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SERVICE DATE – AUGUST 11, 2014

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 167 (Sub-No. 1189X)

CONSOLIDATED RAIL CORPORATION—ABANDONMENT EXEMPTION—IN HUDSON
COUNTY, NJ

Docket No. AB 55 (Sub-No. 686X)

CSX TRANSPORTATION, INC.—DISCONTINUANCE OF SERVICE EXEMPTION—IN
HUDSON COUNTY, NJ

Docket No. AB 290 (Sub-No. 306X)

NORFOLK SOUTHERN RAILWAY COMPANY—DISCONTINUANCE OF SERVICE
EXEMPTION—IN HUDSON COUNTY, NJ

Digest:¹ In this decision the Board lifts a stay, grants the request of a group of limited liability companies to intervene, and discusses the preparation of a Supplemental Environmental Assessment.

Decided: August 8, 2014

This decision vacates the April 20, 2010 stay the Board issued to allow the courts time to address whether the trackage at issue here constituted a “railroad line” requiring Board abandonment authority.² The United States District Court for the District of Columbia (District Court) has found that the trackage constituted a railroad line when it was transferred to Consolidated Rail Corporation (Conrail) in 1976 (a finding affirmed by the United States Court

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).

² Railroads require prior approval from the Board to abandon rail lines that are part of the interstate rail network. 49 U.S.C. § 10903. The abandonment of a “spur”—generally, ancillary track not directly used in line haul service—is excepted from this requirement by 49 U.S.C. § 10906.

of Appeals for the District of Columbia Circuit (D.C. Circuit)).³ Accordingly, the Board will reinstitute these proceedings, grant the request of a group of limited liability companies to intervene, and prepare a Supplemental Environmental Assessment (Supplemental EA).

BACKGROUND

History of the Line

The trackage at issue here is an approximately 1.36-mile portion of a line of railroad, known as the Harsimus Branch, located in an urban area of Jersey City, N.J. The Harsimus Branch extends between milepost 0.00, CP Waldo, and milepost 1.36, a point east of Washington Street, in Jersey City.⁴ The property was constructed by the United New Jersey Railroad and Canal Company (UNJRCC), leased to the Pennsylvania Railroad Company (PRR) in 1871, and used in rail service for much of the 20th Century.⁵ The trackage ran from a connection with the UNJRCC main line near Waldo Avenue to the Harsimus Cove area on the Hudson River. The Sixth Street Embankment is part of the Harsimus Branch and is a series of six embankments, located between city streets and joined by plate girder bridges that spanned north-south streets.⁶ The Harsimus Branch was built on top of these embankments and bridges.

The PRR merged into the Penn Central Transportation Company (Penn Central) in 1968. Penn Central and seven other northeastern railroads declared bankruptcy in 1970. In response to these bankruptcies, Congress enacted the Regional Rail Reorganization Act of 1973, 45 U.S.C. §§ 701-719 (3R Act), under which the bankrupt railroads were merged into a new entity: Consolidated Rail Corporation, or Conrail for short. The United States Railway Association was created by the 3R Act to examine the bankrupt railroads' properties and identify those lines that would be retained in active service and consequently conveyed to Conrail. This plan identifying the rail properties to be conveyed to Conrail was known as the Final System Plan (FSP).⁷ In

³ City of Jersey City v. Conrail, 968 F.Supp.2d 302 (D.D.C. Sept. 30, 2013), aff'd, No. 13-7175 (D.C. Cir. Feb. 19, 2014).

⁴ Consol. Rail Corp.—Aban. Exemption—in Hudson Cnty., N.J., AB 167 (Sub-No. 1189X); CSX Transp., Inc.—Discontinuance of Serv. Exemption—in Hudson Cnty., N.J., AB 55 (Sub-No. 686X); Norfolk S. Ry.—Discontinuance of Serv. Exemption—in Hudson Cnty., N.J., AB 290 (Sub-No. 306X) (STB served Mar. 18, 2009).

⁵ Consol. Rail Corp. v. STB (Conrail v. STB), 571 F.3d 13, 15 n.2 (D.C. Cir. 2009).

⁶ See Conrail v. STB, 571 F.3d at 16 n.6

⁷ The term “rail properties” in the 3R Act and FSP included both regulated lines of railroad (meaning that they could only be abandoned upon authority from the Board's predecessor, the Interstate Commerce Commission (ICC)) and ancillary track and facilities that were exempt from ICC regulation. See 45 U.S.C. § 742.

1976, the Harsimus Branch was transferred to Conrail pursuant to the FSP. Conrail began operating the Harsimus Branch in 1976.

By the mid-1980s Conrail had sold much of the trackage in the area to developers or to the Jersey City Development Agency (Agency).⁸ Starting in 1984, the Agency negotiated with Conrail to purchase the embankment properties, but no deal was reached. In 1994, Conrail—at the request of the City—permitted the City and a private developer to remove the bridges on the embankment. Conrail then offered to sell what remained of the embankment to the City. Negotiations continued until 1999, at which point, negotiations ended without an agreement when the properties were declared eligible for listing on the New Jersey State Historic Register.

In October 2002, Conrail put the six embankment properties and two other properties back up for sale. Shortly thereafter, the City designated the six embankment properties as a “historic landmark” under municipal law, and Conrail informed prospective bidders that the designation would require a developer to obtain the consent of the Jersey City Historic Preservation Commission to proceed with development of those properties. Conrail then began negotiations to sell the eight parcels to a group of eight developers (LLCs).⁹ In July 2005, Conrail—treating the property as unregulated spur or yard track within the meaning of § 10906 and therefore not requiring abandonment authority from the Board—sold the eight parcels to the LLCs.

STB and Court Proceedings

In January 2006, the City, the Pennsylvania Railroad Stem Embankment Coalition, the Rails to Trails Conservancy, and New Jersey Assemblymen Louis M. Manzo asked the Board for a declaratory order finding that the Harsimus Branch was a line of railroad rather than an unregulated spur and therefore should not have been sold without Board abandonment authority.¹⁰ The Board’s decision in Jersey City Dec. Order concluded that the Harsimus Branch had been conveyed to (and operated by) Conrail as a line of railroad subject to Federal abandonment regulation.¹¹ In reaching its decision, the Board relied in part on the FSP.

⁸ Conrail v. STB, 571 F.3d at 17.

⁹ Those developers were: 212 Marin Boulevard, LLC; 247 Manila Avenue, LLC; 280 Erie Street, LLC; 317 Jersey Avenue, LLC; 354 Cole Street, LLC; 389 Monmouth Street, LLC; 415 Brunswick Street, LLC; and 446 Newark Avenue, LLC.

¹⁰ City of Jersey City—Pet. for Declaratory Order (Jersey City Dec. Order), FD 34818 (STB served Aug. 9, 2007).

¹¹ The Board denied a petition for reconsideration of its ruling in a decision served December 19, 2007.

The parties appealed the Board's decision to the D.C. Circuit.¹² The court vacated the Board's decision without reaching the merits of whether the line was regulated or excepted track. Instead, the court found that the Board lacked the jurisdiction necessary to determine the status of the trackage sought to be abandoned, because, under the 3R Act, a "Special Court" had been created with exclusive jurisdiction "to interpret, alter, amend, modify or implement any of the orders entered by such court pursuant to section 743(b) of this title in order to effect the purposes of this chapter or the goals of the [FSP]. 45 U.S.C. § 719(e)(2)."¹³ Conrail v. STB, 571 F.3d at 18. The D.C. Circuit determined that the petition for declaratory order before the Board raised substantial questions with respect to the interpretation of the FSP, and therefore, it fell within the "original and exclusive jurisdiction" of the Special Court. Id. at 19.

Following the issuance of the Jersey City Dec. Order, Conrail began to prepare the environmental and historic reports required in abandonment cases. See 49 C.F.R. §§ 1105.7, 1105.8, 1105.10-11. After completing the consultations with state and federal agencies required by the Board's environmental rules, Conrail submitted environmental and historic reports to the Board in March 2008.¹⁴

In 2009, Conrail, CSX Transportation, Inc. (CSXT), and Norfolk Southern Railway Company (NSR) jointly filed a verified notice of exemption under 49 C.F.R. § 1152 Subpart F—Exempt Abandonments and Discontinuances of Service for Conrail to abandon, and for CSXT and NSR to discontinue service over, the Harsimus Branch. The notice of exemption was served and published in the Federal Register on March 18, 2009 (74 Fed. Reg. 11,631-32). The exemption was scheduled to become effective April 17, 2009.

The filing of the notice triggered the start of the Board's environmental and historic review. On March 23, 2009, an EA¹⁵ was issued for public review and comment, based on the

¹² Conrail and the LLCs separately petitioned for review of the Jersey City Dec. Order and the D.C. Circuit consolidated the petitions. The City intervened.

¹³ A United States District Court composed of three Federal judges selected by the Judicial Panel on Multi-District Litigation acted as the Special Court. The Special Court was later abolished and the jurisdiction and other functions of the Special Court were transferred to the District Court. See 45 U.S.C. § 719(b)(2).

¹⁴ Conrail filed a notice with the Board on March 12, 2008, of its intention to seek expedited abandonment authorization for the Harsimus Branch. On April 17, 2008, however, Conrail notified the Board that it was deferring the abandonment proceeding because of potential environmental issues raised by interested parties.

¹⁵ The EA was prepared by the Section of Environmental Analysis, the office which preceded the current Office of Environmental Analysis (OEA). For convenience, we will refer to OEA in this decision.

available information about the proposed abandonment.¹⁶ Consistent with Board and court precedent, the review of environmental impacts in the EA focused on the potential environmental effects resulting from diversion of traffic from rail to other modes and also from salvage activities. See Iowa S. R.R.—Exemption—Abandonment, 5 I.C.C. 2d 496 (1989), aff'd sub nom. Goos v. ICC, 911 F.2d 1283 (8th Cir. 1990). Comments on the EA were due April 7, 2009. OEA received approximately 2,000 comments on the EA. By decision served April 16, 2009, the effective date of the notice of exemption was stayed to allow the Board to complete the environmental review process, which requires the Board to consider and address the comments received on the EA.

At the same time that the environmental review was taking place, the City, Rails to Trails Conservancy, and Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition (City Parties) filed an action against Conrail in the District Court (sitting as the Special Court), seeking to determine whether the Harsimus Branch was conveyed as regulated or excepted track. The Board, by decision served on April 20, 2010, stayed the abandonment and discontinuance proceedings (including completion of the environmental review process) to allow the District Court time to resolve the status of the Harsimus Branch.

The District Court initially ruled, without reaching the merits, that the plaintiffs lacked standing, but the D.C. Circuit reversed on appeal. City of Jersey City v. Consol. Rail Corp., 741 F. Supp. 2d 131 (D.D.C. 2010), rev'd, 668 F.3d 741 (D.C. Cir. 2012). The D.C. Circuit remanded the case back to the District Court. On July 10, 2012, the City Parties and the LLCs jointly stipulated that the Harsimus Branch was conveyed to Conrail as a line of railroad subject to the ICC's (now the Board's) abandonment authority.¹⁷ Conrail neither joined nor opposed the stipulation.

On September 30, 2013, the District Court granted summary judgment for the City Parties, "given that the parties have now stipulated that the Harsimus Branch was conveyed to Conrail as a line and not a spur." City of Jersey City v. Conrail, 968 F.Supp.2d at 307. Despite having stipulated that this was conveyed to Conrail as a line of railroad, the LLCs then filed a notice of appeal to the D.C. Circuit. City of Jersey City v. Consol. Rail Corp., No. 13-7175 (filed Oct. 29, 2013).¹⁸ The D.C. Circuit summarily affirmed the decision of the District Court

¹⁶ That information included: Conrail's environmental and historic reports (including supplements); a historic preservation analysis on the embankment and surrounding area prepared by Richard Grubb and Associates, Inc., a consulting firm that Conrail retained; a staff site visit to the area by the Board's environmental staff, joined by the New Jersey State Historic Preservation Officer and others; and the environmental comments that already had been submitted.

¹⁷ A copy of the joint stipulation was attached as Exhibit B to City Parties' November 22, 2013 filing.

¹⁸ After the District Court issued its decision, City Parties filed a request to lift the stay of the Board's proceedings. On December 11, 2013, Conrail and the LLCs opposed that request

on February 19, 2014. On February 26, 2014, the LLCs filed the D.C. Circuit's order with the Board, stated that they would not appeal the court's jurisdictional determination, and requested permission to intervene in the proceedings before the Board. No replies to that submission were filed.¹⁹

DISCUSSION

Because the Courts have ruled that the Harsimus Branch was conveyed to Conrail as part of the rail carrier's railroad lines, subject to the ICC's (now the Board's) abandonment authority, it is now established that these abandonment and discontinuance proceedings are within the jurisdiction of the Board.²⁰ Accordingly, the stay issued in these proceedings in April 2010 will be vacated. Further, because there have been no objections to the LLCs' petition to intervene and because they were parties to the court and prior Board proceedings, we will grant the LLCs' petition to intervene.

The Board will now proceed with the historic and environmental review process. As discussed above, the initial EA was issued in March 2009 and portions may no longer be up to date or relevant. Given the unique circumstances here, and to assure that the EA is as current as possible, OEA will issue a Supplemental EA for public review and comment, followed by a Final EA assessing any comments received. As a first step, if Conrail does not wish to use an independent third party contractor, as permitted by 49 C.F.R. § 1105.10, Conrail should prepare new environmental and historic reports and serve them on the appropriate agencies pursuant to 49 C.F.R. §§ 1105.7, 1105.8, and 1105.11. Next, OEA will prepare the Supplemental EA based on the available information and provide an opportunity for public review and comment. The issuance of a Final EA addressing any comments received and proposing appropriate mitigation will conclude the environmental review process.

(. . . continued)

as premature, given the LLCs' appeal to the D.C. Circuit. Given the D.C. Circuit's summary affirmance and our decision here, the Board is granting the request of the City Parties to lift the stay of the Board's proceedings. Because the arguments of Conrail and the LLCs are now moot, we will not address them.

¹⁹ On May 8, 2014, the LLCs (the eight LLCs previously listed and an additional entity, NZ Funding, LLC) filed a petition for declaratory order in 212 Marin Boulevard, LLC—Petition for Declaratory Order, FD 35825. The Board has denied that petition in a decision issued today.

²⁰ In our decision issued today in 212 Marin Boulevard, LLC—Petition for Declaratory Order, FD 35825, the Board rejects the LLCs' argument that, subsequent to the conveyance of the Harsimus Branch to Conrail as a line of railroad, Conrail's abandonment of a nearby line severed the Harsimus Branch from the national transportation system, constituting a de facto abandonment that divested the Board of its jurisdiction over the Harsimus Branch.

The April 2009 stay of the effective date of the notice of exemption—issued to allow the Board to complete the environmental review process—will remain in effect. Upon the completion of the environmental review process the Board will decide whether to make the notice of exemption effective and, if so, what environmental mitigation to impose, if any.²¹

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

It is ordered:

1. The stay issued on April 20, 2010, is vacated.
2. The LLCs' petition to intervene is granted.
3. The environmental review process shall proceed as discussed above.
4. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman.

²¹ On June 17, 2014, City Parties filed a motion requesting a scheduling order in these proceedings. On July 18, 2014, counsel for the LLCs submitted a letter requesting that the Director of the Office of Proceedings ask the City of Jersey City to provide an affirmation of the City's Notice of Intent to file an offer of financial assistance (OFA). On August 5, 2014, City Parties filed a reply to the letter. We will address those filings and outstanding issues regarding OFAs in a separate decision.