

SERVICE DATE – JANUARY 16, 2024

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36678

MMD INVESTMENT, LLC—PETITION FOR DECLARATORY ORDER

Digest:¹ The Board grants in part a request for a declaratory order and finds that tracks on a right-of-way owned by Conrail in Irvington, N.J., are not subject to the Board’s licensing authority. However, because the parties agree that the tracks are not in use and are not needed for rail service, the Board declines to issue a declaratory order determining whether the tracks have been abandoned.

Decided: January 16, 2024

By petition filed on May 30, 2023, MMD Investment, LLC (MMD) seeks a declaratory order determining 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).² According to MMD, any right that Conrail has to the Subject ROW is for use as ancillary track under 49 U.S.C. § 10906,³ but Conrail has not exhibited an intent to continue using the Subject ROW to provide rail service. (Pet. 5-6.) Alternatively, MMD asks that the Board declare that the Subject ROW is not needed as part of the interstate rail system and remove its jurisdiction over the Subject ROW. (*Id.* at 8-9.) As discussed in more detail below, the Board concludes that any track over the Subject ROW is ancillary track under § 10906 but that it need not make a finding as to whether any such track has been abandoned or is needed as part of the interstate rail system, because there is no controversy or uncertainty on that question.

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 Subject Property is depicted in Exhibit A to MMD’s petition for declaratory order.

³ Section 10906 states that “[t]he Board does not have authority . . . over construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks.” Although such ancillary track (also known as excepted track) is not subject to the Board’s licensing authority, it nevertheless is within the Board’s exclusive jurisdiction. See 49 U.S.C. § 10501(b)(2); see also, e.g., Tri-City R.R.—Pet. for Declaratory Ord., FD 36037, slip op. at 4 (STB served June 1, 2017).

BACKGROUND

MMD states that it would like to acquire the Subject Property as part of a redevelopment project,⁴ but that Conrail claims to have an easement for a railroad right-of-way over at least part of the Subject Property and has not agreed to sell its interest in the Subject ROW. (Pet. 2.) MMD asserts that the relief requested here would allow it to pursue its redevelopment plans in state court to acquire through condemnation⁵ any of Conrail's remaining rights with respect to the Subject ROW and Subject Property. (Id. at 3.)

According to MMD, any right that Conrail has to the Subject ROW is for use as ancillary track under § 10906. (Id. at 7.) MMD asserts that the Subject ROW is stub-ended at Nye Avenue, is not part of Conrail's mainline, has been paved over, and is separated from the rest of Conrail's right-of-way by a fence and overgrowth of bushes. (Id. at 5-6.) MMD also states that there is no rail service over the Subject ROW and that no customers or potential customers are located along the Subject ROW. (Id. at 6.) MMD argues that, because ancillary track can be abandoned without Board authority under § 10906, Conrail has "voluntarily abandoned" its interest in the Subject ROW by failing to exhibit a continuing intent to provide common carrier service over it. (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 for over 13 years, 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 (an adjacent property owner) has never used rail service on the Subject ROW, and no other potential customers are located along the Subject ROW. (Id.)

Conrail was served with a copy of the petition but did not file a response. On July 6, 2023, MMD filed a letter noting that Conrail had not responded and reiterating the request that the Board institute a proceeding and establish a procedural schedule. (MMD Letter 1.)

By decision dated September 12, 2023, the Board instituted a declaratory order proceeding and ordered Conrail to file a reply to the petition. In its October 12, 2023 verified reply, Conrail states that it retains an ownership interest in the Subject Property that is related to its interest in an adjacent right-of-way. (Conrail Reply 2.) However, Conrail does not dispute that any prior or existing track over the Subject Property is ancillary track under § 10906, that such tracks end at Nye Avenue, and that Conrail does not currently conduct rail operations over the Subject Property. (Id.) Conrail also states that it has no plans for future rail operations over the Subject Property and that any prior or existing track over the Subject Property "might be considered 'abandoned' in the sense that Conrail has not 'continued to exhibit a fixed and continuing intent to hold out to provide common carrier rail service to the public' using the tracks." (Id. (quoting JGB Props., LLC—Pet. for Declaratory Ord., FD 35817, slip op. at 8 (STB served May 22, 2015)).) Further, Conrail states that it "does not assert that the Subject ROW is needed as part of the interstate rail system." (Conrail Reply 3.)

⁴ MMD states that the project involves MMD's adjacent property, which is occupied by Asia Trading Intl LLC d/b/a UniPro International (UniPro). (Pet. 2 n.1.)

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

On October 20, 2023, MMD filed a rebuttal urging that the Board should grant the relief requested because Conrail does not dispute the factual allegations in the petition or raise legal argument in opposition to the relief requested. (MMD Rebuttal 1-2.)

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 a 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).

The Board will issue a declaratory order here with respect to whether tracks over the Subject Property are ancillary tracks governed by § 10906. As noted above, see supra note 3, ancillary tracks are within the Board’s exclusive jurisdiction, but Board authority is not required to abandon or discontinue service over them. In determining whether a particular track is subject to the Board’s licensing authority under 49 U.S.C. § 10901 or is ancillary track under § 10906, the Board has adopted a case-by-case approach that examines factors such as intended use of the track, physical characteristics, relationship to the rail system, and history. See N.Y.C. Econ. Dev. Corp.—Pet. for Declaratory Ord., FD 36467, slip op. at 3 (STB served June 11, 2021). Certain indicia used in making this determination have included the length of the track; whether it serves more than one shipper; whether it is stub-ended; whether it was built to penetrate new markets; whether the shipper is located at the end of the track; whether there is regularly scheduled service; traffic volume; who owns and maintains the track; whether the track was constructed with light-weight rail; the condition of the track; what the track is used for (e.g., switching, loading, and unloading); and whether there are stations on the track. See Tri-City R.R., FD 36037, slip op. at 4. The Board considers and weighs such indicia as appropriate in light of the evidence and circumstances of each case. See Great Walton R.R.—Pet. for Declaratory Ord., AB 1242 (Sub-No. 1), slip op. at 9 (STB served June 9, 2020).

Here, the parties agree that the track is ancillary track, and the Board is not aware of any evidence to the contrary. Conrail indicates that the intended use of any such track over the Subject Property was for ancillary purposes and that the line is stub-ended. (Conrail Reply 2.) Further, Conrail does not claim that any existing or past track over the Subject Property is or was part of its main line or needed as part of the interstate rail system. And there is no information in the record regarding the other indicia regularly considered by the Board (as discussed above) that would suggest a different result. Based on the record, the Board finds that any track over the Subject Property is or was ancillary track governed by § 10906.

It is not necessary for the Board to address whether the track over the Subject Property has been abandoned. The Board lacks regulatory authority over the abandonment of ancillary tracks, meaning such tracks can be removed from the interstate rail system without Board authority. See § 10906. Although the Board has occasionally issued declaratory orders determining whether ancillary tracks have been abandoned and removed from the Board’s

jurisdiction, such cases typically involved a dispute concerning the use or removal of the tracks.⁶ Where there is no dispute between parties, however, there is no need for the Board to weigh in on whether excepted tracks have been abandoned or removed from the interstate rail system. N.Y.C. Econ. Dev. Corp., FD 36467, slip op. at 6. In this case, there is no dispute that the tracks at issue (to the extent that any still exist) are not in use and not needed for rail service. Conrail concedes that it has not exhibited a continuing intent to hold itself out to provide common carrier service over any track on the Subject Property, that any such track could be considered abandoned, and that the Subject ROW is not needed to provide rail service. (Conrail Reply 2-3.) Because there is no dispute between the parties or uncertainty to resolve, a declaratory order on this issue is not necessary.

For the reasons discussed above, the petition for declaratory order will be granted in part and denied in part.

It is ordered:

1. The petition for declaratory order is granted in part and denied in part, as explained above.
2. This decision is effective on its service date.

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

⁶ See, e.g., NewVista Prop. Holdings, LLC—Pet. for Declaratory Ord., FD 36040, slip op. at 3-4 (STB served Mar. 17, 2017); Pinelawn Cemetery—Pet. for Declaratory Ord., FD 35468, slip op. at 8-11 (STB served Apr. 21, 2015).