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SERVICE DATE – SEPTEMBER 17, 2009

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35239

ALLEGHENY VALLEY RAILROAD COMPANY—PETITION FOR DECLARATORY
ORDER

Decided: September 15, 2009

This proceeding concerns whether a 0.3-mile rail easement between 16th Street and 21st Street in Pittsburgh, PA has been abandoned. The line segment over which the easement allegedly runs had been owned by Consolidated Rail Corporation (Conrail) as part of a longer line called the Valley Industrial Track. In 1983, Conrail sold a 3.21-acre parcel of land bisected by the track to The Buncher Company (Buncher) and reserved the easement over the line segment for itself and its successors. Between 1984 and 1988, most of the railroad track within the easement area not embedded in concrete had been removed or covered.

In 1995, Conrail purportedly sold, among other assets, the 0.3-mile rail easement to Allegheny Valley Railroad Company (AVRR).¹ AVRR now wants to restore the 0.3-mile segment of the line as part of a longer line and provide passenger and freight rail service over it. Buncher opposes the plan to restore the segment and claims that the easement has been abandoned.

On April 23, 2009, AVRR filed a petition for declaratory order to clarify whether the segment is an active rail easement. AVRR requests that the Board issue a declaratory order confirming (1) that the carrier has the full and unrestricted right to provide common carrier rail service over the permanent rail easement and (2) that it may proceed to reconstruct railroad tracks over the easement along with other rail facilities, including passenger platforms, without further opposition from adjacent landowners or governmental entities.

On May 13, 2009, the Board instituted a declaratory order proceeding to clarify the issue and established a procedural schedule. Pursuant to that schedule, Buncher filed a reply in opposition to AVRR's petition on June 2, 2009, and AVRR filed a rebuttal on June 11, 2009. Although the procedural schedule did not provide for additional filings, Buncher submitted a response to AVRR's rebuttal on June 25, 2009, and a motion asking that the Board accept its submission into the record. AVRR filed a response on July 15. Buncher filed supplemental evidence and a motion asking that the Board accept it on August 4, 2009. AVRR replied on

¹ See Allegheny Valley Railroad Company—Acquisition and Operation Exemption—Certain Lines of Consolidated Rail Corporation, Finance Docket No. 32783 (ICC served Nov. 17, 1995).

August 20. We will defer ruling at this time on whether to accept the additional filings into the record.

For purposes of this decision we note that Buncher generally claims that the Valley Industrial Track was abandoned in 1984 based on a certificate issued by our predecessor, the Interstate Commerce Commission. AVRR counters that this certificate refers to a different Valley Industrial Track than the one referenced in the 1984 issuance. Buncher replies that there was only one Valley Industrial Track in the area, and it points to, among other evidence, the Final System Plan (FSP)² in support of its position.

Recently, the Board addressed a segment's conveyance to Conrail via the FSP in determining whether a segment was a line of railroad requiring Board approval for abandonment. See City of Jersey City—Petition for Declaratory Order, STB Finance Docket No. 34818 (STB served Aug. 9, 2007), recons denied (STB served Dec. 19, 2007). In the subsequent appeal, Consolidated Rail Corp. v. STB, 571 F.3d 13 (D.C. Cir. 2009) (Harsimus), the United States Court of Appeals for the District of Columbia Circuit found that, where the Board's authority was challenged and an interpretation of the FSP or the Special Court's conveyance order under 45 U.S.C. 719(e)(2) was required, the Board lacked jurisdiction to resolve the question of the nature of the trackage sought to be abandoned.³ Harsimus, 571 F.3d at 20. Rather, the Harsimus Court found, the district court *qua* the Special Court⁴ retains exclusive jurisdiction over the FSP interpretation question.

In Harsimus, one party affected by the Board's order first raised the argument that the matter came within the exclusive jurisdiction of the Special Court only after the Board had issued an adverse declaratory order addressing the merits of the dispute before it. To avoid that situation here, we direct Buncher and AVRR to address whether or how the Court's Harsimus ruling affects this case, including whether this agency has jurisdiction to resolve their dispute. Filings on this preliminary issue are due by October 2, 2009.

² In response to the bankruptcy of several midwestern and northeastern railroad companies, Congress enacted the Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, 87 Stat. 985 (1974) (3R Act). Under the 3R Act, the FSP was developed by the United States Railway Association. This plan designated which lines would be retained in active service and consequently transferred to Conrail, a government-created successor railroad to the various railroads in reorganization, and which would be allowed to be abandoned. The FSP was submitted to Congress on July 26, 1975, and was specifically approved in section 601(e) of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 127 (1976).

³ In March 1976, the Special Court, a United States district court composed of three federal judges selected by the Judicial Panel on Multi-District Litigation, ordered the trustee or trustees of each railroad in reorganization to convey to Conrail the rail properties designated for transfer in the FSP.

⁴ The Special Court has been abolished and the jurisdiction and other functions of the Special Court have been assumed by the United States District Court for the District of Columbia. See 45 U.S.C. 719(b)(2).

It is ordered:

1. AVRR and Buncher must submit their responses to the matter described above by October 2, 2009.

2. This decision is effective on its date of service.

By the Board, Chairman Elliott, Vice Chairman Nottingham, and Commissioner Mulvey.

Anne K. Quinlan
Acting Secretary