FINANCE DOCKET NO. 14433 [1]

DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY ET AL. MERGER, ETC.

Submitted May 2, 1944. Decided May 15, 1944

1. Merger of the properties of the New York, Lackawanna & Western Railway Company into the Delaware, Lackawanna & Western Railroad Company for ownership, management, and operation, and acquisition by the latter of control of the New York, Lackawanna & Western Railway Company of Pennsylvania, through ownership of stock, approved and authorized.
2. Authority granted to the Delaware, Lackawanna & Western Railroad Company (*a*) to issue certificates of deposit in respect of not exceeding 98,320 shares of the capital stock of the New York, Lackawanna & Western Railway Company, not exceeding $5,899,200 of first and refunding mortgage 5-percent bonds, series C, and $3,932,800 of income mortgage bonds, both of the New York, Lackawanna & Western division and scrip certificates representing fractional interests in these bonds; and (*b*) to assume obligation and liability under a merger agreement in respect of the payment of the principal of and interest on $23,639,000 of bonds of the New York, Lackawanna & Western Railway Company, consisting of $13,639,000 of first and refunding mortgage 4-percent gold bonds, series A, and $10,000,000 of first and refunding mortgage 4½-percent gold bonds, series B; all in connection with the merger of the properties of the 2 companies.

Chauncey H. Hand, Jr., *F. P. Hammond, Jr.*, and *Douglas Swift* for Delaware, Lackawanna & Western Railroad Company.

Frederick M. Schlater for New York, Lackawanna & Western Railway Company.

Edwin M. Slote for intervener.

REPORT OF THE COMMISSION

DIVISION 4, COMMISSIONERS PORTER, MAHAFFIE, AND MILLER

BY DIVISION 4:

No exceptions to the report proposed by the examiners were filed.

The Delaware, Lackawanna and Western Railroad Company and The New York, Lackawanna and Western Railway Company, herein after referred to individually as the Delaware company and the New York company, respectively, and collectively as the applicants, on December 16, 1943, filed a joint application under section 5 (2) of the Interstate Commerce Act, as amended, for authority (1) to merge the

[1] This report also embraces Finance Docket No. 14434, Delaware, Lackawanna & Western Railroad Company Securities and Assumption of Obligation and Liability.

properties of the latter into the former for purposes of ownership and continued management and operation, and (2) to acquire as a result of such merger control of the New York, Lackawanna & Western Railway Company of Pennsylvania, hereinafter referred to as the Pennsylvania subsidiary, through ownership of capital stock by the Delaware company. On the same date, the Delaware company applied for authority under section 20a of the act (1) to issue certificates of deposit in respect of not exceeding 98,320 shares of the capital stock of the New York company, not exceeding $5,899,200 of first and refunding mortgage 5-percent bonds, series C, and $3,932,800 of income mortgage bonds, both of the New York, Lackawanna & Western division, and scrip certificates representing fractional interests in these bonds; and (2) to assume obligation and liability in respect of $23,639,000 of bonds of the New York company, consisting of $13,639,000 of first and refunding mortgage 4-percent gold bonds, series A, and $10,000,000 of first and refunding mortgage 4½-percent gold bonds, series B, all in connection with the proposed merger. A hearing was held, at which a stockholder of the New York company was permitted to intervene in opposition to the applications. No representations have been made by State authorities, and no other formal objection to the applications has been offered.

JURISDICTION

The intervener is the owner of 37 shares of capital stock of the New York company. His counsel questioned our jurisdiction to proceed under section 5 (2) of the act on the grounds that, as the proposal constitutes but one step in a general program to merge various properties now being operated under leases by the Delaware company and such general program is being presented piecemeal, the Commission is not afforded an opportunity to pass upon the fairness of the entire plan; and that what appears to be a merger is in fact a reorganization of the Delaware company, and therefore a matter within the provisions of section 77 of the National Bankruptcy Act. Such contentions appear to be without merit. The New York company is the most important of the lessor companies in main-line mileage, being almost double that of the Delaware company, and from a traffic standpoint it must necessarily handle all of the system traffic exchanged at the western end of the line. Other leased lines cover principally branch-line mileage. Merger of the properties involved in this proceeding is not dependent upon the merger of other lessor properties. Furthermore, a carrier is not to be condemned for its efforts to merge the properties of its lessors into its own and to issue securities incidental thereto, if it appears that by so doing it may later avoid a reorganization under section 77. The matter is one over which we have jurisdiction.

THE DELAWARE COMPANY

History.—The Delaware Company was incorporated on March 19, 1849, as the Ligett's Gap Railroad Company, under a Special Act of the Legislature of Pennsylvania, approved April 7, 1832. Its present name was approved by an act of the legislature dated March 11, 1853. Its charter consists of various statutes and extracts of statutes of the Commonwealth of Pennsylvania and agreements of merger, and, while not incorporated in any other State, it is authorized to do business in the States of New Jersey and New York.

Physical property.—It operates a main line of railroad extending from Hoboken, N. J., to Buffalo, N. Y., a distance of 396 miles, through the States of New Jersey, Pennsylvania, and New York. Its system includes 15 leased lines, in which it owns varying proportions of capital stocks and bonds. That part of its line situated in the State of Pennsylvania is not operated under a lease arrangement. All of its other lines, with 1 minor exception, are operated under long-term leases. The excepted line, 6.38 miles in length, the Pennsylvania subsidiary, is controlled through stock ownership by the New York company, and is operated by the Delaware company by virtue of its lease with that company. The main feature of all these leases is that the Delaware company agrees to pay as rental interest on any bonds of the leased-line companies where bonds have been issued, and a fixed amount per share per annum to the stockholders of such companies.

Financial.—The Delaware company's authorized capital stock consists of 1,748,150 shares of the par value of $50 a share, of which 1,688,824 shares representing $84,441,200, are outstanding. Each share is entitled to 1 vote. As of February 1, 1943, there were 9,672 stockholders. The Delaware company has no issued or outstanding bonds, but is the lessee of certain equipment under equipment-trust agreements, and is the guarantor of equipment-trust certificates outstanding thereunder, which as of December 31, 1943, amounted to $5,244,426.68.

The Delaware company owns all the outstanding stock of the Harlem Transfer Company and of the New York & Hoboken Ferry Company, the latter owning all of the outstanding stock of the Hoboken Ferry Company. It also owns 9,641 shares, or 20.4 percent, of the stock of the Lehigh & Hudson River Railway Company. Approximately 7.86 percent of the Delaware company's common stock is owned by the New York Central Railroad Company, and 300 shares are owned by the Allentown Railroad Company.

Immediate outlook of Delaware company system.—The Delaware company as a system, and its leased lines individually are or will be affected by a number of court actions and decisions in various stages of litigation, some in regard to the payment of Federal income taxes, and others in regard to the payment of property taxes to the State of

New Jersey. Of minor concern are other suits by leased lines against former directors, and stockholders' suits. The decisions in the Federal income tax suits will affect both the Delaware company and its leased lines, but the decisions in the New Jersey property tax suits will directly affect only the lines in New Jersey and the Delaware company.

The possible effect of adverse decisions in these suits on the Delaware system as a whole is depressing, especially when considered in connection with its earnings record in the pre-war period and the probable reduction from its war-period earnings when business becomes more normal. In the period 1932–39 inclusive, the Delaware company sustained deficits after fixed charges in the aggregate amount of $15,974,786. After fixed charges, it earned in 1940 $205,277; in 1941 $3,671,698; in 1942 $5,149,485; and in 1943 $4,688,759.

General proposals to improve situation.—The Delaware company in an attempt to avoid insolvency, has begun and carried on negotiations with the boards of directors of its various lessor companies, with a view to acquiring their properties by merger, or in some cases by purchase of assets. Such a program is designed to achieve a reduction of the existing fixed charges payable by the Delaware company under the provisions of the various leases, to result in the payment of Federal income taxes and interest of the lessor companies claimed for past periods, to settle the pending tax litigation, and to eliminate Federal income tax problems for the future.

Of its 15 leased lines, 7 will be involved in possible mergers. In those not to be merged the Delaware company owns a majority of the stock, while in those involved in proposed mergers, its stock interests are small. The 7 companies involved are: The Lackawanna Railroad Company of New Jersey, the Morris & Essex Railroad Company, the New York company, the Oswego & Syracuse Railroad Company, the Utica, Chenango & Susquehanna Valley Railway Company, the Valley Railroad Company, and the Warren Railroad Company. The property of the Valley Railroad Company will be acquired by purchase and the company dissolved, the procedure being slightly different from the others. Four of these companies are parts of the main line of the Delaware company, viz, the New York company, the Morris & Essex Railroad Company, the Lackawanna Railroad Company of New Jersey, and the Valley Railroad Company.

The negotiations with the New York company have reached the stage of the present applications, which are preliminary to the carrying out of the whole program. As to other companies, an agreement has been entered into with the Valley Railroad Company and an application of the Delaware company for authority to acquire control of the Valley Railroad Company, through ownership of stock, and to pur-

chase the property was approved by us on April 25, 1944, in *Valley Railroad Company Control*, 257 I. C. C. 812. Accords have been reached with representatives of the boards of directors of the Morris & Essex Railroad Company, of the Lackawanna Railroad Company of New Jersey, and of the Utica, Chenango & Susquehanna Valley Railroad Company, on the basis of which the boards of directors of those companies and the board of managers of the Delaware company have authorized their representatives to proceed to the drafting of detailed merger agreements, which are now in process of preparation.

THE NEW YORK COMPANY

Physical.—The New York company, incorporated on August 24, 1880, under the laws of the State of New York, is the most important, as heretofore stated, of the leased lines of the Delaware company system. Its line extends from Binghamton to Buffalo, N. Y., a distance of 214.44 miles, all main-line mileage, and, as stated heretofore, includes the 6.38 miles owned by the Pennsylvania subsidiary, all of which are operated by the Delaware company under a lease dated October 2, 1882, which continues for the corporate existence of the New York company, and any renewals thereof, being in effect a lease in perpetuity. The New York company has no operating equipment and the property has been under lease to the Delaware company since opened for operation, or soon thereafter.

Lease.—Under the lease the Delaware company agrees, among other things, to pay as rental directly to the holders of the capital stock of the New York company 5 percent per annum upon the par value of the stock of the New York company in quarterly payments on January 1, April 1, July 1, and October 1, free of all taxes, assessments, and impositions during the term of the lease. It also agrees to pay during the term of the lease all taxes and assessments imposed, levied, or assessed on any of the leased property, or on the business, or any business done on or with the property, or on the income or profits of the business, or on the lessor as a corporation, or on any of its rights, privileges, or franchises. It further agrees to maintain the property, and to assume all existing liabilities of the lessor company including outstanding bonds. The rental payments in respect of capital stock amount to $500,000 a year, of which $8,400 accrues to the Delaware company by virtue of stock ownership.

These rental payments, as well as those of the other leased lines, are involved in the litigation in regard to Federal income tax payments.

Financial.—The authorized capital stock of the New York company is 100,000 shares, of a par value of $100 a share, representing $10,000,000, all of which are issued, each share being entitled to 1

vote. The Delaware company owns $168,000 of this stock, and the remaining $9,832,000 thereof is in the hands of the public, the number of stockholders as of May 20, 1943, being 1,946. The New York company has heretofore issued and there are at present outstanding $13,639,000 of its first and refunding mortgage 4-percent gold bonds, series A, and $10,000,000 of its first and refunding mortgage 4½-percent gold bonds, series B, all issued under and secured by the first and refunding gold bond mortgage, dated May 1, 1922, between that company and The Farmers' Loan & Trust Company (now City Bank Farmers Trust Company), as trustee, and supplement thereto, dated May 1, 1934, which provides for a total issue of $30,000,000 of bonds thereunder, indicating an unissued amount of $6,361,000. This mortgage is a first lien on the properties of the New York company. Series A and B bonds are dated May 1, 1922, and May 1, 1923, respectively, and both series mature May 1, 1973. Payment of the principal of and interest on the outstanding bonds has been guaranteed by endorsement by the Delaware company under the lease arrangement. Neither series is subject to redemption, and no sinking funds are provided for either.

As stated before, the New York company owns all of the outstanding shares of capital stock of the Pennsylvania subsidiary, consisting of 240 shares.

The secretary and treasurer, the assistant secretary and assistant treasurer, and the comptroller of the Delaware company hold positions in the New York company of second vice president, secretary and treasurer, and comptroller, respectively.

Because the proposed merger is so closely connected with, and is dependent on the pending litigation, a discussion of that litigation will follow.

PENDING LITIGATION

Federal income tax suits.—In 1939, the Federal Government brought three suits against the Delaware company and three of its lessor companies, viz, The Warren Railroad Company, the Syracuse, Binghamton & New York Railroad Company, and the Passiac & Delaware Railroad Company, in the District Court of the United States for the Southern District of New York, involving leases of the properties, in which the Government sought primarily a determination that under the provisions of the leases of these companies the Delaware company was liable for the payment of Federal income taxes which had been assessed against the lessor companies. These suits are referred to as the Warren suits. The district court granted judgments for the Government and against both defendants in each case, that against the lessors being by default. *United States* v. *Warren*, 39 Fed. Supp. 135.

From this judgment the Delaware company appealed to the Circuit Court of Appeals, Second Circuit, and the judgment of the lower court was reversed. (127 Fed. (2d) 134.) However, it held that the Federal Government could collect such taxes out of the rentals payable to the stockholders of the lessor companies and for that purpose might file a supplemental petition for judgment in each suit asking that the Delaware company be enjoined from making further payments to the stockholders of the lessor companies out of any rentals then or thereafter payable until the Federal Government should from time to time have an opportunity to levy thereon for such taxes. Petitions have accordingly been filed in these suits by the Federal Government and temporary injunctions *pendente lite* have been granted.

Additional suits have also been commenced by the Federal Government against the Delaware company and other of its lessor companies, including the New York company, in which similar temporary injunctions against further payments in respect of the capital stocks of such lessor companies have been granted.

Also, suits have been commenced by some of the lessor companies and by the stockholders of these companies, in which the question of the liability of the Delaware company for the payment of Federal income taxes assessed against the lessor companies on account of the rentals paid by the Delaware company to their respective stockholders is raised for determination.

As stated above, the Warren decisions against the lessor companies in the district court were rendered on default, a point stressed by the intervener. He also alleged, and the applicants did not deny, that on April 18, 1942, after the decision was rendered, an amendment to the mandate of the circuit court was entered, specifying that the matter was not *res adjudicata* between the lessors and the lessee of the properties on the question of whether the Delaware company is obligated to pay income taxes of the lessors, or on their rights to litigate the question. The amendment is not included in the reported decision. The intervener also alleges that counsel for the New York company, who is also counsel for the Warren company, is responsible for the amendment to the mandate, and should have included this information in the applications filed with the Commission, as well as the fact that the Delaware company had paid all the income taxes of the New York company from the enactment of the income tax laws in 1913, to 1932, and that payment was discontinued without notification or explanation to the stockholders of the New York company. Because of these omissions, the intervener asserts, the stockholders who are not conversant with the situation might be led to believe that their rights had already been determined by an adverse decision. The intervener also

insisted that the applications were premature for two reasons, viz, applicants should await the decisions on the suits pending in the courts, and applications should be filed with the Commission only after all the leased companies had agreed to the mergers, so that the stockholders could compare positions and terms of all the companies.

The Delaware company stipulated at the hearing that no decision had been reached in the New York company suit, and confined the analogy to the Warren decisions to the statement that if a similar decision were reached in the New York company litigation, certain results were expected. Counsel for Delaware company objected to a postponement of the filing of applications because of the injury to its financial standing with the passing of time. We believe that the stockholders will not be injured by any of the allegations recited above, because, after considering the facts set forth in the report, the stockholders not disposed to accept the terms may refuse to do so.

(*a*) *Federal income taxes due.*—The unpaid Federal income taxes of all the lessor companies for the period 1934–42, inclusive, was $5,202,367.75, and the interest penalties thereon were $973,105.85, making a total of $6,175,473.60. The total dividend rental payable on the stocks of all the lessor companies for 1943 was $3,033,956, the Delaware company's portion being $411,259, making a net of $2,622,697. However, the tax is computed on the whole rental, from which interest of $307,985 is deducted, making the taxable income $2,725,971. The estimated tax for 1943 was given as $1,364,038, including interest. This would increase the total unpaid Federal income tax, so that as of December 31, 1943, it would amount to $7,539,511.60 with interest. Included therein is the New York company's indebtedness of $1,044,043.61 up to December 31, 1942, with the estimated tax for 1943 of $231,293, including interest, a total of $1,275,337. These figures are based on a tax rate of 40 percent applied to rental income. If the decision of the Warren cases, referred to above, prevails, these taxes would have to be paid to the Government before the stockholders could receive any further rental. In the case of the New York company, the total rental is $500,000 annually, but the Delaware company's portion is $8,400, which would make the amount payable to others $491,600. Payment of the back taxes would therefore postpone payment of rents to the stockholders of the New York company for several years. The payment of this rental has been enjoined since July 1, 1942, and as taxes and interest will accrue for 1944, it will be some time, possibly in 1946, before the stockholders will receive any rental income. When the rentals become current with the taxes, assuming the Warren decisions to be applicable to the New York company situation, the stockholders' rental would be reduced 40 percent, or to approximately $3 a share.

In the proposed merger, which will be discussed hereinafter, this matter of the New York company's possible liability for past income taxes and interest to the Federal Government is to be adjusted by the Delaware company's paying the whole amount of the taxes and interest at the time of the merger, and withholding payment of contingent interest on the proposed income bonds held by the New York company stockholders until the amount of interest so withheld will equal 50 percent of the back taxes and interest. That is, the matter is to be compromised, in view of the uncertainty of the outcome of the litigation now pending, by the Delaware company and the New York company each paying 50 percent of the amount due.

(*b*) *Intervener's objections.*—This adjustment the intervener also objects to, because of the fact that the Delaware company had paid the income taxes of the New York company from 1913 to 1932, and because there has been no decision establishing any obligation of the New York company to pay any of such income taxes. The Delaware company is relying on the decisions in the Warren cases as being analogous to that of the New York company suit, which the intervener claims are not controlling, as heretofore stated.

New Jersey property tax suits.—These suits affect primarily the Delaware company and its financial standing, although the properties of the lessor companies in the State of New Jersey are also affected. However, none of the properties of the New York company are located in that State, so its only concern with these suits is in regard to their effect upon the Delaware company's financial standing.

On July 21, 1943, the Chancery Court of New Jersey, in an action entitled David T. Wilentz, Attorney General of New Jersey, Informant, and Robert C. Hendrickson, State Treasurer, Defendant, held that Chapter 290 (P. L. 1941, p. 768) as amended by Chapter 241 (P. L. 1942, p. 651) of the laws of New Jersey, being an act relating to the collection of certain delinquent taxes upon railroad companies, was unconstitutional. The decision of the chancery court was adverse to the Delaware company. Appeal was taken to the Court of Errors and Appeals of New Jersey, the highest court in the State, and the case was argued on February 1, 1944. The taxes involved are property taxes on all the leased lines and the Delaware company's property located in the State of New Jersey, for the years 1934 to 1940 inclusive, with interest and penalties at 1 percent per month, the latter being the controversial subject.

(*a*) *Taxes involved.*—If the decision of the chancery court is affirmed, the total amount of interest penalties which will have accrued against the Delaware company as of December 31, 1943, will be $7,127,794, and the total liability as of that date for both principal and interest penalties is computed at $14,363,941. A substantial

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amount of this sum has been tendered to the State, but has not been accepted as payment for back taxes, but, deducting such tender, there will remain an obligation of $10,645,238.38. Of this amount, $4,099,475.83 represents principal, and $6,545,762.55 penalties. The amount of the principal is protected by reserves shown in the general balance sheet of the Delaware company as of December 31, 1943. Account No. 767, Accrued Tax Liability of $7,202,509.30, includes $1,400,000, representing 2 years' liability for unpaid New Jersey taxes; and the remaining amount of the accrual of the principal of the New Jersey tax is included in Account No. 770, Other Deferred Liabilities, to the extent of $2,699,475.83. The principal amount of the tax is not in controversy, and hence has been accrued. The penalties, which are the subject of litigation, are not provided for in the reserves. An analysis was made of the cash accounts in an effort to ascertain whether the Delaware company had sufficient cash to pay for this tax obligation if the decision were adverse. This analysis revealed that Account No. 708, Cash, is $12,034,321.01; Account No. 709, Temporary Cash Investments, $9,538,000; and Account No. 711, Special Deposits, $6,083,850.74; a total of $27,656,171.75. The Temporary Cash Investment consists entirely of U. S. Government bonds. The Special Deposits are in general earmarked, but with one exception—that of enjoined rental—could be used for general corporate purposes. This account includes enjoined rental, $3,358,000; New Jersey franchise tax payable December 1, 1944, $1,279,000; railroad retirement tax, $551,931; unemployment insurance tax $255,287; withholding tax of employees $241,086; freight transportation tax of 3 percent from shippers, payable to the U. S. Government, $214,265; and passenger tax of 10 percent, $119,216. Additional cash from earnings would normally increase these accounts.

Effect of adverse decisions in pending litigation.—Assuming that decisions in the Federal income tax suits and the New Jersey property tax suits were all adverse to the Delaware company, that company would be obligated to pay not only the $10,645,238.38 remaining unpaid of the New Jersey back taxes and penalties, but also Federal income taxes and interest in regard to leased-line rentals, aggregating $7,539,512, a total of $18,184,750.38, both computations as of December 31, 1943.

Assuming also that the Delaware company was unable to pay this amount, or, if able to do so, unable to continue paying its fixed rental charges plus the Federal income tax on its leased lines, its only resort would be bankruptcy, and following that reorganization, presumably under section 77. It was admitted that such a contingency has been considered by both applicants, and that 44 percent of the stockholders of the New York company, represented by dealers and insurance com-

panies, after considering all contingencies of such a reorganization, have reached an accord on the merger agreement.

EARNINGS SURVEY OF NEW YORK COMPANY

No individual operating account is kept for the New York company. At the request of the Delaware company, an appraisal of the earnings of the leased lines, referred to as the Wyer report, was made by William Wyer, now chief executive officer for the trustees of the Central Railroad Company of New Jersey, but the report was not used in arriving at the proposed exchange of securities, except possibly to determine priority of contingent interest on the new income mortgage bonds and for the purpose of determining whether or not in the event of bankruptcy the lease would be rejected. The comptroller of the Delaware company made several estimates of segregated earnings which were incomplete and not in conformity with the Commission's rules in ascertaining segregated earnings. That information, however, was used in the preparation of the Wyer report, a copy of which was distributed to the leased lines. No other consideration was given to earnings resulting from the operation of the New York company's property. A copy of the Wyer report was offered as his own exhibit by counsel for the intervener, but applicant's counsel objected to it on the ground that the author of the report was not present for cross-examination, and the report was not received in evidence.

The president of the New York company made a general survey of the earnings on traffic handled on that company's line from which he concluded that such earnings were sufficient to warrant the continued operation of the property under the terms of the lease even during the pendency of bankruptcy proceedings. The estimate, for which 1940 traffic was used, was based on ton-miles at the average rate per ton. Operating expenses were determined on the basis of a 60-percent operating ratio. A deduction of 20 percent was made for loss of any traffic furnished by the New York terminal of the Delaware company. Taxes were estimated at the rate of 40 percent after first deducting interest on bonds, and 4 percent interest was allowed for equipment in addition to interest on advances of $15,000,000 by the Delaware company for improvements. No figures were submitted to us, but the witness stated that such calculations resulted in earnings of the New York company of about $9 a share. In arriving at that result, it was assumed that the operation was conducted by the Delaware company. The witness stated that the most important connection for the New York company is the Delaware & Hudson Railroad at Binghamton; that the Erie Railroad parallels the New York company mile for mile; that there is no assurance, in the event of independent operation of the New York company, the principal connections at the

western end would not immediately switch their traffic elsewhere; and that he could give no assurance that the New York company could earn operating expenses under independent operation.

Although no use of the Wyer report was made other than as heretofore stated, the earnings estimated in that report, according to the witness, were also about $9 a share, but under a different method of computation.

Eliminating the possibility of the railroad being returned for independent operation and without taking into account possible liability for Federal income taxes, the stockholders of the New York company would then be entitled to $5 a share rental in perpetuity, or for so long as the Delaware company could continue to operate. Having thus satisfied themselves that the earnings of the New York company were sufficient to insure that the lease would not be disaffirmed in the event of bankruptcy of the Delaware company, the officials of the New York company started negotiations on a settlement with no relation to earnings.

PRELIMINARY STEPS TO CARRYING OUT PROPOSED MERGER

Having reached an accord with a substantial percentage of the stockholders of the New York company, the Delaware company has caused the merger provisions to be embodied in an agreement of merger, referred to hereinafter as the agreement, which was made between the two companies and their respective boards of directors under date of November 10, 1943. To further the consummation of the agreement and the general program of the Delaware company, a plan of adjustment, hereinafter referred to as the plan, has been prepared setting forth certain provisions for carrying out the merger.

As an initial step in carrying out their program, the applicants have filed the present applications, seeking approval and authorization of the requests therein. Upon the granting of these requests, it is proposed to submit the agreement to the stockholders of the New York company and of the Delaware company, and if adopted by at least two-thirds of the voting power of each of these companies, that fact will be certified by the proper officer of each company. In accordance with the provisions of the plan, assenting stockholders will be requested to deposit their certificates of stock with the First National Bank of the City of New York, which will be appointed as the Delaware company's agent for the purpose of receiving such deposits and issuing certificates of deposit therefor. Upon securing the necessary approvals of public authorities and the adoption of the agreement by the stockholders of the two applicants, the New York company will be merged into the Delaware company under the name of The Delaware, Lackawanna and Western Railroad Company.

DESCRIPTION OF AGREEMENT

When effective.—The agreement provides that the contemplated merger will become effective only if the conditions set forth therein are met. It provides that any time after the agreement has been adopted by the stockholders of the two companies and within 7 months after adoption by the stockholders of the New York company, certified original counterparts may be filed by the Delaware company with the Department of State of the State of New York, and the Secretary of the Commonwealth of Pennsylvania, the Clerk of the County of New York, N. Y., and the Office of the Prothonotary of the County of Lackawanna, Pa., regardless of whether the conditions of the agreement have been met, and such filing may be made by the New York company if the conditions have been met. Thereafter, such filing may be made by either company if the conditions have been met, or upon written consent of both companies if the conditions or either of them have not been met. The essential conditions are:

(1) That the New York company must agree to make arrangements satisfactory to the Delaware company for the dismissal at or prior to the time of such filing, on the merits and without costs to any party as against the others of any suits in which the Delaware company, or any director, officer, or former director or officer of the New York company is or may be a party plaintiff, or which the New York company may have caused or may cause to be brought, including particularly, but not limited to, the suit entitled *"The New York, Lackawanna and Western Ry. Company* v. *Louis L. Babcock, et al.,"* pending in the Supreme Court of the State of New York for the County of New York, and the suit entitled *"The New York, Lackawanna and Western Railway Company and Frederick Hoadley, et al.* v. *The Delaware, Lackawanna and Western Railroad Company,* pending in the District Court of the United States for the District of New Jersey; and

(2) That at least 90 percent of the outstanding shares of the capital stock of the New York company owned by others than the Delaware company shall at the time of such filing be on deposit in accordance with the plan, or, at the time of such filing, other evidences of assents to the merger by the holders of such stock; as provided in the plan, shall be in effect.

The date of the last filing in the afore-mentioned county and State offices will be referred to as the date of the merger, and thereafter the two companies are to be considered as one corporation, possessing within the two States of New York and Pennsylvania all the rights, privileges, exemptions, and franchises, and subject to all the restrictions, disabilities, and duties of both companies; and all the property of the two companies, and all debts due to each, and all stock and choses in action belonging to each will be deemed to be vested in or remain vested in the Delaware company without further act or deed. In the event of any conflict between the rights, obligations, et cetra of the two companies, under their respective charters or articles of asso-

ciation, the provisions of the charter of the Delaware company will prevail.

Proposed indentures.—As soon as reasonably convenient after the date of the merger, the Delaware company will execute and deliver a supplemental indenture to the first and refunding gold bond mortgage, dated May 1, 1922, of the New York company, to the City Bank Farmers Trust Company, as trustee, which will provide for the issue of $5,899,200 of first and refunding mortgage 5-percent bonds, series C, to be issued under that mortgage as supplemented. Such an issue will result in closing that mortgage, the amount of issued bonds thereunder then to total $29,538,200.

It will also execute to the Manufacturers & Traders Trust Company of Buffalo, N. Y., or such other bank or trust company as it may select, in case the named bank is unable to act, an income-bond mortgage, providing for the issue of $3,932,800 of income mortgage bonds, and creating a lien for the security of such bonds upon the property and franchises now covered by and subject only to the lien of the first and refunding gold mortgage. The terms and conditions of these mortgages and bonds will be discussed hereinafter.

New York company stock.—The agreement provides that upon the date of the merger holders of the capital stock of the New York company, or holders of certificates of deposit representing such stock, or both, will be entitled to receive from the Delaware company, which will issue and pay to such holders as soon as reasonably convenient thereafter, in full substitution for each share of such capital stock, and for all rights, privileges, and claims then or theretofore incident thereto, including any rights to rental under the lease of the properties of the New York company to the Delaware company, dated October 2, 1882, bonds or scrip certificates or both bonds and scrip certificates representing fractional interests therein, and cash, as follows:

(a) $60, principal amount, of first and refunding mortgage 5-percent bonds, series C.

(b) $40, principal amount, of income-mortgage bonds.

(c) Cash sums equal to and representing interest from the last rental-payment date (July 1, 1942) up to and including which rental under the lease between the two companies shall have been received by the holders of the capital stock of the New York company, to the semiannual payment date of May 1 or November 1, as the case may be, next preceding the date of the merger, at the rate of 5 percent per annum, on the $60, principal amount, of first and refunding mortgage 5-percent bonds, series C, any coupons representing such interest to be detached from the bonds prior to their delivery. No series C bonds and no income-mortgage bonds will be issued in respect of the 1,680 shares of capital stock of the New York company owned by the Delaware company, and these shares are not to be sold,

exchanged, or otherwise disposed of by the Delaware company while the agreement is in effect.[1]

(d) Scrip certificates, noninterest bearing, in bearer form, will be issued by the Delaware company in appropriate forms in the denomination of $20 each, to represent fractional interests in the first and refunding mortgage 5-percent bonds, series C, and in the income-mortgage bonds, and will entitle the holders thereof, upon the surrender for cancelation of such certificates having an aggregate face value of $100, to receive an equal principal amount of bonds of such issue, plus any interest on such bonds which shall have accrued and become payable since the semiannual payment date next preceding the date of the merger in case of the series C bonds, and since the interest-commencement date in the case of the income-mortgage bonds. The scrip certificates will be issued under an appropriate agreement with some bank or trust company, which will act as scrip agent, and the scrip certificates and agreement will contain such other terms and conditions as to termination of the certificates, sale of bonds represented thereby, distribution of cash proceeds of such sale to the holders of scrip certificates as the boards of the two companies may determine.

The agreement also provides that all amounts owed by the Delaware company under the lease of New York company's properties accrued and unpaid to the date of the merger will become payable the day preceding such merger date.

The New York company, under the agreement, agrees not to increase its indebtedness or obligations beyond those existing as of June 30, 1942, except for taxes, necessary and reasonable expenses in connection with the maintenance of its corporate existence, and the performance of its corporate functions, and such reasonable obligations as have been or may be incurred in connection with the litigation heretofore mentioned.

Modification of agreement.—Modification of the agreement, by written supplement thereto, is provided for at any time prior to the date upon which it is adopted by the stockholders of both corporations.

DESCRIPTION OF PLAN OF ADJUSTMENT

The plan for reduction of fixed charges by merger of the Delaware company and the New York company prescribes the procedure for consummating the proposed merger.

Method of assenting to plan.—Holders of shares of capital stock of the New York company may assent to the plan by depositing with the First National Bank of the City of York, as the Delaware company's agent, their certificates for such stock, either assigned or accompanied by appropriate instruments of assignment in blank, together with the letter of transmittal and assent in the form prescribed, duly executed. A duly executed proxy is to be sent to the bank at the same time, authorizing the persons named therein to vote such stock in approval of

[1] Interest from the enjoined rental date, July 1, 1942, to the date of the merger, is to be computed on both types of bonds, payable in cash in respect of series C bonds, but postponed, together with future interest, in respect of the income mortgage bonds, for a period sufficient to accumulate funds to pay one-half of the past due Federal income taxes.

the agreement at the meeting of the stockholders of the New York company, to be called for the purpose.

The Delaware company will reserve the right to accept assents to the plan from any holder of more than $50,000, par amount, of such stock without deposit, on such terms and conditions as it may determine. While a certificate of deposit representing such stock is outstanding, any amounts which may be paid by the Delaware company in respect of deposited stock or of any of the securities to be issued for such stock upon the effective date of the merger will be paid to the registered holder of such certificate of deposit. The Delaware company may fix a record date for the determination of holders of certificates of deposit entitled to such payment, and upon any such payment the deposited stock certificates may be appropriately stamped in evidence thereof.

Upon written request at the time of deposit, stockholders will be reimbursed for all ordinary expenses of forwarding their stock certificates for deposit, including registration costs. Insurance of all stock forwarded by registered mail has been arranged for.

The Delaware company will issue certificates of deposit in fully registered form in respect of all stock certificates deposited. A detailed description of these certificates will be given hereinafter.

Revocation of assents.—Assents by stockholders of the New York company may be revoked, and deposited certificates for such shares may be withdrawn by written notice to the agent accompanied by surrender of the certificate or certificates of deposit, at any time prior to approval and adoption of the agreement, or before the plan has been declared, or has become effective, except during the period provided for in the plan if the plan shall have been declared operative.

Method of declaring the plan operative.—The Delaware company may declare the plan operative whenever in the judgment of its board of managers the holders of a sufficient number of shares of capital stock of the New York company have assented to or become bound by the plan to make it advisable to proceed.

The right to revoke assents and to withdraw certificates of stock will cease for a period of 6 months from and after 7 days after the the first publication of notice that the plan has become operative, but such declaration will have no other effect and will not otherwise change the rights of the stockholders of the New York company whether or not they may have assented to the plan. Unless the agreement has been approved and adopted, prior to or within the 6 months' period, by the stockholders of the New York company, or the plan has been declared or otherwise become effective, assents may be revoked and certificates of stock may be withdrawn between the term-

ination of the 6 months' period and the date the plan has been declared, or may otherwise become, effective.

Modification or abandonment of plan.—The plan and also the agreement may be modified or amended at any time and from time to time before it becomes effective, notice to be given as provided in the plan. At any time within 30 days after the first publication of such notice, and whether or not the plan shall then have been declared operative or the agreement shall have been adopted by the New York company's stockholders, assenting stockholders of the New York company may revoke their assents and withdraw deposited certificates by giving written notice to the agent accompanied by surrender of their certificates of deposit, if any, in negotiable form. Return of such certificates will be without expense to the holder.

Stockholders who do not revoke their assents or withdraw deposited certificates of stock within the 30-day period will be classed as assenting to such modification or amendment, and to have confirmed any proxy previously executed by such stockholder or his predecessor, and authorizing the voting of such stock in approval of the agreement, as a proxy authorizing the voting of such stock in approval of the agreement as so modified or amended, and such stockholder theretofore bound by the plan shall be bound by such modification or amendment with like effect as if such modification or amendment had been part of the plan, including the agreement, prior to his assent.

The plan may be abandoned, including the abrogation of the agreement and abandonment of the merger, at any time prior to the filing of the agreement, whether or not the plan has been declared operative or effective, by publishing notice of such abandonment as provided therein. If the plan is abandoned, all deposited stock certificates will be returned to the respective registered holders of certificates of deposit without expense to them.

Method of consummating plan.—Unless the Commission authorizes the issue of the certificates of deposit, no deposits or assents will be requested or accepted by the Delaware company. When the plan has been declared effective, notice will be given as provided therein, and also will be mailed to registered holders of certificates of deposit. Thereupon the plan will be effected by the consummation of the merger and by the execution by the Delaware company and the respective trustees of the supplemental indenture to the first and refunding gold bond mortgage and the income bond mortgage, and the securities proposed by the plan will be issued by the Delaware company. The right to revoke assents and withdraw certificates of stock will cease at the close of business on the day that the first notice that the plan has been declared effective has been published. The notice that the plan has

been declared effective will state the date on and after which holders of certificates of deposit should surrender them in negotiable form to the agent in return for bonds, scrip certificates, and cash.

DESCRIPTION OF INDENTURES

Supplemental indenture.—The supplemental indenture to the first and refunding gold bond mortgage will be executed by the Delaware company to the City Bank Farmers Trust Company, as trustee, under date of July 1, 1942, and will provide for the issue of series C bonds to the principal amount of $5,899,200.

Sinking-fund provisions, restrictions on dividends, and modification of the indenture and bonds are similar to those in the income bond mortgage, under which they are discussed at some length.

Description of series C bonds.—The series C bonds will be issuable in coupon form in denominations of $1,000, $500, and $100, registrable as to principal, and in fully registered form in denominations of $1,000 and multiples thereof. If in coupon form, they will be dated the day of the last semiannual rental date up to and including which rental under the lease between the two applicants has been received by the holders of the capital stock of the New York company, viz, July 1, 1942. However, if, at the date of the merger, any additional rent under the lease shall have been received by the holders of the capital stock of the New York company, the series C bonds will be dated as of the subsequent semiannual rental date up to and including which such rents have been received, instead of being dated July 1, 1942. If in fully registered form, they will be dated the date of issue. They will bear interest at the rate of 5 percent per annum, payable semiannually on May 1 and November 1 from date of the bonds, principal and interest and premium, if any, being payable in such coin or currency of the United States as at the time of payment is legal tender for public and private debts. Such interest will be payable without deduction for any taxes, assessments, or governmental charges, except State, succession, and inheritance taxes, and State income taxes, and except Federal income taxes exceeding in the aggregate 2 percent per annum, which the Delaware company may be required or permitted to pay thereon or deduct therefrom by any present or future law of the United States, or of any State, county, or municipality thereof, or other taxing authority. They will mature May 1, 1973. They will be redeemable at the option of the Delaware company, or for sinking-fund purposes, in whole, or from time to time, in part on any interest-payment date subsequent to the date of the bonds and prior to maturity, at their principal amount, if redeemed by the use of any sinking-fund moneys, or, if otherwise redeemed, at 105, if the redemption is prior to May 1, 1971, and at their principal amount, if redeemed thereafter, in each case with accrued interest to date of redemption.

Income-bond mortgage.—The income-bond mortgage will be executed by the Delaware company to the Manufacturers & Traders Trust Company, of Buffalo, New York, but if for any reason that company is unable to act, to such bank or trust company as the Delaware company may select as trustee. It will provide for the issue of, and for the terms and conditions of, $3,932,800, principal amount, of income mortgage bonds, and will create a lien for the security of such bonds upon the property and franchises now covered by and subject only to the lien of the first and refunding gold bond mortgage.

(*a*) *Description of income mortgage bonds.*—These bonds will be issued in coupon form in the denominations of $1,000, $500, and $100, registrable as to principal, and in fully registered form in denominations of $1,000 and multiples thereof. Coupon and registered bonds without coupons and the several denominations of either form are interchangeable in authorized denominations, but bonds of either form may not be exchanged for bonds of lesser denominations when less than $1,000. The bonds will be dated July 1, 1942, which, as has been stated, is the last semiannual rental date up to and including which rental under the lease between the applicants has been received by the holders of the capital stock of the New York company. If, at the date of the merger, any additional rental under the lease has been received by the holders of the capital stock, the income mortgage bonds, instead of being dated as of July 1, 1942, will be dated as of the subsequent semiannual rental date up to and including which such rentals have been so received. These bonds will mature May 1, 1993. They will bear contingent interest from and after an interest-commencement date computed at this time by an involved formula, but definitely determinable as of the date of the merger, and expressible upon the execution of the mortgage as of a definite date, at the rate of 5 percent per annum from the commencement date, as follows: (*a*) For any period from the commencement date to the next December 31, inclusive, it will accrue and be due on such latter date, and if there is available net income for such period, it will be payable on May 1 of the succeeding year to the extent of such available income so applicable; (*b*) for each succeeding calendar year interest will accrue and become due on December 31 of such year subject to the limitations of the mortgage, and if unpaid in respect of any calendar year, and if there is available net income applicable to such payment, will be payable on May 1 of the following year to the extent of such available net income; (*c*) amounts applicable to the payment of interest from available net income need be paid in multiples of only one-fourth of 1 percent, but interest otherwise payable on any May 1 but not paid because of these provisions will be reserved and added to the amount payable as interest on the next

May 1; (*d*) if at the end of any calendar year the aggregate amount of accrued and unpaid interest in respect of preceding years, plus interest at the rate of 5 percent per annum for such calendar year, on any income mortgage bond, less the sum of any interest on such bond theretofore payable but unpaid, and the amount of the available net income for such year determined as provided in the mortgage and applicable to the payment of interest on such bond, plus any amounts of accrued and unpaid interest on such bond in respect of preceding years, which shall have accrued pursuant to the provision for additional accruals as hereinafter set forth, shall exceed 15 percent of the principal amount of such bond, interest for such year to the amount of the excess shall not accrue nor become payable, but, if the amount of interest in respect of any such year on such bond which would not accrue under these provisions exceeds, as a result of any deduction because of deficiency of available net income for fixed charges for the year and certain other charges being carried forward into the succeeding year or years, what it would have been if such deduction had not been made, then interest in respect of such year on such bond in the amount of such excess will accrue and become due in addition to the amount of interest in respect of such year, if any, which would have accrued and become due in the absence of such provision; (*e*) accrued and unpaid interest on any income mortgage bond, together with currently accruing interest at the rate of 5 percent per annum, for any period from the last December 31, in respect of which interest shall not have accrued under the preceding provisions, will be payable on the stated maturity date of the bond or on the date on which the principal of such bond becomes due as the result of a call for redemption, or for any other reason, or on the date, if any, on which interest on such bond shall become fixed interest because of the happening of certain events described hereinafter; (*f*) upon the stated maturity of the principal of any income mortgage bond, or upon the maturity of the principal of such bond by redemption, declaration or otherwise, if the principal shall not then be paid, or if and when a petition or answer admitting the allegations of a petition shall be filed by the Delaware company under section 77 of the Bankruptcy Act or similar law at the time in force, or a permanent or confirmed appointment shall be made of any trustee or receiver for the Delaware company, or the greater part of its properties, then interest on such bond at the rate of 5 percent per annum shall forthwith from that time become fixed interest and be payable on succeeding May firsts.

(*b*) *Redemption.*—Outstanding income mortgage bonds, other than those pledged by or held by the Delaware company, may be redeemed before their stated maturity date at the option of that company, or

for sinking-fund purposes, at any time, as a whole or in part, at their principal amount if redeemed by the use of sinking-fund moneys, or, if otherwise redeemed, at 105, if the redemption occurs prior to May 1, 1991, and at their principal amount, if such redemption occurs on May 1, 1991, or thereafter, in each case with interest accrued and unpaid to date of redemption. If less than the whole of the bonds is called for redemption, such redemption shall be by lot, excluding those held by the scrip agent under the scrip agreement. Coupon bonds presented for redemption are to be accompanied by all coupons attached thereto at time of issue except those which became payable prior to date of redemption. In case of a registered bond to be redeemed in part only, the Delaware company will execute to the registered holder thereof at its expense a new bond or bonds of authorized denominations for the unredeemed portion of the bond so presented. Bonds called for redemption are to be canceled by the trustee.

Modification of both indentures and bonds issued thereunder.—The income-bond mortgage and the supplemental indenture, together with bonds issuable thereunder, may be modified or amended at any time upon the consent of the Delaware company, and the written consent of, or by favorable action of the holders of not less than two-thirds of the principal amount of outstanding bonds, exclusive of those held by or pledged by the Delaware company, affected by such modification, at a bondholders' meeting, but such modification must not alter or impair the obligation of the Delaware company to pay the principal of or interest on any bond at the time and place and at the rate and in the currency provided therein, without the holder's consent; *nor permit the creation by the Delaware company of any new mortgage or lien prior to or on a parity with the lien of the income-bond mortgage, unless consented to in the manner provided by the holders of all outstanding bonds issued under that mortgage;*[2] nor alter the specific provisions of the special and 20-percent sinking funds, hereinafter discussed.

Extension of series A, B, and C bonds.—The income-bond mortgage will contain no covenant against the extension of the first and refunding mortgage bonds, series A, B, and C on their maturity, but will affirmatively permit the extension of the principal thereof from time to time at the same or different rates of interest and with such other terms and provisions as the Delaware company may determine.

Sinking funds for both mortgages.—The income-bond mortgage, like the supplemental indenture, will provide for three sinking funds,

[2] The emphasized provision negatives the intervener's contention that the applications are premature and should await the completion of the merger program to protect the rights of the New York company stockholders.

the special sinking fund, the 20-percent sinking fund, and the general sinking fund.

A summarization of these funds follows: Initially, a special sinking fund will be created into which will be paid at the outset 18 percent of available net income after provision for contingent interest, capital fund, and certain other deductions, the percentages to be paid into such fund in respect of each year to be reduced 1 percent for specified reductions in the special sinking-fund base. A table showing the amounts of the sinking-fund bases and the percentage rates are shown in appendix I. Payments into this fund may be used to retire any bonds secured by liens upon properties now owned by the New York company, and may be so applied over a 3-year period to purchase, or, after the first year, to redeem such bonds. The special sinking fund, unless displaced by a general sinking fund, will be continued until either one of the following events occurs: (*a*) The aggregate amount of the first and refunding mortgage bonds of all series, plus the income mortgage bonds shall have been reduced to $20,000,000, principal amount; or (*b*) the fixed and contingent charges of the Delaware company shall have been reduced to not more than $4,000,000.

Upon the occurrence of either of these events, and the cessation of the special sinking fund, the Delaware company will pay, until none of the first and refunding bonds, series C, or income bonds are outstanding, or until its fixed and contingent charges have been reduced to not more than $3,000,000, into a 20-percent sinking fund, 20 percent of its remaining available net income, such moneys to be applicable to the retirement of any system securities, or to pay, or to reimburse the Delaware company for the payment, if made subsequent to December 31, 1942, of any liabilities for Federal or State taxes assessed against the Delaware company or any of its leased-line companies, or may be applied to pay any liabilities incurred by the Delaware company in connection with the acquisition of properties held by it under lease, including liabilities resulting from the exercise by stockholders of leased-line companies of any rights of appraisal. Sinking-fund money may also be applied in payment or reimbursement for payment of indebtedness incurred to pay such liabilities. Amounts paid into this fund may be applied over a 3-year period for the purposes outlined in the mortgages.

Before the termination of the special sinking fund as a result of contingencies provided therefor, the Delaware company may obligate itself to the trustees of the first and refunding mortgage and of the income-bond mortgage to establish a general sinking fund, in which case the special sinking fund will terminate and be superseded by a general sinking fund. The characteristics of the latter will be as follows:

Until the Delaware company's fixed and contingent charges shall have been reduced to not more than $4,000,000 per annum, it will pay not less than 60 percent of its remaining available net income into such fund annually, of which 15 percent will be applied to the retirement of any first and refunding mortgage bonds, series A, B, and C, and of income mortgage bonds and the remainder will be applied to the retirement, in the discretion of the Delaware company, of any system securities or to the payment or reimbursement for the payment of liabilities of the character described under the 20-percent sinking fund or for both such purposes. Thereafter, until the Delaware company's fixed and contingent charges shall have been reduced to not more than $3,000,000, it will pay not less than 20 percent of such remaining available net income into such general sinking fund, which may be applied to the retirement of any system securities, or to the payment or satisfaction of any of the liabilities hereinbefore mentioned, or for both purposes.

If the Delaware company's plan to acquire its leased lines is completed, it is expected that a general sinking fund of the character described will be established by similar covenants in the respective indentures, or supplements thereto, whereby certain percentages of the fund will be applicable to the retirement of particular securities, and the remainder applicable, in the discretion of the Delaware company, to the retirement of any system securities and to the payment of certain liabilities. The special sinking fund therefore will be of temporary character and will be superseded by the general sinking fund. Only one sinking fund will be operative at a time. The special sinking fund is a sinking fund entirely for the bonds of the New York company, but the general sinking fund will be a sinking fund for the securities of all of the companies which it is anticipated will be merged. A certain percentage of the funds of the general sinking fund will be applicable to the bonds of the New York company, but not the same percentage as that given in the special sinking fund.

Restrictions on dividends.—The Delaware company will covenant in both the income-bond mortgage and the supplemental mortgage that, until its fixed and contingent charges, exclusive of interest on obligations theretofore or thereafter issued in financing the acquisition of equipment, and exclusive of interest on securities pledged by, or held by it, have been reduced to not more than $4,000,000 per annum, it will not pay dividends on its capital stock out of available net income for the period July 1, 1943, to December 31, 1943, in excess of 40 percent of such part of the available net income as may remain for application under paragraph (3) of section 4 of the agreement and that it will not pay dividends on its capital stock out of available net income for any subsequent year or part thereof out of which it is ob-

ligated to make payments into the special sinking fund provided for in excess of the applicable percentage, of such part of the available net income as may remain for application, as shown in appendix I hereto. The Delaware company will also covenant that until such reduction of its fixed and contingent charges it will not pay dividends on its capital stock out of any surplus available therefor existing on the date of the agreement, but whenever such fixed and contingent charges shall have been so reduced, it will be free to declare dividends out of such surplus existing on the date of the agreement, and out of any such part of any available net income for any year or part thereof without the restrictions provided for.

Determination of available net income.—The agreement specifies that both the supplemental indenture to the first and refunding gold-bond mortgage, and the income-bond mortgage will contain provisions for determining the Delaware company's net income. They will specify that beginning July 1, 1943, and thereafter so long as any of the series C or income mortgage bonds are outstanding, including therein bonds pledged by, but excluding those held by, the Delaware company, its available net income will be determined for each calendar year, or part thereof, within 3 months after the termination of such year, such computations to be on a calendar-year basis, and to be in accord with the rules of the appropriate regulatory body. Parts of a year will be computed on a fractional yearly basis. In arriving at the available net income for any year, the following will be deducted from the Delaware company's income available for fixed charges: (*a*) All fixed charges of the Delaware company accrued during the year; and (*b*) all other charges properly deductible from such income in determining income after fixed charges.

For each calendar year, available net income will be determined as the accounts may be stated on the Delaware company's books for that year, including any charges or credits which should properly have been included in the income account of any prior year, provided such charges or credits are made by appropriate entries and in the accounts of such year or years as may be determined by applicable orders, rules, and regulations of the Commission, or, in their absence, as may be approved by the Commission. However, any charge to income account for any such calendar year on account of taxes assessed by the State of New Jersey in respect of any year prior to January 1, 1943, together with penalties or interest thereon, will be excluded, but there will be deducted from the income available for fixed charges for such calendar year any amount by which the charges to income for such year in respect of Federal and State taxes of the Delaware company have been reduced by the payment of such New Jersey taxes, penalties, or interest, and any charge to income account for any such calendar year on

account of the retirement of nondepreciable road property not replaced (other than charges representing the cost of dismantling or demolishing such property) shall be excluded. Also, any charge or credit exceeding $25,000 in amount included in the income account of any year subsequent to December 31, 1942, which should properly have been included in that account in any year prior to January 1, 1943, will be eliminated from that account in any year subsequent to December 31, 1942. If in any calendar year the income of the Delaware company available for fixed charges should be inadequate to pay its fixed charges accruing that year, and the other charges properly deductible from such income in determining income after fixed charges, as stated above, the amount of such deficit, after adjustments as provided in the two preceding sentences, may in the discretion of its board of managers be carried forward and be deducted in determining available net income for the succeeding calendar year or years, until such deficit, or accumulated or remaining deficits, have been made up by earnings, which in the absence of such deficit or deficits, would have been available net income. Except as stated, in computing the available net income of the Delaware company for any calendar year, any charges or credits made in the accounts of that year which should properly have been included in the income account of a prior year, shall, whether cleared through income or profit and loss accounts, be treated as income items for the year in which entered on the books.

In case the properties of the Delaware company by merger, consolidation, or sale of assets, are unified with those of any other corporation or corporations, available net income of the Delaware company will be determined by deducting from the aggregate of the income of these properties available for the fixed charges of such corporations, all fixed charges of these corporations accrued during such year, plus all other charges properly deductible from such income in determining income after fixed charges in respect of these corporations.

Application of available net income.—The agreement also provides that both the supplemental indenture to the first and refunding gold-bond mortgage, and the income mortgage, will specify how the available net income is to be disbursed. They will provide that beginning July 1, 1943, and thereafter so long as any of the first and refunding mortgage bonds, series C, or any of the income mortgage bonds are outstanding, including bonds pledged by, but excluding bonds held by the Delaware company, available net income of the Delaware company for each calendar year or part thereof, will be applied to the following purposes in the order shown:

(1) To the payment (in the discretion of the Delaware company pro rata with any contingent interest which may be payable out of such available net income on any securities which may be issued for the stock of the Valley Railroad Company)

in the manner and at the time provided in and subject to the limitations and conditions of section (2), article eighth, of the agreement, of contingent interest on the income mortgage bonds in the following order:

First.—To the pro rata payment of contingent interest, if any, which has accrued otherwise than by reason of the operation of the proviso at the end of clause (d) of section (2), article eighth. of the agreement, and be unpaid in respect of any calendar year or years, or part thereof.

Second.—To the pro rata payment of contingent interest which has accrued by reason of the operation of the proviso at the end of clause (d) of section (2), article eighth, of the agreement, and be unpaid in respect of any calendar year or years or part thereof.

(2) To such of the following purposes and in such order as the Delaware company may from time to time determine:

(*a*) To the payment of any contingent interest which shall be payable out of such available net income on any securities issued by the Delaware company.

(*b*) To the payment of, or to the reimbursement of the Delaware company for all amounts expended by it during any year subsequent to December 31, 1942, otherwise than out of funds borrowed for the purpose, to satisfy, in whole or in part (*i*) any taxes assessed by the State of New Jersey in respect of any years prior to January 1, 1943, as well as penalties or interest thereon, against the Delaware company or any corporation, the properties, assets or franchises of which are held by it under lease, or (*ii*) any liability or liabilities arising in connection with or as a result of the acquisition by the Delaware company by merger, consolidation, purchase or otherwise, of any properties, assets and franchises now held by it under lease, and resulting from the exercise of any rights of appraisal by stockholders of any leased-line company in connection with such acquisition, or (*iii*) any indebtedness incurred by the applicant to pay any such taxes or liability or liabilities.

(*c*) To the payment of amounts required by the provisions of any sinking fund provided for in respect of any securities issued or obligations incurred by the Delaware company other than securities issued or obligations incurred for the stocks of any of its leased-line companies.

(*d*) To the payment into any special sinking fund of amounts required by the terms of any securities issued or obligations incurred by the Delaware company for the stock of any of its leased-line companies and by which the Delaware company has obtained a reduction of its fixed charges in respect of the stock of such leased-line company, provided that, the total of the annual payments into any such special sinking fund plus the amount of the annual fixed charges plus the amount of the annual contingent charges payable pursuant to clause 2a hereof, on any such securities or obligations issued or incurred for such stock shall not exceed the Delaware company's annual fixed charges in respect of such stock as they existed prior to such reduction.

(*e*) If so determined by the board of managers of the Delaware company, to the creation of, or to the credit of a capital fund to be applied to, or to provide for, or to reimburse the treasury for

(*A*) Capital Investments, or such substituted accounts as may be in effect, made or contracted for subsequent to July 1, 1943, including therein initial and principal payments on equipment leased under equipment trusts or purchased under conditional-sale agreements to the extent that such payments during any calendar year shall exceed depreciation of equipment charged against income for such year, or

(*B*) Advances to subsidiaries, whose earnings or losses are included in the Delaware company's income account, for expenditures which, if made directly by that company in respect of its own properties, would be chargeable to such accounts; however, this subsection (*e*) is so limited that (*i*) the amount set aside in the capital fund out of available net income for the period July 1, 1943, to December 31, 1943, may not exceed the sum of $250,000, and the amount so set aside out of available net income for any subsequent calendar year may not exceed the sum of $500,000, plus the amount, if any, by which available net income applicable to such capital fund for the last preceding calendar year shall have been less than the maximum amount permitted for the capital fund for such year; (*ii*) the amount of the capital fund unused at any one time may not exceed $2,000,000; and (*iii*) to the extent that expenditures are so provided for or reimbursed out of the capital fund, the Delaware company may not thereafter have the right to issue any bonds or other evidences of indebtedness to capitalize or reimburse itself for such expenditures; but such expenditures may be used to supply in whole or in part any excess of capital expenditures required to be certified to the trustee under any indenture over the principal amount of the bonds or other obligations issued under the terms of the indenture.

(3) To the payment into the special sinking fund hereof of such amount of any remaining available net income as may be required by the provisions hereof to be paid therein; or, in the event the Delaware company ceases to be so obligated, to the payment for sinking-fund purposes of such amounts as may be required under the 20-percent sinking fund; and to the payment into any other sinking fund which may thereafter be established of any additional amounts of such remaining available net income required to be paid into any such sinking fund, subject to the Delaware company's right to deposit bonds in the special sinking fund, or in the 20-percent sinking fund, respectively, in lieu of such payments.

(4) Subject to the provisions as to the payment of dividends, hereinbefore stated, the balance of any available net income may be applied to any proper corporate purpose.

GENERAL BALANCE SHEETS

A general balance sheet of each of the applicants, and a constructed general balance sheet giving effect to the merger, all as of December 31, 1943, are shown in appendix II.

An examination of the constructed general balance sheet shows that the capitalization of the Delaware company after the merger will be: Capital stock outstanding, including premiums and assessments, $84,511,920, funded debt outstanding $33,258,000, and equipment obligations $5,244,426.68. Amounts payable to affiliated companies will total $1,081,353.55. The total funded debt outstanding will be $38,502,426.68, which, with advances, will amount to $39,583,780.23. Total capitalization, consisting of stock and funded debt, will be $123,014,346.68.

Road and equipment is shown at $185,381,077.24, with accrued depreciation thereon of $50,633,821.85, resulting in a net figure of $134,747,255.39. Accrued amortization of defense projects, both road and equipment, total $789,459.89.

FIXED CHARGES

The total securities of the lessor lines as of December 31, 1943, was $155,534,160, consisting of $50,580,160 in stocks and $104,954,000 in bonds. The Delaware company's holdings totaled $23,886,580, of which $7,098,580 was in stock, and $16,788,000 was in bonds.

The total fixed charges of the Delaware company for the year 1943 amounted to $7,373,717, of which amount annual rent represented $6,987.781. Of this amount, $3,033,956 was applicable to stocks, and $3,953,825 to bonds, of which the Delaware company's portions are $411,259 and $337,600, respectively, or a total of $748,859.

From the standpoint of the New York company merger alone, the minimum reduction annually in fixed charges is estimated at $200,000, and administrative savings will approximate $5,000, which will include savings resulting from the elimination of directors' fees, preparation of tax returns, payment of various taxes, the preparation of reports to public commissions, stationery, and postage.

If the general program is completed, the reduction in fixed charges will of course be increased. In view of the Delaware company's earnings in the pre-war period, the reduction in fixed charges is considered of vital importance. In addition, the substitution of bonds for the $5 per annum rental charge in perpetuity on each share of stock will further decrease the amount of fixed charges by the retirement of bonds through the sinking funds or by redemption, with a possibility of eliminating the bonds entirely at their due dates.

ANTICIPATED EXPENSES OF PROPOSED MERGER

The anticipated expenses will include costs of printing the agreement, applications, mortgages, plan and other documents, and engraving the definitive securities (if engraved), cost of soliciting deposits and assents of the stock, legal fees payable to counsel of both applicants, cost of mortgage taxes, original issue taxes, recording and filing fees, and certain miscellaneous expenses. Taxes and recording and filing fees are estimated at not exceeding $62,000. Detailed estimates of the other items can not be made at this time, but it is thought that the total will approximate $200,000, including the $62,000. Services of additional counsel are not included in this estimate, and no estimate of these expenses could be given at this time.

There may also be some additional cash expenditures to pay for appraisals of stock of the New York company in the event any of the stockholders perfect their right of appraisal. Such payments would, however, be in lieu of the issue of bonds and interest thereon for a past period.

SUMMARY OF EACH APPLICANT'S POSITION

The Delaware company now has under its lease the right to use the properties of the New York company in perpetuity and the right to the earnings from those properties for the payment of the rent, which, as relates to the stock of that company, amounts to $5 a share per annum in perpetuity. Regardless of the earnings from the New York company's properties, the stockholders can receive no more than the stated amount. For that reason the terms of the merger were not based on earnings as one of the controlling elements, but earnings were considered in determining that contingent interest on the income mortgage bonds will be paid prior to such interest resulting from other leased-line mergers and involving the issue of income mortgage bonds, except in the case of the Valley Railroad Company. In that respect, the New York company stockholder will become a preferred creditor. If the pending litigation regarding Federal income taxes is favorable to the leased lines, the rental income of the New York company stockholder will not be impaired; but if the decision is adverse, the rental income will be reduced to $3 a share by virtue of a deduction of 40 percent for the Federal income tax. This uncertainty is reflected in the terms of the merger by the provision requiring the dismissal of the pending suits in respect to the applicants herein, and the division of payment of back Federal income taxes and penalties on a 50–50 basis, the Delaware company paying the back taxes and penalties initially and reimbursing itself by postponing the payment of contingent interest on the income mortgage bonds until such time as the interest equals one-half of the taxes, roughly sometime in 1946. If the decision is adverse to the Delaware company and that company must pay the tax, its rental payments would be increased by 40 percent, a substantial amount when considered in respect of all the leased lines, and a demand which may impair its financial standing, when its earnings return to normal, or even before then. If the merger is accomplished, the Delaware company will be released from its obligation to pay $5 per annum in perpetuity, and from whatever risks there may be that it may have to pay the Federal income taxes of its leased lines. In respect to the proposed merger of the New York company alone, its fixed charges will be reduced about $200,000 per annum as a minimum, and if the completed program is carried out, a much larger saving will be accomplished. The substitution of bonds for stock and the proposed sinking-fund provisions will make the retirement of part or all of the bonds possible through earnings, and will further reduce fixed charges. Simplification of the corporate structure will also result in savings as heretofore noted.

From the standpoint of the Delaware company, the entire merger program is advantageous in view of the situation heretofore described.

From the standpoint of the stockholder of the New York company, if the merger is accomplished, he gives up his right to receive in perpetuity $5 a share for each share of stock surrendered, with the possibility that such return may be reduced to $3 a share per annum by decisions in the pending Federal income tax suits. For each share of stock surrendered he receives $100 in bonds of the Delaware company, secured by liens upon the properties of the New York company. In this respect his lien will differ from the usual reorganization where the stockholders, if allowed to participate therein, have a general interest in the system properties. Of the $100 of bonds, $60 will be in first and refunding mortgage bonds, series C, secured by a first lien on the properties of the New York company, and with fixed interest of $3 per annum (equivalent to $5 a share on the stock, with the Federal income tax deducted). The remaining $40 will be represented by income mortgage bonds, secured by second lien on the same properties, bearing interest at a rate amounting to $2 per annum, payment being contingent upon earnings, but with priority as to payment as heretofore stated. Interest is computed on both types of bonds from the date the rental was enjoined, viz, July 1, 1942, payable in cash at the time of the merger in respect of the series C bonds, but withheld, as heretofore explained, in regard to the income mortgage bonds, until approximately the year 1946. The series C bonds will be secured equally with the series A and series B bonds now outstanding under the New York company's first and refunding mortgage, and in that respect the stockholder's position will be bettered, as the stock is at present inferior in position to the $23,639,000 of bonds outstanding and also to $15,096,709 of advances for which the issue of bonds may be requested. It should be noted, too, that the $2 interest on the income mortgage bonds reflects the amount of the Federal income tax per share, and the uncertainty of the charge is reflected in the contingent character of this interest. After the merger the New York company stockholders will again receive income, which has been enjoined since July 1, 1942. Assuming payment of the bonds at maturity, the stockholder's income will continue for 30 years in the case of the series C bonds and for 50 years in the case of the income mortgage bonds. If redeemed, or retired through the sinking fund, he would receive the principal. Whether the stockholder wishes to avail himself of the offer of the Delaware company is a matter for his personal decision. So far as the public interest is concerned, there seems to be no argument against it. Both companies should be benefited by the settlement of the pending litigation and the elimination of the Federal in-

come tax problem. These are particularly important to the Delaware company, as well as the reduction in fixed charges.

STOCKHOLDERS' ACCORD

Holders of approximately 44 percent of the stock of the New York company, excluding the Delaware company's holdings, after considering all angles of the proposed merger, are in accord with its principles. These holders include dealers, insurance companies, and directors of the New York company. Until we have approved the applications herein, no vote will be taken by the stockholders of the applicants. With the exception of the intervener represented at the hearing, only one bondholder has objected to date, and his objection was withdrawn. He felt that the issue of series C bonds would be a dilution of the interest of the series A and series B bondholders, and that the holders of these bonds should have voted on the issue of series C bonds. However, the mortgage makes no such provision, and is open to the extent of the proposed issue.

As a matter of fact, the 60–40 basis of distribution was the result of the latter situation. The first and refunding mortgage was open to the extent of approximately $6,000,000, which represented 60 percent of the $10,000,000 of stock of the New York company, and the remaining 40 percent had to be provided for otherwise.

RECENT QUOTATIONS OF APPLICANTS' SECURITIES

During the calendar year 1943, the Delaware company's stock (par value $50) was quoted at a low of 3¼ in January, and a high of 10¾ in May. The range since January 1, 1944, has been a low of 5⅞ on January 3, and a high of 8¾ on February 17.

The New York company stock (par value $100) during 1943 reached a low of 28½ in January, and a high of 54 in December. Since January 1, 1944, its low was 52 on January 3 and 63⅝ on February 16.

The New York company's 4-percent series A bonds, due 1973, reached a low of 71 and a high of 80½ since January 1, 1944; and its 4½-percent series B bonds, due also in 1973, reached a low of 77 and a high of 85⅛ since January 1, 1944.

VALUATION OF NEW YORK COMPANY PROPERTIES

In *Delaware, L. & W. R. Co.*, 39 Val. Rep. 1, the Commission by division 1 found the final value, for rate-making purposes, of the properties of the New York company (including the property of the Pennsylvania company), leased to the Delaware company and devoted to common-carrier purposes to be $36,974,604 as of June 30, 1918. The applicants show that the net cost of additions and betterments from that date to December 31, 1942, was $8,731,244 for the New York com-

pany, and $123,506 for the Pennsylvania company. No separate valuation has been found by the Commission for the properties of the Pennsylvania company, but the comptroller for the Delaware company estimates the value at $770,746.

DESCRIPTION OF OTHER SECURITIES

Certificates of deposit.—The proposed certificates of deposit in fully registered form will be issued by the Delaware company for shares of capital stock of the New York company deposited under the proposed agreement. Each holder of such certificates, by acceptance thereof, agrees to be bound by all the provisions of the plan, and of the certificate of deposit, and confirms such assent in respect of the shares of stock deposited, and is entitled to all the rights and benefits provided in the plan with the same effect as if he had deposited the stock certificate or certificates and had signed the assent.

Payment by the Delaware company in respect of stock deposited under the plan represented by certificates of deposit, or in respect of any of the securities to be issued for such stock if the plan becomes effective, will be made to the registered holder of the certificate, and coincident with such payment, the deposited stock certificate may be properly stamped as evidence thereof.

When the plan becomes effective, the registered holder of the certificate of deposit will be entitled to receive, without expense, upon surrender of the certificate, for each share of capital stock of the New York company, the amounts of bonds hereinbefore designated to be issued in exchange therefor; but if the plan should be abandoned, such holder, upon surrender of the certificate of deposit, will be entitled to receive without expense the stock certificate or certificates deposited.

If the plan or agreement should be modified or amended after the issue of the certificate of deposit, notice thereof will be given as provided, and the stock certificate or certificates will be returned without additional expense. If the certificate is not surrendered within a 30-day period, the registered holder and subsequent transferees will be deemed to have assented to the modification and will be bound thereby.

Prior to the approval and adoption of the agreement by the stockholders of the New York company, or before the plan has been declared or becomes effective, whichever occurs first, except during the period provided in the plan, if the plan shall have been declared operative the registered holder may withdraw the stock certificate or certificates deposited, which will revoke the assent.

The certificates and the interests represented thereby are to be transferable subject to such rules as may be adopted by the Delaware company, and upon endorsement and surrender thereof, but endorsement is agreed to make the certificates negotiable. When endorsed in

blank the bearer is to be regarded as the absolute owner. All endorsements must have the signature witnessed and guaranteed by a bank or trust company having an office or correspondent in New York City, or by brokers having membership in the New York Stock Exchange.

Scrip certificates.—Because of the amounts in which shares of the capital stock of the New York company are held by individual stockholders, the principal amounts of first and refunding mortgage 5-percent bonds, series C, and income mortgage bonds, to which such stockholders may become entitled, will not correspond to the denominations in which it is proposed to issue these bonds. Consequently the Delaware company will issue non-interest-bearing scrip certificates representing such fractional interests, in the denomination of $20, in bearer form, with a provision that they will be void on and after 6 years from the date of the merger. They will contain provisions authorizing the sale at any time on or after 4 years after the date of the merger of all bonds held for issue in exchange for outstanding scrip certificates and the retention of the net proceeds of such sales for distribution pro rata in respect of the scrip certificates then outstanding. The scrip certificates will be issued pursuant to a proposed scrip agreement with a bank or trust company selected by the Delaware company.

ASSUMPTION OF OBLIGATION AND LIABILITY

The Delaware company includes in its fixed charges as rental for leased lines the interest on the first and refunding mortgage bonds, series A and B, of the New York company, as it is already obligated under the terms of the lease and by guaranty to pay both the principal of and interest on these bonds. However, it seeks authority to assume obligation and liability as to the payment of both principal of and interest on these bonds under the terms of the proposed agreement. No increase in existing fixed charges will result from this obligation, but the Delaware company will thus become a primary obligor in respect of these bonds.

Stock acquired by merger.—The only stock proposed to be acquired by the Delaware company in consummating the merger will be the outstanding stock of the Pennsylvania subsidiary, now owned by the New York company, as heretofore stated.

OTHER OBJECTIONS OF INTERVENER

The intervener insisted that in fairness to the stockholders of the New York company, a segregation of earnings should have been made of the New York company's contribution to the system income, otherwise it would be impossible to know whether the proposed plan was fair and reasonable. The applicants regard the merger as a purchase of a reversionary interest, and state that regardless of earnings the

stockholders of the New York company could never receive more than the rental income, a maximum of $5 a share, with a possibility of reduction by an adverse court decision on the obligation to pay Federal income taxes.

The 60–40 basis of distribution was also objected to, the intervener recommending a change to a 75–25 basis and a possible change in interest rates. In view of the provisions of the first and refunding mortgage, this basis would be impossible, without a change in the entire plan.

Counsel for the intervener contended, among other things, that the relative importance of the trackage, terminal facilities, and freight earnings of the New York company must be considered in relation to the comparative unimportance of other leased lines comprising the Delaware system; that the limited priority of claims against general system earnings is inadequate to compensate for the superiority of position, earnings, and comparatively small amount of unpaid taxes of the New York company; that we are no longer concerned with the terms of the lease under which the stockholders of the New York company are limited to a 5-percent return but that this application, being one for a merger, is in effect a purchase; and that it is therefore impossible for the Commission to pass upon the fairness of the proposed plan in the absence of facts showing the earning power of the New York company's property, the board of directors of the New York company having failed to consider such earnings, except to the limited extent heretofore indicated. Counsel for the applicants stated in this connection that the productivity of the New York company's property or earnings from its operation was not the basis for the proposed merger; that this is not a case of a merger of a separately operated company with a right to its earnings where the stockholders anticipate dividends in the light of what those earnings may be, but rather a merger of a company where under an existing lease the lessee has the right to use the property and the right to its earnings as long as there is no default under the lease.

The earnings from the operation of the property of the New York company, which as stated have not been segregated from those of the system, are not of controlling importance here. The stockholders of the New York company are not directly affected by traffic earnings, as under the lease they are entitled to a fixed return on their investment. The rental, in effect, represents the earnings of the property as far as the stockholders are concerned. Whether earnings from operation would be considered an important element in the event of default in the lease is a matter not now before us and therefore one upon which we can only conjecture. On the other hand, the Delaware company

is bound by a bargain, made many years ago, which is not dependent upon the earnings from operation of the property. The proposed plan affords it an opportunity to be released from such a perpetual obligation without default in the lease or disaffirmance in a proceeding under section 77 of the Bankruptcy Act, and, as heretofore stated, is undoubtedly to its advantage.

Authorization and approval will be granted on the understanding that the Delaware company will not record the merger in its books until the related journal entries reflecting the transaction have been submitted for our approval.

The proposed merger will insure continuation of a transportation service to the public which has been in existence for many years. No other railroad has requested to be included in the transaction, nor does it appear that the public interest or the interests of other carriers in the territory would be affected by failure to include other railroads. Since no change in the methods of operation will be made, the interests of employees will not be adversely affected. No increases in fixed charges will result, and the assumption of payment of fixed charges is not inconsistent with the public interest. Furthermore, the simplification of the Delaware company's corporate structure will effect substantial administrative savings.

CONCLUSIONS

We find that (1) merger of the properties of The New York, Lackawanna and Western Railway Company into The Delaware, Lackawanna and Western Railroad Company for ownership, continued management, and operation, and (2) acquisition by the latter of control of the New York, Lackawanna & Western Railway Company of Pennsylvania, through ownership of stock, in the manner and upon the terms and conditions proposed herein, is within the scope of section 5 (2) of the Interstate Commerce Act, as amended, and that the transaction will be consistent with the public interest. Since no change is involved in the status or interest of employees, no condition as to employment will be necessary.

We further find that (1) the proposed issue by The Delaware, Lackawanna and Western Railroad Company of certificates of deposit in respect of not exceeding 98,320 shares of the capital stock of The New York, Lackawanna and Western Railway Company, not exceeding $5,899,200 of first and refunding mortgage 5-percent bonds, series C, and $3,932,800 of income mortgage 5-percent bonds, both of the New York, Lackawanna & Western division, and scrip certificates representing fractional interests in these bonds; and (2) the proposed assumption of obligation and liability in respect of $23,639,000 of

bonds of The New York, Lackawanna and Western Railway Company, consisting of $13,639,000 of first and refunding mortgage 4-percent gold bonds, series A, and $10,000,000 of first and refunding mortgage 4½-percent gold bonds, series B, all in connection with the proposed merger, as aforesaid, (*a*) are for lawful objects within its corporate purposes, and compatible with the public interest, which are necessary and appropriate for and consistent with the proper performance by it of service to the public as a common carrier, and which will not impair its ability to perform that service, and (*b*) are reasonably necessary and appropriate for such purposes.

An appropriate order will be entered.

APPENDIX I

Table for special sinking fund and dividends

If the Delaware Company's special sinking fund base for such year or part thereof shall be—	The percentage payable into the special sinking fund shall be—	The percentage which may be used for dividends shall be—
Over $32,471,000	18	40
Over $31,471,000 but not over $32,471,000	17	43
Over $30,471,000 but not over $31,471,000	16	46
Over $29,471,000 but not over $30,471,000	15	49
Over $28,471,000 but not over $29,471,000	14	52
Over $27,471,000 but not over $28,471,000	13	55
Over $26,471,000 but not over $27,471,000	12	58
Over $25,471,000 but not over $26,471,000	11	61
Over $24,471,000 but not over $25,471,000	10	64
Over $23,471,000 but not over $24,471,000	9	67
Over $22,471,000 but not over $23,471,000	8	70
Over $21,471,000 but not over $22,471,000	7	73
Over $20,471,000 but not over $21,471,000	6	76
Over $20,000,000 but not over $20,471,000	5	79

APPENDIX II

General balance sheet of each applicant and constructed balance sheet showing effect of the merger, all as of December 31, 1943

Account	Item	Delaware Company	New York Company	Constructed balance sheet
	Assets			
	Investments:			
701	Road and equipment property	$136,466,568.97	$35,617,206.49	$185,381,077.24
702	Improvements on leased property	15,819,941.20		[1] 8,417,597.08
702½A	Acquisition adjustment	Cr. 5,569.40		Cr. [2] 5,474,222.24
702½B	Donations and grants	Cr. 2,018,237.43		Cr. 2,018,237.43
704	Deposits in lieu of mortgaged property sold	10,566.55		10,566.55
705	Miscellaneous physical property	2,397,845.09	102,676,62	[3] 3,053,358.63
706	Investments in affiliated companies:			
	(A) Stocks	9,758,129.20	12,000.00	[4] 9,780,129.20
	(B) Bonds	4,262,766.17		4,262,776.17
	(D) Unsecured notes	5,235,480.68		5,235,480.68
	(E) Investment advances	3,910,710,66		3,910,710.66

[1] This figure results from transfer of $7,402,344.12 to Account 701.
[2] Results from addition of adjustment of Hopatcong R. R. $5,569.40 plus New York Company $5,468,652.84, the latter figure being the difference between certain assets and liabilities of New York Company listed in detail in application.
[3] Addition of Delaware Company plus New York Company, $655,513.54.
[4] Addition of Delaware Company plus New York Company holdings.

General balance sheet of each applicant and constructed balance sheet showing effect of the merger, all as of December 31, 1943—Continued

Account	Item	Delaware Company	New York Company	Constructed balance sheet
	Assets			
	Donations and grants—Continued.			
707	Other investments:			
	(A) Stocks	$2,213,582.33		[5] $2,093,445.83
	(B) Bonds	11,805,718.75		[6] 11,649,553.75
	(C) Other secured obligations	32,132.15		32,132.15
	(D) Unsecured notes	583,911.73		583,911.73
	(E) Investment advances	15,012,861.77		[7] 7,318,497.04
	Total	205,496,518.42	$35,731,883.11	234,236,777.04
	Current assets:			
708	Cash	12,034,321.01		[8] 11,591,881.01
709	Temporary cash investments	9,538,000.00		9,538,000.00
711	Special deposits	6,083,850.74		6,083,850.74
714	Net balance receivable from agents and conductors	2,792,067.87		2,702,067.87
715	Miscellaneous accounts receivable	4,009,100.24		4,009,100.24
716	Material and supplies	4,563,564.28		4,563,564.28
717	Interest and dividends receivable	119,317.74		[9] 118,634.96
718	Rents receivable		176,211.67	
719	Other current assets	32,105.40		32,105.40
	Total	39,082,327.28	176,211.67	38,639,204.50
	Deferred assets:			
720	Working fund advances	23,865.18		23,865.18
721	Insurance and other funds	189,073.13		189,073.13
722	Other deferred assets	208,516.40	6,351,481.62	208,516.40
	Total	421,454.71	6,351,481.62	421,454.71
	Unadjusted debits:			
723	Rents and insurance premium paid in advance	83,727.98		83,727.98
725.	Discount on funded debt		393,797.77	
727	Other unadjusted debits	4,330,852.34	284,263.25	[10] 4,330,035.12
	Total	4,414,580.32	678,061.02	4,413,763.10
	Grand total	249,414,780.73	42,937,637.42	277,711,199.35
	Liabilities			
	Stock:			
751	Capital stock (common): Book value at date $87,407,500; Held by carrier 2,966,300; Outstanding	84,441,200.00	10,000,000.00	84,441,200.00
753	Premium and assessments on capital stock	70,720.00		70,720.00
	Total	84,511,920.00	10,000,000.00	84,511,920.00
	Long term debt:			
755	Funded debt unmatured		23,639,000.00	33,258,000.00
756½	Equipment obligations	5,244,426.68		5,244,426.68
757	Amounts payable to affiliated companies (open accounts)	1,081,353.55		1,081,353.55
	Total	6,325,780.23	23,639,000.00	39,583,780.23
	Current liabilities:			
759	Traffic and car service balances, credit	2,541,720.55		2,541,720.55
760	Audited accounts and wages, payable	4,878,929.28		4,878,929.28
761	Miscellaneous accounts, payable	665,091.67		665,091.67
762	Interest matured unpaid		10,285 00	10,285.00
764	Unmatured interest accrued	69,427.50	165,926.67	[11] 233,854.17
766	Unmatured rents accrued	1,857,856.73		[12] 1,683,145.06
767	Accrued tax liability	7,202,509.30	1,160,368.25	[13] 8,362,877.55
768	Other current liabilities	3,728,087.55	229,531.99	[14] 3,207,619.54
	Total	20,943,622.58	1,566,111.91	21,583,522.82

[5] Delaware Company holdings less New York Company, $120,136.50.
[6] Delaware Company holdings less New York Company, $156,165.00.
[7] Advances to New York Company of $7,694,364.73 deducted from Delaware Company Investments.
[8] Delaware Company account less $442,440 for fixed interest from July 1, 1942, to December 31, 1943, 7½ percent on $5,899,200 of series C bonds.
[9] Delaware Company account less interest receivable on bonds of New York Company purchased $682.78
[10] Delaware Company figure less accrued interest to date of purchase of bonds of New York Company $817.22.
[11] Addition of Delaware Company account and New York Company account to extent of $164,426.67.
[12] Delaware Company accruals less New York Company rents receivable $174,711.67.
[13] Delaware Company plus New York Company accounts.
[14] Delaware Company account plus New York Company interest on Federal income taxes $229,531.99 less enjoined rental $750,000, net credit $520,468.01.

General balance sheet of each applicant and constructed balance sheet showing effect of the merger, all as of December 31, 1943—Continued

Account	Item	Delaware Company	New York Company	Constructed balance sheet
	Liabilities			
	Deferred liabilities:			
770	Other deferred liabilities	$16,595,341.09	$7,694,364.73	[18] $10,993,859.47
	Total	16,595,341.09	7,694,364 73	10,993,859.47
	Unadjusted credits:			
773	Insurance and casualty reserves	1,031,893.23		1,031,893.23
775½	Accrued amortization of defense projects, road	31,331.14		31,331.14
776	Accrued depreciation, road and equipment	50,349,558.60	284,263.25	50,633,821.85
776½	Accrued amortization of defense projects, equipment	758,128.75		758,128.75
778	Other unadjusted credits	3,449,694.72	393,797.77	[19] 3,165,431.47
	Total	55,620,606.44	678,061.02	55,620,606.44
	Surplus:			
784	Unearned surplus	392,944.97		392,944.97
	(1) Paid-in surplus $335,368.27			
	(2) Other unearned surplus 57,576.70			
785	Appropriated surplus	6,068,053.69		6,068,053.69
786	Earned surplus	58,956,511.73	Dr. 639,900.24	58,956,511.73
	Total	65,417,510.39	Dr. 639,900.24	65,417,510.39
	Grand total	249,414,780.73	42,937,637.42	277,711,199.35

[18] Delaware Company account less equipment obligation to New York Company of $5,601,481.62 canceled.
[19] Delaware Company account less $284,263.25 of New York Company account.