

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33296

CONSOLIDATED RAIL CORPORATION--PETITION FOR
DECLARATORY ORDER--C&P DOCK

Decided: December 10, 1996

In a petition filed November 14, 1996, Consolidated Rail Corporation (Conrail) requests a declaratory order determining whether regulatory approval is required for the Cleveland-Cuyahoga County Port Authority (Authority) to acquire property located on Whiskey Island in Cleveland, OH, containing 43.55 acres of land, and constituting the facility known as the C&P Dock. Conrail also requests the Board to determine whether the Authority will become a common carrier subject to the Board's jurisdiction. We have authority under 5 U.S.C. 554(e) and 49 U.S.C. 721 to issue a declaratory order to terminate a controversy or remove uncertainty.

BACKGROUND

In an agreement dated June 18, 1996, as amended,¹ Conrail proposes to sell the C&P Dock to the Authority for \$6,150,000. The deed transferring the property would provide that Conrail will retain all rail tracks and related rail facilities on the premises and will reserve permanent easements and rights on 11.0 acres of the facility where Conrail's rail tracks and facilities are located. Retention of the easement and other rights would enable Conrail to continue to conduct rail freight operations at the C&P Dock.

The Authority's Executive Director, Gary L. Failor, states that the transaction will enable the Authority to develop C&P Dock into a general bulk transloading facility to handle waterborne traffic for inland movement by both rail and truck. This, he says, will benefit commerce in the City of Cleveland. He states that the Authority will commit over \$6 million to purchase the C&P Dock and is prepared to provide additional funds for its development. He states further that Conrail will continue to provide all rail service at C&P Dock and will retain the railroad's common carrier obligations to provide that service.

According to James L. Forrester, Conrail's Manager, Terminal Planning and Performance, Conrail and its predecessor companies have owned the C&P Dock since it began operating in 1912. The dock has been used almost exclusively for receiving iron ore, mostly in pellet form. Currently, only one rail customer, Weirton Steel Corporation (Weirton), receives ore through the dock. In 1995, approximately 1.5 million gross tons of ore were handled at the facility. Conrail projects Weirton's 1996 tonnage

¹ A copy of the agreement, quitclaim deed and other related documents were attached to the petition as Exhibit A.

to be approximately 1.6 million gross tons.

Conrail states that it contracts with O&WP Dock Company (OW&P), a subsidiary of the M.A. Hanna Company, for car loading, material handling, and stevedoring. Assertedly, O&WP has operated the dock as a contractor and has performed these services continuously since 1912. Mr. Forrester indicates, however, that O&WP employees do not perform rail transportation services.

According to Conrail, ore is discharged to ground storage space by self-unloading ships using their own crews. O&WP directs the placement of the ore in the storage yard during the ship unloading operation. Ore in storage is then picked up by O&WP employees with large, motorized rubber-tired front-end loader tractors, and dumped into open top rail cars provided by Conrail.

Conrail says that it provides all rail operations on the facility using its own employees. Conrail employees, using railroad-owned locomotives, perform all train movements, including placing empties for loading, pulling loaded cars and making up unit trains consisting of up to 150 cars to deliver ore to steel mills. The dock operation is served by six stub-end storage tracks from Conrail's Riverbed Yard, located south of the ore dock along the carrier's Chicago main line.

Conrail indicates that sale of the C&P Dock to the Authority will have no impact on the railroad's operation or handling of transportation services. The railroad states that it will retain a permanent and unrestricted easement in the property for rail operations, and will retain ownership of the tracks. Conrail will continue to control, maintain and operate all of the rail tracks on the dock facility with its own employees.

Conrail avers that it and the Authority are negotiating an amendment to the agreement allowing Conrail to make future modifications and improvements on the property to meet future requirements of rail customers. The railroad indicates that any amendment would not restrict Conrail's ability to operate over the property.

Conrail asserts that the Authority will not acquire any rail equipment or have any rights to handle rail equipment on the tracks retained by Conrail. Apparently, the Authority has contracted with Oglebay Norton Co. (Oglebay) to operate the dock and provide the Authority with the same transloading services currently provided by Conrail's contractor. Additionally, the Authority and Oglebay will negotiate their own rates for the dock service with the consignee. Conrail indicates that it has been advised by Weirton that Weirton has reached an agreement with Oglebay Norton and will not oppose the proposed sale of C&P Dock to the Authority.²

Conrail says further that the Authority proposes to use the

² Conrail also submitted letters supporting the proposal from Lake Carriers Association, representing U.S. flag vessels operating on the Great Lakes, and the International Longshoremen's Association, representing employees performing dock services on the C&P Dock.

C&P Dock to handle other commodities, such as salt, sand and stone. While increased rail opportunities are expected, most of these commodities are expected to use truck service. Additionally, opportunities exist to increase iron ore shipments to other customers which are not served by rail. According to Conrail, Oglebay would perform the same ship berthing, stevedoring and material handling functions, whether the shipments move inland by truck or rail.

DISCUSSION AND CONCLUSIONS

The question presented is whether our regulatory approval is required for the proposed transfer of Conrail's interest in the C&P Dock. The acquisition of an active rail line and the common carrier obligation that goes with it ordinarily requires Board approval under 49 U.S.C. 10901. We have declined to assert jurisdiction over the transfer of right-of-way or other fixed assets to an entity when the railroad retains a permanent, unconditional easement to perform all common carrier freight operations over the line.³ In making a determination here, we will look to whether Conrail retained a permanent, unconditional easement and whether it has sufficient interest and control over the line so that it cannot be prevented from carrying out its common carrier obligation.⁴

The proposed agreement and quitclaim deed transferring Conrail's interest in the C&P Dock to the Authority clearly specify that Conrail will retain "permanent, perpetual, exclusive, unrestricted and assignable easements and rights" on

³ Sacramento-Placerville Transportation Corridor Joint Powers Authority--Acquisition Exemption--Certain Assets of Southern Pacific Transportation Company, STB Finance Docket No. 33046 (STB served Oct. 28, 1996); Los Angeles County Transportation Commission--Petition for Exemption--Acquisition from Union Pacific Railroad Company, Finance Docket No. 32374 (STB served July 23, 1996); Chicago, Terminal Corporation--Acquisition of Leasehold Exemption--Elgin, Joliet & Eastern Railway Company, Finance Docket No. 32495 (ICC served Jan. 12, 1995); N&W Ry. Co.--Lease of Line in Cook & Will Count., IL., 9 I.C.C.2d 1155 (1993), aff'g ICC served May 28, 1993; Metro Transit Auth. of Harris County, TX--Declar. Order, 9 I.C.C.2d 559 (1993); Utah Transit Authority--Acquisition Exemption--Line of Union Pacific Railroad Company, Finance Docket No. 32186, (ICC served Dec. 31, 1992, petition for reconsideration denied ICC served Apr. 14, 1993); South Orient Railroad Company, Ltd.--Acquisition and Operation Exemption--Line of the Atchison, Topeka and Santa Fe Railway Company, Finance Docket No. 31971 (ICC served Sept. 2, 1992); Maine, DOT--Acq. Exemption, Me. Central R. Co., 8 I.C.C.2d 835 (1991) (State of Maine).

⁴ In State of Maine, supra, at 838, the ICC cautioned that:

[A]ny similar transactions should likewise be submitted to us in advance, together with a copy of the agreement between the railroad and the entity acquiring its right-of-way, for a jurisdictional determination. Because of the significant possibility that this sort of transaction could affect the carrier's ability to meet its common carrier obligations . . . we intend to examine these transactions closely and will make a determination based on the facts and circumstances of each case.

the C&P Dock "for the continued ownership, inspection, use, operation, maintenance, repair, replacement, renewal, modification, rehabilitation and removal" of its existing railroad track and facilities, with the free and uninterrupted right to conduct all common carrier operations.

The agreement does not restrict Conrail's rail operations, nor does it impede Conrail's ability to perform rail common carrier service. Conrail will remain the only rail carrier operating on the C&P Dock and will continue to have sole control of the dispatching of trains and maintenance of track. Conrail will retain an easement for the rail tracks on the C&P Dock and may not discontinue service or abandon the line without Board approval.

We see no basis for finding that our approval is required for the transaction or that the Authority would become a rail carrier under our jurisdiction. Conrail is the only entity currently providing rail common carrier service on the C&P Dock and will be the only entity providing rail service after the Authority acquires Conrail's interest in the C&P Dock. The Authority will acquire Conrail's real estate interest, but will not acquire any control over Conrail's rail operations on the C&P Dock.

Through its contractor, the Authority will take over transloading and material handling services, including ship berthage, stevedoring, storage and loading rail cars and trucks. The Authority, however, will not use tracks or locomotives to move, classify or switch rail cars, and will not make up trains or deliver rail traffic to customers. Under these circumstances, the Authority will not become a rail common carrier subject to our jurisdiction. Compare Assoc. of P&C Dock Longshoremen v. The Pitts. & Conneaut, 8 I.C.C.2d 280 (1992).

We find:

1. The above-described acquisition does not require our regulatory approval and will not result in the Authority becoming a rail common carrier subject to our jurisdiction.

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

It is ordered:

1. The proceeding is discontinued.
2. This decision is effective on December 13, 1996.

By the Board, Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen.

Vernon A. Williams
Secretary