

August 21, 2024

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VIA E-FILING

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

ENTERED
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August 21, 2024
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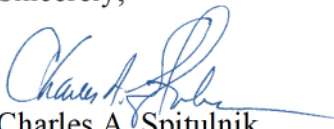
Re: *City of Philadelphia – Petition for Declaratory Order*, STB Finance Docket No. 36768

Dear Ms. Brown:

I have attached for e-filing the Motion of City of Philadelphia to Strike Motion to Dismiss of Eric S. Strohmeyer, or in the alternative, Reply of the City of Philadelphia to Motion to Dismiss in the above-referenced proceeding.

If you have any questions, please do not hesitate to contact me.

Sincerely,



Charles A. Spitulnik

Enclosure

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Docket No. FD 36768

City of Philadelphia – Petition for Declaratory Order

**MOTION OF CITY OF PHILADELPHIA
TO STRIKE MOTION TO DISMISS OF ERIC S. STROHMEYER, OR IN THE
ALTERNATIVE, REPLY OF THE CITY OF PHILADELPHIA
TO MOTION TO DISMISS**

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August 21, 2024

Attorneys for the City of Philadelphia

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Docket No. FD 36768

City of Philadelphia – Petition for Declaratory Order

**MOTION OF CITY OF PHILADELPHIA
TO STRIKE MOTION TO DISMISS OF ERIC S. STROHMEYER, OR IN THE
ALTERNATIVE, REPLY OF THE CITY OF PHILADELPHIA
TO MOTION TO DISMISS**

The City of Philadelphia (the “City”) hereby submits this Motion to Strike the Motion to Dismiss filed by Eric S. Strohmeyer in this proceeding. Mr. Strohmeyer has no interest in this proceeding or in the property that is its subject. He has submitted his Motion without seeking leave of the Board to intervene and without providing any explanation of a valid interest that would justify his participation here. In the event that this Board does not strike his Motion and permits him to participate despite the complete absence of any showing of a cognizable interest, the City submits this Reply to the Motion to ask this Board to deny Mr. Strohmeyer’s Motion.

Mr. Strohmeyer is wrong. Although this matter, like *Consolidated Rail Corp. v. Surface Transportation Board*, 571 F.3d 13 (D.C. Cir. 2009) (“*Conrail*”), requires the Board to determine whether it has jurisdiction over something related to rail lines in the northeastern United States, the similarities between *Conrail* and this matter end there. The heart of the dispute in this matter is whether the Board continues to have jurisdiction over the owner of previously regulated property, and how the Board treats interests in real property after rail lines on the property are abandoned in accordance with applicable federal law. This proceeding presents no issue — at least none between the actual parties in interest here — as to the interpretation of the Final System

Plan or what interests Reading International, Inc. (“Reading”) or the Reading Company possessed at any given time. Notwithstanding Mr. Strohmeyer’s efforts to characterize this dispute otherwise, the parties here have not raised any disagreement for the Special Court to resolve. The question here is whether this Board still has jurisdiction over the real property owned by Reading underlying the former line of railroad. The answer to that question, as the City of Philadelphia has demonstrated, is “no”. As a result, and as the City has also demonstrated previously, federal preemption does not prevent the City from exercising its eminent domain authority with respect to the property.

I. Mr. Strohmeyer is Not an Interested Party and the Board Should Therefore Deny His Attempt to Intervene in this Proceeding.

Mr. Strohmeyer is not a party to this proceeding and has no interest in it that justifies the Board granting him the right to intervene at this time. Had he sought leave to intervene, the City would have objected and asked the Board to deny the motion.¹ And any such motion would have been futile. Mr. Strohmeyer has no legitimate interest in this case. *See North San Diego Cnty. Transit Dev. Bd.—Pet. for Declaratory Order*, FD 34111, slip op. at 1 (STB served Dec. 21, 2001). At no point in his motion does Mr. Strohmeyer claim that he has any stake in the outcome of this proceeding, either in the treatment of the Viaduct or in the rule of law the Board’s decision will set.² Mr. Strohmeyer even suggests that a broad list of interested parties should be served in cases of this nature; notably, he is not on that list, nor does he have an apparent connection to any party who is. Motion at 32. The Board should not allow individuals with no interest in declaratory order proceedings to intervene, thereby bogging down its already busy docket.

¹ Although Mr. Strohmeyer is proceeding *pro se*, he is an experienced practitioner before the Board. The Board should not excuse the deficiencies in the form of Mr. Strohmeyer’s submission. *Norfolk S. Ry. Co.—Pet. for Exemption—In Baltimore City and Baltimore Cnty., Md.*, AB 290 (Sub-No. 311X), slip op. at 5 n.8 (STB served Mar. 22, 2010).

² To the extent that Mr. Strohmeyer indicates he cares about how the merits of the City’s Petition are resolved, he appears to favor the City’s position. Motion at 30–31.

Nor has Mr. Strohmeyer shown that any “[g]ood cause exists to grant [a] petition for leave to intervene,” if he had taken the trouble to file one. *City of Jersey City—Pet. for Declaratory Order*, FD 34818, slip op. at 1 (STB served Jan. 24, 2006). Mr. Strohmeyer simply makes his legal arguments as if already a party.

The Board should therefore deem Mr. Strohmeyer’s filing improperly submitted and decline to consider it.³ Alternatively, the Board should construe Mr. Strohmeyer’s Motion as a Petition for Leave to Intervene and deny the petition.

Once the Board declines to consider Mr. Strohmeyer’s Motion, the Board need not consider the arguments raised therein. Although the issue Mr. Strohmeyer raises concerns the Board’s jurisdiction, the D.C. Circuit has made clear that a party in a Board proceeding can forfeit the argument that the Board lacks jurisdiction to consider a matter under 45 U.S.C. § 719(e) by failing to raise it. *Lowe v. STB*, 540 F. App’x 6, 6 (D.C. Cir. 2013) (holding that, where petitioners claimed “that under [*Conrail*] the Board lacked jurisdiction to determine” an issue in a case but failed to raise that claim to the Board, “the issue[] [was] forfeited”). Reading failed to contest the Board’s jurisdiction in its Reply, so the issue is not properly before the Board.

II. Notwithstanding Mr. Strohmeyer’s Attempts to Cloud the Issue Here, the City Has Demonstrated that the Board’s Jurisdiction Over the Viaduct Has Terminated Because Conrail Completed an Abandonment Under the 3R Act and Reading is Not a Rail Carrier.

By introducing a lengthy exegesis on the history and implications of the Final System Plan, Mr. Strohmeyer’s motion attempts to create the impression that the City’s argument requires interpretation of the Final System Plan or an associated conveyance order. That is incorrect. His Motion also attempts to raise questions about exactly what interests were conveyed to the Reading

³ Additionally, Mr. Strohmeyer’s motion was filed more than three months after the City’s Petition, and more than forty days after the City’s Reply to Reading’s Reply. Where a filing is “not only irregular but out of time as well,” there is little reason to accept it. *Burlington Northern & Santa Fe Ry.—Abandonment of Chi. Area Trackage in Cook Cnty., IL*, AB 6 (Sub-No. 382X), slip op. at 1–2 (STB served Sep. 21, 1999).

Company. This proceeding presents no such question. The question before this Board is whether Conrail complied with the requirements of the Regional Rail Reorganization Act (the “3R Act”) in following the abandonment procedures set forth there, and if so, whether this Board retains any jurisdiction over the Reading Company’s interest in this property that would preclude the City’s exercise of eminent domain. The answer is that Conrail did in fact comply with those requirements and as a result, there is no federal preemption bar to the City’s exercise of its condemnation authority.

Reading and the City have no disagreements concerning the factual background to this matter or the effect of the deed to Conrail. Reading and Conrail agree that:

- The Reading Company conveyed certain interests in the Viaduct to Conrail in a deed executed pursuant to the Final System Plan and that the Reading Company retained an ownership interest in the Viaduct, which Reading now owns.
- Conrail abandoned its interests through a proceeding under the 3R Act. *Conrail Abandonment in Phila., PA*, AB 167 (Sub-No. 479) (STB served June 24, 1983); Pet. for Dec. Order Ex. C; *see also* 45 U.S.C. § 748(c).
- Today, Reading owns the Viaduct and Conrail has no remaining interest in it.
- There is no railroad service on the Viaduct and the tracks have been removed.
- “[T]he Final System Plan did not convey the entirety of the Viaduct property to Conrail” and “Reading retained its property interests in the Viaduct. Conrail only took over operations of the freight services.” Reading Reply at 10.
- Reading retained “pre-existing interests,” “pre-existing property interests,” “ownership interests,” “property interests,” and “fee interests” in the Viaduct.

(These are all of the ways that Reading characterizes its interests in the Viaduct in its Reply, and the City agrees with each.⁴) Reading Reply at 5, 6, 7, 10, 12.

In sum, the parties view much of the Viaduct's history in the same way.

The City's argument is that abandonment under Section 308 of the 3R Act, 45 U.S.C. § 748, was sufficient to terminate the Board's jurisdiction over the Viaduct. An abandonment proceeding under the 3R Act is sufficient to terminate the Board's jurisdiction entirely, notwithstanding the fact that, as Reading notes, "the Viaduct *property* was never abandoned under 49 U.S.C. § 10903," Reading Reply at 7 (emphasis added). This was a crucial flaw in the *Scioli Turco* decision: the District Court failed to grasp that abandonment under Section 308 of the 3R Act has the same effect on the Board's jurisdiction that an abandonment under 49 U.S.C. § 10903 (or its predecessors) does. The statute itself is quite clear, stating that "[a]ny such application [for abandonment] shall be governed by this section and shall not, except as specifically provided in this section, be subject to the provisions of chapter 109 of title 49." 45 U.S.C. § 748(a). Abandonment under the 3R Act is sufficient to terminate the Board's jurisdiction. As a result, the Board has no jurisdiction over the Viaduct unless it has jurisdiction over Reading's interest.

The Board does not have jurisdiction over Reading's interest in the Viaduct. The Interstate Commerce Commission Termination Act ("ICCTA") poses no obstacle to the City's use of its condemnation power because the ICCTA only preempts state and local laws that would regulate rail transportation that is subject to the jurisdiction of the Board. The Board's jurisdiction is exclusive over "transportation by rail carriers" and over "the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities"

⁴ Reading does note that a case the City cited "discusses the different types of railroad interests that may be involved." Reading Reply at 11. But Reading never suggests that it has any "railroad interests," let alone explain what they are. Reading's clear argument is that "property interests" or "ownership interests" are sufficient to make Reading's participation in an abandonment proceeding necessary for the Board's jurisdiction over the Viaduct to terminate.

49 U.S.C. § 10501(b). Accordingly, state and local laws are preempted “with respect to regulation of rail transportation,” with “transportation” defined to require some facility or equipment “related to the movement of passengers or property, or both, by rail.” *Id.* §§ 10102(9), 10501(b). Preemption thus has two prerequisites: “to be subject to the Board’s jurisdiction and qualify for Federal preemption under section 10501(b), the activities at issue must be transportation, and that transportation must be performed by, or under the auspices of, a ‘rail carrier.’” *Town of Babylon & Pinelawn Cemetery—Pet. for Dec. Order*, FD 35057, slip op. at 4 (STB served Feb. 1, 2008).

The Viaduct fails both prongs of this test. Reading is not a rail carrier because it conducts no railroad activities, *see* 49 U.S.C. § 10102(5), and never has. And the Viaduct cannot be used for transportation because the tracks have been removed and there is no ability to connect tracks, if any existed, to any other tracks at either end. Therefore, as the City has explained, the abandonment of Conrail’s interests terminated the Board’s jurisdiction over the Viaduct entirely “because Reading International is not a rail carrier and the Viaduct is not and cannot be used for railroad operations.” *Pet. for Dec. Order* at 8. Reading has undertaken no action that would restore the Board’s or its predecessor’s authority over the Viaduct and simply claiming that such authority exists does not make it so.

In sum, Reading cannot succeed in arguing that the Board has jurisdiction over the Viaduct for two reasons: first, an abandonment under Section 308 of the 3R Act is sufficient to terminate the Board’s jurisdiction over the Viaduct because it terminated all interests within the Board’s jurisdiction in compliance with a statute that set an alternate mechanism for securing abandonment of rail lines that were previously part of the networks of the northeastern railroads whose interests and properties were combined to create Conrail; and second, Reading’s “property interests” or “ownership interests” do not fall within the Board’s jurisdiction, because Reading is not a rail carrier providing transportation that is subject to that jurisdiction.

III. The Board, not the Special Court, has Jurisdiction Over this Matter.

Considering the City's argument free from the sidetracks Mr. Strohmeyer has introduced makes clear that the Board can resolve the disagreements at the heart of this proceeding. The parties do not dispute what property interests Reading has. No party is asking the Board to interpret the deed or the Final System Plan; the mere fact that the deed provides relevant background does not make the deed's meaning disputed. This proceeding does not require the Board to "interpret, alter, amend, modify, or implement" a conveyance order or the Final System Plan itself. 45 U.S.C. § 719(e)(2). Because the Final System Plan and the deed merely form the background of this proceeding and their meanings are not contested, the Board has jurisdiction over this matter.

Reading's arguments make clear that this is so. Reading first argues that "the Viaduct property was never abandoned under 49 U.S.C. § 10903," Reading Reply at 7, and that "the *Scioli Turco* Court was correct when it explained there was a distinction between abandonment under the 3R Act and abandonment filed under 49 U.S.C. § 10903," Reading Reply at 9; *see generally* Reading Reply at 7–10. The City agrees with Reading if it means to argue that Reading never participated in an abandonment proceeding before the Board or the Interstate Commerce Commission ("ICC") because Reading was never a railroad and never had the rights of one. However, the City does not agree that an abandonment under the 3R Act was insufficient to terminate Board jurisdiction. Resolving this dispute does not require that the Board make any reference to the Final System Plan or the deed, but rather to confirm that an abandonment under the special provisions enacted in the 3R Act for certain categories of rail lines in fact removed those lines and properties from the Board's jurisdiction without complying with any other abandonment process.

Second, Reading argues that "[w]hile Conrail relinquished its easement consisting of its operations related to the Viaduct, that relinquishment did not operate to abandon the entirety of

the Viaduct property consisting of Reading’s ownership interests as well.” Reading Reply at 11. In Reading’s view, the Board cannot issue the declaratory order because the Viaduct has not been “more generally abandoned by all owners of interests.” Reading Reply at 3. The City, on the other hand, argues that the owners of real property interests that rail lines cross do not need to abandon their interests for the Board’s jurisdiction to terminate, because real property interests, standing alone, are not subject to the Board’s jurisdiction. That is a dispute about what rights and obligations a landowner has vis-à-vis a railroad line on its property when the jurisdiction of the STB (or its predecessor the ICC) over that line of railroad has been terminated by means of a valid abandonment, not about the interpretation of the Final System Plan or the deed from Reading to Conrail. That dispute, too, is not within the Special Court’s exclusive jurisdiction.

Reading goes on to argue that it is entitled to the benefits of federal preemption notwithstanding the fact that it is not a rail carrier because a rail line “is not ‘abandoned’ under 49 U.S.C. § 10903 until the STB pronounces it so.” Reading Reply at 14; *see also* Reading Reply at 14–16. That is an argument about the interaction between the 3R Act and sections 10501 and 10903, and it therefore has no relationship to the Final System Plan or any conveyance order.⁵ Reading next raises unsupported factual arguments regarding the condition of the Viaduct today. That, too, has nothing to do with the interpretation of the Final System Plan or a conveyance order. Reading Reply at 15. Reading concludes its argument by attempting to rely on the District Court’s decision in *Scioli Turco* and the Board’s decision in *Pinelawn Cemetery—Petition for Declaratory Order*, FD 35468 (STB served Apr. 21, 2015). Reading Reply at 16–18. Reading uses the former decision to interpret § 10501, and the latter to attempt to draw a strained analogy between the rights that a non-railroad landowner has and the rights that a tenant railroad under the preemption

⁵ On the merits, the argument is a misdirection because it does not change the fact that a non-rail carrier is not entitled to the benefits of federal preemption.

provision of § 10501 enjoys. Accordingly, these arguments create disputes between Reading and the City over (1) the meaning of § 10501, (2) whether a bare, unsupported assertion that “certain portions of the Viaduct could still support rail services in the future” is enough to preempt state and local regulation of the Viaduct when the Viaduct has no tracks and no way to connect tracks to any other rail line, and (3) whether the abandonment of rail authority pursuant to a valid procedure enacted to address a specific set of issues facing railroads in the northeastern United States is sufficient to remove the jurisdiction of the STB (and its predecessor the ICC) over that Viaduct. Those disputes are not within the Special Court’s jurisdiction. They are for the Board to resolve.

The Special Court therefore lacks jurisdiction over this matter. Indeed, if the parties asked the Special Court to resolve all of the issues within its exclusive jurisdiction and then returned to the Board so it could resolve what remained, the parties would need to make identical arguments in their filings to those they have already made here, and the Board would be faced with the exact same dispute it now faces. The Special Court’s jurisdiction is built for resolving whether a particular track was subject to the Final System Plan, or what rights were conveyed through the Final System Plan. Because that is not at issue here, the Board, and not the Special Court, has jurisdiction.

Mr. Strohmeyer’s Motion relies heavily on *Conrail*, but Mr. Strohmeyer misinterprets the case. *Conrail* arose when the railroad attempted to transfer properties on which it had previously operated rail service to a private real estate developer, and various parties petitioned the Board for an order declaring that Conrail needed the Board’s authorization to carry out the transfer. 571 F.3d at 17. The rail properties had been conveyed to Conrail pursuant to the Final System Plan. *Id.* at 15–16. Before the Board, Conrail and the petitioners disputed “the track’s nature,” i.e. whether the track was a line of railroad or “spur” track. *Id.* at 19–20. That dispute required the Board to

examine “the ‘nature’ of the conveyance” to Conrail, because “the track’s nature” at the time of the proceeding was determined by what sort of track had been conveyed to Conrail pursuant to the Final System Plan. *Id.* Resolving that dispute required interpreting the Final System Plan itself, specifically the term “Line Code 1420.” *Id.* at 19 (“The Board interpreted ‘Line Code 1420’ in the FSP to include the Embankment as a ‘rail line.’ . . . The petition for a declaratory order in this case, therefore, ‘raises substantial questions with respect to the interpretation of the FSP and [the Special Court’s] conveyance orders themselves.’” (quoting *Consolidated Rail Corp. v. Pittsburgh and Lake Erie Railroad Co.*, 459 F. Supp. 1013, 1017 (Reg’l Rail Reorg. Ct. 1978))). If the Final System Plan and accompanying conveyance order were read one way, then the Petitioners would have been right on the merits. If the Final System Plan and accompanying conveyance order were read a different way, then Conrail’s view would have been correct. That disagreement was at the core of the Special Court’s jurisdiction, so the Board could not interpret the Final System Plan and conveyance order itself. *See* 45 U.S.C. § 719(e)(2) (granting the Special Court exclusive jurisdiction over “any action . . . to interpret, alter, amend, modify, or implement any of the orders entered by [the Special Court] . . . in order to effect the purposes of [the 3R Act] or the goals of the final system plan”).

But the *Conrail* decision took care to note that there is a difference between disputes *about* the Final System Plan and disputes for which the Final System Plan is merely historical background. In the latter case, if the Final System Plan’s interpretation is not disputed, then the Special Court does not have jurisdiction. To make that point, the D.C. Circuit stressed that the Special Court’s jurisdiction stemmed from the fact that resolving the proceeding required resolving a dispute over the interpretation of the Final System Plan. The Board had contended that every abandonment proceeding required it to determine the nature of the track at issue and so a ruling that it had no jurisdiction would be far-reaching, but that, the D.C. Circuit explained, was not so.

If the nature of the track at issue—and thus the meaning of the conveyance order—were not disputed, then “the Board’s authority is not disputed” and the Board has jurisdiction. *Id.* at 20. Most proceedings involving lines in the Final System Plan can be handled by the Board, because “[o]nly in proceedings in which the Board’s authority is challenged and an interpretation of the FSP or the Special Court’s conveyance order under 45 U.S.C. § 719(e)(2) is required does the Board lack jurisdiction.” *Id.* Accordingly, the mere fact that the Final System Plan has determined a party’s property interest is not enough to bring a dispute within the Special Court’s exclusive jurisdiction. Instead, what is needed is a dispute over the interpretation of the Final System Plan or a subsequent conveyance order.

There is no such dispute here. Conrail obtained its interest (and Reading was left with its current interest) through a deed executed because of the Final System Plan. But the parties do not contest the meaning of the deed; the City accepts Reading’s characterizations of its interest. Mr. Strohmeyer’s motion takes as a premise that the Board must interpret the deed. Following that premise, he argues that the consideration of the deed brings this case within the exclusive jurisdiction of the Special Court. But Mr. Strohmeyer’s premise is wrong. The Board does not need to interpret the deed because the parties already agree what rights were transferred from Reading to Conrail. And without the key that unlocks the door to the Special Court, Mr. Strohmeyer’s argument must fail. He does not suggest that the Board lacks jurisdiction to issue a declaratory order concerning any property that was once part of the Final System Plan. Nor could he: *Conrail* makes plain that that Board has jurisdiction in exactly this situation.

Because the parties’ dispute is whether “preexisting property interests” and “ownership interests” are sufficient to maintain the Board’s jurisdiction, this is a matter for the Board to

resolve, and not one within the exclusive jurisdiction of the Special Court.⁶ Therefore, the Board has jurisdiction to issue the requested declaratory order.

IV. Conclusion

The City requests that this Board reject Mr. Strohmeier's attempts to muddy the waters in this proceeding by introducing an argument that is not relevant to the issue at hand and decline to consider his reply. Alternatively, the City requests that the Board deny the Motion to Dismiss and issue the order requested in the City's Petition for Declaratory Order.

Respectfully submitted,

/s/ David Smith

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⁶ Mr. Strohmeier's accusations of bad faith are thus baseless on their face, even without inquiring into the City's subjective motivations. They ignore the fact that the dispute, as the parties have framed it, is one that does not require the Final System Plan to be interpreted; Mr. Strohmeier is wrong on the merits.

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of August, 2024, I caused a copy of the foregoing MOTION OF CITY OF PHILADELPHIA TO STRIKE MOTION TO DISMISS OF ERIC S. STROHMEYER, OR IN THE ALTERNATIVE, REPLY OF THE CITY OF PHILADELPHIA TO MOTION TO DISMISS to be served electronically on the following parties:

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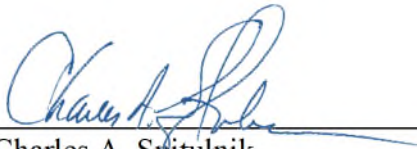
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