

SERVICE DATE – AUGUST 17, 2020

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36380

ATLAS LAND AND BUILDING CORPORATION AND ATLAS MATERIALS
RECYCLING CORPORATION—PETITION FOR DECLARATORY ORDER—
INDUSTRY SPUR TRACK IN PITTSBURGH, PA

Digest:¹ The Board holds this docket in abeyance pending the outcome of related court litigation and orders periodic status reports.

Decided: August 17, 2020

On February 11, 2020, Atlas Land and Building Corporation (Atlas Land) and Atlas Materials Recycling Corporation (collectively, Atlas) petitioned the Board for a declaratory order removing the Board's jurisdiction over an approximately 400-foot stub-ended section of track (the Easement Track) that previously served a warehouse on property owned by Atlas in Pittsburgh, Pa. (Pet. 1-2.) Atlas closed the warehouse in November 2017 and is seeking to complete the sale of the property to a buyer for residential development. (Id.)

The property is subject to an easement deeded to CSX Transportation, Inc. (CSXT), which had used the Easement Track to provide rail service to the Atlas warehouse. (Id. at 2, 4 & Ex. D (easement deed).) Atlas contends that the Easement Track has not been needed for any legitimate freight rail purpose since the warehouse closed in November 2017 because Atlas was the only shipper that could be served by this track and the redeveloped property will not require rail service. (Pet. 1-3.) Concurrently with the petition, Atlas initiated a proceeding in state court seeking a declaration that the easement has terminated under state law, along with other relief. (Id. at 6-7.) That proceeding has since been removed to federal court.²

On March 16, 2020, CSXT replied to the petition, arguing that the Board should dismiss the petition without prejudice as premature and potentially unnecessary, or, in the alternative, hold the proceeding in abeyance pending a decision from the court. (CSXT Reply 5-6, 12-16, 19, Mar. 16, 2020.) CSXT contends that, if the Board proceeds to address the merits, it should

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 See Atlas Land & Building Corp. v. CSX Transp., Inc., No. 2:20-CV-00366-CRE (W.D. Pa.).

find that the Easement Track remains within the Board's jurisdiction and that CSXT has a continuing need for the Easement Track to support its interstate rail operations. (Id. at 6, 17-19.)

As discussed below, resolution of the state property law dispute concerning the easement in the related court proceeding could impact the issues raised in the petition. Accordingly, the Board will hold this docket in abeyance pending resolution of the court case and will order periodic status reports.

BACKGROUND

The Easement Track is the last 400 feet of an approximately 1,600-foot track connected to CSXT's mainline in Pittsburgh, Pa. (Pet. 3 & n.4.) Atlas states that the Easement Track is located on property that Atlas Land purchased in 1993 subject to an easement deed to which CSXT is now the successor in interest. (Id. at 4 & Ex. D.) According to the petition, Atlas was the only customer served by the Easement Track from the time Atlas began operations at that location in 1948 through the closing of its warehouse in 2017. (Pet. 3-4.) Atlas states that in mid-2019, when it requested that CSXT remove the track and confirm that the easement had terminated by its terms through lack of use, CSXT refused to do so, advised Atlas that the easement continued to be used for freight rail purposes, and began parking maintenance-of-way (MOW) equipment on the Easement Track. (Id. at 2, 5-6 & Ex. E (CSXT June 11, 2019 email).) Atlas asserts that the Easement Track is ancillary track (also known as excepted track) governed by 49 U.S.C. § 10906, over which the Board has exclusive jurisdiction but lacks licensing authority. (Pet. 7-11.) Atlas contends that the Board should remove its jurisdiction because the Easement Track is no longer needed for freight rail transportation services, CSXT's alleged failure to use or maintain the Easement Track for 18 months after the warehouse closed indicates that it is not needed to support CSXT's operations, and CSXT's later use of the Easement Track and adjacent property to store MOW equipment is pretextual. (Id. at 15-19.)

CSXT opposes the petition on two grounds. First, CSXT argues that, given the broad easement language granting it the right to "continued placement, usage and maintenance" of the track in question, CSXT will likely prevail on the state property law claims in the court proceeding. (CSXT Reply 5, Mar. 16, 2020.)³ CSXT contends that, because a court ruling in favor of CSXT would moot Atlas's petition for declaratory order, the Board should deny the petition without prejudice as premature and potentially unnecessary, or, in the alternative, hold the docket in abeyance pending a decision from the court. (Id. at 5-6, 12-16.) Second, CSXT asserts that, if the Board chooses to address the merits now, it should find that the Easement Track is needed for CSXT's continued interstate rail operations and therefore remains within the Board's jurisdiction. (Id. at 6, 17-19.) CSXT disputes Atlas's contention that CSXT did not use

³ CSXT also states that it does not concede at this time that the track qualifies as ancillary track under § 10906. (CSXT Reply 6, Mar. 16, 2020.)

the Easement Track to support maintenance activities before Atlas asked CSXT to abandon its easement rights in 2019, and asserts that the 1600-foot long track, which includes the Easement Track, is the most efficient location to stage equipment for system-level maintenance work in that vicinity. (*Id.* at 2-4, 17-19, V.S. Suedhoff 4-6.)

On April 6, 2020, Atlas filed a surreply and a related petition for leave to file. The April 6, 2020 surreply asserts that there is no basis to delay or deny a ruling on the petition for a declaratory order; reiterates the request for an order removing the Board's jurisdiction; and includes a joint verified statement by Atlas personnel regarding their observations of CSXT's use of the Easement Track. (Atlas Surreply 2-9, J.V.S. Parker/Farber.)

CSXT replied to Atlas's petition for leave to file a surreply on April 27, 2020. As pertinent here, CSXT states that the concurrent court litigation addressing Atlas's state law claims is progressing, (CSXT Reply 8-9, Apr. 27, 2020); asserts that the Board should not open a declaratory order proceeding until "it is clear that the Board's views are needed," (*id.* at 13); and argues, in the event the Board reaches the merits, that the Board should find that the Easement Track is needed for CSXT's continued interstate rail operations and therefore remains within the Board's jurisdiction, (*id.* at 17).⁴

DISCUSSION AND CONCLUSIONS

The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321 to issue a declaratory order to eliminate controversy or remove uncertainty. See Bos. & Me. Corp. v. Town of Ayer, 330 F.3d 12, 14 n.2 (1st Cir. 2003); Intercity Transp. Co. v. United States, 737 F.2d 103 (D.C. Cir. 1984); Delegation of Auth.—Declaratory Order Proc., 5 I.C.C.2d 675 (1989). For the reasons explained below, the Board will hold this docket in abeyance pending the outcome of the related court litigation.

Atlas seeks a declaration removing the Board's jurisdiction over the Easement Track because, it contends, the track in question "has not been needed for any legitimate freight rail purpose for more than two years, and the intended future use of the Atlas Property will not require any rail service." (Pet. 3.) However, Atlas recognizes that it must succeed on its state law claims concerning CSXT's easement rights in the concurrent court proceeding before it can proceed with the sale of the property. (*Id.* at 7.) Atlas states that it anticipates the court will be able to resolve all disputes relating to the termination of CSXT's easement rights and does not seek the Board's involvement in those issues. (*Id.*) CSXT notes, and Atlas does not dispute, that resolution of the state property law issues may eliminate the need for a declaratory order

⁴ While the Board's regulations do not generally permit "replies to replies," 49 C.F.R. § 1104.13(c), the Board will accept Atlas's April 6, 2020 surreply and CSXT's April 27, 2020 reply, in the interest of having a more complete record.

proceeding. (CSXT Reply 5, Mar. 16, 2020; CSXT Reply 8, 10-11, Apr. 27, 2020.) According to CSXT, litigation of the state property law issues is progressing and the parties have conferred regarding the submission of a joint case management report setting forth proposed deadlines for mediation and discovery. (CSXT Reply 3, 8, Apr. 27, 2020.)

In these circumstances, the Board finds that holding this docket in abeyance is the most appropriate course. In deciding whether to hold a case in abeyance, the Board considers whether abeyance would promote efficiency and whether it would be fundamentally unfair to any party. E.g., N. Am. Freight Car Ass'n v. Union Pac. R.R., NOR 42144 et al., slip op. at 3 (STB served Mar. 31, 2017). The Board has broad discretion to determine whether to take such procedural actions, and its decision to do so in any particular situation is highly dependent on the facts and circumstances of the case. Id.

Here, abeyance will promote efficiency because resolution of the parties' state property law disputes could moot the need for a declaratory order or, at least, inform the Board's analysis of issues pertinent to the petition. If the court finds that CSXT's easement continues in effect, CSXT would be entitled to continue to use the Easement Track according to the terms of the easement and the need for a declaratory order from the Board would be obviated (because even if the Board removed its jurisdiction over the Easement Track, CSXT would still be allowed to use the track under state law). Accord Great Walton R.R.—Pet. for Declaratory Order, AB 1242 (Sub-No. 1), slip op. at 11-12 (STB served June 9, 2020), corrected (STB served June 23, 2020) (holding docket in abeyance pending resolution of state property law issues that may impact the need to determine whether excepted track remains part of the interstate rail system).⁵ At the same time, if the court finds that the easement does not continue in effect, the information and evidence pertaining to such a determination could provide context for important issues, such as whether CSXT exhibited a "fixed and continuing intent" to use the Easement Track after rail service to the Atlas warehouse ceased in 2017. See generally Pinelawn Cemetery—Pet. for Declaratory Order, FD 35468, slip op. at 10-11 (STB served Apr. 21, 2015).

Abeyance will not be fundamentally unfair to either party here because Atlas initiated the court proceeding concerning the resolution of the state property law questions, that litigation is proceeding, and the completion of that litigation may allow for a more expeditious resolution of

⁵ Atlas's reliance on Port of Benton County, Wash.—Adverse Discontinuance of Rail Service—Tri-City Railroad, AB 1270 (STB served Oct. 31, 2019), as an "analogous case," (Atlas Surreply 2-3), is not persuasive. Port of Benton involved discontinuance of one carrier's operating authority over a line served by three carriers (rather than removal of assets from the interstate rail network), and the decision focused on issues relating to the adequacy and continuing availability of rail service (not the status of ancillary track). See Port of Benton, AB 1270, slip op. at 5-6 (noting that "this is not a case in which a property owner is seeking to oust a railroad to put the property to a non-rail use").

issues at the Board, if such action is ultimately necessary. Accordingly, the Board will hold this docket in abeyance pending judicial resolution of the parties' state property law dispute. To ensure that it remains informed about the progress of that litigation, the Board will direct the parties to submit status reports (jointly, if possible) every six months, with the first report due on February 17, 2021, and to submit any merits decision by the court within 10 days of its issuance.

It is ordered:

1. Atlas's petition for leave to file a surreply is granted. Atlas's surreply and CSXT's April 27, 2020 reply thereto are accepted into the record.
2. This docket is held in abeyance.
3. The parties are directed to submit status reports (jointly, if possible) every six months, with the first report due on February 17, 2021, describing the status of the court litigation, and to submit any merits decision by the court within 10 days of its issuance.
4. This decision is effective on the date of service.

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