structures and buildings of every kind and nature whatsoever located within the leased premises, and also all lands under water, water courses, water rights, riparian rights, franchises, licenses and permits, and all other lands, premises, rights,

easements and property held for or in connection with the construction, maintenance, operation or use of the said leased premises forming part thereof or thereunto belonging or in any wise appertaining.

Together with all and singular the tracks, sidings, turnouts, bridges, culverts, fences, station houses, tool houses, shops, turntables, stations, pole lines and wires, overhead conductors, third-rail systems, substations, switch gear, power and control cables, buildings, fixtures and all other structures, improvements and facilities of every kind and nature whatsoever located within the said leased premises.

All without warranty and subject to existing leases, licenses, liens, agreements and encumbrances of record or otherwise, including but not limited to the National Railroad Passenger Corporation Agreement dated as of April 16, 1971, between Lessor and National Railroad Passenger Corporation (the "Amtrak Agreement"), and the following mortgage indentures:

The New York & Harlem Railroad Company Mortgage dated June 1, 1897 to Guaranty Trust Company of New York (now Morgan Guaranty Trust Company of New York), Trustee;

The New York & Harlem Railroad Company Mortgage dated July 1, 1943 to J. P. Morgan & Co. Incorporated (now Morgan Guaranty Trust Company of New York), Trustee;

The New York Central and Hudson River Railroad Company Gold Bond Mortgage dated June 1, 1897 to Central Trust Company of New York (now Manufacturers Hanover Trust Company), Trustee;

The New York Central and Hudson River Railroad Company Consolidation Mortgage dated June 20, 1913 to Bankers Trust Company, Trustee; and

The New York Central and Hudson River Railroad Company Refunding and Improvement Mortgage dated October 1, 1913 to Guaranty Trust Company of New York (now Morgan Guaranty Trust Company of New York), Trustee, and

Excluding from the said leased premises: (i) all air-rights, including all buildings and structures therein other than the GCT station building, and land immediately above said transportation properties northward to 96th Street, (ii) all air-rights above the GCT station

building, (iii) all space within any structure hereafter built in the area generally from the north line of the Express Concourse ticket windows of the GCT station building south to the north building line of 42nd Street, provided that such structure is built either (a) pursuant to the Agreement of Lease, dated as of January 22, 1968, between The 51st St. Realty Corporation and UGP Properties, Inc. and Agreement of Sublease, dated as of January 22, 1968, between UGP Properties, Inc. and The New York Central Railroad Company or (b) a successor development plan limited to such area, (iv) subject to the first sentence in the second unnumbered sub-paragraph of paragraph 5 hereof, the right to transfer air-rights (or rights to build floor area) from the parcel occupied by the GCT station building to other parcels, and (v) subject to existing railroad improvements and replacements thereof, all air-rights, including all buildings and structures therein, over the remainder of the leased premises north of 96th Street, Manhattan, above a plane established at 22 feet from top-of-rail or, where rail is not present, 23 feet from existing grade (except that the plane shall be 15 feet 9 inches from top of rail or, where rail is not present, 16 feet 9 inches from existing grade with respect to the following parcel of land: Putnam Division Valuation Section 56, Map Number 2, from a line 20 feet easterly of and parallel with the common boundary line of the Hudson and Putnam Divisions, easterly to the westerly property line of the Major Deegan Expressway, and extending from the southerly boundary line of Tremont Avenue southerly for a distance of 450 feet along the said common boundary line); and excluding from the said leased premises existing poles, towers, columns, footings, foundations and facilities supporting or serving structures presently located within the space encompassed by the said air-rights; and excluding the subsurface of the said leased premises and all non-transportation structures and facilities therein.

Reserving, however, from the leased premises all rights necessary to enable Lessor to perform its obligations, and National Railroad Passenger Corporation to exercise its rights, under the Amtrak Agreement; and

Reserving further from the leased premises, the right, which continues to remain with Lessor (A) to operate upon the leased premises (the "Trackage") a railroad common carrier service to the extent (i) authorized under the Interstate Commerce Act, or any future law of like import, or (ii) otherwise permitted by law, including the right:

(a) to operate over the Trackage freight trains, cars and locomotives; (b) to provide through and local freight service (including mail and express) at any point (exclusive of passenger station areas other than Grand Central Terminal) along the Trackage; (c) to operate long-haul (through) passenger trains, cars and locomotives (including baggage, mail and express), to and from points north of Poughkeepsie or Dover Plains, New York, through or via Poughkeepsie or Dover Plains, over the Trackage, provided, however, that except temporarily in an emergency, all such long-haul passenger trains, cars and locomotives (including baggage, mail and express) may receive and discharge passengers only at the following stations within the Harlem-Hudson Area (as that term is defined in the Harlem-Hudson Service Agreement): Grand Central Terminal, Croton-Harmon, Poughkeepsie and Dover Plains, and provided further, that tickets honored on such passenger trains and cars shall read to or from stations outside of the said Harlem-Hudson Area, and provided further, that the schedules of such passenger trains and cars may not be altered in a manner as to unduly interfere with either the Harlem-Hudson Service or the New Haven Service as they are then constituted; (d) to operate over the Trackage suburban railroad passenger services, as they may from time to time be constituted; (e) to use any portion of the Trackage for switching, storage of cars and locomotives and the making, breaking and servicing of trains; (f) to operate work equipment upon the Trackage; and (g) subject to paragraph 5 hereof, to occupy and use such portions of stations, buildings, shops and other facilities within the leased premises which are reasonably necessary or legally required for providing railroad passenger or freight service, except that Harmon Shops may not be so occupied or used if and to the extent that it unduly interferes with the servicing, maintenance or repair of equipment used either in the Harlem-Hudson Service or in the New Haven Service, and (B) (i) to modify at any time that portion of the GCT station building consisting of the area generally from the north line of the Express Concourse ticket windows south to the north building line of 42nd Street for the purpose of implementing the proposed Breuer plan or any successor development plan in that area, provided however that any such plan permits continued access to the GCT station building from 42nd Street and from the adjoining New York City

Transit Authority subway passenger stations substantially equivalent to the access presently permitted, (ii) to require Lessee to continue furnishing through existing CCT facilities, to the extent of their capacities, electricity, steam, compressed air and hot water service to the structures presently served by such facilities in the Grand Central Terminal area, charging for such services rates not in excess of the greater of those rates which would cover Lessee's costs of furnishing such services or those rates which would be charged by the applicable public utility company for comparable service for each such structure, provided (a) Lessee need not continue any such service to any parcel after its existing structure is demolished, and (b) Lessee need not be required to make a substantial capital expenditure with respect to the system which furnishes any such service;

All for a term of 60 years to commence as of the effective date hereof, upon the following terms, covenants and conditions:

1. Lessee shall pay to Lessor as fixed rent within ten days after the end of every quarter following the effective date hereof, for the use of (a) all passenger stations served on the Harlem Line by the Harlem-Hudson Service within the boundaries of the City of New York, including Grand Central Terminal to 59th Street, and (b) that portion of the leased premises, other than passenger stations, lying between Grand Central Terminal and Woodlawn Junction, an amount for each such category equal to one-quarter of the sum assigned to it for the calendar year shown in Schedule B attached hereto, multiplied by a fraction of which the numerator is the number of railroad cars and locomotive units of the Harlem-Hudson Service entering Grand Central Terminal at 59th Street during the quarter and the denominator is the total number of railroad cars and locomotive units entering Grand Central Terminal at 59th Street during the quarter. Lessee shall also pay to Lessor as fixed rent for the remainder of the leased premises the sum of $1 per annum.

2. Lessee agrees to hold Lessor harmless from the payment of any taxes or levies, including vault rentals and franchise charges for street occupancies, imposed upon the leased premises but only to the extent that they are attributable to the use of the leased premises for

transportation purposes; and further agrees to hold Lessor harmless from those taxes or levies imposed upon the leased premises which are attributable to existing concessions the revenues from which Lessee is entitled to pursuant to paragraphs 3 and 4 hereof or attributable to any future concessions or other uses engaged in or permitted by, or any future improvements made by, Lessee upon the leased premises during the term hereof. This indemnity shall be applicable only in the event that the said taxes, levies, vault rentals or franchise charges are held by a court of competent jurisdiction to have been lawfully imposed in proceedings in which Lessee is given an opportunity by Lessor to participate, the arbitration provisions hereof notwithstanding.

3. Lessee shall be entitled to any and all rents, revenues and other income derived from the leased premises. Lessor hereby assigns to Lessee, and Lessee hereby assumes the obligations of Lessor under, any and all existing leases, easements, contracts or other agreements pursuant to which such rents, revenues and other income are payable.

4. Notwithstanding the provisions of paragraph 3 hereof, Lessee hereby assumes the obligations of Lessor under the GCT Joint Facilities Agreement, dated as of October 27, 1970, among Lessor, Lessee and the State of Connecticut acting through its duly authorized agency the Connecticut Transportation Authority of the Department of Transportation (hereinafter referred to as the "GCT Joint Facilities Agreement"), except that Lessor shall remain obligated for the annual $2,000,000 credit referred to in Section 302 of the GCT Joint Facilities Agreement and for the New Haven Service portion of the annual credit referred to in Appendix III-A Account 8293 (v) of such agreement. If the structure referred to in (iii) of the exclusions to the leased premises is constructed, Lessor shall remain obligated annually for concession revenues with respect to any portion of GCT which as of December 31, 1967, was generating concession revenues or was used as concession space on such date and which was converted to a non-GCT concession use by such construction. In computing such concession revenues for this purpose, such converted portion shall be deemed to be generating concession revenues equal to the concession

revenues it actually generated at the time of its conversion to non-GCT concession use or as of December 31, 1967, whichever is greater. Such deemed concession revenues shall thereafter be increased or decreased in the same proportion as the remaining GCT concession revenues shall have increased or decreased since the time of said conversion.

Lessor grants Lessee the right to exercise all of Lessor's rights under the GCT Joint Facilities Agreement, but Lessee shall not amend said Agreement without Lessor's consent, which consent shall not unreasonably be withheld. In the event the GCT Joint Facilities Agreement is terminated during the term of this lease, Lessee shall grant Lessor, for a fair and reasonable charge, rights comparable to the rights granted MTA/CTA in Article Two of the GCT Joint Facilities Agreement to the extent Lessor requires such grant of rights to enable it to operate service comparable to the New Haven Service operated into GCT pursuant to the GCT Joint Facilities Agreement, and shall provide to Lessor sufficient traction power, at a fair and reasonable charge, to effect such entry.

5. Lessee shall have the right to improve the leased premises for any lawful purpose and, in connection therewith, if such improvement is for railroad transportation purposes, subject to then existing agreements, to enter Lessor's air-rights north of 59th Street, Manhattan, or subsurface rights, so long as and to the extent that there is no undue interference with any prior exercise of those rights by Lessor.

Without limitation of the foregoing, Lessee shall be entitled to improve the GCT station building by adding floor space thereto, but in so doing Lessee shall take no action which will operate to reduce by more than 100,000 "zoning" square feet the amount of space which may legally be built or the amount of air rights (or rights to build floor area) which may legally be transferred as contemplated by (iii) or (iv), respectively, of the exclusions to the leased premises, above. Lessor shall have the right to exercise its air-rights and subsurface rights above and below the leased premises for any lawful purpose and, in connection therewith, to enter upon the leased premises for the purpose of gaining access to the subsurface or, in the case

of air-rights, for the purpose of constructing, reconstructing, maintaining and repairing poles, towers, columns, footings, foundations, utilities, and service connections serving buildings and structures within the air-rights, provided in every case that there is no undue interference with the operation of the Harlem-Hudson Service or with Lessee's enjoyment of the leased premises as then improved. Subject to the provisions of the preceding sentence, the right of Lessee to improve the leased premises shall include the right to alter or demolish any then existing improvements to the leased premises, provided that if any such existing improvement is required for the exercise of any of the trackage rights hereinbefore reserved, Lessee shall provide a substitute improvement adequate to serve the same function, except that in the case of Harmon Shops, the substitute improvement shall be deemed adequate if it accommodates the needs of the Harlem-Hudson Service.

The rights granted the Lessee to improve the leased premises are further limited in that Lessee may not make any improvement which will interfere with any clearance requirement which must be observed in order to permit Lessor to conduct all of its present types of operations over existing track. In elaboration of this obligation, but without limitation: (a) in the event Lessee shall construct high-level platforms at passenger stations, they shall provide for a clearance of 5′ 8″ from the center line of the tangent track unless Lessor shall remove all restricted clearances in the affected territory, in which event the side clearance shall be increased at the expense of Lessee to 5′ 9″, and (b) in the event that Lessee shall construct overhead bridges, they shall provide vertical track clearance in each case of no less than 16′ 6″ from top-of-rail on the Harlem Line and, on the Hudson Line, 16′ 6″ from top-of-rail south of Tarrytown and 18′ 6″ from top-of-rail north of Tarrytown, provided, however, that in the event Lessor shall remove all other equally or more restrictive vertical track clearances on either such line or any portion thereof, then the vertical clearance on such line or portion shall be increased wherever necessary, again at the expense of Lessee, to the minimum of the other vertical clearances provided by Lessor in such removal program subject to a maximum vertical clearance of 22′ from top-of-rail.

6. Title to any improvements made to the leased premises by Lessee shall be in Lessor upon completion thereof, unless the same consists of a fixture which may be removed without causing permanent damage to the realty, in which event Lessee shall have title to such fixture and may remove the same at Lessee's expense at the expiration or termination of the term hereof; provided, however, that title to the following fixtures shall vest in Lessor upon their installation upon the leased premises in the course of railroad maintenance, repairs or improvements whether or not they may be removed without causing permanent damage to the realty: (a) all ties, rails, switches, other track material, ballast, track laying and servicing material, fences and other right of way material, (b) all signal system apparatus including interlockers, (c) all communication systems and public address equipment, (d) all power transmission systems equipment exclusive of power sub-station equipment, (e) all bridge, tunnel and viaduct equipment, and (f) all shop, engine house and repair track machinery and equipment including machinery and equipment located in yards or terminals for the repair and servicing of trains, locomotives or cars, including MU cars.

7. Lessee shall have the right to sublet the leased premises or any portion thereof, but shall notify Lessor of each such sublease. Lessee shall not assign or transfer this Lease or its rights hereunder in whole or in part to any person or corporation other than a successor to the rights and properties of Lessee or a subsidiary corporation of Lessee without the prior written consent of Lessor, which consent shall not be unreasonaby withheld. Lessee agrees to execute such instruments in recordable form as may be reasonably requested to confirm any rights reserved to Lessor under, or areas excluded from, this Lease.

8. Lessor shall have the right to terminate this lease 30 days after written notification to Lessee that Lessee is in default in the payment of moneys payable hereunder or 90 days after written notification to Lessee that Lessee is otherwise in default hereunde., and Lessee's failure to cure such default in the payment of money or such other default prior to the expiration of such 30- or 90-day period.

Upon such termination, Lessor shall be immediately entitled to the leased premises and to all revenues, rents and income derived therefrom and, thereupon, the leased premises shall be returned to Lessor, Lessee shall cease to have any estate, right, title, claim or interest in or to the leased premises except (subject to the provision of paragraph 6 hereof) title to improvements made by Lessee as aforesaid, and Lessor may re-enter and take possession of the whole or any part of the leased premises and may at any time enter upon said premises and every part thereof, and have and possess the leased premises, as of its former estate, and without such re-entry, may recover possession thereof in the manner prescribed by the statute relating to summary process; it being understood that no demand for rental, and no re-entry for condition broken, as at common law, shall be necessary to enable Lessor to recover such possession pursuant to said statute relating to summary process.

8-A. Lessee, to the extent rights thereunder have not already been terminated, shall have the right to terminate this Lease on not less than 30 days' written notice to Lessor (a) at any time after Lessee shall have been deprived of its right of peaceable possession of any substantial part of the leased premises as a result of the termination of the contract dated April 1st, 1873 between The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company or foreclosure or other enforcement proceedings under any of the mortgages specifically identified in the provisions of this Lease, (b) at any time after another carrier shall have been substituted for Lessor to operate the Harlem-Hudson Service pursuant to the provisions of Section 705 of the Harlem-Hudson Service Agreement provided, however, that the Harlem-Hudson Service shall have been first lawfully abandoned or discontinued.

9. Lessee shall have the right to renew the term of this lease for up to six additional consecutive renewal terms of five years each upon giving Lessor written notice of its election to renew not less than eighteen months prior to the expiration of the original or the prior renewal term, as the case may be. The fixed rent payable for

each year of any such renewal term shall be fixed at the commencement of such year by agreement or, failing agreement, by arbitration procedures as herein provided in which event the arbitrators shall establish such fixed rent at: (a) as to the portion of the leased premises south of the Harlem River lift-bridge, the fair rental value of all land (exclusive of land in the bed of a street) comprising such portion, viewed as unimproved, and (b) as to the portion of the leased premises north of, and including, such bridge, the fair rental value of all land held in fee or by lease by Lessor comprising such portion, based upon the particular use or uses to which it is then being applied. In the fixing of such fair rental values, the arbitrators shall exclude any component thereof intended to represent real estate tax obligations of the owner, but only if and to the extent that at the time of the determination property leased by Lessee for transportation purposes is exempt by law from taxation or special ad valorem levies.

10. Upon the expiration of the term of this lease or the termination thereof, Lessee shall (i) discharge any liens, encumbrances or other charges imposed against the leased premises or any part thereof without the consent of Lessor and resulting from the acts or omissions of Lessee, its agents, contractors or subcontractors, (ii) assign to Lessor (and Lessor shall assume the obligations of Lessee under) any and all then existing leases, easements, contracts, or other agreements pursuant to which Lessee shall be entitled to rents, revenues and other income derived from the leased premises, and (iii) vacate the leased premises and leave the same in as good condition as when received, ordinary wear and tear, required major structural repairs which have been made the basis for a termination of this Lease, and improvements, alterations and demolitions permitted by the provisions of this Lease (provided, in the case of such alterations or improvements, that each of them is in good repair) excepted.

11. In addition to the covenants and obligations set forth herein, Lessor and Lessee shall be bound by all the covenants and obligations set forth in the aforementioned Harlem-Hudson Lease Agreement. Each of the provisions of general applicability, including the definitions, set forth in Articles One and Six of the Harlem-Hudson Lease Agreement shall be deemed to be set forth in full in this lease and

shall be applicable to the rights and obligations of each of the parties hereunder.

12. Notwithstanding anything in this lease to the contrary, it is understood and agreed that (i) in no event shall the said leased premises include (a) any property demised under those ground leases and grants of term, as amended to the date hereof (whether or not the same shall have expired or been terminated), identified in Schedule C annexed hereto (the "ground leases"), and any property above the elevations shown on the plot plan for 466 Lexington Avenue annexed hereto as a part of Schedule D, and (b) any easements, covenants and other rights granted to the lessees under the ground leases; and (ii) there is hereby granted to the Lessee, and included in the said leased premises, for so long as this lease shall be in effect, those easements, covenants and other rights heretofore reserved to the lessors for the benefit of the transportation properties both under the ground leases and as shown or enumerated in Schedule D, and Lessor covenants and agrees that said easements, covenants and other rights will be reserved for the benefit of Lessee from any conveyance by Lessor of the property and easements, covenants and other rights set forth in (i) above.

13. MTA covenants that over the initial term of the Harlem-Hudson Lease it will expend the moneys appropriated to it by Chapter 473 of the Laws of New York for 1970, as amended, and by Section 10 of Chapter 1 of the Laws of New York for 1971 for the improvement of the Harlem-Hudson Service in the manner contemplated by the said statutes, subject to (a) amendment or repeal of either or both of the said statutes by the Legislature of the State of New York, (b) the provisions of Section 103 of the Harlem-Hudson Lease Agreement, including, without limitation, the need for the Director of the Budget to issue his "certificate of approval of availability" as required by the said statutes and the need for the State Comptroller to perform his audit and issue his warrant for the expenditure of the said moneys as required by the said statutes, and (c) the termination of the Harlem-Hudson Lease, by any person and for any reason, in accordance with its terms. In the event of such termination, this

obligation to expend moneys shall be deemed to have been released and shall not be subject to proration.

14. The provisions of this lease shall become effective as of June 1, 1972.

IN WITNESS WHEREOF, the parties hereto have duly executed this Lease on the day and year above written.

METROPOLITAN TRANSPORTATION AUTHORITY

By WILLIAM J. RONAN,
WILLIAM J. RONAN, Chairman

SEAL

ATTEST:

ROBERT R. PRINCE

ROBERT R. PRINCE, Secretary

GEORGE P. BAKER, RICHARD C. BOND, JERVIS LANGDON, JR. AND WILLARD WIRTZ, AS TRUSTEES OF THE PROPERTY OF THE PENN CENTRAL TRANSPORTATION COMPANY, DEBTOR

By GEORGE P. BAKER

WITNESS:

ROBERT D. BROOKS
General Solicitor

Exhibit A-3

Extracts from

Conrail Trackage Rights Agreement

effective as of January 1, 1983

TRACKAGE RIGHTS AGREEMENT

BETWEEN

METRO NORTH COMMUTER RAILROAD COMPANY,

METROPOLITAN TRANSPORTATION AUTHORITY,

CONNECTICUT DEPARTMENT OF TRANSPORTATION

AND

CONSOLIDATED RAIL CORPORATION,

EFFECTIVE AS OF JANUARY 1, 1983

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TRACKAGE RIGHTS AGREEMENT

This Trackage Rights Agreement (Agreement), entered this 6th day of August, 1991, to become effective as of January 1, 1983, is made by and between the Metro North Commuter Railroad Company (METRO NO.), Metropolitan Transportation Authority (MTA), Connecticut Department of Transportation (CDOT), and Consolidated Rail Corporation (Conrail).

WITNESSETH

WHEREAS, the Northeast Rail Service Act of 1981 (NERSA) directed in Section 1137 that Conrail convey to commuter authorities Rail Properties used or useful in the operation of commuter service and retain appropriate trackage rights for its freight operations on those properties; and

WHEREAS, in accordance with NERSA §1136 and §1137, the parties hereto have executed Transfer Agreements, dated as of September 1, 1982 (Transfer Agreements); and

WHEREAS, Section 9.01 of the Transfer Agreements provides that the parties will enter into a trackage rights agreement; and

WHEREAS, litigation before the Special Court, established by the Regional Rail Reorganization Act of 1973, has confirmed Conrail's right to continue freight operations under the terms of the Harlem-Hudson Lease Agreement, the MTA Purchase and Lease Agreement and the CTA Lease Agreement; and

WHEREAS, in accordance with NERSA and the Transfer Agreements, it is necessary to establish appropriate rights and responsibilities between the parties for continued operation of rail commuter passenger and freight service over MTA/CDOT Rail Properties and Conrail Rail Properties;

NOW, THEREFORE, in consideration of the covenants, agreements, representations, and warranties contained herein, and intending to be legally bound, METRO NO., MTA, CDOT and Conrail agree as follows:

ARTICLE I

DEFINITIONS

Section 1.01. Definitions

(a) "Actual Costs" shall mean all expenses incurred by the party in connection with a transaction, including retroactive wage adjustments and the party's applicable additives and over-head rates in effect at the time the work is performed.

(b) "CDOT" shall mean the Connecticut Department of Transportation.

(c) "Car Mile" shall mean a locomotive, car, unit of self-propelled work equipment, whether or not loaded, whether or not carrying passengers or freight, moved one mile over Rail Properties.

(d) "Conrail" shall mean the Consolidated Rail Corporation, a corporation organized under the laws of the Commonwealth of Pennsylvania.

(e) "Conrail Rail Properties" shall mean the rail properties, including (except as otherwise specifically provided herein) additions and betterments thereto, enumerated and so identified in Exhibits 2 and 6 hereto.

(f) "Crossover" shall mean a track fixture which is used to switch a train from one track to an adjacent parallel track and consists of two (2) turnouts. A turnout consists of a switch and other track components.

(g) "NERSA" shall mean the Northeast Rail Service Act of 1981.

(h) "METRO NO." shall mean the Metro North Commuter Railroad Company, a public benefit corporation of the State of New York and a wholly owned subsidiary of Metropolitan Transportation Authority.

(i) "MTA/CDOT Rail Properties" shall mean the rail properties identified in Exhibits 1, 4 and 5 owned or leased by MTA, METRO NO. or CDOT, respectively, including facilities existing thereon and additions and betterments thereto. Rail Properties identified in Exhibits 4 and 5 are those properties which are presently used solely by Conrail for its freight operation. Properties identified in Exhibit 1 are those jointly used properties which have been or are presently used by Conrail for its freight operations and are presently used by METRO NO. for its passenger operations.

(j) "MTA" shall mean the Metropolitan Transportation Authority.

(k) "Non-Routine Maintenance" shall be that work generally performed and programmed on a maintenance cycle, on a project or emergency basis, including, but not limited to, partial or entire replacement of switch timbers, ties, metal materials, ballast, switch stands, signal apparatus, and derails, if any.

(l) "Owner" shall mean Conrail, when referring to Conrail Rail Properties, and shall mean METRO NO. when referring to MTA or CDOT Rail Properties.

(m) "Parties" shall mean Conrail, METRO NO., MTA and CDOT collectively.

(n) "Rail Properties" shall mean the MTA/CDOT Rail Properties or Conrail Rail Properties as set forth in the Exhibits to this Agreement.

(o) "Routine Maintenance" shall be that work performed by basic maintenance forces including, but not limited to, inspections, switch stand and rod adjustments, lubricating, welding, respiking, spot surfacing and tamping, signal department tests and inspection, snow removal and turnout surfacing.

(p) "Transfer Agreements" shall mean the Agreements between MTA and CDOT, respectively, and Conrail, dated as of September 1, 1982, setting forth terms and conditions for the transfer of commuter rail properties and operations.

(q) "User" shall mean Conrail, when referring to MTA/CDOT Rail Properties, and shall mean METRO NO. when referring to Conrail Rail Properties.

ARTICLE II

ACCESS TO RAIL PROPERTIES

Section 2.01. Access to MTA and CDOT Rail Properties

(a) MTA and CDOT hereby grant to Conrail, subject to the provisions of this Agreement, the right to enter upon and utilize the existing tracks and related operating facilities located on MTA or CDOT Rail Properties listed in Exhibits 1, 4 and 5 for the purpose of performing Conrail's freight service, including such service operated by Conrail for others. This right shall be the same as that granted to the Penn Central Corporation in (1) the Harlem-Hudson Lease Agreement, as amended, (2) the MTA Purchase and Lease Agreement, as amended, and (3) the CTA Lease Agreement, as amended, and transferred to Conrail pursuant to the Final System Plan and affirmed by the Special Court in action No. 83-14.

(b) MTA acknowledges Conrail's continuing right to use:

(1) the freight trackage rights reserved to Penn Central in the Harlem-Hudson Lease Agreement, as amended, and in the MTA Purchase and Lease Agreement, as amended; and transferred to Conrail pursuant to the Final System Plan (affirmed by Special Court Action No. 83-14) subject to the use levels set forth in Appendix III-A of said Agreements, without payment for such use;

(2) the said trackage rights in excess of the use levels set forth in Appendix III-A, for which excess freight

use Conrail shall pay METRO NO. in accordance with Article V hereof;

(c) CDOT acknowledges Conrail's continuing right to use:

(1) the freight trackage rights reserved to Penn Central in the CTA Lease Agreement and transferred to Conrail pursuant to the Final System Plan, except for the segment between Derby Jct. and Waterbury, subject to the use levels set forth in Appendix III-A of said CTA Lease Agreement, without payment for such use;

(2) the said trackage rights in excess of the use levels in said Appendix III-A, for which excess freight use Conrail shall pay METRO NO. in accordance with Article V hereof.

(d) NERSA Rail Properties

MTA and CDOT hereby affirm that, subject to the provisions of this Agreement, Conrail has retained easements (except easements presently held by other railroads) for freight operations over rail properties conveyed in fee to MTA or CDOT pursuant to the provisions of NERSA and the Transfer Agreements dated as of September 1, 1982 and as reserved in the deeds from Conrail to MTA or CDOT.

(e) MTA will lease to Conrail for the sum of $1.00 (the receipt of which is hereby acknowledged) all of that property known as Chevy Yard, Tarrytown, New York, necessary for Conrail freight operations and service to freight customers. This property shall be designated as an Exhibit 4 Rail Proper[illegible]

(f) Where practicable, Conrail, at its sole cost and expense, shall arrange for and obtain necessary heat, water, electricity and other utility services required for its use. In the event it is impracticable to secure any of such services other than through facilities owned by MTA or CDOT, Conrail shall install, at its expense, if economically feasible and where permitted by law, necessary connections, supply lines and meters to measure its consumption of such services. In the event separate metering is not feasible, the utility bill shall be allocated on a fair and reasonable basis. Neither MTA nor CDOT shall be liable for any temporary suspension of any such services unless caused by either MTA or CDOT's negligence or that of their respective agents or employees. Conrail shall have the right to use facilities, connections, supply lines and meters presently serving the involved Rail Properties.

I. Differences Between Draft CP Trackage Rights Agreement and Draft CSX Trackage Rights Agreement.

CP	CSX
A. **USE OF SUBJECT TRACK**	A. **USE OF SUBJECT TRACK**
(Article 2)	(Article 2)
1. CP may use the Subject Trackage to switch, store or service cars of equipment, make or break up trains or serve an industry. Art. 2(b).	1. CP is prohibited from using the Subject Trackage to switch, store or service cars or equipment, make or break up trains, or serve an industry. Art. 2(b).
2. CP has the right to enter/exit Subject Trackage at the endpoints and other points to connect with its existing line and/or any other railroad lines. Art. 2(c).	2. No comparable provision. Note: Under the "Master Trackage Rights Agreement" supposedly used by CP as the model, CP has the right to enter/exit Subject Trackage only at the endpoints or other points to connect with its existing line and joint CSX[CP] lines. Art. 2(c).
3. CSX does not have exclusive control of dispatching the Subject Trackage. Art. 2(d).	3. CSX has exclusive control of dispatching the Subject Trackage. Art. 2(c).
4. No comparable provision.	4. The Agreement limits CP's rights to use Subject Trackage to 50% of freight capacity of line when the combined demands of CP and CSX exceed the freight capacity of the line. Art. 2(d).

CP	CSX
B. **RESTRICTION ON USE** 1. No comparable provision.	B. **RESTRICTION ON USE** (Article 3) 1. CP may use the trackage rights only on bridge traffic between the terminals of the Subject Trackage. CP may not perform any local freight service on the Subject Trackage, except as the parties may separately agree. Use of trackage rights between milepost CP 75.8 and milepost CP 0.0 is limited to an eight-hour window.
C. **SPECIAL PROVISIONS** (Article 3) 1. Similar to CSX proposal except that it refers to CSX dispatcher in Jacksonville.	C. **SPECIAL PROVISIONS** (Article 4) 1. Makes no reference to location of CSX dispatcher. Art. 4(c). 2. The CSX Agreement substitutes the term "Subject Trackage" with "CSX Trackage." Art. 4(c).
D. **COMPENSATION** 1. There is no Compensation provision in the body of the CP Agreement. It is presented in Sec. 3 of the CP Trackage Rights Addendum.	D. **COMPENSATION** (Article 5) 1. CP will pay on a proportionate usage basis all direct and associated expenses, including maintenance, operating, supervisory and administrative costs. Art. 5(a).

CP	CSX
2. No comparable provision.	2. CP will also pay an annual interest rental fee (payable in advance in monthly installments and annually equal to one-half of 10% of the value of the Subject Trackage, as determined by an independent appraiser jointly selected by the parties) for access to and joint use of the Subject Trackage. Art. 5(a).
E. **PAYMENT OF BILLS**	E. **PAYMENT OF BILLS**
(Article 4)	(Article 6)
1. CP must pay CSX within **30 days** of the billing date. Art. 4(a).	1. CP must pay CSX within **15 days** of the billing date. Art. 6(a).
2. There is no comparable provision for payment by electronic transfers.	2. Payment must be rendered via a standard Electronic Funds Transfer Authorization Agreement. Art. 6(a).
3. The CP Agreement does not specify a particular currency for bill payment.	3. Payment must be in U.S. Dollars. Art. 6(a).
4. The CP Agreement contains no statement as to frequency of bills.	4. Bills may be rendered monthly. Art. 6(a).
5. Records relating to matters in the Agreement must be kept open for inspection by the other party for **three years** from the billing date. Art. 4(a).	5. Records relating to matters in the Agreement must be kept open for inspection by the other party for **two years** from the billing date. Art. 6(a).

CP	CSX
F. MAINTENANCE OF SUBJECT TRACKAGE	**F. MAINTENANCE OF SUBJECT TRACKAGE**
(Article 5)	
1. CSX must maintain the Subject Trackage to a minimum standard of FRA Class III. Art. 5(a).	1. No comparable provision. (None in Master Trackage Rights Agreement, said to be the "model" for CP). Note: CSX is using the same track for its own similar use.
G. CONSTRUCTION AND MAINTENANCE OF CONNECTIONS	**G. CONSTRUCTION AND MAINTENANCE OF CONNECTIONS**
(Article 6)	(Article 8)
1. CP has the right to determine whether any new or upgraded connections are needed at an existing terminal (other than endpoint), and to determine whether upgrading, including to switches, power switches, signals, communications, etc., is needed for operational efficiency. Art. 6(b).	1. CSX approval (including for design) is required for any additional connections. Art. 8(b).
2. If CP makes the determinations in (1) above, CSX must cooperate. Art. 6(b).	2. No comparable provision.
3. The CP Agreement does not include the "sole cost and expense" language. Art. 6(b)(i).	3. At its "sole cost and expense," CP will furnish labor and material and construct track on CP's right-of-way or others that connect with the lines of CSX and CP. Art. 8(b)(i).
4. There is no stated obligation to "maintain, repair and renew" such track, or to do so at its "sole cost and expense."	4. At its "sole cost and expense," CP must maintain, repair and renew" track located on CP's right of way or others that connect the lines of CSX and CP. Art. 8(b)(i).

CP	CSX
5. The CP provision does not contain the "sole cost and expense" language. Art. 6(b)(ii). Cf. CP Trackage Rights Addendum, Sec. 2(b), giving CP a separate track for half the cost of a track.	5. Construction for CP's own use must be at its "sole cost and expense." Art. 8(ii).
6. No comparable provision.	6. Upon termination of the Agreement, CSX, at CP's sole cost and expense, may remove portions of trackage appurtenances paid for by CP. Salvage material will be released to CP, which is entitled to credit for the fair market value of such salvage. Art. 8(b)(ii).
H. **ADDITIONS, RETIREMENTS AND ALTERATIONS** (Article 7)	H. **ADDITIONS, RETIREMENTS AND ALTERATIONS** (Article 9)
1. No comparable provision.	1. Additions, betterments, and retirements will modify the annual interest rental basis. Art. 9(a).
2. The burden for constructing additional facilities lies **solely** with CSX. Art. 7(b).	2. CSX may construct, **or have constructed**, addition facilities. Art. 9(b).
I. **MANAGEMENT AND OPERATIONS** (Article 8)	I. **MANAGEMENT AND OPERATIONS** (Article 10)
1. **Both CSX and CP** must comply with specified and unspecified legal obligations. Art. 8(a).	1. **Only CP** is obligated to comply with the specified and unspecified legal obligations. Art. 10(a).
2. A provision addresses to CP's violation of operating rules or practices while on the **"Subject Trackage."** Art. 8(d). See also Art. 8(e).	2. A provision addresses to CP's violation of operating rules or practices while on **"CSX Trackage," not the Subject Trackage."** Art. 10(d). See also Art. 10(e).

CP	CSX
3. CSX must cooperate with CP and "promptly" inform CP of operating, maintenance, and construction plans that might affect CP's operations on the Subject Trackage. In scheduling, CSX must consider CP's operations and avoid any disproportionate interference with them. CSX must indemnify CP against costs or expenses incurred by CP as a result of CSX's breach of its obligations under this section. Art. 8(f). No reciprocal provision imposed to CP as to CSX.	3. No comparable provision.
4. If a train of **CSX or CP** stops on the Subject Trackage due to causes not resulting from an accident or derailment or fails to **maintain the speed by that party's published schedule** or sets out defective cars, the other party has the option of providing assistance and is entitled to compensation for such assistance. Art. 8(g). Varies the Master Trackage Rights Agreement, which is like CSX's.	4. The CSX provision **is limited to actions of CP**, and **does not extend the responsibilities and liabilities to CSX**. The CSX provision also specifically includes stoppages due to insufficient hours of service remaining on CP's crew. CSX has the right to recrew CP's trains. The CSX provision refers to the **speed for the Subject Trackage set by CSX**; it gives no authority to CP to set speeds. Art. 10(g).
5. Each party has the right to fix the schedules of its trains on the Subject Trackage. Consultation with the other party is required to minimize conflicts. Art. 8(j).	5. No comparable provision.
6. To protect CP's equipment, CP police must have complete access and police powers in regard to the Subject Trackage. Art. 8(k).	6. No comparable provision.

CP	CSX
J. **CLEARING OF WRECKS** (Article 10) 1. The cost, liability and expense relating to the clearing of wrecks will be apportioned according to **Article 11 (Liability).** Art. 10.	J. **CLEARING OF WRECKS** (Article 12) 1. The language mirrors the CP Agreement except it cross-references **Article 14 (Claims).** Art. 12.
K. **LIABILITY** (Article 11) 1. For purposes of liability, CSX trains include Amtrak trains and the trains of other third parties admitted by CSX operating on the Subject Trackage. Art. 11(a). No comparable provision for liabilities of third parties, such as NY&A, admitted by CP. 2. Sole responsibility. Except where damage exceeds $25 million, each party bears all responsibility for damage to or resulting from its own trains and equipment and for the death/injury of its employees. Art. 11(a).	K. **LIABILITY** (Article 13) 1. No comparable provision. 2. Sole responsibility. If a loss occurs while the Subject Trackage is being used solely by either CP or CSX, the using party is solely responsible, even if the liability is caused partially or completely by the other party. Art. 13(a). If a loss occurs while both CSX and CP are using the Subject Trackage, each is responsible for loss to its own equipment, locomotives and employees, including lading. Art. 13(b). Where loss is solely caused by one party, that party is solely responsible. Art. 13(b). A loss involving CP or CSX and a third party is the sole responsibility of the party herein involved in the controversy. Art. 13(c).

CP	CSX
3. Joint responsibility. Damage less than $25 million, and not the sole responsibility of one party, is split 50-50 between CP and CSX, and above that, on a comparative fault basis. Art. 11(b) and 11(e). (See item 6 below). Both parties have joint responsibility for handling and paying for joint damage. Art. 11(c).	3. Joint responsibility. If a loss occurs where both CSX and CP are using the Subject Trackage, both are equally (50-50) responsible for loss to the Subject Trackage and also for losses by third parties, regardless of the proportionate caused responsibility between them, unless the loss is caused solely by one party. Art. 13(b).
4. Indemnification. Each party will indemnify the other against payments that are the responsibility of the indemnifying party and all expenses, including legal fees incurred in defending any claim for which the other party is liable. Each party will defend such other party against claims with counsel selected by such other party. Art. 11(d).	4. Indemnification. Each party will indemnify the other against an apportioned or assumed liability, regardless of whether the liability resulted from conduct of the indemnitee or its directors, officers, agents or employees. Art. 13(d). CP must indemnify CSX and its parent directors, subsidiaries and affiliates, officers, agents and employees against any liability for which CP is responsible. Art. 13(h). If a suit is brought against one party for damages that are in whole or in part the responsibility of the other party, the party being sued must notify the other party, which must help defend the suit and pay a proportionate part of the judgment and costs, including attorneys' fees, according to its liability. Art. 13(c).
5. No comparable provision.	5. Employee death/injury. Where compensation must be paid under workman's compensation, etc. in installments for death/injury of an employee, expiration or termination of the Agreement does not relieve such party from paying future installments. Art.13(e).

I have reviewed the submission made in this matter by CP in its "CP-24" filing. I have particularly taken note that, in order to access the Hudson Line from its own ownership, CP contends that it needs to have three different access routes over portions of the present Conrail lines which are to be allocated to CSX. Asking for three routes would be curious even if CP proposed to operate several long haul trains to or from New York City in three different directions. Where, as here, CP proposes only one train a day, and appears to be only "hopeful" that another train might develop in the future, the request is wholly unjustified from a service planning perspective.

In my view, CP's interest in acquiring rights over three different CSX routes in and around Albany is not related to the issue of providing a second Class I rail carrier with direct access to New York City. Rather, it amounts to little more than an attempt to enhance its own Albany area rail network without any of the expenses or liabilities of ownership. As evidenced by CP's own maps (included in the Gilmore V.S. in the CP Filing), it already has its own route structure in the Albany area that provides it with the means to make its own movements through this area (via Delanson, Schenectady, West Albany and Ballston).

In fact, CP already has a trackage rights route by which it reaches the East of the Hudson Line at Rensselaer. I understand that the Verified Statement of R.R. Downing addresses this further.

CP's motivation is perhaps better understood when one considers the number of customers located on the Conrail lines it claims it needs to reach the East of the Hudson line.

CP, of course, seeks local trackage rights on these routes, not overhead rights, so that the primary benefit of the order it seeks from the Board is not the access to the East of the Hudson line (it already has one route), but rather the access to the industries served by Conrail along the way.

CP's first proposed "access" route is over the Conrail/CSX Chicago Line from the intersection of that line with the CP North-South Line through the Conrail/CSX West Albany Yard and over the Livingston Avenue Bridge through Rensselaer to Stuyvesant. The following customers (including Conrail terminal facilities) are located on that route: Marjam Lumber; MJS Warehouse; Yank Waste; Gas Resources; and the Flexi-Flo Facility (handling corn syrup and chemicals); and Ashland Chemical.

CP's second proposed "access" route is from a connection between the CP Voorheesville Running Track and the Selkirk Branch Line, which is the main freight route through the Albany area used by Conrail and to be used by CSX, on the Selkirk Branch through Selkirk Yard, and then over the Castleton Bridge and through CP-SM to the Selkirk Branch's connection with the Hudson Line at Stuyvesant. Along those Conrail lines are the following industries/facilities: Owens Corning; Airco; GE Plastics; Appleton Paper; Texan Eastern Gas; Powell Minnock Brick.

Finally, CP's third proposed "access" route is from CP's Kenwood Yard south on the Conrail Albany Secondary Track to CP SK, into Selkirk Yard going West, then involving a "run around" of the locomotive, a reverse movement Easterly out of Selkirk

Yard on the Selkirk Branch, then, as in the second proposed "access" route, through CP-SM to the connection with the Hudson Line at Stuyvesant. Eastern Gas and Power Minnock Brick, whose facilities are on "access" route No. 2, also are on this route.

Some of these industries are very substantial customers of Conrail which Conrail has served and worked with for many years. Time has not allowed me to quantify the commercial significance of these customers, but I am confident that they purchase several millions of dollars worth of Conrail services every year.

I am further troubled by other aspects of CP's proposal to the Board. I understand that their proposed trackage rights agreement would allow them to use all of Conrail's rail facilities along the proposed trackage rights route. This would include the right to store cars. As a marketing officer, I am deeply troubled by the prospect of a competitor having the right to use tracks and other facilities which CSX will need to provide competitive service. The opportunities for CP to exercise those rights in a way that could impede CSX's operations are legion. A deliberate attempt to undermine CSX's competitive service may very well be exactly what CP has in mind in making such sweeping proposal. Yet, railroad operations are sufficiently complicated that it could be very difficult to demonstrate that stored cuts of cars, slow switching, extended time on main line tracks, etc. were intentional tactics.

Related to this point, Selkirk Yard is absolutely critical in providing successful service by CSX to the current Conrail customers in New York, Massachusetts, Connecticut and Quebec. It is both unwarranted and unwise to allow interference by CP Rail in this

major Conrail/CSX rail hub and its approaching and access lines. Current CP entrance into this yard is solely for providing interchange between CP, the Port of Albany and Conrail, with traffic that would enter Selkirk Yard as Conrail's in any other arrangement. This current arrangement was entered into as an operating convenience. This differs significantly from allowing CP the ability to pass through this classification yard with its own traffic and, as I understand CP seeks, to use any of the yard's facilities and to access all shippers served directly from the yard.

In CSX's first submission in this matter (CSX-167), CSX proposed that CP construct a connection at CPSK and that would skirt the periphery of the yard.

Given CP's demand for the right to freely operate in the Selkirk Yard and its proposed trackage rights agreement, which would give it the right to serve customers along all trackage rights lines and to use any tracks along the way for storage, I do not think the Board should select that option. Rather, if the trackage rights were to carry rights of local service, I believe that the Board should require CP to access the East of the Hudson line via its existing trackage rights arrangement across the Livingston Avenue Bridge, as described by Mr. Downing. In any event, from a marketing standpoint, I do not think CSX should be forced to tolerate the operation of a competitor in Selkirk Yard, when that competitor has sought rights to use Conrail tracks in a way that could very well be adverse to CSX's future operations.

Selkirk Yard is critical to the efficient operation of CSX's operating plan between the North Jersey Shared Assets Area and Buffalo, Cleveland, Chicago and intermediate points over the Water Level Line. Selkirk Yard is the single largest yard on the portions of Conrail that CSX will operate. Given CP's posture in this sub-proceeding, I could never endorse allowing CP to have access to Selkirk Yard on anything other than the existing basis – *i.e.*, a readily cancelable interchange agreement. So long as CSX remains free to readily cancel CP's rights in the yard, it can maintain operational discipline. If it loses that control, the operating plan for this part of the expanded CSX network is hostage to any inefficient, or imprudent operation by the interloping competitor.

Perhaps the most egregious aspect of the rights CP seeks is the proposed right to operate into (and as I understand it, within) Conrail terminal facilities where freight is transloaded to trucks for delivery to customers. CP's proposal would have it operating into the Conrail auto ramp at Selkirk Yard, the Conrail Flexi-Flo bulk transfer facility at West Albany Yard, and to the Gas Supply liquid propane gas distribution center, also at West Albany Yard.

Each of these facilities is an operational terminus of Conrail's rail service. From these terminals, trucks make the final delivery to customers. There is no reason why CP, with its substantial resources, could not construct similar facilities at its own expense, under its own control in or near its own many properties in the Albany area. The auto terminal and Flexi-Flo facilities are Conrail-owned facilities. The Gas Supply propane terminal is private, but was constructed with incentives provided by Conrail. I headed the Conrail

industrial development group when we competed directly with CP and other railroads, all seeking to persuade this customer to locate on our own respective lines. It is outrageous for CP now to attempt to secure the right to serve this customer when it lost out in the fair commercial competition.

CP's demand of the right to jointly make use of these facilities, when it could construct or locate equivalent competitive facilities adjacent to its many lines in the Albany area, should be rejected.

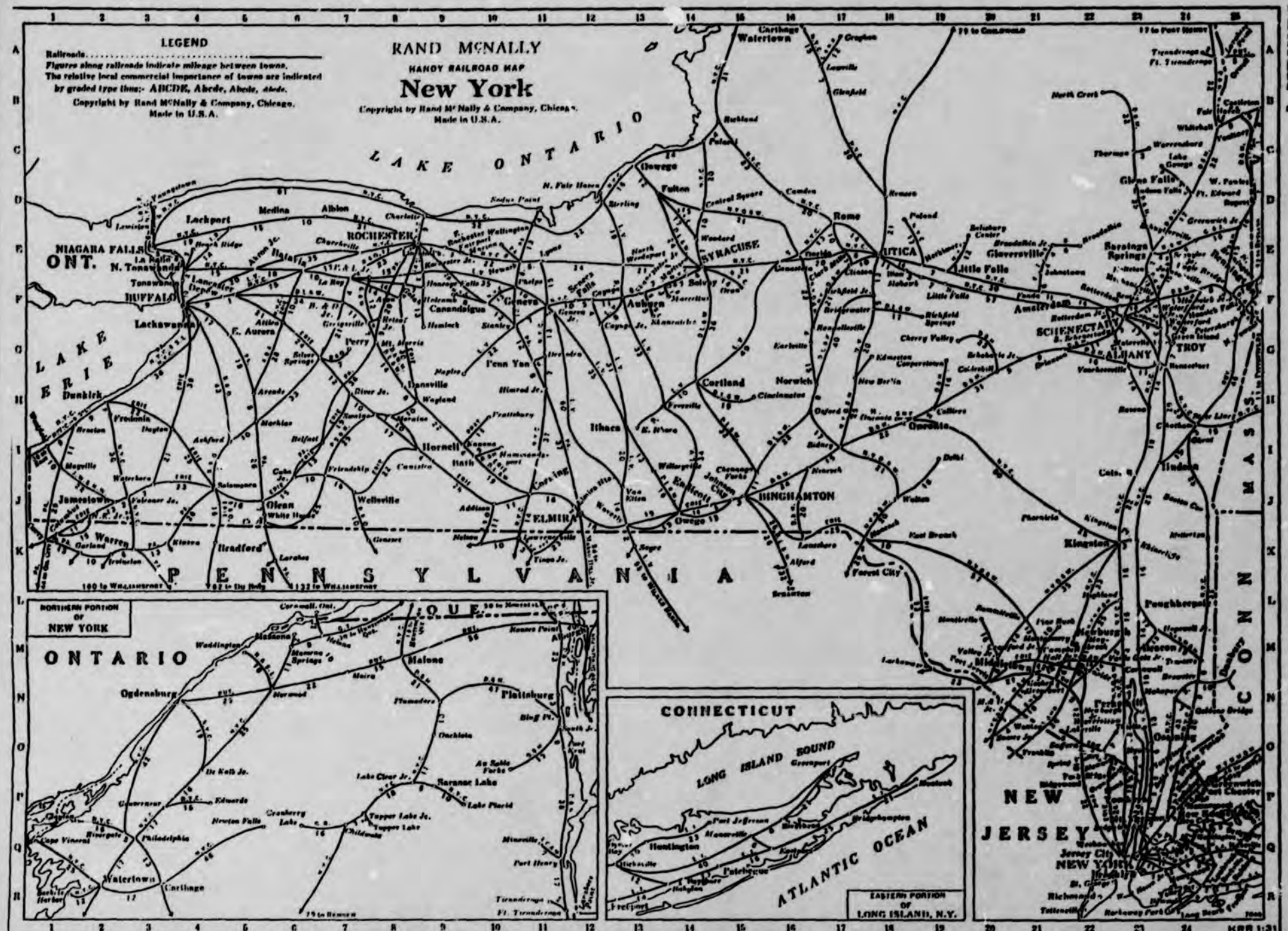
Further, declarant says not.

VERIFICATION

I, Jerry Vest, 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.

Jerry Vest

Annex 1


LEGEND
Railroads
Figures along railroads indicate mileage between towns.
The relative local commercial importance of towns are indicated by graded type thus:- ABCDE, Abcde, Abcde, abcde.
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NIAGARA FALLS
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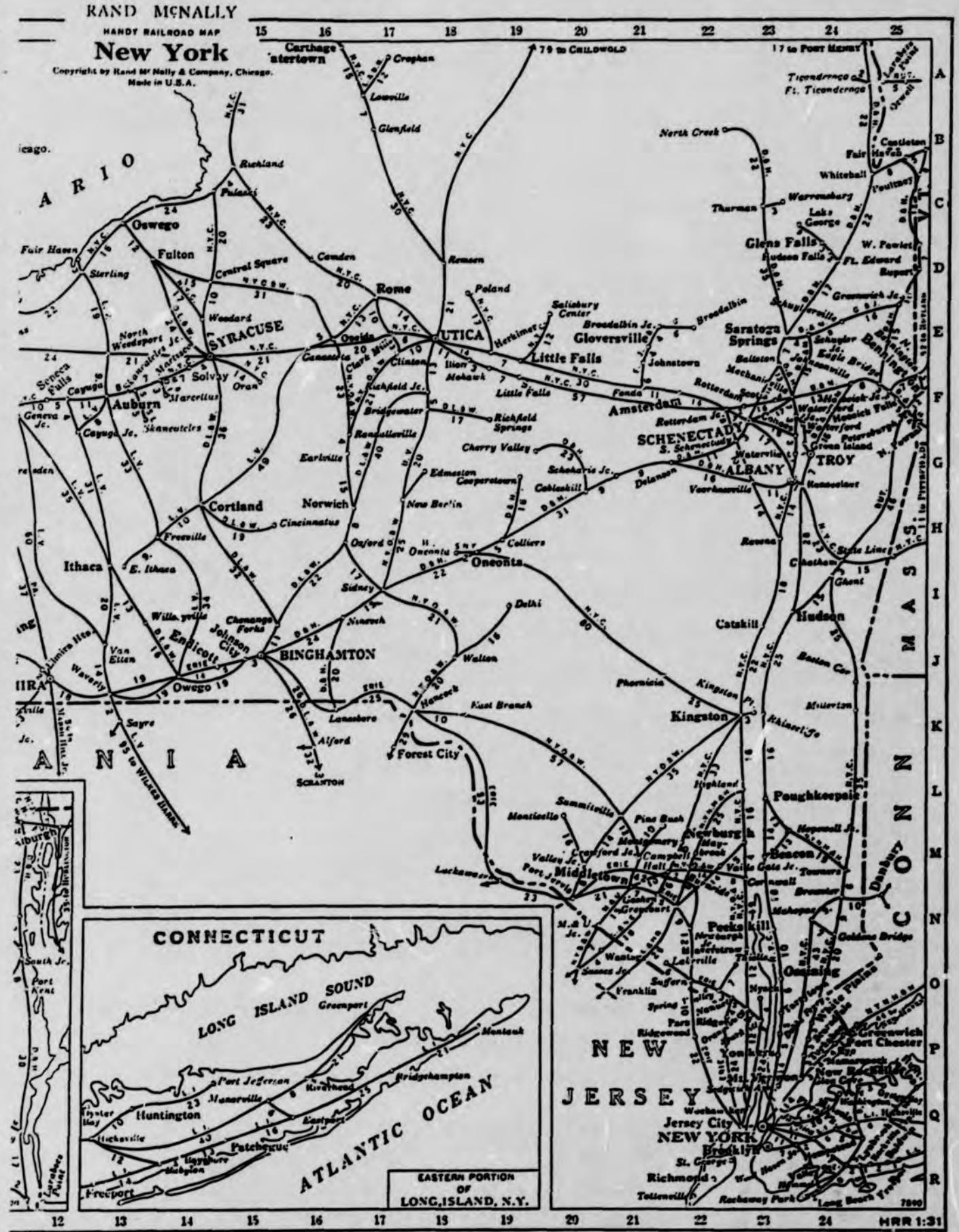
ROCHESTER
SYRACUSE
UTICA
ALBANY
TROY
ELMIRA
BINGHAMTON
PENNSYLVANIA
NORTHERN PORTION OF NEW YORK
ONTARIO
QUE.
CONNECTICUT
LONG ISLAND SOUND
ATLANTIC OCEAN
EASTERN PORTION OF LONG ISLAND, N.Y.
NEW JERSEY
MASS.
CONN.

Annex 1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Attachment 4
Carey Reply Verified Statement

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33388

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

VERIFIED STATEMENT OF R. PAUL CAREY

I. INTRODUCTION

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.

In addition to the requirements of my current position, I have served as Conrail's General Manager - Albany Division with responsibility for Conrail operations in the area East of the Hudson (in addition to other places). I was born and raised in Westchester County, New York, and continue to regularly visit family in this area. I have been employed in the railroad industry since 1971, and was an informed observer of this industry in the area East of the Hudson prior to that time. I am entirely familiar with the subject of railroad operations in this area.

I make this Verified Statement in connection with the proceedings before the Surface Transportation Board in STB Finance Docket No. 33388, Sub No.-69, in which there may be an issue 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 in preparing this statement, is the period immediately prior to the merger of the Pennsylvania Railroad and the New York Central to form 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 in order to become part of the Penn Central (on January 1, 1969) following the creation of that company.

NEW YORK CITY (The Bronx, Manhattan, Queens and Brooklyn).

Prior to the creation of Penn Central, the New York Central and the New Haven both operated freight service in The Bronx. The New Haven's carload freight service was limited to Harlem River yard, the same site that has since been acquired by the State of New York. As of 1968, Harlem River was a station solely served by the New Haven, which reached the area via a line once known as the "New York Connecting" railroad, which was opened around 1911 to connect the then-new Pennsylvania Station with New England via New Rochelle. This line is today operated as part of Amtrak's Northeast Corridor. The balance of The Bronx was served solely by the New York Central. The New Haven did not offer any freight services in Manhattan, but had operated its passenger service into Grand Central Terminal (via the New York Central over Woodlawn Jct.) under a trackage rights arrangement dating from the mid-19th century. The few freight customers on this line (all were in The Bronx on what was NYC's "Harlem Division") were solely served by the New York Central. Local freight operations were conducted in The Bronx on the NYC's Harlem, Hudson, and Putnam Divisions, with the preponderance of through freight trains operated via the Hudson Line (as Conrail's trains move today). A few "milk" trains had operated via the Harlem Division, but this traffic was lost by the late 1950's.

The New Haven also owned and operated its freight line (part of the so-called New York Connecting) between Sunnyside Jct. (the connection to the Pennsylvania Station passenger route in Queens just east of the Hell Gate Bridge approach) and Bay Ridge. The New Haven connected with the Long Island Rail Road (now NY&A) at Fresh Pond Junction and conducted other interchange operations in Brooklyn from this route. Conrail operates over the portion of route between Oak Point Yard (in The Bronx), across Amtrak's Hell Gate Bridge (on separate track), and through Queens to Fresh Pond Jct. via what is now known as the "Fremont Secondary Track", where Conrail/NY&A interchange operations are presently conducted. Prior to 1966, when the LIRR was sold to New York Metropolitan Transportation Authority, the LIRR was an affiliate of the Pennsylvania Railroad.

Such carload freight service as was provided by rail in Manhattan was provided by the New York Central via its Hudson Line or via carfloat interchange over its West 72nd Street Float Bridges. There was no carload freight use of the passenger tunnels under the Hudson (North) River or the East River (there was a limited intermodal use of this route for mail, but this was a short-lived service of the Penn Central). These tunnels were exclusively reserved for the passenger operations of the Pennsylvania, the Long Island and the New Haven railroads. There were certain so-called "freight stations" of other railroads on various piers in Manhattan (and other Boroughs - principally Brooklyn) but generally these were reached via lighterage or car float and involved public delivery trackage (where equipped for carload traffic), all reserved for the exclusive use of the owning carrier.

In The Bronx, there was no reciprocal switching or common or shared terminal use, and accordingly, each railroad facility was exclusive as to access by other freight railroads. The same was the case in Queens. There was no reciprocal switching and no switching district in either The Bronx or Queens. To the extent two (or more) railroads each may have served trade competitors in New York, one may have inferred competition between the railroads as it would follow the competition between the customers. I am unable to identify a single example of such "presumed" competition.

North of The Bronx, the New York Central was the sole serving freight carrier with respect to its lines. The New Haven also served a part of Poughkeepsie incidental to its Maybrook Line (an east-west line) over which the New Haven handled its interchange with the Erie Railroad. The only vestige remaining of this is the Hospital Industrial Track (and the hulk of the Poughkeepsie Bridge - abandoned since the fire in 1974). The New Haven also reached Beacon (via Hopewell Junction); this community was earlier known as "Fishkill Landing" - evidence of the railroad's 19th century ferry operations (long since abandoned). Beacon is located on the Hudson River, approximately 14 miles south of Poughkeepsie. As between the New York Central and the New Haven, there were no switching districts or reciprocal switching arrangements between the carriers in this area.

ALBANY

The only rail carrier serving New York Central points on or accessible via the Hudson Line south or east of Rensselaer (inclusive) was the New York Central then, just as it is with Conrail today.

VERIFICATION

R. Paul Carey, being duly sworn, deposes and says that he has read the foregoing statement and that the contents thereof are true and correct to the best of his knowledge, information and belief.

R. Paul Carey

Subscribed and sworn to before me the 8th day of December, 1998.

Robert B. D'Zuro
Notary Public

NOTARIAL SEAL
ROBERT B. D'ZURO, Notary Public
City of Philadelphia, Phila. County
My Commission Expires Sept. 18, 2000