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SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35905

CITY OF WOODINVILLE, WASH.—PETITION FOR DECLARATORY ORDER

Digest:[1] This decision grants in part and denies in part Eastside Community Rail, LLC's petition to reconsider and clarify a Board decision served on October 7, 2015.

Decided: October 5, 2016

Eastside Community Rail, LLC (ECR), requests that the Board reconsider and clarify the Board's October 7, 2015 decision (October 7 Decision), in which the Board determined that the City of Woodinville (the City) did not need Board authorization to acquire from the Port of Seattle (the Port) the physical assets of an approximately 2.58-mile line of rail (the Line) in King County, Wash., because the city would not acquire the right or legal obligation to provide freight rail service, nor would the city be in a position to unduly interfere with freight operations. For the reasons discussed below, the Board grants in part ECR's petition for reconsideration and clarifies the October 7 Decision.

BACKGROUND

On May 29, 2015, the City, a political subdivision of the State of Washington and a noncarrier, filed an amended petition for declaratory order asking the Board to declare that the City's acquisition of the land and physical assets of the Line owned by the Port, a municipal corporation of the State, did not require Board authorization under 49 U.S.C. § 10901 and would not cause the City to become a "rail carrier" within the meaning of 49 U.S.C. § 10102(5).

According to the City, it had entered into an Amended and Restated Real Estate Purchase and Sale Agreement (PSA) with the Port. Pursuant to the PSA, the City would acquire the land and physical assets of the Line located approximately between milepost 23.8 and milepost 26.38[2]

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[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] In its original petition filed on February 3, 2015, the City had proposed to enter into two related agreements with the Port. One agreement was for the purchase of the land and physical assets comprising the 2.58-mile Line. The other agreement was for the purchase of "ancillary" parcels of property located adjacent to the Line that "did not have any railroad facilities on them," and that were "not being used for railroad operations." (Original Pet. 4.)

(primarily in the City but also in the neighboring City of Bothell, in King County, Wash.) but would not acquire the common carrier right or obligation with respect to the Line. (Am. Pet. 2-3.)

The Port had acquired these assets from BNSF Railway Company (BNSF) in 2008, pursuant to the Board's decision in Port of Seattle—Acquisition Exemption—Certain Assets of BNSF Railway (Port of Seattle), FD 35128, slip op. at 5 (STB served Oct. 27, 2008). In that decision, the Board held that the Port's acquisition of the land and physical assets at issue would not cause the Port to become a rail carrier under § 10102(5) because that transaction comported with the line of cases beginning with Maine, Department of Transportation—Acquisition & Operation Exemption—Maine Central Railroad (State of Maine), 8 I.C.C.2d 835 (1991).[3] Specifically, the Board found that, as a result of that transaction, BNSF would retain an exclusive freight rail easement, and the Port would not become a rail carrier subject to Board jurisdiction. Port of Seattle, slip op. at 3, 5. Through a series of subsequent transactions, BNSF's freight easement and operating rights were conveyed to ECR.[4]

In the City's amended petition for declaratory order, the City argued that, because it was proposing to purchase the Port's interest, and because the land and physical assets to be acquired by the City would remain subject to the retained freight rail easement and Operations & Maintenance Agreement (O&M Agreement) filed in Port of Seattle, the City likewise would not acquire any common carrier rights. (Am. Pet. 7.) On June 18, 2015, however, ECR filed a reply to the amended petition expressing concerns regarding Section 12.12 of the parties' O&M Agreement. Section 12.12 states in pertinent part:

> This Agreement is made for the benefit of the Corridor and shall run with the land, except that any parcel transferred by the Port to an unaffiliated person or entity for purposes other than rail operations or trail use that does not contain any facilities used in connection with the rail operations intended by this Agreement shall be deemed removed from the Corridor or Port Property as applicable.

(Am. Pet., Attach. 2.) ECR asserted that Section 12.12 was inconsistent with the State of Maine principles that govern acquisitions of rail lines by public entities wishing to remain noncarriers. ECR further requested that any grant of the amended petition be subject to the condition that the

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[3] For a discussion of the Board's State of Maine standard, see Florida Department of Transportation—Petition for Declaratory Order—Rail Line of CSX Transportation, Inc. Between Riviera Beach & Miami, Florida, FD 35783, slip op. at 6-7 (STB served Oct. 1, 2014).

[4] BNSF sold its previously retained interests in the Line, including its exclusive freight rail easement, to GNP Rly Inc. (GNP). GNP Rly Inc.—Acquis. & Operation Exemption—BNSF Ry., FD 35213 (STB served Feb. 13, 2009). Thereafter, ECR acquired, among other things, the lease and operating rights that GNP had acquired from BNSF. Eastside Cmty. Rail—Acquis. & Operation Exemption—GNP RLY, Inc., FD 35692 (STB served Nov. 23, 2012). Shortly thereafter, Ballard Terminal Railroad Company, LLC, was authorized to lease the Line from ECR and operate over it. Ballard Terminal R.R.—Lease Exemption—Line of Eastside Cmty. Rail, FD 35730 (STB served Apr. 18, 2013).

City may not terminate any part of ECR's permanent rail freight easement on the Line without the consent of ECR or further order of the Board. (ECR Reply 9-10.)

In the October 7 Decision, the Board granted the City's amended petition for declaratory order and determined that Section 12.12 would not undermine ECR's operating authority. However, to ensure that there was no misunderstanding, the Board reiterated, see Port of Seattle, slip op. at 5, that neither the Port nor the City could materially interfere with ECR's right and obligation to provide rail freight service on the Line. October 7 Decision at 5. The Board also specifically stated that ECR could petition the Board to take further action should it experience undue interference in its ability to perform common carrier duties over the Line—including an attempt by the Port or the City to use Section 12.12 to convey a parcel needed for current or future rail service.

In its petition for reconsideration and clarification, ECR argues that the Board's October 7 Decision incorrectly ascribed to it the position that Section 12.12 authorizes the Port or the City to unilaterally terminate substantial portions of ECR's permanent rail freight easement. (ECR Pet. for Recons. 4.) Specifically, ECR argues the October 7 Decision stated that "ECR interprets Section 12.12 as granting the landlord the unfettered power to 'dictate what parts of rail common carrier rights-of-way remain available for railroad purposes and what parts are converted for other uses,'" slip op. at 3, but that was actually the City's interpretation of Section 12.12. (ECR Pet. for Recons. 4 (citing Original Pet. 4-5, 7-9).) ECR requests that the Board clarify the language on page 3 of the October 7 Decision to make this point clear. (ECR Pet. for Recons. 4.)

ECR also argues that the Board should reconsider the October 7 Decision because the Board improperly shifted the burden of proof when it stated that ECR could petition the Board to take further action if ECR experienced undue interference in its ability to perform common carrier duties over the Line. (Id. at 1.) According to ECR, agency precedent is clear that the burden is on the party seeking to take property out of the national rail system to show that the entire right-of-way is not and will not be needed for rail purposes. See City of Creede, Colo.—Pet. for Declaratory Order (City of Creede), FD 34376, slip op. at 6 (STB served May 3, 2005); see also City of Lincoln v. STB (City of Lincoln), 414 F.3d 858, 862 (8th Cir. 2005). Yet, according to ECR, without discussing the governing case law, the Board's October 7 Decision reversed that burden and imposed upon ECR the obligation to seek and justify further Board relief should the City act to partition ECR's existing railroad right-of-way. (ECR Pet. for Recons. 1, 6.) ECR further contends that reconsideration is warranted because it is unclear how petitioning the Board would work on a practical level. (Id. at 6.) ECR states that it would have little ability to know if or when the City executed a transfer of supposedly "ancillary" property from the "permanent" easement that ECR holds. (Id.) According to ECR, the fact that such a transfer has taken place might not be evident until the day that construction equipment appears on the right-of-way to commence road or bridge construction or other non-rail functions. (Id.)

In its opposition to ECR's petition, the City argues that ECR's position with respect to the meaning and scope of Section 12.12 requires no clarification because the October 7 Decision acknowledged that ECR did not agree with a broad reading of Section 12.12. (City Reply 3.) The City further argues that ECR fails to demonstrate material error warranting reconsideration of the Board's October 7 Decision. (Id. at 4.) The City asserts that the Board's decision did not

improperly shift the burden to ECR, and that the question of what would be the burden of proof in a potential, future proceeding was not material to the issues that were addressed in the October 7 Decision. (Id. at 4, 7.) In response to ECR's arguments that it should not be required to challenge a proposed transfer of ancillary parcels because that would shift the burden of proof to ECR as the moving party, the City also attempts to distinguish City of Creede and City of Lincoln. (Id. at 6.) The City states that, in both cases, the Board found that the carriers had first demonstrated that there was a current or future railroad purpose for the property before holding that the moving parties' actions were preempted because the parties could not overcome the showings by the rail carriers. See City of Creede, slip op. at 7; see also City of Lincoln, slip op. at 4. The City also notes that while these two cases were brought by cities seeking to take or regulate railroad property, there are many proceedings where the railroad petitioned to stop a threatened action that it asserted was preempted because such action would unduly interfere with railroad operations. Thus, the City states that the Board has held that regardless of whether preemption is sought affirmatively or as a defense to a planned action, the burden is on the railroad. (City Reply 7 (citing E. Ala. Ry.—Pet. for Declaratory Order, FD 35583, slip op. at 4 (STB served Mar. 19, 2012).)

DISCUSSION AND CONCLUSIONS

Request for Clarification

We first address ECR's request for clarification on grounds that the October 7 Decision allegedly misstates ECR's position regarding the effect of Section 12.12 of the parties' O&M Agreement. The Board understands that ECR does not interpret Section 12.12 as authorizing the Port or the City to unilaterally terminate substantial portions of ECR's permanent rail freight easement. Rather, ECR was concerned about the potential for Section 12.12 to be interpreted that way. (ECR Reply 9 ("[t]o the extent that Section 12.12. purports to allow the Port . . . to unilaterally terminate large portions of the permanent freight easement held by ECR, it inconsistent with [] State of Maine principles . . .).) The Board's October 7 Decision was intended to address the purported interpretation that concerned ECR. Nonetheless, the Board clarifies that it is ECR's position that "the idea that Section 12.12 of the O&M Agreement . . . [could] legitimately empower [] a non-carrier landlord to unilaterally eliminate wide and long swaths of such easements is unsupportable and inconsistent with fundamental State of Maine principles." (ECR Reply 7.)

Request for Reconsideration

A party may seek reconsideration of a Board decision by submitting a timely petition that (1) presents new evidence or substantially changed circumstances that would materially affect the case, or (2) demonstrates material error in the prior decision. 49 U.S.C. § 1321; 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, 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 Can. Pac. Ry.—Control—Dakota, Minn. & E. R.R., FD 35081, slip op. at 4 (STB served May 7, 2009). If a party has presented no new evidence, changed circumstances, or material error that "would mandate a different result," then the Board will not grant reconsideration. See Montezuma Grain v. STB, 339 F.3d 535, 541-

42 (7th Cir. 2003); Or. Int'l Port of Coos Bay—Feeder Line Application—Coos Bay Line of Cent. Or. & Pac. R.R., FD 35160, slip op. at 2 (STB served Mar. 12, 2009).

ECR raises two issues for Board reconsideration: (1) the October 7 Decision improperly shifted the burden of proof to ECR going forward; and (2) the need for prior notice should the City transfer any parcels of land in the right-of-way. The Board finds that it did not improperly shift the burden of proof when it invited ECR to petition the agency if ECR experienced undue interference with its rail operations, and as a result, there was no material error with respect to the Board's statement to that effect in the October 7 Decision. However, the Board clarifies the burden issue raised by ECR in its petition for reconsideration. In addition, the Board finds material error in the October 7 Decision because, without the advance notice required by today's decision, ECR could be denied the ability to seek effective relief in the event that property in the rail easement is transferred. Accordingly, the Board will grant reconsideration and impose a condition requiring that the City notify ECR in writing at least 30 days prior to any transfer of real property within the right-of-way and rail easement.

ECR alleges that the Board materially erred in the October 7 Decision by improperly shifting the burden of proof when it invited ECR to petition the agency to take further action should ECR experience undue interference in its ability to perform common carrier duties over the Line. Although ECR questions why the Board failed to discuss City of Creede or City of Lincoln in the October 7 Decision, no burden of proof issue was raised before the Board at that time. Rather, the City, a noncarrier, had filed an amended petition for declaratory order asking the Board to declare that the City's acquisition of the land and physical assets of the Line would not require Board authorization. Based upon the evidence presented, the Board determined in the October 7 Decision that the City's proposed transaction would not be an acquisition of a railroad line that would require Board authorization, or cause the City to become a rail carrier under the Interstate Commerce Act. There was no need to discuss, in that decision, the burden of proof that would apply if, in the future, ECR brought an action alleging interference with its ability to conduct rail operations.

In any event, the Board did not shift the burden in the October 7 Decision, but merely informed ECR that it could petition the Board if the City was interfering with rail service, which included a conveyance of parcels needed for rail service. To avoid confusion, we clarify here that while it is ECR that would bring an action before the Board, see City of Lincoln, 414 F.3d at 862, the party seeking to remove property from the national rail transportation system—the City or the Port—would bear the burden of demonstrating that the property is not (and will not be) needed for rail purposes. See City of Creede, slip op. at 6.

ECR also raises concerns that it would have little ability to know if or when the City executed a transfer of property from the permanent easement that ECR holds. (ECR Pet. for Recons. 6.) Based on consideration of ECR's claim and further review of the parties' O&M Agreement, ECR is correct that, given the terms of the parties' agreement, ECR would not necessarily know in advance if the City executed a property transfer involving land in the right-of-way. Without actual notice, ECR's ability to seek effective relief to protect its access to the physical assets of the Line needed to conduct its freight operations would be limited.

Accordingly, the Board will now impose a condition requiring the City to notify ECR at least 30 days prior to any transfer of property within the right-of-way and rail easement.

It is ordered:

1. ECR's petition for reconsideration is granted in part and denied in part as discussed above.

2. The October 7 Decision is clarified as discussed above.

3. The City shall notify ECR in writing at least 30 days prior to any transfer of any parcels of land within the right-of-way and rail easement.

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

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