

SERVICE DATE – JUNE 11, 2021

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36467

NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION ON BEHALF OF THE
CITY OF NEW YORK—PETITION FOR DECLARATORY ORDER

Digest:¹ This decision concludes that certain tracks owned by the City of New York in Brooklyn, N.Y., are governed by 49 U.S.C. § 10906. In the absence of a dispute regarding the tracks, the Board finds it need not decide whether the tracks have been abandoned.

Decided: June 10, 2021

On February 5, 2021, the New York City Economic Development Corporation (NYCEDC) on behalf of the City of New York (the City) filed a petition for declaratory order, asking the Board to find that certain tracks owned by the City in Brooklyn, N.Y., are governed by 49 U.S.C. § 10906 and that they have been abandoned. No comments were filed in response to the petition. For the reasons explained below, the Board concludes that the tracks at issue are governed by 49 U.S.C. § 10906² but that it need not make a finding regarding whether they have been abandoned.

BACKGROUND

According to NYCEDC, the City owns rail facilities on the Brooklyn waterfront, including a rail terminal known as Bush Terminal, a rail yard within Bush Terminal known as the 51st Street Yard, and a line of railroad along 1st Avenue in Brooklyn that connected the rail yard to shippers. (Pet. 2, 4, Attach. A.) NYCEDC states that the facilities at issue in its petition consist of tracks and a roundhouse that were located in a portion of the 51st Street Yard that is no longer used and tracks that were located outside the 51st Street Yard within Bush Terminal. (Id.

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 Pol’y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

² Section 10906 states that “[t]he Board does not have authority . . . over the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks.” Such track is often referred to as excepted track or ancillary track. Although these tracks are not subject to the Board’s licensing authority, they are subject to the Board’s exclusive jurisdiction. See, e.g., Tri-City R.R.—Pet. for Declaratory Order, FD 36037, slip op. at 4 (STB served June 1, 2017).

at 5, 9.) NYCEDC states that these facilities are no longer used for rail service and that the tracks that were located in the disused portion of the 51st Street Yard have been removed. (*Id.* at 4, 8-9.) NYCEDC also suggests that the tracks at issue that were outside the 51st Street Yard but within Bush Terminal have been removed as well, referring to them as “former tracks.” (*Id.* at 8, 9.) NYCEDC also notes that another portion of the 51st Street Yard (referred to by NYCEDC as the “Operating Yard”) and portions of the line along 1st Avenue are still used for rail operations by New York New Jersey Railroad, LLC (NYNJ), and that these facilities are not subject to its petition. (*Id.* at 4, 9.)

NYCEDC explains that a former owner of the facilities at issue, the New York Dock Railway Company (NYD), filed an application in 1983 with the Board’s predecessor, the Interstate Commerce Commission (ICC), to abandon all its operations. (*Id.* at 2-3.) The facilities operated by NYD included two rail terminals in Brooklyn, one of which was Bush Terminal, and a cross-harbor float operation that connected its terminals in Brooklyn to facilities that were owned by Consolidated Rail Corporation in Greenville, N.J.³ NYD Aban. Appl. 2, Ex. B, May 3, 1983, N.Y. Dock Ry.—Aban.—Entire Line, Kings Cnty., N.Y., AB 219 (Sub-No. 2).⁴

NYCEDC states that excepted track can be removed from the interstate rail system without authority from the Board and that to determine whether track is governed by § 10906, the Board evaluates the facts on a case-by-case basis and analyzes the track’s intended use, physical characteristics, and relationship to the rail system. (Pet. 6.) NYCEDC argues that the tracks at issue qualify as excepted track under this standard, based on: (1) previous statements by NYD in its abandonment application indicating the intended use of the tracks was for switching operations; (2) the layout and the location of the facilities, which indicate that they would have been used for ancillary operations such as switching, loading/unloading, and repairs; (3) the absence of stations on the tracks; (4) the fact that the tracks were stub-ended; and (5) the self-contained nature of the facilities, which confirms that they were not built to penetrate new markets but to make up and break up trains coming in and out of the waterfront facilities. (*Id.* at 8.)

NYCEDC further argues that, under Board precedent, the Board has the authority to determine whether excepted track has been abandoned and that the key consideration in such a determination is whether the carrier “has continued to exhibit a fixed and continuing intent to hold out to provide common carrier rail service to the public.” (*Id.* (quoting Pinelawn Cemetery—Pet. for Declaratory Order, FD 35468, slip op. at 10 (STB served Apr. 21, 2015)).) With respect to the tracks at issue, NYCEDC asserts that the tracks in the disused portion of the

³ Attachment B of NYCEDC’s petition shows the former approach to a float bridge located adjacent to Bush Terminal. A comparison of Attachment B and Attachment A, which delineates the track at issue here, along with NYCEDC’s description of the assets at issue, show that the tracks that formerly connected to the float bridge are not at issue in this petition.

⁴ The ICC did not act on NYD’s abandonment application. The New York Cross Harbor Terminal Corp. (NYCH) obtained authority from the ICC to take over the operations for which NYD had sought abandonment authority. N.Y. Cross Harbor R.R. Terminal Corp.—Exemption for Operation & Issuance of Securities (N.Y. Cross Harbor), FD 30183 et al. (ICC served Jul. 15, 1983).

51st Street Yard have been removed. (*Id.* at 9.) NYCEDC also describes the tracks outside the 51st Street Railyard in Bush Terminal as “former tracks.” (*Id.* at 8, Attach. A.) In addition, NYCEDC attached as Attachment C to the petition a letter from the Port Authority of New York and New Jersey on behalf of NYNJ,⁵ to NYCEDC and the Department of Small Business Services of the City of New York, stating that the rail facilities located in the area identified in Attachment A as the “Disused 51 St. Railyard” have not been used in many years and are not needed for rail service. (Pet. 9.)

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); *Delegation of Auth.—Declaratory Order Proceedings*, 5 I.C.C.2d 675 (1989).

The Board will issue a declaratory order here with respect to whether the tracks at issue are excepted track governed by § 10906. As noted above, *see supra* note 2, while excepted track is subject to the Board’s jurisdiction, Board authority is not required for the construction, acquisition, operation, abandonment, or discontinuance of excepted track. However, the tracks at issue were previously the subject of an ICC abandonment proceeding and an ICC acquisition proceeding, which raises the question of whether the tracks were previously considered tracks subject to the Board’s licensing authority for which acquisition authority is required pursuant to 49 U.S.C. § 10901 and abandonment authority is required pursuant to 49 U.S.C. § 10903.⁶ As explained below, the Board finds that the prior ICC proceedings did not establish that the tracks at issue are tracks subject to the Board’s licensing authority. The evidence filed here supports the conclusion that the tracks at issue are excepted tracks under § 10906. The Board will not issue a declaratory order with respect to the issue of whether the tracks have been abandoned, however, as there is no need to address that issue here.

The categories of excepted tracks enumerated in § 10906—spur, industrial, team, switching, and side tracks—are not defined in the statute, nor does the legislative history of the Interstate Commerce Act reveal a clear Congressional intent regarding the meaning of these terms. *Bhd. of Locomotive Eng’rs v. United States*, 101 F.3d 718, 726 (D.C. Cir. 1996); *N.Y.C. Econ. Dev. Corp.—Pet. for Declaratory Order*, FD 34429, slip op. at 5 (STB served July 15, 2004). In determining whether a particular track is subject to the Board’s licensing authority or is excepted track, the Board has adopted a case-by-case approach that examines factors that may include the track’s intended use, physical characteristics, relationship to the rail system, and history. *See, e.g., Oakland Glob. Rail Enter.—Pet. for Declaratory Order*, FD 36168, slip op.

⁵ NYNJ is owned by the Port Authority of New York and New Jersey. *See* NYNJ Rail, About NYNJ, <https://nynjr.com/about-nynjr/> (last visited June 3, 2021).

⁶ At the time of those ICC proceedings, excepted track was governed by a similar statutory provision at 49 U.S.C § 10907, which stated, in relevant part, that the ICC did not have authority over “the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks if the tracks are located, or intended to be located, entirely in one State.”

at 8 (STB Served Mar. 15, 2019), pet. for recon. denied (STB served June 20, 2019); JGB Props., LLC—Pet. for Declaratory Order, FD 35817, slip op. at 6-7 (STB served May 22, 2015).

With respect to intended use, the Board has considered whether the track will be used for certain ancillary operations (e.g., switching, loading, and unloading); whether it serves more than one shipper; whether the shipper is located at the end of the track; whether there are stations on the track; whether there is regularly scheduled service; who owns and maintains the track; and the volume of traffic moving over the track. Oakland Glob. Rail Enter., FD 36168, slip op at 8. With respect to physical characteristics, the Board has considered the length of the track; whether it is stub-ended; and whether the track was constructed with light-weight rail. Id. With respect to relationship to the rail system, the Board typically has considered whether the track was built to penetrate new markets or territory. Id. The Board considers and weighs the various indicia as appropriate in light of the particular evidence and circumstances of each case. Given the typical connection between the track's relationship to the rail system, its physical characteristics, and its intended use, the various indicia generally relate to one another, and evidence regarding some indicia may be sufficient for the Board to make a determination on the overall legal status of the track without evidence to analyze all potential indicia. Id.

Here, the record from the prior abandonment proceeding indicates that the intended use of the track was for ancillary purposes. In 1983, NYD filed an abandonment application in which it sought to abandon all its rail facilities, which included Bush Terminal. NYD Aban. Appl. 1-2, May 3, 1983, N.Y. Dock Ry.—Aban.—Entire Line, Kings Cnty., N.Y., AB 219 (Sub-No. 2). NYD, in describing its operations, stated that its track “is primarily switching track in its terminals with minimal main line operations not exceeding one and one-half miles.” Id. at 7. In addition, the application referred to the terminals operated by NYD as “switching terminals” and stated that it used switcher locomotives at the terminals for loading/unloading, classifying, and switching cars. Id.

The physical characteristics of the tracks at issue also support the conclusion that they were excepted track. The track in the disused portion of the 51st Street Yard consisted of a series of short, parallel, stub-ended tracks within a rail terminal facility. (Pet., Attach. A.) The tracks in Bush Terminal outside the 51st Street Railyard consisted of short, stub-ended tracks that extended out into the harbor on what used to be a series of piers.⁷ (Id. at 4 & Attach. A.)

The relationship of the tracks at issue to the rail system also suggests that they were excepted tracks. The tracks at issue did not allow for the penetration of new markets. While the rail line outside Bush Terminal along 1st Avenue and the former rail line leading to a cross-harbor float bridge—neither of which are at issue here—allowed for connections between the Brooklyn waterfront and other markets, the series of stub-ended tracks within Bush Terminal

⁷ As noted above, the various indicia generally relate to each other. Here, the physical characteristics of the tracks at issue suggest that the intended use of the tracks was for ancillary operations. The series of short, parallel, stub-end tracks within the disused portion of the 51st Street Yard appear designed for classifying and switching cars and the tracks that extended out onto a series of piers appear to have been designed for loading and unloading cargo on and off cargo ships.

simply allowed traffic to move in and out of the Brooklyn waterfront area to reach those rail lines. (Id. at Attach. A & B.)

The prior proceedings involving the tracks at issue have caused some uncertainty. ICC authority was not required to abandon or acquire excepted track, yet the tracks at issue were subject to an ICC abandonment proceeding and an ICC acquisition proceeding, raising the question of whether these tracks were previously considered tracks subject to the Board's licensing authority. A close examination of those proceedings, however, demonstrates that they do not preclude a finding that the tracks at issue are excepted tracks. Although NYD included the tracks in Bush Terminal in its abandonment application, NYD's description of the tracks and how they were used supports the conclusion that their intended use was as excepted track and that NYD's inclusion of the track inside Bush Terminal in its application was not intended to suggest it viewed that track as subject to the Board's licensing authority. As noted above, NYD described its terminals as "switching terminals," described the track inside its terminals as "switching track" and explained that switcher locomotives were used at its terminals for loading/unloading, classifying, and switching cars. NYD Aban. Appl. 7, May 3, 1983, N.Y. Dock Ry.—Aban.—Entire Line, Kings Cnty., N.Y., AB 219 (Sub-No. 2).

In the N.Y. Cross Harbor decision discussed earlier, see supra note 4, the ICC noted that the NYD assets would be purchased by Northbrook Leasing, which would lease the track to NYCH. N.Y. Cross Harbor, FD 30183 et al., slip op. at 2. The ICC stated that acquisitions of excepted track do not require ICC authority and indicated that it was unclear whether Northbrook's proposed acquisition of the tracks at the terminal facilities required ICC authority. Id. at 2-3. However, the ICC then went on to grant an exemption for Northbrook Leasing's acquisition without further analysis. Id. at 4. Thus, the ICC never directly addressed the regulatory status of the track at Bush Terminal. Rather, it appears the ICC granted an exemption for Northbrook Leasing to acquire all of the track inside and adjacent to the two terminals previously operated by NYD without attempting to differentiate between tracks subject to the Board's licensing authority and excepted track. Therefore, the Board finds that the fact that the tracks at issue here were included in previous proceedings before the ICC is not determinative of the status of the tracks, which the Board finds to be excepted track.

However, there is no need for the Board to address whether the tracks here have been abandoned. As noted, excepted tracks are within the Board's jurisdiction, but the Board lacks regulatory authority over the abandonment of excepted tracks, so excepted tracks can be removed from the interstate rail system without Board authority. The Board has, on a few occasions, made a determination regarding whether excepted tracks have been abandoned and removed from the Board's jurisdiction; however, those cases involved situations where there was a dispute between the railroad and another party regarding removal of the tracks.⁸ In other words, a third party was attempting to remove the tracks without the railroad's consent. Here, there is no indication that the railroad opposes removal of the tracks. Indeed, NYCEDC provided a letter from the railroad's owner, on behalf of the railroad, explaining that the tracks at

⁸ See Pinelawn Cemetery, FD 35468, slip op. at 10-11; JGB Props., LLC, FD 35817, slip op. at 7-8; Newvista Prop. Holdings, LLC—Pet. for Declaratory Order, FD 36040, slip op. at 3-4 (STB served Mar. 17, 2017).

issue are not needed for rail service. (Pet., Attach. C.) Where there is no dispute between the parties, there is no need for the Board to weigh in on whether excepted tracks have been abandoned and removed from the interstate rail system.

For the reasons discussed above, the petition for declaratory order will be granted in part and denied in part.

It is ordered:

1. The petition for declaratory order is grant in part and denied in part, as explained above.
2. This decision is effective on its service date.

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