

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36107

SOO LINE RAILROAD COMPANY—PETITION FOR DECLARATORY ORDER

Digest:¹ Pending the resolution of state law issues, the Board holds in abeyance a petition for declaratory order filed by Soo Line Railroad d/b/a Canadian Pacific requesting the Board find that termination of a specific interchange agreement would require Board approval.

Decided: August 8, 2017

On March 13, 2017, Soo Line Railroad d/b/a Canadian Pacific (CP) filed a petition for declaratory order requesting that the Board find that termination of the Indiana Harbor Belt Interchange Agreement (IHBIA) would require Board approval. CP states that its petition relates directly to a complaint for declaratory judgment filed by Norfolk Southern Railway Company (NSR) in the United States District Court for the Northern District of Indiana (District Court), in which NSR has sought a declaration that, under Indiana law, it has the implied right to terminate the IHBIA upon 90 days' written notice to the other parties to the agreement. (CP Pet. 1.)

As discussed below, the Board finds that NSR's District Court litigation over whether NSR can terminate the IHBIA presents a threshold matter that should be resolved prior to the Board's consideration of CP's petition. The Board will therefore hold this proceeding in abeyance pending resolution of NSR's litigation before the District Court.

BACKGROUND

According to CP, the underlying dispute involves two agreements: the Michigan Trackage Rights Agreement (MTRA) and the IHBIA. (CP Pet. 4.) The MTRA is a May 2005 trackage rights agreement between NSR and CP that grants CP certain trackage rights over NSR's line between Detroit, Mich., and Chicago, Ill. (CP Pet., Ex. 1 at 1; CP Pet. 5.) The MTRA also provides CP with the right to use two "connection points" to enter and exit NSR's line: CP-509, which provides CP a connection to the Belt Railway of Chicago (BRC); and

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

CP- 502, which provides CP a connection to the Indiana Harbor Belt Railway (IHB).² (CP Pet. 5.) After the MTRA was signed, CP intended to obtain trackage rights from IHB to effectuate its use of CP-502, but CP was blocked from doing so by CSXT, the owner of a portion of the IHB segment over which CP sought trackage rights. (Id. at 7.)

In July 2005, CP and IHB entered the IHBIA, which granted CP operating rights to interchange with IHB at Gibson Yard³ via CP-502. (Id. at 8.) The IHBIA thus allowed CP to use CP-502 as an entry/exit point to NSR's line and gave CP an alternate route through the busy Chicago terminal. (Id. at 5-6, 8.) Although the IHBIA principally sets forth rights and obligations of CP and IHB, NSR and Consolidated Rail Corporation (Conrail) are also signatories because they are owners of the underlying property between CP-502 and Gibson Yard. (Id. at 8; CP Pet., Ex. 2.) The IHBIA provides that IHB or CP may terminate the agreement upon 90 days' written notice to the other parties. (CP Pet., Ex. 2 at 6.)

In January 2017, NSR filed a complaint in the District Court, Norfolk Southern Railway v. Soo Line Railroad, No. 2:17-cv-00015-PPS-PRC (N.D. Ind. filed Jan. 12, 2017), seeking a declaration that, under Indiana law, NSR has an implied right to terminate the IHBIA. (CP Pet. 10.) On March 13, 2017, CP filed its petition with the Board, seeking a declaratory order that NSR must seek authorization from the Board before it may terminate the IHBIA. (Id. at 18.) CP argues that if NSR succeeds in its complaint before the District Court, NSR "could potentially unilaterally terminate the IHBIA upon 90 days' written notice, without regard for the impact such termination would have on CP's rights granted to it in the MTRA." (Id. at 10-11.)

CP offers two reasons why NSR should be required to obtain Board authority before it may terminate the IHBIA. First, CP suggests that the IHBIA is essentially a trackage rights agreement that would require Board authority to terminate. In support, CP cites a 2016 arbitration decision (see id., Hubbard V.S., Ex. 4.) regarding a separate dispute over the same line, which found that the IHBIA granted "essentially the same bundle of rights as a formal trackage rights agreement." (CP Pet. 10.) Second, CP argues that the IHBIA is intrinsically linked to the MTRA because the IHBIA was necessary to effectuate CP's rights to use CP-502, granted under the MTRA. (Id. at 2, 11.) CP therefore argues that NSR's termination of the IHBIA would "have the effect of substantially modifying the MTRA, thereby depriving CP of the ability to realize the full value and benefits of its Board-authorized trackage rights." (Id. at 16.) Accordingly, CP argues that any attempt by NSR to terminate the IHBIA would require NSR to obtain partial adverse discontinuance authority from the Board. (Id.) CP also argues that NSR must obtain this Board authority before it may "pursue other legal remedies to force the carrier off the line," including a declaratory judgment from the District Court. (Id. at 18, quoting Yakima Interurban Lines Ass'n—Adverse Aban.—in Yakima Cty., Wash., AB 600, slip op. at 5 (STB served Nov. 19, 2004); CP Pet. 3.) CP asks the Board to initiate a declaratory order proceeding, permit discovery, and adopt a procedural schedule. (Id. at 23.)

² CP filed its notice of exemption for the MTRA with the Board on June 6, 2005, and the STB served and published the notice on June 24, 2005. See Soo Line R.R.—Trackage Rights Exemption—Norfolk S. Ry., FD 34709 (STB served June 24, 2005).

³ Gibson Yard is located south of CP-502 on the line operated by IHB that is subject to the IHBIA.

On April 3, 2017, NSR filed a reply in opposition to CP’s petition, arguing that the IHBIA, as an interchange agreement involving only operating rights, is not subject to Board approval. (NSR Reply 2, 8-9, citing Ind. R.R.—Exemption—Acquis. & Operation, FD 30789 (I.C.C. served Oct. 10, 1986), reconsideration denied Ind. R.R.—Exemption—Acquis. & Operation (Ind. R.R. 1987), FD 30789 (I.C.C. served Apr. 16, 1987), aff’d sub nom. Black v. I.C.C., 837 F.2d 1175 (D.C. Cir. 1988); Norfolk S. Ry.—Pet. for Declaratory Order—Interchange with Reading Blue Mountain & N. Ry., NOR 42078, slip op. at 4 n.5 (STB served Apr. 29, 2003).) NSR asserts that CP improperly relies on the 2016 arbitration decision in arguing that the IHBIA essentially grants trackage rights (NSR Reply 18-19), and notes that the IHBIA specifically states that “[s]aid grant shall be considered a grant of operating rights and not trackage rights.” (emphasis added.) (Id. at 6, quoting CP Pet., Ex. 2 at 2.) NSR further contends that CP wrongly conflates the IHBIA with the MTRA, as the two agreements apply to different lines and involve different parties. In particular, NSR points out that the MTRA “was approved by the Board before the IHBIA even came into existence.” (NSR Reply at 3; see also id. at 5 (stating that “when signed and approved, the MTRA gave CP the ability to enter and exit NS[R]’s line at Control Point 509, but CP had no ability to meet the contractual restrictions necessary to enter or exit at Control Point 502.”).) In addition, NSR argues that whether it may terminate the IHBIA is a contract matter for a court to decide. (Id. at 2, 13-15.) Until the District Court has ruled on that contract matter, NSR contends, any Board involvement is premature. (Id. at 2, 3-4, 15-17.) For these reasons, NSR asks the Board to dismiss CP’s petition “and confirm that no Board authority is required to terminate contractual operating rights for the purpose of interchange that have never been authorized by the Board.” (Id. at 19.)

On April 3, 2017, Conrail also filed a reply in opposition to CP’s petition, arguing that the Board should deny the petition. (Conrail Reply 1.) Conrail states that it “endorses and supports NS[R]’s position in this proceeding,” and that it filed its reply “to discourage any infringement on the property rights or contract rights held by Conrail.” (Id.) Conrail reiterates many of NSR’s arguments. In addition, Conrail argues that the IHBIA could not have been intended to modify the MTRA because if it had, it would have required Board approval as an amendment to a trackage rights agreement, and no such approval was sought or obtained. (Id. at 2.) Further, Conrail challenges CP’s contention that the IHBIA is necessary to effectuate its rights under the MTRA and that the two are thus linked for regulatory purposes. Specifically, Conrail refutes CP’s assertion that the MTRA should be interpreted as giving CP access to NSR’s line from CP-502 to Gibson Yard, as subsequently effectuated by the IHBIA. First, Conrail notes that it owns Gibson Yard, but that it is not a party to the MTRA; thus, the MTRA could not have provided CP rights to use Gibson Yard. Second, Conrail points out that if the MTRA had in fact provided CP rights to access Gibson Yard via CP-502, then the IHBIA would not have been necessary. (Id. at 3, 7-9.)

DISCUSSION AND CONCLUSIONS

Under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321,⁴ the Board may issue a declaratory order to terminate a controversy or to remove uncertainty. The Board has broad discretion to determine whether to issue a declaratory order. See Bos. & Me. Corp. v. Town of Ayer, 330 F.3d 12, 14 n.2 (1st Cir. 2003); Intercity Transp. Co. v. United States, 737 F.2d 103 (D.C. Cir. 1984); Delegation of Auth.—Declaratory Order Proceedings, 5 I.C.C.2d 675, 675 (1989). Here, CP has asked the Board to issue a declaratory order finding that NSR must seek authorization from the Board before it may terminate the IHBIA.

Interchange agreements are not generally subject to Board approval. See Ind. R.R. 1987, FD 30789, slip op. at 2 (“The law is well settled that . . . operations over another carrier’s track under an interchange agreement do not require Commission approval.”), aff’d sub nom. Black, 837 F.2d at 1178; Norfolk S. Ry., NOR 42078, slip op. at 4 n.5 (“[N]o further Board authority is needed for one carrier to use another carrier’s track solely in connection with interchange” when the carrier otherwise did not have Board-approved rights to use the track.). Indeed, no Board authority was sought or obtained upon the parties entering into the IHBIA. Nonetheless, CP argues that now NSR should be required to obtain Board authority before it can terminate the IHBIA.

CP argues that, before the District Court considers NSR’s complaint, the Board must decide whether NSR needs Board authority to terminate the IHBIA and NSR must actually obtain that Board authority, if needed. In support of its argument that the Board must rule now, despite the pending court case, CP cites to Yakima Interurban, Docket No. AB 600, a proceeding in which the Board issued an adverse abandonment. However, the Board disagrees and finds that CP’s reliance on that case is misplaced. In that case, the Board stated that, in an adverse abandonment proceeding, a Board decision that the public convenience and necessity does not require or permit continued operations over a line removes the “shield” of the Board’s jurisdiction, and enables an applicant for adverse abandonment to “pursue other legal remedies to force the carrier off the line.” Yakima Interurban, AB 600, slip op. at 5. Here, however, NSR is not seeking to have the District Court remove CP from the line subject to the IHBIA, but is seeking a declaration regarding NSR’s rights to terminate a contract under Indiana law. That is a matter properly before the District Court. See, e.g., Ind. Harbor Belt R.R.—Trackage Rights—Consol. Rail Corp., FD 36099 et. al, slip op. at 5 (STB served Mar. 14, 2017) (“the Board has consistently stated that contractual disputes are properly for courts to decide”).

Whether NSR has the right to terminate the IHBIA under Indiana law is a threshold question that should be answered before the Board considers CP’s petition. If the District Court finds that NSR has no such right, NSR would be unable to terminate the IHBIA regardless of whether it would need Board authority to do so, and CP’s petition before the Board would be moot. Only if the District Court finds that NSR does have such a right would it become appropriate for the Board to issue a decision on the merits of CP’s petition.

⁴ The Surface Transportation Board Reauthorization Act of 2015, Pub. L. No. 114-110, recodified certain provisions of title 49, United States Code, redesignating 49 U.S.C. § 721 as § 1321.

The Board therefore finds that it is appropriate to hold this proceeding in abeyance pending resolution of the related proceeding before the District Court. Once that proceeding is resolved, any party may either request that the Board dismiss this proceeding or issue a decision on the merits of the petition. Additionally, CP is directed to serve the Board with the District Court's decision within 30 days after the conclusion of that proceeding. Because this proceeding is being held in abeyance, the Board need not address CP's requests for discovery and the adoption of a procedural schedule at this time.

It is ordered:

1. This proceeding is held in abeyance pending further order of the Board.
2. CP is directed to serve the Board with the District Court's final decision within 30 days of the conclusion of that proceeding.
3. This decision is effective on its date of service.

By the Board, Board Members Begeman, Elliott, and Miller.