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SERVICE DATE - DECEMBER 9, 1998

SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 33388

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

Decision No. 107

STB Finance Docket No. 33388 (Sub-No. 80)

RESPONSIVE APPLICATION--WHEELING & LAKE ERIE RAILWAY COMPANY

Decided: December 8, 1998

This decision addresses the petition for clarification (designated as WLE-10) filed October 22, 1998, by Wheeling & Lake Erie Railway Company (W&LE or petitioner) with respect to the transaction we authorized in Decision No. 89, served July 23, 1998.¹ In its petition, W&LE states that, as directed by the Board, it has negotiated with applicants with the goal of reaching an agreement on the conditions we imposed in Decision No. 89, but several matters remain unresolved. W&LE therefore asks us to resolve these issues in the manner and to the extent it requests.² By separate replies filed November 10, 1998 (designated as NS-72 and CSX-166), applicants CSX and NS oppose W&LE's requested relief.³

¹ In Decision No. 89, we approved, subject to conditions, the application by CSX Corporation and CSX Transportation, Inc. (collectively CSX), and Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively NS) under 49 U.S.C. 11321-26 for: (1) the acquisition of control of Conrail Inc., and Consolidated Rail Corporation (collectively Conrail); and (2) the division of Conrail's assets by and between CSX and NS.

² W&LE supplemented its petition for clarification by: correspondence filed October 30, 1998; a response (designated as WLE-11) filed November 10, 1998, to matters raised by applicants; and a reply (designated as WLE-12) filed November 19, 1998, to CSX-166.

³ In addition, on October 22, 1998, NS filed a report and proposal with respect to the conditions (designated as NS-71), and CSX filed related correspondence on October 22 and 23, 1998.

BACKGROUND

In our decision approving the primary transaction, we granted in part and denied in part W&LE's responsive application in Sub-No. 80. As pertinent here, in Decision No. 89, slip op. at 109, we stated:

We will require applicants to provide certain remedies to W&LE to prevent further erosion of W&LE's financial viability due to this transaction. We will require applicants to provide: (a) overhead haulage or trackage rights access to Toledo, OH, with connections to the Ann Arbor Railroad and other railroads there; (b) an extension of W&LE's lease for the Huron Docks and trackage rights access to the Huron Docks over NS' Huron Branch; (c) overhead haulage or trackage rights to Lima, OH, including a connection to the Indiana and Ohio Railroad. Further, we will require that applicants negotiate with W&LE concerning mutually beneficial arrangements, including allowing W&LE to provide service to aggregate shippers or to serve shippers along CSX's main line from Benwood to Brooklyn Junction, WV.

As regards items (a), (b), and (c) above, we required the parties to attempt to negotiate an agreement; and, if negotiations were not fully successful, applicants and W&LE could submit separate proposals 90 days after the service date of Decision No. 89. Id. at 109 and 181. With regard to the mutually beneficial arrangements, we required the parties to enter into negotiations and inform us of any arrangements that they have reached.

W&LE asserts that applicants CSX and NS have taken too narrow of an approach to the negotiations over the imposed conditions. According to petitioner, the conditions imposed on its behalf must be viewed from the broader perspective that W&LE provides essential rail services in a highly industrialized area, that the Conrail transaction threatens W&LE's viability as a strategic regional railroad, and that each of the Board's conditions was designed to provide W&LE with new traffic and revenue opportunities to promote the carrier's financial viability and well-being. Therefore, petitioner maintains that, in order to provide meaningful relief, applicants should be directed to grant W&LE: access to local industries in Toledo and Lima, OH,⁴ via reciprocal switching at a switching rate of \$184 per car; permanent, lease-to-own trackage rights access to NS' Huron Docks without the existing restriction as to commodity; local trackage rights over CSX's line

⁴ With respect to trackage rights to Lima, OH, W&LE also seeks: direct access to Clark Oil Refinery and "the BP refining complex," including the right to purchase Conrail's tracks leading to these facilities; and an interchange with Indiana & Ohio Railway Company (IORY) and R.J. Corman Railroad Company/Western Ohio Line (RJC).

between Benwood and Brooklyn Junction, WV; and trackage rights over NS to institute service on behalf of aggregates shippers.⁵

CSX and NS contend that the relief sought by W&LE goes beyond the scope of our conditions and should be denied. Applicants argue that W&LE is not seeking clarification, but instead is seeking reconsideration and the imposition of new conditions on applicants. As regards W&LE's request for access to local industries in Toledo and Lima, applicants assert that petitioner is asking for additional concessions beyond anything the carrier sought in its responsive application. Such relief, according to applicants, can only properly be sought in a petition to reopen, not through a clarification request. With respect to mutually beneficial arrangements, applicants maintain that W&LE is asking for conditions that will not benefit either CSX or NS. Applicants assert that the Board's language is unambiguous and requires no clarification.

RELIEF SOUGHT BY W&LE

Trackage rights access to Toledo. W&LE states that it has elected to serve Toledo by way of trackage rights from Bellevue to Toledo, OH, via the existing NS route between these two points. According to petitioner, the parties have agreed to submit to the Board those regulatory filings necessary to enable W&LE to initiate trackage rights operations to Toledo and to permit the sale of NS' Maumee River pivot bridge to W&LE, with NS retaining operating rights over the bridge. W&LE states that discussions are progressing concerning its use of two tracks at NS' Homestead Yard for the pickup and delivery of traffic. W&LE asks that it be given access to these yard tracks for the purposes of staging its traffic. W&LE also proposes that the Board require the parties to reach an agreement as to NS' reconstruction of certain track facilities (i.e., a so-called Bellevue mini-plant) that will facilitate operations around Bellevue, subject to terms and conditions to be agreed upon by the parties.

W&LE maintains that the Board intended it to have access to local Toledo industries, and not merely to connections with other railroads in the Toledo area, including CSX and NS. According to petitioner, the Board did not intend to limit W&LE's access to Toledo only for the purpose of interchanging traffic there with the Ann Arbor and other railroads in the vicinity, as applicants have contended in negotiations. W&LE submits that, if the Board adopts applicants' interpretation of the Toledo condition, W&LE will lack sufficient traffic and revenue opportunities to support viable service to Toledo.

To minimize interfering with existing rail operations in the Toledo area, W&LE proposes to limit its local presence by depending upon other carriers in Toledo, including NS and CSX, to provide reciprocal switching services to W&LE at all points and stations in the Toledo area

⁵ On December 4, 1998, Lafarge Lime Ohio, Inc. (Lafarge), an aggregates shipper, also urged that W&LE be given access to Lafarge's facilities.

currently open for such service. W&LE proposes to pay \$184 per car for such reciprocal switching service. W&LE submits that the applicants have no basis to reject W&LE's reciprocal switching proposal, and urges the Board to grant its requested arrangement (including the proffered reciprocal switch charge) as necessary for W&LE to compete successfully in the Toledo market.

NS contends that the Board quite plainly granted W&LE overhead haulage or trackage rights access to Toledo and that nowhere in Decision No. 89 does the Board even suggest that its condition includes local access to shippers at Toledo. NS points out that W&LE's own responsive application and operating plan sought access to Toledo expressly to effect an interchange with IORY, Ann Arbor Railroad Company (AA), and Canadian National Railway Company (CN). WLE-4 at 74 and 82. Although NS disputes petitioner's claim that the imposed condition permits W&LE to interchange with all other railroads at Toledo, including the applicants, NS states that it is willing to permit W&LE to interchange with NS and CSX at Toledo, provided that any interchange between W&LE and CSX takes place at CSX's yard facilities.⁶ As regards petitioner's proposals for access to NS' Homestead Yard and the construction project at Bellevue, NS maintains that these matters are not directly linked to the Board's conditions and, in view of the parties' ongoing negotiations, should not be imposed as conditions now.

Huron Docks. W&LE indicates that, although some progress has been made on the issue of its access to Huron Docks, NS disagrees with its proposal concerning the appropriate terms and duration of an agreement. Accordingly, W&LE renews its request for permanent, lease-to-own trackage rights access to NS' Huron Docks without the current restrictions in the lease as to commodity. W&LE maintains that its proposal provides for long-term operations that are consistent with the Board's intent to accomplish two objectives: (1) to preserve a meaningful competitive transportation alternative for Wheeling-Pittsburgh Steel at Mingo Junction, OH; and (2) to protect for the long term W&LE's access to the substantial revenue opportunity W&LE already enjoys by having access to the Huron Docks. W&LE also contends that its access to the Huron Docks is critical to its refinancing of long-term debt and consequently to W&LE's future viability.

NS states that the Board clearly did not order divestiture of the Huron Docks and did not order unrestricted access by W&LE. NS maintains that, to the contrary, the Board required applicants to "extend W&LE's lease at, and trackage rights access to," Huron Docks at Lake Erie. Decision No. 89, slip op. at 181. NS contends that, rather than accepting petitioner's overreaching request, the Board should adopt its proposal offering W&LE: an extension of longer duration than the original lease term; the right to terminate the lease on 6-months' notice, without reserving a similar right for NS; and consideration, on a case-by-case basis, of exceptions to the current commodity restrictions.

⁶ NS also indicates that it has agreed to provide W&LE with overhead trackage rights to interchange points in Toledo with AA and CN, and that it has reached agreement with W&LE as to route, compensation, and effective date of those rights. See NS-72 at 6.

Trackage rights access to Lima, OH. W&LE states that CSX has agreed to its proposed route (CSX from Carey, OH, to Lima via Upper Sandusky) and trackage rights rates. Contrary to CSX's remaining position, however, W&LE contends that the Board's condition permits W&LE to obtain access to local industries in Lima, in addition to a connection with IORY. W&LE asks the Board to extend the scope of the relief at Lima to include direct access to the BP refining complex and Clark Oil Refinery at Lima⁷ and an interchange with RJC, a short line rail carrier also serving the Lima area.

W&LE states that access to Lima was not a part of its responsive application, but rather is a novel component of the Board's remedies extended to W&LE.⁸ According to W&LE, applicants incorrectly assume that W&LE would derive significant economic benefit by merely having a connection with IORY. Petitioner states that, after a number of meetings with IORY, it does not appear that the two carriers have the ability to generate any appreciable interchange business between themselves. Without access to local industry, W&LE has determined that the prospective volume of interchange between W&LE and IORY (and RJC) at Lima is so small that W&LE's service to and from this point would result in an operating deficit.

W&LE stresses that its access to Lima will be meaningless unless the condition is interpreted to include local access. As it proposes in the case of Toledo, W&LE offers to limit its service to local industry at Lima to access via reciprocal switch to all industries and stations in Lima currently open to reciprocal switching, at a switching charge of \$184 per car. W&LE submits that its proposal is not merely reasonable, but also offers the least disruptive arrangement to the applicants' planned operations in Lima. W&LE believes that its reciprocal switch access to Lima, along with access to Clark Oil Refinery and the BP refining complex, IORY, and RJC, will generate sufficient traffic and revenue opportunities to permit W&LE to sustain its trackage rights operations, and maintain a constructive presence.

⁷ W&LE states that it has identified a route to the Clark Oil Refinery and adjacent BP facilities that appears to be a short rail segment between the IORY and the Clark/BP properties (a line that apparently will be conveyed to CSX). Petitioner believes that CSX can serve the above-mentioned facilities without the need for the Conrail branch trackage. In the event that CSX seeks to dispose of the trackage in question through abandonment or sale, W&LE requests that it be given the right to purchase this line to ensure its continued access to the industry immediately surrounding the Clark Oil Refinery.

⁸ Although W&LE originally sought a connection with IORY and other carriers at Toledo, there is no available interchange with IORY at that location. We therefore granted W&LE overhead haulage or trackage rights to Lima to enable petitioner to connect with IORY. See Decision No. 89, slip op. at 109 and 181.

CSX maintains that, as in the case of Toledo, petitioner requests concessions at Lima that are not supported in the record. According to CSX, W&LE seeks rights at Lima that not only go beyond the Board's decision, but also beyond anything that W&LE sought in its responsive application and request for conditions. CSX contends that petitioner's new proposal for local access should not be entertained because the Board expressly denied the carrier's numerous requests in its responsive application for direct commercial access. CSX also opposes petitioner's request for additional trackage rights to interchange with RJC at Lima.

Aggregate and Benwood-to-Brooklyn Junction Service. In its responsive application, W&LE requested haulage rights, with underlying trackage rights, between Benwood and Brooklyn Junction. W&LE states that these rights would allow it to provide single-carrier service in moving British Petroleum coke traffic from Toledo to Cressup, WV, via a more direct route, and that PPG, Bayer, and other shippers on the line would benefit from its local access. W&LE states that, although it believes that access to customers on this line is an essential component of settlement negotiations, CSX refuses to discuss W&LE operations over this line. Accordingly, W&LE seeks confirmation from the Board that conclusion of a mutually acceptable arrangement is an integral part of the remedial condition and that CSX must grant W&LE local trackage rights over the Benwood-Brooklyn Junction line. W&LE proposes trackage rights fees at NS/CSX merger-related charges of 29 cents per car-mile.

With respect to negotiations over an aggregate traffic agreement, W&LE states that NS has asserted that many of the aggregate locations where W&LE could previously have been a part of a mutually beneficial solution have essentially retained single-line CSX or NS service by virtue of other protective conditions included in Decision No. 89. In view of that response, W&LE believes that the parties have reached an impasse. Furthermore, W&LE notes that the applicants seem committed to negotiating on aggregate-related matters only at the exclusion of discussions on Benwood to Brooklyn Junction.

W&LE believes that the Board intended that the full scope of relief to be afforded W&LE should include agreements for access to provide additional service to aggregate shippers. For that reason, W&LE urges the Board to direct applicants to enter into arrangements which will allow W&LE to provide expanded service for aggregate shippers. As in the case of its Benwood-to-Brooklyn Junction operations, W&LE offers to pay trackage rights compensation equal to the CSX/NS merger related charges of 29 cents per car-mile.

CSX and NS indicate that, although they are willing to continue discussions with W&LE to identify mutually beneficial opportunities, they are not willing to provide W&LE with local trackage rights to all aggregates shippers and customers located on the Benwood-Brooklyn Junction line. Applicants contend that it would not make business sense for them to allow petitioner to use their lines and directly serve their customers with no reciprocal benefits for them. CSX indicates that it has submitted a number of proposals to W&LE for its consideration, including a proposal concerning movements on behalf of a shipper on the Benwood-Brooklyn Junction line. NS

maintains that neither it nor CSX has ever taken the position that negotiations on aggregate-related matters could only proceed if discussions as to Benwood-Brooklyn Junction are excluded, or vice versa.

DISCUSSION AND CONCLUSIONS

The relief sought by W&LE will not be granted. In Decision No. 89, we found that W&LE's projection of an annual diversion of between \$12.7 and \$15 million in traffic revenue to applicants was overstated, and that a more realistic estimate was probably between \$1.4 and \$3.0 million. We also found that the extensive conditions sought by W&LE were a substantial overreach both in terms of geographic scope and financial impact. We concluded nevertheless that the traffic losses and W&LE's precarious financial situation warranted the imposition of less intrusive conditions. In imposing those conditions, we intended to give W&LE the opportunity

to achieve operational cost savings and expand its market reach through connections with other regional carriers. Despite petitioner's assertions to the contrary, it was not our intention to maximize W&LE's financial prospects in each instance where we imposed a condition on its behalf.⁹

To address petitioner's situation, we granted W&LE overhead haulage or trackage rights to Toledo with rights to connect to AA and other railroads there. We also granted W&LE identical overhead rights to Lima that included a connection with IORY. Our conditions in this regard mirrored the relief sought by W&LE in its responsive application. In its responsive application, petitioner requested access to certain carriers, including AA and IORY, and to one shipper, British Petroleum, at Toledo, but W&LE did not seek access to local industries in Toledo. W&LE stated that it wanted these new carrier connections to provide operational flexibility and opportunities to develop new, more efficient traffic patterns:

* * * By the addition of a series of relatively short and simple connections, the W&LE will have the ability to bring many efficiencies to rail transportation in this region. In addition, W&LE seeks the ability to establish new interchanges that will develop traffic patterns that do not exist today. With a location central to a geographic area that includes the heart of Conrail, the W&LE needs to reach out to connections that make sense to our customers, and to provide a real transportation alternative.

⁹ As regards our conditions, W&LE did not seek reopening or reconsideration of Decision No. 89 for the purpose of contesting the scope of the relief we imposed on its behalf or for asking us to grant it further relief. See Decision No. 96, served October 19, 1998, slip op. at 17-18. The time has passed for an administrative appeal from our decision. W&LE cannot substitute its current petition for clarification for a substantive challenge to that decision.

WLE-4, VS Wait at 68 (emphasis in original).

* * * [W&LE would operate] one train in each direction per day, six days per week between an existing connection with the Norfolk Southern at Yeomans, Ohio, and Toledo for interchange with the Ann Arbor Railroad, Canadian National, and the Indiana & Ohio. Additional traffic would be loaded hoppers of petroleum coke received from British Petroleum.

Id. at 82.

Thus, the relief that W&LE seeks goes beyond the conditions that the Board imposed as relates to Toledo and Lima--conditions that largely reflected what W&LE had originally sought and that adequately incorporate the Board's concerns regarding W&LE's viability. Regarding the other relief that W&LE seeks, W&LE also requested in its responsive application local trackage rights on CSX's Benwood-Brooklyn Junction line, access to shippers PPG and Bayer at Natrium, WV, and to BP coke traffic moving between Toledo and Cressup, WV, and commercial access to specific aggregates shippers. We did not, however, grant direct commercial access to British Petroleum, Lafarge, or any other specific shippers or locations. Instead, we required applicants to negotiate with W&LE concerning mutually beneficial arrangements, including the various rights sought by W&LE in its requests for local access. By definition, our imposition of the arrangements now sought by petitioner, over applicants' objections, would not be of mutual benefit.

W&LE renews its request for permanent, lease-to-own trackage rights access to NS' Huron Dock with the current lease's restrictions as to commodity. We did not grant that relief in Decision No. 89. To the contrary, we quite plainly required applicants to "extend W&LE's lease at, and trackage rights access to," Huron Dock on Lake Erie. Id. at 181. NS indicates that it has offered petitioner an extension of even longer duration than the current lease term and it is willing to consider exceptions to the commodity restrictions now in force. Again, petitioner's divestiture request is overreaching.

We ask the parties to continue good faith negotiations in a manner consistent with our findings in Decision No. 89. We will continue to assess this situation carefully during the course of our oversight proceeding to ensure that W&LE has the opportunity to achieve operational cost savings and remain a viable carrier in the region where it currently operates.

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

It is ordered:

1. The petition for clarification and further instruction (WLE-10) is denied.

STB Finance Docket No. 33388 et al.

2. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary