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SERVICE DATE - MAY 20, 1999

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. 126

Decided: May 19, 1999

This decision addresses: the request “for declaratory order to Surface Transportation Board Decision No. 89,” filed March 29, 1999, by General Mills, Inc. (GMI); and the CSX-183 reply, filed April 29, 1999, by CSX Corporation and CSX Transportation, Inc.¹

BACKGROUND

Buffalo Creek Line. GMI’s request concerns a 5.66-mile line of the former Buffalo Creek Railroad that Conrail acquired when it came into existence in 1976. This line,² which is located in the City of Buffalo, NY, and which serves the Buffalo “waterfront area,”³ extends between Williams Street (near Howard Street) and Peck Slip (near Michigan Avenue). See CSX/NS-178 (filed Dec. 15, 1997), Vol. 3A at 339 and 358 (narrative descriptions of the Buffalo Creek line). See also

¹ In this decision as in Decision No. 89: CSX Corporation and CSX Transportation, Inc., and their wholly owned subsidiaries, and also Consolidated Rail Corporation’s wholly owned New York Central Lines LLC subsidiary, are referred to collectively as CSX; Norfolk Southern Corporation and Norfolk Southern Railway Company and their wholly owned subsidiaries, and also Consolidated Rail Corporation’s wholly owned Pennsylvania Lines LLC subsidiary, are referred to collectively as NS; Conrail Inc. and Consolidated Rail Corporation, and also their wholly owned subsidiaries other than New York Central Lines LLC and Pennsylvania Lines LLC, are referred to collectively as Conrail or CR; and CSX, NS, and Conrail are referred to collectively as applicants.

² The record indicates that this line is either all that remains or all that ever was of the Buffalo Creek Railroad, which (the record further indicates) operated as a terminal switching railroad with dock facilities for Great Lakes vessels handling bulk commodities in lake/rail transfer.

³ See CSX/NS-176 (filed Dec. 15, 1997) at 67 (line 4).

CSX/NS-178, Vol. 3A at 355 and 373 (maps of the Buffalo Creek line). See also the Conrail System Map dated 6/7/97, that was submitted with the CSX/NS/CR application filed June 23, 1997 (the Buffalo Creek line appears to be the line designated on the system map as the BUFFALO CREEK RT.; the section of track designated on the system map as the GENERAL MILLS LD., which exists as a stub at the end of the Buffalo Creek line, appears to be the section of track that accesses GMI's Buffalo facilities).

GMI's Buffalo Facilities. GMI's Buffalo facilities, which are located at the end of the Buffalo Creek line (i.e., in the vicinity of Peck Slip), include a flour mill, a grain elevator, a cereal plant, and several warehousing operations. See Decision No. 89, slip op. at 290. GMI indicates that the Buffalo Creek line ends exactly at GMI's property line, which (GMI adds) lies a few yards southeast of Michigan Avenue and opposite Peck Slip.⁴

B&O Trackage Rights. An agreement dated February 1, 1980 (hereinafter referred to as the B&O agreement), by and between Conrail (as lessee and operator of the Buffalo Creek Railroad) and the Baltimore and Ohio Railroad Company (B&O, a CSX predecessor), provides that, subject to various terms and conditions, B&O shall have the right to operate over the entire 5.66-mile Buffalo Creek line. See CSX/NS-178, Vol. 3A at 339-55. The B&O agreement further provides: that B&O's use of the 5.66-mile line shall be in common with Conrail's use of that line, see CSX/NS-178, Vol. 3A at 342; and that the B&O trackage rights are "bridge rights only and [B&O] shall not perform any local freight service whatever at any point located on the [5.66-mile line]," see CSX/NS-178, Vol. 3A at 341.

C&O Trackage Rights. Another agreement dated February 1, 1980 (hereinafter referred to as the C&O agreement), by and between Conrail (as lessee and operator of the Buffalo Creek Railroad) and the Chesapeake and Ohio Railroad Company (C&O, another CSX predecessor), provides that, subject to various terms and conditions, C&O too shall have the right to operate over the entire 5.66-mile Buffalo Creek line. See CSX/NS-178, Vol. 3A at 356-73. The C&O agreement further provides: that C&O's use of the 5.66-mile line shall be in common with Conrail's use of that line, see CSX/NS-178, Vol. 3A at 361; and that the C&O trackage rights are "bridge rights only and [C&O] shall not perform any local freight service whatever at any point located on the [5.66-mile line]," see CSX/NS-178, Vol. 3A at 359.

⁴ The record is not entirely clear whether the section of track designated on the system map as the GENERAL MILLS LD. is or is not part of the Buffalo Creek line. If, on the one hand, this section of track is part of the Buffalo Creek line, it (like the rest of that line) would have been acquired by Conrail in 1976. If, on the other hand, this section of track is not part of the Buffalo Creek line, it would appear to be a privately owned section of track that is owned today by GMI (and that was owned in 1976 by GMI or a GMI predecessor). For present purposes, however, the discrepancy appears to be of no consequence.

B&O Rights Assigned; C&O Rights Not Used. CSX has indicated: that, in 1988, it sold its Buffalo-area rail assets to the Buffalo & Pittsburgh Railroad, Inc. (BPRR);⁵ that, in connection with this sale, the B&O trackage rights were assigned to BPRR;⁶ and that, although the C&O trackage rights were retained by CSX, CSX “has not served shippers on the Buffalo waterfront since it sold its property to the [BPRR] in 1988.” See CSX/NS-176 at 67.

Buffalo Creek Line: Post-1988 Status. After the 1988 assignment of CSX’s B&O trackage rights to BPRR, three carriers had rights of access to the Buffalo Creek line: Conrail had such rights, because it owned the line;⁷ BPRR had such rights, because it had been assigned the B&O trackage rights; and CSX had such rights, because it had retained the C&O trackage rights.

The CSX/NS/CR Transaction, As Proposed. The CSX/NS/CR transaction, as proposed by applicants: contemplated the transfer of the Buffalo Creek line from Conrail to CSX; but did not contemplate the transfer of the C&O trackage rights from CSX to NS. See Decision No. 89, slip op. at 306 (first paragraph, item 4) & n.507. If this aspect of the CSX/NS/CR transaction had been approved without conditions, only two carriers (CSX and BPRR) would have had post-transaction rights of access to the Buffalo Creek line. CSX would have had such rights, because it would have acquired ownership of the line from Conrail; and BPRR would have had such rights, because it would have continued to hold the B&O trackage rights it had been assigned in 1988.

ENRSC’s Objection. The fact that the CSX/NS/CR transaction, as proposed by applicants, did not contemplate the transfer of the C&O trackage rights from CSX to NS was objected to by the Erie-Niagara Rail Steering Committee (ENRSC), an ad hoc committee representing various interests in New York State’s “Niagara Frontier” region. The “waterfront area of Buffalo,” ENRSC insisted, “is an area of the Niagara Frontier region that should be protected from competitive harm by ensuring that NS has access to the customers on this line so that they will continue to have the same competitive alternatives they have today.” See ENRS-6 (ENRSC’s comments, filed Oct. 21,

⁵ The 1988 sale may have been made by “CSX’s predecessor.” See CSX/NS-176 at 67 (line 11). But see CSX/NS-178, Vol. 3C at 111 (lines 3-4). For ease of reference, we will refer to this sale and related matters as if the sale had been made by CSX itself.

⁶ See CSX/NS-178, Vol. 3C at 111-12.

⁷ The record is not entirely clear as to whether, in 1988 or thereafter, Conrail owned the Buffalo Creek line or was merely the lessee of that line. For present purposes, the discrepancy appears to be of no consequence.

1997) at 30; ENRS-19 (ENRSC's brief, filed Feb. 23, 1998) at 38-39. See also Decision No. 89, slip op. at 306 (first paragraph, item 4) and 307 n.509.⁸

Applicants' Responses To ENRSC. Applicants, in their rebuttal submissions filed December 15, 1997, offered two points in support of their argument that shippers in the Buffalo waterfront area did not require a 2-to-1 remedy. See Decision No. 89, slip op. at 306 n.507. First, applicants argued that, although CSX had retained (in 1988) its C&O trackage rights over the Buffalo Creek line, "CSX has not had access to, and has not served[,] shippers on the Buffalo waterfront since it sold its property to the [BPRR] in 1988." See CSX/NS-176 at 67. Second, applicants argued that whether CSX still had access to the Buffalo waterfront was irrelevant, because the CSX/NS/CR transaction contemplated that waterfront area shippers would have, post-transaction, access to two carriers (CSX, which would be Conrail's replacement; and BPRR, which would continue to hold the B&O trackage rights). See CSX/NS-176 at 67-68.

Decision No. 89: In General. In Decision No. 89 (served July 23, 1998), we approved, subject to certain conditions, the acquisition of control of Conrail, and the division of the assets thereof, by CSX and NS. Acquisition of control of Conrail was effected by CSX and NS on the Control Date, which was August 22, 1998 (the effective date of Decision No. 89). The division of the assets of Conrail has not yet been effected; it will be effected on a date that has been referred to variously as Day One, the Closing Date, and the Split Date (and which we have generally referred to as Day One). CSX and NS have indicated that Day One will occur on June 1, 1999.

Decision No. 89: Buffalo Creek Condition. GMI's request implicates Decision No. 89's Buffalo Creek condition, which requires the transfer, from CSX to NS, of the C&O trackage rights over the Buffalo Creek line. See Decision No. 89, slip op. at 178, ordering paragraph 34. See also Decision No. 89, slip op. at 19, item 15 (similar statement). See also Decision No. 89, slip op. at 87-88 (we explained that we were imposing the Buffalo Creek condition "[t]o ensure that shippers on the Buffalo Creek line would not inadvertently lose one of their two Class I rail connections as a result of the transaction"). In view of the Buffalo Creek condition, three carriers (CSX, BPRR, and NS) will have, on and after Day One, rights of access to the Buffalo Creek line: CSX will have such rights, because it will have acquired ownership of the line from Conrail; BPRR will have such rights, because it will continue to hold the B&O trackage rights it was assigned in 1988; and NS

⁸ GMI, like ENRSC, submitted comments in October 1997 (GMI, however, did not file a brief in February 1998). GMI's comments focused on Conrail's pre-transaction reciprocal switching charges, which GMI insisted were much too high; these charges, GMI argued, had effectively precluded GMI from using other railroads either into or out of Buffalo. GMI's comments did not address the C&O trackage rights issue raised by ENRSC. See Decision No. 89, slip op. at 290-91 (summary of the evidence and arguments, and related requests for affirmative relief, contained in GMI's comments).

will have such rights, because (under the Buffalo Creek condition) it will hold the C&O trackage rights now held by CSX.

GMI vs. CSX Dispute; Relief Now Sought By GMI. GMI contends that the B&O trackage rights held by BPRR and the C&O trackage rights that will be held by NS authorize BPRR and NS, respectively, to provide direct service to GMI's Buffalo facilities. Because CSX has insisted that neither set of trackage rights authorizes direct service by the respective trackage rights operator, GMI has asked that we issue a declaratory order clarifying that, in crafting our Buffalo Creek condition, it was our intent to allow the Buffalo waterfront industries on the Buffalo Creek line to have, on and after Day One, access both to BPRR and also to NS.

DISCUSSION AND CONCLUSIONS

The conditions we imposed in Decision No. 89 will effect, on and after Day One, a substantial expansion of GMI's rail transport options. Prior to the CSX/NS/CR transaction, GMI was, as a practical matter, rail-served solely by Conrail: only Conrail actually provided direct physical service to GMI's facilities;⁹ and, although Conrail provided reciprocal switching for traffic moving from/to GMI's facilities, the "establishment by Conrail of the current reciprocal switching charges (approximately \$450) [had] effectively shut down the Buffalo/Niagara Frontier rail gateway," and had thus eliminated reciprocal switching as a competitive option.¹⁰ On and after Day One, however, GMI will have a wider array of rail transport options: access by CSX via direct physical service; and access both by NS and by BPRR via reciprocal switching conducted by CSX at a charge substantially lower than the Conrail charge. GMI will have the NS/BPRR reciprocal switching options because applicants negotiated, and we then enhanced and imposed as conditions, the terms of the NITL agreement,¹¹ which provides, in pertinent part: that CSX will cause any point at which Conrail has provided reciprocal switching to be kept open to reciprocal switching for 10 years after Day One; and that, for 5 years after Day One, reciprocal switching charges at such points will not exceed \$250 per car, subject to annual RCAF-U adjustment. See Decision No. 89, slip op.

⁹ The evidence of record indicates that, prior to the CSX/NS/CR transaction, neither BPRR nor CSX ever actually provided direct physical service to GMI's facilities.

¹⁰ See Decision No. 89, slip op. at 290-91 (summary of the evidence submitted by GMI).

¹¹ The NITL agreement is the settlement agreement that CSX and NS entered into with The National Industrial Transportation League (NITL). See Decision No. 89, slip op. at 248-52. See also Decision No. 89, slip op. at 176, ordering paragraph 20 (we required applicants to adhere to all of the terms of the NITL agreement, subject to the modifications made in Decision No. 89).

at 250-51.¹² And we, on our own initiative, extended the benefits of the NITL agreement's reciprocal switching provisions to shortline railroads that pay switching charges to Conrail. See Decision No. 89, slip op. at 18 n.30 (last clause); Decision No. 89, slip op. at 57 (last paragraph); Decision No. 89, slip op. at 176 n.264 (item b).¹³

GMI, however, wants more. GMI insists, and asks that we clarify, that Decision No. 89 contemplates direct physical access by BPRR and NS to GMI's facilities.

As previously noted, however, both the B&O trackage rights now held by BPRR and the C&O trackage rights that will be held by NS are "bridge rights only" that explicitly prohibit the relevant trackage rights operator from performing "any local freight service whatever at any point" located on the Buffalo Creek line. Because the scope of operations permissible under trackage rights agreements are generally determined by the terms of those agreements, because the terms of the B&O/C&O agreements do not contemplate access to GMI's facilities by the B&O/C&O trackage rights operators, and because the evidence of record demonstrates that, since at least February 1980, no railroad other than Conrail has had direct physical access to GMI's facilities,¹⁴ we hold that neither the B&O trackage rights now held by BPRR nor the C&O trackage rights that will be held by NS authorize the relevant trackage rights operator to provide direct physical service at GMI's facilities.

We are not persuaded by any of the arguments that have been made in support of direct physical access to GMI's facilities by BPRR and NS.

(1) GMI contends that Decision No. 89 contemplates direct physical access by BPRR and NS to GMI's facilities. This argument fails because, when we crafted the Buffalo Creek condition, we intended neither an expansion of the scope of the C&O trackage rights then held by CSX nor an expansion of the scope of the B&O trackage rights held (then and now) by BPRR. The only thing we intended, when we crafted the Buffalo Creek condition, was to effect the transfer of the C&O trackage rights (whatever they might be) from CSX to NS. See Decision No. 89, slip op. at 178, ordering paragraph 34, which correctly expresses our intent in crafting the Buffalo Creek condition: "CSX must transfer to NS the trackage rights now held by CSX over the Conrail line that was formerly a Buffalo Creek Railroad line." See also Decision No. 89, slip op. at 88 n.139, citing CSX/NS-178, Vol. 3A at 359 (page 359 contains the section of the C&O trackage rights agreement

¹² The Rail Cost Adjustment Factor unadjusted for productivity is referred to as RCAF-U.

¹³ CSX has acknowledged that Decision No. 89 gives GMI access to BPRR via reciprocal switching, at \$250 per car. See CSX-183 at 7.

¹⁴ See CSX-183, V.S. Edwards at 1-2.

that provides that the C&O trackage rights are “bridge rights only and [C&O] shall not perform any local freight service whatever at any point located on the [5.66-mile line]”).

(2) The condition that we imposed in Decision No. 89 requiring adherence by applicants to all of the representations they made on the record during the course of proceeding is not relevant here. See Decision No. 89, slip op. at 176, ordering paragraph 19, and slip op. at 21 n.36.¹⁵ The statement made by applicants in their rebuttal submissions (filed Dec. 15, 1997), that shippers in the Buffalo waterfront area would continue to have access to BPRR,¹⁶ suggests that the B&O trackage rights authorize direct physical access to facilities located on the Buffalo Creek line. (We have concluded that these rights are overhead rights only.¹⁷) But this statement was not a representation or commitment that applicants would do or not do something for the benefit of these shippers such as would be covered by our “representations” condition. This was simply an ambiguous description of the nature of these trackage rights, and this description neither advantaged CSX¹⁸ nor disadvantaged any person with interests adverse to CSX’s.¹⁹ Even if CSX had not provided this description, we would have imposed the same Buffalo Creek condition that we imposed in Decision No. 89.²⁰

(3) GMI argues that, because it is a private carrier railroad that gives traffic from its private tracks (located on its private property) to another rail carrier (i.e., any common carrier railroad that operates on the Buffalo Creek line), GMI’s traffic is “bridge traffic” that, under the terms of the B&O/C&O agreements, can be handled by the B&O/C&O trackage rights operators. GMI’s attempt to describe itself as some sort of a railroad (entitled to interchange “bridge traffic” with other

¹⁵ See also Decision No. 89, slip op. at 17 n.26: “We think it appropriate to note, and to emphasize, that CSX and NS will be required to adhere to all of the representations made on the record during the course of this proceeding, whether or not such representations are specifically referenced in this decision.”

¹⁶ See CSX/NS-176 at 67-68.

¹⁷ CSX has acknowledged that the Buffalo Creek discussion in the CSX/NS-176 rebuttal submission (CSX/NS-176 at 67-68) was ambiguous and incomplete. See CSX-183 at 8-9.

¹⁸ CSX’s interests would have been equally well served if it had simply noted that neither BPRR’s B&O trackage rights nor CSX’s C&O trackage rights authorized direct physical access to facilities located on the Buffalo Creek line.

¹⁹ CSX’s error could not have caused ENRSC or GMI, or any other person with interests adverse to CSX’s, to take any position or request any relief that it would not otherwise have taken or requested.

²⁰ The essence of our Buffalo Creek condition is the requirement that the C&O trackage rights be transferred from CSX to NS.

railroads) is unpersuasive. GMI states that it owns a few tracks, but, as CSX points out, this does not make it a railroad. The traffic that GMI, as a shipper, tenders to a railroad is simply not overhead in nature.

(4) GMI argues that evidence of past operations demonstrates that the B&O/C&O agreements have previously been understood to embrace direct physical access to GMI's facilities by the B&O/C&O trackage rights operators. This argument fails because, even if evidence of past (i.e., pre-1980) operations were relevant to a determination of the scope of the trackage rights granted by the 1980 agreements, the evidence alleged by GMI²¹ does not actually demonstrate that the B&O/C&O trackage rights were ever understood to embrace direct physical access to GMI's facilities.²²

(5) GMI argues that, because its facilities are located at the end of the Buffalo Creek "peninsula" (i.e., at the stub end of the Buffalo Creek line), the B&O/C&O authorization to operate over the "entire" Buffalo Creek line²³ must mean that the B&O/C&O trackage rights operators are to have access to GMI's facilities. The right to operate over the "entire" line, GMI suggests, would make no sense if access to GMI's facilities could not be had. See also CSX/NS-178, Vol. 3A at 341 and 359 (with one exception not presently relevant, each trackage rights agreement explicitly bars the trackage rights operator from using any part of the line "for the purpose of switching, storage of cars, [or] making or breaking up of trains"). This argument of GMI fails for two reasons: because it would eliminate, at least in part, the ban on local freight service in an effort to preserve the right to operate over the entire line;²⁴ and because the right to conduct bridge operations over the entire line

²¹ GMI claims that a track immediately adjacent to its property is known as "the B&O Lead Track." GMI further claims that it has, in its archives, a photograph of a B&O switching engine performing switch duties at GMI's facilities.

²² CSX has explained (convincingly, in our opinion): that, prior to about 1966, a coal dock and freight house were in business near the GMI plant; that B&O had access to transloading with vessels at that dock and via that freight house; that transloading may have been considered different from local industrial service; and that facilities proprietary to B&O may have been involved. See CSX-183 at 15-16. And we agree with CSX that a random anecdotal assertion like the assertion implicit in the alleged photograph of the B&O switching engine (which GMI has not entered into the record) provides no basis to ignore the clear language of the B&O/C&O agreements.

²³ See CSX/NS-178, Vol. 3A at 339 and 358.

²⁴ There is no reason to believe that the drafters of the B&O/C&O agreements contemplated that, in case of a conflict, the right to operate over the entire line would prevail over the ban on local freight service.

can be explained as a reflection of the prior existence of the vessel docks and proprietary facilities noted by CSX.²⁵

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

It is ordered:

1. GMI's request for declaratory order is denied.
2. This decision is effective on the date of service.

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes.

Vernon A. Williams
Secretary

²⁵ The evidence submitted by CSX suggests that, when such docks and facilities existed, B&O and/or C&O did indeed conduct "bridge" operations over the "entire" Buffalo Creek line. See CSX-183 at 15-16. The inclusion, in the 1980 agreements, of the right to operate over the "entire" line may well have been intended to preserve the rights of the B&O/C&O trackage rights operators to serve any future vessel docks and proprietary facilities.