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

Re: Holland Park Owner, LLC – Reply to Petition for Declaratory Order, Finance Docket
No. 36308

Dear Ms. Brown:

Enclosed for filing in the above-referenced docket is the Reply by the Consolidate Rail
Corporate to Holland Park Owners, LLC's petition for declaratory order.

If you have any questions, please contact me.

Respectfully submitted,



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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 36308

**HOLLAND PARK OWNER, LLC - -
PETITION FOR DECLARATORY ORDER**

REPLY TO PETITION FOR DECLARATORY ORDER

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August 19, 2019

INTRODUCTION

Petitioner, Holland Park Owners, LLC, seeks a Surface Transportation Board (“STB” or “Board”) declaration that Consolidated Rail Corporation (“Conrail”) has abandoned certain easement rights on Petitioner’s property. First, the STB must deny the Petition because the STB is without jurisdiction to grant the requested relief. The United States District Court for the District of Columbia (the “District Court”), as successor to the Special Court created by the Regional Reorganization Act of 1973 (the “Special Court”), has original and exclusive jurisdiction to review the requested relief. Second, even if the STB has jurisdiction, the Board should deny the Petition because the scope of the easement, and whether it has been abandoned, are state property law issues which the Board has repeatedly ruled should be decided by the courts. Third, even if Conrail’s easement was limited to track rights (which it is not), the District Court would have exclusive jurisdiction. Finally, even if the Board had jurisdiction and departed from its consistent precedent to refrain from ruling on state property law issues, it still could not grant the requested relief, because Petitioner has failed to present sufficient evidence to prove that Conrail has abandoned its easement rights on what is now the Holland Property.

STATEMENT OF FACTS

On March 31, 1976, the Trustees of the Erie Lackawanna Railway Company conveyed to Conrail all of its right, title, and interest in certain rail lines and property located in Hudson County, New Jersey pursuant to a deed numbered EL-CRC-RP-5 (the “Hudson County Deed”). The Hudson County Deed conveyed to Conrail, among other things, the Morristown Line (A-10—Line Code 6801) and the Weehawken Branch (A-5—Line Code 6160), and on a reserved parcel now owned by Holland (the “Holland Property”) the following easement:

. . . easements and rights to use, operate, maintain, repair, renew, replace and remove on, under, over and across the real property hereinafter reserved and excepted (“Burdened Property”), any and all poles, pipes, appliances, equipment, structures, facilities and appurtenances (each an “Easement Item”) existing on and used or useful as of the date of delivery of this Deed as a part of any railroad communication, signal or interlocker system or as a part of any electric, telephone, telegraph, water, gas, steam, sanitary sewer, storm sewer or other utility system, together with the easement of reasonable access over the Burdened Property to permit the exercise of the foregoing easements and rights, and the easement for lateral support of the real property conveyed by this Deed.

See Petition, Exhibit C at 2.

The foregoing conveyance was made pursuant to the Conrail Final System Plan (“FSP”), I FSP 284 and 320, and the Order of Conveyance to Trustees of Railroads in Reorganization in the Region (“Conveyance Order”) issued pursuant to 45 U.S.C. § 719 by the Special Court. See Petition at 3.¹

On September 15, 1978, Conrail conveyed to New Jersey Transit certain rail properties, including the “same property conveyed to [Conrail] on April 1, 1976,” by the Hudson County Deed, and reserved for itself “[a]n easement for the right and license to enter upon and utilize the existing tracks and related operating facilities on the real property conveyed to [New Jersey Transit] for the purpose of performing [Conrail’s] freight services.” See Petition, Exhibit D at 4.²

ARGUMENT

Petitioner seeks an STB declaration that Conrail has abandoned all of its easement rights on Petitioner’s property. The STB must deny the Petition, because the STB is without

¹ The 1979 conveyance to Lifschultz Fast Freight, Inc. and the reservation from that conveyance, occurring after the original conveyance to Conrail referenced in the Petition, are inapposite to Conrail’s current rights.

² Reading the 1976 granted easement and the 1978 retained easement together, Conrail has rights to use the Holland Property for any railroad utility unless Holland can show that no used or useful Easement Item (poles, pipes, etc.) existed at the time the 1976 easement grant or at the time of the 1978 retained easement, referred to herein as the “Conrail Easement.”

jurisdiction to grant the requested relief. The District Court has original and exclusive jurisdiction to grant the requested relief. Even if this were not the case, the Board should deny the Petition because the scope of the easement and whether it has been abandoned are state property law issues, which the Board has repeatedly ruled should be decided by the courts. Even if Conrail's easement was limited to track rights (which it is not), the District Court would have exclusive jurisdiction. Finally, even if the Board had jurisdiction and departed from its precedent (which is to refrain from ruling on state property law issues) to reach the merits and construe Conrail's rights on Petitioner's property, it still could not grant the requested relief, because Petitioner has failed to present sufficient evidence to prove that Conrail has abandoned its easement rights.

1. The Board Lacks Jurisdiction to Grant the Relief Requested by Petitioner

As noted above, Conrail's original easement rights on what is now the Holland Property were granted pursuant to the FSP and the Special Court's Conveyance Order, which was confirmed by Congress in Title VI of the Railroad Revitalization and Regulatory Reform Act of 1976, P.L. 94-210, 90 Stat. 31 (the "4R Act"). The United States District Court for the District of Columbia, as successor to the Special Court, has original and exclusive jurisdiction over "any action ... to interpret, alter, amend, modify, or implement" any Special Court order to convey property included in the FSP. 45 U.S.C. § 719(e)(2).³

If the Board granted the declaratory relief requested by Petitioner – to find that Conrail had abandoned the easement rights - the Board necessarily would "alter," "amend" and "modify"

³ The Special Court was abolished in 1996, but its jurisdiction to interpret, alter, amend, modify, or implement any Special Court order to convey property included in the FSP under 45 U.S.C. § 719(e)(2) was transferred to the U.S. District Court for the District of Columbia by section 605 of the Federal Courts Improvement Act, P.L. 104-317, 110 Stat. 38, October 19, 1996, 45 U.S.C. § 719(b)(2).

the Conveyance Order by eliminating, through its abandonment finding, Conrail's rights on what is now the Holland Property. The STB has no jurisdiction to alter, amend, or modify the Conveyance Order. In addition, even before ruling on the requested relief, the Board would need to "interpret" the Conveyance Order, because in order to determine whether Conrail had abandoned its easement rights, the Board would need to define Conrail's rights. The STB has no jurisdiction to interpret the Conveyance Order.

The declaratory relief requested by Petitioner also would require the STB to interpret the FSP, which also is beyond the Board's purview. In *Consolidated Rail Corp. v. Surface Transportation Board*, 571 F. 3d 13 (D.C. Cir. 2009), the court held that the Board was without jurisdiction to grant a petition for declaratory order on whether certain track constituted a rail line (requiring STB abandonment exemption or approval) or exempt spur track (not requiring such exemption or approval) because answering that question raised "substantial questions with respect to the interpretation of the FSP and [the Special Court's] conveyance orders themselves." *Id.* at 19, quoting *Consolidated Rail Corp. v. Pittsburgh and Lake Erie RR Co*, 459 F. Supp. 1013 (Reg'l Rail Reorg. Ct. 1978)(*"P&LE"*). For that reason, the requested declaratory relief fell within the original and exclusive jurisdiction of the United States District Court for the District of Columbia as successor to the Special Court. *Id.*

The Regional Rail Reorganization Act of 1973, P.L. 93-236, (*"3R Act"*), as amended by the 4R Act, established an "intricate mechanism to achieve the goals of the Final System Plan through a system of rail property transfers." I FSP 221. Among other steps, the United States Railway Association (*"USRA"*) developed the FSP; Congress reviewed and approved the plan (3R Act, § 208); and the USRA certified to the Special Court that the rail property transfers in the FSP were "fair and equitable and in the public interest." (3R Act, § 209[c][4]). Chapter 8 of

the FSP describes the transfer of “rail properties involved (e.g., rail lines, facilities, rolling stock) and the nature of the property interests in the property to be transferred;” I FSP 221.⁴ Section 102(10) of the 3R Act defined “rail properties” to include “assets or rights owned, leased or otherwise controlled by a railroad which are used or useful in rail transportation service.” 3R Act § 102(10); see I FSP 222. Regarding the “rail properties” definition, the FSP provides:

The most important feature of this definition is its breadth. Rail properties include not only land, buildings, tracks, rolling stock, equipment, securities, cash and accounts receivable "used or useful in rail transportation" but also "rights". Rights in rail properties include not only fee ownership but leasehold interests and other interests less than full ownership.

I FSP 222. In designating rail lines and rail facilities for transfer to Conrail, the USRA solicited the views of the railroads in reorganization regarding how properties were used and included property adjacent to right of way and associated with it if such property would be “used or useful in rail transportation service.” I FSP 239, n. 39. The easement granted to Conrail in 1976 would have been “used or useful” to Conrail even if there was no track on the property at the time of the conveyance.⁵

To grant the declaratory relief requested by Petitioner, the STB would need to determine the scope and meaning of the rights conveyed to Conrail on what is now the Holland Property before determining what the status of those rights might be. This would require the STB to apply principles in the FSP pertaining to what rail properties and facilities are used, and the breadth of the rights intended to be conveyed as used or useful in the FSP. This goes to the core issue of the

⁴ Before Special Court certification, the USRA was required to “identify and describe in more detailed and traditional property-law terms the rail properties subject to conveyance.” I FSP 222.

⁵ Structures located in yards were transferred on the same basis as the yards and structures along transferred lines used or useful in rail transportation service, and transferred on the same basis as the adjacent lines. I FSP 246.

nature of Conrail's rights on what is now the Holland Property and thereby intrudes on the central functions of the District Court.

2. Even if the District Court Does Not Have Exclusive Jurisdiction, the Interpretation of Conrail's Property Rights Should be Left to the Courts.

Even if the District Court did not have exclusive jurisdiction to construe the Conrail's rights on the Holland Property, including whether those rights have been abandoned, the Board had repeatedly held that state property law issues are best left to the courts because of their expertise. *E.g., Allied Indust. Dev. Corp. – Petition for Declaratory Order*, FD 35477, slip op. at 5 (STB served Sept. 17, 2015)(proceeding returned to the state court for determination of the validity of the sale of a parcel due to state court's necessary expertise); *Allegheny Valley R.R.—Pet. for Declaratory Order—William Fiore*, FD 35388 (STB served Apr. 25, 2011) (denying a petition for declaratory order because the question posed was a property line dispute best adjudicated by the state court); *Allegheny Valley Railroad Company—Petition for Declaratory Order*, FD 35239, slip op. at 9 (STB served June 15, 2010)(size and extent of a railroad easement is a matter of state property law and best addressed by state courts); *CSX Transp.—Aban. Exemption—in Allegany Cty., Md.*, AB 55 (Sub-No. 659) (STB served Apr. 24, 2008) (questions presented involving an alleged error in the form of a deed transfer were matters best left for the state court to decide).

In the absence of District Court jurisdiction, the same result would be appropriate here. The complexity of the property law issues associated with the conveyance to Conrail in 1976 and the conveyance from Conrail to New Jersey Transit in 1978, and abandonment (or not) of the various rights held by Conrail would require the expertise of a state court.

3. Even if the Conrail Easement Was Limited to Track Rights, The District Court Would Have Exclusive Jurisdiction.

Well aware that the STB does not construe property rights, Petitioner attempts to manufacture a basis for the Board to construe the Conrail Easement by ignoring the broad scope of the easement (addressing only its track aspects) and asserting that the STB has authority to determine whether the easement has been abandoned. Petition at 9, 11 (*citing Pinelawn Cemetery – Pet. For Declaratory Order*, FD 35468, slip op. at 10).⁶

The Conrail Easement is not limited to track rights, but if it was the Board would deny the requested relief on jurisdictional grounds. In *Pinelawn*, the Board held that the petitioner had not demonstrated that the involved rail carrier had abandoned certain spur track. The Board's authority to decide whether the rail carrier had abandoned the spur track was based on its general jurisdiction. *Pinelawn*, slip op. at 9.⁷ In the present case, the Board does not have jurisdiction to construe the track rights in the Conrail Easement. *Consolidated Rail Corp. v. Surface Transportation Board*, 571 F. 3d 13 (D.C. Cir. 2009). Declaratory relief on jurisdictional track issues (whether spur track or rail line) is within the original and exclusive jurisdiction of the District Court. *Id.*

4. Petitioner has failed to Show that Conrail has Abandoned the Conrail Easement.

Even if the STB had authority to determine whether the Conrail Easement had been abandoned, Petitioner has ignored the non-track aspects of the Conrail Easement and thereby failed to present sufficient evidence to prove that Conrail has abandoned its easement rights on the Holland Property. Petitioner has the burden of proof and has failed to meet that burden. 5

⁶ See Petitioners' errata sheet, filed August 16, 2019.

⁷ There is no indication in the *Pinelawn* decision that anyone challenged the Board's jurisdiction to decide whether the spur track had been abandoned.

U.S.C. § 556(d); see e.g., *Eastern Alabama Railway LLC – Petition for Declaratory Order*, F.D. No. 35583, slip op. at 4 (STB served March 9, 2012).

Petitioner’s evidence is limited to the absence of track on Holland Property, the absence of adjacent track and the absence of shippers that could be served from the Holland Property.⁸ This evidence (and the argument on page 9) only goes to whether the track-related aspects of the Conrail Easement have been abandoned. Petitioner ignores the plain fact that the Conrail Easement is broader than track-related usage and has failed to provide any evidence regarding what was or might have been present on the property in 1976 at the time of conveyance to Conrail or in 1978 at the time of the conveyance to New Jersey Transit.⁹

To give just one example, the Conrail Easement includes the right to use the Holland Property for a cellular communications tower for use in provision of Conrail freight services, provided that such use is linked to poles, pipes *et cetera* that existed on March 31, 1976 and continued to exist on September 15, 1978 (including as renewed or replaced). This use has nothing to do with the presence or use (at any time) of track. Assuming for purposes of argument only that Conrail has abandoned track-related usage in the Conrail Easement, there is still no evidence in the record of any kind in the Petition for the proposition that Conrail has abandoned any non-track related rights in the Conrail Easement.

CONCLUSION

For the foregoing reasons, the Board should deny Holland’s Petition for Declaratory Order.

⁸ See Petition at 1-3 (generally), 5-7 (absence of connecting or adjacent track); and Exhibit A, Verified Statement of Steven H. Santoro at 7-8 (conclusions).

⁹ Petitioner does say the Holland Property “is in the center of a part of Jersey City ... that for many years was covered with a spider web of connecting rail lines owned historically by a complex network of railroad companies.”

Respectfully submitted,


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August 19, 2019

CERTIFICATE OF SERVICE

I, Carolyn Kraska, hereby certify that on August 19, 2019, a true and correct copy of the Reply to Petition for Declaratory Order was sent via electronic mail to the following:

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