

SERVICE DATE – AUGUST 27, 2008

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33388 (Sub-No. 101)

CSX TRANSPORTATION, INC.—PETITION FOR DECLARATORY ORDER

Decided: August 26, 2008

In 1986, Consolidated Rail Corporation (Conrail) entered into an agreement with Francis Vitale and Frank Vitale (the Vitales) for the sale of approximately 7 acres of land along a Conrail rail line (the Agreement). The Agreement reserved to Conrail a permanent railroad easement providing the right to use, operate, maintain, repair, replace, and inspect the tracks located on the land. CSX Transportation, Inc. (CSXT), a successor to Conrail, filed a petition on October 4, 2007 (Petition), seeking a declaratory order finding that the implementation of the Agreement would interfere with CSXT's acquisition and operation of certain assets of Conrail, as authorized under 49 U.S.C. 11321-25 in CSX Corp. et al.—Control—Conrail Inc. et al., 3 S.T.B. 196 (1998) (Conrail), aff'd, Erie-Niagara Rail Steering Comm. v. STB, 247 F.3d 437 (2d Cir. 2001). In Conrail, the Board authorized the division of Conrail's assets between two rail carriers, CSXT and Norfolk Southern Railway Company (NS).

In a pleading filed on November 21, 2007 (Vitales' Reply), the Vitales ask us to dismiss or deny the petition for a declaratory order, arguing that implementation of the Agreement would not interfere with the division of Conrail's assets or with CSXT's operation of the rail line. The Vitales filed a supplemental affidavit and attachments on November 26 and 27, 2007, respectively. On December 11, 2007, CSXT filed a motion for leave to reply, a reply, and a motion for a procedural schedule that would include a 120-day period for discovery (CSXT Motions). The Vitales opposed the CSXT Motions in a pleading filed on December 20, 2007.

The parties have provided sufficient information for the Board to determine that the Agreement fully allows for continued railroad operations on the rail line at issue. Because it is clear that preemption of the Agreement under 49 U.S.C. 11321 is not necessary to allow CSXT to carry out the transaction approved in Conrail, the request for a declaratory order proceeding will be denied.

BACKGROUND

Description of the Line. The property in this dispute is approximately 7 acres of land in the Borough of Queens, City of New York (the Property).¹ A 0.28-mile segment of rail line on

¹ As explained below, the State of New York has since taken a portion of the Property in eminent domain.

the Property parallels the Brooklyn-Queens Expressway (BQE).² There is either an overpass or an underpass for every street that crosses the line. As part of reconstructing the BQE, the New York State Department of Transportation (NYSDOT) has rebuilt the Roosevelt Avenue Bridge, which passes over the Line within the Property. This newly rebuilt bridge gives the rail line approximately a 30-foot horizontal clearance and 18-foot vertical clearance. As part of the same reconstruction, the rail line's right-of-way was reduced to about 60 feet at a point adjacent to the BQE.

Along this line to the south of the Property, a major retailer has constructed a retail superstore and parking area above the tracks on a new overhead bridge with span openings 30 feet wide at the existing track. (At this location, apparently a different rail carrier owns the line, which CSXT uses.) The Metropolitan Avenue overpass, which is approximately 500 feet long with a horizontal clearance of 30 feet and a vertical clearance of 17 feet 6 inches, is also south of the Property and above this line.

The Agreement. In the Agreement, dated February 20, 1986, Conrail promised to sell to the Vitales all of its right, title and interest in the Property. The Vitales intend to construct a multi-building complex, both residential and commercial, on and over the Property. To enable continued use of the segment of the rail line that runs over the Property, Conrail reserved a permanent railroad easement with a width of 75 feet and a height of 22 feet above the top of the rail.³ The agreed sale price was \$900,000, with a deposit paid at execution of the Agreement and the remainder of the purchase price due at the closing of the sale, which was to occur within 18 months of the signing.⁴

The Agreement provided that it would not be binding upon Conrail until Conrail's Real Estate Office gave notification to the Vitales that the transaction had received the necessary approval of Conrail's senior management or Board of Directors. Other than that provision, the Agreement was to be binding upon the successors of Conrail and of the Vitales.

² The Vitales' transportation expert inspected the rail line on November 12, 2007. From this inspection, the expert was able to make several observations, which are supported by documentary and photographic evidence and not disputed by CSXT.

³ According to the transportation expert hired by the Vitales, these are the industry width and height standards to allow, respectively, double tracking (two sets of tracks within one right-of-way) and the transportation of double-stack containers on flat cars. The easement also provides for a minimum horizontal clearance of 16 feet from the center line of track on the east side and 10 feet from the center line on the west side.

⁴ As explained below, the parties extended the closing date numerous times.

The Agreement contains various protections to ensure continued rail operations. The Vitales are required to provide at least 3 months' notice to the Railroad⁵ prior to commencing construction and to pay for the estimated costs of rehabilitation and relocation of tracks underlying and adjacent to any structure that will be built. In addition, the construction, which the Railroad may inspect, must not unreasonably interfere with the operation of trains. The Agreement gives the Railroad the right of final review and written approval of the construction plans, including placement of the support columns and structures for the complex. Moreover, the Vitales are obligated to provide all necessary protective and safety measures, such as crash walls, warning signs, lighting, inspectors, watchmen, flagmen, and other matters reasonably necessary for purposes of safety.⁶ The Agreement also requires the Vitales to confer with the Railroad concerning construction scheduling and safety procedures, and to indemnify and insure the construction on the property. Finally, the Vitales agreed to grant the Railroad access to rights-of-way as required for Railroad personnel to access any Railroad facilities.

The Conrail Transaction. More than 10 years after the original Agreement between Conrail and the Vitales was reached, CSX Corporation (CSX), which owns rail carrier CSXT, Norfolk Southern Corporation (NSC), which owns rail carrier NS, and Conrail Inc., which formerly owned rail carrier Conrail, reached an agreement for (1) the acquisition by CSX and NSC of control of Conrail and (2) the division of the assets of Conrail by and between CSXT and NS. In Conrail, the Board, acting under 49 U.S.C. 11321-25, authorized the acquisition and division of assets, subject to a number of conditions designed to protect competition. Section 11321(a) provides that a carrier in an STB-approved consolidation "is exempt from the antitrust laws and from all other law, including State and municipal law," as necessary to permit the rail carrier to "carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction."

To effect the division, Conrail formed two wholly owned subsidiaries: New York Central Lines LLC (NYC) and Pennsylvania Lines LLC (PRR). On the division date, June 1, 1999, Conrail assigned to NYC those Conrail assets that were to be operated as part of the CSX rail system and assigned to PRR those Conrail assets that were to be operated as part of the NSC rail system. Among the assets assigned to NYC were Conrail's rail lines in New York City, east of the Hudson River, including the rail line that traverses the Property.⁷

⁵ For ease of reference, we will use "Railroad" to refer Conrail and to its successors, including CSXT.

⁶ The Agreement incorporates by reference current industry specifications for crash walls and protective supporting columns located within 25 feet of the center line of track.

⁷ In a subsequent decision, the Board authorized CSXT to acquire the lines that had been assigned to NYC and NS to acquire the lines that had been assigned to PRR. CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company—Control and Operating Leases/Agreements—Conrail Inc. and Consolidated Rail Corporation [Petition for Supplemental Order], STB Finance Docket No. 33388 (Sub-No. 94), Decision No. 2 (STB served Nov. 7, 2003).

Disputes Regarding the Enforceability of the Agreement. Between July 1987 and May 1999, the Vitales and Conrail agreed to numerous extensions of the closing date of the sale, with the last agreement providing for closing on or by August 31, 1999. But the sale did not close by the last agreed date. In May 2002, NYC (the then-owner of the line) sent a letter to the Vitales, taking the position that the Agreement was non-binding because the Railroad had never delivered to the Vitales a notice of Conrail's official adoption of the Agreement, in the form and manner required by the Agreement.

In response to NYC's letter, the Vitales commenced arbitration seeking specific performance of the Agreement. NYC sought a stay of the arbitration in a New York State court on the grounds that the Agreement was not enforceable; the Vitales cross-petitioned to compel arbitration.⁸ In April 2003, the court denied the stay, granted the cross-petition, and directed the parties to proceed to arbitration.

The Arbitrator issued an Award in September 2004, finding that the Agreement was a binding contract for the sale of the real estate and awarding specific performance of the Agreement, among other things. The Arbitrator found that it was unlikely that the parties could close the sale until they obtained a "Section 18 Release" from NYSDOT, which is required under State law for a railroad to sell any of its real estate in New York. The Arbitrator ordered the Railroad and the Vitales to cooperate in obtaining that release. The Arbitrator further ordered that, if the release were obtained, the parties proceed expeditiously with the closing of the sale.

In accordance with the Arbitrator's direction, the Railroad submitted three applications to NYSDOT (one for each of three parcels comprising the Property), requesting a determination that the preferential right of acquisition reserved to NYSDOT does not apply to the sale of the property to the Vitales, or in the alternative, for release by NYSDOT of such right. In each of the applications, CSXT stated that the Agreement's railroad easement "ensures that the Railroad will be able to continue to use the Property for rail transportation purposes, as the Railroad intends to do."⁹ NYSDOT granted the releases for each of the parcels of property, but CSXT refused to close on the sale.

The Vitales next applied to the State Supreme Court (a lower state court) for confirmation of the Arbitration Award so that a judgment could be recorded against the Property. The Railroad objected on the ground that it could no longer perform its obligations under the Agreement because, after entry of the Arbitration Award, a portion of the property had been taken in eminent domain for reconstruction of the BQE. The court rejected the Railroad's claim that it could not perform its obligation. It directed the parties to proceed with closing at the agreed price, recited that the conveyance to the Vitales would be limited to those portions of the property that were not taken in fee by the State and would be subject to easements taken by the

⁸ The court proceeding is New York Central Lines, LLC v. Vitale, Index No. 20662 / 2002 (N.Y. Sup. Ct., Queens County).

⁹ Vitales' Reply, Exhibit A.

State, and recognized the Vitales' right to seek an abatement of a portion of the purchase price or an equitable share of the condemnation award, in further proceedings before the Arbitrator.

The Railroad appealed to the Appellate Division from only the portion of the lower court's decision that recognized the Vitales' right to seek an equitable share of the condemnation award or an abatement of the purchase price. In 2007, the Appellate Division affirmed the lower court.

The Vitales sought to resume the arbitration to address the claim for an equitable share or abatement. However, according to the Vitales, CSXT advised that it would not agree to the supplemental arbitration. Consequently, the Vitales filed a motion with the State court seeking to compel resumption of the arbitration. Shortly thereafter, CSXT filed its petition with the Board, to which the Vitales replied.

PRELIMINARY ISSUES

Citing the Board's regulation at 49 CFR 1104.13(c) proscribing the filing of a "reply to a reply," the Vitales ask us to deny CSXT's motion for leave to file a reply to the Vitales' reply. In the interest of a more complete record, we will accept CSXT's reply into the record. Acceptance of CSXT's reply will not prejudice the Vitales in light of our determination to decline to institute a declaratory order. Accordingly, CSXT's motion for leave to file a reply will be granted.

CSXT's motion for a procedural schedule will be denied as moot in light of the denial of its request to institute a declaratory order proceeding. Nor is it necessary to provide for discovery before denying CSXT's request. Discovery is not typically conducted in declaratory order proceedings, and here, CSXT has not indicated what relevant new information it would obtain through discovery that it has not already had the opportunity to seek in the years of litigation and arbitration over this matter. To the extent that CSXT implies that it needs discovery regarding the Vitales' precise development plans, as discussed in more detail below, we do not believe such discovery is necessary given that the Agreement provides CSXT with the right to reasonably disapprove construction plans that interfere with its operations and provides for greater clearances than CSXT currently enjoys over adjacent segments of the same rail line. Moreover, CSXT should already possess information, if any, that could possibly demonstrate whether the railroad easement reserved in the Agreement is not sufficient to permit CSXT to operate, maintain, inspect, and repair the rail line.

DISCUSSION AND CONCLUSIONS

Under 5 U.S.C. 554(3) and 49 U.S.C. 721, the Board may issue a declaratory order to terminate a controversy or remove uncertainty. Here, however, there is no uncertainty that preemption of the Agreement under 49 U.S.C. 11321 is not necessary to allow CSXT to continue

its rail operations on the line or implement the Conrail transaction.¹⁰ Therefore, there is no need to institute a declaratory order proceeding.

At the outset, it should be noted that Conrail, the carrier that first entered into the Agreement, was an experienced, large rail carrier. We can assume that Conrail would not have entered into an agreement that would substantially interfere with its business. To the contrary, it is apparent that in reaching the Agreement, Conrail determined that the reserved easement would permit it to continue to provide rail service over the rail line traversing the Property.¹¹ Such a determination is not surprising given that the width and height of the easement are standard in the industry to permit both double tracking and transporting double-stacked containers. Therefore, should the demand for rail service on this line increase, there are at least two ways in which the railroad can increase the line's capacity.

Nevertheless, CSXT argues that the construction by the Vitales would severely restrict CSXT's use of the rail line by creating a chokepoint, preventing expansion of the line as may be needed in the future, potentially restricting the commodities that could be transported on the line, acting as an attractive nuisance leading to injury or death to trespassers, making maintenance of the line more difficult, potentially harming security, and chilling any changes to the rail line. CSXT emphasizes the physical limitation that the density of development east of the Hudson River in New York imposes on any effort to increase rail capacity in that area, as recognized in Conrail, 3 S.T.B. at 279-80. CSXT implies that any additional development, such as that of the Vitales, would make it more difficult to expand this rail line. But in Conrail, the Board specifically recognized the low density of the rail freight traffic at issue: "only about 5% of the rail freight revenues in the Greater New York City area are derived from shipments originating at or destined to points east of the Hudson." Id. at 280. The continuation of low traffic density appears to be borne out by the Vitales' estimate that approximately one loaded and one empty train traverse the line daily, as observed by the Vitales themselves and their rail expert. Thus, there does not seem to be a lack of capacity on this rail line.

¹⁰ CSXT contends that, in deciding whether to institute a declaratory order proceeding, the Board must construe factual allegations in the light most favorable to the petitioner and may decline to institute a declaratory order proceeding only if the petition does not state reasonable grounds for investigation and action. In deciding whether a declaratory order proceeding is needed to resolve uncertainty, the Board generally considers the facts as presented in the petition. See, e.g., James Riffin—Petition for Declaratory Order, STB Finance Docket No. 34997, slip op. at 1 (STB served May 2, 2008). Here, however, CSXT has presented very few facts concerning a potential interference of the Vitales' development with the rail line, which is the central issue in the case. Instead, CSXT speculates on its possible future use of this line. Thus, in deciding whether to grant CSXT's request, we will not necessarily give credence to speculative statements about future track use that do not appear grounded in the record.

¹¹ Although CSXT now claims that its statements were pro forma, it is noteworthy that CSXT itself told NYSDOT that the Agreement would not interfere with its ability to use the Property to conduct rail transportation. See Vitales' Reply, Exhibit A at 2.

The “chokepoint” claim also is belied by the fact that existing clearances at overpasses on this line are narrower than, and not as high as, the clearances reserved for the railroad easement in this Agreement. For example, NYSDOT recently reconstructed the Roosevelt Avenue Bridge over the portion of this rail line on the Property to be sold to the Vitales and there are lesser horizontal and vertical clearances under that bridge than are reserved in the railroad easement at issue. Other, older constructions over the line likewise have lesser clearances. Therefore, the chokepoint claim is not credible in light of other, smaller clearances that already exist.

CSXT asserts that the Vitales’ development would make line maintenance more difficult. But the existing tunnels, overpasses, and other obstructions on this line also make maintenance more difficult than on a rail line located in an undeveloped area, and yet CSXT has been able to continue maintaining and operating the line notwithstanding these difficulties. Moreover, the Agreement requires sufficient clearances from the center line of track to allow maintenance crews and equipment to operate. Accordingly, there is no basis for concluding that the Agreement would cause sufficient maintenance difficulties to obstruct CSXT’s operations.

CSXT’s concern that the Vitales’ development would endanger homeless persons or trespassers who could be drawn to the rail line when seeking shelter from the elements similarly is not persuasive. The same would be true, however, for other overhead constructions that provide shelter, such as, for example, the large retail store and parking area that were constructed over this rail line south of the Property. Notwithstanding these existing sheltered areas, however, CSXT has continued operating on the line.

The argument that the Vitales’ development could lead to a potential restriction against transporting unnamed commodities over this line is likewise unconvincing. CSXT has not stated that there are any existing bans on transporting particular commodities on this line. It is highly unlikely that a commodity that would endanger the residential/commercial development planned by the Vitales would not already endanger the existing nearby development, including the retail superstore and parking area constructed over this line. Also, security concerns would not seem to differ significantly between the apartments and commercial space that the Vitales plan to construct and the existing neighboring store and bridges, and the streets that already cross over this line.

In view of the existing overpasses and restrictions on this line and the protections in the Agreement, including one that would allow CSXT to reasonably disapprove construction plans that would prevent continued operation of this line, we are satisfied that preemption of the Agreement is not necessary to allow CSXT to operate, maintain, or expand this line or to otherwise implement the transaction authorized in Conrail.

This decision will not affect the quality of the human environment or the conservation of energy resources.

It is ordered:

1. CSXT's motion for leave to file a reply is granted and CSXT's reply is accepted.
2. The Vitales' motion to deny CSXT's motion for leave to file a reply is denied.
3. CSXT's motion for a procedural schedule and petition for institution of a declaratory order proceeding are denied.
4. This decision is effective on the date of service.

By the Board, Chairman Nottingham, Vice Chairman Mulvey, and Commissioner Buttrey.

Anne K. Quinlan
Acting Secretary