

SERVICE DATE – FEBRUARY 1, 2008

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33388 (Sub-No. 100)

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

Decided: January 31, 2008

On January 20, 2006, Bridgewater Resources, Inc. (BRI) and ECDC Environmental, L.L.C. (ECDC), referred to collectively as petitioners, filed with the Surface Transportation Board (Board) a joint petition for clarification (petition) as to the limits of the North Jersey Shared Assets Area (NJSAA), established as part of the Conrail control transaction, approved by the Board in CSX Corp. et al. — Control — Conrail Inc. et al., 3 S.T.B. 196 (1998) (Decision No. 89).¹ In particular, petitioners sought a determination that BRI's waste transfer facility (BRI facility) was within the NJSAA and/or could be switched by Conrail under the parties' agreements pertaining to the NJSAA. In the event the Board found that the BRI facility was not located within the NJSAA, petitioners sought in the alternative a supplemental order that would enable Conrail to provide switching service, which NS currently provides between the BRI facility and CSXT's Manville Yard.

In a decision served July 31, 2006 (July 31 decision), the Board: (1) denied petitioners' alternative request for the supplemental order; (2) denied the motion filed by NS to dismiss the petition for clarification; and (3) established a procedural schedule that authorized petitioners to pursue limited discovery regarding the parties' intent in defining the boundaries of the NJSAA, established as part of the Conrail control transaction approved by the Board in Decision No. 89. The Board stated that it had particular interest in what the parties meant by the use of the term "CP," or control point, in defining the NJSAA.

¹ In Decision No. 89, the Board approved the acquisition of control of Conrail Inc. and Consolidated Rail Corporation (Conrail), and the division of that carrier's assets by (1) CSX Corporation (CSXC) and CSX Transportation, Inc. (CSXT) (collectively CSX), and (2) Norfolk Southern Corporation (NSC) and Norfolk Southern Railway Company (NSR) (collectively, NS). Acquisition of control of Conrail was effected by CSX and NS on August 22, 1998. The division of Conrail's assets was effected on June 1, 1999 (Split Date).

Upon completion of limited discovery, petitioners submitted their supplemented petition for clarification on November 3, 2006. On December 1, 2006, Conrail, NS, and CSX filed separate replies to the supplemented petition. Also on December 1, 2006, James Riffin d/b/a The Raritan Valley Connecting Railroad (Riffin) and CNJ Rail Corporation (CNJ Rail) submitted comments.

On February 6, 2007, petitioners filed their reply to the comments on their supplemented petition for clarification (February 6 reply). In their reply, petitioners state that they do not contest the assertions of NS and CSX that “CP-Port Reading Jct.” was intended to refer to milepost 35.92. Petitioners argue, however, that the BRI facility would be entitled to switching service by Conrail via the Raritan Valley Line, had Conrail not removed a section of track between the Lehigh Line and the Raritan Valley Line, known as the Reading Connector. Prior to its removal, the Reading Connector connected via a switch connection to the Raritan Valley Line at Bound Brook Junction, milepost 31.9, approximately 1.7 miles west of Bound Brook Station, milepost 30.2. Petitioners argue that the westerly limit of the NJSAA on the Raritan Valley Line is at Middle Brook Branch, milepost 32.4, and that this switch connection is located within the NJSAA. Therefore, petitioners assert that the Reading Connector could otherwise have been used by BRI to obtain switching service by Conrail after consummation of the Conrail control transaction. Presently, the BRI facility can only be served from the NS-owned portion of the Lehigh Line at a point of connection (with BRI’s Royce Spur) that lies outside of the NJSAA. Accordingly, petitioners request that the Board issue an order clarifying Decision No. 89 by finding that the BRI facility is connected to railroad-owned facilities located within the NJSAA, via the Raritan Valley Line, and that Conrail is authorized to provide switching service between the BRI facility and CSX’s Manville Yard under the terms of the NJSAA Operating Agreement by using the existing connection between the Lehigh Line and the remnants of the Reading Connector (i.e., BRI’s Royce Spur).

Pursuant to a decision served February 27, 2007, NS and CSX each filed comments on March 15, 2007, in response to petitioners’ February 6 reply.² Both NS and CSX dispute the assertion that the BRI facility is entitled to switching service via the Raritan Valley Line. On March 29, 2007, BRI submitted a reply to these comments, asserting, among other things, that the replies of NS and CSX failed to rebut BRI’s contention regarding the unauthorized removal of the Reading Connector that allegedly prevented petitioners’ access to Conrail.

BACKGROUND

In 1982, Conrail sold its Raritan Valley Line to New Jersey Transit (NJT) for commuter service. Conrail retained operating rights over the Raritan Valley Line to provide freight service. Conrail also granted NJT an easement over certain Conrail lines, including its Trenton Line, for commuter service. The Trenton Line crossed the Lehigh Line at CP-Port Reading Junction, proceeded north, and connected via a switch connection to the Raritan Valley Line at Bound

² The February 27 decision also simultaneously granted NS’s motion for leave to reply to comments submitted by Riffin and CNJ Rail and accepted NS’s comments.

Brook Junction, milepost 31.9, approximately 1.7 miles west of Bound Brook Station, milepost 30.2. The section of the Trenton Line track between the Lehigh Line and the Raritan Valley Line was known as the Reading Connector.

Subsequently, NJT terminated its commuter service and removed the switch at Bound Brook Junction that had connected the Reading Connector's northern point and the Raritan Valley Line, and Conrail removed the diamond where the Reading Connector's southern point crossed the Lehigh Line. Much of the Reading Connector trackage was removed.

In 1995, Conrail conveyed the real estate comprising the right of way of the Reading Connector to the then-owner of the BRI facility, Joseph Horner (Horner). The deed made clear that Horner had no right or expectation to receive rail service from Conrail on the property being sold or to require Conrail to establish any rail connections between his property and Conrail's other lines.

Subsequently, under the terms of the transaction agreement executed by NS, CSX, and Conrail in 1997, as part of the Conrail control transaction: (1) Conrail's Lehigh Line west of CP-Port Reading Junction, including the Lehigh Line's siding known as the Royce Running Track, were allocated to NS; (2) Conrail's Trenton Line and Manville Yard were allocated to CSX; (3) Conrail's Raritan Valley Line trackage rights between Aldene, NJ, and Bound Brook, NJ, were allocated to NJSAA and (4) Conrail's trackage rights between Bound Brook, NJ, and Ludlow, NJ, were allocated to NS. Additionally, Conrail's 2-mile Middle Brook Branch, which connects to the Raritan Valley Line at about milepost 32.4, was allocated to NS.

In 1998, Conrail and BRI entered into a Sidetrack Agreement to operate and construct a sidetrack on BRI's property, the Royce Spur, that would have a switch connection with the Royce Running Track. Conrail's successor, NS, has been providing rail service to the BRI property over the Royce Running Track and the Royce Spur under the terms of the Sidetrack Agreement.

POSITIONS OF THE PARTIES

Petitioner³ maintains that it is entitled to switching service by Conrail because the BRI facility resides on property inside the NJSAA. Specifically, petitioner states that the BRI facility is adjacent to the portion of the Raritan Valley Line that is within the NJSAA.

Petitioner asserts that the Middle Brook Branch, at milepost 32.4, marks the westerly limit of the NJSAA on the Raritan Valley Line. This point is west of Bound Brook Junction, where the Reading Connector previously connected with the Raritan Valley Line and west of BRI's facility. In support of its claim, petitioner points to the deed by which Conrail conveyed its lines in Somerset County, NJ, specifically conveying Conrail's interest in the Raritan Valley Line west of Middle Brook Branch to Pennsylvania Lines, LLC (PRR) (now NS). Petitioner also relies on the map attached to the transaction agreement, showing the southernmost track of the

³ On April 3, 2007, a motion for leave to withdraw as petitioner was filed by ECDC. Upon the Board's granting this motion in this decision, BRI will remain as the sole petitioner.

Raritan Valley Line in blue—i.e., as allocated to the NJSAA—as far west as the point denominated “Brook,” where the Raritan Valley Line connects with Middle Brook Branch.

Petitioner further argues that the BRI facility could have been served by Conrail over the Reading Connector from within what is now the NJSAA. Though the Reading Connector no longer existed at the time of the transaction agreement, petitioner asserts that that trackage was removed without the agency’s required abandonment authorization prior to the transaction agreement. (Petitioner relies on comments submitted by CNJ Rail and Riffin, which indicate that Conrail never sought or received authority from the Board’s predecessor to abandon or discontinue service on the Reading Connector.) Therefore, petitioner argues that Conrail has an obligation to restore the switch connection (and/or the crossing diamond) so that petitioner can exercise its right to obtain Conrail service.

Petitioner also submits that the Board has authority to permit Conrail to serve the BRI facility via the Lehigh Line (and thus avoid the need to reconstruct the Reading Connector) because, under the transaction agreement, section 3(c)(ii), NS has granted rights to CSXT and Conrail to use its lines as “necessary to effectuate the train operations and services contemplated by [the transaction agreement].”

NS disputes petitioner’s assertion that the NJSAA extends to Middle Brook Branch; rather, NS states that Bound Brook Station, approximately 2.2 miles east of Middle Brook Branch, marks the boundary between NS and the NJSAA territory along the Raritan Valley Line. NS contends that Bound Brook Junction is not within the NJSAA. NS relies on the language of the transaction agreement, which allocated trackage rights between “Bound Brook, NJ” and “Aldene, NJ” to the NJSAA. NS and CSX explain that, in railroad terminology, the designation “Bound Brook” signifies the station at Bound Brook. NS notes that the transaction agreement map shows in green—i.e., as allocated to NS—both the “Middle Brook I.T.” and trackage rights proceeding east of Middle Brook Branch, as far as “Bound Brook”; however, NS states, contrary to petitioner’s assertion, what is shown in blue as far west as “Brook” is not part of the Raritan Valley Line itself, but is what the map specifically identifies as “Bound Brook Yard” and “Calco Sdg.” Calco Siding, NS notes, once extended from Bound Brook Yard to Bound Brook Junction, but was removed some time prior to the transaction agreement. NS also points to cut point maps showing the allocation of rights on the Raritan Valley Line to NS, as far east as Bound Brook Station, and to the NJSAA, as far west as Bound Brook Yard. NS states that such depictions reflect the understanding of Conrail and NS as to the division points between NS and the NJSAA on the Raritan Valley Line.

Regarding the deed by which Conrail conveyed its lines in Somerset County, NJ, to PRR, NS asserts that the deed does not explicitly define the boundary between NS and NJSAA territory. To the extent the deed could be read to imply that the boundary is at the junction of the Raritan Valley Line and the Middle Brook Branch, rather than at Bound Brook Station, NS asserts that such an interpretation would be directly contrary to the transaction agreement language and map, the cut point notes and map, and the longstanding understanding of the parties to the transaction agreement.

NS further explains that, while regulatory authority was not sought to remove the switch connection between the Reading Connector and the Raritan Valley Line, no regulatory approval was required because, at the time, Conrail owned, or had freight rights over, all of the relevant trackage, and the “rearrangement” of tracks that took place did not impair Conrail’s ability to provide rail service to any shippers.

Even if Bound Brook Junction were located within the NJSAA, NS argues that BRI would not be entitled to Conrail service via the Reading Connector because, at the time of the transaction agreement, the Reading Connector was physically connected only to the Royce Running Track, which was allocated to NS. Under the terms of the transaction agreement, NS contends, the Reading Connector would thus be allocated to NS.

Furthermore, NS asserts that any finding that Conrail was required to restore the Reading Connector would be contrary to the express terms on which Conrail sold the Reading Connector to Horner. Lastly, NS and CSX state that the BRI facility is not entitled to service via the Lehigh Line under section (c)(ii) of the transaction agreement, as asserted by petitioner, because operations to the BRI facility via the Raritan Valley line were physically impossible at the time of the transaction agreement. Therefore, they claim, such service was not “contemplated” by the parties at the time of the transaction agreement.

DISCUSSION AND CONCLUSIONS

Petitioner’s argument that it is entitled to Conrail switching service via the Raritan Valley Line rests on its assertion that the Middle Brook Branch marks the division of trackage rights between the NJSAA and NS, thus placing Bound Brook Junction, where the Reading Connector joined the Raritan Valley Line, within the NJSAA. However, the parties to the original transaction agreement contend that Bound Brook Station, located 1.7 miles east of Bound Brook Junction, marks the NJSAA boundary. As noted in our July 31 decision, it is appropriate to give considerable weight to what the parties intended in their original transaction agreement in defining the boundaries of the NJSAA. Both NS and CSX submit persuasive evidence rebutting petitioner’s argument that Bound Brook Junction is located within the NJSAA. In particular, NS and CSX both refer to the language in the transaction agreement, allocating trackage rights to NS from Ludlow, NJ, to Bound Brook, NJ. Both NS and CSX explain that “Bound Brook” refers to Bound Brook Station. Furthermore, notes corresponding to the cut point maps prepared by CSX shortly before the Split Date place Bound Brook, NJ, at “NN-3” on the cut point map, where Bound Brook Station is located. CSX adds that Bound Brook Station, as opposed to Bound Brook Junction, serves as a logical cut point because it is located at Bound Brook Yard, thus allowing for interchange movements.

In short, petitioner has not supported its claim as to the location of the dividing line between NS’s and Conrail’s freight operating rights on the Raritan Valley Line. Accordingly, we find the BRI facility is not entitled to Conrail switching service under the terms of the transaction agreement because the facility is not within the NJSAA.

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

It is ordered:

1. Petitioner's request that the Board issue an order clarifying Decision No. 89 by finding that the BRI facility is connected to railroad-owned facilities located within the NJSAA, via the Raritan Valley Line, and that Conrail is authorized to switch cars between the BRI facility and CSX's Manville Yard under the terms of the NJSAA Operating Agreement, is denied.

2. ECDC's motion for leave to withdraw as petitioner is granted.

3. This decision is effective on March 2, 2008.

By the Board, Chairman Nottingham, Vice Chairman Mulvey, and Commissioner Buttrey.

Anne K. Quinlan
Acting Secretary