

SERVICE DATE – MAY 16, 2018

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36169

CHESTER COUNTY, PA.—PETITION FOR DECLARATORY ORDER

Decided: May 15, 2018

By petition filed on March 14, 2018, Chester County, Pa. (the County), a municipal governmental entity, seeks a declaratory order confirming that a line of railroad located between Linfield Road and State Route 422 in Pottstown, Pa. (the Line) and owned by Norfolk Southern Railway Company (NSR) has been abandoned. The County also asks the Board to confirm that, if the Line has been abandoned, its acquisition by the County and conversion to a trail cannot be undertaken pursuant to § 8(d) of the National Trails System Act (Trails Act) 16 U.S.C. § 1247(d), and 49 C.F.R. § 1152.29.

The County states that it seeks to acquire the Line from NSR to preserve and dedicate it as a portion of the County's historic network of recreational trails. (Pet. 2.) It explains that the Line is a segment of the Schuylkill Secondary,¹ which was conveyed to Consolidated Rail Corporation (Conrail) under the Final System Plan in 1975. (Pet. 2-3.) The County states that by decision issued on July 15, 1984, the Board's predecessor, the Interstate Commerce Commission (ICC), authorized abandonment of the Line and required Conrail to notify it upon consummation of the abandonment. (*Id.* at 3 (citing Conrail Aban. in Montgomery Cty., Pa., AB 167 (Sub-No. 710N) (ICC served July 15, 1984) (authorizing for abandonment 2.9 miles of the Pottstown Branch from Parkersford in Chester County to Pottstown in Montgomery County)). However, the County indicates that it found no record of Conrail's filing a notice of consummation. (Pet. 3.) Nevertheless, the County asserts that the Line has been abandoned, a conclusion that it argues is supported by an evaluation of the status of the Line and Conrail's intent. (*Id.* at 4.) The County claims that NSR has advised it that NSR also thinks the Line was abandoned by Conrail but is unable to confirm the abandonment definitively. (*Id.* at 3; Suppl. Comments 2-3.)

On March 28, 2018, NSR filed a reply to the petition, asking the Board to decline to open a proceeding or issue a declaratory order at this time. (Reply 2.) NSR states that it owns the Line and has not agreed to sell it to the County or any other party and that the property is not subject to a legal dispute or any contestable transaction. (*Id.* at 3.) NSR argues that when the agency has previously issued declaratory orders related to the legal status or abandonment of a line, such a determination was at issue in a pending legal proceeding or actual transaction. (*Id.* at

¹ It appears that the Line has also been referred to as the Pottstown Branch. (Pet. Ex. C at 1, Ex. D at 2.)

2-3.) Further, NSR states that the County's request for confirmation that acquisition and conversion of the Line to a trail cannot be undertaken pursuant to the Trails Act inappropriately seeks an answer to an entirely hypothetical question. (Id. at 3.) NSR notes, however, that if the Board decides to address the County's petition, the Board should institute a proceeding and examine evidence as to the status of the Line. (Id. at 4 n.1.)

On April 24, 2018, the County filed supplemental comments² reasserting that Conrail previously abandoned the Line. The County states that it has been negotiating with NSR to acquire the Line since at least February 2011, but the parties have not agreed upon proper valuation in part because of a dispute over whether the Line has been abandoned. (Suppl. Comments 2.) According to the County, on August 17, 2017, County Commissioners adopted a resolution that authorized condemnation of the Line and, on September 7, 2017, the County informed NSR that it would pursue condemnation proceedings to acquire the Line. (Id. at 3.) However, the County acknowledges that it cannot condemn the Line unless it has been abandoned; thus, the County states, it will file the condemnation action once it has confirmed that the Line has been abandoned. (Id.)

The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321 to issue a declaratory order to terminate a controversy or remove uncertainty. Here, despite NSR's opposition and assertion that there is no current need for a determination of the Line's status, there is uncertainty and a present controversy that should be addressed regarding whether the Line has been abandoned. The County has taken concrete steps toward a condemnation action, and the question of the Line's regulatory status appears to impact the County's ability to pursue that action. Therefore, it is appropriate to institute a declaratory order proceeding to determine the regulatory status of the Line.

The County and NSR are directed to confer and jointly submit, by May 29, 2018, a proposed procedural schedule to govern the proceeding. Should the parties fail to agree on a procedural schedule, the County and NSR shall each propose one separately by that same date, and the Board will determine a final procedural schedule.

It is ordered:

1. A declaratory order proceeding is instituted.
2. The County and NSR are directed to confer and submit (jointly, if possible, or separately) a proposed procedural schedule by May 29, 2018.
3. This decision is effective on its date of service.

By the Board, Scott M. Zimmerman, Acting Director, Office of Proceedings.

² The County's supplemental comments could be construed as a reply to a reply. See 49 C.F.R. § 1104.13(c). In the interest of compiling a more complete record, the Board will accept the County's supplemental comments.