

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42078

NORFOLK SOUTHERN RAILWAY COMPANY  
– PETITION FOR DECLARATORY ORDER –  
INTERCHANGE WITH READING BLUE MOUNTAIN  
& NORTHERN RAILROAD COMPANY

Decided: April 29, 2003

On April 2, 2003, Norfolk Southern Railway Company (NSR) filed a petition for declaratory order and injunctive relief relating to an interchange with Reading Blue Mountain & Northern Railroad Company (RBMN) at Lehigh, PA.<sup>1</sup> RBMN has provided NSR with 30 days' written notice, as provided for in their existing interchange agreement, that it will terminate the agreement between them and no longer receive interchange traffic at Lehigh as of April 19, 2003. Instead, RBMN has designated Penobscot, PA, 40 track miles to the north, as the point of interchange on its line.

The relief sought by NSR in its petition for declaratory order will be denied for the reasons discussed below.

BACKGROUND

On August 19, 1996, RBMN entered into an interchange agreement with Consolidated Rail Corporation (Conrail) to tender and receive cars at Lehigh, PA. Conrail and RBMN interchanged

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<sup>1</sup> Due to the short time period until the termination date of the parties' agreement, NSR requested that RBMN reply by April 9, 2003, and that the Board expedite handling of its petition. On April 4, 2003, RBMN indicated by letter that it intended to reply by April 11, 2003. By a decision served on April 7, 2003, we ordered RBMN to reply on or before April 10, 2003. RBMN replied on that date and indicated that it would postpone the termination date of the agreement until April 30, 2003.

On April 14, 2003, NSR filed two pleadings concurrently: (1) a petition for waiver under 49 CFR 1110.9 of our rule prohibiting a reply to a reply at 49 CFR 1104.13(c) and leave to file a surreply; and (2) the surreply, which, it asserts, corrects misstatements of fact, clarifies mischaracterizations of NSR's contentions, and opposes the affirmative relief sought by RBMN on reply. RBMN responded on April 16, 2003, by filing a reply seeking denial of the waiver request, and alternatively, a rebuttal to NSR's surreply. In the interests of having a complete evidentiary record, we will accept and consider both pleadings. Moreover, neither party will be prejudiced by such action.

cars at that location 6 days per week. Subsequently, NSR acquired the Conrail assets at issue,<sup>2</sup> and began interchanging cars with RBMN 6 days per week as successor and assignee to the agreement. Since the fall of 2001, however, the parties have been interchanging cars only 3 days per week.

Also, in the fall of 2001, NSR decided to reroute overhead haulage traffic away from RBMN's Lehigh Line in favor of a line operated by the Delaware Lackawanna Railroad. NSR notified RBMN that it was interested, however, in pursuing an overhead trackage rights agreement with RBMN to replace NSR's Buffalo Line between Canada and the northeast. In the course of these negotiations, NSR suggested replacing the Lehigh interchange with one located at Penobscot. However, when NSR requested concessions regarding commercial terms between the carriers as a condition precedent to moving the interchange, RBMN refused and such discussions ended. A trackage rights agreement to effect replacement of the Buffalo Line was signed on June 28, 2002, but the agreement did not provide for a change in the carriers' interchange point.

According to RBMN, it and its customers began experiencing service problems arising from the infrequency of the Lehigh interchange during the fall of 2002. These problems included increased transit times, bunching of cars, and a need for longer crew working hours, longer trains, and increased locomotive power to ascend the grade on the Lehigh Line. NSR took the position that the number of cars interchanged at Lehigh does not warrant performing interchange more than 3 days per week, and that it is fully complying with its interchange obligations. The dispute between the parties culminated in the early part of this year. On January 31, 2003, NSR missed one of its scheduled interchanges. RBMN contacted NSR in order to alleviate service problems and asked that NSR increase the frequency of interchange at Lehigh. In February, RBMN resumed picking up cars 6 days per week. During this period, relocating the interchange to Penobscot was revisited as a possibility.

Negotiations to relocate the interchange ultimately broke down. NSR again sought a change in terms of the revenue factor for traffic moving to Lehigh Line points before agreeing to move the interchange. RBMN again refused, contending that there was no basis for any such change and adding that it would have to expend funds for infrastructure investment in order to make Penobscot suitable for interchange.

On March 18, RBMN formally<sup>3</sup> notified NSR by letter that it intended to terminate the parties' agreement pursuant to its terms and that, thereafter, it would make facilities available for interchange at

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<sup>2</sup> See CSX Corp. et al. – Control – Conrail Inc. et al., 3 S.T.B. 196 (1998).

<sup>3</sup> RBMN first notified NSR by e-mail on March 13, 2003, that it would terminate the agreement.

Penobscot. On March 31, counsel for NSR faxed a letter to counsel for RBMN regarding the dispute and the possibility of the instant petition.

In the instant petition, NSR requests that we issue an order pursuant to 5 U.S.C. 554(e) and 49 U.S.C. 721(b)(4): (1) declaring that RBMN may not cease tendering and accepting cars<sup>4</sup> for interchange at Lehighton and dictate a different interchange point without NSR's agreement; and (2) directing that, in order to maintain the status quo pending negotiations and to preserve service to shippers, the parties continue tendering and accepting cars at Lehighton until the parties can reach a new interchange agreement.

### POSITIONS OF THE PARTIES

NSR argues that interchange arrangements, including points of interchange, are, in the first instance, a matter of negotiation and mutual agreement between carriers, citing Central Power & Light Co. v. Southern Pac. Trans Co., 2 S.T.B. 235, 243 (1997), aff'd sub nom. MidAmerican Energy Co. v. STB, 169 F.3d 1099 (8th Cir. 1999), cert. denied, 528 U.S. 950 (1999) (CP&L). Further, NSR contends that, once carriers have agreed upon and established a point of interchange, neither carrier has the right to unilaterally change the point of interchange or dictate a new point unless the other party agrees or the Board prescribes one, citing CP&L and New York, C. & St. L. R. Co. v. New York Central R. Co., 314 I.C.C. 344, 346 (1961) (New York, Chicago). NSR argues that RBMN's actions here, in terminating interchange at Lehighton and designating Penobscot without NSR's concurrence or asking the Board to prescribe a new interchange point, are unlawful and warrant injunctive relief.

RBMN concedes that, if there exists a valid interchange agreement between the parties, the terms of that agreement control the location of the interchange. But here, RBMN asserts, the agreement has been lawfully terminated pursuant to its terms. In the absence of an agreement, RBMN argues that the parties are only required by law to make "reasonable facilities for interchange" available under 49 U.S.C. 10742. According to RBMN, that requirement allows a receiving carrier to designate where it will accept cars in interchange, as long as that location or operation does not impose unusual, unreasonable, or impossible operating hazards or require the delivering carrier to do work which properly belongs to the receiving carrier. New York, Chicago, 314 I.C.C. at 345. RBMN contends that reasonable facilities for interchange exist at Penobscot and, as such, its designation of that point after termination of the parties' agreement meets its statutory obligations.

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<sup>4</sup> RBMN's March 13 e-mail specified Penobscot as its delivery point to NSR. The formal notice letter of March 18 stated that "RBMN will make facilities available for interchange at Penobscot, PA." On reply and in its additional filing, RBMN clarifies that Penobscot is the point it has designated to accept cars, and NSR is free to designate another point to accept RBMN's deliveries.

## DISCUSSION AND CONCLUSIONS

Under 5 U.S.C. 554(e) and 49 U.S.C. 721, we may issue a declaratory order to terminate a controversy or remove uncertainty. We have broad discretion in determining whether to issue a declaratory order. See Intercity Transp. Co. v. United States, 737 F.2d 103 (D.C. Cir. 1984); Delegation of Authority – Declaratory Order Proceedings, 5 I.C.C.2d 675 (1989). Here, as subsequently discussed, NSR’s position is contrary to law and established precedent. Because the applicable law is clear, we will deny the relief that NSR seeks.

This is an unusual dispute for this agency. We rarely see cases like this. Under 49 U.S.C. 10742, connecting carriers are required to interchange traffic with each other. Usually they do so on the basis of mutual agreement. This is an operational matter that carriers should be able to settle themselves. Here, the carriers have failed to do so and we issue this decision to address the arguments they have made and apply the law to the circumstances. We anticipate that we will have few, if any, of these matters brought to us in the future as they are better resolved by negotiation of the parties to the arrangement.

NSR’s petition rests on the proposition that “once connecting carriers have agreed upon and established a point of interchange, neither carrier has the right unilaterally to change the point of interchange or to dictate a new interchange point to the other carrier unless the other carrier agrees or the Board finds reason to prescribe a new interchange point and new interchange terms.” NSR petition at 6. This is a misstatement of the law.

Under 49 U.S.C. 10742, a rail carrier must “provide reasonable, proper, and equal facilities that are within its power to provide for the interchange of traffic between, and for the receiving, forwarding, and delivery of . . . property to and from, its respective line and a connecting line of another rail carrier. . . .” Custom requires the receiving railroad in a direct physical interchange to designate a point on its own line where it will receive traffic and to provide a free route over its tracks to that point for the delivering carrier. Burlington N. R.R. v. United States, 731 F.2d 33, 38 (D.C. Cir. 1984) (Burlington Northern). Here, RBMN has notified NSR that it will discontinue interchange at Lehighton pursuant to the terms of the parties’ agreement, and has designated a point on its own line where it will receive traffic, i.e., Penobscot.<sup>5</sup> These actions are fully consistent with the law.

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<sup>5</sup> In this regard, we note NSR’s claim that it does not now have the physical ability to reach Penobscot for purposes of interchange, because its trackage rights are overhead, not local. However, RBMN has offered to allow NSR to use its tracks for this purpose, and no further Board authority is needed for one carrier to use another carrier’s track solely in connection with interchange. See Black v. ICC, 837 F.2d 1175, 1178 (D.C. Cir. 1988).

NSR relies on CP&L and New York, Chicago to support its contention that RBMN may not change the interchange point without NSR's agreement or the Board's prescription. However, neither case supports its position. Indeed, New York, Chicago explicitly acknowledges that an interchanging carrier has a right to designate the point on its line at which it will accept traffic, so long as the point designated is not unreasonable:

[T]he receiving carrier necessarily has the right to designate where it will accept cars in interchange from its connections, provided, in making such designation, the receiving carrier does not impose unusual, unreasonable, or impossible operating hazards or require the delivering carrier to do work which properly belongs to the receiving carrier.

314 I.C.C. at 345 (citing Kansas City S. Ry. Co. v. Louisiana & A. Ry. Co., 213 I.C.C. 351, 359 (1935)). In that case, the aggrieved carrier made a showing as to the hardship that it would face if its connecting carrier moved the point of interchange. Here, however, NSR has not done so. Instead, it has asserted that RBMN may not move the point where it receives cars without NSR's agreement or a Board prescription and that, in any event, the new point designated by RBMN has not been shown to be reasonable.

NSR is correct insofar as it maintains that RBMN's right to designate the point where it will receive cars is not absolute. New York, Chicago, 314 I.C.C. at 345. The ICC noted in New York, Chicago that interchange is "a matter to be arranged by the parties . . . by consultation, exploration of mutual benefits, and negotiation of differences." *Id.* Such language is consistent with our strong preference for private sector solutions over regulation. But, in this proceeding, NSR's petition would place the burden of proof on RBMN to show that its proposed point to receive cars in interchange is reasonable, rather than placing the burden on NSR to show that such a point is "unusual, unreasonable, or impossible." Holding RBMN to a standard where it would need to demonstrate that its proposal was reasonable would eviscerate the right to designate a point to receive cars, contradict precedent, and nullify the termination clause in the parties' agreement. We will not impose such a standard on RBMN.

Nor has NSR met its burden of demonstrating that Penobscot is an unreasonable choice for interchange. NSR claims that Penobscot is unacceptable for both operational and commercial reasons, but has not so demonstrated. Indeed, the record belies NSR's claims, based on the facts that NSR initially proposed the change to Penobscot, NSR trains already run past that point on a daily basis, and RBMN has stated that it has completed all significant infrastructure improvements at Penobscot necessary for interchange. NSR has also made no showing that the absence of any revenue

concessions from RBMN at Penobscot would render that location unreasonable for interchange or even that it is entitled to any such concessions.<sup>6</sup>

The fact that interchange can be effected at Lehighon does not mean that we should preclude RBMN from selecting another reasonable interchange point. Rather, “[t]he courts have long recognized that, when a carrier has the power to provide two or more options for interchanging traffic, each of which is independently reasonable, proper, and equal, it need not provide all such options to connecting lines but may instead offer only that option which best serves its own business interests.” Burlington Northern, 731 F.2d at 40. Here, RBMN has notified NSR that it will receive cars at Penobscot and, as discussed, there is nothing on the record to indicate that this is not a “reasonable, proper, and equal” facility for interchange under section 10742.

The other decision that NSR cited, CP&L, served to resolve a petition to clarify another decision in a “bottleneck” rate reasonableness proceeding.<sup>7</sup> Section 10742 was discussed in CP&L in connection with the holding that, for traffic from an origin not currently served by the bottleneck carrier, but destined to a point on its line, that carrier may not refuse a shipper’s request for service. CP&L, 2 S.T.B. at 243-45. Instead, that carrier must interchange this traffic with the origin railroad and provide a route and a rate to complete the transportation. MidAmerican, the shipper-petitioner in that proceeding, asked, inter alia, whether the bottleneck carrier could refuse to establish such a rate by insisting on an interchange different from the one selected in the shipper’s contract with the origin railroad. It was in this context that the Board discussed the determination of an interchange point.

We noted there that such a discussion was different than in traditional interchange disputes under section 10742 between rail carriers, because we were dealing with routing and rate issues with shippers. CP&L, 2 S.T.B. at 243 n.10. In analyzing this issue of first impression, we stated that interchange points are best determined by mutual consent under cases such as New York, Chicago,

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<sup>6</sup> NSR also argues that “[h]auling traffic 30 miles over the receiving carrier’s own tracks would seem to be ‘work which properly belongs to the receiving carrier.’” NSR surreply at 3-4. Again, the record does not support NSR’s position. In response to this argument, RBMN points out that the interchange at Lehighon is 11 miles south of M&H Junction, where the trains move north over RBMN’s Lehigh Line or northwest to Hazleton over NSR’s Ashmore Secondary, and that M&H Junction is 22 miles south of RBMN’s nearest customer. According to RBMN, it has to travel 33 miles to pick up interchange cars at Lehighon, and it does so only to accommodate the NSR interchange. It adds that Lehighon was selected for interchange only due to a lack of appropriate facilities at M&H Junction – the true junction point of the two railroads. RBMN rebuttal at 3-4.

<sup>7</sup> A bottleneck carrier is one that has sole access to a shipper. Normally, a shipper may only seek regulatory rate relief on the total transportation charges from origin to destination. Great N. Ry. v. Sullivan, 294 U.S. 458 (1935); Louisville & N.R.R. v. Sloss-Sheffield Co., 269 U.S. 217, 234 (1925).

314 I.C.C. at 346, and Black v. ICC, 837 F.2d 1175, 1178 (D.C. Cir. 1988), and our preference for private sector solutions over regulation. But most importantly, we stressed in CP&L that the common carrier obligation of the carriers is of paramount importance and stated that the bottleneck and origin carrier must provide at least one route to complete the shipper's needs. In so doing, we also pointed out that, if necessary, we would prescribe an interchange point and terms to resolve any disagreement as to the route over which the carriers must provide service.

Here, neither carrier has refused to provide rates or denied service to shippers. No shipper is seeking rate relief or even a through rate. We have not been asked by any shipper to designate an interchange point or set terms, nor do we have an evidentiary record that would support such an action. In other words, the instant proceeding is distinguishable from CP&L.

Finally, we caution both parties that the provisions of section 10742 are compulsory. The parties must continue to provide facilities for interchange to ensure that service to shippers continues. Each party may designate where it will receive cars, but neither party may prevent interchange from occurring. In the event that one party or the other finds the conditions of interchange contrary to the requirements of section 10742, as described in this decision, and negotiations to remedy the situation fail, they may seek a prescription from the Board.

Finally, because we are denying NSR's petition, there is no basis for granting the injunctive relief that it seeks. Therefore, we will deny its request as moot.

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

It is ordered:

1. NSR's surreply and RBMN's rebuttal thereto are accepted into the record for consideration.
2. NSR's request for a declaratory order is denied.
3. NSR's request for injunctive relief is denied as moot.
4. This decision is effective on the date of service.

By the Board, Chairman Nober and Commissioner Morgan. Commissioner Morgan commented with a separate expression.

Vernon A. Williams  
Secretary

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Commissioner Morgan, commenting:

I am puzzled by the fact that this matter has come before the Board for resolution, as such matters would seem particularly appropriate for private-sector resolution. Accordingly, I would hope that the parties will resolve this matter between themselves without further Board involvement.