

SERVICE DATE – JULY 31, 2006

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

(PETITION FOR CLARIFICATION OR
IN THE ALTERNATIVE FOR SUPPLEMENTAL ORDER)

AGENCY: Surface Transportation Board.

ACTION: Decision No. 1 in STB Finance Docket No. 33388 (Sub-No. 100); Notice of Filing of Petition for Clarification or in the Alternative for Supplemental Order; and Issuance of Procedural Schedule.

SUMMARY: On January 20, 2006, Bridgewater Resources, Inc. (BRI) and ECDC Environmental, L.L.C. (ECDC), referred to collectively as the 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 seek a determination that BRI's waste transfer facility (BRI facility) is within the NJSAA and/or can be switched by Conrail under the agreements pertaining to the NJSAA. If the Board finds that the BRI facility is not located within the NJSAA, petitioners seek 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.

By separate motions filed on February 9, 2006, NS seeks dismissal of the petition, and a protective order to quash discovery, or in the alternative, to stay all discovery pending a decision by the Board on NS's motion to dismiss. Also on February 9, 2006, Conrail requested that all discovery related to this matter be quashed, or in the alternative, stayed pending a decision by the Board on NS's motion to dismiss. On March 1, 2006, petitioners filed replies to both of NS's

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). Control of Conrail was effected by CSX and NS on August 22, 1998.

procedural motions. For the reasons discussed below, NS's motion to dismiss BRI's petition for clarification is denied and a schedule to allow BRI to pursue limited discovery regarding the parties' intent involving the boundaries of the NJSAA is established. BRI's alternative request for a supplemental order is denied.

DATES: The effective date of this decision is July 31, 2006. Petitioners have until August 30, 2006 to complete discovery, as prescribed by this decision. Upon completion of discovery, petitioners have until September 29, 2006 to supplement the petition based on additional information provided by NS and Conrail in response to petitioners' discovery request, unless the Board provides otherwise in connection with any motions to compel. Any person who wishes to file comments respecting this petition as supplemented must do so by October 19, 2006. Petitioners will have until October 30, 2006 to reply to those comments.

Any motions to compel that may be necessary regarding discovery requests must be filed by August 21, 2006. Replies to motions to compel will be due 3 business days later.

ADDRESSES: Any filing submitted in this proceeding must be submitted **either** via the Board's e-filing format **or** in the traditional paper format. Any person using e-filing should comply with the instructions found on the Board's website at www.stb.dot.gov at the "E-FILING" link. Any person submitting a filing in the traditional paper format should send an original and 10 paper copies of the filing (and also an IBM-compatible floppy disk with any textual submission in any version of either Microsoft Word or WordPerfect) to: Surface Transportation Board, 1925 K Street, N.W., Washington, DC 20423-0001. In addition, one copy of each filing in this proceeding must be sent (and may be sent by e-mail only if service by e-mail is acceptable to the recipient) to each of the following: (1) Christopher A. Mills, Slover & Loftus, 1224 Seventeenth Street, N.W., Washington, DC 20036; (2) Kendra A. Ericson, Slover & Loftus, 1224 Seventeenth Street, N.W., Washington, DC 20036; (3) John V. Edwards, Norfolk Southern Corporation, Three Commercial Place, Norfolk, VA 23510-2191; (4) Richard A. Allen, Zuckert, Scutt & Rasenberger, LLP, 888 Seventeenth Street, N.W., Washington, DC 20006; and (5) Shannon M. Moyer, Zuckert, Scutt & Rasenberger, LLP, 888 Seventeenth Street, N.W., Washington, DC 20006. Any reply should also be served (one copy each) on each commenting party, and may be served by e-mail, but only if service by email is acceptable to the recipient.

FOR FURTHER INFORMATION CONTACT: Julia M. Farr, (202) 565-1655. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1-800-877-8339.]

SUPPLEMENTARY INFORMATION: In Decision No. 89, Conrail's rail operating properties were divided into two categories: Allocated Assets and Retained Assets. The latter were retained by Conrail for operation for the benefit of both CSX and NS and consist primarily of three Shared Assets Areas (SAAs), one of which is the NJSAA. Under the Shared Assets Agreements, Conrail has the right to perform switching service within the SAAs.

BRI owns and operates a fully permitted solid waste transfer station near Manville/Port Reading Jct., in Bridgewater Township, Somerset County, NJ. Non-toxic municipal solid waste (MSW), construction and demolition debris, and non-hazardous soils are transported to the BRI

facility from various locations in northern New Jersey and Staten Island. These waste materials are processed at the BRI facility and shipped to disposal sites in other states, with approximately 2,500 cars of MSW moved annually.

ECDC is a subsidiary of Allied Waste Industries. ECDC arranges for the transportation of containerized shipments of MSW from collection stations at various points, including the BRI facility, to landfills in other states. ECDC pays the freight charges for most rail shipments from the BRI facility to such landfills.

Presently, NS and CSX provide rail service for these MSW shipments, pursuant to a transportation contract, under which NS acts as the switching carrier, switching loaded and empty railcars between the BRI facility and CSXT's nearby Manville Yard, in Manville, NJ. The BRI facility is located north of NS's Lehigh Line and is served by a private spur, the Royce Spur, which connects to a track known as the Royce Running Track. BRI manages the loading of railcars and coordinates the movement of cars between its facility and Manville Yard. CSXT performs the line-haul transportation between Manville Yard and the landfill in South Carolina. ECDC pays a single, through fare for these rail transportation services.

Petitioners assert that NS service has deteriorated over the past 6 months, citing NS's failure to switch the facility on several occasions when service should have been provided. On some of these occasions, the petitioners state that BRI requested and received service from Conrail when an NS crew was unavailable. Petitioners argue that both the BRI facility and Manville Yard are located within the NJSAA, and that, therefore, Conrail should be found to be allowed to provide switch service between these points, pursuant to the NJSAA Operating Agreement approved by the Board in Decision No. 89.

In the alternative, should the Board find that the BRI facility is located outside the NJSAA, petitioners request that the Board issue a supplemental order, allowing Conrail to perform switching service between the BRI facility and CSXT's Manville Yard.

PETITION FOR CLARIFICATION. Petitioners request that the Board clarify whether the BRI facility is within the NJSAA and/or can be switched by Conrail under the agreements pertaining to the NJSAA that were approved by the Board in Decision No. 89.

Petitioners contend that the NJSAA extends southwest of "CP-Port Reading Jct.," where CSXT's Trenton Line and NS's Lehigh Line come together. Petitioners assert that a "CP," or control point, includes everything within the approach circuits for the interlocking(s) at the location involved, including all track, signals, turnouts and electronic circuitry between the approach signals for the interlocking. Therefore, petitioners contend that the CP at Port Reading Junction, and thus the boundary of the NJSAA, extends west along the Lehigh Line to the approach signal and related circuits of the interlocking for the junction where the Trenton and Lehigh Lines converge. If the boundaries of the NJSAA are defined in that way, petitioners state that, at least a portion, if not all, of the Royce Spur track that serves the BRI facility would also be located within the NJSAA, and that the right-of-way for the spur would abut the Conrail property in the NJSAA.

In its motion to dismiss, NS argues that petitioners' claim that the BRI facility is within the NJSAA is clearly refuted by the unambiguous provisions of the transaction agreement among NS, CSXT, and Conrail that was approved in Decision No. 89. NS relies on schedules and maps included in the transaction agreement that identify the portion of the Lehigh Line, running from CP Port Reading Jct. eastward to Oak Island Yard, as among the lines allocated to Conrail's NJSAA. According to NS, the transaction agreement further shows that the portion of the Lehigh Line, running from CP Port Reading Jct. westward to Allentown, PA, is allocated to Pennsylvania Lines, LLC (or PRR) (now NS). NS states that the maps show that the Royce Running Track that connects to the Royce Spur (which serves the BRI facility) is an NS line and is not in the NJSAA, and further that the Royce Running Track joins the NS portion of the line west of its connection to the NJSAA.

NS states that Port Reading Jct. is the point where Conrail's portion of the Lehigh Line terminates, where NS's portion of the Lehigh Line begins, and where the Lehigh Line meets CSXT's Trenton Line. The designation, "CP-Port Reading Jct.," signifies that the switches at that point and the signals controlling access to the interlocking are controlled by the Conrail North Jersey Train Dispatcher. However, NS argues, the boundaries of an interlocking do not define the ownership of the various tracks within the interlocking and do not determine the use of equipment and personnel over those various tracks by those other railroads.

NS asserts that the SAAs, as governed by the Shared Assets Agreements, are not broad geographic areas encompassing non-railroad as well as railroad property but consist only of railroad property. NS argues that, since under the Shared Assets Agreements Conrail may only operate over SAA tracks, Conrail may not operate to, or provide switching services for, a facility if it can do so only by operating over non-SAA tracks of NS or CSXT, such as the tracks that serve the BRI facility.

NS has presented strong evidence, based on the transaction agreement, to support its claim that the BRI facility is located outside the NJSAA. Nevertheless, it is appropriate for the Board to allow for limited discovery for BRI to obtain evidence to further develop the record as to what the parties intended in their original transaction agreement before resolving the issues that are presented here. The Board notes that Conrail's past switching service of the BRI facility is not controlling in determining whether the BRI facility is within the NJSAA.

Therefore, NS's motion to dismiss the petition for clarification will be denied, and the Board will allow for limited discovery, a supplement to the petition, and the filing of comments by all interested persons, as described below.

PETITION FOR SUPPLEMENTAL ORDER. In the alternative, should the Board find that the BRI facility is located outside the NJSAA, petitioners request a supplemental order that would allow Conrail to perform switching service between the BRI facility and CSXT's Manville Yard.

Under 49 U.S.C. 11327, the Board has continuing authority to enter supplemental orders to modify decisions entered in merger and control proceedings under 49 U.S.C. 11323. Citing what they consider to be NS's failure to provide adequate service, petitioners argue that the

public interest favors a change in the carriers authorized to serve the BRI facility by including Conrail in that authorization.

In seeking a supplemental order that would authorize Conrail to provide its switching service outside the NJSAA, petitioners essentially request what the Board explicitly denied in Decision No. 89: “The ICC and the Board have consistently declined to attempt to equalize the rail transportation options of shippers who receive merger benefits with all those who do not. . . . [T]his is not the kind of harm that the agency rectifies under its conditioning power.” 3 S.T.B. at 269-270. As the Board has dismissed similar claims seeking additional relief in previous Conrail decisions, it will decline to issue a supplemental order here. See, e.g., CSX Corp. et al. — Control — Conrail Inc. et al., 4 S.T.B. 107 (1999). Therefore, petitioners’ request for a supplemental order is denied.

DISCOVERY. The Board will allow for limited discovery pertaining to the parties’ intent in defining the NJSAA boundaries in the original transaction agreement. The Board is particularly interested in what the parties meant by the use of the term “CP,” or control point, in defining the SAAs. Therefore, the NS and Conrail motions for protective order are denied to the extent needed to permit the limited discovery.

PROCEDURAL SCHEDULE. The Board has arranged to publish this decision in the Federal Register on July 31, 2006, to provide notice of this proceeding to all interested persons, and to provide an opportunity for public participation.

Petition Available to Interested Persons. Interested persons may view the petition (and/or other related filings) on the Board’s website at www.stb.dot.gov, at the “Filings” button.

Any person wishing to obtain a paper copy of the petition may request a copy in writing or by phone from petitioners’ representatives (1) Christopher A. Mills, Slover & Loftus, 1224 Seventeenth Street, N.W., Washington, DC 20036; and (2) Kendra A. Ericson, Slover & Loftus, 1224 Seventeenth Street, N.W., Washington, DC 20036.

Comments and Replies. Any person who wishes to file comments regarding the petition as supplemented must file such comments by October 19, 2006. Petitioners will have until October 30, 2006, to reply to any comments filed by interested persons.

Decision by the Board. The Board will act as promptly as possible to issue its decision on the merits of the petition as supplemented.

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

It is ordered:

1. NS's motion to dismiss the petition for clarification is denied. Petitioners are permitted to pursue limited discovery pertaining to the parties' intent in defining the NJSAA's boundaries in the original transaction agreement.
2. Petitioners' request in the alternative for a supplemental order is denied.
3. Limited discovery, as described in this decision, must be completed by August 30, 2006.
4. Petitioners' supplement to the petition is due by September 29, 2006.
5. Comments of interested persons on the petition as supplemented are due by October 19, 2006.
6. Petitioners' reply is due by October 30, 2006.
7. This decision is effective on its service date.

Decided: July 24, 2006.

By the Board, Chairman Buttrey and Vice Chairman Mulvey.

Vernon A. Williams
Secretary