

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36678

MMD INVESTMENT, LLC—PETITION FOR DECLARATORY ORDER

Decided: September 12, 2023

On May 30, 2023, MMD Investment, LLC (MMD), filed a petition for declaratory order pursuant to 5 U.S.C. § 554(e) and 49 U.S.C. § 1321, asking the Board to declare that Consolidated Rail Corporation (Conrail) has abandoned a railroad right of way (Subject ROW) over a property in Irvington, N.J., measuring approximately 50 feet wide and 400 feet long (Subject Property). According to MMD, any right that Conrail has to the Subject ROW is for use as ancillary track under 49 U.S.C. § 10906, but Conrail has not exhibited an intent to continue using the Subject ROW to provide rail service. (Pet. 5-6.) Alternatively, MMD asserts that the Board should remove its jurisdiction over the Subject ROW because it is not needed as part of the interstate rail system. (*Id.* at 8-9.) As discussed in more detail below, the petition raises questions that should be addressed before the agency considers whether to issue a declaratory order in this case. Therefore, a proceeding will be instituted and Conrail will be directed to provide additional information.

BACKGROUND

MMD states that it would like to acquire the Subject Property as part of a redevelopment project involving MMD's adjacent property (MMD Property).¹ (Pet. 2.) According to MMD, however, Conrail claims that the Subject Property is subject at least in part to an easement for a railroad right of way that is an extension of Conrail's adjacent right of way. (*Id.*) MMD further states that discussions between it and Conrail for a voluntary sale of Conrail's interest in the Subject ROW have been unsuccessful. (*Id.*) MMD asserts that the relief requested here would allow it to pursue its redevelopment plans in state court to acquire through condemnation² any of Conrail's remaining rights with respect to the Subject ROW and Subject Property. (Pet. 3.)

MMD argues that "any of Conrail's rights in the Subject [ROW] would have been as Section 10906 ancillary track," which can be abandoned without Board approval under § 10906. (*Id.* at 7.) For support, MMD states that the Subject ROW is stub-ended and neither it nor the

¹ MMD states that the MMD Property is occupied by a related business, Asia Trading Intl LLC d/b/a UniPro International (UniPro). (Pet. 2 n.1.)

² MMD states that it "is in preliminary talks with Irvington to be designated as redevelopers with the power of condemnation." (Pet. 5.)

adjacent right of way are part of Conrail's mainline. (Id. at 5-6.) MMD also states that the Subject ROW has been paved over, no customers or potential customers are located along the Subject ROW, there is no service over the Subject ROW, and a fence and overgrowth of bushes separate the Subject ROW from the rest of Conrail's right of way. (Id. at 6.)

According to MMD, because any previously existing track over the Subject ROW was not mainline, the Board can issue a declaratory order finding that Conrail voluntarily abandoned its interest in the Subject ROW. (Id. at 6-7.) MMD argues that the Board should issue such an order because the condition of the Subject ROW, and the "lack of upkeep and non-use by Conrail," show that Conrail has not exhibited a continuing intent to use the Subject ROW to provide rail service. (Id. at 8.)

Alternatively, MMD argues that the Subject ROW is no longer needed as part of the interstate rail system because the tracks on the Subject Property have been paved over, a fence and overgrowth have severed the Subject ROW from Conrail's remaining tracks, the Subject ROW is not part of a through route, UniPro has never used rail service, and no other potential customers are located along the Subject ROW. (Id.)

DISCUSSION

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 a controversy or remove uncertainty. The petition raises questions that should be addressed by Conrail to facilitate development of a more complete record before the agency considers whether to issue a declaratory order in this case. To date, Conrail has not participated in this proceeding.

Accordingly, a declaratory order proceeding will be instituted. MMD has already consented to the petition serving as its opening statement. (Pet. 9.) Conrail will be directed to submit a verified statement in reply that, at minimum, should clarify the following:

- Whether Conrail retains any easement or ownership interest in the Subject Property;
- Whether any such interest is an extension of an adjacent right of way;
- Whether Conrail disputes that any prior or existing tracks over the Subject Property are "spur, industrial, team, switching, or side tracks" under 49 U.S.C. § 10906 that end at Nye Avenue and, if not disputed:
 - Whether there are any current rail operations over the Subject Property, and if not, when operations ceased;
 - Whether there are any planned future rail operations over the Subject Property, and if so, the proposed timeline for and any steps taken to further such operations;
 - Whether Conrail has abandoned the Subject ROW; and
 - Whether Conrail asserts that the Subject ROW is still needed as part of the interstate rail system.

Conrail's reply on the above issues is due by October 12, 2023. MMD's rebuttal will be due 10 days after Conrail files its reply.

It is ordered:

1. A declaratory order proceeding is instituted.
 2. This decision will be served on Conrail.
 3. Conrail is directed to file a reply addressing the information described above by October 12, 2023.
 4. MMD's rebuttal will be due 10 days after Conrail's reply is filed.
 5. This decision is effective on its service date.
- By the Board, Mai T. Dinh, Director, Office of Proceedings.