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Before the
Surface Transportation Board

JR - 27

STB DOCKET NO. AB-167 (Sub-No. 1189X)

CONSOLIDATED RAIL CORPORATION – ABANDONMENT EXEMPTION –
IN HUDSON COUNTY, NJ

STB DOCKET NO. AB-55 (Sub-No. 686X)

CSX TRANSPORTATION, INC. – DISCONTINUANCE OF SERVICE EXEMPTION –
IN HUDSON COUNTY, NJ

STB DOCKET NO. AB-290 (Sub-No. 306X)

NORFOLK SOUTHERN RAILWAY COMPANY – DISCONTINUANCE OF SERVICE
EXEMPTION – IN HUDSON COUNTY, NJ

RIFFIN’S MOTION TO DISMISS

1. Comes now James Riffin, (“**Riffin**”) who herewith respectfully **Moves to Dismiss** the above entitled proceeding **for lack of jurisdiction**, and in support hereof states:

2. In *CSX Transportation, Inc. – Abandonment Exemption – In Rocky Mount, Nash County, NC*, STB Docket No. AB-55 (Sub. No. 562X), Served December 1, 1999 (“**Rocky Mount**”), Petition to Reopen denied, July 27, 2000, CSX filed a Notice of Exemption (“**NOE**”) to abandon a 3,000 foot track segment. The New Southern of Rocky Mount (“**NSRM**”), a non-carrier, timely filed an Offer of Financial Assistance (“**OFA**”), to acquire the track segment, for \$17,500.

CSX consented to sell the track segment to NSRM. Three days later, the City of Rocky Mount filed a motion **to dismiss** the NOE, for ‘lack of jurisdiction,’ arguing that the track segment was excepted track, and as such, could **NOT** be the subject of a NOE to abandon. The STB determined that the track segment was in fact excepted track. The STB then **dismissed the NOE** and vacated **all** of its prior decisions. The NSRM filed a Petition to Reopen, which was denied.

THE SIGNIFICANCE OF *ROCKY MOUNT* IN 1189X

3. If a track segment is not line, it cannot be the subject of a Notice of Exemption (“**NOE**”) to abandon.

4. Conrail has advocated, and continues to advocate:

“Conrail has consistently taken the position that neither the properties constituting the defunct Hudson Street IT nor the properties constituting the defunct Harsimus Cove Yard were conveyed as regulated lines of railroad. Rather, they constituted spur and yard track over which the Board had no abandonment authority.” Conrail **December 5, 2016** Reply in FD 36078 at 3.

5. The only portion of the Harsimus that has been determined to be line, is the segment between CP Waldo and the West side of Marin Blvd.

6. Since Conrail advocates that all track segments East of Marin Blvd are excepted track, and since there has been no determination contrary to what Conrail advocates, **none of the track segments east of Marin Blvd may be the subject of an NOE** to abandon (such as Conrail’s 1189X NOE).

7. Conrail’s 1189X NOE is ‘false and misleading,’ for Conrail, in the 1189X NOE, (A) depicts on its Map, and (B) seeks authority in its NOE, to abandon the track segments East of Marin Blvd, even though Conrail advocates that the track segments East of Marin Blvd are excepted track. By depicting the track segments East of Marin as ‘line’ on its Map, and by seeking abandonment authority for the track segments East of Marin, Conrail, in its NOE, is

‘misrepresenting’ (if not expressly, then impliedly) that the track segments East of Marin are line, while continuing to advocate that the track segments East of Marin are excepted track.

8. Per *Rocky Mount*, the STB **lacks jurisdiction** to authorize abandonment of any track segments East of Marin Blvd.

9. Riffin argues that neither the STB **nor Conrail, cannot alter** what Conrail seeks to abandon. (See *Railroad Ventures*, discussed below.) And if the STB lacks jurisdiction to grant abandonment authority for **all** that Conrail seeks to abandon, the STB **is barred** from granting Conrail any relief. (Such as by bifurcating Conrail’s 1189X NOE into two segments: The segment between CP Waldo and the West side of Marin Blvd; and the segment East of Marin Blvd.)

10. In addition, until the proper classification for the track segments East of Marin Blvd is determined, granting abandonment authority for the CP Waldo to Marin Blvd segment would be highly improvident, for there is a very high probability that such an abandonment would leave multiple stranded line segments East of Marin Blvd.

11. One scenario might go like this: The CP Waldo - Marin Blvd segment is granted authority to abandon. A Complaint is filed in the Special Court to determine whether any track segments East of Marin were conveyed to Conrail as line. There is a very high probability that the Special Court would rule that track segments East of Marin were conveyed to Conrail as line. (Such as the HSIT.) A petition to reopen the 1189X proceeding would be filed, noting ‘material error:’ Multiple line segments were unlawfully stranded. 1189X would be reopened, and vacated.

12. Another scenario might go like this: A motion to dismiss the 1189X proceeding is filed, arguing lack of jurisdiction. Since Conrail advocates that all track segments East of Marin are Excepted, the STB, without any contrary determination, would have to dismiss the 1189X proceeding, since the STB lacks jurisdiction to grant abandonment authority for the track

segments East of Marin Blvd, as requested by Conrail.

Railroad Ventures

13. In *Railroad Ventures, Inc. v. STB*, 299 F. 3d 523, 552 (6th Cir. 2002), the Sixth Circuit stated:

“Thus, while a railroad may ‘abandon any part of its railroad lines’ under 49 U.S.C. § 10903(a)(1)(A), the STB is permitted to authorize a prospective buyer under the OFA provisions to purchase ‘that part of the railroad line to be abandoned’ under 49 U.S.C. § 10904(d). The line owner can seek authority to abandon all or a part of its rail line, but if it does so, then, pursuant to § 10904(f)(1)(B), a qualified OFA purchaser is entitled to determine how much of the line it wishes to acquire. Once the offeror seeks to purchase the entire rail line or a portion thereof, as described in the abandonment petition, 49 U.S.C. § 10904(c), the STB is then statutorily obligated to render a decision setting price and other sale terms as to what the offeror seeks to buy, within thirty days of a request to set conditions. 49 U.S.C. § 10904(f)(1)(A). Under this statutory provision, then, it necessarily follows that **neither the abandoning rail carrier nor the STB can alter or amend what the OFA buyer has offered to buy**; rather, the STB can only set the terms on what the offeror has proposed to purchase.

In short, once the owner of a rail line submits a petition seeking the STB’s authority to abandon the line, it must allow a prospective OFA purchaser the opportunity to determine how much of the line to acquire, as the line is described in the abandonment petition. **Thus, at the point of filing the abandonment petition, the abandoning rail line owner cannot reduce or diminish the rail line or the nature of the property interests associated with the line.** Because a rail line owner is subject to the STB’s jurisdiction until such time that the line has been properly abandoned or sold, it therefore **must maintain the status quo with respect to its property interests in the rail line as described in its abandonment petition.”**

The primary reason for maintaining the status quo with respect to the property interests associated with the rail line as described in the abandonment petition is *553 to allow a prospective OFA buyer sufficient opportunity to assess whether the acquisition of the line is economically viable and to determine what valuation to place on the rail line that it seeks to acquire. In this respect, it is evident that a rail line embraces more than just the track necessary for the provision of rail service. *See Iowa Terminal*, 853 F. 2d at 965 (rejecting the abandoning railroad’s attempt to limit the transfer of land to two, rather than ten, acres, even though eight acres of land had been leased for nonrail purposes for several years, since ‘[t]he purpose of the statute empowering the [STB] to mandate a sale is to keep viable lines in operation’); *see also In re Boston & Maine Corp.*, 596 F. 2d 2,

6 (1st Cir. 1979) (noting that a ‘railroad line’ is not merely the service being provided, but the physical properties and interests belonging to the debtor that constitute the line’). Holding the status quo from the filing of the abandonment petition is imperative from a practical perspective since a prospective OFA buyer has to act quickly, examining and evaluating pertinent data about the condition of the line, its traffic and revenue before submitting an OFA, which is due within ten days of the decision of the STB granting a petition for abandonment or exemption. 49 U.S.C. § 10904(c); 49 C.F.R. § 1152.27(c)(1)(i)(B). Thus, to ensure the efficacious valuation of a rail line, it is essential that the property interests associated with the rail line remain stable.

Maintenance of the status quo upon the filing of an abandonment petition also promotes the practical goal of properly administering the statute since the STB is obligated to make certain decisions within a highly constrained time frame so as to advance the goal of continuous rail service. Specifically, it accords with the purpose of the forced-sale provision set forth in 49 U.S.C. § 10904, which is to promote the continuation of viable rail service, not simply the maintenance of the rail line itself.”
Bold added.

14. On March 9, 2009, both Jersey City and CNJ Rail filed a Notice of Intent to File an Offer of Financial Assistance (“**Notice**”). In the case of CNJ Rail, its Notice was for the entirety of the line Conrail seeks to abandon.

15. Because Notices were filed, “**neither the abandoning rail carrier nor the STB can alter or amend what the OFA buyer has offered to buy.**” *Id.* 552. “**Thus, at the point of filing the abandonment petition, the abandoning rail line owner cannot reduce or diminish the rail line or the nature of the property interests associated with the line.**” *Id.* 552.

16. Per *Railroad Ventures*, Conrail **cannot** alter or amend its NOE, to eliminate the portion of the Harsimus that lies East of Marin Blvd.

17. Consequently, since Conrail advocates that all track segments East of Marin Blvd are excepted track segments, which are not subject to the STB’s abandonment jurisdiction, and since there has been no determination to the contrary, unless and until it is determined that the track segments East of Marin Blvd are line, the STB **has no jurisdiction** to grant Conrail the relief that it seeks in 1189X: Abandonment authority for all track segments East of Marin Blvd.

18. And without the requisite jurisdiction, the STB must dismiss the 1189X et al. proceeding.

Respectfully,

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CERTIFICATE OF SERVICE

I hereby certify that on or before the 21st Day of December, 2016, a copy of the foregoing Riffin's Motion to Dismiss, was served on all of the parties in this proceeding, either via e-mail, or via U.S. Postal Service, postage prepaid. A copy was also served on all of the parties in the FD 36078 proceeding.

James Riffin