

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: November 30, 2006

In a decision served July 31, 2006 (July 31 decision), the Board: (1) denied the motion filed by Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively, NS) to dismiss a petition for clarification filed by Bridgewater Resources, Inc. (BRI) and ECDC Environmental, L.L.C. (collectively, petitioners); and (2) established a procedural schedule that authorized petitioners to pursue limited discovery regarding the parties' intent involving the boundaries of the New Jersey Shared Assets Area (NJSAA), as 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

On September 5, 2006, petitioners filed a joint motion to compel responses to discovery requests involving relevancy objections. Petitioners seek answers to interrogatories and production of documents regarding: (1) the status/disposition and location of the former "Reading Connector;" (2) the division of property interests/operating rights on the Raritan Valley Line; and (3) Conrail's switching activities to facilities in the vicinity of the NJSAA that are located on tracks/property it does not own. On September 8, 2006, NS filed a reply to the joint motion to compel. On September 11, 2006, CSX and Conrail filed separate replies in opposition to the joint motion.²

¹ In Decision No. 89, the Board approved the acquisition of control of Conrail Inc. and Consolidated Rail Corporation (collectively, Conrail), and the division of that carrier's assets by (1) CSX and CSX Transportation, Inc. (collectively, CSX), and (2) NS. The transaction agreement between CSX, NS, Conrail, and CRR Holdings, LLC, dated June 10, 1997, governed the control transaction and division of assets. See 3 S.T.B. at 219 (1998).

² Replies to motions to compel were due September 8, 2006, according to the procedural schedule set forth in our decision served on August 29, 2006. Nevertheless, the Board will accept the late-filed pleadings.

1. Reading Connector

In Petitioners' Discovery Request to Applicants, dated August 4, 2006, petitioners submitted Interrogatory Nos. 3 and 4 and Document Request No. 3, to seek information related to the status/disposition and location of the Reading Connector. Petitioners state that the status and location of the Reading Connector are relevant to the question of what the parties to the transaction agreement intended in denominating "CP-Port Reading Jct." as one of the end points of the NJSAA. Specifically, petitioners contend that the requested information would clarify the division of ownership between Conrail and Pennsylvania Lines, LLC (PRR) (now, NS) on the Lehigh Line at milepost 35.92, where the Reading Connector crossed the Lehigh Line prior to its partial removal. Also, petitioners assert that such information would refute NS's claim that CP-Port Reading Jct. refers to a point, not an area; because milepost 35.92 lies west of the switch connection between the Lehigh and Trenton Lines, petitioners argue, CP-Port Reading Jct. includes the area between the two points.

NS and CSX object to the request for this information. They argue that the requests go beyond the limited discovery authorized by the July 31 decision and that the information sought is irrelevant to any issue presented by the petition. Both NS and CSX note that the Reading Connector did not exist when the parties defined the boundaries of the NJSAA; thus, in their view, its history and status are irrelevant as to the parties' intent in defining the NJSAA boundaries. Furthermore, CSX and NS assert that Interrogatory No. 4, which asks where the Reading Connector would be located if it were reconstructed and restored to service, poses a hypothetical question that cannot be answered with any degree of certainty and invites only speculation on behalf of respondents.

Petitioners have not shown how information regarding the Reading Connector, which did not exist when the parties agreed to the NJSAA boundaries, is relevant to the issue of what the parties intended when referring to "CP-Port Reading Jct." Petitioners fail to show how the information sought in Interrogatory Nos. 3 and 4 and Document Request No. 3, regarding the status and disposition of the Reading Connector and the possible location of the Reading Connector if it were reconstructed, would clarify the boundary of the NJSAA, at or around milepost 35.92. NS also states that it intends to provide petitioners with all maps and track charts in its possession of the rail lines, which will give petitioners additional information about the location of CP-Port Reading Jct. Nor have petitioners shown how this information would provide evidence to refute NS's argument that parties intended for boundaries to be defined by specific points, not general areas.

2. Raritan Valley Line

In their Interrogatory Nos. 7 and 8 and Document Request No. 2, petitioners seek information regarding NJ Transit's Raritan Valley Line. Petitioners state that the requests are designed to elicit information concerning Conrail's conveyance of property rights to PRR in the vicinity of Bound Brook Jct., and Conrail's operating rights east and west of that point (and as to the limits of the NJSAA in the vicinity). Petitioners state that these discovery requests are reasonably calculated to lead to the discovery of relevant evidence regarding the extent to which

property ownership governs Conrail's operating rights and thus to ascertaining the parties' intent in establishing the limits of the NJSAA at CP-Port Reading Jct.

NS and CSX object to the requests, stating that ownership and operating rights over the Raritan Valley Line are not relevant in determining the parties' intent in defining the NJSAA boundaries, nor in determining whether the BRI facility is within the NJSAA, as no part of that line connects with, or can be used to serve, BRI's facility.

Petitioners fail to demonstrate the relevance of the information they request to the issues before the Board in this case, namely, the parties' intent in defining the boundaries of the NJSAA at the time of the transaction agreement, and whether the BRI facility is located within those boundaries. As the Board stated in the July 31 decision, Conrail's past switching services to the BRI facility are not controlling in determining the NJSAA boundaries. Similarly, Conrail's operations and services to other facilities are not relevant to the parties' intent at the time of the transaction agreement.

3. Conrail Switching Services

In Interrogatory No. 9, petitioners originally sought information concerning the extent to which Conrail has provided switching service, since June 1, 1999 (the date when the division of assets of Conrail by NS and CSX took place), to any facility in the vicinity of the NJSAA that is located on railroad property or reached via tracks that Conrail does not own. Petitioners have since narrowed their original interrogatory by limiting the request to information detailing switching services to industries in the vicinity of Manville, Port Reading Jct., Bound Brook, and Bound Brook Jct., NJ. Petitioners assert that information detailing Conrail's rights and ability to operate over trackage it does not own is relevant in assessing the merits of NS's argument that property ownership determines Conrail's operating rights in the Port Reading Jct. vicinity.

Conrail objects to the amended request on the ground that information about its switching services is irrelevant as to the parties' intent in their original transaction agreement and as to whether the BRI facility is within or connected to the NJSAA. Conrail asserts that its right to perform switching services depends primarily on whether the tracks and facilities are part of the NJSAA, not on whether they are owned by Conrail. Conrail further argues that switching services provided to certain facilities outside of the Shared Assets Areas (SAA) are not a basis for determining if other facilities are entitled to be included within an SAA.

Information pertaining to Conrail's switching services to facilities located on property not owned by Conrail in or near the NJSAA is not relevant to the issues presented in the petition or the scope of discovery authorized by the July 31 decision. As the Board stated in that decision, Conrail's past switching service of the BRI facility is not controlling in determining whether the BRI facility is within the NJSAA. Petitioners have failed to show how information regarding Conrail's switching services to other facilities in the Port Reading Jct. vicinity will help determine the parties' intent in creating the boundaries of the NJSAA. If the BRI facility is located within the NJSAA, it is entitled to receive switching service from Conrail, as dictated by the transaction agreement the Board approved in Decision No. 89; however, Conrail's

operations, whether in or outside the NJSAA, do not automatically confer status upon a facility equivalent to placing it 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. Petitioners' joint motion to compel discovery is denied, as discussed above.
2. This decision is effective on the date of service.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary