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SERVICE DATE - DECEMBER 17, 1998

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33522

CHICAGO SOUTHSORE & SOUTH BEND RAILROAD
—PETITION FOR DECLARATORY ORDER—
STATUS OF TRACK AT HAMMOND, IN

Decided: December 16, 1998

Chicago SouthShore & South Bend Railroad (CSS) filed a petition for a declaratory order seeking a determination that a certain segment of its track is exempt from the Board's regulatory jurisdiction under 49 U.S.C. 10906, and, thus, that CSS need not obtain Board approval under 49 U.S.C. 10903 to abandon this track. By decision served January 28, 1998, a declaratory order proceeding was instituted, and CSS was directed to serve a copy of its petition and a copy of the decision on the shipper served by the track in question.

On February 23, 1998, the shipper, Harbison-Walker Refractories Company (Harbison), filed a reply in opposition to the petition for declaratory order,¹ and on March 5, 1998, CSS filed a statement in rebuttal. In addition, on March 13, 1998, Harbison filed a petition for leave to file reply argument to new evidence assertedly contained in CSS's rebuttal. The petition embraced the reply and on March 17, 1998, Harbison filed a supplement to that reply argument. In response, on March 26, 1998, CSS filed an objection to Harbison's petition for leave to file, embracing a rebuttal statement to the reply argument and the supplement.² After reviewing the record, we have determined that the relevant track segment is exempt track not subject to our jurisdiction.

¹ Harbison has filed a separate complaint in Harbison-Walker Refractories Co. v. Chicago SouthShore & South Bend Railroad, STB Finance Docket No. 33593. Because of our findings in this decision, the complaint is moot and is being dismissed in a separate decision served concurrently with this decision.

² Although technically all of the pleadings submitted after CSS's rebuttal are not permitted under 49 CFR 1104.13(c) as replies to replies, we will accept them for filing in the record as no party would be harmed by their admission.

BACKGROUND

CSS's main line consists of approximately 77 miles of railroad line extending between milepost 0.9 near South Bend, IN, and milepost 75.55 near Kensington, IL.³ The track in question is approximately 1.8 miles (9,520 feet) long and connects by a switch at milepost 64.2 to Parrish Siding, which in turn connects to CSS's main-line track at mileposts 63.8 and 64.9, at or near Hammond, IN.⁴ The subject track is stub-ended, terminating inside Harbison's facility, and includes a run-around track, at or near Harbison's facility, whereby locomotives can move from one end of the cars to the other. According to CSS, the subject track has no mileposts or stations, has never been shown in railroad timetables, and was not specifically listed in the notice of exemption whereby CSS acquired its main line.⁵ CSS contends that no through freight trains have operated on the track since it was acquired and the only activity on the track since its purchase has been for CSS to switch cars for loading and unloading Harbison's freight. CSS submits that the track is in need of immediate repair, and that it has been embargoed because of poor conditions since September 17, 1997.

According to CSS, the current main line was constructed by its predecessor in 1956. This construction was undertaken to relocate the main line, between current milepost 63.6 (east of Cline Avenue) and current milepost 67.9, from the former route along Chicago Avenue in Hammond to the current route parallel to and immediately south of Interstate Highway 90 (the Indiana Turnpike), a limited-access highway. The new main line bisected the South Shore Industrial District, a 270-acre tract that had been acquired in 1951 and 1952 for development as an industrial park. Harbison describes the subject track as a loop track extending from a seven-track yard located at the present location of Parrish Siding. CSS states, however, that although the seven-track yard was apparently planned, it was never constructed.

Harbison's facility was constructed in 1957 for the manufacture of refractories, and its most recent use of the track has been primarily to receive shipments of magnesite used in the refractory manufacturing process. According to CSS, Harbison's facility shipped or received 150 carloads in

³ The total mileage includes a 2.3-mile branch line not involved here.

⁴ It appears, from a review of various maps submitted on the record, that the configuration of the subject track is unusual, proceeding initially in an eastward direction away from Harbison's facility and curving northward to cross over the Indiana Turnpike before returning westward to serve the facility. This configuration passes nearly every part of the South Shore Industrial District. It is not clear, though, whether the Harbison facility is within the industrial district or adjacent to it. (See attached diagram.)

⁵ See Chicago SouthShore & South Bend Railroad Co.—Acquisition and Operation Exemption—Chicago South Shore and South Bend Railroad Co., Finance Docket No. 31575 (ICC served Jan. 10, 1990).

1995, generating gross revenue of \$63,000; 189 carloads in 1996, generating gross revenue of \$80,136; and 71 carloads, from January to August 1997, generating gross revenue of \$30,104.

DISCUSSION AND CONCLUSIONS

CSS requests a declaratory order determination that this track is exempt from Board jurisdiction, under 49 U.S.C. 10906, as a “spur, industrial, team, switching, or side” track.⁶ Our authority under 5 U.S.C. 554(e) to issue a declaratory order to terminate a controversy or remove uncertainty is discretionary.

Preliminary Matters.

Harbison argues that CSS should have filed either an abandonment application or a petition for exemption, together with a motion to dismiss on jurisdictional grounds. We disagree. There is no rule or requirement preventing a railroad from using a petition for declaratory order to seek a determination of this nature. Indeed, in Effingham Railroad Company—Petition for Declaratory Order—Construction at Effingham, IL, STB Docket No. 41986 (STB served Sept. 12, 1997) (Effingham), a similar argument was rejected.⁷ Harbison also argues that in the absence of the filing of an application or petition for exemption seeking abandonment of the line, the exempt or nonexempt status of the trackage is an abstract question, and there is no active controversy. Once again, we disagree. If we find the trackage to be a line of railroad subject to our jurisdiction, CSS must comply with our regulations to terminate service. If we find otherwise, no regulatory permission is needed. Accordingly, there is an active controversy and the filing of a petition is a proper procedure for CSS to follow.

Standard of Review.

⁶ Harbison opposes the declaratory order on the grounds that abandonment of the track would cause it economic harm due to increased costs to deliver magnesite by truck rather than directly by rail; abandonment of the track outside of Board jurisdiction would preclude its acquisition under 49 U.S.C. 10904 for continued rail operation; and abandonment of the track would insulate CSS from complaint for violation of 49 U.S.C. 11101(a) with respect to its allegedly wrongful embargo.

⁷ Harbison attempts to distinguish Effingham based on the fact that it involved a proposed construction, rather than an abandonment and, thus, no party other than the petitioner in that case stood to be harmed by the filing of a request for declaratory order. We never made such a distinction in Effingham. To the contrary, we stated that there is no set procedure for determining jurisdiction and nothing to preclude a rail carrier from filing a petition for declaratory order. Our further explanation that the only difference between the available procedures would be that a rail carrier would have to wait for a decision on the merits of its proposed construction until it files an appropriate application or petition for exemption applies with equal force to the abandonment scenario.

There is no single test of what constitutes exempt track under 49 U.S.C. 10906. Our analysis must focus on the disputed track's use, history, and physical characteristics, and we rely on a variety of indicia, including: the length of the track; whether it serves more than one shipper; whether it is stub-ended; whether it was built to invade the territory of another railroad; whether the shipper is located at the end of the track; whether there is regularly scheduled service; the volume of traffic moving over the track; who owns and maintains the track; whether the track was constructed with light weight rail; the condition of the track; what the track is used for (e.g., loading, unloading, switching); and whether there are stations on the track. See CNW—Aban. Exemp.—In McHenry County, IL, 3 I.C.C.2d 366 (1987), rev'd on other grounds sub nom. Illinois Commerce Com'n v. ICC, 879 F.2d 917 (D.C. Cir. 1989).

Undisputed Indicia.

The following indicia are not in dispute. The track is stub-ended. Prior to the embargo, there was no regularly scheduled service. Service was provided on an as-needed basis. CSS owns and maintains the track. There are no stations on the track.

Disputed Indicia.

Harbison argues that the length and unusual physical configuration of the track indicate that it is a line of railroad, and not a spur. According to Harbison, a spur would tend to be much shorter and extend more directly to its facility. CSS submits maps that do not recognize the subject track as main-line track and notes that Parrish Siding, to which it connects, is believed to have been built at the time of or shortly after the rerouting of the main line. Although the length of the track is somewhat greater than is usual for an exempt siding, spur, or industrial track, some of this length might be explained by the manner in which the track must cross the Indiana Turnpike to reach the Harbison facility. Length of track, however, is not conclusive and Harbison has failed to provide concrete proof that the track was historically a line of railroad.

Harbison contends that the circuitous routing of the track also indicates that it was evidently used to provide service to numerous other shippers. It also contends that the track in question was actually part of a longer line of railroad previously operated as a main line by the Indiana Harbor Belt Railroad Company (IHB). Harbison produces two undated maps of the area which it interprets as indicating that the relevant track was previously owned and/or operated by the IHB and actually extended north across the Grand Calumet River into East Chicago, IN. From this assumption, Harbison theorizes that the line must have been used to serve additional shippers (however, none is named and no tonnage information is supplied), as the area was heavily industrialized. Finally, Harbison submits photocopies of selected pages from a published history of CSS's predecessor stating that several industries were under construction in the South Shore Industrial District before a new East Chicago bypass was opened in 1956. CSS disputes Harbison's description of the extent of track within the industrial district and points out that, even though additional track was apparently planned to serve the industrial district, no additional track was ever built. It contends that the track was never part of any IHB rail line, that it did not acquire any portion of the track from IHB, and

that the track was constructed by its predecessor at the time of the relocation of the main line. The maps and other evidence presented by Harbison are of questionable probative value and, accordingly, we find that there is no conclusive evidence that the track has ever been used to serve more than one shipper. This is illustrated by the fact that no other shipper has been specifically identified. Even if the track was constructed to serve an industrial district, it could still qualify as exempt, industrial track under section 10906, based on its usage since being acquired by CSS.

Harbison submits that CSS's rebuttal evidence establishes that this track was and is one of CSS's lines of railroad, because it was constructed into territory not theretofore served by CSS and already served by IHB. CSS counters by stating that this track did not extend into new territory, because the relocated main-line track runs through the industrial district. It also points out that Harbison's facility is located approximately equidistant between the CSS main line and IHB's line on the other side of the Grand Calumet River. We conclude that this track was not built to invade the territory of another railroad. When CSS's predecessor was authorized to relocate its main line, that authorization implicitly permitted construction of exempt sidings, spurs, and industrial track to serve industries located on the line. Because the new line ran through the middle of the new industrial district, we are persuaded that all sites in the industrial district are properly considered to be in CSS's own territory today, for they would certainly have been within the territory of CSS's predecessor at the time when the new main line was built.

Harbison translates the 189 carloads that moved over the track in 1996 into 105 carloads per mile of track. According to Harbison, this is considered to be heavy usage not indicative of spur track. While the volume of traffic that moved over the track prior to the embargo is not insubstantial, it is but one factor to be considered and is not conclusive as to the jurisdictional status of the track.

Harbison notes that the subject track is primarily constructed of 100-pound rail, which is heavier than commonly used in spur tracks. CSS points out, however, that rail salvaged from the old main line was used in construction of the subject track, that the new main line was constructed of 115-pound rail, and that no rail on CSS's entire system is constructed with less than 90-pound rail. Because the track was constructed with rail salvaged from the old main line, it is perhaps built of heavier rail than normal for a spur track, but not substantially heavier than the rail on CSS's other spurs and sidings. In the circumstances, we conclude that the rail weight is not inconsistent with the track being considered exempt track.

CSS maintains that defective ties and erosion of shoulder ballast make rehabilitation of the line necessary if it is to be placed back in service. Harbison argues, however, that the track has not been shown to require rehabilitation, either for replacement of crossties or for application of ballast. Although the condition of the track is in dispute, suffice it to say that some rehabilitation work would be necessary to return this embargoed line into service.

Harbison argues that the track is currently used for line-haul transportation rather than switching, including the line-haul transportation of trainloads of coal destined to Northern Indiana

Public Service Company at Michigan City, IN. CSS acknowledges that Parrish Siding is used at times to hold trains waiting to be delivered to shippers at other locations, but neither the siding nor the subject track is used to provide access to those points, and the subject track is not used to provide service to other shippers. CSS insists that the subject track is used only to switch cars to and from Harbison's facility. We conclude that the track is used for switching cars to and from the Harbison facility for loading and unloading, and we find no probative evidence that it has ever been used for any other purpose.

A review of the evidence presented indicates that the situation here resembles that in Battaglia Distributing Co., Inc. v. Burlington Northern Railroad Company, Finance Docket No. 32058 (STB served June 27, 1997, and Dec. 11, 1998) (Battaglia). In that case, the track in question was approximately 2,600 feet in length, served only one shipper, and was stub-ended. We concluded that it was unlikely the track had been constructed to invade another carrier's territory and noted that the sole shipper was located at the end of the track and received a relatively modest volume of traffic when the track was in service. The track there was constructed of 90-pound rail and was paved over in places, requiring rehabilitation, and it was asserted that the track was used for the sole purpose of switching cars to and from the shipper's facility, was not the type of track that could or would be used for through train service, and had never been used for branch or main line operations. No other industries along that track had showed any interest in using it, and the design of the track precluded efficient service to multiple businesses. There were no stations on that track. Battaglia (June 27, 1997 decision, slip op. at 3-4).

As we stated in Battaglia, (June 27, 1997 decision, slip op. at 4):

Just as there is no single test for what constitutes a side track, there is no single characteristic related to its use, history, or physical characteristics that is dispositive in making a side track determination. Side track may be shorter or longer than the one at issue, branch lines may be stub ended, 90-lb. rail is not unusually light and lower weight rail has been used to construct branch lines, and the absence of a station may not be significant, depending on the location of the track. However, the overwhelming balance of factors relevant to this analysis supports a finding that the disputed track is side track.

A similar conclusion is warranted here. A finding that the subject track is exempt is favored by the factors that the track is stub-ended, that the track was constructed to serve an industrial district through which the relocated main line passed, that the track was not built to invade the territory of another railroad, that there is no evidence that the track served more than one shipper, that the sole shipper is located at the end of the track, that there was no regularly scheduled service on the track, that the track was constructed using comparatively light-weight rail, that the track is used only for switching cars to and from the shipper's facility, and that there are no stations on the track. On the other hand, factors that may lead to the conclusion that the track is not exempt are the length of the track, the volume of traffic, and that it is owned and maintained by the railroad. On

balance, the preponderance of relevant factors favors the conclusion that the track is exempt from Board jurisdiction.

We are mindful that as a result of our decision the shipper will not have the opportunity to offer to buy the track for continued rail service under 49 U.S.C. 10904, which is contingent upon our authorizing abandonment under 49 U.S.C. 10903. However, nothing in this decision forecloses the shipper from attempting to purchase the track from CSS and then seeking service from CSS under 49 U.S.C. 11103.

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

It is ordered:

1. The petition for leave to file reply argument, filed on March 13, 1998, is granted. The reply argument filed on that date, the supplement filed on March 17, 1998, and CSS's objection and rebuttal statement filed on March 26, 1998, are accepted for filing.
2. The petition for declaratory order is granted.
3. This proceeding is discontinued.
4. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

STB Finance Docket No. 33522

PLEASE SCAN MAP