

SERVICE DATE - DECEMBER 19, 2019

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36223

NORFOLK SOUTHERN RAILWAY COMPANY—PETITION TO SET TRACKAGE
RIGHTS COMPENSATION—NORFOLK & PORTSMOUTH BELT LINE RAILROAD
COMPANY

Digest:¹ This decision denies reconsideration of an earlier Board decision that held this proceeding in abeyance.

Decided: December 18, 2019

On March 29, 2019, in response to a petition filed by Norfolk Southern Railway Company (NSR), the Board instituted a proceeding to set compensation for the trackage rights of Norfolk & Portsmouth Belt Line Railroad Company (NPBL) over approximately 11 miles of rail lines (the Lines) owned by NSR in Norfolk, Va., and Chesapeake, Va. In that decision, the Board also granted a petition by CSX Transportation, Inc. (CSXT), to intervene. On July 25, 2019, in response to a motion by CSXT, the Board held the proceeding in abeyance. NSR filed a petition to reconsider that decision on August 14, 2019. For the reasons explained below, NSR's petition for reconsideration will be denied.

BACKGROUND

On September 13, 2018, NSR filed a petition requesting that the Board institute a proceeding to set compensation for the trackage rights of NPBL over the Lines. NPBL is owned approximately 57% by NSR and 43% by CSXT. (NSR Pet. 3, Sept. 13, 2018.) Shortly after filing its petition to intervene, CSXT submitted a copy of a complaint it filed in federal district court alleging that NSR and NPBL have taken actions to effectively prevent CSXT from using NPBL to provide service to customers at the Norfolk Intermodal Terminals and that these actions constitute a violation of federal antitrust laws, a breach of contract, and a violation of state law in several respects, including a violation of NPBL's fiduciary duty to CSXT as a shareholder of NPBL.² In the Board's March 29, 2019 decision instituting a proceeding and granting CSXT's

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² Compl. at 25-38, CSX Transp., Inc. v. Norfolk S. Ry., No. 2:18-cv-00530 (E.D. Va. filed Oct. 4, 2018). CSX filed this complaint with the Board on October 5, 2018.

petition to intervene, the Board stated that it would “establish compensation under the framework set forth in SSW Compensation,”³ that parties should limit discovery to and present evidence on issues related to the calculation methods recognized under that framework, and that evidence relating solely to the issues in the pending federal court case would not be permitted. Norfolk S. Ry.—Pet. to Set Trackage Rights Comp.—Norfolk & Portsmouth Belt Line R.R., FD 36223, slip op. at 5-7 (STB served Mar. 29, 2019).

On April 18, 2019, CSXT filed a petition for clarification or reconsideration and a request to hold the proceeding in abeyance. CSXT argued, among other things, that the scope of the proceeding should be broadened to allow parties to raise any matter potentially relevant to the competitive effects of a prescribed trackage rights fee and any alternatives to the SSW Compensation methodologies that may be necessary to address the unique competition factors in this case. (CSXT Pet. for Clarification 3-4, 12-16.) In addition, CSXT requested that the Board consider holding the proceeding in abeyance while the parties litigate the federal district court case, because doing so could assist the Board in resolving the trackage rights compensation dispute. (*Id.* at 17-18.) NSR and NPBL replied on May 8 and 9, 2019, respectively.

On July 25, 2019, the Board ordered that the trackage rights compensation proceeding be held in abeyance. That decision explained that resolution of the federal district court proceeding could reduce the number of disputed issues between the parties before the Board, thereby promoting efficiency, and that holding the proceeding in abeyance would not be unfair to any party. Norfolk S. Ry.—Pet. to Set Trackage Rights Comp.—Norfolk & Portsmouth Belt Line R.R., FD 36223, slip op. at 2 (STB served July 25, 2019).

On August 14, 2019, NSR filed a petition for reconsideration of the Board’s July 25, 2019 abeyance decision. NSR asserts that it was material error for the Board to hold the proceeding in abeyance based on the potential resolution of issues before the federal court, because those issues are not relevant to setting trackage rights compensation and because the Board’s March 29, 2019 decision explained that the Board would not accept evidence relating solely to the issues in the pending federal court case. (NSR Pet. for Recons. 3-4.) NSR also argues that the decision to hold the proceeding in abeyance constituted material error because it is inconsistent with precedent. According to NSR, the Board has previously held proceedings in abeyance pending resolution of a court proceeding only where the court’s ruling might moot the Board’s proceeding. (*Id.* at 5-6.) In addition, NSR argues that, under Board precedent, abeyance is not appropriate if it would be fundamentally unfair to any party and that abeyance in this case is fundamentally unfair to NSR and NPBL because it requires NSR and NPBL to operate without benefit of an agreement regarding trackage rights compensation. (*Id.* at 5, 7-8.) NSR further

³ The “SSW Compensation” framework for calculating trackage rights compensation was first established in St. Louis Southwestern Railway—Trackage Rights over Missouri Pacific Railroad—Kansas City to St. Louis, 1 I.C.C.2d 776 (1984), and was modified by the subsequent decision, St. Louis Southwestern Railway—Trackage Rights over Missouri Pacific Railroad—Kansas City to St. Louis, 4 I.C.C.2d 668 (1987).

asserts that most, if not all, the issues before the federal court are within the exclusive jurisdiction of the Board and that the court therefore cannot resolve such issues. (Id. at 7.)

On September 3, 2019, CSXT replied to NSR's petition for reconsideration. According to CSXT, holding a proceeding in abeyance is within the Board's discretion and the material error standard does not apply to such discretionary actions. (CSXT Reply 2, Sept. 3, 2019.) CSXT further argues that the Board acted consistent with precedent, stating that the Board has not required that a court action have the potential to moot a Board proceeding in order to hold that Board proceeding in abeyance. (Id.) In addition, CSXT argues that the competition issues before the federal court are relevant to the trackage rights compensation proceeding and that the Board's previous decision recognized the relevance of these issues. (Id. at 2-3.) Finally, CSXT asserts that holding the proceeding in abeyance is not unfair to NSR or NPBL because they continue to operate under the pre-existing agreement, which, CSXT notes, had been used, with rate adjustments and escalation, for over 100 years before NSR sought to terminate it. (Id. at 4-5.)

NPBL also filed a reply on September 3, 2019. NPBL argues that the decision to hold the proceeding in abeyance at CSXT's request is inconsistent with the Board's finding in its March 29, 2019 decision that CSXT's participation would "not unduly disrupt the schedule." (NPBL Reply 1, Sept. 3, 2019.) NPBL also claims that the Board has exclusive jurisdiction to resolve many of the issues before the court and that the Board's deferral to the court is therefore material error. (Id. at 2-3.)

DISCUSSION AND CONCLUSIONS

"The Board has broad discretion to determine whether to hold a proceeding in abeyance, and its decision 'to do so in any particular situation is highly dependent on the facts and circumstances of the case.'" Pet. of the Nat'l R.R. Passenger Corp. for Relief Pursuant to 49 U.S.C. § 24905, FD 36048, slip op. at 3 (STB served Oct. 3, 2016) (quoting E.I. DuPont de Nemours & Co. v. Norfolk S. Ry., NOR 42125 et al., slip op. at 4 (STB served Nov. 29, 2012); see also Ballard Terminal R.R.—Pet. for Declaratory Order, FD 36261, slip op. at 4-5 (STB served June 27, 2019); Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 543 (1978) ("Absent constitutional constraints or extremely compelling circumstances, the 'administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'" (quoting FCC v. Schreiber, 381 U.S. 279, 290 (1965))). In the present case, the Board continues to find that resolution of the federal court proceeding may reduce the number of disputed issues between the parties, thereby promoting efficiency.

The Board is unpersuaded by NSR's and NPBL's arguments that the abeyance decision was in error because "the [Board] has the exclusive authority over many of the remedies that may be raised in CSXT's federal case." (NSR Pet. for Recons. 7.) Indeed, the court considered and rejected NPBL's argument that the court lacks jurisdiction. CSX Transp., Inc. v. Norfolk S.

Ry., No. 2:18-cv-00530, at 20-21 (E.D. Va. Sept. 9, 2019). While acknowledging that the question of whether to approve a rate for the line in the future is committed to the Board, the court found that federal and state law claims alleged could be addressed by the court. Id. at 23-25.

The Board is also not persuaded that abeyance should be limited to situations where resolution of a judicial or administrative proceeding could moot the Board's proceeding and NSR has cited no authority imposing such a limitation. Rather, in deciding whether to hold a docket in abeyance, the Board considers "whether abeyance would promote efficiency and whether it would be fundamentally unfair to any party." N. Am. Freight Car Ass'n v. Union Pac. R.R., NOR 42144 et al., slip op. at 3 (STB served Mar. 31, 2017). Indeed, the Board has granted abeyance in circumstances other than where another proceeding might moot the proceeding before the Board. See Dyno Nobel, Inc. v. Nustar Pipeline Operating P'ship, L.P., NOR 42147, slip op. at 4-5 (STB served Mar. 24, 2017) (holding a proceeding in abeyance until a court decided state law issues that were relevant to, but not determinative of, the issues before the Board).

In addition, contrary to NPBL's claim, the Board's decision to hold the proceeding in abeyance is not inconsistent with its previous finding that allowing CSXT to intervene in the proceeding would not "unduly delay the schedule." Because resolution of the court proceeding could result in a more efficient, and thus less costly, trackage rights compensation proceeding before the Board, in the Board's view, the abeyance would not result in undue delay.

Finally, the Board rejects NSR's claim that abeyance is fundamentally unfair to NPBL and NSR because they must now continue operating for some period without a trackage rights compensation agreement. In fact, NPBL and NSR continue to operate under the terms of the pre-existing agreement as they have for over 100 years. (NSR Pet. 3, Sept. 13, 2018.) Moreover, NSR waited three years after deciding to terminate the agreement before petitioning the Board to set trackage rights compensation. (CSXT Reply 4, Sept. 3, 2019.) In these circumstances, an additional delay caused by the abeyance is not fundamentally unfair.⁴

It is ordered:

1. NSR's petition for reconsideration is denied.

⁴ NSR also asks that the Board clarify that any trackage rights compensation finding will be made retroactive to September 13, 2018, the date of NSR's initial petition to set trackage rights compensation. (NSR Pet. for Recons. 8.) Issues regarding trackage rights compensation, including whether it will be applied retroactively, will be addressed, as necessary, in a future decision by the Board on the merits after the Board lifts the abeyance.

2. This decision is effective on its date of service.

By the Board, Board Members Begeman, Fuchs, and Oberman