

SERVICE DATE – OCTOBER 22, 2021

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36463

THE LOUISVILLE AND JEFFERSON COUNTY RIVERPORT AUTHORITY—
PETITION FOR DECLARATORY ORDER

Digest:¹ The Board denies a petition for declaratory order filed by the Louisville and Jefferson County Riverport Authority seeking a finding that its lessee, New Albany Main Street Properties, LLC, is operating as a common carrier on certain track without Board authority because the petitioner has failed to show that its lessee is operating as a common carrier.

Decided: October 21, 2021

On November 18, 2020, the Louisville and Jefferson County Riverport Authority, d/b/a Louisville Riverport Authority (LRA), filed a petition for declaratory order requesting that the Board determine that: (1) the New Albany Main Street Properties, LLC, d/b/a the Port of Louisville (Port of Louisville or the Port), has been improperly operating certain rail lines in and around LRA's Riverport Complex without the required authorization from the Board; (2) the Port of Louisville should cease rail operations on those rail lines immediately; and (3) LRA may seek authority from the Board to have another "railroad" operate on the rail lines. The Port of Louisville responded to the petition on January 6, 2021, contending that it is not operating as a common carrier on the subject tracks and its activities have been limited to noncarrier contract switching operations. Thus, it asserts that the petition is without merit and should be denied. As discussed below, LRA's request for a declaratory order will be denied because the Port of Louisville is not operating as a common carrier on the tracks in question.

BACKGROUND

The Riverport Complex was developed by LRA in the mid-1980s and houses more than 120 companies in the industrial service, logistics and distribution, manufacturing, retail, and other industries that use various modes of transportation, including truck, barge, and railroad. (Port of Louisville Reply 5, Jan. 6, 2021.) There are approximately 13 miles of rail in and around the Riverport Complex. (*Id.* at 5-6.) The Port of Louisville leases from LRA and operates a 300-acre facility located within the Riverport Complex (Port Facility). (*Id.* at 1-2.) The Port Facility includes a barge-served bulk commodity transfer terminal and general cargo

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

dock along the Ohio River, railroad tracks that include approximately four miles of double loop track plus a short piece of connecting track, a coal storage area, and loading and unloading facilities. (*Id.* at 3.) According to LRA, it entered into a lease agreement with the Port of Louisville in 2009 for the Port of Louisville to manage and conduct the business of the Port Facility. (Pet. 4; see also id., Ex. A, Section III.A.1.) Specifically, under the lease agreement, the Port of Louisville provides, among other things, railroad switching services to move goods through the Port Facility and its rail infrastructure, as well as certain rail maintenance services. (Pet. 5; see also id., Ex. A, Section V.A.7.) As part of the contractual services it provides, the Port of Louisville loads and unloads cargo to and from storage, barges, trucks, and railroad cars required in the operation of the Port Facility. (*Id.*; see also id., Ex. A, Section V.A.4.) The Port of Louisville states that, under the lease agreement, it is required to maintain some of the tracks located beyond the Port Facility in the Riverport Complex. (Port of Louisville Reply 14, Jan. 6, 2021.) The Port of Louisville states that the 2009 lease agreement was renewed with no material operating changes in 2012, and then again in 2016. (*Id.* at 4.)

Positions of the Parties.

LRA argues that the Port of Louisville has the obligation to conduct rail operations, including maintenance, in and around the Port Facility, which includes active rail lines subject to the authority of the Board. (Pet. 6.)² LRA argues, however, that despite operating on the above-described tracks for approximately 11 years, the Port of Louisville has never sought operating or trackage rights authority from the Board. (*Id.* at 18.) According to LRA, through a series of transactions, CSX Transportation (CSX), Norfolk Southern Railway (NS), and the Paducah & Louisville Railroad (P&L) all received authority to operate on its rail lines, which connect to the Riverport Complex, to serve customers at the Port Facility, yet the Port of Louisville has failed to do so. (*Id.* at 17-18; see Port of Louisville Reply 6, Jan. 6, 2021); see also Louisville & Jefferson Cnty. Riverport Auth.—Constr. & Operation Exemption—in Jefferson Cnty., Ky., FD 31136 (ICC decided Dec. 16, 1987); S. Ry.—Trackage Rights Exemption—Louisville & Jefferson Cnty. Riverport Auth., FD 31747 (ICC decided Oct. 31, 1990); Paducah & Louisville Ry.—Trackage Rights Exemption—Louisville & Jefferson Cnty. Riverport Auth., FD 31573 (ICC decided Mar. 1, 1990). LRA further argues that the Port of Louisville has utilized LRA’s tracks to serve certain customers with facilities on the mainline.³ (Pet. 24 (asserting that the Port of

² According to its lease agreement with LRA, the Port of Louisville has the obligation to “conduct and manage its business and operations in a reasonable, prudent and business-like manner, in accordance with customary industry standards, utilizing [lessee]’s reasonable best efforts, skill and experience and in compliance with all federal, state and local laws, statutes, ordinances and regulations.” (Pet. 6 (quoting *id.*, Ex. A, Section III.A.1) (emphasis omitted).)

³ LRA also relies, in part, on a non-binding advisory letter from an attorney at the Federal Railroad Administration (FRA) that suggests, “[b]ased upon the information that was provided” from LRA, that the Port of Louisville may be conducting common carrier rail operations. (Pet. 9-14.) LRA says that, in a subsequent call, the FRA recommended that the Port of Louisville should seek Board authority to operate as a common carrier railroad. (*Id.* at 14.) The Port of Louisville responds that the FRA was provided with erroneous information supplied by LRA concerning the scope of the Port of Louisville’s operations. (Port of Louisville Reply 26-28, Jan. 6, 2021.)

Louisville has used LRA's rail lines to serve ELG Metals, Russtech, and other shippers located on the mainline).) Additionally, LRA states that a section on the Port of Louisville's website titled "About Our Railroad" demonstrates that the Port of Louisville holds itself out to the public as providing common carrier service. (LRA Surreply 6.)

In its reply, the Port of Louisville states that, contrary to LRA's allegations, it has not improperly conducted rail operations on any rail lines without required Board authorization. (Port of Louisville Reply 18, Jan. 6, 2021.) According to the Port of Louisville, its rail operations, which are only a small part of its overall duties under the lease agreement as the manager of the Port Facility, are that of a contract switcher that has always confined its switching operations to the loop tracks within the Port Facility—industry tracks originally constructed by LRA without any authority from the Board's predecessor, the Interstate Commerce Commission (ICC). (*Id.* at 2.) The Port of Louisville argues that it is not a rail carrier subject to the Board's jurisdiction; rather it is a contract switcher that only operates on tracks within the Port Facility. (*Id.* at 2, 24.) Specifically, the Port of Louisville submits that it does not hold itself out to provide rail service for compensation to rail shippers, and it has not done so in practice. (Port of Louisville Reply 7, Feb. 2, 2021.) The Port of Louisville also asserts that it has not entered into any interchange agreements with linehaul railroads, nor has it been involved in setting rates or service terms for any rail shippers located in the Riverport Complex, or the Port Facility specifically. (*Id.*) The Port of Louisville states that it has not received direct payments from any railroads, nor does it have knowledge of any railroads' rates or other arrangements with its customers. (Port of Louisville Reply 25, Jan. 6, 2021; *id.*, V.S. Tegart 11.)

The Port of Louisville explains that it is merely the agent of LRA in fulfilling LRA's private switching duties on the Port Facility loop tracks under the separate railroad agreements LRA has with CSX, NS, and P&L. (Port of Louisville Reply 7, Feb. 2, 2021.) Additionally, the Port of Louisville argues that the history of the Riverport Complex indicates that Board authorization is not needed for the Port of Louisville's operations at the Port Facility. As the Port of Louisville explains, prior to LRA leasing the Port Facility to the Port of Louisville in 2009, LRA engaged the services of another contractor, Cooper/T. Smith, for approximately 20 years without either LRA or Cooper/T. Smith seeking any authority from the ICC or the Board to conduct rail operations as a common carrier over the Port Facility tracks, or any other Riverport Complex tracks. (Port of Louisville Reply 21, Jan. 6, 2021.) The Port of Louisville further asserts that the parties renewed the 2009 lease agreement in substantially the same form in 2012 and then again in 2016. (*Id.* at 13.) According to the Port of Louisville, each lease renewal carries forward the operating provisions of the 2009 lease, which also incorporates the railroad agreements LRA has with CSX, NS, and P&L, and which require the Port of Louisville to act in accordance with the lease terms. (*Id.*) The Port of Louisville ultimately asserts that LRA had recently sought to terminate its lease agreement with the Port of Louisville in Kentucky state court without success and that LRA's petition for declaratory order is part of LRA's

broaden plan to improperly remove the Port of Louisville from the Port Facility. (Port of Louisville Reply 15-17, Jan. 6, 2021.)⁴

PRELIMINARY MATTER

On February 2, 2021, the Port of Louisville moved to strike a surreply filed on January 21, 2021, by LRA. The Port of Louisville argues that LRA's submission violates 49 C.F.R. § 1104.13(c), which prohibits "replies to replies."

The motion to strike will be denied. Inclusion of LRA's surreply in the record is not prejudicial, as it does not form the basis of this decision but rather helps to provide additional context to the filings before the Board. Furthermore, although the January 21, 2021 filing is not authorized under the Board's regulations, this submission will be accepted in the interest of a complete record. See City of Alexandria—Pet. for Declaratory Order, FD 35157, slip op. at 2 (STB served Nov. 6, 2008) (allowing a reply to a reply "[i]n the interest of compiling a full record"). The Board will also accept the Port of Louisville's February 2, 2021 reply in response to LRA's surreply.

DISCUSSION & 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 remove uncertainty. The Board has broad discretion in determining whether to issue a declaratory order. See Bos. & Me. Corp. v. Town of Ayer, 330 F.3d 12, 14 n.2 (1st Cir. 2003); Delegation of Auth.—Declaratory Order Proc., 5 I.C.C.2d 675 (1989). The Board will deny LRA's request for a declaratory order because the Port of Louisville is not operating as a common carrier on the track in and around the Port Facility.

Because the Port of Louisville is not operating as a common carrier, the Board need not reach LRA's requests that the Board require the Port of Louisville to cease rail operations immediately, and permit LRA to seek authority to have another entity operate on the rail lines located in and around the Port Facility.

The Port of Louisville's Status.

Under the facts presented, the Board finds that the Port of Louisville is neither a rail carrier nor an agent of a rail carrier, nor are its operations under the control of a rail carrier. The Board has jurisdiction over "transportation by rail carrier." 49 U.S.C. § 10501(a). To come within the Board's jurisdiction, an activity must be both "transportation" and "by rail carrier" under § 10501. The statute defines "transportation" expansively to encompass any property,

⁴ The Port of Louisville has provided a copy of an arbitrator's decision denying LRA's breach of contract claims and finding that LRA had not acted in good faith in its attempts to terminate the lease agreement with the Port. (Port of Louisville Reply, Ex. C, Jan. 6, 2021.) The Port also provided a copy of a state court decision granting the Port's motion to confirm the arbitration decision, along with LRA's notice of appeal of the state court decision. (Port of Louisville Reply, Ex. D, Jan. 6, 2021.)

facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, and services related to that movement, including receipt, delivery, transfer in transit, storage, handling, and interchange of passengers and property. 49 U.S.C. § 10102(9). Further, a “rail carrier” is defined as a “person providing *common carrier* railroad transportation for compensation.” 49 U.S.C. § 10102(5) (emphasis added).⁵ And “railroad” is defined broadly to include a switch, spur, track, terminal, terminal facility, freight depot, yard, and ground, used or necessary for transportation. 49 U.S.C. § 10102(6).⁶ Whether a particular activity is considered part of transportation by rail carrier under § 10501 is a case-by-case, fact-specific determination. See, e.g., Padgett v. STB, 804 F.3d 103, 108 (1st Cir. 2015).

The Board’s jurisdiction extends to rail-related activities that take place at transloading facilities if the activities are performed by a rail carrier, the rail carrier holds out its own service through a third party that acts as the rail carrier’s agent, or the rail carrier exerts control over the third party’s operations. See Borough of Riverdale—Pet. for Declaratory Order, FD 35299, slip op. at 4 (STB served Aug. 5, 2010). The Port of Louisville’s transloading activities fall within the statutory definition of transportation as the Port of Louisville provides, among other things, railroad switching services to move goods through the Port Facility and its rail infrastructure—which include the receipt, transfer, and handling of property. But, as noted above, for such transloading activities to come under the Board’s jurisdiction, they must be offered by a rail carrier, either directly or through its agent, or a rail carrier must exert control over a third-party’s operations. (*Id.*)

On this record, the Port of Louisville has not been shown to be a rail carrier. Although LRA alleges that the Port of Louisville provides common carrier transportation in and around the Port Facility, the evidence on the record here fails to establish that it does. Specifically, LRA has failed to demonstrate that the Port of Louisville holds itself out to provide common carrier services by rail for compensation. Indeed, nothing in the record demonstrates that the Port of

⁵ The Board has stated that a common carrier is one that “holds itself out to the general public as engaged in the business of transporting persons or property from place to place for compensation.” Am. Orient Express Ry. v. STB, 484 F.3d 554, 557 (D.C. Cir. 2007); Wis. Cent. Ltd. v. STB, 112 F.3d 881, 884 (7th Cir. 1997). A rail carrier has a common carrier obligation to provide service upon reasonable request. 49 U.S.C. § 11101.

⁶ 49 U.S.C. § 10102(9) defines “transportation” to include “(A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and (B) services related to that movement, including, receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property.” A “rail carrier” is defined to be a “person providing common carrier railroad transportation for compensation, but does not include street, suburban, or interurban electric railways not operated as part of the general system of rail transportation.” 49 U.S.C. § 10102(5). And § 10102(6) provides that a “railroad” includes “(A) a bridge, car float, lighter, ferry, and intermodal equipment used by or in connection with a railroad; (B) the road used by a rail carrier and owned by it or operated under an agreement; and (C) a switch, spur, track, terminal, terminal facility, and a freight depot, yard, and ground, used or necessary for transportation.”

Louisville has been involved in offering or setting rates or service terms for any rail shippers located in the Riverport Complex or the Port Facility, or that it has entered into any interchange agreements with linehaul railroads. Instead, the evidence of record indicates that the Port of Louisville provides contractual switching and transloading services pursuant to its 2009 lease agreement with LRA and its agreements with its customers. (Port of Louisville Reply 10-11, Jan. 6, 2021.)

Additionally, while LRA alleges that the Port of Louisville has the obligation under the lease agreement to provide rail maintenance over active rail lines subject to the authority of the Board, the Board has found that the responsibility for track maintenance, by itself, is not enough to require Board authorization. See Utah Transit Auth.—Acquis. Exemption—Union Pac. R.R., FD 35008, slip op. at 6-7 (STB served July 23, 2007) (finding that Board authorization was not required for passenger rail authority’s acquisition of a rail line where another carrier retained permanent and exclusive freight operating easement, even where parties’ agreement required the acquiring party to perform track maintenance); N.M. Dep’t of Transp.—Acquis. Exemption—Certain Assets of BNSF Ry., FD 34793, slip op. at 1-3 (STB served Feb. 6, 2006) (same).

The Port of Louisville has also refuted LRA’s allegation that the Port of Louisville has utilized its employees and locomotive to serve customers by rail on the mainline tracks in the Riverport Complex. The Port states that it has always confined its operations to the Port Facility loop tracks and a short piece of connecting track located within the Port Facility, (Port of Louisville Reply 2, Jan. 6, 2021), and LRA has not provided any evidence to the contrary. The Port of Louisville notes that, on a few rare occasions, it has “assisted the two companies whose facilities are adjacent to the Port Facility boundaries by either moving rail cars around for one as a courtesy and for no compensation, and by temporarily storing the rail cars of the other on the loop track for a daily charge,” (*id.* at 13), paid through “individually negotiated arrangements,” (*id.* at 25). The Board finds that these instances do not rise to the level of holding out or providing common carrier service by rail for compensation that would fall within the Board’s jurisdiction. See 49 U.S.C. § 10102(5) (“‘rail carrier’ means a person providing common carrier railroad transportation for compensation.”) And, despite LRA’s argument that a section on the Port of Louisville’s website titled “About Our Railroad” demonstrates that the Port of Louisville holds itself out to the public as providing common carrier service, (see LRA Surreply 6), the Board, under 49 U.S.C. § 10501, must determine what activities come under its jurisdiction. As discussed above, the Port of Louisville does not hold itself out as a common carrier by rail. Moreover, the Port of Louisville’s description of its services on its website is generally consistent with its explanation that it provides switching and transloading services on the Port property, while the website otherwise appears to more broadly market the rail infrastructure located in and around the Riverport Complex and Port Facility and accessibility to CSX, NS, P&L, and other carriers. A colloquial reference to the Port of Louisville being a railroad does not change this analysis.⁷

⁷ On September 1, 2021, the Port of Louisville moved to supplement the record with a recent email from an attorney in the FRA’s Office of Chief Counsel and correspondence referenced in the email. The email states that the FRA has learned of new information regarding the Port’s rail activities and that, based on that information, the Port of Louisville’s “railroad

Further, nothing in the record establishes that the Port of Louisville is acting as an agent for a rail carrier or that a rail carrier has exerted control over the Port of Louisville's operations. Whether a shipper/receiver or third-party is deemed to be providing transload services on behalf of a rail carrier depends, in part, on how integral the service is to the rail carrier's underlying common carrier services that are being held out to the public and the degree of control exercised by the rail carrier over the transloading services. See e.g., Town of Babylon—Pet. for Declaratory Order, FD 35057 (STB served Feb. 1, 2008), recons. denied (STB served Sept. 26, 2008); declaratory order granted (STB served Oct. 16, 2009), aff'd sub nom., N.Y. & Atl. Ry. Co. v. STB, 635 F.3d 66, 73-75 (2d Cir. 2011) (affirming Board determination that it lacked jurisdiction over transload operations where rail carrier did not exercise sufficient control). A review of the record here indicates that the Port of Louisville's services are independent of any carrier's rail business because the obligations of such rail carriers begin or end at the Port Facility double loop tracks.

Indeed, pursuant to the rail agreements between LRA (and, in turn, its contractor—the Port of Louisville) and the rail carriers servicing the Riverport Complex, “all shipments . . . by the three railroads in common carrier service are deemed to be fully and completely delivered as soon as the car containing such shipment shall have been placed in the location designated by [LRA] to receive it,” which the Port of Louisville asserts is the loop tracks. (Port of Louisville Reply, V.S. Tegart 5, Jan. 6, 2021.) Further, the Port of Louisville asserts in its reply that its operations include, among other things, “picking up and dropping off cars delivered to the loop tracks by linehaul railroads . . . [which] are taken by the Port of Louisville to be loaded (from barges) or unloaded (to barges or trucks) and/or switched as needed.” (Port of Louisville Reply 24-25, Jan. 6, 2021; id., V.S. Tegart 10.) Additionally, there is no indication that the rail carriers serving the Riverport Complex or Port Facility have offered transloading services to their shippers as part of their common carrier service, or that transloading services have been bundled (i.e., services combined as one offering) with the transportation services offered by these carriers. Based on the foregoing, LRA has produced no evidence that the Port of Louisville's

operations [are] under FRA's safety jurisdiction as a railroad carrier,” although the FRA will exercise its enforcement discretion and “will not exercise its safety jurisdiction” over the Port. (Port of Louisville Motion to Supplement, Attachment A, Sept. 1, 2021.) However, although the FRA email refers to the Port of Louisville as a “railroad” under FRA's safety jurisdiction, the Board's and FRA's jurisdictions are not coextensive. See Denver & Rio Grande Ry. Hist. Found.—Pet. for Declaratory Order, FD 35496, slip op. at 11 (STB served Aug. 18, 2014); see also Napa Valley Wine Train, Inc.—Pet. for Declaratory Order, 7 I.C.C. 2d 954, 966 n.33 (1991) (noting that FRA's safety jurisdiction “extends to all railroads—even those not engaged in interstate commerce”). And, as discussed in this decision, the Board concludes, based on the record in this case, that the Port of Louisville is not a rail carrier within the meaning of the Board's governing statute. Although the Port of Louisville's motion to supplement the record post-dated the deadline for submitting evidence and argument, the Board nevertheless will accept the supplemental materials into the record where, as here, they warranted consideration and could not have been submitted earlier. See South Plains Switching, Ltd.—Compensation for Use of Facilities in Alternative Rail Serv.—W. Tex. & Lubbock Ry., FD 35111, slip op. at 3 (STB served Dec. 15, 2008).

movement of cargo within the Port Facility is in furtherance of, or considered to be, an integral part of any railroad's common carrier service.

Moreover, the Port of Louisville also notes that it offers its own transloading services to customers directly. Specifically, the Port of Louisville asserts that it has direct contracts with customers of the Port Facility—most of which are not located within the Riverport Complex—for loading or unloading a railcar that is placed on the loop tracks. (Port of Louisville Reply 25, Jan. 6, 2021.) Further, the Port of Louisville does not receive direct payments from any linehaul railroad servicing the Riverport Complex, nor does it have knowledge of any of the railroads' rates or other arrangements made with their customers. (Port of Louisville Reply 25, Jan. 6, 2021; *id.*, V.S. Tegart 11.) The Board has found that it lacks jurisdiction over activities of a noncarrier transloader offering its own services directly to customers. *See Town of Babylon*, FD 35057, slip op. at 5. Based on the evidence in this case, LRA has failed to demonstrate that the Port of Louisville is a rail carrier or that it is performing transportation-related activities on behalf of any rail carrier servicing the Riverport Complex or the Port Facility.

Because the Port of Louisville is not operating as a common carrier, LRA's petition for declaratory order will be denied.⁸ Given the Board's determination here, the Board need not address LRA's request that the Board require the Port of Louisville to cease rail operations immediately, as the Port of Louisville is a noncarrier that requires no Board authorization to conduct its rail operations at the Port Facility. Further, with respect to LRA's request seeking Board authority to have "another railroad operate" in and around port, the Board notes that LRA, or any entity that LRA allows on the port tracks, may file at any time a notice of exemption for operation over the Riverport Complex rail lines.⁹ The Board declines LRA's request to replace the Port of Louisville with another operator because the Board does not intervene in private contractual relationships, such as the lease between LRA and the Port of Louisville, leaving enforcement of private contracts to the courts. *See, e.g., Sierra R.R. v. Sacramento Valley R.R.*, NOR 42133, slip op. at 4 & n.12 (STB served Nov. 28, 2012).

It is ordered:

1. The petition for declaratory order is denied.
2. The Port of Louisville's motion to strike LRA's surreply is denied.
3. LRA's petition for leave to file a surreply is granted. LRA's surreply and the Port's reply to LRA's surreply are accepted into the record.

⁸ Because of the Board's determination here, the Board need not address the status of the loop tracks located within the Port Facility.

⁹ Of course, LRA may or may not be subject to contractual limitations on which entities can operate on tracks in the Riverport Complex.

4. The Port of Louisville's motion to supplement the record is granted.
5. This decision is effective on the date of service.

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