

SURFACE TRANSPORTATION BOARD

DECISION

STB Ex Parte No. 693

ORAL ARGUMENT

Decided: December 1, 2009

The Surface Transportation Board will hold oral argument on Tuesday, January 26, 2010, at 9:30 a.m., in the Board's hearing room at the Board's headquarters located at 395 E Street, S.W., Washington, D.C. The arguments will address two cases: STB Finance Docket No. 35225, San Benito Railroad LLC–Acquisition Exemption–Certain Assets of Union Pacific Railroad Company (San Benito RR); and STB Finance Docket No. 35239, Allegheny Valley Railroad Company–Petition for Declaratory Order (Allegheny Valley). The oral arguments will be open for public observation, but only counsel for the parties will be permitted to present argument.

In STB Finance Docket No. 35225, San Benito Railroad LLC (San Benito), a noncarrier, has filed a verified notice of exemption to acquire from Union Pacific Railroad Company (UP) certain railroad assets, including approximately 12.43 miles of rail line extending between approximately milepost 0.7 (near Hollister, CA) and approximately milepost 12.50 (near Carnadero, CA) in San Benito County. San Benito simultaneously filed a motion to dismiss the notice of exemption. San Benito seeks a determination from the Board that it would not become a common carrier and that the Board would not have jurisdiction over the proposed acquisition because the parties have structured the transaction pursuant to the terms and conditions of the Interstate Commerce Commission's decision in State of Maine–Acq. And Op. Exempt., 8 I.C.C.2d 935 (1991) (State of Maine), and subsequent Board decisions addressing State of Maine.

The Brotherhood of Maintenance of Way Employees Division/IBT and the Brotherhood of Railroad Signalmen (collectively "Unions") filed a response in opposition to San Benito's motion to dismiss. The Unions argue that State of Maine was wrongly decided and must be overturned because it is contrary to the Interstate Commerce Act. The Board will hear argument on the motion to dismiss the notice of exemption.

San Benito RR will be the first case argued. The movant in San Benito RR (San Benito) will have a total of 20 minutes of argument time and the opposition (Unions) will have a combined total of 20 minutes of argument time. San Benito will open and may reserve part of its time for rebuttal if it so chooses. Board members may ask questions during the parties' allotted time.

In STB Finance Docket No. 35239, Allegheny Valley Railroad Company (AVRR) has filed a petition for declaratory order to determine whether a 0.3-mile rail segment between 16th Street and 21st Street in Pittsburgh, PA, remains an active rail easement. AVRR, which claims that the easement remains active, wants to restore the 0.3-mile segment of the line as part of a longer line and provide passenger and freight rail service over it. AVRR purportedly acquired the easement as part of a line sale by Consolidated Rail Corporation (Conrail). The segment spans property owned by The Buncher Company (Buncher). Buncher claims that the track in question has been abandoned and that the property interest has been extinguished.

On May 13, 2009, the Board instituted a declaratory order proceeding to clarify the issues and established a procedural schedule. The parties submitted several rounds of evidence concerning the status of the track.

On September 17, 2009, the Board issued a decision directing AVRR and Buncher to address whether or how the recent ruling by the United States Court of Appeals for the District of Columbia Circuit in Consolidated Rail Corp. v. STB, 571 F.3d 13 (D.C. Cir. 2009) (Harsimus) affects this case. In Harsimus, the Court of Appeals found that where the Board's authority was challenged and an interpretation of the Final System Plan (FSP) for the creation of Conrail or the Special Court's conveyance order under 45 U.S.C. 719(e)(2) for Conrail's creation was required, the Board lacked jurisdiction to resolve the question of the nature of the involved trackage.

AVRR and Buncher filed their evidence on October 9, 2009. AVRR claims that Harsimus is limited to its facts and that the Board should resolve the case. Buncher asserts that the Board should dismiss the case in accordance with Harsimus, as the resolution of the case relies upon interpreting the FSP and the documents relating to the conveyance to Conrail, thus placing the case directly under the jurisdiction of the Special Court, which is now the United States District Court for the District of Columbia.

The Board will hold an oral argument on the threshold jurisdictional issue and on other issues raised in the case. It will be the second case argued. AVRR will have a total of 20 minutes of argument time and Buncher will have a total of 20 minutes of argument time. AVRR will open and may reserve part of its time for rebuttal if it so chooses. Board members may ask questions during the parties' allotted time.

By January 21, 2010, the parties should submit to the Board the name of the counsel who will be presenting argument, the party counsel will be representing, and the requested time reserved for rebuttal if the party is the movant or petitioner. No additional written comments or new studies or exhibits may be filed in connection with the oral arguments, as extensive written records on the issues to be argued have already been developed in these proceedings. Each party is encouraged to use its oral argument time to call attention to the points it believes are particularly important. The arguments will be in the style of an appellate court. Parties should prepare a short statement of their argument and be prepared to answer questions from the Board. The purpose of oral argument is not to restate the written arguments previously made, but to summarize and emphasize the key points of a party's case, and provide an opportunity for questions that the Board may have regarding any issue in the proceeding.

Counsel for the parties should check in with Board staff in the hearing room prior to the argument.

A video broadcast of the oral argument will be available via the Board's website at <http://www.stb.dot.gov>, under "Information Center"/"Webcast"/"Live Video" on the home page.

Instructions for Attendance at Hearing

The STB requests that all persons attending the hearing use the Patriots Plaza Building's main entrance at 395 E Street, S.W. (closest to the northeast corner of the intersection of 4th and E Streets). There will be no reserved seating, except for those scheduled to present oral arguments. The building will be open to the public at 7:00 a.m., and participants are encouraged to arrive early. There is no public parking in the building.

Upon arrival, check in at the 1st floor security desk in the main lobby. Be prepared to produce valid photographic identification (driver's license or local, state, or federal government identification); sign-in at the security desk; receive a hearing room pass (to be displayed at all times); submit to an inspection of all briefcases, handbags, etc.; then pass through a metal detector. Persons choosing to exit the building during the course of the hearing must surrender their hearing room passes to security personnel and will be subject to the above security procedures if they choose to re-enter the building. Hearing room passes likewise will be collected from those exiting the hearing upon its conclusion.

Laptops and recorders may be used in the hearing room, but no provision will be made for connecting personal computers to the Internet. Cellular telephone use is not permitted in the hearing room; cell phones may be used quietly in the corridor surrounding the hearing room, or in the building's main lobby.

The Board's hearing room complies with the Americans with Disabilities Act, and persons needing such accommodations should call (202) 245-0245, by the close of business on January 21, 2010.

For further information regarding the oral arguments, contact Amy Ziehm at (202) 245-0391. Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at (800) 877-8339.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Oral argument in these proceedings will be held on Tuesday, January 26, 2010, at 9:30 a.m., in the Surface Transportation Board Hearing Room, at 395 E Street, S.W., Washington DC as described above.

2. By January 21, 2010, the parties shall submit to the Board the name of the counsel who will be presenting argument, the party counsel will be representing, and the requested time reserved for rebuttal if the party is the movant or petitioner.

3. This decision is effective on the date of service.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.