

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35239

ALLEGHENY VALLEY RAILROAD COMPANY—PETITION FOR DECLARATORY
ORDER

Decided: June 11, 2010

On April 23, 2009, Allegheny Valley Railroad Company (AVRC) filed a petition for a declaratory order, asking that the Board find that a rail easement between 16th Street and 21st Street in Pittsburgh, Pa. remains available for use as a line of railroad. The easement comprises the end of a longer line now known as the Valley Industrial Track. The Buncher Company (Buncher), a party whose property is crossed by the easement, opposes AVRC's petition. Buncher claims that the easement has been extinguished and AVRC's common carrier authority terminated. The Board received several rounds of pleadings from the parties and held an oral argument. For the reasons set forth below, we are granting the petition for declaratory order and finding that AVRC's rail easement over Buncher's property remains active.

BACKGROUND

This case concerns a rail easement running between 16th Street and 21st Street in Pittsburgh's Strip District. The trackage for which the easement was created was a part of the original line of the Allegheny Valley Railroad, laid down in the 1850's.¹ In their turn, the Pennsylvania Railroad (PRR), the Penn Central Transportation Company (Penn Central), and Consolidated Rail Corporation (Conrail) became successor operators of the line.

In 1983, Conrail sold a parcel of land in the Strip District to Buncher, but retained the rail easement in question for itself. Buncher and the Pittsburgh Redevelopment Authority had each previously acquired railroad property in the area. The parcel with the easement constituted the last remaining rail property in that area.

In Conrail Abandonment in Allegheny County, Pa., AB-167 (Sub-No. 558N) (ICC served May 18, 1984) (Conrail Abandonment), Conrail sought authority from our predecessor, the Interstate Commerce Commission (ICC), to abandon 1.46 miles of track, including a portion of

¹ The Allegheny Valley Railroad and petitioner AVRC are unrelated companies.

the Valley Industrial Track,² pursuant to a Northeast Rail Services Act of 1981 (NERSA) certificate.³ This authority covered some track in the Strip District. By the mid-1980's, the track running over the easement had been removed and the area paved over without objection by Conrail. In 1995, pursuant to a quitclaim deed, AVRC purportedly bought the easement from Conrail as part of its acquisition of a 22.65-mile line running from downtown Pittsburgh through New Kensington to Arnold, Pa. The line included portions of the Valley Industrial Track.⁴ AVRC wants to reconstruct track across this easement as part of a plan to provide passenger and freight service. Buncher objects.

As noted, on April 23, 2009, AVRC filed the instant petition to clarify whether the easement remains active for use as a line of railroad. AVRC requests that the Board issue a declaratory order confirming that (1) the carrier has the full and unrestricted right to provide common carrier rail service over the rail easement, and (2) it may proceed to reconstruct railroad tracks over the easement along with other rail facilities, including passenger platforms.

Buncher filed a reply in opposition to AVRC's April 23 arguments on June 2, 2009, and AVRC filed a rebuttal on June 11, 2009. Buncher submitted a response to AVRC's rebuttal on June 25, 2009, and a motion asking that the Board accept its filing. AVRC filed a reply on July 15, 2009. Buncher filed supplemental evidence on August 4, 2009, and attached a motion asking that the Board accept the filing into the record. AVRC filed a reply on August 20, 2009.

² The abandonment authority included the Valley Industrial Track from its connection with the Fort Wayne Connecting Track in Pittsburgh (approximately milepost 0.0) to the north side of 21st Street (approximately milepost 0.66) in Allegheny County, Pa.

³ NERSA provided a window (ending in 1985) during which Conrail could qualify for streamlined abandonment procedures for its lines.

⁴ These portions are described as running between milepost 0.3 and milepost 4.7, milepost 2.7 and milepost 13.8, milepost 1.8 and milepost 2.7, and milepost 0.7 and milepost 2.3. Allegheny Valley R.R.—Acquis. & Operation Exemption—Certain Lines of Consolidated Rail Corp., FD 32783 (ICC served Nov. 17, 1995) (Allegheny Acquisition).

Because Buncher had made an argument concerning the “Final System Plan” (FSP),⁵ the Board ordered the parties to submit additional filings regarding the effect on this case of the decision of the United States Court of Appeals for the District of Columbia Circuit in Consolidated Rail Corp. v. STB, 571 F.3d 13 (D.C. Cir. 2009) (Harsimus). That case involved the Board’s jurisdiction to interpret the FSP or the Special Court’s conveyance order under 45 U.S.C. § 719(e)(2).⁶ Id. at 20. Pursuant to the Board’s September 17 order, Buncher and AVRC submitted their respective supplemental filings on October 9, 2009, concerning whether Harsimus affects this case.

Two government officials have submitted comments in this proceeding. On June 9, 2009, the Honorable Jason Altmire, United States Representative for the 4th District of Pennsylvania, filed a letter supporting AVRC’s petition and the institution of commuter rail service into downtown Pittsburgh. The Board also received a similar letter from Pennsylvania State Representative Frank Dermody on June 24, 2009.

On January 26, 2010, the Board held an oral argument to further explore the parties’ positions in this proceeding. In a letter dated January 28, 2010, AVRC addressed a question raised at oral argument regarding the existence of a survey of the easement. According to AVRC, Exhibit E of its petition for declaratory order contains a survey of the easement. On February 2, 2010, Buncher filed a reply disagreeing that Exhibit E separately identifies the easement rights within the parcel of land at issue in this proceeding. AVRC filed a rebuttal on February 26, 2010.

POSITIONS OF THE PARTIES

The parties dispute numerous issues regarding whether there is an active easement running over Buncher’s property. These issues include whether there had been 1 or 2 lines of railroad running through the Strip District, and, if 2, whether the easement at issue was subject to

⁵ 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). Pursuant to that Act, the United States Railway Association developed the FSP to designate 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 approved in § 601(e) of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 127 (1976). Buncher had pointed to the FSP, along with other evidence, as support for its position that Conrail Abandonment included the portion of the Valley Industrial Track at issue here.

⁶ In March 1976, the Special Court, a United States District Court composed of 3 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. See Order of Conveyance to Trustees of Railroads in Reorganization in the Region, Misc. No. 75-3(A), at 8-9 (Reg’l Rail Reorg. Ct. Mar. 25, 1976).

the 1984 Conrail NERSA abandonment authority; whether the removal of the track constituted an abandonment; whether the easement at issue involved yard track not subject to agency abandonment authority; and whether the Board has jurisdiction to decide this case in light of the recent court ruling in Harsimus. Below, we highlight the pertinent arguments raised by the parties.

One or 2 Lines of Railroad. AVRC claims that it possesses an active easement over Buncher's property known as the Valley Industrial Track. Buncher counters that Conrail sought and received abandonment authority for this portion of the Valley Industrial Track in 1984 in Conrail Abandonment, slip op. at 1, which unconditionally granted abandonment authority under NERSA.

AVRC contends that the 1984 abandonment certificate did not cover the line in question. AVRC claims that the abandonment application and resulting ICC abandonment certificate only covered the westernmost section of the Valley Industrial Track and included only the trackage and right-of-way that ran along Smallman Street between 11th Street and 21st Street in the Strip District. This track was referred to as the Allegheny Secondary.⁷ AVRC explains that the track and right-of-way abandoned by Conrail in 1984 did not include the permanent rail easement retained by Conrail in the 1983 sale to Buncher, because the easement comprised the portion of Valley Industrial Track (the former Allegheny Branch) that extended from Railroad Street between 16th and 21st Streets. AVRC essentially claims that there were 2 Valley Industrial Tracks, and that the certificate does not refer to the line which is the subject of the petition for declaratory order. AVRC submits a number of maps in support of its position.

Buncher disagrees that there were 2 parallel lines of railroad, both known as the Valley Industrial Track and located in the same small area bounded by 16th Street and 21st Street in the Strip District. It claims that AVRC's theory is inconsistent with the FSP, the deed by which the Penn Central transferred the relevant property to Conrail, and Conrail's own records.

Effect of Track Removal. Buncher claims that the subsequent removal of track and lack of objection by Conrail to the grading and paving of the property confirmed Conrail's intent to abandon this portion of its system. Buncher asserts that Conrail's failure to object constituted abandonment of the railroad line and removed it from the Board's regulatory regime. Although there is no evidence that Conrail ever filed a letter stating that it had consummated the grant of abandonment authority (a letter the ICC had instructed Conrail to file upon exercising its authority), Buncher states that "Board staff" informed it that the absence of such a letter from the public file does not demonstrate that the letter was not submitted to the agency.⁸

⁷ Buncher argues that this line, now known as the Valley Industrial Track, was formerly known as the Allegheny Secondary and before that was known as the Allegheny Branch. AVRC contends that the Allegheny Secondary, which was the subject of the 1984 abandonment, was not the same line as the Allegheny Branch, which AVRR purportedly acquired.

⁸ According to Buncher, pursuant to the holding in Lucas v. Township of Bethel, 319 F.3d 595 (3d Cir. 2003) involving another NERSA abandonment, the ICC's jurisdiction over the
(continued . . .)

According to Buncher, the removal of the track and lack of objection by Conrail also extinguished, under Pennsylvania law, the easement that Conrail had reserved over this portion of property, thereby precluding Conrail from conveying any such easement or common carrier rights to AVRC in 1995.

AVRC concedes in its petition that track on the Buncher property has been removed and the land paved over, but it claims that agency precedent holds that such action does not constitute abandonment of the line. AVRC argues that the Board must grant authority to abandon the line before this easement can revert or be extinguished. AVRC claims that neither it nor Conrail sought such authority for the segment in question. Furthermore, the railroad notes that neither it nor Conrail removed the adjacent Pittsburgh Produce Terminal station from the Open and Prepay Station List Tariff or sought Pennsylvania Public Utility Commission approval to abolish the 21st Street crossing. AVRC claims that Conrail's actions only demonstrated an intent to discontinue service and that Conrail had long-term plans to reactivate the line. AVRC states that it holds itself out to the public to provide common carrier railroad freight service to potential shippers located in the immediate vicinity of the easement.

Track Status. Buncher asserts that AVRC's July 15 filing provides evidence that the segment in question was not a line of railroad and that the through-route actually ran over a different track. Buncher claims that the track that ran across its property in the easement was yard track excepted from our abandonment regulation under 49 U.S.C. § 10906.⁹ Buncher contends that Conrail abandoned this track more than 20 years ago when the track was removed and the entire area paved and graded for non-railroad use without objection from Conrail.

(. . . continued)

property ended anyway upon issuance of the abandonment authority without regard to whether Conrail exercised it. AVRC challenges that holding and points out that the 1984 abandonment certificate is a permissive grant of authority and that the record demonstrates that this authority has not been consummated.

⁹ As noted in Union Pacific R.R. Co.—Operation Exemption— In Yolo County, Cal., FD 34252, slip op. at 3-4 (STB served Dec. 5, 2002), in cases governed by 49 U.S.C. § 10906 (formerly 49 U.S.C. § 10907 (1995)), we do not have authority under §§ 10901-10905 and § 10907 over construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching or side tracks. For a discussion of the factors we consider when we address whether a track segment is excepted from our licensing authority by § 10906 or, alternatively, fully subject to the rail licensing provisions of the statute, see, e.g., United Transportation Union-Illinois v. STB, 169 F.3d 474, 477-78 (7th Cir. 1999).

AVRC responds that it has submitted conclusive evidence establishing that, from 1856 to 1983, Conrail and its predecessor companies operated the Allegheny Branch¹⁰ as a main line of railroad through the yard to provide interstate rail service.

Jurisdiction. Buncher asks that we dismiss the proceeding. It claims that the successor to the Special Court should determine if Conrail acquired the track in question as a line of railroad. If so, according to Buncher, the successor to the Special Court should then determine if Conrail also acquired a parallel line of railroad. Buncher asserts that these questions turn on interpreting the FSP and documents related to the conveyance to Conrail, matters that Harsimus places within the jurisdiction of the Special Court. Buncher submits into the record sections of the FSP and the deed by which the Penn Central transferred the relevant property to Conrail. AVRC counters that Harsimus is inapplicable here and that the Board should resolve the case.

PRELIMINARY MATTERS

Buncher included with both its June 25 filing and August 4 filing a motion asking that the Board accept the respective filings into the record. Buncher justifies its June 25 request by claiming that AVRC's June 11 filing presents new evidence and arguments. And Buncher justifies its August 4 motion by noting that the material it submitted that day makes for a more complete record. AVRC opposes acceptance of these submissions because they are "replies to replies" and reference matters that Buncher could have argued in its June 2 submission. AVRC asks that, should the Board accept Buncher's filings, the agency should also accept the railroad's submissions. We will grant Buncher's motions and accept all of these filings into the record. Accepting these submissions will not prejudice the parties and will provide a more complete understanding of a complicated situation.

DISCUSSION AND CONCLUSIONS

Under 5 U.S.C. § 554(e) and 49 U.S.C. § 721, the Board may issue a declaratory order to terminate a controversy or remove uncertainty. The Board has broad discretion in determining whether to issue a declaratory order. See Boston & Maine Corp. v. Town of Ayer, 330 F.3d 12, 14 n.2 (1st Cir. 2003); Delegation of Authority—Declaratory Order Proceedings, 5 I.C.C.2d 675 (1989). Because there is uncertainty that affects both the parties and the citizens of Pittsburgh, it is appropriate to issue a declaratory order and clarify the situation.

We will grant the petition and find that AVRC possesses an active easement over Buncher's property. As discussed below, we find that there were 2 lines running through the Strip District and that the line over Buncher's property was not the one subject to the 1984 NERSA abandonment certificate. We do not need to interpret either the FSP or the conveyance of property to Conrail to reach this conclusion. Accordingly, we do not find the Harsimus ruling

¹⁰ AVRC states that the Valley Industrial Track that had run over Buncher's property was formally known as the Allegheny Branch. As set forth above, AVRC argues that the track in question was 1 of 2 lines each known as the Valley Industrial Track.

to be applicable here, and need not refer any matters in this case to the successor to the Special Court.

Two Line Question. AVRC's witness, provides a logical explanation of the development of 2 distinct lines of railroad.¹¹ He explains that the Allegheny Valley Railroad completed building a rail line in 1856 between Pittsburgh and Kittanning, Pa.¹² This line commenced at the terminal at the intersection of 11th Street and Smallman Street (milepost 0.0) and crossed north to the Railroad Street alignment and then eastward. Presumably, line haul service began to be provided on this line in the late 1850s immediately following its construction. This line became known as the Allegheny Branch. In 1900, PRR leased the Allegheny Branch,¹³ and the 1919 map of the PRR that AVRC submitted as part of its July 15 filing clearly shows this line.¹⁴

As for the second line of railroad running through that area, Peterson explains that, in 1899, PRR constructed a single-track line running along Smallman Street. PRR established a connection for this line with the historic Allegheny Valley Railroad at 11th Street at Allegheny Valley Railroad milepost 0.0. The PRR line continued eastward and connected again to the Allegheny Valley Railroad at 29th Street. The PRR line also connected to the west via what would become the Fort Wayne Bridge across the Allegheny River and what would become known as the Fort Wayne Connecting Track. This line, which became known as the Allegheny Secondary, is also clearly shown on the 1919 PRR map.¹⁵

In 1902, a new two-level bridge known as the Fort Wayne Bridge was constructed over the Allegheny River at 11th Street replacing the original bridge. The PRR Smallman Street Line connected to the lower level of the new bridge. The upper level of the new bridge carried PRR's main line and through trains into the Pittsburgh passenger station and beyond toward Philadelphia. The lower level carried local freight and connected to the Allegheny Valley Railroad. The line on the lower deck became designated as the Fort Wayne Connecting Track.

Over time, the PRR developed an extensive structure of yard tracks straddling the original Allegheny Valley Railroad main line. During 1929 and 1930, PRR constructed a greatly expanded produce yard between 11th and 21st Streets. This facility consisted of a number of switching tracks and a number of buildings, including a combined fruit auction and general sales building.¹⁶ This facility supported a produce distribution terminal operation in the area.

¹¹ See AVRC's Reply, V.S. Peterson, July 15, 2009.

¹² See id. at 2.

¹³ In 1910, PRR consolidated the Allegheny Valley Railroad into its own corporate structure. Again, AVRC and the Allegheny Valley Railroad are unrelated companies.

¹⁴ See AVRC's Reply, Exh. BB, July 15, 2009.

¹⁵ Id.

¹⁶ See AVRC's Reply, Exhibit DD, July 15, 2009.

By the 1970s, the line of railroad along Railroad Street and the line of railroad along Smallman Street were both owned by the trustees of the Penn Central. As noted, the line along Railroad Street became known as the Allegheny Branch. The trustees abandoned a 0.2-mile section of this line between 12th Street and 14th Street in 1972, severing its connection on the west to what had become the PRR Smallman Street Line and the Fort Wayne Bridge.¹⁷ The description of the Allegheny Branch line is consistent with the description of the Valley Industrial Track beginning at milepost 0.3 acquired by AVRC in Allegheny Acquisition, slip op. at 1. Therefore, at that point in time, only the line along Smallman Street connected to the Fort Wayne Bridge and Fort Wayne Connecting Track. By the early 1980s, the truncated line and the connecting line were both referred to as the Valley Industrial Track. In 1984, Conrail filed a notice of insufficient revenue under NERSA and abandoned the lower level of the Fort Wayne Bridge and the line eastward. Conrail Abandonment, slip op. at 1. Because only the Smallman Street Line was connected to the bridge at that time, the Smallman Street Line had to have been the line subject to that abandonment authority, not the truncated line over which the easement runs.

AVRC's explanation of the lines' history is both logical and rational. It is also supported by one of the few unambiguous pieces of evidence in the proceeding, a PRR map from 1919 that AVRC submitted as Exhibit BB in its July 15 filing. This map plainly depicts 2 through routes running through the Produce Terminal Area. Buncher has failed to demonstrate that this map shows otherwise.

Furthermore, as noted above, in 1972, the ICC granted the trustees of the Penn Central authority to abandon the section of the Allegheny Branch between 12th Street and 14th Street. Only 12 years later, Conrail sought to abandon a line between 11th Street and 21st Street through the 1984 NERSA abandonment certificate. Under Buncher's theory that there was only 1 line, Conrail would have been seeking authority to abandon the same line twice, a result that, as discussed at the oral argument, would have been irrational.¹⁸ Such a nonsensical action cannot be attributed to mistaken or shifting mileposts either: the descriptions provided by the parties of both the Penn Central abandonment and the Conrail abandonment reference specific streets. Therefore, we find that there were 2 lines of railroad running through the Strip District.

Conrail's 1984 NERSA Abandonment. We are confident that the line of railroad that was the subject of the 1984 NERSA abandonment certificate was not the line that crosses Buncher's property. Again, the proposition that it would be irrational for Conrail to seek authority to abandon a line for which authority to abandon had already been granted supports the idea that the NERSA abandonment was referring to a different line. As noted above, the inclusion in the abandonment of the lower level of the Fort Wayne Bridge, which connected only to the Smallman Street Line, also supports that conclusion.

¹⁷ See Buncher's Reply n.5, V.S. Jackovic 2, & Ex. C, June 2, 2009.

¹⁸ See Oral Argument Transcript at 24.

Furthermore, we find Conrail's actions telling. It had the most information at its disposal. It filed for abandonment authority in 1984 and sold an easement for the historic Allegheny Valley Railroad line (Railroad Street Line) to AVRC in 1995. Clearly, Conrail believed that it had an active interest there to sell. Although it sold the segment pursuant to a quitclaim deed, it did explicitly reference the rail easement in question among the segments it sold to AVRC.

Other Questions. An active easement over Buncher's property therefore survived the NERSA abandonment. Generally, the only way a line of railroad can be abandoned is by obtaining and then exercising (*i.e.*, consummating) abandonment authority granted by this agency or our predecessor.¹⁹ Because there is no record of such authority being issued to any of the owners of this line, it remains active for use as a line of railroad.

The other facts found in the record do not lead us to find otherwise. Although switching was apparently performed on the line in the late 1970's, this activity does not turn a line of railroad into § 10906 excepted track. In Atchison, Topeka and Santa Fe Railway Co.—Abandonment Exemption—Lyon County, Kan., AB-52 (Sub-No. 71X), slip op. at 3 (ICC served June 17, 1991), the ICC explained in reference to a similar segment of rail property:

Because this track was clearly part of a rail line at one time, we find that it cannot be converted into an exempt spur and the Commission divested of jurisdiction over it solely through the railroad's unilateral decision to change its use of the track segment over time. To find that this is a spur would be inconsistent with our well-established policy that where a carrier decides to reduce or cease service and/or remove track, the carrier's common carrier obligation remains until appropriate abandonment authority is obtained.

In sum, neither the fact that switching occurred nor the fact that the track was removed changes the fact that Conrail possessed a line of railroad.²⁰ It sold this line to AVRC in 1995. Accordingly, AVRC possesses an active easement across Buncher's property that remains available as a line of railroad on which AVRC can reconstruct the track.

Lastly, the parties dispute the width of the easement. As noted at the oral argument, this matter is better settled by a Pennsylvania state court. This is a question of property law, and it should be handled by a tribunal that frequently addresses such matters.

¹⁹ See Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 490 U.S. 311, 311 (1981); Honey Creek R.R.—Petition for Declaratory Order, et al., FD 34869, et al., slip op. at 3 (STB served June 4, 2008); and 49 U.S.C. 10903(a)(1).

²⁰ The segment was a line of railroad before Conrail acquired it in the 1970s. Conrail's acquisition could not change the status of the line without agency approval, and Conrail did not seek such authority. Given this record, no interpretation of the FSP is needed to resolve the matter before us.

It is ordered:

1. Buncher's motions to supplement the record are granted, and Buncher's submissions and AVRR's responses are all accepted into the record.

2. AVRR's petition for declaratory order is granted as discussed above.

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

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