

Before The
Surface Transportation Board

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

**REPLY OF NORFOLK SOUTHERN CORPORATION AND NORFOLK
SOUTHERN RAILWAY COMPANY TO COMMENTS OF CNJ RAIL
CORPORATION AND JAMES RIFFIN DBA THE RARITAN VALLEY
CONNECTING RAILROAD**

Norfolk Southern Corporation and Norfolk Southern Railway Company
(collectively, "NS") submit this reply to the comments filed on December 1, 2006 by two
parties that have not previously participated substantively in this proceeding: CNJ Rail
Corporation ("CNJ") and James Riffin d/b/a The Raritan Valley Connecting Railroad
("Riffin").¹ As discussed below, the interests of CNJ and Riffin in this proceeding are
tangential, at best, and the issues they raise have no relevance to the issue presented by
the petition that initiated this proceeding: whether the waste transfer facility of petitioners
Bridgewater Resources, Inc. and ECDC Environmental, L.L.C. (collectively "BRI" or
"Petitioners") is within the North Jersey Shared Assets Area ("NJSAA").

¹ The Board's decision served November 22, 2006 provides that "Petitioners will have until December 13, 2006 [subsequently extended to February 6, 2007] to reply to those comments [filed on or before December 1, 2006 to the petitioners' supplement to their petition]," but it did not specifically provide for replies by other parties to such comments. By accompanying motion, NS seeks leave to file this reply to the comments of CNJ and Riffin inasmuch as their comments raise new issues to which NS has had not opportunity to respond.

THE COMMENTS OF CNJ

CNJ claims to control, indirectly, an entity known as Somerset Terminal Railroad Corporation ("Somerset"). CNJ claims that Somerset is a Class III rail carrier by virtue of a notice of exemption filed in STB Finance Docket No. 33999 (served Feb. 13, 2001). That notice stated Somerset's intent to operate, pursuant to an easement, over 1.25 miles of rail line owned by Joseph C. Horner, which the notice asserted to be part of the line "known as the Reading Company New York Branch (also known as the Raritan Valley Connecting Track)."

CNJ asserts that the line that was the subject of the notice of exemption in Finance Docket No. 33999 is what BRI in its petition and pleadings in this proceeding has referred to as the "Royce Spur." As established by BRI's petition and the comments of NS in this proceeding, the Royce Spur is an industrial spur, which serves the BRI facility and connects to NS's Royce Running Track, which in turn connects to NS' Lehigh Line at a point west of the NJSAA. The Royce Spur was constructed on part of the right of way of the line of the former Delaware and Bound Brook Railway that once extended between the Lehigh Line and the Raritan Valley Line, which the BRI petition referred to as the Reading Connector.

CNJ also asserts, *inter alia*, that (1) Mr. Horner acquired the Reading Connector from Conrail by deed dated August 24, 1995, (2) Horner then leased the Reading Connector to BRI, (3) that Somerset "acquired a property interest in the line from Mr. Horner in 2000", (4) BRI filed for Chapter 11 bankruptcy protection in July 2000, (5) Somerset "operated the property" for some unspecified period of time, (6) that Somerset assigned its interest in the line in October 2002 to the Morristown & Erie Railway, Inc.,

pursuant to a notice of exemption filed in Finance Docket No. 34267, (7) “[a] dispute to title in the line of railroad and other various property interests emerged as part of that proceeding,” (8) on October 8, 2004, another entity, Standard Railroad of New Jersey, Inc. (“Standard”) filed a notice of exemption to acquire the same line in Finance Docket No. 34551, and (9) on November 21, 2006, yet another entity, Riffin, filed a notice of exemption to acquire and operate the line in Finance Docket No. 34963. CNJ comments at 3-4.

As CNJ and Riffin both note, on November 27, 2006, NS requested the Board to issue a housekeeping stay of the effectiveness of the notice of exemption filed by Riffin in Finance Docket No. 34963. NS’ petition was based on the fact that Conrail had never filed an application with the Board or the Interstate Commerce Commission (“ICC”) to abandon the line at issue, as attested by the attached verified statement of a Conrail employee. NS also asserted that Mr. Riffin incorrectly filed for exemption from 49 U.S.C. §10901, since he appeared to already control a carrier. Subsequently, on December 1, 2006, Riffin filed a motion to amend his earlier notice of exemption and filed a “Corrected Verified Notice of Exemption,” which seeks exemption from 49 U.S.C. §10902. By decision served December 12, 2006, the Board granted Riffin’s motion to amend his notice. The Board noted NS’ request to stay the previous notice and also noted earlier decisions, involving the same line, holding that the publication and effectiveness of a notice of exemption do not constitute any finding by the Board regarding the ownership of the property or the entity’s legal authority to operate over the line. NS did not request a stay of the effectiveness of the amended notice.

CNJ contends that, in view of Conrail's failure to obtain ICC authority for the abandonment of the Royce Spur and its subsequent sale to Mr. Horner, the Board should "reopen this proceeding and allow for additional discovery in this matter" (CNJ Comments at 6, ¶ 35); "address this issue before it can determine what the parties to the transaction agreement intended at CP Port Reading Junction" (*id.* at 7, ¶ 37); and "set[] aside the unapproved sale of the Raritan Valley Connecting Line to Mr. Horner" (*id.* at 10, ¶ 52).

CNJ is incorrect. The status of the Royce Spur, its ownership and whether Conrail should have obtained ICC authority to abandon it or to sell it to Mr. Horner are matters that have no relevance to the issue in this proceeding, which is whether BRI's facility is within the NJSAA. Neither CNJ nor Riffin disputes that the Royce Spur connects to the Royce Running Track, a line allocated to NS (via Pennsylvania Lines, LLC) by the Transaction Agreement. Nor do they dispute that at the time of the Transaction Agreement, the Royce Spur did not connect to any track that became part of the NJSAA and connected only to the Royce Running Track.² Those are the essential facts that demonstrate that the BRI facility is not within the NJSAA. Those facts remain true whether or not Conrail should have obtained abandonment authority, whether it validly conveyed a property interest in the Royce Spur to Mr. Horner and regardless of whatever interests he in turn may have validly conveyed to BRI, Somerset or any other party.

² According to Riffin, some time after Conrail acquired the line of the Delaware and Bound Brook Railway, including the Reading Connector, in 1982, Conrail removed the diamonds by which that line crossed and connected to the Lehigh Line and reconnected the Lehigh Line and the Reading Connector where the Royce Spur now connects to the Royce Running Track. Riffin Comments at 7-8, ¶¶ 22-25.

It is far from clear whether Conrail's actions before the Transaction Agreement, including the sale of the real estate underlying the Royce Spur required regulatory approval,³ but there is no occasion for the Board to consider that question, because it has no relevance to any issue in this proceeding; in any event, the BRI facility would not be connected to the NJSAA. If Conrail's conveyance to Mr. Horner was invalid or were to be set aside, then under the terms of the Transaction Agreement, Conrail's right, title and interest in the Royce Spur would belong to NS, because at the time of the Transaction Agreement it connected to an NS line (the Royce Running Track) and only to an NS line. Schedule I, Item 2(A)(4) provides in pertinent part: "The 'PRR Allocated Assets' shall include all of CRR's, CRC's and the respective Affiliates' right, title and interest in and to the following Assets: (A) . . . All Routes identified as PRR Allocated Assets and Attachment I and II . . . together with the following assets that are related to such Routes (4) real estate (whether or not used for operating purposes) adjacent or in proximity to the Routes included in the PRR Allocated Assets" Attachment I further provides in its preamble: "Lines not specifically listed are to be acquired by the owner/acquirer of the CRC route/line to which they connect." Conrail's failure to obtain abandonment authority for the Royce Spur thus provides no basis for any claim that the BRI facility is within the NJSAA.

Thus, the Board was correct in its decision served November 30, 2006 denying BRI's motion to compel discovery relating to the status/disposition and location of the

³ When Conrail took these actions, it retained the ability to provide rail service to the shipper located on the Reading Connector (BRI) via the Royce Running Track and the Royce Spur, and Conrail and NS (after Split Date) have provided such service without interruption. *See, e.g., Union Pacific Railroad Company and Stillwater Central Railroad Company—Joint Relocation Project Exemption—Fort Sill, OK*, STB F.D. N. 34439 (served December 16, 2003).

so-called Reading Connector. The Board correctly stated: "Petitioners fail to show how the information sought . . . 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." Decision at 2. CNJ provides no basis for reconsidering that conclusion.

Furthermore, if Conrail's failure to seek abandonment authority with respect to the Royce Spur provided any basis for setting aside the sale to Mr. Horner or for providing any administrative or other legal relief to persons adversely affected by that failure, this is not the appropriate proceeding. The appropriate means for seeking such relief would be a separate action initiated by a genuinely aggrieved person. Petitioners here have not sought such relief in this proceeding. There is no any indication that petitioners – who have been using the Royce Spur for rail transportation purposes for many years and for receiving rail service from NS – have been harmed by Conrail's conduct. Nor is there any indication that CNJ (which claims to have operated on the Royce Spur for some period, presumably for compensation) or Mr. Riffin (who merely asserts an intent to negotiate to acquire the spur from whoever owns it) have been harmed in any way. Indeed, it CNJ has no colorable interest in the issue at all, since it asserts that it assigned any rights it may have had with respect to the Royce Spur to another entity.

THE COMMENTS OF RIFFIN

As noted earlier, on November 21, 2006, Riffin filed a notice of exemption in Finance Docket No. 34963 to acquire and operate the Royce Spur, and on December 1, 2006 filed a "corrected" notice of exemption for the same purpose. As also noted, Riffin is the fourth entity to have filed notices to acquire and operate the Royce Spur in recent years. Riffin, however, claims no present interest in the Royce Spur and has not demonstrated any likelihood of acquiring any interest in it. Both notices acknowledge that Riffin is uncertain who has title to the spur. The Corrected Notice states at p. 2:

In a deed dated August 24, 1995, recorded in the Land Records of Somerset County, New Jersey, at Liber BK 2031 folio 320 *et al.*, Conrail transferred all of its title and interest in this portion of the former D&BB line, to Joseph C. Horner, an individual. Mr. Horner in turn has leased this line to Bridgewater Resources, Inc. ("BRI"). If Conrail received authority from the Interstate Commerce Commission to sell this line segment, then BRI has title to the line. If the Commission did not approve the sell [sic] of this line segment, and if the Board sets aside the unauthorized sale of the line, then Conrail, or its successor in title, would still have title to the line segment.

Although the Corrected Notice, like the original notice, asserts that "[a]greements are being negotiated," NS is not engaged in any negotiations with Riffin and understands that neither BRI nor Conrail is engaged in negotiations with him. To the extent Riffin has any interest in the line and in this proceeding, it is entirely speculative and insubstantial.

Notwithstanding his lack of any substantial interest in the matter, Riffin advances a number of confusing and convoluted arguments, which, like CNJ's comments, focus on Conrail's failure to seek abandonment authority with respect to the Royce Spur. These arguments are both incorrect and are irrelevant to the issue in this case for essentially the same reasons discussed with regard to CNJ's comments.

Riffin's principal argument appears to be that the BRI facility is within the NJSAA because it is adjacent to the Royce Spur, which Riffin asserts to be within the NJSAA. Riffin Comments at ¶¶ 28-36. Riffin offers four reasons for his claim that the Royce Spur (which Riffin refers to as the "D&BB Line") is within the NJSAA: (1) it was not expressly conveyed by the Transaction Agreement to NS or CSX and would therefore "be classified as a Retained Asset" (*id.* at ¶ 28); (2) it is east of the straight line between Milepost 35.92 on the Lehigh Line and Milepost 32.4 on the Raritan Valley Line of New Jersey Transit (which Riffin refers to as the "CRNJ Line")(*id.* at ¶ 29); (3) prior to Conrail's removal of the connections, the Royce Spur connected to the Lehigh Line and the Raritan Valley Line at points that are now within the NJSAA, and "Respondents are estopped from arguing [that the Royce Spur] is not connected to Shared Assets Trackage" because Conrail removed the connections without authority (¶¶ 30, 33, 36); and (4) Conrail maintains the approach signals to the interlocking at Port Reading Junction and therefore has rights to operate over NS trackage to maintain those signals (*id.* at ¶¶ 31-35).

These claims are incorrect and/or irrelevant. First, Riffin is incorrect that, under the Transaction Agreement, the Royce Spur is classified as a Retained Asset because it was not expressly conveyed to NS or CSX. Riffin cites no provision of the Transaction Agreement to support this claim, and it is refuted by Schedule I, Item 2(A)(4) of the Transaction Agreement which, as discussed earlier, provides that "The 'PRR Allocated Assets' shall include all of CRR's, CRC's and the respective Affiliates' right, title and interest in and to . . . real estate (whether or not used for operating purposes) adjacent or in proximity to the Routes included in the PRR Allocated Assets" It is also refuted

by Attachment I to Schedule I, which provides: "Lines not specifically listed are to be acquired by the owner/acquirer of the CRC route/line to which they connect."

The fact that the Royce Spur is east of a straight line between two points on lines that are part of the NJSAA is irrelevant to whether it is within the NJSAA. The NJSAA Agreement, like the other SAA agreements, defines "Shared Assets" as tracks, rights of way and other property "which CRC [Conrail] owns, leases or has the right to operate over," and defines "Shared Asset Areas as "the geographical area comprising the Shared Assets and Operator [*i.e.*, NS or CSX] Facility and Jointly Operated Facility directly (without intermediate connection to another railroad) attached to trackage included within the Shared Assets" NJSAA Agreement §§1(ss) and (tt).

The fact that the Royce Spur is constructed on part of a line that once connected to lines that became part of the NJSAA but that were not so connected at the time of the Transaction Agreement does not make the Royce Spur part of the NJSAA. As discussed earlier, even if one were to assume that Conrail's failure to obtain abandonment authority rendered its 1995 sale of the property to Mr. Horner invalid and that Conrail therefore retained title to it and/or operating rights over it, the relevant question would be whether the 1996 Transaction Agreement allocated Conrail's rights, title and interests in the property to PRR, for NS' exclusive use, or to the NJSAA. Since, at the time of the Transaction Agreement, the Royce Spur was adjacent to and connected only to a line allocated to PRR (NS), then under the clear terms of the Transaction Agreement, all of Conrail's right, title and interest in the Royce Spur would have been allocated to NS. What comprises the NJSAA was determined by the Transaction Agreement, and the line allocation decisions by the parties to the Transaction Agreement were based on the lines

and connections that existed at the time of that agreement, not on the basis of lines and connections that may have existed in the past. Whether or not the Royce Spur once connected to lines that later became part of the NJSAA and whether or not Conrail should have obtained regulatory authority for its pre-1996 actions are irrelevant to the question whether or not the Royce Spur became part of the NJSAA under the Transaction Agreement.

Riffin's argument premised on his claim that Conrail maintains the western approach signals to the Port Reading interlocking and therefore has rights to operate over NS tracks to reach those signals is incorrect because Conrail does not in fact maintain the western approach signals to the Port Reading interlocking. As stated in the responses of NS, CSX and Conrail to the interrogatories of BRI, NS maintains the western approach signal and the track circuitry between that signal and the western home signals.⁴

Mr. Riffin makes a number of other arguments and factual claims regarding the consequences of Conrail's failure to obtain abandonment authority, what actions the Board might take as a result, the rights of persons to make offers of financial assistance and the alleged interests of New Jersey Transit in the Royce Spur. Riffin Comments, ¶¶ 46-48. There is no need or warrant for the Board to consider those arguments and claims, however, because they are all completely irrelevant to the issue in this proceeding for the reasons discussed. The Board would need to address them only if they were presented to the Board by an appropriate complaint or petition for relief by a party with standing to

⁴ In response to BRI's Second Discovery Requests, Interrogatory No. 13, NS stated: "NS maintains the approach signal at Mile Post LE-38.4 and the track circuitry between this signal and the home signals at 67RC and 67R shown on the 'Track Layout - Sheet'" provided previously to petitioners." CSX and Conrail responded similarly to this interrogatory. These responses are included in Exhibits 1, 2 and 3 to the Second Supplemental Verified Statement of Paul Reistrup, attached to BRI's Supplement to its petition.

raise them and to seek such relief -- namely, a party who was adversely affected by Conrail's actions.

CONCLUSION

The comments of CNJ and Riffin provide no grounds relevant to the issue in this proceeding and no grounds for granting the Petition for Clarification Or in the Alternative For Supplemental Order—North Jersey Shared Assets Area filed by BRI on January 20, 2006. That petition should be denied.

John V. Edwards
**NORFOLK SOUTHERN
CORPORATION**
Three Commercial Place
Norfolk, Virginia 23510-2191
(757) 629-2838



Richard A. Allen
David M. Endersbee
**ZUCKERT, SCOUTT &
RASENBERGER, LLP**
888 Seventeenth Street, NW
Suite 700
Washington, D.C. 20006
(202) 298-8660

*Attorneys for
Norfolk Southern Railway Company*

February 6, 2007

CERTIFICATE OF SERVICE

I certify that I have this 6th day of February, 2007, caused copies of the foregoing Reply of Norfolk Southern Corporation and Norfolk Southern Railway Company to Comments of CNJ Railroad Corporation and James Riffin d/b/a/ The Raritan Valley Connecting Railroad to be served by hand or first class mail, postage prepaid, on the following:

John K. Enright
Assistant General Counsel
Consolidated Rail Corporation
1000 Howard Blvd.
Mt. Laurel, NJ 08054-2355

Steven C. Armbrust
Counsel
CSX Transportation, Inc.
500 Water St., J-150
Jacksonville, FL 32202
(904)359-1229

James Riffin
1941 Greenspring Drive
Timonium, MD 21093

John V. Edwards
Norfolk Southern Corporation Three
Commercial Place
Norfolk, Virginia 23510-2191
(757) 629-2657

Christopher A. Mills
Slover & Loftus
1224 17th St., N.W.
Washington, D.C. 20036

Eric Strohmeier
CNJ Rail Corporation
833 Carnoustie Drive
Bridgewater, NJ 08807



David M. Endersbee