DOCKET NO. AB-167 (SUB-NO. 1094)A

CHELSEA PROPERTY OWNERS
— ABANDONMENT —
PORTION OF THE CONSOLIDATED RAIL CORPORATION'S
WEST 30TH STREET SECONDARY TRACK IN NEW YORK, NY

Decided July 8, 1999

This decision denies a motion for the issuance of a certificate of abandonment and for an order requiring consummation of abandonment.

BY THE BOARD:

BACKGROUND

In a decision served in this proceeding on September 16, 1992,[1] the Interstate Commerce Commission (ICC) authorized the abandonment of a 1.45-mile rail line (hereafter, the Highline) owned by Consolidated Rail Corporation (Conrail) in the Borough of Manhattan, NY, subject to conditions.[2] The application underlying the proceeding was an "adverse abandonment" application filed by the Chelsea Property Owners (CPO), a group seeking to develop real estate in New York City. CPO asked the ICC to authorize abandonment in order to remove plenary Federal jurisdiction over the rail line.

Conrail operated over the Highline viaduct pursuant to an easement whose termination terms require Conrail to absorb the cost of demolishing the viaduct. An abandonment constitutes termination under the easement. Based on CPO's representation that demolition expenses would not exceed $7 million, the ICC made its abandonment authorization subject to the condition that CPO indemnify Conrail for all demolition costs in excess of $7 million by posting "an appropriate surety bond or similar security" to ensure payment. *Chelsea* at pages 792 and 794. On judicial review in *Conrail*, the court upheld the ICC's grant of adverse

[1] The decision is reported in *Chelsea Property Owners — Aban. — The Consol. R. Corp.*, 8 I.C.C.2d 773 (1992) (*Chelsea*), *aff'd sub nom. Consolidated Rail Corp. v. ICC*, 29 F.3d 706 (D.C. Cir. 1994) (*Conrail*).

[2] The line, which runs along an elevated viaduct between 34th Street and Gansevoort Street, is a segment of Conrail's West 30th Street Secondary Track, known as the Highline.

abandonment authority and found that the ICC's imposition of the surety bond condition was proper.

On February 3, 1999, CPO filed a motion asking us to issue a certificate of abandonment in this case. CPO also asked for an order requiring Conrail and CSX Corporation to consummate the abandonment.[3] On February 23 and 24, 1999, respectively, Elizabeth Bradford, General Counsel of the New York Convention Center Development Corporation (NYCCDC), and John F. Guinan, Assistant Commissioner for Passenger and Freight Transportation of the New York State Department of Transportation (NYSDOT), filed verified statements in support of CPO's motion. CSX Corporation and CSX Transportation, Inc. (hereafter, collectively, CSX) and Conrail filed reply statements on February 23, 1999.

On March 29, 1999, the City of New York (the City) filed a request for leave to late-file a statement, accompanied by a verified statement of Henry D. Perahia, Chief Engineer of the New York City Department of Transportation, in support of the CPO motion. On April 6, 1999, Conrail and CSX filed separate responses in opposition to the City's submission. On April 16, 1999, Anthony P. Semancik, Deputy General Counsel for the Metropolitan Transportation Authority of the State of New York (MTA) requested permission to late-file a verified statement in support of the CPO motion and the City's abeyance request. On April 16 and April 19, 1999, Conrail and CSX, respectively, replied in opposition to the MTA submission. Also on April 19, CPO filed a reply in support of the City's motion.[4] In view of the City's and MTA's interest, and because consideration of their pleadings will not delay our disposition of this proceeding, the submissions will be accepted into the record and considered.

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[3] The Highline is an asset that will be operated by CSX Transportation, Inc., pursuant to the Board's decision in *CSX Corp. et al. — Control — Conrail Inc. et al.*, 3 S.T.B. 196 (1998).

[4] On May 7, 1999, CPO tendered a pleading styled a "status report." On May 12, 1999, CSX and Conrail replied. In the pleading, CPO presents evidence that, as a result of a civil suit against Conrail and CSX for 63 violations of building codes, the railroads entered into a stipulation with the City and Edison Properties, LLC (Edison), requiring Conrail and CSX to take protective and remedial action. This information regarding safety concerns does not implicate the Board's jurisdiction and is not relevant to the issue before us. CPO also presents a supplemental statement by Edison's president in which he: (1) expresses his opinion regarding potential liability for violations of environmental laws, and (2) indicates CPO's willingness to assist Conrail in obtaining releases from the owners of property under portions of the Highline that pass through or over buildings. The statement sheds some additional light on, but does not serve to resolve, the issues before the Board.

POSITIONS OF THE PARTIES

CPO states that the Highline has remained in place since the ICC issued its decision because, until now, no party has tendered the bond that was a condition precedent to the issuance of an abandonment certificate. CPO indicates that Edison, the parent of CPO member Manhattan Mini Storage, is now actively pursuing redevelopment of the Manhattan Mini Storage property and has tendered an appropriate indemnity to Conrail/CSX. Specifically, Edison has tendered the railroads a contract signed by Seasons Contracting Corporation, a bonded demolition contractor ready, willing, and able to demolish the Highline for less than $7 million. According to CPO, once Conrail and/or CSX signs the demolition contract, Edison will indemnify the railroads against any expenses for the contracted-for demolition work that exceed $7 million, subject only to final approval by Liberty Mutual Insurance Company, which has agreed to provide Edison with a bond insuring any obligations it may be required to pay under its indemnity.

CPO has submitted copies of a draft indemnity bond and its proposed demolition contract. CPO states that the demolition contract is identical in all material respects to Conrail's standard form demolition contract, amended only to remove certain clauses that would be inconsistent with the fact that the ICC has ordered Conrail to abandon, and be liable to demolish, the line so long as the bond is provided. CPO asserts that the scope of the demolition work under the contract is the same as that covered by CPO's original indemnification offer to Conrail, which the ICC incorporated into its 1992 decision, *i.e.*, it excludes portions of the Highline that pass over or through several buildings. CPO sees no reason why Conrail/CSX should refuse to employ the contractor that has been procured and that has agreed to perform the work for less than $7 million. Accordingly, CPO requests the Board to issue a certificate of abandonment and to order Conrail and/or CSX to consummate the abandonment by signing the proffered demolition contract and proceeding to demolish the Highline.

NYCCDC owns the property occupied by the Jacob K. Javits Convention Center, as well as certain adjacent property that is used for employee parking and as a marshalling yard. A portion of the Highline occupies the NYCCDC property adjacent to the Convention Center. NYCCDC complains that the Highline's presence seriously limits the Convention Center's use of the adjacent property and causes increased expense for show organizers and exhibitors as well as parking congestion. NYSDOT asserts that the Highline has no transportation potential, is dilapidated, constitutes an eyesore, and should be removed.

The City complains that the Highline remains in a dilapidated condition and is a serious safety hazard. The City asserts that, despite Conrail's efforts to address problems on a case-by-case basis, the falling of concrete, corroded steel, and other loose material from the Highline continues to pose a safety problem for nearby property owners and for the general public. The City proposes that the Board hold CPO's motion in abeyance for 60 days and order the parties to engage in non-binding negotiations during that period in an effort to resolve the situation. MTA also has safety concerns and claims that the continued existence of the Highline prevents it from fully utilizing its property.

Conrail replies, first, that CPO has not met the ICC's indemnity condition. The railroad argues that CPO has not submitted the required unconditional surety bond but simply has filed a demolition contract with a contractor of CPO's own choosing, a letter of undertaking from a bond services company to act as a surety, and an unsigned form indemnity bond. Conrail contends further that CPO's proffered indemnity is insufficient in any event because it contains exclusions not permitted by the ICC's 1992 decision.

Conrail notes that, according to the tendered demolition contract and CPO's arguments, demolition of portions of the Highline that pass over or through several buildings is excluded. In addition, according to a letter from the president of Edison to Conrail and CSX appended to CPO's motion, the agreement to indemnify does not cover "any expense for complying with any environmental or other laws."[5] The railroad points out that the ICC's indemnification condition did not contain the stated exclusions, and that, moreover, CPO unsuccessfully sought on appeal to have the condition overturned because it did not contain the very exclusions CPO now includes in its indemnity proffer. Conrail asserts that there is no logical or legal justification for the exclusions. Further, it queries how much it would cost to remove the entire Highline, what engineering and safety issues would arise if portions of the Highline were left intact, and who would own and bear the responsibility for maintaining portions of the line left standing.

Finally, Conrail specifically states that it is fully prepared to abide by the ICC's 1992 decision. At the same time, CSX urges that the expenses and liabilities required to be borne by Conrail and, accordingly, indirectly in part by CSX, be strictly limited to the $7 million contemplated by the 1992 decision.

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[5] Conrail notes also that the draft indemnity bond contains a provision that appears to limit the amount of the bond. Whereas the opening paragraph of the bond binds the surety to "an open amount," paragraph 1 of page 2 indicates that the obligation of the surety shall not exceed the "aggregate amount herein stated." It is unclear what, if any, aggregate amount is referenced.

CSX supports the positions Conrail takes in its reply, that the proposed bonding arrangements, which are ambiguous and subject to numerous material exceptions and areas of noncoverage, are clearly not responsive to the 1992 decision. If a proper bond, fully responsive to that decision, were provided by a bonding company of satisfactory responsibility, CSX asserts, the railroad would not object to the issuance of a certificate of abandonment.

In response to the submissions by the City and MTA, Conrail and CSX generally argue that: (1) the cited safety concerns are unfounded and not germane to this proceeding; and (2) holding the proceeding in abeyance would serve no useful purpose and could actually harm the parties by depriving them of the Board's views on the indemnification issue.

DISCUSSION AND CONCLUSIONS

The key issue before us here is whether CPO has satisfied the indemnification condition that the ICC placed on the abandonment authorization in this proceeding. The subject condition requires CPO to post "an appropriate surety bond or similar security to ensure payment of any demolition costs exceeding $7 million." *Chelsea* at 792. Our review of the record leads us to conclude that the documents submitted by CPO here do not satisfy that condition. Accordingly, we will deny CPO's motion.

The determinative factor here is that CPO would exclude indemnification for: (1) the costs of removing portions of the Highline that pass over or through buildings; and (2) "any expense for complying with any environmental or other laws." The ICC's condition is unconditional, unequivocal, and without limitation. No reason appears why an indemnification commitment subject to both definite, substantial exclusions and indefinite, potentially substantial exclusions should be deemed sufficient to satisfy the condition. In addition, we note that the owners of the property over and through which the viaduct passes have not appeared here to express their approval of CPO's proposal that portions of the structure be left undemolished.

In light of our findings above, we need not address CPO's requested orders and the related jurisdictional arguments. Furthermore, while we see no reason to hold this decision in abeyance or to order the parties to engage in non-binding negotiations, as the City has suggested, we do expect that the parties will continue to negotiate and that our decision here will serve as both guidance and incentive for negotiations.

A final matter requires comment. Following revisions to the law enacted in the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, certificates

of abandonment no longer are issued when abandonments are authorized.[6] Consistent with the new law, once we find that CPO has satisfied the indemnification condition, we will simply state that the abandonment may be consummated.

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

It is ordered:

1. The City and MTA requests for leave to late-file statements are granted.
2. The Chelsea Property Owners' motion is denied.
3. This decision is effective on August 13, 1999.

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes.

[6] *See*, 49 U.S.C. 10903(d) and (e).