

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35825

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

Digest:¹ This decision denies the request of property owners for a declaratory order holding that the Board does not have authority over certain rail property, because the courts have already found that the trackage at issue was conveyed as a railroad line requiring abandonment authority from the Board.

Decided: August 8, 2014

By petition filed on May 8, 2014, 212 Marin Boulevard, LLC, et al. (LLCs)² requested that the Board issue a declaratory order terminating all Board jurisdiction over the LLCs and the trackage at issue, known as the Harsimus Branch. The United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) has summarily affirmed the finding of the United States District Court for the District of Columbia (District Court) that the Harsimus Branch was transferred as a line of railroad to Consolidated Rail Corporation (Conrail) in 1976.³ As a result, the question that the LLCs ask the Board to address in this proceeding—whether the Harsimus Branch is subject to the Board’s jurisdiction and requires abandonment authority—has already been decided.⁴ Accordingly, we find no controversy or uncertainty warranting institution of a declaratory order proceeding here and will thus deny the petition and terminate this proceeding.

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. See Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² The LLCs are listed 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; 446 Newark Avenue, LLC; and NZ Funding, LLC.

³ 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).

⁴ We address below the LLCs’ argument that, subsequent to the transfer of the Harsimus Branch as a line of railroad, it was severed from the national transportation system and thereby removed from the Board’s jurisdiction.

BACKGROUND

History of Related Proceedings. The history of the Board and court proceedings involving the Harsimus Branch is set out in our decision served today reinstating Consolidated Rail Corp.—Abandonment Exemption—in Hudson County, N.J., AB 167 (Sub-No. 1189X); CSX Transportation—Discontinuance of Service Exemption—in Hudson County, N.J., AB 55 (Sub-No. 686X); and Norfolk Southern Railway Company—Discontinuance of Service Exemption—in Hudson County, N.J., AB 290 (Sub-No. 306X) (collectively, Conrail Abandonment Proceedings). As pertinent here, we explain in that decision that the Board issued a declaratory order in 2007 concluding that the Harsimus Branch had been conveyed to, and operated by, Conrail as a line of railroad subject to federal abandonment regulation.⁵ But, in 2009, the D.C. Circuit vacated the Board’s decision without reaching the merits, holding that only the Special Court (now the District Court) had jurisdiction to address issues involving the nature of the trackage conveyed to Conrail under the Final System Plan.⁶ In the subsequent District Court proceeding, the parties (including the LLCs, but not including Conrail) jointly stipulated in 2012 that the Harsimus Branch was conveyed to Conrail as a line of railroad subject to the abandonment authority of the Interstate Commerce Commission (ICC), now the Board.⁷ Based on that stipulation, the District Court determined that the Harsimus Branch was a line of railroad that required abandonment authority.⁸ The D.C. Circuit summarily affirmed the District Court’s decision in 2014. The LLCs declined to seek further review of the District Court’s jurisdictional determination, and instead requested permission to intervene in Conrail Abandonment Proceedings.⁹ In our decision served today in Conrail Abandonment Proceedings, the Board vacates the stay that had been imposed (thus reinstating those proceedings) and grants the LLCs’ petition to intervene.

This Proceeding. Notwithstanding their own stipulation in the District Court that the Harsimus Branch was conveyed to Conrail as a railroad line, that court’s final decision on the matter, its affirmance on appeal, and their pending petition to intervene in Conrail Abandonment Proceedings, the LLCs filed a petition for declaratory order. In its petition, the LLCs ask the Board to discontinue its jurisdiction over the Harsimus Branch on the ground that the property is

⁵ City of Jersey City—Pet. For Declaratory Order (Jersey City Dec. Order), FD 34818 (STB served Aug. 9, 2007).

⁶ Consol. Rail Corp. v. STB, 571 F.3d 13, 18 (D.C. Cir. 2009). After the 2007 issuance of Jersey City Dec. Order, Conrail filed a notice of exemption for authority to abandon and discontinue service over the Harsimus Branch, but the Board stayed those proceedings in 2010 to allow the District Court time to resolve the status of the Harsimus Branch.

⁷ Conrail neither joined nor opposed the stipulation.

⁸ See City of Jersey City, 968 F. Supp. 2d at 307 (if the track at issue was conveyed as a line of railroad subject to the agency’s abandonment jurisdiction, then the STB retains its authority to approve or deny an abandonment application).

⁹ The LLCs’ petition to intervene was unopposed.

no longer needed or suitable for railroad use. The LLCs also allege that Conrail's abandonment of a nearby line, known as the River 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.¹⁰

The City of Jersey City, Rails to Trails Conservancy, and Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition (City Parties) filed a reply to the petition for declaratory order on May 22, 2014, arguing that the petition should be dismissed as an attempt to relitigate issues already decided by the Board and the courts.¹¹ On May 27, 2014, Conrail filed a reply declining to take a position on the LLCs' petition.

Notwithstanding Board rules that do not allow replies to replies, 49 C.F.R. § 1104.13(c), on May 28, 2014, City Parties filed another reply. On the same day, the LLCs filed a reply to City Parties' May 22 filing. On May 29, 2014, Conrail filed a reply to City Parties' May 22 filing. On June 2, 2014, the LLCs filed a reply to City Parties' May 28 filing, requesting to strike materials in City Parties' May 22 and May 28 filings. On June 3, 2014, City Parties filed a reply to the LLCs' motions to strike.

PRELIMINARY MATTERS

The Board accepts filings in reply to petitions for declaratory order, and we have fully considered the permitted replies to the LLCs' petition filed by City Parties and Conrail. Here, however, City Parties have filed three additional replies, Conrail has filed two additional replies, and the LLCs have filed two additional replies. We will reject all of the replies to replies as they do not clarify the record and are not necessary to complete it.

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 Intercity Transp. Co. v. United States, 737 F.2d 103 (D.C. Cir. 1984); Delegation of Auth.—Declaratory Order Proceedings, 5 I.C.C. 2d 675 (1989). Here, the District Court and D.C. Circuit have already determined that the Harsimus Branch was conveyed to Conrail as a railroad line subject to the ICC's (now the Board's) abandonment authority. Moreover, the LLCs acknowledge that in the District Court action, they stipulated to

¹⁰ See Pet. at 4-5, 20-21, 28-31.

¹¹ City Parties also requested that the Board lift the stay imposed in Conrail Abandonment Proceedings, which, as previously noted, the Board has done today. In addition, City Parties suggested that the Board could consolidate this petition with the Jersey City Dec. Order proceeding. The D.C. Circuit, however, vacated the Board's decision in Jersey City Dec. Order for lack of jurisdiction in Conrail, 571 F.3d at 18. Accordingly, the Board will not accept any further filings in Docket No. FD 34818.

the location of the portion of the Harsimus Branch in dispute and that the Harsimus Branch was conveyed to Conrail as a line of railroad under the ICC's (now the Board's) jurisdiction.¹²

The LLCs also allege that, in 2002, the Harsimus Branch was severed from the national transportation system, due to Conrail's abandonment of a nearby line, known as the River Line, constituting a de facto abandonment.¹³ Specifically, the LLCs claim that the connection between the River Line and the Harsimus Branch was not at "Controller Point (CP) Waldo," but at a point 750 feet away, which would mean that a single track connected the River Line and the Harsimus Branch to CP Waldo. The LLCs argue that the abandonment of the River Line included this 750-foot stretch of track, thus severing the Harsimus Branch from the national rail system. However, the Board's decision regarding the River Line expressly authorized abandonment of a segment connecting to the Harsimus Branch "at Controller Point (CP) 'Waldo.'"¹⁴ Thus, the Board's abandonment authorization for the River Line did not include trackage that would sever the Harsimus Branch from the national transportation system.

Having rejected the LLCs' severance argument, we conclude that the declaratory order proceeding sought by the LLCs would be duplicative of the jurisdictional issues that have already been decided.¹⁵ Therefore, there is no controversy or uncertainty here warranting institution of a declaratory order proceeding. The appropriate course of action here is to resume the abandonment and discontinuance proceedings involving the Harsimus Branch initiated by Conrail in 2009. See Conrail Abandonment Proceedings, AB 167 (Sub-No. 1189X) (STB served August 11, 2014).

¹² See Pet. at 3.

¹³ See Pet. at 4-5, 20-21, 28-31.

¹⁴ Conrail Aban. of the Weehawken Branch—in Hudson Cnty., N.J., AB 167 (Sub-No. 766N), et al., slip op. at 1 n.4 (STB served Jan. 17, 2002).

¹⁵ The LLCs request that the Board exempt the LLCs and their properties from the Board's jurisdiction, citing 49 U.S.C. § 10502. Pet. at 5, 13-14. However, § 10502 provides for exemptions from regulation under the Board's governing statute, not exemptions from the Board's jurisdiction. To the extent the LLCs seek an exemption from the Board's regulation with respect to Conrail's abandonment of the Harsimus Branch, the Board has held that third party requests for abandonment of a railroad line may not proceed via an exemption. See, e.g., SMS Rail Serv., Inc.—Adverse Discontinuance of Serv. Exemption—Gloucester Cnty, N.J., AB 1095X (STB served Mar. 2, 2012) (parties are not permitted to use exemption procedures for adverse abandonments or discontinuances; rather, relief may only be obtained through an application). Further, the determination that the Harsimus Branch was conveyed to Conrail as a railroad line is final (i.e., affirmed by the D.C. Circuit). As the Supreme Court held in Parklane Hosiery Co. v. Shore, 439 U.S. 322, 332 (1979), parties cannot seek to relitigate the same issue they previously had a full and fair opportunity to litigate. Here, the LLCs, as parties to both the District Court and D.C. Circuit cases, are bound by those rulings and cannot seek to relitigate before the Board the same issues already decided. Thus, it is appropriate for the Conrail Abandonment Proceedings to move forward.

For these reasons, the Board declines to initiate a proceeding here and will deny the petition for declaratory order.

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 declaratory order is denied and this proceeding is terminated.
2. This decision is effective on its service date.

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