

SERVICE DATE – LATE RELEASE OCTOBER 15, 2019

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36298

NAVAL NUCLEAR PROPULSION PROGRAM, UNITED STATES ARMY MILITARY
SURFACE DEPLOYMENT AND DISTRIBUTION COMMAND, AND FLUOR MARINE
PROPULSION, LLC—PETITION FOR DECLARATORY ORDER

Digest:¹ This decision grants a petition for declaratory order and makes findings concerning a rail segment near Ballston Spa, N.Y.

Decided: October 15, 2019

On April 30, 2019, the Naval Nuclear Propulsion Program (NNPP),² the United States Army Military Surface Deployment and Distribution Command, and Fluor Marine Propulsion, LLC (collectively, the Government), filed a petition seeking a declaratory order related to a 430-foot rail segment (End Segment) near Ballston Spa, N.Y., owned by Delaware and Hudson Railway Company, Inc., d/b/a Canadian Pacific (CP).³ The Government uses the End Segment as part of its periodic nuclear refueling activities at the nearby Kenneth A. Kesselring Site (Kesselring Site), a facility operated by NNPP. (Government Pet. 7, 10-11.) CP has shown interest in selling to the Government the End Segment and a connecting segment extending to CP's mainline. (*Id.* at 2, 22.) The Government asks the Board to address three questions: (1) whether the End Segment is a regulated rail line under 49 U.S.C. § 10901; (2) whether CP has a common carrier obligation to provide common carrier rates and service on the End Segment upon reasonable request and to provide the Government reasonable access to the End Segment to transload its freight; and (3) if the End Segment is (or becomes) a non-regulated line and the Government were to purchase it for the Government's exclusive use, what would be the extent of CP's common carrier obligation over it. (*Id.* at 5-6, 40.)

As discussed below, the Board finds that the End Segment is a line of railroad under § 10901 and that CP has a common carrier obligation to provide rates, to make the track

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 Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² NNPP is an integrated joint U.S. Department of Energy (DOE) and U.S. Navy organization. NNPP is responsible for all aspects of the U.S. Navy's nuclear propulsion program. (Government Pet. 7.)

³ CP refers to the End Segment as the Siding. (CP Reply 2, May 31, 2019.)

available for loading and unloading, and to provide service on the End Segment. If the Government were to purchase the End Segment and convert it into private track, CP would not have a common carrier obligation to operate over that track. However, CP would still need to provide some means of accepting and delivering traffic tendered to the connecting line of railroad leading to CP's mainline.

BACKGROUND

CP owns an approximately half-mile rail segment near Ballston Spa, N.Y., which includes the End Segment. (Government Pet. 2, 4; CP Reply 1, May 31, 2019.) The segment, which the Government refers to as the Ballston Spa Industrial Track (BSIT),⁴ extends off a CP mainline and terminates by a freight house. (Government Pet. 2.) The End Segment constitutes the last 430 feet of the BSIT and has been used for loading and unloading freight.

The Government is currently the only customer that uses the BSIT. (CP Reply 7, May 31, 2019.) It receives rail service over the End Segment to support its nearby Kesselring Site, where Navy personnel are trained to operate nuclear-powered vessels through the use of operating prototype naval nuclear reactors. (Government Pet. 2, 10-11.) The Government relies on rail service over the BSIT in support of its periodic refueling of the prototype reactors at the Kesselring Site. (Government Pet. 10.) The Government states that the BSIT is the only location where it can transload its cargo to and from the Kesselring Site. (*Id.* at 14.)

The most recent "refueling overhaul" began in 2013 when the Government approached CP about readying the BSIT for upcoming movements. (*Id.* at 14-15, V.S. Boyle 3.) The first of these movements occurred in 2018 with empty containers arriving onto the BSIT. (*Id.*, V.S. Boyle 7.)

In 2017, CP offered to sell the BSIT to the Government. (CP Reply 7-8, May 31, 2019.) During the negotiations, the parties became aware of a 1980 proceeding, Delaware & Hudson Railway—Abandonment—in the Towns of Ballston & Milton, N.Y., Docket No. AB 156 (Sub-No. 9F), before the Board's predecessor, the Interstate Commerce Commission (ICC). (Government Pet. 18-19.) In that docket, Delaware and Hudson Railway Company (D&H), prior to its acquisition by CP, applied to abandon a longer piece of track that included, but extended beyond, the BSIT. (Government Pet. 42-43.) After filing that application, D&H partially withdrew it and thus retained as common carrier line the portion of the line from the mainline connection at milepost A 30.76 to "milepost A 31.32." (*Id.* at 37 & Counsel Ex. CE-80.) This partial withdrawal resulted from an objection filed by DOE, in which DOE stated that it relied on rail service over the BSIT for shipments needed for the Kesselring Site. (Government Pet. 29-30.) The ICC dismissed D&H's application with respect to the segment between the mainline and milepost A 31.32, and granted abandonment authority for the remainder of the line. See Del. & Hudson Ry.—Aban.—in the Towns of Ballston & Milton, N.Y., AB 156 (Sub-No. 9F), slip op. at 1 (ICC served Oct. 15, 1980).

⁴ CP refers to the BSIT as the Ballston Spa Spur Industrial Track. (CP Reply 1, May 31, 2019.)

The negotiations that began in 2017 over a possible sale of all or part of the BSIT continued without success, apparently due at least in part to the parties' differing interpretations of the precise boundary of the 1980 abandonment—in particular, the regulatory status of the End Segment, described as the last 430 feet of the BSIT terminating at the freight house. The Government asserts that the End Segment is regulated railroad line under § 10901 following the 1980 abandonment (Government Pet. 5); CP argues that the § 10901 portion of the rail line ends where the End Segment begins and that the End Segment is excepted track under 49 U.S.C. § 10906 used for ancillary operations. (CP Reply 19-20, May 31, 2019.)

In March 2019, CP proposed to retain what it considers to be the “regulated segment” of the BSIT (that is, the BSIT excluding the End Segment), sell the End Segment to the Government, and then operate over the End Segment under a “private siding agreement.” (Government Pet. 4.) The next month, the Government filed its petition,⁵ asking the Board to address the three questions set forth above concerning the regulatory status of the End Segment, the extent of CP's common carrier obligation over it, and what the extent of CP's common carrier obligation would be if the End Segment were acquired by the Government as private track.

The Government asks the Board to expedite its consideration of the petition. (*Id.* at 60-61.) The Government alleges that, during negotiations over the potential sale of the BSIT, CP threatened to stop providing service on the BSIT or deny the Government access to the End Segment to transload its future freight. (*Id.* at 2, 6-7.) The Government remains concerned that CP will renew that threat if the issues raised here are not resolved promptly. (*Id.* at 6-7.) It adds that any delay in the refueling schedule could lead the Government to incur significant costs. (*Id.* at 7.)

In its reply to the petition, CP claims that the indicia that the Board relies on in determining track status support the conclusion that the End Segment is § 10906 excepted track, as the End Segment is just 430 feet long, stub-ended, terminates at the wall of the freight house, and is used solely for loading and unloading by only one customer, the Government. (CP Reply 7, 13, May 31, 2019.) CP claims that its assertion that the End Segment is excepted track is supported by the 1980 abandonment proceeding and that the Government's claim that that proceeding turned the End Segment into a line of railroad is unfounded. (*Id.* at 19-22.) CP further argues that its obligation to provide service over the End Segment if it were acquired by the Government as private track is broader than the Government asserts. (*Id.* at 28-29; Government Pet. 59, 59 nn. 21 & 22.) CP states that it has repeatedly assured the Government that it understands the scope of its common carrier obligation to require CP to provide rail

⁵ The Government also moved for a procedural schedule, and the Board adopted one on May 14, 2019. In that decision, the Board also asked the parties to inform the agency whether they were interested in participating in Board-sponsored mediation. The parties notified the Board that they were willing to mediate, and the Board initiated mediation in a decision served on June 17, 2019. In a letter filed on July 29, 2019, however, the mediators informed the Board that mediation did not result in a settlement.

service to the loading/unloading area by the freight house regardless of whether the track involved is a private or rail-owned segment. (CP Reply 3, 28-29, May 31, 2019.) CP therefore argues that the Government's concern that CP could fulfill its common carrier obligation merely by "shunting the car upon the switch, clear of the main tracks" and leave the railcars short of the loading/unloading area is unfounded. (*Id.* at 29; Government Pet. 59 n.21.) CP supports its claims with case law purportedly demonstrating that its obligation extends to the End Segment's loading and unloading area, even if that becomes private track, citing to, among others, the ICC's decisions in United States v. Chesapeake & Ohio Railway, 305 I.C.C. 201 (1958), and Terminal Services, Minnesota Transfer Railway, New Brighton, Minn., 279 I.C.C. 52 (1950). (CP Reply 28, 28 nn.14 & 15, May 31, 2019.)

The Government filed a rebuttal on June 14, 2019,⁶ defending its claim that the End Segment is § 10901 track on various grounds, including that the End Segment became a line of railroad based on the 1980 abandonment proceeding. (Rebuttal 17.) It also claims that CP misinterprets the carrier's obligation if this track becomes private track. (*Id.* at 26.) The Government argues that the cases cited by CP do not stand for the proposition that the carrier must deliver to a loading and unloading area on private track. (*Id.* at 28-29.) Instead, according to the Government, those cases stand for the proposition that, if carriers exercise their discretion to provide service over private track: (1) they have to publish, upon reasonable request, line-haul common carrier rates to apply to the service; (2) such rates must cover the carrier's service up to a point where the shipper's traffic can be reasonably loaded, unloaded, or transloaded; and (3) that the agency has jurisdiction to adjudicate such tariff-compliance issues. (*Id.* at 24, 28, 28 n.41.)

PRELIMINARY MATTERS

On May 31, 2019, Samuel J. Nasca, for and on behalf of SMART/Transportation Division, New York State Legislative Board (SMART), petitioned to intervene in the proceeding and provided comments arguing that the End Segment is a line of railroad. Neither the Government nor CP have objected to SMART's petition. In the interest of a complete record, the petition to intervene will be granted and the comments accepted into the record.

DISCUSSION AND CONCLUSIONS

Under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321, the Board may issue a declaratory order to terminate a controversy or to remove uncertainty. The Board has broad discretion to determine whether to issue a declaratory order. See Intercity Transp. Co. v. United States, 737 F.2d 103 (D.C. Cir. 1984); Delegation of Auth.—Declaratory Order Proceedings, 5 I.C.C.2d 675 (1989). The Board finds that it is appropriate to resolve the issues raised in the petition for declaratory order. There is an apparent controversy over the regulatory status of the End Segment and the extent of CP's common carrier obligation over it.

1. Status of the End Segment.

⁶ The Government filed a correction to its rebuttal on June 18, 2019.

The crux of the parties' dispute is the regulatory status of the End Segment following the ICC's October 15, 1980 decision in Delaware & Hudson Railway, Docket No. AB 156 (Sub-No. 9F). The Government argues that the End Segment is a line of railroad under § 10901 that was not included in the 1980 abandonment. CP argues that the End Segment is not, and never has been, a line of railroad under § 10901 and that the track's use, physical characteristics, and relationship to the rail system demonstrate that the End Segment is excepted track.

The record indicates that the End Segment is a line of railroad under § 10901. In 1980, D&H initially submitted an application for abandonment authority over what it described as a "remnant of the old main line," extending between mileposts A 30.76 and A 31.79. (Government Pet., Counsel Ex. CE-13 & CE-14.) After DOE raised an objection to the abandonment application, DOE and D&H entered into an agreement under which D&H agreed to partially withdraw its abandonment application with respect to the portion of rail line between milepost A 30.76 and milepost A 31.32, meaning that the only portion of rail line ultimately subject to the ICC's grant of abandonment authority was the portion extending between mileposts A 31.32 and A 31.79. (*Id.* at 38 & Counsel Ex. CE-82); Del. & Hudson Ry., AB 156 (Sub-No. 9F), slip op. at 1. This partial withdrawal was meant to preserve rail freight service to DOE, which used the portion of rail line between mileposts A 30.76 and A 31.32 for shipments to the nearby Kesselring Site, and to Tufflite Plastics, Inc. (Tufflite), a shipper on the line at the time. (Government Pet., Counsel Ex. CE-81); Del. & Hudson Ry., AB 156 (Sub-No. 9F), slip op. at 1. As explained in the parties' agreement, submitted to the ICC along with D&H's request to partially withdraw its abandonment application, the parties understood that the portion of rail line withdrawn from D&H's application, and therefore retained for common carrier service, would "extend[.]...to the Tufflite Plastics Company Warehouse at Milepost A 31.32."⁷ (Government Pet., Counsel Ex. CE-92.)⁸

CP argues, however, that the End Segment is not, and never has been, regulated railroad line under § 10901 because milepost A 31.32 (the point where the 1980 abandonment began after the partial withdrawal discussed above) is not at the freight house (where the End Segment ends), but rather at a point 430 feet short of it (where the End Segment begins). (CP Reply 19-20, May 31, 2019.) CP's claim is based on a map attached to DOE and D&H's 1980 agreement to preserve service. (*Id.* at 5.) CP argues that the map and "accepted industry methods" place milepost A 31.32 at the switch to the freight house, which would be 430 feet short of the freight house itself. (*Id.* at 19.) The Government questions the accuracy of that map, noting that it is hand drawn and that milepost A 31.32 is not actually marked on it. (Rebuttal 14-15.) The

⁷ The record indicates that Tufflite owned the freight house at the time and used it as a warehouse. (Government Pet., Counsel Ex. CE-19.)

⁸ According to the Government, in discussions with CP prior to the institution of this proceeding, CP asserted that the End Segment was not included in this line because the mainline switch from which the parties had been measuring was 430 feet south of where it is today. (Government Pet. 48, V.S. Boyle 11-12.) CP has since conceded that the switch did not move after 1980. (CP Reply, V.S. Williams 4, May 31, 2019.)

Government also notes that DOE and D&H's agreement repeatedly refers to milepost A 31.32 as being located at the old freight house. (*Id.*)

The Board finds that the wording of the agreement between D&H and DOE specifically indicates that the parties understood milepost A 31.32 to be at the freight house itself. (*See* Government Pet., Counsel Ex. CE-90 to CE-93, CE-96.) Such an understanding is logical, as the entire purpose of the 1980 agreement was to ensure that service to the Kesselring Site would continue via common carrier rail service over the End Segment. (*Id.* at 53-54, & Counsel Ex. CE-90 to CE-92.) Furthermore, the agreement notes that nothing in the agreement precludes D&H from seeking abandonment past the freight house at milepost A 31.32. (*Id.*, Counsel Ex. CE-96 at Article 7.) Therefore, when D&H partially withdrew its application so that common carrier service would continue to milepost A 31.32, it meant that such service would continue to the freight house and that common carrier operations would cease beyond the freight house. The 1980 map indicates that D&H intended to remove the track south of the freight house and beyond it, while retaining the End Segment, which leads directly to the freight house. It follows that D&H's intentions resulted in the End Segment serving as the line of railroad that directly reaches the freight house once the track south of the freight house was removed.⁹ Only this interpretation would permit common carrier service to reach the freight house, as was contemplated in DOE and D&H's agreement.¹⁰

The Board therefore finds that the End Segment was part of the 0.56-mile line of common carrier rail line retained when, to preserve service to the freight house, D&H partially withdrew its abandonment application. Given this conclusion, it is unnecessary to consider whether the End Segment bears some indicia of excepted track. A line of railroad remains so until abandoned pursuant to Board authority, regardless of whether the track bears some of the typical indicia of excepted track. *See Atchison, Topeka & Santa Fe Ry.—Aban. Exemption—in Lyon Cty., Kan.*, AB 52 (Sub-No. 71X) (ICC served June 17, 1991).

2. CP's Current Obligations on the End Segment.

Because the Board concludes that the End Segment is a line of railroad under § 10901, CP has a common carrier obligation over it, including the obligation to provide rates and service for the Government's forthcoming loaded containers, upon reasonable request. *See* 49 U.S.C. § 11101(a) & (b). The obligation also requires CP to provide the Government with reasonable

⁹ The relocation of a rail line from one track to another, to the extent that occurred here, generally does not require agency authorization under the Interstate Commerce Act. *See, e.g., Swanson Rail Transfer, LP—Declaratory Order—Swanson Rail Yard Terminal*, FD 35424, slip op. at 2-3 (STB served June 14, 2011) and cases cited therein.

¹⁰ The 1980 map attached to the 1980 agreement supports this conclusion. The map indicates that the length of the "Truncated Ballston Industrial Spur," which the agreement defines as "extend[ing]...from milepost A 30.76 to the Tufflite Plastics Company Warehouse at Milepost A 31.32," (Government Pet., Counsel Ex. CE-92), is 0.55 miles. This length is therefore encompassed within the 0.56 miles of track D&H petitioned to exclude from abandonment prior to the October 15, 1980 decision.

access to the End Segment to transload its freight. See Bi-State Dev. Agency of the Mo.-Ill. Met. Dist—Acquis. & Operation Exemption—Norfolk & W. Ry., FD 31425 (Sub-No. 1), slip op. at 2 (ICC served Sept. 7, 1989).

3. CP's Obligations if the End Segment Becomes Private Track.

In its petition, the Government asks the Board to address the scope of CP's common carrier obligation to provide service over the End Segment should the Government purchase it and operate it as private track. (Government Pet. 40.) The Government argues that under these circumstances, a rail carrier, as part of its common carrier obligation, would be required to place railcars on the shipper's private track just clear of the rail line but would have no obligation to provide service over the private track. (Rebuttal 27.)

CP claims that the common carrier obligation is broader, extending over what would be private track. CP argues that, even if the End Segment or the entire BSIT becomes private track, CP would be required to provide service to the loading and unloading area by the freight house. (CP Reply 26-29, May 31, 2019.) CP explains that such service is encompassed within its line-haul rates for service on the BSIT, that this is the historical practice and mutually agreed upon location for such activity, and that this would arguably be the only reasonable delivery point. (*Id.*) CP notes that the ICC has found a carrier's obligation to deliver to loading and unloading locations to be encompassed within line-haul rates in other circumstances with greater distances than that covered by the BSIT, citing older cases including Terminal Services from 1950 and Chesapeake & Ohio Railway from 1958. (CP Reply 28, 28 n.14, May 31, 2019.)

CP's reliance on Terminal Services and Chesapeake & Ohio Railway is misplaced. Terminal Services and Chesapeake & Ohio Railway both arose out of a 1935 proceeding announcing principles to govern the payment of allowances to industries for performing spotting services at their industrial plants, or the performance of such services by carriers in lieu of payment. See Practices of Carriers Affecting Operating Revenues or Expenses, Pt. II, Terminal Servs., 209 I.C.C. 11 (1935); Carrier Switching at Indus. Plants, 294 I.C.C. 159, 160 (1955). Although Terminal Services and Chesapeake & Ohio Railway do suggest that delivery onto what seems to be private track can, under certain circumstances, be deemed part of a carrier's line-haul service, both cases focus primarily on whether the services being provided could properly be considered "simple switching placement" for the purposes of receipt and delivery. Terminal Servs., 279 I.C.C. at 56; Chesapeake & Ohio Ry., 305 I.C.C. at 206.¹¹

Furthermore, the cases cited by CP do not reflect the agency's more recent precedent stating that the common carrier obligation does not extend to private track. As explained in Devens Recycling Center—Petition for Declaratory Order, FD 34952, slip op. at 2 (STB served Jan. 10, 2007), while the Board has jurisdiction over transportation by "rail carrier," 49 U.S.C. § 10501(a)(1), which is defined as "a person providing common carrier railroad transportation for compensation," 49 U.S.C. § 10102(5), the agency's jurisdiction does not extend to purely private track. See also B. Willis, C.P.A., Inc.—Pet. for Declaratory Order, 6 S.T.B. 280, 281

¹¹ The other cases cited by CP are likewise unpersuasive.

(2002), aff'd sub nom. B. Willis v. STB, 51 Fed. App'x 321 (D.C. Cir. 2002). Indeed, although CP argues that its common carrier obligation extends over what would be private track, CP itself acknowledges that the Board cannot order it to operate over private track. (CP Reply 31, May 31, 2019 (citing Winnsboro Granite Corp. v. S. Ry. Co., 176 I.C.C. 481, 483 (1931)).)¹²

The Board does note, however, that although CP would not have a common carrier obligation over the End Segment if the Government purchased the track (after abandonment) for private use, CP would still need to provide some means of accepting traffic from, and delivering traffic to, the Government via the remaining portion of the BSIT leading to CP's mainline.¹³ See Bi-State Dev. Agency, FD 31425 (Sub-No. 1), slip op. at 2.

It is ordered:

1. SMART's petition to intervene is granted, and its comments are accepted into the record.
2. The Government's petition for declaratory order is granted as discussed above.
3. This decision is effective on its service date.

By the Board, Board Members Begeman, Fuchs, and Oberman.

¹² See, e.g., Energy Solutions LLC—Aban. Exemption—in Anderson & Roane Ctys., Tenn., AB 1128X, slip op. at 3 (STB served Oct. 13, 2015) (denying a carrier's petition for exemption to abandon a line, noting that the carrier would no longer have a common carrier obligation on the segment and that the shippers on the segment would lose regulatory remedies for service failures or inadequacies); SierraPine—Lease & Operation Exemption—Sierra Pac. Indus., FD 33679, slip op. at 2 (STB served Aug. 26, 2002) (explaining that a railroad cannot extinguish its common carrier obligation by converting a line of railroad into private track unless it receives abandonment authority from the Board).

¹³ For example, even if the End Segment were to become private track, CP would still be required to pick up cars from and deliver cars to the connection point between the End Segment and CP's track.