

SERVICE DATE — MAY 11, 2022

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36559

ACTION ENVIRONMENTAL SYSTEMS, LLC, DH PROPERTY HOLDINGS, LLC AND
BRIDGE INDUSTRIAL, LLC—PETITION FOR DECLARATORY ORDER

Digest:¹ This decision concludes that certain tracks that were located on property owned by Action Environmental Systems, LLC, located in Bronx County, N.Y., are spur tracks excepted from Board licensing under 49 U.S.C. § 10906.

Decided: May 10, 2022

On December 8, 2021, Action Environmental Systems, LLC (AES), DH Property Holdings, LLC (DH Property), and Bridge Industrial, LLC (Bridge Industrial, collectively with AES and DH Property, Petitioners) filed a petition for declaratory order asking the Board to find that certain tracks located on property owned by AES in the Bronx, N.Y., are excepted track governed by 49 U.S.C. § 10906.² For the reasons explained below, the Board concludes that, based on the record before it, the tracks at issue are excepted track governed by 49 U.S.C. § 10906.

BACKGROUND

According to Petitioners, AES owns property located at 920 East 132nd Street, Bronx, N.Y. (the Property), on which there are “long abandoned railroad facilities.” (Pet. 2.) Petitioners state that the railroad facilities were previously used by the New York, New Haven & Hartford Railroad to service customers with sidings for loading and unloading freight, including fish and grocery products. (Id. at 3.) Petitioners further describe the railroad facilities on the Property as follows:

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 provides that “[t]he Board does not have authority . . . over 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 otherwise subject to the Board’s exclusive jurisdiction. See, e.g., Tri-City R.R.—Pet. for Declaratory Ord., FD 36037, slip op. at 4 (STB served June 1, 2017).

A spur adjacent to the westernmost border of the property terminated near a loading shed and ran parallel to a concrete driveway. A points-facing-west turnout diverged from the “fish warehouse” spur to enter the subject property. Three turnouts on the property created two extremely short run around tracks at the base of two, separate, stub-ended, elevated unloading tracks. These facilities were likely used to unload coal from bottom discharge hoppers.

(Id.) In addition, “[t]he siding into the property was fed by a series of other spurs which ultimately accessed the easternmost portion of the Harlem River Yard.” (Id. at 4.) Petitioners contend that all of the sidings on the Property “ultimately stub ended south and east of 132nd Street, on the property,” and that “[n]one of the track ever constituted a through route of any kind.” (Id. at 5.) Moreover, “the track layout would only have been able to accommodate shorter, lighter weight rail-cars common in the early 20th century, as evidenced by the extremely short passing sidings on the property.” (Id.)

Petitioners explain that the rail facilities were transferred to Penn Central Transportation Company (Penn Central) in 1969, and that Penn Central ceased operations at Harlem River Yard in 1972. (Id.) According to Petitioners, the railroad right-of-way was later conveyed to the Consolidated Rail Corporation (Conrail).³ However, according to Petitioners, in response to a request to investigate, “Conrail found nothing to indicate it operated the spur into the subject property at any time.” (Pet. 5.) Petitioners contend that nearly all the railroad infrastructure was removed from the Property by 1980 and that rail service was never restored to the property by Penn Central or Conrail. (Id. at 7-8.)

³ Penn Central and seven other northeastern railroads declared bankruptcy in 1970. See Consol. Rail Corp.—Aban. Exemption—in Schuylkill & Carbon Cnty., AB 167 (Sub-No. 1195X), slip op. at 1 n.3 (STB served Dec. 2, 2021). In response to these bankruptcies, Congress enacted the Regional Rail Reorganization Act of 1973 (3R Act), Pub. L. No. 93-236, 87 Stat. 985 (codified at 45 U.S.C. §§ 701-719), under which the bankrupt railroads were merged into Conrail. The United States Railway Association (USRA) was created by the 3R Act to examine the bankrupt railroads’ properties and identify those lines that would be retained in active service and consequently conveyed to Conrail as rail lines. USRA submitted its plan, known as the Final System Plan, to a special court established under 45 U.S.C. § 719(b). The Final System Plan was submitted to Congress on July 26, 1975, and it was approved in § 601(e) of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat 31 (1976).

The deed attached to the Petition indicates that the railroad right-of-way was transferred from Penn Central to Conrail by order of the special court, but the deed does not provide any information regarding whether the track was implicated by the Final System Plan. Cognizant that the court in Conrail v. STB found that the Board lacks jurisdiction to determine the status of trackage if “the Board’s authority is challenged and an interpretation of the FSP . . . is required,” 571 F.3d 13, 18-20 (D.C. Cir. 2009), the Board will delay the effectiveness of this decision and leave the record open for 30 days to allow any person or entity to provide information indicating that the status of the tracks is dependent upon an interpretation of the Final System Plan, if any such information exists.

No replies to the Petition were filed.

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. Procs., 5 I.C.C.2d 675 (1989). The Board finds that it is appropriate to issue a declaratory order in this case to remove uncertainty concerning the status of the tracks. The evidence presented here supports a finding that the tracks at issue are excepted under § 10906, and the Board will issue a declaratory order to that effect.

The categories of excepted track 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 Ord., 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., New York City Econ. Dev. Corp.—Pet. for Declaratory Ord., FD 36467, slip op. at 3-4 (STB served June 11, 2021); Oakland Glob. Rail Enter.—Pet. for Declaratory Ord., FD 36168, slip op. at 8 (STB Served Mar. 15, 2019), pet. for recon. denied (STB served June 20, 2019).

With respect to intended use, the Board considers whether the track is being or has been 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 considers 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 considers 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, with the result that evidence regarding some indicia may be sufficient for the Board to determine the overall legal status of the track without evidence to analyze all potential indicia. Id.

With respect to evidence on use of the tracks here, the only evidence of record on the past use of the tracks is Petitioners' claim that the New York, New Haven & Hartford Railroad used the tracks to serve customers with sidings for loading and unloading products. (Pet. 8.) Based on the information before the Board, the last rail carrier to own the tracks was Conrail, and according to the record, in response to a request to investigate, Conrail did not find any evidence

that it ever operated the tracks. (Id. at 5.) Notwithstanding the limited record of the tracks' past use, other factors also indicate that the tracks were excepted track.

The physical characteristics of the tracks support the conclusion that they were excepted track. The sidings on the Property were stub-ended south and east of 132nd Street. (Id. at 8-9.) One spur track terminated near a loading shed. (Id. at 3.) Another track diverged from the "fish warehouse" spur to enter the Property. (Id.) Three of the turnouts on the property created two short runaround tracks at the base of two stub-ended, elevated unloading tracks, likely used for unloading coal from bottom discharge hoppers. (Id.) Thus, the physical characteristics of the tracks—short, stub-ended, some elevated—indicate that their intended use was for ancillary operations, including loading and unloading.

The relationship of the tracks at issue to the rail system also suggests that they were, and remain, excepted track. There is no evidence that the tracks at issue allowed for penetration of new markets. And while the siding into the property was fed by a series of other spurs that ultimately access the easternmost portion of the Harlem River Yard, none of the tracks were ever part of a main line or through route. (Id. at 4-5.)

For the reasons discussed above, the Board finds, based on the evidence before it, that the tracks at issue were, and remain, excepted track under § 10906. However, for the reasons discussed above in footnote 3, the record will remain open until June 10, 2022, to allow any person or entity with information indicating that the status of the tracks is dependent upon an interpretation of the Final System Plan to file comments. If no such comments are filed, this petition for declaratory order will be effective June 11, 2022. If comments are filed, Petitioners may reply by June 27, 2022, and this decision will not take effect until further order of the Board.

It is ordered:

1. The petition for declaratory order is granted, subject to 30 days for the filing of further comments, for the reasons discussed above.
2. This decision will be effective June 11, 2022, unless further comments are filed by June 10, 2022. If any further comments are filed, Petitioners may file a reply by June 27, 2022, and this decision will not take effect until further order by the Board.

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