

SERVICE DATE – AUGUST 4, 2010

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35345

PHILADELPHIA BELT LINE RAILROAD COMPANY—
PETITION FOR DECLARATORY ORDER

Decided: August 3, 2010

On January 14, 2010, Philadelphia Belt Line Railroad Company (PBL)¹ petitioned the Board for an order declaring that PBL retains a rail right-of-way on a former street that the City of Philadelphia, Pennsylvania, has now stricken from the city plan. HSP Gaming, L.P. and SugarHouse HSP Gaming, L.P. (collectively referred to as SugarHouse), developers of a casino project sited in part upon the former street, claim that the petition lacks merit because there is no evidence that the right-of-way was ever used for rail purposes. The contested right-of-way is currently the subject of an ongoing dispute in Pennsylvania state court between PBL and SugarHouse. Because PBL has failed to demonstrate either its status as a common carrier over the disputed right-of-way or its authority under the Interstate Commerce Act² to conduct rail operations over the right-of-way, the Board is denying PBL's petition.

BACKGROUND

On December 26, 1890, Philadelphia passed an ordinance (the 1890 Ordinance) granting PBL rights-of-way for railroad lines following along the Schuylkill and Delaware Rivers and branching outward at various defined points. Philadelphia gave PBL 5 years to complete its rail line construction on the granted rights-of-way.

As relevant here, the 1890 Ordinance granted PBL the right to build and operate railroad tracks on Penn Street³ near the Philadelphia industrial waterfront. When Philadelphia passed the 1890 Ordinance, the River Front Railroad (River Front) and the Philadelphia and Reading Railroad (P&R), both predecessors to the Consolidated Rail Corporation (Conrail), were joint

¹ PBL is a Class III railroad that was incorporated in 1889 and has since operated in Philadelphia, Pennsylvania.

² Ch. 104, 24 Stat. 379 (codified as amended in scattered sections of 49 U.S.C.).

³ At the time of the 1890 Ordinance, the at-issue portion of street was actually called Delaware Avenue. In 1910, the name for the particular portion of street was changed to Penn Street. For ease of identification, we will refer to this street throughout our decision as "Penn Street."

owners and operators of existing railroad lines running along Penn Street.⁴ The 1890 Ordinance set the PBL right-of-way on Penn Street, 9.5 feet east of the Penn Street Lines. An 1891 agreement between Philadelphia and PBL authorized PBL to widen Penn Street and shift the Penn Street Lines to accommodate any line construction that PBL might undertake on its new right-of-way.

Philadelphia passed another ordinance in 1893 (1893 Ordinance) that removed the requirement that PBL complete its rail line construction within 5 years. The 1893 Ordinance authorized PBL instead to use existing rail lines and thereby avoid the expenses of widening streets, shifting existing tracks, and constructing new tracks. PBL entered into what appear to be haulage agreements⁵ with other carriers to move freight on PBL's behalf over the existing Penn Street Lines.⁶

On September 10, 1986, Conrail – successor to River Front, P&R, and the Pennsylvania Railroad Company (PRC) – received authorization from the Interstate Commerce Commission (ICC) to abandon its Penn Street Lines. There is no evidence that PBL opposed the Penn Street Lines abandonment. Nor does it appear that PBL informed the ICC at that time of any PBL right or obligation to operate over the Penn Street Lines.

In 2004, in connection with redevelopment efforts, Philadelphia passed an ordinance that struck Penn Street, between Ellen and Shackamaxon Streets, from the city plan. Although it maintained rights-of-way on the former Penn Street for drainage, water main, and gas main purposes, Philadelphia neither reserved a railroad purpose on the former Penn Street nor addressed the PBL right-of-way.⁷

In September 2009, PBL filed a lawsuit in the Court of Common Pleas for Philadelphia County, asserting that it holds the PBL right-of-way over the former Penn Street. PBL requested a permanent injunction barring SugarHouse from any action that could obstruct use of the PBL

⁴ We will refer to the undeveloped right-of-way Philadelphia granted PBL over Penn Street in 1890 as the “PBL right-of-way.” We will refer to the pre-existing River Front/P&R railroad lines running over Penn Street as the “Penn Street Lines.”

⁵ A haulage agreement allows a railroad to have its trains operated on its behalf by a second railroad over the second railroad's tracks. Board approval is not needed for a haulage agreement as it does not implicate either the control of a line of railroad, the transfer of a common carrier obligation, or the operation of one carrier over the tracks of another.

⁶ PBL has submitted an 1892 agreement with River Front and the Pennsylvania Railroad Company (PRC), the lessee of River Front, regarding operations to be performed by those carriers on behalf of PBL.

⁷ The survey of the casino site submitted by PBL on May 7, 2010 (Casino Site Survey) includes the PBL right-of-way as part of a list of exceptions, conditions, and agreements that apply to the casino project site, and additionally describes the PBL right-of-way by stating “as amended by the Ordinance of City Council approved July 1, 2004.”

right-of-way. PBL filed its petition for declaratory order at the Board on January 14, 2010, under 5 U.S.C. § 554(e) and 49 U.S.C. § 721(b)(4).

In its petition, PBL seeks an order confirming that its “right and obligation to provide rail freight common carrier service on the right-of-way including the former Penn Street ... has not been abandoned or otherwise extinguished.” PBL claims that, because it served as a common carrier over Penn Street,⁸ the PBL right-of-way on Penn Street is under federal jurisdiction and therefore could not have been extinguished by local ordinance. PBL also claims that the abandonment authority Conrail obtained in 1986 did not affect PBL’s common carrier obligations, its operational rights, or the status of the PBL right-of-way over Penn Street. According to PBL, the PBL right-of-way and its common carrier obligations over Penn Street could only have been extinguished by Board approval of a separate abandonment application from PBL.⁹

SugarHouse filed a reply on February 3, 2010. SugarHouse argues that only rail lines can be abandoned under 49 U.S.C. § 10903, and that there is no basis for a Board grant of a declaratory order without evidence that PBL actually constructed a railroad line on the PBL right-of-way. SugarHouse noted that PBL conceded in papers filed before the Court of Common Pleas that it had never exercised its authority to construct a rail line on the PBL right-of-way. SugarHouse claims that PBL’s common carrier status over other lines is irrelevant to whether the PBL right-of-way is under the Board’s jurisdiction.¹⁰

DISCUSSION AND CONCLUSIONS

After examining both our current statutory authority and the history of the Interstate Commerce Act, the Board concludes that: (1) PBL has not demonstrated that it ever perfected the right to operate as a common carrier over the PBL right-of-way; (2) PBL has neither demonstrated that it was a common carrier over the Penn Street Lines via trackage rights, a lease,

⁸ In addition to the operations over the Penn Street Lines apparently performed on its behalf through its contractual arrangements with other carriers, PBL claims to have published freight rail service tariffs in 1977 offering service over the Penn Street Lines. PBL does not, however, claim to have ever constructed or operated a line of railroad or provided service over the PBL right-of-way on Penn Street.

⁹ On January 15, 2010, PBL filed a letter requesting that the Court of Common Pleas defer action pending the Board’s decision on the PBL petition for declaratory order. On January 19, 2010, the Court deferred any decision until after the Board decides the merits of PBL’s petition.

¹⁰ On May 7, 2010, PBL filed a motion for leave to file a reply to a reply and a verified reply to the reply of SugarHouse. On May 27, 2010, SugarHouse filed a reply to the motion of PBL for leave to file a reply to a reply. Under 49 C.F.R. § 1100.3, the Board’s rules are to be construed liberally to ensure a just determination of the issues presented. In the interest of compiling a full and complete record, PBL’s motion is granted and the PBL verified reply to the reply of SugarHouse will be accepted into the record.

or otherwise, nor established that PBL's status as to those lines is related to the PBL right-of-way; and (3) 49 U.S.C. § 10903 does not apply to the PBL right-of-way. Because the PBL right-of-way is not subject to agency jurisdiction, the Board cannot grant PBL the requested declaratory order.

Common carrier obligations over the PBL right-of-way. PBL has not demonstrated that it ever perfected any rights under the Interstate Commerce Act to operate as a common carrier over the PBL right-of-way. In the Transportation Act of 1920,¹¹ Congress granted the ICC sole licensing authority for the operation, extension, or construction of rail lines initiated 90 or more days after the Act's effective date.¹² Parties initiating railroad operations, line extensions, or line construction after that date were required to obtain prior authorization from the ICC. While the ICC required carriers initiating activity before the 90-day period to notify the agency, the ICC also described a minimum level of qualifying, pre-Act construction activity that would exempt parties from the need to seek ICC authorization: "the undertaking must embrace not merely purpose or intent to extend or construct [T]he mere provision in a charter or prospectus, or the making of a preliminary survey for the extension or construction of a line or railroad, does not constitute an undertaking of such extension or construction"¹³

PBL has conceded that it never constructed or operated a railroad line over the PBL right-of-way.¹⁴ PBL has presented no evidence that it ever took an action on the right-of-way that would have met the minimum requirement for a pre-1920 operation, extension, or construction of a railroad line.¹⁵ Nor is there evidence that PBL sought post-1920 Transportation Act permission to operate, extend, or construct a railroad line on the PBL right-of-way. The PBL right-of-way thus does not come within the agency's jurisdiction.

¹¹ Ch. 91, § 402, 41 Stat. 456, 477-78 (1920).

¹² *Id.* at 477.

¹³ Rogers Mac Veagh, The Transportation Act 1920, Its Sources, History, and Text, Together with Its Amendments to the Interstate Commerce Act, 223-24 (Henry Holt & Co. 1923) (Quoting a May 25, 1920 ICC notice to carriers interpreting certain portions of the Transportation Act).

¹⁴ Although the Casino Site Survey denotes "segments of railroad tracks (no longer in use)" on the former Penn Street, there is no proof that these segments were constructed by PBL, nor does PBL argue that the segments of railroad tracks were on the PBL right-of-way.

¹⁵ The 1892 agreement submitted by PBL merely provided that River Front and PRC "will receive from the party of the second part [PBL] and will deliver, as the said party may direct, all empty and loaded cars tendered to them by the party of the second part [PBL]" over tracks constructed and provided by PBL as a connection in the neighborhood of Swanson Street and Tasker Street. Although River Front and PRC may have moved freight on behalf of PBL over the former Penn Street, they did not do so by using tracks constructed and owned by PBL, and they did not confer rights to PBL to operate over their tracks. Thus, PBL's 1892 agreement did not confer operating rights or obligations recognized by this agency or its predecessor as being grandfathered under the Transportation Act of 1920.

It is apparent why PBL provides no direct argument to support the claim that its status as a common carrier places the PBL right-of-way under the Board's regulatory authority. PBL cannot claim to have ever served local shippers through use of the PBL right-of-way, because it never constructed a line of railroad over the PBL right-of-way. Similarly, PBL cannot argue that local customers to which it has common carrier obligations have a right to service over the PBL right-of-way. Thus, PBL cannot make a direct case that it was either a common carrier over the PBL right-of-way or that the right-of-way falls under the Board's jurisdiction because of PBL's general status as a common carrier.

Common carrier obligations over the Penn Street Lines. PBL has failed to show how its alleged common carrier activities over the Penn Street Lines are pertinent to the issue pending before us regarding the PBL right-of-way. First, PBL's alleged contractual arrangements for moving traffic over the Penn Street Lines appear to be haulage agreements. Agency approval is not required for the initiation or termination of haulage agreements.¹⁶ PBL argues that tariffs published over the course of its history confirm its common carrier status as to the PBL right-of-way. However, claims of tariffs under which PBL agreed to transport freight for shippers, coupled with agreements for other carriers to actually haul that freight over their rail property, do not necessarily establish that PBL served as a common carrier over the Penn Street Lines. PBL has cited Indiana Hi-Rail Corp.—Show Cause, 1994 WL 716781 (ICC served Dec. 29, 1994), as support for the proposition that it served as a common carrier over the Penn Street Lines. That case, however, addressed the jurisdictional implications of post-abandonment/offer of financial assistance ownership transfers and operator agreements. Unlike PBL, the parties in Indiana Hi-Rail were either operators or owners of the 2 railroad lines at issue. Thus, although PBL may claim to have controlled transportation over the former Penn Street by holding out service, filing tariffs, and receiving payment from shippers, PBL was not the owner or operator of a line of railroad over the former Penn Street. Instead, PBL's relationship with the Penn Street Lines was apparently limited to haulage arrangements with the actual owner-operators of the railroad lines.

Second, it remains unclear how PBL's claim of common carrier status over the Penn Street Lines could have caused the PBL right-of-way to fall under the Board's jurisdiction. PBL's implied argument is that its alleged common carrier activities over Penn Street are independent of any particular railroad lines on Penn Street. However, PBL provides no support for the proposition that its status as a common carrier is wholly independent of any physical plant that would allow PBL to actually serve as a carrier. Nor is there support for the claim that common carrier status on another railroad line could make PBL a common carrier on a right-of-way over which it has not constructed or operated, nor received federal authority to construct or operate, a line of railroad. PBL's attempt to use its tariff and non-jurisdictional agreements as a means of "bootstrapping" its arguments regarding the PBL right-of-way is unavailing.

¹⁶ E.g., Waterloo Ry.—Adverse Aban.—Lines of Bangor and Aroostook R.R. and Van Buren Bridge Co. in Aroostook County, Me., AB 124 (Sub-No. 2) (STB served May 3, 2004).

Finally, PBL's lack of action in the 1986 Penn Street Lines abandonment further undercuts its claims of continuing obligations to operate over the former Penn Street Lines. PBL presented no evidence of opposition – from either itself or its customers – to Conrail's abandonment application. Nor is there evidence that PBL informed the ICC of a continued obligation to operate on the Penn Street Lines during the abandonment proceeding. To the extent PBL ever held any rights or obligations over the Penn Street Lines, PBL took no action to preserve them in 1986. Having failed to indicate any continuing relationship with the Penn Street Lines 24 years ago, PBL's arguments that such a relationship supports its contemporary claims regarding the PBL right-of-way are untenable.

Scope of 49 U.S.C. § 10903. PBL's argument that it retains a common carrier obligation over Penn Street absent any formal abandonment is contradicted by the plain text of § 10903. Section 10903(a)(1) states that “[a] rail carrier providing transportation subject to the jurisdiction of the Board under this part who intends to—(A) abandon any part of its railroad lines; or (B) discontinue the operation of all rail transportation over any part of its railroad lines, must file an application relating thereto with the Board.” This agency has not interpreted the term “railroad line” as including a right-of-way granted by a municipality that has never held track or been used for rail purposes and has never even been authorized by this agency or its predecessor for such use.

Summary. In short, PBL has not supported its argument that it provided common carrier service over the Penn Street Lines and thereby created a common carrier obligation over a different easement. Nor has PBL provided support for its argument that a right-of-way granted by a municipality, but never exercised and developed or otherwise perfected under the Transportation Act of 1920, must be authorized to be abandoned pursuant to § 10903 before it may be dissolved. Accordingly, PBL's request for declaratory order will be denied.

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

It is ordered:

1. Petitioner's request for a declaratory order is denied.

2. Copies of this decision will be mailed to:

The Honorable Sandra Mazer Moss
Court of Common Pleas
City Hall, Rm. 392
Philadelphia, PA 19107
Re: Case ID 090900166, Control No. 09103504

3. This decision is effective on its service date.

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