

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35825

212 MARIN BOULEVARD, LLC, ET AL.—PETITION FOR DECLARATORY ORDER

Digest:¹ This decision denies a petition to reconsider a Board decision served on August 11, 2014, because the petitioners have failed to support their claims of material error. In addition, the Board denies a motion to supplement the record.

Decided: April 23, 2015

BACKGROUND

These proceedings involve an approximately 1.36-mile portion of a railroad line,² known as the Harsimus Branch, located in 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.³

In January 2006, the City of Jersey City (the City), the Pennsylvania Railroad Harsimus Stem Embankment Coalition, the Rails to Trails Conservancy, and New Jersey Assemblyman Louis M. Manzo (collectively, City Parties) asked the Board for a declaratory order finding that the Harsimus Branch was a railroad line subject to the Board’s abandonment authority, rather than a spur excepted from Board licensing under 49 U.S.C. § 10906. Eight limited liability

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 Agency decisions sometimes refer to a “line of railroad.” However, in the 1978 recodification of the Interstate Commerce Act, P.L. 95-473 (Oct. 17, 1978), all references to “line of railroad” were changed to “railroad line.” In this decision, we will use the modern statutory term “railroad line.”

³ 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). Collectively, these three dockets are referred to in this decision as Harsimus Abandonment Proceeding, and all decisions under these three dockets will be referenced as such.

companies (Original LLCs)⁴ intervened in this proceeding shortly after it began. City of Jersey City—Pet. for Declaratory Order, FD 34818 (STB served Jan. 24, 2006). In August 2007, the Board found that the Harsimus Branch was a railroad line subject to its abandonment authority. City of Jersey City—Pet. for Declaratory Order, FD 34818, slip op. at 1 (STB served Aug. 9, 2007). The Original LLCs filed a petition for reconsideration on August 29, 2007, arguing, among other things, that the line was not transferred as a railroad line, that only the U.S. District Court had jurisdiction to determine the status of the Harsimus Branch when it was conveyed to Consolidated Rail Corporation (Conrail), and that the Harsimus Branch had been “rendered inaccessible by the abandonment of the River Line.”⁵ The Board denied the petition for reconsideration in December 2007. City of Jersey City— Pet. for Declaratory Order, FD 34818, slip op. at 1 (STB served Dec. 19, 2007).

Both the Board’s August 2007 decision, determining that the Harsimus Branch was subject to Board jurisdiction, and the Board’s December 2007 decision, denying the Original LLCs’ petition for reconsideration, were appealed. On appeal, the U.S. Court of Appeals for the D.C. Circuit vacated the Board’s orders on grounds that only the U.S. District Court for the District of Columbia had jurisdiction to decide the status of the Harsimus Branch. Consol. Rail Corp. v. STB, 571 F.3d 13, 19 (D.C. Cir. 2009). In 2013, the District Court granted summary judgment in favor of the plaintiffs,⁶ based on the parties’ stipulation that the Harsimus Branch was conveyed to Conrail in 1976 as a railroad line, and the D.C. Circuit summarily affirmed the District Court’s decision in February 2014. City of Jersey City v. Consol. Rail Corp., 968 F. Supp. 2d 302 (D.D.C. 2013), aff’d, No. 13-7175 (D.C. Cir. Feb. 19, 2014).

Following the Board’s 2007 declaratory orders, on February 26, 2009, Conrail filed a notice of exemption to abandon the Harsimus Branch, and an Environmental Assessment was issued for public review and comment, but the Board subsequently issued a decision holding the proceeding in abeyance while the federal court litigation went forward. Harsimus Aban.

⁴ The LLCs were described as: 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 (Original LLCs).

⁵ The River Line, as applicable here, was comprised of two segments: 1) approximately 3.84 miles of the Weehawken Branch in Hudson County, N.J. and 2) approximately 6.95 miles of the River Line in Hudson County, N.J. For a detailed explanation of the mileposts, yards, and rights of way included and excluded, see Conrail Abandonment of the Weehawken Branch—in Hudson County, N.J. (River Line Abandonment), AB 167 (Sub-No. 766N), et al., slip op. 1-2 nn.3-4 (STB served Jan. 17, 2002).

⁶ The plaintiffs in the District Court proceeding were the City, Rails to Trails Conservancy, and the Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition. The Original LLCs were defendant-intervenors in the proceeding.

Proceeding, AB 167 (Sub-No. 1189X), et al., (STB served Apr. 20, 2010). The Board vacated the abeyance order and reinstated the Harsimus Abandonment Proceeding in an August 11, 2014 decision, after the D.C. Circuit's summary affirmance of the District Court's decision that the Harsimus Branch was a railroad line when it was conveyed in 1976. See generally Harsimus Aban. Proceeding, AB 167 (Sub-No. 1189X), et al., (STB served Aug. 11, 2014). The order vacating the abeyance order also granted the Original LLCs' request to intervene and discussed the limited scope of the ongoing proceedings (completion of the environmental review process through preparation of a Supplemental and Final Environmental Assessment by the Board's Office of Environmental Analysis and the conclusion of the National Historic Preservation Act review, followed by a decision on whether to allow Conrail's notice of exemption to become effective). Id. at 6-7.

On May 8, 2014, the Original LLCs and NZ Funding, LLC (the LCCs)⁷ initiated a new proceeding by filing a petition for declaratory order asking the Board to terminate jurisdiction over the Harsimus Branch. On August 11, 2014, the date the Board reinstated the Harsimus Abandonment Proceeding, the Board also issued a separate decision denying the LLCs' petition on grounds that the District Court had already decided that the Harsimus Branch was conveyed to Conrail as a railroad line subject to the Board's abandonment authority in 1976. 212 Marin Blvd., LLC—Pet. for Declaratory Order (August 2014 Decision), FD 35825 (STB served Aug. 11, 2014). In addition, the Board determined that the abandonment authorized in River Line Abandonment, AB 167 (Sub-No. 766N), et al. (STB served Jan. 17, 2002), had not severed the Harsimus Branch from the national rail system. August 2014 Decision, slip op. at 3-4.

On August 29, 2014, the LLCs filed a motion for reconsideration of the August 2014 Decision,⁸ to which the City Parties replied in opposition on September 18, 2014. The LLCs argue that the Board's August 2014 Decision constituted material error.

On March 6, 2014, the LLCs filed a motion to supplement the record filed with their petition for reconsideration. For the reasons discussed below, we will deny both the LLCs' petition for reconsideration of the August 2014 Decision and their motion to supplement.

DISCUSSION AND CONCLUSIONS

A party may seek to have the Board reconsider a decision by submitting a timely petition that presents new evidence or substantially changed circumstances that would materially affect the case, or that demonstrates material error in the prior decision. 49 U.S.C. § 722(c); 49 C.F.R. § 1115.3; see also W. Fuels Ass'n v. BNSF Ry., NOR 42088, slip op. at 2 (STB served Feb. 29,

⁷ NZ Funding, LLC was added, according to the petition, because it had acquired an ownership interest in properties along the Harsimus Branch.

⁸ We will treat this motion as a petition for reconsideration under 49 C.F.R. § 1115.3.

2008). In a petition alleging material error, a party must do more than simply make a general allegation; it must substantiate its claim of material error. See Canadian Pac. Ry.—Control—Dakota, Minn. & E. R.R., FD 35081, slip op. at 4 (STB served May 7, 2009) (denying petition for reconsideration where the petitioner did not substantiate the claim of material error and the Board found none). If a party has presented no new evidence, changed circumstances, or material error that “would mandate a different result,” then the Board will not reopen. See Montezuma Grain v. STB, 339 F.3d 535, 541-42 (7th Cir. 2003); Or. Int’l Port of Coos Bay—Feeder Line Appl.—Coos Bay Line of Cent. Or. & Pac. R.R., FD 35160, slip op. at 2 (STB served Mar. 12, 2009).

In their petition for reconsideration, the LLCs allege that the August 2014 Decision contained a material error because the Board no longer has jurisdiction over the Harsimus Branch. The LLCs claim that, because of non-use, the line is no longer part of interstate commerce and, as a result, the Board’s jurisdiction has terminated.⁹ The LLCs further argue that the Harsimus Branch was severed from the national transportation system in 2002 when Conrail abandoned the River Line.¹⁰ The LLCs claim that the River Line and the Harsimus Branch shared a single track from CP Waldo at milepost 0.0 for about 750 feet until the switch where the River Line and Harismus Branch separated and the River Line went north to Weehawken and the Harsimus Branch continued east. Because, the LLCs argue, the River Line Abandonment included the shared section of track from CP Waldo at milepost 0.0 to the switch, that portion of the Harsimus Branch was abandoned in 2002, thereby severing the Harsimus Branch from the national rail system. According to the LLCs, this resulted in a de facto abandonment and terminated the Board’s jurisdiction.

The LLCs fail to establish material error. Railroad lines subject to the Board’s licensing requirements remain subject to Board jurisdiction unless and until the Board authorizes the line’s abandonment and the abandonment is consummated. See City of Creede, Colo.—Pet. for Declaratory Order (City of Creede), FD 34376, slip op. at 8 (STB served May 3, 2005); Atchison, Topeka & Santa Fe Ry.—Aban. Exemption—in Lyon Cnty., Kan. (Lyon County), AB 52 (Sub-No. 71X), slip op. at 4 (ICC served June 17, 1991). As the District Court held, the Harsimus Branch was a railroad line subject to the Board’s abandonment authority in 1976. City of Jersey City, 968 F. Supp. 2d 302, aff’d, No. 13-7175. Actions unilaterally taken by Conrail since that time cannot remove the Board’s authority over the track.¹¹ As a result, the arguments

⁹ LLCs’ Pet. for Recons. 3-7.

¹⁰ LLCs’ Pet. for Recons. 8-16.

¹¹ See City of Creede, slip op. at 8 (“Once rail operations have been authorized by the Board, the track remains a line of railroad subject to full agency regulation until the agency authorizes its abandonment.”); Lyon County, slip op. at 4 (“because this track was clearly part of a rail line at one time, we find that it cannot be converted into [spur track] . . . solely through the railroad’s unilateral decision to change its use of the track segment over time.”); Bhd. of Maint.

(continued . . .)

that the LLCs make relating to the River Line Abandonment do not affect the Board's authority over the Harsimus Branch, and there is no material error in the August 2014 Decision.

The LLCs' motion to supplement the record will be denied. The motion seeks to add information and arguments relating to the City Parties' claims regarding the River Line Abandonment, and whether the trackage in that abandonment proceeding included track connecting the Harsimus Branch to the national rail system.¹² As discussed above, the claim that the Harsimus Branch was severed by virtue of the River Line Abandonment does not affect the need for Board authority to abandon the Harsimus Branch under the circumstances presented here.

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

It is ordered:

1. The LLCs' petition for reconsideration and motion to supplement are denied.
2. This decision is effective on its date of service.

By the Board, Acting Chairman Miller and Vice Chairman Begeman.

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of Way Emp. & Soo Line Sys. Div. v. CP Rail Sys., FD 32835, slip op. at 3 (STB served June 10, 1997) ("Because it was once a rail line, the carrier's reduced or ceased freight service and its treatment of the line as a spur does not, in and of itself, effect a conversion so as to unilaterally divest us of jurisdiction over its disposition.").

¹² The Original LLCs had raised claims relating to the River Line Abandonment in their 2007 motion for reconsideration of the Board's August 2007 decision. See Pet. for Recons., City of Jersey City—Pet. for Declaratory Order, FD 34818 (filed Aug. 29, 2007). The Board rejected their argument holding that the LLCs had failed to show that the Harsimus Branch trackage was lawfully severed from the national rail system by the River Line Abandonment. City of Jersey City—Pet. for Declaratory Order, FD 34818, slip op. at 6-7 (STB served Dec. 19, 2007).