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SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 290 (Sub-No. 311X)

NORFOLK SOUTHERN RAILWAY COMPANY— PETITION FOR EXEMPTION— IN
BALTIMORE CITY AND BALTIMORE COUNTY, MD.

Decided: May 4, 2010

The Board recently granted a petition for exemption by Norfolk Southern Railway Company (NSR) to abandon its freight operating rights on a line of railroad currently owned by the Maryland Transit Administration (MTA), which uses the line to provide light-rail commuter passenger service in and around Baltimore, Md. In that decision, the Board also granted NSR's request for an exemption from the offer of financial assistance (OFA) provisions of 49 U.S.C. § 10904. James Riffin now seeks a stay of the effectiveness of the abandonment authorization until the Board can decide the merits of Riffin's recently filed petition to reopen the Board's decision. Because the stringent requirements for obtaining a stay have not been met, this decision denies the petition for stay filed by Riffin.

BACKGROUND

In the 1960s and early 1970s, eight major railroads in the northeast and midwest entered reorganization proceedings under the Bankruptcy Act. Ultimately, Congress intervened by enacting the Railroad Reorganization Act of 1973, Pub. L. No. 93-236, 87 Stat. 985, which, through a "Final System Plan" (FSP), reorganized these railroads, stripped of excess facilities, into a single, viable system operated by a private, for-profit entity, the Consolidated Rail Corporation (Conrail). Regional Rail Reorganization Act Cases, 419 U.S. 102, 108-09 (1974).

Among the many lines disposed of by the FSP was the Cockeysville Branch, owned by the Penn Central Transportation Company (Penn Central), which ran north from Baltimore into Pennsylvania. According to the FSP, Conrail acquired the portion of the Cockeysville Branch—currently referred to as the Cockeysville Industrial Track (CIT)—between milepost 0.0 and milepost 15.4. The portion of the Cockeysville Branch between milepost 15.4 and milepost 54.6 in Hyde, Pa. appears on a list of lines "not designated for transfer to [Conrail]."

In 1990, Conrail sold the CIT to MTA to construct, operate, and maintain a light rail transit service between downtown Baltimore and certain of its suburbs. The Agreement of Sale reserved to Conrail a perpetual, assignable, exclusive freight operating easement over the CIT.

Conrail executed a deed quitclaiming to MTA its interest in the CIT, which it describes as ending at “the southerly line of Bridge No. 16.”

In 1999, NSR succeeded to Conrail’s interest in the CIT.¹ On December 16, 2009, NSR filed a petition under 49 U.S.C. § 10502 for exemption from the provisions of 49 U.S.C. § 10903 to abandon a 13.26-mile dead-end segment of the CIT (the Line). The Line is described as running between milepost UU-1.00 “and the end of the CIT line south of the bridge at railroad milepost UU-15.44.”² NSR also sought exemption from the offer of financial assistance provisions of 49 U.S.C. § 10904 and the public use condition provisions of 49 U.S.C. § 10905. MTA, seeking to remove any potential for conflicts between its commuter passenger rail operations on the Line and any potential freight traffic, supported NSR’s requests. Riffin opposed the request for an OFA exemption, and claimed that there is a significant potential demand for renewed freight rail operations on the Line.

By decision served on April 5, 2010, the Board granted NSR’s petition for an exemption to abandon freight rail service on the above-described line, subject to standard employee protective conditions, and for an exemption from the OFA process. The Board denied as moot NSR’s request for an exemption from the public use condition process, because no one had sought a public use condition. The Board provided that its decision would be effective on May 5, 2010, that petitions for stay would be due April 20, 2010, and that petitions to reopen would be due April 30, 2010.

On April 20, 2010, indicating that he planned to seek reopening by April 30, Riffin asked the Board to stay the effectiveness of the abandonment authorization granted in the April 5 decision until the Board resolved his petition to reopen. In his stay petition, Riffin claims that he is likely to succeed on the merits of his petition to reopen, arguing that the Line actually ends at milepost 15.96 and not milepost 15.44 and that, contrary to public policy, NSR’s abandonment of the Line will leave a stranded segment. Riffin attaches purportedly new evidence of shipper interest in the Line, in the form of letters from Baltimore County Councilperson Bryan McIntire and from Kenneth Holt, a candidate for the office of Baltimore County Executive, regarding rail service to a proposed incinerator in Harford County, Md. Riffin also claims that the Board’s conclusion that Riffin is not a shipper on the CIT is erroneous, because it was based on incorrect statements submitted by an MTA witness in a previous case and did not take into consideration Riffin’s current ownership interest in a 400-foot segment of track adjacent to the CIT known as the Veneer Spur.

¹ See CSX Corp.—Control & Operating Leases/Agreements, 3 S.T.B. 196 (1998), 3 S.T.B. 764 (1998), aff’d sub nom. Erie-Niagara Rail Steering Comm. v. STB, 247 F.3d 437 (2d Cir. 2001).

² Although the milepost markers suggest that the CIT is 15.44 miles long, in a prior proceeding, MTA explained that the CIT is 14.22 miles long and that the discrepancy is due to the fact that milepost 0.0 was moved 1.18 miles up the line when Calvert Station (the original location of milepost 0.0) was demolished. See Md. Transit Admin.—Petition for Declaratory Order, FD 34975, slip op. at 1-2 (STB served Oct. 9, 2007).

Riffin additionally claims that he will face irreparable harm if the stay is not granted, because the MTA could remove portions of the Line after the abandonment exemption becomes effective, and neither the Board nor Riffin would be able to compel the MTA to replace track infrastructure that has been removed. Riffin further claims that the MTA has sovereign immunity and cannot be sued or compelled to pay monetary damages. Finally, Riffin states that a stay would benefit the public interest by permitting government officials time to study the effect of the abandonment of the CIT on the proposed Harford County incinerator.

NSR and MTA filed responses on April 23, 2010, and April 26, 2010, respectively. Both argued that Riffin has not satisfied his burden of showing a likelihood of success on the merits. They contend that the abandonment would leave no stranded segment because the FSP did not designate the portion of the Cockeysville Branch between milepost 15.44 and 15.96 for transfer to Conrail and thus that portion remained part of the Penn Central bankruptcy estate. They also argue that Riffin's purported new evidence of "shipper interest" shows nothing of the sort, and that the Board properly found that Riffin himself was not a shipper on the Line. Finally, they contend that Riffin has not established that he would be irreparably harmed by allowing the abandonment to proceed, given that the Board may require an abandoning railroad to restore the status quo ante if it is determined that abandonment authority was improperly granted and that, in contrast, the presence of a freight obligation on the Line would harm the commuting public by restricting MTA's ability to plan and implement improvements to the CIT.

On April 30, 2010, Riffin filed a petition to reopen the Board's April 5 decision. On that date, Lois Lowe also filed a motion to supplement and a verified statement in support of Riffin's petition to reopen.

DISCUSSION AND CONCLUSIONS

The request for a stay will be denied because Riffin has not met the stay criteria. In deciding petitions for stay, the Board follows the traditional stay criteria by requiring a party seeking a stay to establish that: (1) there is a strong likelihood that it will prevail on the merits of any challenge to the action sought to be stayed; (2) it will suffer irreparable harm in the absence of a stay; (3) other interested parties will not be substantially harmed by a stay; and (4) the public interest supports the granting of the stay. Hilton v. Braunskill, 481 U.S. 770, 776 (1987); Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958). The party seeking a stay carries the burden of persuasion on all of the elements required for such extraordinary relief. Canal Auth. of Fla. v. Callaway, 489 F.2d 567, 573 (5th Cir. 1974).

Likelihood of Prevailing on the Merits

Riffin argues that he is likely to prevail on the merits of his petition to reopen because he can show that (1) NSR's abandonment of the Line will leave a stranded segment, (2) new evidence of shipper interest on the Line exists, and (3) the Board erroneously concluded that Riffin is not a shipper on the Line.

Riffin has failed to show that he is likely to prevail on the merits of his principal argument, which is that NSR's abandonment of its freight operating rights on the Line will leave a stranded segment between milepost 15.44 and milepost 15.96, where he now claims the Line ends. To prevail on reopening, Riffin must show material error, new evidence, or substantially changed circumstances that warrant the relief sought. 49 U.S.C. § 722(c); 49 C.F.R. § 1152.25(e)(4). Riffin fails to explain how his argument about the endpoint of the Line meets any of these criteria.³ Riffin's stranded-segment argument does not reflect a changed circumstance occurring after the Board's decision. Nor does Riffin present "new evidence," that is, evidence about the Line's endpoint, that was not reasonably available to him when the record was developed.⁴ On the contrary, the Conrail-to-MTA deed dates from 1990, and Riffin fails to explain why he could not have presented this evidence earlier.

Riffin fares no better if his stranded-segment argument is viewed as raising a claim of material error. Procedurally, Riffin appears to have forfeited the stranded-segment argument by not timely disputing NSR's assertion in its petition that the Line ended at milepost 15.44. See BNSF Ry. v. STB, 453 F.3d 473, 479 (D.C. Cir. 2006). Indeed, it would appear that Riffin did not merely fail to dispute NSR's assertion in a timely manner; he affirmatively waived his current claim that the Line ends at milepost 15.96: in a confidential filing dated February 25, 2010, Riffin submitted a map with a handwritten notation marking the end of the MTA's property at milepost 15.44, not milepost 15.96.

Even apart from these procedural obstacles on the milepost issue, Riffin has not established a likelihood of success on the merits. NSR sought authority to abandon to the northern-most end of this line, as shown by NSR's description of the line proposed for abandonment in its petition for exemption as a 13.26-mile "dead-end segment" of a line of railroad extending to the "end of the CIT line south of the bridge." (NSR Pet. 6.)⁵ NSR also specifically indicated in its petition that the Agreement of Sale dated May 1, 1990, between MTA and Conrail, allowed for some small variance to the described length of the Line, and that differences in the actual distance between the mileposts of the Line resulted from multiple relocations of milepost 0.0. (NSR Pet. 7-8, n. 6.)

Not only did NSR make clear its intent to abandon the Line to the end of the CIT, but the FSP on its face shows that the portion of the Cockeyville Branch transferred to Conrail ended at milepost 15.4, not milepost 15.96. Although we cannot resolve a substantial question related to

³ As a frequent participant in numerous Board proceedings over the past several years, Riffin is familiar with the law and the Board's regulations. The Board rejects Riffin's attempt, see Stay Petition at 3, to incorporate into his stay petition whatever arguments he later makes in his petition to reopen. Riffin may not evade the deadline for filing a stay petition, which would deprive NSR and MTA of the ability to respond. Accordingly, Riffin has forfeited all arguments in support of his stay request that he did not set forth in his stay petition.

⁴ See Toledo, Peoria & W. Ry. v. STB, 462 F.3d 734, 753 (7th Cir. 2006).

⁵ NSR has referred to it as a segment, because NSR intends to retain its authority to operate over the CIT line between milepost UU-0.0 and UU-1.00 at the southern end to continue to serve its bulk transfer terminal located there.

the nature of the track transferred in the FSP, see Consolidated Rail Corp. v. STB, 571 F.3d 13, 19-20 (D.C. Cir. 2009), here the nature of the track is not in issue. As noted by both NSR and MTA, the FSP states that Conrail obtained that portion of the Cockeyville Branch between milepost 0.0 and milepost 15.4. (MTA's Reply, Ex. A.) The segment running north from Cockeyville at milepost 15.4 to Hyde, Pa. at milepost 54.6 is explicitly designated as a line not transferred to Conrail under the FSP. (MTA's Reply, Ex. B.) Again, that is clear on its face, and no interpretation of the FSP is necessary.

The 1990 Conrail-to-MTA deed on which Riffin relies does not introduce any ambiguity into what was transferred to Conrail under the FSP. The deed describes the line as "continuing to the ENDING at the southerly line of Bridge No. 16" (Riffin Pet., Ex. 3-A.). The deed, however, does not indicate that bridge's milepost location. If anything, the deed supports NSR's position that it sought, and the Board granted, exemption authority for NSR to abandon its operations over the northern-most part of the Line. Thus, Riffin has failed to demonstrate a strong likelihood of showing that NSR's exercise of the abandonment exemption would result in a stranded segment of rail line.

Riffin also claims that he is likely to succeed on the merits of his petition to reopen because he will present new evidence of shipper interest in the Line in the form of letters from, among others, Baltimore County Councilperson Bryan McIntire and from Kenneth Holt, who in April 2010 declared himself a candidate for Baltimore County Executive. Riffin already included a copy of letters from McIntire and Holt with his petition for stay.

This argument is unpersuasive. Neither of the letters he has presented constitutes shipper interest, as neither Councilperson McIntire nor Candidate Holt is requesting freight rail service or demonstrating an actual need for such service in the future. Indeed, McIntire's letter is merely a transmittal to the Baltimore County Attorney's office of an unspecified matter referred to the Councilperson's office by Riffin. Holt's letter, while asserting an interest in the transportation of municipal solid waste via rail from Baltimore County to the proposed incinerator in Harford County, does not indicate shipper interest, as the candidate is not a shipper requesting rail service for the transportation of his goods. See Union Pac. R.R.—Discontinuance—in Utah County, Utah, AB 33 (Sub-No. 209), slip op. at 2-3 (STB served Jan. 2, 2008). Nor can Holt represent the official position of Baltimore County, as he is not an elected official. As the April 5 decision observes, the sitting Baltimore County Executive, in a letter dated June 26, 2009, states unequivocally that, given MTA's commuter rail operation on the CIT, Baltimore County has no interest in using the CIT for any freight traffic on the Line. In short, no one currently a part of the area local governments or otherwise a part of the proposed incinerator project has appeared on this record to submit evidence of a need for rail service.⁶ Indeed, as set forth in the Board's

⁶ NSR served its petition for exemption on the Surface Deployment and Distribution Command Transportation Engineering Agency (SDDCTEA), Railroads for National Defense Program, giving the military notice of the abandonment proposal. The proposed incinerator, if built, apparently will be located on the property of Edgewood Arsenal, Aberdeen Proving Ground (APG), in Harford County, Md.

April 5 decision, slip op. at 6-7, serious questions exist as to the economic feasibility of using the Line to perform a portion of the transportation of waste to the proposed incinerator.

Finally, Riffin's references to letters from Cockeysville businesses do not establish a likelihood of success on the merits. The letters, most of which were dated in 2006 or 2007 and submitted by Riffin in 2009 in another proceeding, merely indicated that these firms would consider using rail service if it were available and less expensive than trucking. Accordingly, the letters do not constitute credible evidence of an overriding public need for continued rail service for purposes of this proceeding.⁷

Riffin additionally claims that, contrary to the Board's finding in its April 5 decision, he is a shipper on the Line. He argues that the Board based its contrary conclusion with respect to one parcel on purportedly incorrect statements submitted by an MTA witness in a previous case and failed to consider Riffin's current ownership interest in another parcel, the Veneer Spur. With respect to the first parcel, as stated in the April 5 decision, slip op. at 4, n. 4, the Board has previously determined that Riffin is not a shipper on the Line, because that parcel is not located on the CIT and its connection to the CIT was severed some time ago. Riffin concedes that this parcel is about 200 feet north of the CIT right-of-way, and he does not dispute that the parcel's connection to the CIT was severed.

Nor does Riffin show that his more recent acquisition of a leasehold interest in the Veneer Spur has made him a shipper. First, his testimony is inconsistent with his own sworn statements in his recently filed petition for bankruptcy in the Maryland bankruptcy court.⁸ In any event, his testimony here, even if it were accurate, would not prove his case. Riffin claims that when he acquired this interest, he became a bona fide shipper on the Line, and but for NSR's refusal to provide service, would already have received goods via rail on the Veneer Spur. Any interest Riffin may have in the Veneer Spur, however, has little relevance as to whether he is a shipper on the Line. As NSR and MTA point out, while that property may once have had a spur connection to the Line, Riffin has failed to demonstrate that the property even connects to the CIT right-of-way or that he has made a reasonable request for rail service. Moreover, in another proceeding, Riffin claimed to have acquired an interest in the Veneer Spur to operate a transload

⁷ On April 30, 2010, Lowe submitted a confidential filing containing recently verified versions of many of these letters, and new letters, in support of continued freight rail service. These letters have not been filed in a timely matter for consideration of the stay request.

⁸ Riffin claims that he acquired the Veneer Spur on February 16, 2009. (Riffin Pet. 5). According to the record in a prior proceeding involving the Veneer Spur, his acquisition consisted of a lease of the property from noncarrier Mark Downs, Inc. See James Riffin—Petition for Declaratory Order, FD 35245, slip op at 3 (STB served Sept. 15, 2009). But Riffin's claim that he acquired a leasehold interest in the Veneer Spur is contradicted by his sworn statements in his Maryland bankruptcy proceeding. In that proceeding, Riffin was required to list "all unexpired leases of real or personal property" to which he was a party. Riffin did not include the Veneer Spur property on that list. See Schedule G – Executory Contracts and Unexpired Leases, Feb. 1, 2010, In re Riffin, No. 10-11248 (Bankr. D. Md.).

service for others, not to ship goods for himself.⁹ Finally, the Board's recent decision, finding that Riffin was not a rail carrier on the Allegany line and that his proposal to operate the Veneer Spur failed to qualify as the operation of an "additional" or "extended" line of railroad,¹⁰ has no bearing on whether Riffin is a shipper on the Line. In rejecting Riffin's claims, the Board made no finding on whether Riffin is a shipper on the Veneer Spur.

For the reasons explained above, Riffin has not carried his burden of showing he would prevail on the merits of a challenge to the petition for exemption. The record here does not support the conclusion (1) that NSR's abandonment of the Line will leave a stranded segment, (2) that new evidence of shipper interest on the Line exists, or (3) that the Board erroneously concluded that Riffin is not a shipper on the Line.

Irreparable Harm

Riffin's claim that he will face irreparable harm because the MTA has sovereign immunity and cannot be sued or compelled to pay monetary damages is unavailing. The grant of abandonment authority by the Board does not preclude appellate review. Indeed, when a petition for judicial review is filed, the legal effect of an order permitting an abandonment depends on the court's review, even though the order may apply in the interim unless the court issues a stay. If the court holds that the order was not in accordance with law, then the permission to abandon contained in that order is rescinded, and the original obligation to offer service remains in force. Busboom Grain Co. v. I.C.C., 830 F.2d 74, 76 (1987). Riffin has already indicated that if his petition to reopen is denied by the Board, he will seek judicial review of the Board's decision. Thus, it is unlikely that Riffin will face irreparable harm if the stay is not granted, as the Board's decisions are subject to judicial review at the appellate level.

Riffin's additional claim that he will face irreparable harm because MTA may remove portions of the Line is also unpersuasive. MTA has indicated that it will continue light rail operations on the Line after the abandonment authority becomes effective; thus it is unlikely that MTA will remove large sections of track from the Line. In any event, the Board can order any removed sections to be replaced if the Board's decision in this case is reversed by appellate order and there is a reasonable request for service. As Riffin currently has no freight moving on the Line that would be affected in the interim, irreparable harm is not likely. Thus, based on the record before us, Riffin has failed to meet his burden of showing that he would suffer irreparable harm if the abandonment authority is allowed to become effective.

⁹ James Riffin—Acquis. & Operation Exemption—Veneer Mfg. Co. Spur—in Baltimore County, Md., FD 35236, Verified Notice of Exemption at 2 ("Applicant proposes to use the eastern end of the Veneer Spur to provide transload rail service to a number of local shippers.").

¹⁰ James Riffin—Petition For Declaratory Order, FD 35245 (STB served Sept. 15, 2009).

Harm to Other Parties

While not directly addressing this criterion, Riffin reasons that NSR will suffer little or no economic harm if a stay were entered. MTA responds that it will be harmed. MTA explains that, once the Line is turned over entirely to passenger rail use, MTA will be able to expand its service and make improvements in an efficient manner appropriate to passenger-only operations. MTA states that the removal of uncertainty from the continued presence of a freight obligation on the Line (however remote the possibility of resumption of such operations might be) will permit MTA to plan and budget for its activities without having to address freight-related contingencies. Riffin has failed to show otherwise.

Public Interest

Finally, Riffin has failed to show that a stay would be in the public interest. He claims that officials in Harford County, Baltimore County, and APG did not receive notice of the proposed abandonment, and that the Baltimore County Executive James Smith was not aware of the proposal to build a municipal solid waste incinerator on APG in Harford County when he wrote his June 26, 2009 letter to NSR in support of the proposed NSR abandonment of the CIT. Riffin claims that a stay will allow government officials to study the effect of the abandonment on the transportation of municipal solid waste to Harford County.

First, Riffin's claim that these government officials did not receive notice of the proposed abandonment is without merit. NSR's petition for exemption was published in the Federal Register on January 5, 2010, which constitutes sufficient notice to any interested party. Indeed, Baltimore County was clearly aware of the proposed abandonment, as County Executive Smith wrote a letter in support. And, as previously noted, NSR served a copy of the petition on the military, consistent with the Board's rules at 49 C.F.R. § 1152.60(d). Second, Riffin admits that the public became aware of the incinerator proposal at least by November 2009, giving any interested party ample opportunity to raise concerns about the potential impact the abandonment proposal would have on the incinerator project.

The Board has received no letter directly from any government or military official suggesting that the abandonment of the Line requires further study. Riffin claims, with no support, that the APG garrison commander is unable to communicate the installation's interest in continued rail service over the Line due to the restrictions of military regulations. The claim is implausible. The Federal Government in general, and the Department of Defense in particular, has participated in numerous proceedings at the Board and its predecessor.¹¹ Riffin has not shown that any federal agency or official would oppose this abandonment if a stay were granted.

Riffin has not carried his burden of showing that the abandonment of freight rail service over the Line would harm the public interest here. A state agency, MTA has testified that the abandonment is crucial to the future safety and success of its light rail transit system. While

¹¹ See, e.g., Ford Motor Co. v. ICC, 714 F.2d 1157 (D.C. Cir. 1983); Major Rail Consolidation Procedures, EP 582 (Sub-No. 1) (STB served June 11, 2001).

Riffin in essence challenges the weight the Board should accord to MTA's pleading, pointing out it was not supported by a verified statement of an MTA employee,¹² the record does not support Riffin's claim that there is a need for future freight rail service over the Line.

Moreover, what Riffin is proposing here does not appear to be consistent with the intent of the OFA statute of preserving existing freight rail service or the opportunity to resume freight rail service in the foreseeable future. The only potential for future freight rail service appears to involve some sort of truck-to-rail transload service to the proposed incinerator. Questions persist as to the economic viability of rail participation over the Line in serving the incinerator once it is built, and any such service would not commence for years. Imposing uncertainty on the use of the Line during such a lengthy period of time is not what a forced taking under the OFA process is meant to do.¹³ Thus, the public interest here favors allowing the exemptions granted by the Board to become effective.

For all the reasons set forth above, Riffin has not met the stay criteria and the request for stay will be denied.

It is ordered:

1. The petition for stay is denied
2. This decision will be effective on its date of service.

By the Board, Daniel R. Elliott, Chairman.

¹² As MTA points out, the Board's rules specifically permit it to rely on pleadings signed by counsel. 49 C.F.R. § 1104.4(a).

¹³ It is noted, however, that with MTA's light rail use, the tracks and right-of-way will remain in place. Thus, should a future need arise to use the Line to serve the incinerator, given the economics of light rail transit operations, MTA ought to have the financial incentive and willingness to work with other Maryland governmental entities to allow the resumption of freight rail operations to serve the incinerator should such an arrangement prove viable.