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SERVICE DATE – FEBRUARY 2, 2022

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36493

PROTECT SUDBURY INC.—PETITION FOR DECLARATORY ORDER

Digest:[1] The Board in its discretion declines Protect Sudbury Inc.'s request for a declaratory order finding that a railroad line in Sudbury, Mass., has not been abandoned and that easement agreements related to the line are void.

Decided: February 1, 2022

On March 11, 2021, Protect Sudbury Inc. (PSI), filed a petition for a declaratory order asking the Board to find that a rail line in Sudbury, Mass., owned by the Massachusetts Bay Transportation Authority (MBTA) has not been abandoned and that easements MBTA has granted on the line for trail use and electric power transmission unlawfully interfere with the potential reactivation of rail service and are therefore void. For the reasons explained below, PSI's petition will be denied.

BACKGROUND

PSI is a non-profit organization located in Sudbury, whose "primary objective is to prevent all power lines along the MBTA rail line that runs through the town and to prevent above-ground power lines anywhere in Sudbury." (Pet. 2.) According to PSI, the rail line at issue here (the Line) was part of a branch line called the Central Massachusetts Railroad Division operated by the Boston and Maine Corporation (B&M). (Id. at 4.) PSI states that the Line runs from milepost B23/N81 to milepost B27/N86 and is now a portion of the Mass Central Rail Trail. (Id.) PSI explains that B&M entered bankruptcy in 1970 and in the bankruptcy proceeding the trustees of B&M granted to MBTA ownership of the physical assets of the Line but reserved an easement allowing B&M to continue freight transportation on the Line. (Id. at 4-5.)

PSI states that in 1979, B&M filed an application to abandon two branch lines that included the Line, but the Board's predecessor, the Interstate Commerce Commission (ICC), found that B&M could not abandon the branch lines because MBTA rather than B&M owned them and recommended to the United States District Court for the District of Massachusetts that

[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).

discontinuance authority be granted instead.[2] (Id. at 6 (citing Meserve, Aban. Between Waltham N., Berlin, & Marlboro, Mass., AB 32 (Sub-No. 7F) (ICC served Apr. 1, 1980).) PSI states that in In re Boston and Maine Corp., No. 70-250-M (D. Mass., Oct. 3, 1980), the District Court issued an order that followed the ICC's recommendation and granted B&M discontinuance authority. (Pet. 6.) PSI asserts that there has been no rail service on the Line since that order. (Id. at 7.)

According to PSI, on December 30, 2010, MBTA and the Massachusetts Department of Conservation and Recreation (DCR) entered into a trails-use agreement for the Line. (Id.) PSI claims that a trail now runs through the right-of-way of the Line and that under the agreement, MBTA may continue to utilize the rail corridor for rail transportation purposes but any portion so utilized in connection with third-party transactions must continue to provide for the continuity of the rail-trail corridor. (Id. at 7, 16.)

PSI states that on June 9, 2017, MBTA entered into an agreement with an energy company called Eversource Energy (Eversource) for an easement to allow Eversource to install a new 115 kv subsurface electric transmission line along the rail right-of-way for approximately 8.63 miles, including the right-of-way for the Line. (Id. at 7.) According to PSI, the easement reserves to MBTA the right to install, operate, repair, and maintain transportation/rail infrastructure within the easement area provided that such rights will not unreasonably interfere with Eversource's use of the easement for its purposes. (Id.) PSI asserts that installation of the subsurface transmission line would result in the removal of all tracks and a substantial portion of the ballast on the Line. (Id. at 17.) PSI and the Town of Sudbury attempted to stop installation of the power line by challenging in state court, and as a matter of state administrative law, issuance of a permit by the Massachusetts Department of Public Utilities. (MBTA Supp. 2.) The Supreme Judicial Court of Massachusetts (SJC) recently issued an opinion upholding the issuance of the permit. (Id.) The Town of Sudbury also separately challenged in state court the legality of the agreement between MBTA and Eversource, contending that the agreement was barred by the state law "prior public use" doctrine. The SJC upheld the lower court's decision dismissing the Town's claims. (Id.; see also MBTA Reply 3.)

PSI argues that the issues it raises are ripe for review by the Board. (Pet. 9.) PSI claims that guidance from the Board regarding the status of the Line is necessary so that landowners with property abutting the Line can determine what legal avenues are available to protect their property interests. (Id.) PSI further argues that Meserve was wrongly decided in holding that B&M had to seek discontinuance authority rather than abandonment authority and is inconsistent with subsequent cases that have allowed carriers in situations similar to B&M's to seek abandonment authority, and that the Board must act to resolve this inconsistency. (Id. at 9-13.) In addition, PSI claims that the easements granted by MBTA would prohibit the reactivation of rail service and that under Board precedent the Board must void these easements to ensure that rail service can be reactivated in the future. (Id. at 10, 17-18.)

[2] According to PSI, section 17(a) of the Milwaukee Railroad Restructuring Act, Pub. L. No. 96-101, 93 Stat. 736 (1979), transferred jurisdiction over B&M abandonments and discontinuances from the ICC to the District Court. (Pet. at 6.)

In response, MBTA argues that PSI's petition should be denied as premature. (MBTA Reply 5.) MBTA asserts that since PSI has not asserted any interest in service over the Line and there has been no demand for service since service ceased approximately 40 years ago, there is no reason for the Board to issue a declaratory order. (Id.) MBTA further argues that it never acquired a common carrier obligation with respect to the Line, and, although the decisions by the ICC and the District Court in 1980 were framed in terms of discontinuance, those decisions were intended to remove the Line from the national rail system and the ICC's jurisdiction. (Id. at 6-10.) Finally, MBTA argues that, if the Board were to find that the Line has not been abandoned, MBTA would simply obtain abandonment authority under class exemption procedures for lines that have been without service for two years or more and PSI therefore would still fail to prevent installation of the power line. (Id. at 11.)

On October 20, 2021, the Town of Sudbury (the Town) filed a reply to PSI's petition requesting that, in order to preserve an existing rail-trail, the Board issue a notice of interim trail use/rail banking (NITU) should the Board determine that the Line is abandoned. (Town Reply 1.)

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 Ord. Proc., 5 I.C.C.2d 675 (1989). For the reasons explained below, the Board, in its discretion, will decline to issue a declaratory order here.

The Board has exclusive jurisdiction over transportation by rail carrier. 49 U.S.C. § 10501(a) & (b). In § 10501(b), Congress adopted a broad preemption provision, which serves as the basis for PSI's request.[3] As the Board has explained, preemption under 10501(b) "is broad enough to preclude all state and local regulation that would prevent or unreasonably interfere with railroad operations." Norfolk S. Ry.—Pet. for Declaratory Ord., FD 35196, slip op. at 3 (STB served Mar. 1, 2010). The Board has noted, "the core purpose of this provision is to ensure the free flow of interstate commerce, particularly by preventing a patchwork of differing regulations across states." Ass'n of Am. R.R.s—Pet. for Declaratory Ord., FD 36369, slip op. at 2 (STB served Dec. 30, 2020) (and cases cited therein). PSI, however, has no interest in or relationship to rail transportation. PSI does not seek to provide rail service, nor is it a shipper seeking rail service, nor is it a landowner seeking a determination concerning its possible rights in the rail corridor. Rather, PSI acknowledges that its goal is to prevent the installation of power lines in the rail corridor and in the Town of Sudbury generally, even though such installation has been permitted by the Massachusetts Department of Public Utilities with that permitting decision upheld by the highest court in Massachusetts.

[3] PSI does not explicitly frame the issue in terms of preemption, but its request that the Board find that easement agreements governed by state law are void appears to be, in effect, a request for a finding of preemption.

Exercising its broad discretion, the Board issues declaratory orders to remove uncertainty or address controversies concerning rail transportation issues within its jurisdiction, including whether certain activities would unreasonably interfere with rail service and would therefore be preempted under § 10501(b). Here, however, PSI has no interest in the integrity of the rail system or the provision of rail service, which is what § 10501(b) is designed to protect. Because PSI has no interest in rail service, or even a claimed property interest in the rail line, it is unnecessary for the Board to determine the extent to which preemption might apply.[4] Under the circumstances present in this case, a party should not be allowed to use a statute designed to define the limits of rail regulation and preserve the integrity of the interstate rail system where it has no interest in those purposes, particularly in an effort to prevent a public use of property that has been approved by the relevant state agencies. Such a legal maneuver risks abuse of the Board's statute and processes. The Board also need not address the issue of whether the Line was abandoned. Apparently, PSI seeks a determination that the Line was not abandoned only because such a determination is necessary for the Board to reach the preemption question, which is, in effect, the issue raised by PSI.

PSI's arguments as to why the Board should issue a declaratory order are unpersuasive. PSI argues that the Board must act to void the easements entered into by MBTA because they make reactivation of rail service on the Line impossible and, under Board precedent, state actions that prevent reactivation of a rail line subject to Board jurisdiction are precluded. PSI cites statements from many cases to support its preemption argument, but these cases either involved restrictions that were found void in order to protect parties with a real interest in continuing or restoring rail service or simply contain dicta generally addressing limits on contractual or other restrictions of rail service.[5] Moreover, the types of actions taken or planned by MBTA—

[4] This decision should not be interpreted to suggest that the Board will only rule on the merits of a petition for a declaratory order regarding preemption filed by entities involved in rail transportation or with an interest in rail property. For example, the Board may be willing to issue a declaratory order where an interest group or a group of citizens has legitimate concerns about the potential effects on the environment of rail transportation activities, provided that the matter is within the Board's jurisdiction. However, in this case, petitioner's only stated concern is to prevent the installation of power lines in a right-of-way and, to attain that end, it has argued that such installation would interfere with rail operations despite having no legitimate interest in those operations or their effects. The Board will not entertain petitioner's request for declaratory relief under these circumstances.

[5] Union Pac. R.R.—Pet. for Declaratory Ord., FD 34090, slip op. at 2-3 (STB served Nov. 9, 2001) (finding any agreement with the carrier that permitted city, in response to reactivation, to terminate carrier's rights over the line and require it to remove tracks was void); New Orleans Terminal Co. v. Spencer, 366 F.2d 160, 162-63 (5th Cir. 1966) (finding city could not enforce ordinance directing railroad to remove tracks when line was in service and within the ICC's jurisdiction); R.R. Ventures, Inc.—Aban. Exemption—Between Youngstown, Ohio & Darlington, Pa. in Mahoning & Columbiana Cntys., Ohio, & Beaver Cnty., Pa., AB 556 (Sub-No. 2X) et al., slip op. at 3 (STB served Jan. 7, 2000) (finding terms of agreement were void as they unreasonably interfered with a party's efforts to restore service on a line); Hanson Nat. Res. Co.—Non-Common Carrier Status—Pet. for Declaratory Ord., FD 32248 (ICC served Dec. 5,

granting easements for a trail and subsurface utilities in the right-of-way and removing track—are not generally inconsistent with the reactivation of rail service in the future.[6] See, e.g., Jie Ao—Pet. for Declaratory Ord., FD 35539, slip op. at 7 (STB served June 6, 2012) (stating that an "easement does not take railroad property outright, and it is often possible for an easement that crosses over, under, or across a right-of-way, to co-exist with active rail operations without necessarily interfering with the latter"); Lincoln Lumber—Pet. For Declaratory Ord., FD 34915, slip op. at 3 (STB served Aug. 13, 2007) (finding permanent easement for underground storm sewer running along the entire length of the right-of-way would not necessarily prevent or unreasonably interfere with railroad operations); BNSF Ry.—Pet. for Declaratory Ord., FD 35164 et al., slip op. at 5-6 (STB served May 7, 2010) (stating that "[a] carrier may even remove track on a line over which it has a common carrier obligation, as long as no shipper seeks service and the carrier is prepared to restore the track should it receive a reasonable request for service"); Roaring Fork R.R. Holding Auth.—Aban. Exemption—in Garfield, Eagle & Pitkin Cntys., Colo., AB 547X, slip op. at 3 (STB served May 21, 1999) (denying a request to issue a cease and desist order with respect to an easement for a grade crossing and an easement for trail purposes over a portion of the right-of-way because these were "ordinary activities, fully consonant with the usual operations of a railroad" and placed "no burden upon maintaining transportation services").

1994) (finding purchaser was not common carrier but noting that any contractual restrictions that unreasonably interfere with common carrier operations are void); United States v. Balt. & Ohio R.R., 333 U.S. 169, 177-78 (1948) (holding that owner of track could not by contract compel railroads to operate in a way which violates the Interstate Commerce Act); Nat'l Wildlife Fed'n v. ICC, 850 F.2d 694, 703-04 (D.C. Cir. 1988) (stating that state laws are subject to the ICC's authority and "a state may not require a railroad to cease operations over a right-of-way") (internal citations omitted). The remaining cases PSI cites do not involve preemption or voiding contractual agreements as incompatible with the Interstate Commence Act and, thus, do not support PSI's assertion of preemption here. See Maumee & W. R.R.—Pet. for Declaratory Ord.—CSX Transp., Inc., Crossing Rts. at Defiance, Ohio, FD 34527 (STB served May 9, 2007); Wis. Dep't of Transp.—Aban. Exemption—in Winnebago Cnty., Wis., AB 343 (Sub-No. 2X) et al. (ICC served July 13, 1993).

[6] Even if the Board were to examine its preemption claims, PSI does not explain how the easements would interfere with the reactivation of rail service. With respect to the trail easement, PSI simply states that MBTA can use the corridor for rail purposes but that "any portion so utilized in connection with third-party transactions will continue to provide for the continuity of the rail-trail corridor." (Pet. 16.) It is not clear how this would prevent reactivation of rail service. With respect to the utility easement, PSI points to certain provisions of the easement as indicative of MBTA's "intent to eliminate the possibility of rail service reactivation." (Pet. 17.) However, as noted above, the easements contain provisions providing for MBTA's right to operate rail service on the Line. If MBTA intended to prevent the reactivation of rail service, presumably it would not have included such provisions. In any event, the Board will not issue a declaratory order based on inferences regarding MBTA's intent with respect to a hypothetical reactivation of rail service brought by a party with no interest in such service where there is no indication that MBTA could not reactivate rail service if required to do so.

PSI further argues that the ICC and the Board have been inconsistent in determining whether discontinuance or abandonment authority is appropriate for carriers in situations similar to B&M's in 1979, and that a declaratory order is needed to clarify this issue for the rail industry. But PSI does not represent the rail industry, nor does it have any interest in determining what type of authority was or may be necessary for carriers in situations similar to B&M in 1979. Ultimately, any such uncertainty need not be addressed here and can be addressed if a future case arises involving a carrier in a situation similar to B&M's seeking to end service.

PSI also argues that Board guidance on the status of the Line is needed so that landowners with property abutting the Line can determine what legal avenues are available to protect their property interests. However, PSI has not identified itself as a landowner with a potential property interest in the rail corridor, nor does it assert that it represents any such landowners. See, e.g., 14500 Ltd. LLC—Pet. for Declaratory Ord., FD 35788 (STB served June 15, 2014) (addressing preemption issue where party asserted state property law claims concerning rail yard property); Jie Ao, FD 35539 (deciding, in part, preemption issue where parties asserted state property law claims concerning railbanked rail line). Moreover, it is not clear how any existing uncertainty regarding the status of the Line has any effect on the ability of such landowners to protect their property interests.

The Board will also deny the Town's request for issuance of a NITU. Under the Board's regulations, NITUs are issued in proceedings where Board authority to abandon a line is sought, whether via application, petition for exemption, or notice of exemption. See 49 C.F.R. § 1152.29(b)-(d); Limiting Extensions of Trail Use Negotiating Periods Rails-to-Trails Conservancy—Pet. for Rulemaking, EP 749 (Sub-No. 1) et al., slip op. at 3-4 (STB served June 6, 2019). This declaratory order proceeding is not such a case. Moreover, in any event, on November 8, 2021, MBTA filed a reply to the Town's NITU request stating that it does not consent to negotiate for an interim trail use/railbanking agreement with the Town or any other party. The Board cannot issue a NITU without such consent. See, e.g., 49 C.F.R. § 1152.29(c), (d); Citizens Against Rails-to-Trails v. STB, 267 F.3d 1144, 1152 (D.C. Cir. 2001) (explaining that 16 U.S.C. § 1247(d) (the Trails Act) does not permit the Board to compel conversion to a trail where the railroad does not consent).

For the reasons discussed above, the petition for declaratory order and the request to issue a NITU will be denied.

It is ordered:

1. The petition for declaratory order is denied, as explained above.

2. The request for issuance of a NITU is denied.

3. This decision is effective on its service date.

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