

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34527

MAUMEE & WESTERN RAILROAD COMPANY AND RMW VENTURES LLC –
PETITION FOR DECLARATORY ORDER –
CSX TRANSPORTATION, INC. CROSSING RIGHTS AT DEFIANCE, OH

Decided: May 8, 2007

In a decision served July 13, 2005, the Board instituted this proceeding upon the petition of Maumee & Western Railroad Company (M&W) and RMW Ventures LLC (RMW) (collectively, petitioners). Petitioners seek a declaratory order regarding actions taken by CSX Transportation, Inc. (CSXT) that petitioners allege unreasonably interfered with M&W's ability to conduct common carrier rail service operations under 49 U.S.C. 10901 and other statutory provisions.¹ In particular, several years after constructing and operating a second main line track at a longstanding crossing of M&W's track at Defiance, OH, CSXT removed the two crossing diamonds at this location, effectively severing M&W's main line track.

Petitioners seek a "declaration or revocation of crossing rights" and a Board order directing CSXT to immediately replace and restore the crossing diamonds, reconnect the main line track of M&W, enter into a crossing and interlocking agreement with M&W, and provide reasonable compensation to M&W for the crossing rights. Petitioners also seek Board authority to oust CSXT from M&W's right-of-way in the event of noncompliance. For the reasons discussed below, we grant in part the petitioners' request for a declaratory order, and find that CSXT is obligated to restore the crossing diamonds at Defiance promptly, unless the parties agree to a different crossing arrangement.

BACKGROUND

In 1874, CSXT's predecessor in interest constructed a rail line (CSXT line) that crossed an already existing line at Defiance. The existing line that it crossed (M&W line) was acquired in 1998 by RMW and has been operated by M&W for RMW.² The M&W line extends 51 miles,

¹ M&W asserts that, under section 10901(d), the Board was obligated to issue a decision in this proceeding within 120 days. However, the Board instituted this declaratory order proceeding under 5 U.S.C. 554 (e) and 49 U.S.C. 721, which do not contain time limits for issuing orders.

² See Maumee & Western, LLC—Acquisition and Operation Exemption—Norfolk and Western R. Co., STB Finance Docket No. 33478 (STB served Oct. 31, 1997); see also Maumee

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from milepost TN-28.0, at Liberty Center, OH, through the Defiance crossing (located between milepost 51.0 and milepost 52.0), to its terminus (milepost 79.0), at Woodburn, IN, where there is an interchange with Norfolk Southern Railway Company (NS). The CSXT line that crosses the M&W line is CSXT's main east-west line, running from Chicago to Pittsburgh and the northeast.

Until recently, the Defiance crossing was governed by a succession of agreements between the parties' predecessors in interest, the most recent agreement being one entered into in 1979. Under the 1979 agreement, the costs of operating, maintaining, repairing and renewing the "interlocking facilities" at the Defiance crossing were to be split between the parties in proportion to the amount of traffic traversing the crossing.³ On December 5, 2002, M&W gave written notice to CSXT of its intent to cancel the 1979 agreement, effective December 5, 2003, due to the present dispute.

According to petitioners, in 1995 CSXT constructed double track on much of its main line. In 2000, CSXT constructed a second crossing diamond in Defiance so that it would not have to switch to a single track to traverse the crossing. Petitioners did not object, at the time, to the construction of the double-track line or the installation of a second crossing diamond at Defiance.

In December 1999, because of the poor condition of M&W's tracks near the crossing, M&W requested that CSXT assist it in detouring some of M&W's trains away from the Defiance crossing.⁴ CSXT detoured individual trains for M&W to the west of Defiance until at least September 2001.

In December 2001, vandals set fire to the M&W bridge at milepost 64.49, near Cecil, OH, about 13 miles west of the Defiance crossing. Because the fire made movement over the bridge impossible, petitioners embargoed the M&W line at Cecil, OH.⁵ In the 12-month period prior to that embargo, M&W asserts that it moved 1,834 carloads over the M&W line that traversed the Defiance crossing.⁶ Since the embargo, M&W has not moved any traffic over the M&W line to the Defiance crossing. Instead, M&W has at times maintained minimal rail service

(. . . continued)

& Western R. Corp.—Operation Exemption—Maumee & Western, LLC, STB Finance Docket No. 33535 (STB served Jan. 16, 1998); RMW Ventures, LLC—Corporate Family Transaction, STB Finance Docket No. 33541 (STB served Mar. 10, 1998).

³ See Petition (Pet.), Exh. B; see also CSXT Reply, Exh. 2. CSXT contends that this agreement covered all maintenance associated with the crossing. Petitioners contend that this agreement related only to interlocking equipment, and that there has never been a written agreement on crossing maintenance in the over-100-year history of the crossing. See Petitioners' Rebuttal Statement (Reb.), Wendelin Verified Statement (V.S.) at 6.

⁴ See CSXT Reply, Vol. II, Thoburn V.S., Exh. C at 24-190.

⁵ See *id.*, Davis V.S., Exh. A at 219.

⁶ See Reb., Wendelin V.S. at 4.

by rerouting traffic via either a CSXT connection at Toledo, OH, or an NS connection at Findlay, OH.

To rehabilitate the M&W line, M&W's consultants recommended that M&W use heavier track for the portion of the line between the embargoed bridge and the Defiance crossing. Accordingly, in April 2002, M&W requested that CSXT provide it with enough heavy rail and ties to repair approximately 13 miles of track, arguing that this would enable M&W to serve shippers whose traffic would ultimately be interchanged on CSXT's line.⁷ CSXT declined, on the ground that the anticipated CSXT revenues associated with future M&W movements would not justify the expense of the requested assistance.⁸

In June 2002, CSXT notified M&W that CSXT had "made the decision to temporarily remove the CSXT/M&W crossing diamonds," citing "the interest of safety and efficiency," M&W's lack of usage of the crossing, and M&W's track conditions.⁹ M&W objected in writing to CSXT's removal of the crossing, stating that "such removal can not occur, unless [M&W] is assured of continuous and uninterrupted access to that portion of our railroad which lies west of those diamonds." M&W informed CSXT of its belief that removal of the crossing "would constitute a forced and unauthorized de facto abandonment of that portion of [M&W's] line."¹⁰ CSXT nonetheless disconnected M&W's track from the crossing diamonds in early July 2002, although it did not immediately remove them.¹¹

On July 15, 2002, M&W sought assistance from the Board's Office of Compliance and Enforcement (OCE)¹² to get CSXT to repair the diamonds and reconnect M&W's tracks to them. In its letter to OCE, on which CSXT was copied, M&W argued that otherwise its ability to provide competitive rail service would "be held hostage" by CSXT.¹³ M&W also argued that it had an "immediate need" to use the portions of its track west of the diamonds that was not embargoed for car storage and access to repair the embargoed portion. Finally, M&W expressed concern that the removal of the diamonds would discourage shippers from making traffic commitments to M&W.¹⁴ Ultimately, the parties were not able to resolve the dispute through mediation.

⁷ See Reply, Vol. II, Thoburn V.S., Exh. E at 197-98.

⁸ Id.

⁹ Pet., Exh. D. Petitioners suggest that "track creep" – by which petitioners apparently refer to the adverse impact that heavy trains can have on the alignment of a crossing diamond and the tracks at or near the crossing – contributed to the degradation of the crossing diamond. See Pet., at 4; Reb., Wendelin V.S. at 5.

¹⁰ Pet., Exh. F.

¹¹ Pet., at 5.

¹² OCE has since been renamed as the Office of Compliance and Consumer Assistance.

¹³ Pet., Exh. F.

¹⁴ Id.

On November 19, 2002, CSXT removed the crossing diamonds at Defiance altogether. CSXT asserts that it removed the diamonds due to high maintenance costs, lack of usage by M&W, and operational concerns. CSXT contends that the crossing diamonds must be maintained at a cost of about \$35,000-\$45,000 per year and must be replaced about every 3 years, at a cost of about \$275,000 each. CSXT argues that this maintenance cost was not justified because M&W had not moved any traffic over the crossings for some time due to the condition of M&W's own tracks.

CSXT further argues that, under its speed policy for railroad crossings, the crossing diamonds caused it to reduce train speed to 40 miles per hour on its 60-mile per hour main line tracks. CSXT estimates that this reduction of train speed through Defiance increased each train's time by 4 minutes, which, at an average of 52 trains per day, slowed its traffic moving over the Defiance crossing by a total of 208 minutes per day.

M&W's embargo related to the bridge damage expired approximately 3 weeks after CSXT's removal of the crossing diamonds. Petitioners assert that M&W made repairs to the bridge and attempted to provide service over the line.¹⁵ Three months later, however, M&W embargoed its line less than 4 miles west of the Defiance crossing, between milepost 55.9 and milepost 58.2, due to poor track conditions.¹⁶ This embargo lasted until August 2003, but there is no evidence in the record that this M&W track is operable today or that significant repairs have been made.¹⁷

Throughout the various embargoes, petitioners made numerous demands that CSXT reinstall the crossing diamonds at Defiance. In December 2003, CSXT discussed an alternative crossing with M&W, proposing to use a connecting track to allow M&W to cross its tracks. Petitioners rejected this offer, insisting that the crossing diamonds be replaced.

In the Spring of 2004, the City of Defiance and the Ohio Department of Development began working with private investors to develop a 700-acre industrial park (Defiance Industrial Park) to be bounded by M&W's line on one side and CSXT's line on another.¹⁸ Petitioners claim that, without the Defiance crossing, M&W has been unable to serve the Defiance Industrial Park and that this fact demonstrates that CSXT's removal of the crossing diamonds is anticompetitive.

¹⁵ See Reb., Wendelin V.S. at 23.

¹⁶ See CSXT Reply, Vol. II, Davis V.S., Exh. A at 219.

¹⁷ See Reb., Wendelin V.S. at 18.

¹⁸ CSXT has reached an agreement with the City of Defiance for CSXT to serve the Defiance Industrial Park. See Pet., Exh. O (no page numbers).

On July 16, 2004, petitioners filed the petition in this proceeding.¹⁹ The parties initially requested that OCE assist in mediation of the dispute, but petitioners subsequently withdrew that request.

In its reply to the petition, CSXT proposed an alternative crossing structure along the lines of the one it had advanced in December 2003. CSXT offered that, instead of reinstalling the diamonds, it would build a connecting track between CSXT's and M&W's lines. Under its proposal, CSXT would utilize an existing interchange track in the northwest quadrant of the crossing to connect M&W's track to CSXT's first main line, use an existing crossover track to move M&W trains to CSXT's second main line, and construct a new connecting track from the second CSXT main line to M&W's tracks so that trains could continue on east of the Defiance crossing. CSXT would pay for construction and maintenance of the connecting line. This connection would cost \$250,000 to install, would have a useful life of 12 years, and would cost about \$3,500-\$4,500 per year to maintain. CSXT states that it would guarantee M&W at least one crossing in each direction per day, but not a fixed operating window.

CSXT estimates that it could complete construction of the connecting tracks within 6 months. However, CSXT asserts that it should not bear these costs until M&W commits to a plan to repair its track west of the crossing (including identification of a funding source), maintains its track in operable condition, and cooperates with CSXT in arranging for its operation over the crossing.

In their rebuttal, petitioners argue that this alternative crossing would be operationally unworkable and that CSXT's preconditions to installing a crossing are not justified.²⁰ Petitioners provide letters supporting their position from shippers seeking rail competition.²¹

DISCUSSION AND CONCLUSIONS

Crossing arrangements between carriers are best handled through private negotiation and agreement as they require substantial cooperation between the parties. Consequently, crossing disputes are rarely brought before the Board. Here, because the parties have been unable to agree on what sort of crossing, if any, must be provided at Defiance and when it must be provided, we will address these core issues, which are central to the parties' dispute. We expect the parties to then resolve any remaining issues among themselves (with informal assistance from the Board's staff, if necessary).

¹⁹ The Board accepted the petition as petitioners' opening statement. CSXT filed a reply statement, to which petitioners filed rebuttal.

²⁰ See Reb., Wilbert Snyder V.S. at 2-5, 7.

²¹ See Reb., Wendelin V.S. at 37-43 (page numbering stops after 36).

Relevant Statutory Provisions

Under 49 U.S.C. 11101(a), every rail carrier subject to the jurisdiction of the Board has a common carrier obligation to “provide [] transportation or service on reasonable request.” Neither a public nor a private entity may interfere with a carrier’s ability to fulfill its common carrier obligation by severing a carrier’s line without Board authorization.²²

Crossing arrangements between carriers are governed by 49 U.S.C. 10901(d)(1), which requires that a carrier allow another carrier to cross its existing line if certain conditions, to protect the operation of the crossed carrier from material or unreasonable interference, are met.²³ While the language of section 10901(d)(1) focuses on crossings by a newly constructed or extended rail line, it has also been applied to crossings that predated enactment of that provision.²⁴

Petitioners suggest that 49 U.S.C. 10742, which codifies a rail carrier’s obligation to maintain interchange facilities, is also relevant to this dispute. We disagree. What petitioners seek to have reinstated is not an interchange, but rather a crossing. M&W interchanges traffic with CSXT on a separate interchange track near the Defiance crossing, and the operation of that interchange is not the subject of this dispute.

²² See, e.g., Union Pacific Railroad Co. – Petition for a Declaratory Order, STB Finance Docket No. 34090 (STB served Nov. 9, 2001) (“[I]t is well settled that, without abandonment authority from the Board, a state or local order, regulation or civil enforcement action that would sever a line of railroad or prevent operation over it is precluded.”); Wisconsin Dep’t of Trans. – Abandonment Exemption – In Winnebago, WI; Wisconsin & Southern R.R. Co. – Discontinuance Exemption – In Winnebago County, WI, ICC Docket No. AB-343 (Sub-No. 2X), at 2 n.3 (ICC served July 13, 1993) (noting that a carrier’s severing of line “on its own initiative” for a highway project “could be construed as an unlawful abandonment,” and admonishing carrier that it must seek advance authorization in the future).

²³ Section 10901(d)(1) states:

When a certificate has been issued by the Board under this section authorizing the construction or extension of a railroad line, no other rail carrier may block the construction or extension authorized by such certificate by refusing to permit the carrier to cross the property if – (A) the construction does not unreasonably interfere with the operation of the crossed line; (B) the operation does not materially interfere with the operations of the crossed line; and (C) the owner of the crossing line compensates the owner of the crossed line.

²⁴ See The Burlington Northern and Santa Fe Railway Company – Petition for Declaration or Prescription of Crossing, Trackage, or Joint Use Rights, STB Finance Docket No. 33740, slip op. at 9 (STB served May 13, 2003) (Burlington Northern).

CSXT's Obligation to Provide a Crossing at Defiance

A carrier may not undercut another carrier's ability to fulfill its common carrier obligation by unilaterally severing track of the other carrier that is part of the national transportation system. Here, it is uncontested that CSXT unilaterally removed the crossing diamonds at Defiance. CSXT claims that it was entitled to do so due to the lack of use by M&W, the poor condition of M&W's track, and the detrimental effect the unused crossing had on CSXT's high-speed operations. But it did so over M&W's vehement objections and without approval from the Board. Under these circumstances, CSXT did not have the right to sever another carrier's line, thereby precluding M&W's ability to operate over a portion of M&W's line.

CSXT argues that the crossing diamonds used here slowed the flow of traffic on one of CSXT's main lines, and were expensive to maintain. However, crossing arrangements between railroads are governed either by mutual arrangement between the parties or, in extreme cases where the parties are unable to work out agreements, by Board intervention. One carrier may not unilaterally terminate a long-standing crossing arrangement over the other carrier's objections and without Board authority by severing the other carrier's line.

There may be situations that merit an exception to this general rule. For example, if a line has been long dormant and the carrier desiring to remove a crossing has made every attempt to contact the owner of the dormant line but has not received a reply after a sufficient amount of time, it may be reasonable to remove the crossing without consent and without seeking approval from the Board. Even in such situations, however, the carrier removing the crossing must be cognizant of the fact that it would be under an obligation to restore the crossing at the request of the owner.

Given that M&W responded when CSXT provided notice of its intention, and registered a strong objection to the removal, CSXT's removal of the crossing at Defiance does not merit an exception to the general rule. Therefore, CSXT is obligated to restore the status quo ante and reinstall the crossing. We believe that this can and should be accomplished within 60 days.

Unless CSXT obtains M&W's consent for another arrangement, CSXT is obligated to restore the same type of crossing that it removed (i.e., diamonds); it may not unilaterally dictate another type of crossing.²⁵ The value of M&W's line, whether to M&W today or to an acquirer of the line in the future, is certainly related to the ease with which trains can traverse the line and the crossing. If M&W is correct that a turn-out type crossing would create significant operational difficulties for it, then it is likely that both the utility and value of M&W's line would

²⁵ CSXT's reliance upon Burlington Northern to justify its unilateral decision to alter the type of crossing is misplaced. The carriers in that case agreed to relocate and alter a crossing – it was not moved over the objection of either carrier. Rather, the dispute before the Board in Burlington Northern involved one of these carriers' subsequent attempt, several years later, to begin charging a "switching rate" to traverse the relocated crossing and the tactics it used to enforce that arrangement.

be diminished. However, we recognize that crossing diamonds are not always ideal,²⁶ and we encourage the parties to endeavor to work out a mutually satisfactory crossing arrangement that will also address CSXT's interest in efficient high-speed operations.²⁷

Under the circumstances here, M&W is not required to satisfy preconditions before CSXT's obligation to restore the crossing diamonds is triggered. CSXT has suggested that M&W be required to show that it has traffic and/or that its tracks have been repaired prior to CSXT restoring the crossing. However, CSXT was not authorized to remove the crossing in the first place, and, as the crossing carrier, CSXT must ensure that the operations of the crossed carrier are not disrupted. Accordingly, given the facts here CSXT has an obligation to restore the status quo ante forthwith, without preconditions.

We do not intend to suggest that a crossing, once in place, can never be altered or removed. Parties to crossing arrangements remain free to negotiate changes to the crossing that are acceptable to both sides. In cases of impasse between the parties, the party desiring to alter the crossing can seek Board intervention and assistance.²⁸ But it cannot sever another carrier's line over the objection of that carrier and without Board approval.

Other Issues

M&W argues that CSXT's removal of the crossing diamonds is an anticompetitive action that has caused M&W to lose actual and potential business to CSXT. But M&W has not shown that its business losses are due to the removal of the crossing as opposed to its own track

²⁶ See Burlington Northern at 15 n.39 ("A configuration other than a diamond crossing can be beneficial to the railroads involved because of the generally higher cost of maintaining that type of crossing."); Public Service Co. of Colorado – Petition for Crossing Authority Under 49 U.S.C. 10901(d), STB Finance Docket No. 33862 (Sub-No. 1) (STB served Mar. 22, 2001) at 3 (noting that the parties had agreed to replace a crossing diamond with "a double turnout configuration that would apparently minimize interference with BNSF's operations over its main north-south route through Colorado and would also be safer to operate."); Montezuma Grain Company, LLP and Parke County Redevelopment Com'n v. CSX Transportation, Inc., ICC Docket No. AB-55 (Sub-No. 486) at n.5 (STB served Sept. 13, 2002) ("A crossing diamond is a plate installed where the rail of one line crosses the rail of another line. Because gaps in the rail are necessary to permit passage of wheel flanges, the rail ends at the gaps are high stress points and subject to deterioration. Any diamond with even moderately heavy traffic requires frequent maintenance.").

²⁷ Regardless of the type of crossing installed, CSXT must ensure that M&W has reasonable operational access to the crossing. This can be achieved by establishing appropriate protocols that take each carrier's actual and potential traffic into account.

²⁸ See Burlington Northern (ordering that a long-standing crossing be restored despite one carrier's attempt to physically block the other from crossing).

conditions. And the restoration of the crossing should remove the potential for anticompetitive behavior.

Petitioners have raised a number of additional arguments in their pleadings that we will not attempt to resolve at this time. For example, M&W has argued that CSXT's introduction of double-tracked high-speed trains in the late 1990's caused misalignment of M&W's neighboring track. However, M&W does not specify what portion of its track was allegedly damaged, nor has it demonstrated that CSXT was the cause of the alleged misalignment.

M&W requests that we issue orders regarding compensation and other issues related to the maintenance of the crossing. We will leave these matters to be negotiated by the parties. We encourage the parties to reduce to writing who will bear the costs of maintaining the crossing once it has been restored, since Mr. Wendelin indicates that there has never been an agreement on who would maintain the crossing in the more than 100 years the crossing was in place.²⁹

Conclusion

In sum, CSXT is obligated to restore the crossing diamonds at Defiance within 60 days, unless the parties agree to another crossing arrangement. The parties should negotiate any compensation arrangements, such as maintenance for the crossing, and any remaining disputed issues.³⁰

It is ordered:

1. Petitioners' request for declaratory relief is granted to the extent set forth above.
2. This decision is effective on its date of service.

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

Vernon A. Williams
Secretary

²⁹ Reb., Wendelin V.S. at 6.

³⁰ The parties may avail themselves of mediation by Board staff if they believe it would aid in resolving any remaining disputes more quickly and efficiently.