

FINANCE DOCKET No. 11681
NEW YORK, SUSQUEHANNA & WESTERN RAILROAD
COMPANY REORGANIZATION

Submitted December 22, 1950. Decided March 12, 1951

Upon remand by the court, petition for modification, further hearing and reconsideration, plan of reorganization of the New York, Susquehanna & Western Railroad Company, approved March 5, 1945 (261 I. C. C. 101), pursuant to section 77 of the Bankruptcy Act, modified in certain respects.¹

Appearances as shown in previous reports and *Stuart N. Scott, Philip E. Gregg, Andrew M. Calamari, Leland J. Markley, Irving E. Meller, Frank H. Heiss, and Nicholas Conover English* for interveners.

SECOND SUPPLEMENTAL REPORT OF THE COMMISSION

BY THE COMMISSION :

In our supplemental report and order of March 5, 1945 (261 I. C. C. 101), hereinafter referred to as the prior report, we approved a plan for the reorganization of the New York, Susquehanna and Western Railroad Company, debtor, pursuant to section 77 of the Bankruptcy Act (11 U. S. C. 205), in proceedings pending in the District Court of the United States for the District of New Jersey, and the plan was certified to the court on March 28, 1945.

Pursuant to the provisions of section 77 (e) of the act, the court has referred the plan back to us for reconsideration in the light of the information now available and for further report, and, as required by the statute, it has transmitted to us copies of its opinion of June 7, 1950, its orders No. 427 dated June 12, 1950, and the evidence submitted to it since the date of the prior report. The proceeding was subsequently reopened by our order of June 29, 1950. On August 7, 1950, the New York Life Insurance Company, seven mortgage trustees, two bondholders committees, and two groups of

¹ Previous reports 257 I. C. C. 593, 261 I. C. C. 101, 271 I. C. C. 339, 275 I. C. C. 10, and 275 I. C. C. 182.
282 I. C. C.

bondholders, hereinafter referred to collectively as the petitioners,² filed their joint petition requesting modification of the plan as hereinafter set out and approval of the plan as so modified without further hearing. The proceeding, however, was assigned for further hearing and such hearing was held for the purpose of receiving (a) evidence relating to modification of the plan, (b) evidence essential to bring the record of the debtor's operations up to date, and to assist in reconsideration of the plan, and (c) any other evidence pertinent to reconsideration of the plan or the development of a new plan. Briefs and replies thereto have been filed.

Positions of the various parties.—No new plan of reorganization has been filed. At the further hearing and on brief, petitioners contend that the approved plan should be modified as requested for purposes of clarity or to bring it down to date. They are satisfied that the plan, as a whole, is fair and equitable in all respects, that it is well adapted to the present and foreseeable future requirements of the reorganized company, and that the capitalization of the reorganized company and the distribution of its securities provided therein are appropriate both as regards the interest of creditors and the public interest.

Sutro Bros. & Co., a holder of debtor's bonds, also favors approval of the plan but opposes one of the clarifying modifications sought by the petitioners. Only one holder of debtor's securities, Edith Merritt, opposes the plan generally.

Conclusions on major aspects of the plan.—The plan approved in the prior report was based on the record of actual operations prior to 1943 and estimates of future operations made at that time. Upon consideration of this evidence we concluded that the reorganized company might be expected in a normal year to have net earnings of from \$700,000 to \$775,000 available for the payment of interest. Based on such earnings and a consideration of other relevant factors we determined that the effective date of the plan should be January 1, 1944, and fixed the capitalization of the reorganized company, exclusive of equipment obligations, at \$15,500,000, consisting of \$2,000,000 of new Terminal 4-percent bonds, \$3,000,000 of new first and con-

²This group includes in addition to the New York Life Insurance Co., United States Trust Company of New York, trustee under the Terminal mortgage, Central Hanover Bank and Trust Company, trustee under the Midland and Paterson Extension mortgages, Commercial Trust Company of New Jersey, substitute trustee under the first refunding mortgage, National State Bank of Newark, N. J., substitute trustee under the second mortgage, The New York Trust Company, substitute trustee under the general mortgage, The Commercial National Bank and Trust Company of New York, substitute trustee under the first mortgage of Wilkes-Barre and Eastern Railroad Company, the protective committee for holders of refunding-mortgage bonds, the protective committee for holders of general-mortgage bonds, a group of holders of Paterson Extension bonds, and a group of holders of general-mortgage bonds.

solidated mortgage 4-percent bonds, \$4,000,000 of general mortgage 4½-percent income bonds, \$3,000,000 of 5-percent preferred stock, and 35,000 shares of no-par-value common stock with a stated value of \$100 per share (\$3,500,000). Under the approved plan, the equipment obligations of the debtor outstanding on the date of consummation would be assumed by the reorganized company. The plan also provided that (1) holders of Terminal bonds would receive, in full settlement of their claims, a cash payment of interest accrued thereon prior to the effective date and an equal amount of new Terminal bonds; (2) holders of Midland bonds would receive, in full settlement of their claims totaling \$4,666,538,³ \$1,771,641 of new first and consolidated mortgage bonds and \$2,894,897 of new general-mortgage income bonds; (3) holders of the first and refunding mortgage bonds would receive, in full settlement of their claims totaling \$5,070,000,⁴ \$1,228,359 of new first and consolidated mortgage bonds, \$1,105,103 of new general-mortgage income bonds and \$2,736,538 of new preferred stock; (4) holders of unpledged second-mortgage bonds would receive, in full settlement of their claims totaling \$589,680,⁵ \$118,031 of new preferred stock and \$515,200 of new common stock,⁶ (5) holders of general-mortgage bonds would receive, in settlement of their claims totaling \$3,433,221,⁷ \$145,431 of new preferred stock and \$2,354,725 (23,547.25 shares) of new common stock,⁸ (6) holders of Paterson Extension bonds would receive, in settlement of their claims totaling \$270,833,⁹ the beneficial interest in certain noncarrier property to be sold¹⁰ and \$240,000 (2,400 shares) of new common stock;¹¹ and (7) holders of unsecured claims totaling about \$2,388,258¹² would receive in settlement thereof \$390,075 (3,900.75 shares) of common stock. We found that the claims of debtor's preferred and common stock holders had no value and accordingly the plan included no provisions for their participation.

³ Composed of \$3,489,000 principal and \$1,177,538 unpaid interest.

⁴ Composed of \$3,744,000 principal and \$1,326,000 unpaid interest.

⁵ Composed of \$448,000 principal and \$141,680 unpaid interest.

⁶ 5,152 shares equivalent to about 1.092 shares for each \$100 of remaining claim.

⁷ Composed of \$2,551,000 principal and \$882,221 unpaid interest. These claims are secured by \$552,000 of pledged second-mortgage bonds.

⁸ All of the preferred stock and \$634,800 of common stock was allotted on account of pledged second-mortgage bonds, \$9,925 of common stock was allotted on account of participation in unmortgaged assets and the balance of the common stock was allotted on account of the mortgage lien on the properties. These allotments did not fully satisfy the claims of these bondholders.

⁹ Composed of \$200,000 principal and \$70,833 interest.

¹⁰ This noncarrier property was subsequently sold for \$55,369.54.

¹¹ Equivalent to about 1.115 shares for each \$100 of remaining claim.

¹² Based upon the amount of unsecured claims as shown at the time of the submission of the plan, and subject to adjustment on the basis of the final determination of the amount of the unsecured claims.

282 I. C. C.

Approximately 6 years have elapsed since our approval of the plan, and the trustee presented at the hearing statements of the results of the debtor's operations from January 1, 1942, to June 30, 1950.

The income of the debtor available for the payment of interest in years prior to 1943, as reported to us, has been stated in previous reports in the proceedings. In 1943 and subsequent years it reported income available for interest as follows:

Year 1943.....	\$1,137,805
Year 1944.....	978,323
Year 1945.....	675,472
Year 1946.....	9,222 (Red)
Year 1947.....	385,398
Year 1948.....	116,268 (Red)
Year 1949.....	511,031
Year 1950 (6 months).....	284,541

The petitioners contend that the debtor has developed earning power adequate to support the capitalization provided in the plan and to enable it to efficiently perform its duties to the public. They assert that in order properly to evaluate the earnings record of the debtor for the years 1944 to 1949, inclusive, and for the first 6 months of 1950, it is necessary to make adjustments in the recorded figures for major non-recurring income and expense items. Such adjustments were described by the trustee at the hearing and include (1) the distribution of \$275,000 received by the debtor in 1949, from the New York Central Railroad, as additional compensation, under a modified agreement, for switching services rendered over the period from October 26, 1942, to December 31, 1949, at Edgewater, N. J.; (2) the elimination from the accounts for 1946, 1948, 1949, and 1950 (first 6 months), of legal expenses incurred on account of the reorganization proceeding; (3) the elimination of the amount paid in 1948 to settle the claim of New Jersey for real estate taxes for the years 1933 to 1940, inclusive; and (4) the elimination of extraordinary operating expenses for the years 1946, 1947, and 1948, less an arbitration award received during those years. If such adjustments were made, the income of the debtor available for the payment of interest during the period and the average for the years 1944 to 1949, would have been as follows:

	Income available for bond interest
Year 1944.....	\$977,278
Year 1945.....	674,704
Year 1946.....	371,631
Year 1947.....	445,445
Year 1948.....	858,588
Year 1949.....	308,703
Year 1950 (6 months).....	319,880
Year average (1944-49).....	606,058

282 I. C. C.

On the basis of the adjusted earnings outlined above, the debtor's income available for bond interest would have exceeded the amount estimated for a normal year in 1944 and 1948, and it would have exceeded in every year fixed interest charges on the plan capitalization. In 4 years (1944, 1945, 1947, and 1948), earnings would have been in excess of both fixed and contingent interest requirements on the plan capitalization, while average earnings for the entire period would have been sufficient to meet such charges and provide substantial dividends on the preferred stock provided in the plan.¹³ If adjusted earnings for the year 1950 are estimated as twice adjusted earnings for the first 6 months of the year, they would be about sufficient to pay all plan charges and provide a dividend of 5 percent on the preferred stock.

Important changes have occurred in the debtor's property during the course of this proceeding. Some 900 to 1,000 worn-out freight cars have been retired. The road has been completely dieselized with the purchase of 20 Diesel locomotives. Eight motorcars purchased and worn out during the reorganization proceedings have been retired and replaced with four new Budd rail Diesel cars. Ten steel cabooses have been acquired and an adequate number of freight cars for the debtor's operations are maintained. Extensive improvements have been made to road and structures, including the rearrangement of the Edgewater yard to facilitate operating efficiency and the handling of Seatrain traffic and the construction of a number of new passenger stations. In addition, the debtor and the Pennsylvania Railroad are now engaged in constructing a direct connection between their lines by means of a viaduct over the Croxton yard of the Erie Railroad in Jersey City, N. J., which will enable them to interchange traffic without using the facilities of the Erie and result in a saving for both companies.

The debtor's balance sheet as of August 31, 1950, shows the following assets: Investment in road and equipment less recorded depreciation \$36,894,096, improvements on leased property \$9,451, acquisition adjustment \$2,501 (credit), donations and grants \$185,081 (credit), deposit in lieu of mortgage property sold \$397, investment in affiliated companies \$683,290, investment in miscellaneous physical property \$262,785, cash and temporary cash investments \$2,297,146, special deposits \$56,042, net balance receivable from agents and conductors \$100,293, miscellaneous accounts receivable \$101,278, material and supplies \$500,958, interest and dividends receivable \$210,010, ac-

¹³ In the prior report, we estimated the initial annual charges, through dividends on the preferred stock, of the reorganized company would be about \$821,623 or approximately \$15,000 more than the average adjusted earnings shown in the table.

crued accounts receivable \$97,258, other current assets \$35,384, deferred assets \$304,756, unadjusted debits \$6,770,049, total assets \$48,135,612.

Liabilities shown on the balance sheet as of the same date were as follows: Common stock \$12,816,319, preferred stock \$12,964,844, stock liability for conversion \$223,237, long-term debt in default less debtor's holdings \$12,545,608, equipment obligations \$227,307, traffic and car service balance \$756,243, audited accounts and wages payable \$493,592, miscellaneous accounts payable \$64,626, interest matured unpaid \$127,702, unmatured interest accrued \$33,333, accrued accounts payable \$204,623, taxes accrued \$163,519, other current liabilities \$282,977, total deferred liabilities \$5,302,684, including \$5,281,468 interest in default, unadjusted credits \$6,870,760, total corporate surplus \$4,941,763 (red figure), total liabilities \$48,135,612.

Although numerous changes have occurred in the debtor's property since the time of the prior report, its position now with respect to current assets and liabilities is about the same as it was at that time. On January 1, 1944, the proposed effective date of the plan, the excess of its current assets over current liabilities amounted to \$1,383,079, and on June 30, 1950, such excess amounted to \$1,378,724. During this interval the debtor paid \$2,292,937 interest on funded debt¹⁴ and expended \$2,339,912 for additions and betterments, of which \$2,683,320 were derived from earnings, \$1,144,527 from depreciation charges for road and equipment, \$676,689 from the sale of surplus property, and the balance from surplus and advance contributions by the New Jersey Turnpike Authority for highway construction. It has recently paid \$800,000 in settlement of back taxes of the State of New Jersey, paid certain reorganization expenses, and received income tax refunds.

The debtor's trustee prepared in detail and put in evidence an exhibit showing a projection of its cash and estimated earnings under the plan for the last 6 months of 1950, and for each of the years 1951 to 1957, inclusive, assuming that the plan will be consummated on January 1, 1952. At the hearing the trustee recommended certain revisions in this exhibit, and on brief petitioners submitted a revision thereof to include these changes and also changes required to reflect the purchase of new equipment under arrangements made just subsequent to the hearing. In preparing his estimate, the trustee adjusted the reported earnings of the debtor for the first 6 months of 1950, to eliminate nonrecurring items and doubled the resulting fig-

¹⁴ Pursuant to orders of the court, interest on the bonds outstanding under the Terminal, Midland and refunding mortgages has been paid in the amounts that the holders thereof would have been entitled to under the plan.

ure for comparison with the earnings of the previous 7 years. In this manner he obtained \$639,760 as his estimate of earnings available for bond interest in 1950. On the basis of a traffic study presented the debtor's general manager in charge of operation, the trustee deemed that the first half of 1950 represented a reasonably normal period of the debtor's operations more accurately than any estimates of the future which he could make at that time. He stated that he had a more hopeful idea of normal operations at the time of the previous hearing in 1943, than since that time. The income for the 7 years following 1950 were estimated by him on the basis of a projection of the estimated earnings for 1950 with such additions and deductions as were at the time foreseeable. No attempt was made to reflect possible fluctuations of the national economy.

Starting with \$1,379,000 on July 1, 1950, representing the excess of current assets over current liabilities on that date, the trustee added estimated earnings available for fixed charges, estimated depreciation charges for road and equipment, and estimated amounts to be received as tax refunds and from sale of properties during the last 6 months of the year and deducted the amount of working capital represented by materials and supplies,¹⁵ estimated payments on equipment and additions and betterments to roadway, and payment of plan charges during the same period, leaving the amount available for other corporate purposes at the end of the year. This process was repeated for each year from 1951 to 1957, inclusive.

Estimated earnings available for fixed charges shown in the study ranged from a high of \$825,000 in 1951 to a low of \$671,000 in the following year, and averaged \$708,714 for the years 1951 to 1957, inclusive. The latter figure is within the lower limits of our previous estimate of earnings available for interest in a normal year. On the basis of this study, resources and earnings of the debtor during the period covered would be sufficient to meet all plan charges and reorganization expenses, permit dividend payments on the preferred and common stock provided in the plan, aggregating \$1,385,000 and \$665,000, respectively, and leave a balance at the end of the period of almost \$1,000,000 available for other corporate purposes. This study reflects for the year 1953 and the following years, income taxes at the rate of 45 percent for Federal income tax and an additional 5 percent for State franchise taxes.

It is clear that the trustee's estimate of future earnings under the plan does not attempt to reflect the relatively higher level of earnings which may reasonably be expected to prevail in the immediate

¹⁵ The trustee estimated that the reorganized company would require no cash working capital.

282 I. C. C.

future as a result of the rearmament program. There also was evidence of additional industries which may be located on the debtor's lines. It appears that the actual earnings of the debtor in 1950 exceeded by more than \$100,000 his estimate for that year. We conclude that in the light of present circumstances the reorganized company's earnings available for interest and other corporate purposes for a number of years in the future may be expected to exceed those estimated in our prior report for a normal year.

The period during which the debtor has been operating independently includes war years and a period of transition from war to peacetime economy. Problems have confronted the management, many of which are reflected in the trustee's adjustments of the income account. The full effects of property changes, improvements, and the modified agreement with the New York Central are difficult to appraise at this time. We conclude and find from the record that no change should be made in our previous findings with respect to the capitalization and allocations of securities provided for in the plan of reorganization in this proceeding.

In our prior report we fixed January 1, 1944, as the effective date of the plan, which was reasonably proximate to the expected consummation date. It now appears that the consummation date will probably not be earlier than January 1, 1952. As previously observed, pursuant to orders of the court, holders of debtor's bonds have been paid all interest which would have accrued on the bonds of the reorganized company if the plan had become effective on the date provided. In previously decided cases we have generally held that the effective date of a plan should be reasonably close to the time it would be considered by the court and actually put into effect.¹⁶ In this instance, adoption of a date later than the one provided in the plan would result in a capitalization of unpaid accrued interest on outstanding obligations at contract rates which are higher than those which would apply to the new securities issuable under the plan. The effect of this factor alone would be to increase somewhat the cash or securities distributable to the senior creditors, and to decrease the cash or securities available for the most junior classes of creditors, thus accentuating the diminution of the rights of junior creditors as a result of the administrative delays in the process of reorganization.

Any such modification of the plan probably would cause further delays and expenses in a proceeding which already has been unusually long. The public interest and the interests of the security

¹⁶ See *Chicago, M., St. P. & P. R. Co. Reorganization*, 254 I. C. C. 707.

holders require consummation of a plan for the debtor as speedily as is consistent with the necessity for development of a fair plan.

The litigation which has delayed the progress of this plan, while improving the debtor's earning power, has not, as we have herein found, so changed the situation as to require any modification of the plan. The slight changes hereinafter approved are solely for clarification or to adapt the plan to the present situation as to parties or obligations assumed or paid since our prior approval. They should not require extended further proceedings before us. We approved the plan as fair and equitable in 1945. We believe that in this case the additional delay and drain on the debtor's financial resources as a result of prolongation of the bankruptcy proceedings might more than offset through increased possibility of financial difficulty and reduced value either of the old or the new securities, any additional advantage which any class of creditor would realize through the change in the effective date. Since the delay due to litigation has not resulted in any substantial change in the plan in other respects, we conclude it is fair and equitable that the rights of the creditors be determined as of the effective date previously approved by us. We find that the effective date of the plan should not be changed.

Plan modification requested by petitioners.—The plan provides that any scrip which may be issued and distributed in lieu of fractional bonds or shares of stock shall be void after January 2, 1949. Since final action on the plan is still pending, it is necessary to extend this date to a time beyond the consummation date now expected. Petitioners request that the plan be amended to provide that scrip issued and distributed in lieu of fractional bonds or shares shall be exchangeable for new securities on or before January 2 of the third calendar year next succeeding the date of the order of the court directing consummation of the plan, and be void thereafter. The plan contemplated a period of 5 years between the effective date and termination of rights of the scrip holders. Assuming a period of 2 years after the effective date as necessary for consummation, the scrip rights would have remained intact for 3 years following consummation. Under the proposals of the petitioners, if the plan were consummated during the last month of any calendar year, the scrip would be valid for only a little over 2 years following consummation. To insure validity of the scrip for at least 3 years following consummation, we conclude that the plan should be modified to provide that the scrip shall be exchangeable for new securities on or before January 2 of the fourth calendar year next succeeding the date of the court's consummation order. The plan will be modified accordingly.

282 I. C. C.

The plan also provides for the establishment of a security retirement fund, to be used and applied in the manner of a sinking fund first for the retirement of all general-mortgage income bonds, series A, and then for the retirement of preferred stock. The petitioners suggest that this provision be modified to make clear that retirements made by use of the fund may be made by purchase or redemption at public or private sale or upon calls for tender as well as by the method provided in the terms of the security.

The plan provides for retirement of the various bond issues through use of the sinking funds provided for under the mortgages by purchase or redemption of the bonds at public or private sale or upon calls for tenders. However, the sinking funds under the mortgages will be administered by the mortgage trustees. Since the securities retirement fund provides for retirement of both income bonds and preferred stock, it may be administered by the reorganized company. For this reason we believe it should provide that the securities may be retired only by purchase or redemption in the open market or upon calls for tenders. With this modification we approve this change.

The petitioners also suggest that the plan be modified to eliminate participation of the Prudential Insurance Company of America and the Mutual Benefit Life Insurance Company of New Jersey in the selection of initial voting trustees and reorganization managers because these companies have disposed of part or all of their holdings of the debtor's securities and are no longer participating in the reorganization proceedings. Neither the Prudential nor the Mutual objects to the suggestion and the record shows no recent participation in the proceeding by these companies. The plan will be so modified.

Provision is made in the plan for the sale of certain noncarrier land subject to the mortgage of the Paterson Extension Railroad Company and distribution of the proceeds to the Paterson Extension bondholders. This land was subsequently sold for \$55,369.54 and the petitioners suggest that the plan be amended to reflect this fact. The plan will be modified accordingly.

Subsequent to our approval of the plan, the debtor's trustee, pursuant to appropriate orders of the court, entered into agreements for the construction of a direct connection between the debtor and the Pennsylvania Railroad Company. The agreements provide for the construction by the debtor's trustee of the Croxton viaduct and the conveyance of this viaduct together with certain land and rights connected therewith to the Pennsylvania Railroad upon payment of the stipulated purchase price. In order to finance this project the court authorized the trustee after obtaining appropriate authority

282 I. C. C.

from this Commission ¹⁷ to issue and sell \$1,200,000 principal amount of trustee's certificates maturing serially over a period of 20 years and secured by a first lien (hereinafter termed the Croxton viaduct mortgage) upon, among other things, the viaduct, the viaduct agreement, and the land and rights to be conveyed pursuant to the viaduct agreement. Under the agreement, the Pennsylvania will assume liability in respect of payment of the principal of and interest on the certificates, will operate and maintain the viaduct, and make the required payments of principal and interest. By terms of the court's order the Croxton viaduct mortgage is to be paramount to any and all liens upon the property subject thereto that may exist at the time of making of that mortgage and to the lien of all mortgages to be executed pursuant to the plan. The obligations of the debtor's trustee under the Croxton viaduct mortgage and under the viaduct agreement are to be binding upon his successors, including the reorganized company.

The petitioners suggest that the plan be modified by adding thereto an appropriate paragraph to provide that the liens of the new first and consolidated mortgage and the new income mortgage on the property covered by the Croxton viaduct mortgage shall be subordinate to (a) the lien of that mortgage on the property and (b) the viaduct agreement. This modification is approved.

We provided in the plan that holders of the new preferred stock voting separately as a class should be entitled to elect one-half of the membership of the board of directors of the reorganized company less one until all of the general-mortgage income bonds have been retired through operation of the securities retirement fund or otherwise. The plan further provided that these holders should have the right, voting as a class to elect not less than two directors of the company after default in the payment of the equivalent of six quarterly dividends. The petitioners contend that we intended these voting provisions to be overlapping to the extent that the election of two directors under the one first stated would satisfy the requirement of the second if it should become applicable, and they suggest a clarifying amendment to show this intention.

Sutro Bros. & Co., a broker dealing in securities issued by the debtor and also in securities of the reorganized company on a "when issued basis," opposes the making of the suggested clarification on the ground that we obviously intended to provide in the plan that the preferred-stock holders would have the right to elect a majority of the board of directors if default in the payment of six quarterly

¹⁷ See *New York, S. & W. R. Co. Trustee Certificates*, 275 I. C. C. 811 (not printed in full) decided June 21, 1950.

282 I. C. C.

dividends occurred while general-mortgage bonds are outstanding. On brief the intervener asserts that it and its customers hold a substantial position in the old bonds of the railroad in question as well as in the new "when issued" preferred stocks, and that it has engaged extensively for its customers' accounts in trading in the "when issued" securities of this railroad.

The record shows that the plan filed early in these proceedings by certain insurance companies provided that the preferred-share holders would have the right to one vote for each share held on all matters other than the election of directors where voting as a class they would have the unrestricted right to elect one-half of the board of directors less one. The examiner, in his proposed report, recommended in lieu of this proposal, that no limitation be placed upon the right of the preferred-stock holder to one vote per share on all matters, including the election of directors. In the report of July 19, 1944, the Commission, division 4, rejected the examiner's recommendation and approved the insurance group's proposal but conditioned the right to elect one-half of the membership of the board less one so that it would expire upon the retirement of all of the general-mortgage income bonds of the reorganized company through operation of the securities retirement fund or otherwise.

The controversial provision, giving the right to elect not less than two directors after default in the payment of the equivalent of six quarterly dividends, is a requirement of the New York Stock Exchange for listing of a security on the exchange as a preferred stock. Such requirement was set forth, among others, in the rules of the Stock List Department of the exchange issued May 4, 1940. It was adopted by us in this case and has been generally inserted in the plans of reorganization approved by us as a minimum requirement necessary to insure proper listing of the preferred stocks. In the consummation of the plans in other reorganization cases, it has been consistently interpreted, as far as we are able to determine, as a statement of minimum rights.

No party has previously contended in these proceedings that the preferred-stock holders should have control of the company upon default in the payment of dividends. The distribution of securities in the plan would place 91 percent of the new preferred stock in the hands of the first and refunding bond holders, who also would receive approximately 27.6 percent of the new income bonds. Regardless of whether these present bond holders retain the preferred stock and influence the control of the company as a class, or, preferring investments in bonds rather than stock, immediately dispose of their stock thus facilitating acquisition of control by other interest; we do not believe that a provision which might place control of this property in

282 I. C. C.

the hands of the preferred-stock holders would be beneficial to the carrier or in the public interest. We find that both from a historical standpoint, and from a consideration of the situation on its merits, the provision for election by the preferred-stock holders of at least two directors should apply only as a minimum provision which adds nothing to the right of these stockholders to elect one-half of the board less one director while that right is in effect.

We conclude that we should approve the clarification of the plan in this respect proposed by the petitioners.

Contentions and requested findings not specifically discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

Findings.—Upon consideration of the record, and the petition, we find that our report and order of March 5, 1945, approving a plan of reorganization for the New York, Susquehanna and Western Railroad Company, pursuant to section 77 of the Bankruptcy Act, should be modified and amended as herein specified; that our findings contained in said report, except as modified herein, should be, and they hereby are, affirmed; and that, as thus modified and amended, the plan will meet the requirements of section 77 (b) and (e) of the Bankruptcy Act, as amended, will be compatible with the public interest, and should be approved. Except as the plan would be so modified, the petition should be denied.

An appropriate supplemental order will be entered.

COMMISSIONER JOHNSON did not participate in the disposition of this proceeding.

APPENDIX

Second supplemental order at a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 12th day of March, A. D. 1951

It appearing, That this Commission, on July 19, 1944, by division 4, made and filed its report and order and at a general session on March 5, 1945, made its supplemental report and supplemental order in this proceeding, approving a plan for the reorganization of the New York, Susquehanna and Western Railroad Company pursuant to the provisions of section 77 of the Bankruptcy Act;

It further appearing, That, after objections to the approved plan were filed with, and evidence in support thereof presented to, the District Court of the United States for the District of New Jersey, said court by appropriate order referred the proceedings back to this Commission for reconsideration of the plan and further report;

It further appearing, That a petition for modification of the said plan was filed with this Commission by certain parties, a further hearing held, and this Commission on the date hereof, having made and filed its second supplemental report containing its findings of fact and conclusions thereon, which report,

282 I. C. C.

219160—54—4

together with the said report of July 19, 1944, and the supplemental report and order of March 5, 1945, are hereby referred to and made a part hereof:

It is ordered, That the plan of reorganization of the debtor, approved in the order of March 5, 1945, be, and it is hereby, modified as follows:

1. The second paragraph of section V, entitled New Securities, General, is modified to read as follows:

Script may be issued and distributed in lieu of fractional bonds or shares of stock. Such script will not entitle the holder to any interest or dividend payment or to any voting rights but shall be exchangeable, on or before January 2, of the fourth calendar year next succeeding the date of the order of the court directing consummation of the plan, for new securities (and for such interest and dividends in respect thereto as may be determined by the reorganization managers), when presented in proper multiples on terms and conditions approved by the reorganization managers. After such date, such script shall be void. Such adjustments as may be necessary to avoid the issuance of script in too small fractions may be made by the reorganization managers as they in their discretion shall determine.

2. Subparagraph 3 (g) of section X, entitled Determination and Application of Available Net Income, is modified to read as follows:

(g) Any then remaining available net income may be applied as the board of directors may determine to general corporate purposes or dividends on the several classes of stock in the order of their priority, provided that no dividends on the common stock shall be declared, set aside, or paid unless and until amounts equal to 20 percent of such dividends intended to be declared, set aside, and paid shall be paid into a fund, to be known as the security retirement fund, to be used and applied to the purchase or redemption in the open market or upon calls for tenders of general-mortgage income bonds, series A, and after retirement of all such bonds, to the purchase or redemption in the open market or upon calls for tenders of the preferred stock. General-mortgage income bonds, series A, and preferred stock so purchased or redeemed shall be cancelled and retired and shall not be reissued.

3. The fourth paragraph of section XI, entitled Preferred Stock and Preferred-Stock Voting Trust, is modified to read as follows:

Holders of the preferred stock shall be entitled to one vote per share upon all matters except to the extent that provision is made herein for the election of one director by holders of income bonds and except to the extent that the right of the holders of preferred stock to vote for members of the board of directors of the reorganized company is limited as hereinafter provided. Voting separately as a class, the holders of the preferred stock shall be entitled to elect one-half (if one-half involves a fraction, then the next larger whole number) of the membership of the board of directors of the reorganized company less one, and one of the directors so elected shall be a member of any executive committee and of any other committee exercising general or financial powers of the board of directors of the reorganized company, provided that this right of the preferred stockholders to elect one-half less one of the board of directors shall not apply after all of the general-mortgage income bonds have been retired through operation of the security-retirement fund or otherwise. Holders of preferred stock, voting as a class, shall have the right to elect not less than two directors at all times after default shall have been made and shall be continuing in the payment of the equivalent of six quarterly dividends on the preferred stock, whether or not such dividends shall have been earned and whether or not the defaults shall have been consecutive; provided, however, that this right to elect two directors shall not apply at any time when the holders of preferred stock, voting separately as a class, would be entitled to elect at least two directors pursuant to the provisions of the preceding sentence of this paragraph.

4. The sixth paragraph of section XI entitled Preferred Stock and Preferred-Stock Voting Trust, and the first paragraph of section XIV, entitled Means of

282 I. C. C.

Carrying Out the Plan, Payment and Assumption of Certain Claims, Contracts, Taxes, and Expenses of Reorganization Claims not affected by Plan, Et Cetera, are modified by deleting therefrom the words "the Prudential Insurance Company of America, and the Mutual Benefit Life Insurance Company of New Jersey" wherever they appear.

5. The seventh paragraph of section XIII, entitled Treatment of Existing Securities and Claims, is modified to read as follows:

Holders of the existing bonds of the Paterson Extension Railroad Company shall receive for each \$1,000 bond and all unpaid interest thereon to the effective date of the plan \$1,200 of new no-par-value common stock, stated at \$100 a share, in addition to their prorata share in the proceeds of the noncarrier lands subject to the mortgage of the Paterson Extension Railroad Company, all of which such lands have now been sold by the debtor's trustee, the proceeds of such sales amounting to \$55,369.54.

6. The sixth paragraph of section XV, entitled Miscellaneous Provisions, is modified to read as follows:

Nothing contained herein with respect to limitations on total authorized issues of new securities or total capitalization of the reorganized company or otherwise shall prohibit the issue by the reorganized company of equipment trust obligations upon the purchase of equipment, pursuant to appropriate approval by the Commission where required. Notwithstanding anything herein contained, the respective liens of the first and consolidated mortgage and the new income mortgage on the property subject to the lien of the Croxton viaduct mortgage hereinafter referred to shall be subordinate to (a) the lien on said property of the mortgage authorized and approved by Court Order No. 396 dated May 12, 1949 as supplemented by Court Order No. 418, dated January 9, 1950, and as such orders may be further supplemented, to secure not more than \$1,200,000 principal amount of trustee's certificates and known as the Croxton viaduct mortgage, and to (b) the viaduct agreement authorized and approved by said court orders.

It is further ordered, That, as so modified, said plan or reorganization of the debtor be, and it is hereby, approved;

It is further ordered, That except as stated in the accompanying report and as reflected in the plan of reorganization herein approved, the petition for modification of the plan approved March 5, 1945, is hereby denied;

And it is further ordered, That in all other respects the order of March 5, 1945, shall be and remain in full force and effect.

282 I. C. C.