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BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 36809

Northeast Louisiana Multimodal District – Petition for Declaratory Order –
Former Line of Railroad Between MP 498.44 and MP 501.15 in Madison Parish,
Louisiana

REPLY OF NORTHEAST LOUISIANA MULTIMODAL DISTRICT TO REPLY OF
DELTA SOUTHERN RAILROAD, INC. TO PETITION FOR DECLARATORY ORDER

Background

On August 22, 2024, Northeast Louisiana Multimodal District (“NELMD”, or “the District”)¹ respectfully filed its Petition for Declaratory Order herein (“Petition”) requesting the Surface Transportation Board (“STB” or “Board”) to issue, pursuant to its authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321, a declaration that the Track Segment of the former Vidalia Branch Line between Milepost (“MP”) 498.44 and MP 501.15 (hereinafter, “Track Segment”) owned by Delta Southern Railroad, Inc. (“DSRR”) was authorized for abandonment,

¹ NELMD is a political subdivision of the State of Louisiana.

and was in fact abandoned and, therefore, is no longer subject to the STB's jurisdiction.

This request was made following the issuance of the Judgment of the United States District Court for the Western District of Louisiana ("Western District Court") that, after finding that it lacked subject-matter jurisdiction, *sua sponte* **DISMISSED WITHOUT PREJUDICE**², the suit (sometimes referred to as "the Expropriation Case") that had been removed to the Western District Court by DSRR. Moreover, the Court, by finding that the Magistrate Judge's Report and Recommendation was correct, necessarily agreed with the Magistrate Judge's recognition that "[i]f the STB were to determine it does not have jurisdiction over this controversy, the matter may return to this Court to be disposed of in an appropriate matter"³ and "that review of the STB decisions is directed to the court of appeals, not the district courts."⁴

In its Reply to NELMD's Petition, filed on September 5, 2024, ("DSRR Reply"), DSRR argued that "[t]he decision of the Court in the Expropriation Case, now final and non-appealable, has res judicata and collateral estoppel

² Bolding and capitalization were that of the Western District Court in its Judgment, which is Exhibit 6 to the Petition.

³ Exhibit 5 to the Petition at 10 n.7.

⁴ *Id.* at 9 n.6.

effect that precludes ... [NELMD's] petition.” (DSRR Reply at 6). DSRR’s arguments, which ignore long-standing precedents of, *inter alia*, the Supreme Court of the United States, the United States Court of Appeals for the Fifth Circuit, the United States Court of Appeals for the D.C. Circuit, and Rule 41(b) of the Federal Rules of Civil Procedure, are frivolous and must be rejected. The Western District Court’s Judgment dismissing the suit without prejudice did not reach the merits and thus is consistent with *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998), quoting with approval *Ex Parte McCordle*, 7 Wall. 506, 514 (1869): "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."

Contrary to DSRR’s argument (at 7-11), res judicata and collateral estoppel do not apply where the court in the prior litigation held that it lacked subject-matter jurisdiction or dismissed without prejudice without reaching the merits. *E.g.*, *United States v. Mendoza*, 464 U.S. 154, 158 n.3 (1984)(“Under res judicata, a final judgment on the merits bars further claims by parties or their privies on the same cause of action”); *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 485 (1982)(same for both res judicata and

collateral estoppel); *Boone v. Kurtz*, 617 F.3d 435, 436 (5th Cir. 1980)(dismissal for lack of jurisdiction does not adjudicate the merits and thus no res judicata on substance of claim asserted); *Jackson v. Office of the Mayor of D.C.*, 911 F.3d 1167, 1170-72 (D.C. Cir. 2018); Fed. R. Civ. P. 41(b)(dismissal for lack of jurisdiction does not have preclusive effect). The Western District Court both held that it lacked subject-matter jurisdiction, thus not reaching the merits, and dismissed without prejudice, so NELMD is not precluded from bringing its Petition for Declaratory Order before the Board; indeed, that is what the Western District Court contemplated NELMD would do.

In its vituperative Reply, DSRR devoted only a portion thereof to the merits of NELMD's Petition herein. DSRR spent much of the pages in the DSRR Reply discussing other proceedings before the Board, and court cases in Louisiana, in an obvious attempt at confusing the issues before the Board in this proceeding.

Such attempts also include the spurious claim that "NELMD is the alter ego of the Lake Providence Port Commission."⁵ NELMD and Lake Providence Port Commission are hardly alter egos of one another. NELMD is a Railroad

⁵ DSRR Reply at 3-4.

Development District that was established in 2023 pursuant to the duly enacted and comprehensive provisions of LA Rev Stat §§ 33:140.71 through 33:140.79⁶ The primary purpose for the creation of the District is to promote and encourage development of rail service running between the Parishes of East Carroll, Madison, Tensas, and Concordia, to stimulate the economy among the Parishes through renewed commerce and industry, and for the utilization and development of natural and human resources by providing job opportunities in and among the parishes.

NELMD's governing body is a board of nine commissioners. Two members shall be appointed by the governing authority of each Parish within the District, while the ninth member is appointed jointly by the governing authorities of the Parishes in the District to serve at large. Given the above, DSRR's claim that NELMD is the alter ego of the LPPC must be rejected.

Based on the foregoing, NELMD seeks leave to file its Reply herein to set the record straight for the assistance of the Board. While the Board's regulations (49 C.F.R. § 1104.13) generally prohibit a reply to a reply, the Board freely grants leave to have a more complete record, to clarify matters at issue,

⁶ Copies of which are attached hereto.

or where doing so will not prejudice any party and will not unduly delay the proceeding. *E.g., Tenth Avenue Neighbors*, FD 36654 (STB served May 9, 2024), slip op. at 2 n.2. NELMD seeks leave to file this Reply in order to respond to arguments that could not have been anticipated in NELMD's Petition, to provide the Board with a more complete record, to clarify the matters at issue, and because doing so will not prejudice any party and will not unduly delay the proceeding. Given the above, the Board is urged to accept NELMD's Reply herein to set the record straight for the assistance of the Board.

Furthermore, the Board should ignore the portions of DSRR's Reply that concern other proceedings before the Board, raising such issues as DSRR's efforts to renew its requests for attorneys' fees in some other such proceedings, and that concern litigation in Louisiana other than the Expropriation Case that led directly to the filing of NELMD's Petition herein. Such matters, which are clearly intended to disparage NELMD's attorneys, serve no valid purpose in this proceeding.

ARGUMENT

The Track Segment Was Abandoned and, Therefore,
the Board Does Not Have Jurisdiction Over It.

As NELMD recounted in its Petition, it filed its Expropriation Petition in Louisiana state court. DSRR removed the case to the Western District Court. In her “Report & Recommendation” (Exhibit 5 to the Petition), the Western District Court’s Magistrate Judge discussed the parties’ respective positions and agreed with NELMD that the STB lacks jurisdiction over a line of railroad that has been abandoned. Exhibit 5 at 5, citing *Baros v. Texas Mexican Ry. Co.*, 400 F.3d 228, 234 (5th Cir. 2005)(citing *Preseault v. ICC*, 494 U.S. 1, 5 (1990) (“Once a carrier ‘abandons’ a rail line pursuant to authority granted by the [ICC], the line is no longer part of the national transportation system, and although the [ICC] is empowered to impose conditions on abandonments . . . as a general proposition [the] ICC jurisdiction terminates.” (citations omitted))).

The Magistrate Judge went on to state:

“The Development District asserts that the ICC authorized abandonment of the Track Segment, and neither it nor the STB have been asked to reauthorize interstate transportation on that segment. Memo in Support of M/Remand [doc. #9-1, p. 2]. The Development District further argues that, on this basis, the STB lacks jurisdiction over the Track Segment. *Id.* According to the Development District, because the federal regulator lacks jurisdiction over the Track Segment, there is no federal question to grant this Court jurisdiction over the matter. *Id.*”

The Magistrate Judge [doc. #23, p. 6] also noted that “Delta Southern admits that the Track Segment has previously been abandoned.” Opposition to M/Remand [doc. #14, p. 16 n.9] (“Because [the Track Segment] was abandoned, it is not a common carrier line of railroad.”). In this proceeding, DSRR admits (DSRR Reply at 13) that the Track Segment was “previously abandoned” (i.e., by Missouri-Pacific Railroad Company (“MoPac”) in 1988).

On the basis of the above-cited authority, the Supreme Court’s decision in *Hayfield N. R.R. Co., Inc. v. Chicago & North Western Ry. Co.*, 467 U.S. 622, 633-34 (1984), DSRR’s admission that the Track Segment at issue was abandoned, and the determination of the Interstate Commerce Commission (“ICC”) that “abandonment of the Tallulah-Vidalia segment was consummated,”⁷ NELMD maintains that the Board lacks jurisdiction over the Track Segment.

DSRR argues that the Board does not need to grant a certificate to construct, acquire, or operate Excepted Track under 49 U.S.C. § 10906. While that may be true as a general matter, it is also the case that, in accordance with the above-cited cases, where the Board (or the ICC before it) granted a

⁷ *Louisiana Railcar, Inc. v. Missouri-Pacific Railroad Co.* 5 I.C.C. 2d 542, 544 (1989).

railroad's request to abandon a line of railroad, including Excepted Track, and abandonment of the line was consummated, the Board no longer has regulatory authority over that track.

Indeed, as noted above, in a letter filed September 2, 2022 in FD 36447 by its previous counsel, DSRR admitted that the Track Segment at issue herein is “non-regulated,” and is beyond the southern terminus of the line as established by the Board in 2023. Therefore, DSRR cannot now defend against issuance of NELMD's Petition on the ground that the Track Segment is in fact regulated. DSRR is estopped from contradicting itself before the Board on precisely the same issue.⁸

⁸ By its Petition to Correct the Notice of Exemption, filed September 23, 2022 in FD 33802, *Delta Southern Railroad, Inc.—Acquisition and Operation Exemption – Delta Southern Railroad Company*, DSRR sought to correct the milepost number for the southern terminus of its ownership and operating authority over the Lake Providence Branch Line from MP 489.44 to MP 498.44, which correlates with the operating authority that the ICC granted to DSRC in 1988. Based on DSRR's arguments, the Board, by decision served September 1, 2023, in FD 33802, modified DSRR's ownership and operating authority to reflect the terminus of the Line at MP 498.44, where it connects with “Kansas City Railroad Company (now Canadian Pacific Kansas City, or CPKC).” Slip op. at 2. No mention was made of the segment of the Line south of MP 498.44, which was part of the former Vidalia Branch that was abandoned in 1988, and today is no longer attached to the isolated Track Segment that is the subject of this proceeding. In fact, today the Track Segment can only be reached through an unregulated trackage agreement with CPKC.

In other words, DSRR's then-counsel conceded, on September 2, 2022, that DSRR had done nothing to bring the Track Segment at issue into the Board's regulatory jurisdiction over the national freight railroad system. It still has not done so and offers no argument to the contrary in the DSRR Reply.

Instead, DSRR seems to argue that it can take unilateral actions, including relying on "haulage rights granted by Kansas City Southern" that assertedly overcame DSRR's inability to access the Track Segment caused by DSRR's abandonment of the segment of track that crossed over the Meridian Speedway, and may have been granted outside the Board's regulatory authority, to bring a line of railroad back into the Board's regulatory jurisdiction. NELMD submits instead that, because MoPac sought and obtained the permission of the ICC to abandon the Track Segment in 1988, prior to its acquisition by DSRR or its predecessor-in-interest DSRC, DSRR was obliged to take some sort of action before the Board to bring the Track Segment back into the Board's regulatory jurisdiction after acquiring it,⁹ but it has not done so.

⁹ See *Effingham Railroad Company – Petition for Declaratory Order – Construction at Effingham, IL*, 2 S.T.B. 606, 610 & n. 8 (1997) (Petitioner obliged to file an application for construction and operation of line of railroad under 49 U.S.C. § 10901 or a petition for an exemption under 49 U.S.C. § 10502,

DSRR cites various court cases and decisions of the Board that it claims are to the contrary. NELMD disagrees with DSRR's reading of some of those cases and maintains that others are irrelevant. For example, DSRR cites (DSRR Reply at 13-14) *Allied Indus. Dev. Corp. –Petition for Declaratory Order*, Docket No. 35477, 2015 STB LEXIS 310 (STB decided Sept. 15, 2015) (“... § 10906 track is part of the national rail system. Accordingly, while excepted from the Board's licensing requirements, § 10906 track is nevertheless subject to the Board's jurisdiction”) as well as *New England Transrail, LLC, d/b/a Wilmington & Woburn Terminal Ry.—Construction, Acquisition, and Operation—In Wilmington and Woburn, Ma.*, Docket No. 34797, 2007 STB LEXIS 391 at *26-27 (STB served July 10, 2007); *Friberg v. Kansas. City South. Ry. Co.*, 267 F.3d 439, 443 (5th Cir. 2001); *United Transp. Union—Il. Legis. Bd. v. STB*, 183 F.3d 606, 612 (7th Cir. 1999); *Cedarapids, Inc. v. Chicago, Cent. & Pac. R.R. Co.*, 265 F. Supp. 2d 1005 (N.D. Iowa 2003). But the general proposition is not in dispute, i.e., that § 10906 track is not subject to the Board's licensing jurisdiction.¹⁰ But when a line of railroad was abandoned

including with regard to 206.05 feet of track separately acquired from Agracel Corporation).

¹⁰ The action of the Western District Court in dismissing the litigation below was consistent with the *Cedarapids* Court's observation (265 F. Supp. 2d at 1016) that dismissal “is proper to allow the STB to exercise its jurisdiction.”

pursuant to the Board's approval, a fact not involved in those cases but which occurred here for the Track Segment at issue, the ICC (and subsequently the Board) lacks jurisdiction over the Track Segment under *Hayfield*, *Preseault*, and *Baros*, cited *supra*.

Instead of the above-cited cases, DSRR chiefly relies (at 8-9) on a few other cases. One is *Glosemeyer v. M-K-T R.R. Co.*, 685 F. Supp. 1108, 1117 (E.D. Mo. 1988), but that case does not help DSRR. It involved rail-banking under the Rails to Trails Act, but as the Eastern District of Missouri noted, the line at issue therein was not abandoned, but instead was railbanked, and thus the ICC retained jurisdiction. Another is *Great Walton R.R. Co.—Petition for Declaratory Order*, AB No. 1242 (Sub-No. 1)¹¹(STB served June 23, 2020), but there, the Board stated (slip op. at 6) that “The Board’s decision in Hartwell First, however, was silent on the regulatory status of the runaround track,

The sole issue involved in the Western District Court’s determination to dismiss the action without prejudice to NELMD returning to the District Court after the Board’s determination herein was whether the Track Segment at issue, having been abandoned with the ICC’s approval, was nevertheless subject to the Board’s regulatory jurisdiction. None of the cases relied on by DSRR involves an ICC or STB determination to allow abandonment of § 10906 Excepted Track, which is a matter that is *sui generis* so far as the undersigned counsel are aware.

¹¹ Mis-cited in DSRR’s Reply as AB-No. 1241 (Sub-No. 1).

because addressing that question was not necessary to resolve the petition for adverse abandonment at issue in that case.” The Board went on to note (id. at 7) that “However, simply leaving open the possibility that the runaround track might be reconstructed does not constitute an affirmative entitlement to do so,...” thus demonstrating that the owner of a line that has been abandoned must obtain Board authority to include the line in the Board’s regulatory jurisdiction. The Board went on to explain (id. at 8, emphasis added) that it had not determined the regulatory status of the track, but instead would await the conclusion of state court litigation concerning the preemption issue:

“The second overarching argument made by GWRC in its petition is that the runaround track was and remains part of the mainline and, as such, GWRC is free to resume use of the track. Hartwell First counters that the runaround track was ancillary track under § 10906 and was abandoned by GWRC around 2008 when it removed the track. For the reasons explained below, the Board finds that the runaround track is ancillary track but will defer ruling on whether it was removed from the interstate rail network until the state-level proceedings are concluded.”

Given that the Western District Court determined that it should dismiss NELMD’s suit without prejudice, and expressly acknowledged (Exhibit 5, Report & Recommendation at 10 n. 7) that, “If the STB were to determine it does not have jurisdiction over this controversy, the matter may return to this

Court to be disposed of in an appropriate manner,” the Board should grant NELMD’s request for a declaratory order and resolve the issue that the Western District Court determined was beyond its subject-matter jurisdiction.

DSRR also relied (DSRR Reply at 9) on *Pinelawn Cemetery – Petition for Declaratory Order*, FD 35468 (STB served April 21, 2015). There, the parties argued whether the line at issue was private track or Excepted Track. After determining that the line was Excepted Track, the Board concluded (slip op. at 10): “For these reasons, we conclude that no abandonment of the § 10906 track at issue occurred, and thus the yard is still within the Board’s jurisdiction.” The Board noted (slip op. 10 n. 31) that

“As discussed earlier, because the track at issue is yard or spur track, it is excepted from the Board’s abandonment authority, which includes adverse abandonments. As a result, the proper vehicle for removing the Board’s jurisdiction would be through a declaratory order proceeding.”

The distinction here is that Track Segment at issue was a part of a §10901 line subject to the ICC’s jurisdiction when it was abandoned in 1988 by MoPac, and thus the abandonment removed the Track Segment from the ICC’s (now STB’s) regulatory jurisdiction at that time. For DSRR to bring the Track Segment back into the Board’s regulatory jurisdiction is not something DSRR may do unilaterally, but requires a Board determination, such as

“through a declaratory order proceeding,” as the Board stated *supra* in *Pinelawn*;¹² see also *Effingham Railroad Company*, *supra*, 2 S.T.B. at 610 & n.8.

Conclusion

The United States District Court for the Western District of Louisiana did not address the merits of the dispute before it – i.e., whether the Track Segment at issue is subject to the STB’s regulatory jurisdiction -- but instead held that it lacked subject-matter jurisdiction over that issue and dismissed the suit without prejudice, leaving the merits to the STB to determine in the first instance. Accordingly, *res judicata* and *collateral estoppel* do not apply.

¹² The STB stated in *Pinelawn* (slip op. at 6) that “Certain rail track, however, can be added or removed from the system without a license from the Board.” The Board went on (*id.*) to make clear it was dealing with Excepted Track under § 10906. However, as discussed *supra*, the circumstances involving the Track Segment at issue herein are distinguishable from those in *Pinelawn* because here, the Track Segment at issue (which at that time was part of a § 10901 line of railroad) was authorized for abandonment by the ICC and the abandonment was in fact consummated. Once the ICC determined that the Track Segment should be abandoned, and the abandonment was in fact consummated, DSRR could not thereafter unilaterally determine whether the Track Segment should again be considered part of the Board’s regulatory jurisdiction, but instead, would have to ask the Board for a determination to that effect, else the ICC’s original determination with regard to the Track Segment at issue could be ignored.

NELMD submits that it is clear that the Track Segment at issue is not subject to the STB's regulatory jurisdiction because the Track Segment was abandoned by MoPac in 1988 when it was part of a § 10901 line of railroad, and DSRR admitted herein (Reply at 13) that the Track Segment was in fact abandoned. DSRR's counsel also admitted, in FD 36447, letter dated September 2, 2022 at 2 n.2 that the line is "not regulated," meaning it was abandoned. NELMD therefore submits that the STB should institute a formal proceeding herein and declare that it does not have regulatory jurisdiction over the Track Segment at issue.

Respectfully submitted,

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Certificate of Service

I, Richard H. Streeter, do hereby certify that, on September 9, 2024, a true copy of the foregoing Reply of Northeast Louisiana Multimodal District to Reply of Delta Southern Railroad, Inc. to Petition for Declaratory and all Exhibits attached thereto were served on John M. Scheib, Esq., via email at scheib@gentrylocke.com and Noah Sullivan at NSullivan@gentrylocke.co.

FD 36809

Attachment

Louisiana Revised Statutes 33:140.71 through 33:140.79