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SERVICE DATE – JANUARY 14, 2014

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35459

V&S RAILWAY, LLC—PETITION FOR DECLARATORY ORDER—RAILROAD
OPERATIONS IN HUTCHINSON, KAN.

Digest:¹ In a case involving a dispute between a rail carrier and two shippers, the Board responded to three questions referred to it by the United States District Court for the District of Kansas. The case before the district court largely involves state property and contract law. The questions before the Board involved the practical implications of those state law decisions on who may legally conduct rail operations over different segments of the rail line. In this decision, the Board is denying a request to reconsider that earlier decision.

Decided: January 10, 2014

By petition filed December 28, 2010, V&S Railway LLC (V&S) requested that the Board institute a declaratory order proceeding to address three questions that arose in connection with a proceeding pending before the United States District Court for the District of Kansas.² In that case, V&S and Respondents, Hutchison Salt Company, Inc. (HSC) and Hutchison Transportation Company (HTC) (collectively, HSC/HTC), disagree about whether HSC/HTC may conduct private freight rail operations over a portion of a rail line apparently located entirely within HSC/HTC's own property in Reno County, Kan. In a decision served July 12, 2012 (July 12 Decision), the Board addressed the court's three questions. By petition filed July 24, 2012, V&S seeks reconsideration of that decision. For the reasons discussed below, V&S' Petition for Reconsideration (Petition) will be denied.

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 V&S Ry. v. Hutchinson Salt Co., No. 08-1402-WEB (D. Kan.).

BACKGROUND

In 1926, the Hutchinson & Northern Railway Company (HN) acquired authorization from the Board's predecessor, the Interstate Commerce Commission (ICC), to conduct common carrier rail operations on a 4.731-mile rail line in Hutchinson, Reno County, Kan. (the Line).³ The ICC's decision did not indicate whether HN acquired the Line under state law in fee simple, or whether it simply held a railroad easement or other property interest over it.⁴ In 2006, V&S obtained authority from the Board to acquire the Line from HN by quitclaim deed, as well as to operate the Line.⁵

HSC owns a salt mine and the underlying real estate (Salt Mine Property) at the east end of the Line that includes two parcels of property (known as "Parcel 1" and "Parcel 10"), over which the Line runs, and that are the subject of the current dispute. HSC/HTC claim that HN's parent company (American Salt Company) sold the Salt Mine Property, including Parcel 1 and Parcel 10 (and the rail and other improvements thereon), to HSC on August 1, 1990.

V&S has argued to the court that HSC/HTC may not conduct private freight rail operations over Parcels 1 and 10 because V&S has a valid freight rail easement over the disputed tracks and because it is the only entity with the necessary federal license to conduct common carrier operations over those tracks. HSC/HTC have argued that HSC owns the portion of the track located on its Salt Mine Property and that HSC/HTC may conduct their own private rail operations over those rails. The primary dispute, which is being addressed in district court, is one of state property and contract law. However, under 28 U.S.C. § 1336(b) and the doctrine of primary jurisdiction, the court referred the following three related questions to the Board:

1. Is V&S the sole rail carrier authorized to operate on the railroad line between milepost 0.0 and milepost 5.14 in Hutchinson, Reno County, Kansas, and to interchange traffic with Defendant BNSF Railway Company?
2. Does HSC and/or HTC have the right to operate on the railroad line and to

³ Operation of Line by Hutchinson & N. Ry., 111 I.C.C. 403 (1926).

⁴ The parties refer to a 1925 easement as providing HN with the right to operate on at least the portions of the Line that appear to be the subject of this dispute. See Pet. for Declaratory Order at 4; HSC/HTC Response at 21 n.4, 25. However, the parties have not provided a copy of this easement to the Board, and the terms of the easement are not specifically set out in the record.

⁵ V&S Ry.—Acquis. & Operation Exemption—Hutchison & N. Ry., FD 34875 (STB served May 31, 2006). As noted in the July 12 Decision, there is an unexplained discrepancy between the length of the Line as initially described by the ICC in 1926 (4.731 miles), and the length of the Line as described by V&S when it sought Board authority in 2006 (5.14 miles).

interchange traffic with Defendant BNSF Railway Company by virtue of the fact that they own part of the real property underlying the railroad line and/or the fact that they claim ownership of some of the tracks and improvements that are part of the railroad line the Board authorized V&S to acquire and operate?

3. Did HN or any successor-in-interest abandon the right-of-way on Parcel 1 granted to it by virtue of the 1925 Easement?⁶

In its July 12 Decision, the Board found that V&S is the sole carrier holding Board authority to operate on the Line, but that whether V&S *exercised* its authority to acquire the portion of the Line that crosses Parcel 1 and Parcel 10 depends on whether the court finds that V&S acquired a sufficient property interest from HN in 2006. The Board also concluded that there is no federal barrier to HSC/HTC's conducting private freight rail operations over the tracks in question, assuming that HSC/HTC have an appropriate state law property interest that permits their operations over the tracks. The Board found that if HSC/HTC have such a state property interest, HSC/HTC may continue to perform private carriage on those portions of the Line that they own or have a right to use under state law, so long as their operations do not unduly interfere with V&S' common carrier operations. The Board also concluded that no party has abandoned any segment of the Line.

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, 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). The alleged grounds must be sufficient to convince the Board that its prior decision in the case would be materially affected. See Canadian Nat'l Ry.—Control—EJ&E West Co., FD 35087 (Sub-No. 8), slip op. at 8 (STB served Nov. 8, 2012).

V&S' petition for reconsideration of the July 12 Decision does not satisfy this test. The Board properly found, under the circumstances presented in this case, that contingent upon the district court's resolution of the state property and/or contract law questions, HSC/HTC may have the right to conduct private carriage over certain portions of the Line. The July 12 Decision goes no further, is consistent with Board and ICC precedent, and grants no new rights to shippers

⁶ V&S Ry. v. Hutchinson Salt Co., No. 08-1402-WEB, slip op. at 12-13 (D. Kan. Dec. 20, 2010).

that, as V&S claims, would be contrary to the way the general system of railroad transportation works in this country.⁷ Further, the alleged errors are not material to the outcome of the case.

V&S makes three primary claims of material error, alleging that the Board erred: 1) in finding that, in order to exercise the Board's grant of authority to acquire a line, V&S must have the necessary rights under state property and/or contract law; 2) in holding that HSC/HTC may conduct private rail operations over Parcel 1 and Parcel 10 without V&S' consent; and 3) in finding that HSC/HTC may conduct private carriage over Parcels 1 and 10, provided those operations do not unreasonably interfere with V&S' ability to satisfy its common carrier obligation.

- I. The Board's finding that, to exercise its grant of authority to acquire the Line, V&S must acquire the necessary property and/or contract rights under state law was not material error.

V&S claims that the Board committed material error in finding that a carrier must possess the necessary rights under state property and/or contract law in order to complete the acquisition of a line pursuant to Board authority. V&S argues that it exercised its Board-granted authority to acquire the Line "by becoming a rail carrier on the entire 5.14-mile railroad line"⁸ regardless of its rights under state property and/or contract law.⁹ It claims that HSC/HTC's complaints of poor service are evidence that it operated on the Line.¹⁰

V&S, however, conflates operation and acquisition¹¹ by arguing that its operation over the Line is evidence that it acquired it. The fact that V&S may have operated on the Line does not mean that V&S had the necessary state law property/contract interest needed to exercise the acquisition authority granted by the Board. V&S disregards the well-established precedent that the Board's grant of authority gives a "petitioner permission to acquire the line, but does not mandate the acquisition. . . . Thus, the authority granted by the Board is permissive, not mandatory, and is not dispositive of ownership" of the line. Gen. Ry.—Exemption for Acquis.

⁷ Pet. at 8, 12.

⁸ Pet. at 2.

⁹ Pet. at 3-4.

¹⁰ Pet. at 2. In a footnote, V&S also asserts that the Board committed material error by ignoring V&S's assertion that HSC/HTC's remedy, if they believed V&S' service was unsatisfactory, was to file a complaint with the Board, which HSC/HTC did not do. Whether or not HSC/HTC could or should have filed a complaint with the Board has no impact on the implications of the district court's findings and whether HSC/HTC may conduct private carriage over portions of the Line.

¹¹ Pet. at 2. There appears to be no dispute that V&S operated on the Line.

of R.R. Line—in Osceola & Dickinson Cntys., Iowa, FD 34867, slip op. at 4 (STB served June 15, 2007).¹² “[I]t is up to the parties to decide whether and how to go forward” once Board authority becomes effective. Lackawanna Cnty. R.R. Auth.—Acquis. Exemption—F&L Realty, Inc., FD 33905 et al., slip op. at 6 (STB served Oct. 22, 2001). Whether a party has regulatory authority to acquire a line, or operate it, or both, is distinct from the question of whether it obtained the necessary state law property interest or contractual right to exercise that Board-granted authority. The observation that V&S operated on the Line or even received the regulatory authority to operate on the Line does not resolve the question of whether it obtained the necessary state law property or contractual rights. This is a question of state law and is precisely the issue being addressed in the district court.¹³

- II. The Board’s holding that HSC/HTC may conduct private rail operations over Parcel 1 and Parcel 10 without V&S’ consent was not material error.

V&S claims “the Board committed material error in failing to acknowledge that a shipper may not move trainloads of its own freight on a rail carrier’s line without the rail carrier’s consent.”¹⁴ It argues that the Board should have concluded that HSC/HTC may conduct private rail operations on a rail carrier’s track only with the consent of the rail carrier.¹⁵ V&S’ arguments about carrier consent and private carriage over a rail carrier’s line rest on the assumption that the common carrier is the owner of the line. The July 12 Decision came to no conclusion regarding ownership, but implicit in the decision is that the rights of a shipper are

¹² V&S misreads General Railway, claiming that it holds “that the initiation of operations pursuant to a grant of authority by the Board did not need to be postponed until any controversies under state property and/or contract law have been resolved.” Pet. at 3. In General Railway, the Board did not address whether operations over a line of railroad may begin despite ongoing state law controversies. It discussed a grant of after-the-fact acquisition authority where the railroad, apparently inadvertently, failed to file for acquisition authority while it filed for operating authority. Gen. Ry., slip op at 4-5. The Board found no reason to reject or revoke the notice of acquisition exemption and noted that outstanding state property and/or contract law issues, if any, would best be resolved in state court. Id.

¹³ V&S further argues (Pet. at 2-3) that the Board improperly relied on Middletown & New Jersey Railroad—Lease & Operation Exemption—Norfolk Southern Railway, FD 35412 (STB served Sept. 23, 2011). The Board cited Middletown for the proposition that an entity became a rail carrier when it acquired a line of railroad pursuant to the Board’s authorization of that acquisition, not when it commenced operations over the line. July 12 Decision, slip op. at 6 n.9.

¹⁴ Pet. at 6.

¹⁵ Pet. at 8.

dependent upon that shipper's property and/or contract law interests in the line.¹⁶ As correctly stated in the July 12 Decision, if a common carrier possesses an exclusive property interest in the rail line under state law, then any private carrier would need the consent of the common carrier to conduct private carriage on that line.¹⁷ However, if a shipper owns the tracks and has a sufficient state law interest in the property to access the tracks, there is nothing in our governing statute that would prevent that shipper from conducting private carriage on that line, as long as the shipper does not unduly interfere with the common carrier's ability to meet its common carrier obligation on the line.¹⁸ In other words, HSC/HTC can carry their own goods on *tracks that they own*, if any, without the consent of the common carrier, even if those tracks are part of the common carrier line, as long as HSC/HTC do not unduly interfere with the common carrier operations on the Line. The cases that fall under our State of Maine¹⁹ doctrine—under which noncarriers and rail carriers conduct operations over the same line, often pursuant to arrangements that ensure the noncarrier's operations do not interfere with the carrier's common carrier obligation—are not inconsistent with this conclusion.²⁰ Accordingly, we do not find any material error in the Board's decision relating to HSC/HTC's ability to conduct private rail operations over Parcel 1 or Parcel 10 without V&S' consent, or in our interpretation of the State of Maine doctrine.²¹

¹⁶ V&S asserts that the Board erred in the July 12 Decision in stating that V&S claimed to have exclusive use of the tracks that make up the Line. However, V&S repeatedly claimed to have exclusive or sole use of the tracks in its pleadings and, apparently, also in district court. Pet. for Declaratory Order at 4 (“V&S alone can operate on the Line.”); *id.* at 5; V&S Ry. v. Hutchinson Salt Co., No. 08-1402-WEB, slip op. at 3 (D. Kan. Dec. 20, 2010) (“V&S further claims that its right to operate the railroad is exclusive and cannot be interfered with by Defendants.” (citing Compl. [Doc.1] ¶¶ 25, 28, 31, 37 & 38)).

¹⁷ July 12 Decision, slip op. at 11.

¹⁸ *Id.* In such circumstances, a common carrier would be expected to accommodate private carriage operations.

¹⁹ See Maine, Dep't of Transp.—Acquis. & Operation Exemption—Me. Cent. R.R., 8 I.C.C.2d 835 (1991) (State of Maine).

²⁰ There is nothing in the Board's decision that implies the free-for-all consequences V&S predicts. Pet. at 5.

²¹ V&S claims that the Board misrepresented how the concerns of the Association of Railway Museums, Inc., and the Tourist Railway Association, Inc. (collectively, ARM/TRAIN) were alleviated. In a pleading filed Aug. 13, 2012, ARM/TRAIN themselves clarified that the Board's July 12 Decision alleviated their concerns, not the reply filed by V&S, as V&S claims. We find neither error nor materiality here.

- III. The Board's finding that HSC/HTC may conduct private carriage over Parcel 1 and Parcel 10 provided those operations do not unduly interfere with V&S' common carrier obligation was not material error.

V&S argues that the effect of the Board's decision is to grant "nonconsensual overhead trackage rights to a shipper to operate on the railroad line of a rail carrier which is situated on the property of the shipper so long as the rail carrier is not hindered in rendering service on its railroad line."²² V&S asserts that this "is not the way the general system of railroad transportation works in this country,"²³ and predicts this will lead to the "free-for-all" unregulated use of the nation's rails. V&S provides no factual basis for this speculative prediction.²⁴ Again, V&S' argument rests on the disputed assumption that it owns the entire Line, and that HSC/HTC has no property and/or contractual rights to operate on the line as well. In this case the private shippers (HSC/HTC) claim to own not only the underlying property (Parcel 1 and Parcel 10) but also the disputed track and claim that they are the only shippers served by the Line. As the July 12 Decision clearly explains, if HSC/HTC do own the disputed track, "they may conduct private carriage on that track, even if it is part of the Line, as long as they do not unduly interfere with V&S' common carrier operations, if any."²⁵ Therefore, as discussed above, HSC/HTC's right to conduct private carriage on Parcel 1 and Parcel 10 depends on their property and/or contractual rights under state law, which will be determined by the court. The Board further found that there are no other shippers on the Line and that V&S has not shown that its common carrier operations are being, or may be, unduly interfered with. Consequently, the Board properly concluded that HSC/HTC may continue to perform private carriage on those portions of the Line that they own or have a right to use under state law, as long as their operations continue to refrain from unduly interfering with V&S' common carrier operations. We do not find any material error in the Board's finding regarding HSC/HTC's conducting private carriage over Parcel 1 and Parcel 10.

²² Pet. at 11-12. V&S also argues that "the Board committed material error in failing to acknowledge that HN at no time was a private track." Pet. at 10. No such acknowledgement is necessary. The July 12 Decision specifically holds that "[t]he entire Line was operated by HN as a line of railroad as authorized by the ICC in 1926. The Board is not aware of any abandonment having been authorized by the ICC or the Board for any portion of the Line. Therefore, the entire Line, including any portion of the Line that traverses Parcel 1 and Parcel 10, remains a line of railroad subject to Board jurisdiction." July 12 Decision, slip op. at 14. We do not find any material error in the Board's statements regarding HN's status as a line of railroad.

²³ Pet. at 12.

²⁴ In support of its argument that the Board's decision essentially grants nonconsensual overhead trackage rights to shippers, V&S cites Tap Line Case, 23 I.C.C. 549, 550 (1912). We find no relevance in the cited precedent, which dealt with unlawful privileges given to certain shippers. V&S also questions whether the Board should have consulted with the Federal Railroad Administration (FRA) to determine whether the tracks, personnel, and locomotives are in compliance with federal safety regulations and suggests that the Board overlooked industry

(continued . . .)

For these reasons, we find no material error in our July 12 Decision and therefore deny V&S' request for reconsideration.

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

It is ordered:

1. V&S' Petition for Reconsideration is denied.
2. This decision is effective on its service date.
3. A copy of this decision will be served on:

The Honorable Monti L. Belot
United States Senior District Judge
United States District Court for the District of Kansas
U.S. Courthouse
401 North Market Street, Suite 111
Wichita, KS 67202

By the Board, Chairman Elliott and Vice Chairman Begeman.

(. . . continued)

practice regarding operator training. As V&S acknowledges, Petition at 13, the safety issues it raises are subject to the primary authority of the FRA. V&S is free to raise these issues with the FRA but resolution of safety issues is not necessary for the Board to address the claims raised in the Petition for Declaratory Order. We find no material error.

²⁵ July 12 Decision, slip op. at 12.