

SERVICE DATE – JANUARY 6, 2020

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36308

HOLLAND PARK OWNER, LLC—PETITION FOR DECLARATORY ORDER

Digest:¹ This decision denies in part a petition for declaratory order filed by Holland Park Owner, LLC, and directs Consolidated Rail Corporation to provide supplemental information.

Decided: January 2, 2020

Holland Park Owner, LLC (Holland Park) has filed a petition for declaratory order asking the Board to clarify the status of track that, in the past, may have crossed property owned by Holland Park in Jersey City, N.J. (the Property), over which Consolidated Rail Corporation (Conrail) holds, or at one time held, an easement. As explained further below, the Board denies the petition in part and directs Conrail to file supplemental information in order for the Board to determine whether it has jurisdiction to issue the declaratory order sought by Holland Park.

BACKGROUND

According to Holland Park, between 1976 and 1979, the Property was the subject of a series of transactions that resulted in Conrail holding an easement over the Property for freight rail purposes. (Pet. 3-4.) Holland Park states that there has been no track on the Property at least since 2012 when Holland Park purchased the Property and that, in 2002, Conrail obtained abandonment authority for and consummated the abandonment of the only rail line that could connect any track on the Property to the interstate rail network. (*Id.* at 1, 6-7.) In addition, Holland Park states that, to the best of its knowledge, Conrail never engaged in rail service on the Property. (*Id.* at 1.) Holland Park argues that any track that may have been located on the Property in the past was excepted track under 49 U.S.C. § 10906. (*Id.* at 10.) Holland Park asks that the Board find that Conrail has abandoned its easement or abandoned the right to provide service over the Property and that the Board's jurisdiction over such track has terminated. (*Id.* at 2, 11-12.)

On August 19, 2019, Conrail filed a reply. Conrail states that its original easement rights on the Property were granted pursuant to the Final System Plan (FSP) and an order issued by the

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).

Special Court pursuant to 45 U.S.C. § 719 (the Conveyance Order).² (Conrail Reply 4, Aug. 19, 2019.) Conrail claims that under 45 U.S.C. § 719(e)(2), the United States District Court for the District of Columbia (District Court), as successor to the Special Court, “has original and exclusive jurisdiction over ‘any action . . . to interpret, alter, amend, modify, or implement’ any Special Court order to convey property included in the FSP.” (*Id.* (quoting 45 U.S.C. § 719(e)(2)).) According to Conrail, the Board lacks jurisdiction here because Holland Park has asked the Board to find that Conrail has abandoned its easement rights, and such a finding would necessarily alter, amend, and modify the Conveyance Order and require the Board to interpret the FSP. (*Id.* at 4-5.) Conrail cites as support Conrail v. STB, 571 F.3d at 19, in which the court held that the Board lacked jurisdiction to determine whether certain track constituted a rail line under 49 U.S.C. § 10901 or excepted track under § 10906 because that determination raised substantial questions regarding the interpretation of the FSP and the conveyance order at issue in that case. (Conrail Reply 5, Aug. 19, 2019.) Conrail further claims that even if the Property were not included in the FSP, an exercise of Board jurisdiction here would be inappropriate because the petition requires the Board to address issues of state property law, which the Board has consistently held should be decided by the courts. (*Id.* at 7.) Conrail argues that Holland Park attempts to avoid the property law issues by focusing only on the track rights under the easement. (*Id.* at 8.) However, according to Conrail, even if the easement were limited to track rights, the District Court would have exclusive jurisdiction as established by Conrail v. STB. (*Id.*) Finally, Conrail claims that even if the Board had jurisdiction, it could not grant the requested relief because Holland Park has failed to present sufficient evidence to prove that Conrail has abandoned its non-track-related rights under the easement. (*Id.* at 8-9.)

On August 30, 2019, Holland Park filed a surreply to Conrail’s reply and a motion for leave to file. Holland Park argues that Conrail has misstated the relief Holland Park seeks. (Holland Park Surreply 2.) Specifically, Holland Park claims that Conrail has inaccurately asserted that the petition asks the Board to determine the scope or validity of the easement or whether the easement has been abandoned. (*Id.* at 4.) Holland Park explains that what the petition actually seeks is a determination that the Board “lacks jurisdiction over any track that may have formerly crossed the Property.” (*Id.* at 2.) However, Holland Park also states that its petition seeks a determination that “Conrail has abandoned the freight easement,” and that Conrail’s “right to provide freight service subject to the jurisdiction of the STB has been terminated.” (*Id.* at 2-3.) Holland Park also argues that Conrail v. STB is inapposite. According to Holland Park, the court in that case found that the Board lacked jurisdiction because it involved a question of whether the track at issue was conveyed to Conrail as rail line under the

² Congress passed the Regional Rail Reorganization Act of 1973 (3R Act), Pub. L. No. 93-236, 87 Stat. 985 (1974) (codified as amended at 45 U.S.C. §§ 701-793), to reorganize the assets of various financially distressed railroads. Consol. Rail Corp. v. STB (Conrail v. STB), 571 F.3d 13, 14 (D.C. Cir. 2009). The 3R Act established the United States Railway Association (USRA) to carry out the reorganization and created Conrail to own and operate the reorganized rail assets. *Id.* In July 1975, the USRA published the FSP designating the rail properties to be transferred to Conrail. *Id.* at 15. In March 1976, a United States district court, known as the “Special Court,” issued orders conveying to Conrail the rail properties designated for transfer in the FSP. *Id.*

FSP. (*Id.* at 3-4.) Holland Park argues that in this case, it has not asked, and the Board need not determine, whether the trackage was conveyed to Conrail as rail line under the FSP. (*Id.* at 4.)

On September 10, 2019, Conrail filed a reply to Holland Park's surreply,³ in which it argues that even as clarified by Holland Park's surreply, the petition requests relief that only the District Court has jurisdiction to provide. (Conrail Surreply 3.) Conrail claims that Holland Park is asking the Board to determine whether Conrail's right to provide freight service subject to Board jurisdiction on the Property has been terminated. (*Id.*) According to Conrail, such a determination would necessarily alter, amend, and modify the Conveyance Order. (*Id.* at 4.) Conrail also argues that the relief requested by Holland Park would require the Board to interpret the Conveyance Order and the FSP in order to define the easement rights that Conrail has purportedly abandoned and to determine whether the track at issue was conveyed "as part of Conrail's railroad lines" or as excepted spur track. (*Id.* at 4-5.)

DISCUSSION AND CONCLUSIONS

Under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321, the Board may issue a declaratory order to terminate a controversy or to remove uncertainty. The Board has broad discretion to determine 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).

Holland Park's request for relief is not consistently stated throughout its pleadings. In some instances, it asks the Board to find that it lacks jurisdiction over any track that may have existed on the Property, but in other instances, it asks the Board to find that Conrail has abandoned its easement or that Conrail's right to provide rail service over the Property has been terminated. To the extent that Holland Park is asking the Board to determine that the easement or Conrail's property rights to provide service over the Property have been terminated, Holland Park's petition will be denied. The determination of the scope of the easement and whether the easement still exists would involve questions of state property law and is the type of issue best left to the courts. *See, e.g., Ohio River Partners, LLC—Acquis. & Operation Exemption—Hannibal Dev., LLC*, FD 35984, slip op. at 3 (STB served Apr. 1, 2016) (stating that a dispute regarding whether an easement was exclusive should be resolved by a court rather than the Board); *Allegheny Valley R.R.—Pet. for Declaratory Order—Fiore*, FD 35388, slip op. at 3 (STB served Apr. 25, 2011) ("[T]he size and extent of a railroad easement is a matter of state property law and best addressed by state courts.").

Additionally, for the reasons explained below, the Board finds that it requires additional information from Conrail with respect to Holland Park's request for an order that the Board lacks jurisdiction over any track that may have existed on the Property. The answer to that jurisdictional question depends, at least initially, on the nature of the track. If the track were rail

³ While the Board's regulations do not generally permit "replies to replies," 49 C.F.R. § 1104.13(c), in the interest of having a more complete record, the Board will accept Holland Park's August 30 surreply and Conrail's September 10 surreply.

line under § 10901, the Board retains jurisdiction.⁴ If the track were § 10906 excepted track, the key factor in determining whether the Board's jurisdiction over it has terminated is whether Conrail exhibited a continuing intent to provide common carrier service to the public on that track. Pinelawn Cemetery—Pet. for Declaratory Order, FD 35468, slip op. at 10 (STB served Apr. 21, 2015).⁵

However, based on the current record, it is not clear whether the Board has the power to resolve the issue of the nature of the track. In Conrail v. STB, the court explained that the Board lacks the power to determine the nature of track where an interpretation of the FSP or of a conveyance order of the Special Court is required. 571 F.3d. at 19. In that case, Conrail had removed track from certain property in Jersey City and sold the property to developers. Id. at 17. Third parties then sought and obtained a declaratory order from the Board finding that the track was rail line and therefore could not be abandoned without Board authority. Id. The Board's determination was based on a finding that the FSP designated the track at issue as a "rail line." Id. at 19. On appeal, the court found that because the Board's determination regarding the nature of the track required an interpretation of the FSP, the Board's declaratory order was issued outside of its jurisdiction. Id. at 19-20. However, the court also explained that the Board does not always lack jurisdiction to determine that nature of track that was part of the FSP or the subject of a conveyance order of the Special Court. It stated:

In abandonment proceedings in which the Board's authority is not disputed based on the nature of the trackage, . . . the issue of the track's nature would presumably not arise. In other proceedings, the nature of the trackage may be contested but

⁴ If track previously located on the Property were rail line under § 10901, it would still be subject to the Board's jurisdiction, even though it has since been removed, because abandonment authority has never been obtained for such rail line. See Chelsea Prop. Owners—Aban.—Portion of the Consol. Rail Corp.'s W. 30th St. Secondary Track in New York, N.Y., 8 I.C.C.2d 773, 790-91 (1992), aff'd sub nom. Consol. Rail Corp. v. ICC, 29 F.3d 706 (D.C. Cir. 1994) (rail line remains within the Board's jurisdiction unless Board abandonment authority is obtained even if the rail line has not been used for many years or has been removed).

⁵ As noted above, in this case, Holland Park states that there has been no actual track on the property since at least 2012 and that, in 2002, Conrail obtained abandonment authority for and consummated the abandonment of the only rail line that could connect any track on the Property to the interstate rail network. In addition, Holland Park states that, to the best of its knowledge, Conrail never engaged in rail service on the Property. Conrail has not disputed these claims. Thus, the record as it currently stands suggests that Conrail has not exhibited a continuing intent to provide common carrier service using the track at issue, and the track would therefore no longer be subject to Board jurisdiction if it were § 10906 excepted track. Cf. JGB Prop., LLC—Pet. for Declaratory Order, FD 35817 (STB served May 22, 2015) (finding that if the track at issue was § 10906 excepted track the Board maintained jurisdiction over the track despite its removal where the record demonstrated carrier and shipper interest in rehabilitating track and restoring service); Pinelawn Cemetery, FD 35648, slip op. at 8, 10-11 (finding that the Board retained jurisdiction over § 10906 excepted track where the carrier continued to provide service over the track after its lease inadvertently expired and the carrier renewed its lease on adjacent track that could only be reached via the track at issue).

resolution of the issue would not require interpretation of the FSP or the Special Court's conveyance orders and thus would not implicate the Special Court's (now district court's) exclusive jurisdiction. Only in proceedings in which the Board's authority is challenged and an interpretation of the FSP or the Special Court's conveyance order under 45 U.S.C. § 719(e)(2) is required does the Board lack jurisdiction to resolve the question of the nature of the trackage sought to be abandoned.

Id. at 20 (citations omitted).

Thus, the Board lacks jurisdiction here only if Conrail disputes Holland Park's claim that any track located on the Property was § 10906 excepted track and if resolving that dispute would require an interpretation of the FSP or the Conveyance Order.⁶ However, Conrail's position on these issues is not clear from its pleadings.⁷ Nor is Conrail's position clear on whether, if the track were § 10906 excepted track, the Board retains jurisdiction over it. Therefore, Conrail will be directed to file supplemental information explaining whether it claims that the track that may have crossed the Property was a rail line governed by § 10901. If Conrail's position is that the track was a rail line governed by § 10901, it should explain whether that determination of the track's status requires an interpretation of the FSP, the Conveyance Order, or both. If so, Conrail should submit any relevant portions thereof and explain their significance. If not, Conrail should explain the basis of the claim that the track is rail line governed by § 10901 and submit any evidence *independent of* the FSP or Conveyance Order that supports its position. If Conrail's position is that the track was not a rail line governed by § 10901, it should submit any arguments and evidence it believes are relevant to determining whether the Board maintains jurisdiction over the track.

Conrail must provide this supplemental information by February 5, 2020. Comments in response will be due by February 20, 2020. If Conrail establishes that an interpretation of the FSP or the Conveyance Order is necessary to determine the nature of the track, the Board will

⁶ Conrail has argued that if the Board finds that Conrail has abandoned its easement rights or the right to provide service over the property, such a finding would alter, amend, or modify the Conveyance Order or require an interpretation of the Conveyance Order or FSP and is therefore outside of the Board's jurisdiction. (Conrail Reply 4-5; Conrail Surreply 4.). This argument focuses on Conrail's property rights under the easement and, as explained above, the Board will not issue an order regarding the scope of Conrail's easement or whether the easement still exists.

⁷ Conrail does claim that deciding whether the track is rail line governed by § 10901 or is § 10906 excepted track would require the Board to "to first determine whether the track rights were conveyed by the FSP as part of Conrail's railroad lines." (Conrail Surreply at 5.) However, it is not clear whether Conrail believes, contrary to the court's holding in Conrail v. STB, that such a determination is always required to determine the nature of track subject to the FSP, or if Conrail believes such a determination is necessary in this particular case because it disputes Holland Park's claim that the track is § 10906 excepted track and believes the FSP supports its position.

not address that dispute. Rather, that question would have to be resolved by the Special Court. Conrail v. STB, 571 F.3d at 19-20.

It is ordered:

1. Holland Park's surreply is accepted into the record.
2. Conrail's surreply is accepted into the record.
3. To the extent Holland Park seeks a declaratory order as to the scope or ongoing existence of Conrail's easement over the Property, the petition for declaratory order is denied.
4. Conrail is directed to file, by February 5, 2020, the supplemental information described above.
5. Comments on the supplemental information provided by Conrail are due by February 20, 2020.
6. This decision is effective on its date of service.

By the Board, Board Members Begeman, Fuchs, and Oberman.