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SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36623

RAIL LINE ABUTTING LANDOWNERS—VERIFIED PETITION FOR DECLARATORY ORDER

Digest:[1] The Board, in its discretion, declines a request for a declaratory order to determine the status of a rail line owned by the Massachusetts Bay Transportation Authority.

Decided: December 11, 2022

On June 22, 2022, a group of landowners (Landowners) that own property abutting a rail right-of-way owned by the Massachusetts Bay Transportation Authority (MBTA) filed a petition for declaratory order asking the Board to determine if the rail line located in that right-of-way has been abandoned.[2] For the reasons explained below, Landowners' petition will be denied.

[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] The names of the individual petitioners are listed on pages two and three of the petition. On August 30, 2022, Landowners filed a motion to join several additional persons and entities as petitioners. The proposed new petitioners also own land abutting the rail line at issue and their names are listed on page three of the August 30, 2022 motion. Adding these additional petitioners does not affect the issues presented in this case or delay the proceeding and will not prejudice MBTA. Accordingly, the Board will grant the Landowners' motion. See 49 C.F.R. § 1112.4(a) (stating that the Board may grant a petition to intervene if intervention "[w]ill not unduly disrupt the schedule for filing verified statements" and "[w]ould not unduly broaden the issues raised in the proceeding"). MBTA filed a motion to strike on September 19, 2022, stating that it does not object to the addition of the new petitioners but asks the Board to strike the text of the motion from the beginning of the third paragraph of page three onward. (MBTA Motion 1.) MBTA argues that this part of Landowners' pleading constitutes a reply to a reply in violation of 49 C.F.R. § 1104.13(c). (Id. at 1-2.) The Board agrees that Landowners' motion is inconsistent with § 1104.13(c) but because acceptance of the motion will not prejudice any party and in the interest of a more complete record, the Board will accept the motion into the record. See, e.g., City of Alexandria, Va.—Pet. for Declaratory Ord., FD 35157, slip op. at 2 (STB served Nov. 6, 2008).

BACKGROUND

According to Landowners, the line at issue (the Line) was part of a branch line called the Central Massachusetts Railroad Division of the Boston and Maine Corporation (B&M). Landowners state that the Line runs from Wayland, Mass., near Landham Road and proceeds in a northwesterly direction through Sudbury and Hudson, ending in Hudson at the line dividing Middlesex and Worcester Counties. (Landowners Pet. 5.) The current petition is related to a prior Board decision regarding the Line. On March 11, 2021, a group called Protect Sudbury Inc. (PSI) filed a similar petition for a declaratory order. Protect Sudbury, Inc.--Pet. for Declaratory Ord., FD 36493, slip op. at 1 (STB served Feb. 2, 2022). PSI stated that its primary objective is to "prevent all power lines along the [Line] and to prevent above-ground power lines anywhere in Sudbury." PSI Pet. 2, Protect Sudbury, Inc.—Pet. for Declaratory Ord., FD 36493. PSI's petition asked the Board to find that the Line, which has not been active in over 40 years, has not been abandoned and that easements MBTA has granted on the right-of-way for an underground electric power line and for trail use unreasonably interfere with the potential reactivation of rail service and are therefore preempted by the Board's exclusive jurisdiction over rail transportation under 49 U.S.C. § 10501(b). Id.

The Board denied PSI's petition. Protect Sudbury, Inc.—Pet. for Declaratory Ord., FD 36493, slip op. at 4 (STB served Feb. 2, 2022). The Board explained that it did not need to address the preemption question because PSI had no interest in rail transportation and no property interest in the rail corridor. Id. The Board further stated that allowing PSI to use preemption for the sole purpose of preventing the installation of a power line that had been approved by the relevant state agencies and had twice been the subject of litigation before the state's highest court would risk abuse of the Board's statute and processes.[3] Id. The Board also found it unnecessary to determine whether the Line was abandoned because PSI only raised the abandonment issue in order to reach the preemption question. Id.

Shortly thereafter, on February 13, 2022, PSI issued a statement saying, "[W]e plan to refile with the STB in a manner that insures that all parties involved in the petition have 'standing' so that the STB must make a determination on the status of the line." Protect Sudbury, Letters from the President, http://www.protectsudbury.org/letters-from-president/ (last visited November 29, 2022). On June 27, 2022, a few days after Landowners filed their petition in this docket, PSI issued a statement saying, "[W]e are asking the STB to provide an official determination as to whether the [railroad] rights were in fact 'abandoned.'" Id.

Landowners state that they are individuals and businesses that own land in the towns of Sudbury, Stow, and Hudson, Mass., that abuts the Line. (Landowners Pet. 2.) Landowners explain that B&M entered bankruptcy in 1970, and in 1976, the trustees of B&M granted B&M's interests in the Line to MBTA but reserved an easement on the Line to allow Trustees to conduct freight rail operations. (Id. at 5-6.) According to Landowners, in 1977, the right-of-way

[3] The Board also noted that granting easements for subsurface utilities or a trail in the right-of-way is not generally inconsistent with the reactivation of rail service and that PSI did not explain how the easements on the Line would interfere with the reactivation of rail service. Protect Sudbury, Inc., FD 36493, slip op. at 4-5 & n.6.

containing the Line was the subject of a taking proceeding under state law by which MBTA took the land in fee simple. (Id. at 6.) Landowners state 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 the ICC recommended to the United States District Court for the District of Massachusetts that discontinuance authority be granted instead.[4] (Id. at 7.) Landowners state that in In re Boston & 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. (Id. at 7-8.) Landowners assert that there has been no rail service on the Line since that order. (Id. at 8.)

Landowners suggest that MBTA's 1977 taking was invalid because the landowners at the time never received notice and because the stated purpose of the taking, to expand or restore railroad services, has never been met. (Id. at 6-7.) According to Landowners, if the Line has been abandoned, they may have reversionary rights in the rail property that abuts their existing properties. (Id. at 2.) However, Landowners claim that without a decision from the Board clarifying whether the Line has been abandoned, they will be unable to bring a case in state court to protect their possible property rights in the right-of-way. (Id. at 11.) Landowners also state that the four Landowners that are businesses with property abutting the Line "would have an interest in freight rail service if the Line was reactivated." (Id. at 3.)

MBTA filed a reply on June 12, 2022, arguing that the 1977 taking proceeding was lawful and that even if Landowners' claims regarding the taking were true, any challenge is now time-barred because, under Massachusetts law, a challenge to a taking must be brought within three years. (MBTA Reply 3.) MBTA asserts that because Landowners have no potential reversionary interests in the right-of-way unless and until MBTA's fee simple interest in the right-of-way is invalidated, a Board decision in this case would be premature. (Id. at 4-5.) MBTA also asserts that Landowners' claims that businesses abutting the Line have an interest in rail service is "perfunctory and unsupported." (Id. at 3.) MBTA states that if the Board were to rule on the status of the Line, it should find that the Line is no longer within the Board's jurisdiction.[5] (Id. at 5.)

[4] According to Landowners, 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.)

[5] On September 26, 2022, the Sudbury Valley Trustees, a nonprofit land trust that owns property abutting the MBTA right-of-way, filed a statement in support of the petition. On October 6, 2022, William Schineller, a resident of Sudbury, filed a reply to the petition. Mr. Schineller claims that MBTA does not make decisions based on safety data analysis and argues that the Board may wish to engage in an analysis of whether the proposed power line could cause safety issues that would interfere with the restoration of rail service. (Schineller Reply 1-3, 8.) The reply also claims that the construction of warehouses near the line has been proposed and changes in zoning laws have been made that could lead to a renewed demand for freight and passenger service and that the Board should therefore not remove the line from its jurisdiction. (Id. at 6-8.) The Board also received a letter from U.S. Senators Elizabeth Warren and Edward J.

On July 26, 2022, Landowners filed a reply to MBTA's reply along with a motion for leave to file.[6] Landowners do not dispute that the MBTA currently has fee simple title to the property on the Line (as Landowners had previously acknowledged in their petition (see Landowners Pet. 6)). However, Landowners claim that MBTA's argument that the petition is premature ignores Landowners' position that without a ruling from the Board, they are unable to bring a case in state court to clarify their property rights. (Landowners Reply 2.) Landowners also state that they concur with MBTA that under Massachusetts law, aggrieved property owners have three years to challenge the lawfulness of a taking. (Id. at 2-3.) However, Landowners assert that a court, not the Board, must decide whether any challenge to lawfulness of MBTA's 1977 taking is time-barred. (Id. at 3-4.) Landowners also suggest that even if a challenge to the 1977 taking is now time-barred, they could challenge the installation of the power line or the trail as another taking, (id at 3 n.3), or they could clarify their property rights through an action under Mass. Gen. Laws ch. 183, § 58.[7] (Id. at 3 n.2.)

On November 15, 2022, Landowners filed a status update stating that on October 31, 2022, Eversource Energy began construction of the power line. (Landowners Status Update 1.) In addition, Landowners state that certain "Harmed Landowners" filed a complaint in state court seeking to quiet title with respect to right-of-way and alleging that MBTA's 1977 taking was defective. (Id.)

Markey and a letter from U.S. Representatives Lori Trahan and Katherine Clark. Both letters urge the Board to give Landowners' petition full and fair consideration. On November 29, 2022, Leonard Simon, a member of the Sudbury Board of Selectmen, filed a letter with the Board addressed to Senators Warren and Markey asking them to withdraw their previously filed letter. Mr. Simon claims that supporting the petition is contrary to the views of most of the residents of Sudbury and Hudson and contravenes the findings of the Massachusetts Public Utilities Siting Board, which approved the power line project, and the Massachusetts Supreme Judicial Court, which upheld the approval of the project on appeal.

[6] On August 15, 2022, MBTA filed a reply in opposition to Landowners' motion for leave to file a reply. While the Board's regulations do not generally permit replies to replies, see 49 C.F.R. § 1104.13(c), in the interest of a more complete record, the Board will accept Landowners' reply.

[7] This statute states, "Every instrument passing title to real estate abutting a way, whether public or private, watercourse, wall, fence or other similar linear monument, shall be construed to include any fee interest of the grantor in such way, watercourse or monument, unless (a) the grantor retains other real estate abutting such way, watercourse or monument, in which case, (i) if the retained real estate is on the same side, the division line between the land granted and the land retained shall be continued into such way, watercourse or monument as far as the grantor owns, or (ii) if the retained real estate is on the other side of such way, watercourse or monument between the division lines extended, the title conveyed shall be to the center line of such way, watercourse or monument as far as the grantor owns, or (b) the instrument evidences a different intent by an express exception or reservation and not alone by bounding by a side line."

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.

As explained above, Landowners' petition arises from a prior proceeding involving PSI. After the Board declined PSI's request for a declaratory order, Landowners filed a petition arguing that, unlike PSI, they have a potential property interest in the right-of-way and that a Board decision to clarify the status of the Line is needed before Landowners can bring a court claim with respect to these claimed potential rights. The Board finds that these assertions do not warrant issuance of a declaratory order.

Landowners acknowledge that MBTA, as a result of the taking proceeding in 1977, owns the right-of-way in fee simple and thus concede that they have no property interest in the right-of-way. Landowners argue that they could potentially establish a property interest in the right-of-way by bringing a court challenge to invalidate the MBTA's taking but that such a challenge is not possible without a Board decision clarifying the status of the Line. Landowners cite Murray v. Massachusetts Department of Conservation and Recreation, No. 11 MISC 453534 GHP (Mass. Land Court, Oct. 6, 2014), in support of their position, but in that case, the court simply found that it did not have jurisdiction to determine whether a rail line was abandoned. Moreover, in Murray, it was undisputed that the railroad's interest in the right-of-way was an easement and that the adjoining landowners owned a reversionary interest that would be impacted by a Board determination as to whether the line had been abandoned. Here, in contrast, it is undisputed that MBTA owns the right-of-way in fee simple; therefore, absent a successful state court challenge to MBTA's fee simple ownership, a determination by the Board as to whether the Line has been abandoned would have no bearing on any current rights or property interests of the Landowners. Finally, Murray did not involve a challenge to a previously-executed taking in fee or in any way suggest that a party may challenge the lawfulness of a taking involving a rail right-of-way only where the status of the rail line under federal law is clear.[8] While a court may not decide whether the Line has been abandoned, as that question is within the Board's exclusive jurisdiction, see 49 U.S.C. § 10903, it certainly may determine the existence of any underlying state-law property rights.[9] Thus, a Board order is not needed for

[8] In their August 30, 2022 motion, Landowners also cite Stover v. Mass. Department of Conservation & Recreation, No. 11 MISC. 449303 (MDV) (Mass. Land Ct., July 11, 2017), aff'd, 104 N.E.3d 682 (Mass. App. Ct. 2018), for the same proposition as Murray. (Landowners Mot. 4.) This case had facts similar to Murray, and the court held that the case was controlled by Murray. Thus, Stover provides no more support for Landowners' petition than Murray.

[9] In another matter, the Board recently deferred ruling on issues within its jurisdiction until state courts decide the property ownership issues under state law. Eastside Cmty. Rail, LLC—Acquis. & Operation Exemption—GNP RLY Inc., FD 35692 et al., slip op. at 3 (STB served Mar. 8, 2022) ("Although federal preemption is broad, the Board has consistently held

Landowners to file a state court action seeking to invalidate the MBTA taking and establish a reversionary interest in the right-of-way. Indeed, Landowners apparently agree with this conclusion as they have now filed an action in state court seeking to do exactly that. Given that Landowners admittedly have no current property interest in the right-of-way under state law and that a Board order regarding the status of the Line will have no effect on the parties' property rights unless the state court invalidates MBTA's taking, the Board will exercise its discretion not to issue a declaratory order at this time. However, if Landowners are successful in invalidating the taking and establishing that they hold reversionary rights, the Board would be willing to address the status of the Line.

As noted above, apart from a direct challenge to MBTA's 1977 taking, Landowners raise, in passing, two additional claims they suggest could be brought to protect their purported potential property rights for which the statute of limitations has not expired.[10] The possibility of bringing such claims does not alter the Board's conclusion. Whether Landowners would succeed on such claims is speculative. In addition, for the reasons explained above, the Board is unconvinced that Landowners would require a Board order prior to bringing such state law claims, and that a Board order could have any bearing on Landowners' property rights absent a successful challenge to the 1977 taking under one of these claims.[11]

Landowners claim that the businesses abutting the Line have expressed interest in rail service. Mr. Schineller also claims that the proposed construction of nearby warehouses and changes in zoning laws could result in an interest in rail service. However, the Board does not find these assertions meaningful. In Exhibit A of the petition, Landowners have provided declarations signed by the owners of these businesses stating, "In the event that freight service is restored at some future time, [name of business], will consider receiving freight service depending upon the cost of service and availability of product." (Landowners Pet., Ex. A.) Mr. Schineller only describes local changes that could possibly generate an interest in rail service at some point in the future. (Schineller Reply 6-8.) Such generalized (and highly qualified) assertions regarding the potential demand for rail service at some indeterminate time in the future

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that disputes concerning state contract and property law should be decided by the appropriate courts with expertise in those matters, rather than the Board") (and cases cited therein); see also City of Woodinville v. Eastside Cmty. Rail, LLC, 510 P.3d 355, 359-61 (Wash. Ct. App. 2022) (agreeing that state court had jurisdiction to decide ownership of rail line easement under state law).

[10] Landowners assert that they could (1) raise a claim under Mass. Gen. Laws ch. 183, § 58 or (2) challenge the installation of the power line or the trail in the right-of-way as another taking that, Landowners assert, would not be time-barred. (Landowners Reply 3, July 26, 2022.)

[11] Mr. Schineller's assertions concerning theoretical safety issues are also misplaced. (Schineller Reply 1-3, 8.) The Federal Railroad Administration has primary jurisdiction over rail safety issues. Moreover, as the Board stated in Protect Sudbury, Inc., "subsurface utilities in the right-of-way . . . are not generally inconsistent with the reactivation of rail service" and "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." Protect Sudbury, Inc., FD 36493, slip op. at 4.

are too indefinite and speculative to provide an adequate basis for the Board to devote resources to determining the status of the Line at this time.[12]

For the reasons discussed above, the petition for declaratory order will be denied.

It is ordered:

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

2. Landowners' petition for leave to file a reply to a reply is granted.

3. Landowners' petition to join new parties as additional petitioners is granted.

4. MBTA's motion to strike is denied.

5. This decision is effective on its service date.

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

[12] Cf. Denver & Rio Grande Ry. Hist. Found.—Pet. For Declaratory Ord., FD 35496, slip op. at 9 (STB served Mar. 24, 2015) (finding that a railroad's assertions regarding its present and future plans were vague and speculative); CSX Transp. Inc.—Aban. Exemption—in Summit Cnty., Ohio, AB 55 (Sub-No. 631X) et al., slip op. at 4 (STB served May 3, 2005) ("A complainant must show more than a de minimis or speculative need for rail service to support a finding that an embargo is unreasonable."); Chelsea Prop. Owners—Pet. for Declaratory Order—Highline, FD 34259, slip op. at 3 (STB served Nov. 27, 2002) ("There is no reason to institute a declaratory order proceeding to resolve issues that may never arise.")