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VIA E-MAIL

April 6, 2022

Scott R. Duplisea, Chair
Select Board
c/o Thomas Gregory, Executive Assistant
Town of Hudson
78 Main Street
Hudson, MA 01749
Email: tgregory@townofhudson.org

RE: NSTAR Electric Company d/b/a Eversource Energy
Sudbury-Hudson Transmission Reliability Project
EFSB 17-02 / D.P.U. 17-82 / D.P.U. 17-83

Dear Chairman Duplisea and Members of the Select Board:

Hudson Town Counsel has shared with us, as Special Town Counsel, your request for a legal opinion on a question regarding work to be performed within an inactive Massachusetts Bay Transportation Authority ("MBTA") railroad right-of-way (the "ROW") in Hudson, as part of the construction of the above-referenced underground transmission line (the "Project") proposed by NSTAR Electric Company d/b/a Eversource Energy ("Eversource").

Specifically, we have been asked to address the legal significance of a determination (or, more precisely, the apparent lack thereof) by the Surface Transportation Board (the "STB") or other authority of the ROW's status as an "active", "abandoned" or "discontinued" rail line.

This question arose in response to a February 17, 2022 letter from Eversource to Hudson residents, alerting them that, as part of "pre-construction efforts" for the Project, "Eversource … will be performing environmental surveys along the" ROW in the near future and "marking out the limits for vegetation removal with flagging and stakes." At least one resident has suggested to the Select Board that, absent a formal determination by the STB designating the ROW as an "abandoned" rail line, work performed in the ROW as part of the Project would be illegal.

For the reasons set forth below, it is our legal opinion that any challenge to the Project on this basis would be a significant uphill battle. Despite some uncertainty regarding its formal

classification or status (i.e., active, discontinued or abandoned), the ROW has not supported rail service in more than forty years. Furthermore, the STB has offered guidance on the matter indicating that the Project would not prevent or interfere with reactivation of the rail line within the ROW, which is a critical factor when considering a proposed use of an inactive rail corridor.

BRIEF ROW HISTORY AND PROJECT BACKGROUND

Pursuant to a December 24, 1976 Indenture, Boston & Maine Corporation ("B&M") conveyed to MBTA all right, title and interest in ROW, but B&M retained freight service rights in the ROW.[1] MBTA subsequently took title to the ROW in fee simple under an Order of Taking dated February 16, 1977.[2] As discussed below, B&M subsequently received formal approval to discontinue its freight service line in the ROW. *In the Matter of Boston and Maine Corporation, Debtor*, No. 70-250-M (D. Mass., Oct. 3, 1980).

A December 30, 2010 Alternative Transportation Corridor Lease Agreement between MBTA and the state Department of Conservation and Recreation ("DCR") allows DCR to create and maintain a multi-use trail along a 6.7-mile portion of the ROW, as part of the Massachusetts Central Rail Trail. That 2010 lease provides that "DCR acknowledges that the Premises or a major portion thereof may be necessary for active railroad or other transportation purposes in the future." Similarly, MBTA granted Eversource an easement for transmission lines in the ROW under a June 9, 2017 agreement, but reserved the right to install, operate, repair and maintain transportation/rail infrastructure within the easement.[3]

On or about April 20, 2017, Eversource filed a petition with the Energy Facility Siting Board ("EFSB") for approval of the Project, proposing to construct, operate, and maintain an approximately 9-mile, 115-kV underground transmission line from Eversource's Sudbury substation to the Hudson Light & Power Department's substation at Forest Avenue in Hudson, and to make improvements to the Sudbury and Hudson substations.

The Town of Hudson (the "Town") successfully filed a Motion to Intervene as a full party in the EFSB proceedings, which was allowed on June 26, 2017.[4] During the EFSB's evidentiary hearings on Eversource's petition, the Town filed Direct Testimony from Hudson Department of Public Works Director Eric Ryder, and Hudson Conservation Agent Pam Helinek. The testimony and supporting evidence filed by Town's witnesses focused on the impacts to the natural

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[1] Recorded at Middlesex South Registry of Deeds Book 13117, Page 113.

[2] Recorded at Middlesex South Registry of Deeds, Book 13156, Page 34. That Order of Taking provides that MBTA took the land in fee simple (pursuant to GL c. 79 and GL c. 161A, § 3(o)) for "the mass transportation extension and facilities for the Middlesex County Extension" and more specifically "[f]or the purposes of laying out, constructing and maintaining said mass transportation extension and facilities … ."

[3] Under an August 28, 1984 Agreement between MBTA and Boston Edison Company, recorded at Middlesex South Registry of Deeds, Book 15756, Page 523, MBTA granted Edison an easement and "MBTA hereby agrees that the rights and easements granted herein include the right to install lines underground … ." MBTA "reserve[d] the right for itself, its successors and assigns to use the Property for any legal purpose whatsoever" with certain limitations.

[4] The Town of Sudbury, the Town of Stow, the resident group known as Protect Sudbury, Inc. ("PSI") and the Hudson Light & Power Department were likewise granted full party status to participate in the EFSB proceedings. Sixty residents of Hudson and Sudbury were granted "limited participant" status in the proceedings.

environment and the Town's public water supply associated with constructing the Project in the ROW.[5]

EFSB issued a Tentative Decision on December 2, 2019 (the "Tentative Decision"), upon which the Town submitted comments dated December 10, 2019. The undersigned attended the EFSB's December 17, 2019 public meeting on behalf of the Town and provided oral comments on the Tentative Decision. Again, these written and oral comments focused on the Project's impacts to the natural environment and the Town's public water supply.

EFSB then issued a Final Decision approving construction of the Project in the ROW on December 18, 2019 (the "Final Decision").[6] The Town's participation in the EFSB proceedings successfully effected changes to the Final Decision to promote protection of natural resources, as well as the Town's public water supply, which were the issues of greatest concern to the Town.[7]

On January 7, 2020, the Town of Sudbury and PSI filed appeals challenging the Final Decision. The Massachusetts Supreme Judicial Court ("SJC") ruled in favor of the EFSB and Eversource, concluding that the Project had been properly approved. *Town of Sudbury v. EFSB*, 487 Mass. 737 (2021). The SJC had previously upheld the dismissal of another lawsuit filed by the Town of Sudbury, rejecting Sudbury's argument that the doctrine of prior public use prohibited MBTA from executing the above-referenced agreement with Eversource for the Project. *Town of Sudbury v. MBTA*, 485 Mass. 774 (2020).

On or about March 11, 2021, PSI filed a Petition with STB requesting a Declaratory Order that the MBTA rail line within the ROW has not been abandoned, and that the easements granted by MBTA to Eversource (for electric power transmission) and DCR (for trail use) are void because they unlawfully interfere with the potential reactivation of rail service in the ROW (the "Petition"). On February 1, 2022 STB rendered a Decision denying PSI's Petition and declining to issue a Declaratory Order (the "Decision"), a copy of which is attached hereto.[8]

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[5] Specifically, the Town argued that: the Final Decision should deny construction of the Project along the "Preferred Route" (mostly within the ROW, with a 1.4-mile stretch beneath existing roadways in Hudson) in favor of the "Noticed Alternative Route" (located entirely beneath existing roadways in Sudbury and Hudson); and alternatively, if the EFSB approved construction of the Project along the "Preferred Route", it should include conditions requiring mechanical vegetation management and prohibiting the use of herbicides, pesticides or any other chemicals for vegetation management or other maintenance along the entire length of the ROW.

[6] Eversource served copies of the Final Decision upon the Town and others on December 23, 2019.

[7] The EFSB's Final Decision revised the Tentative Decision in response to the Town's comments by: 1) requiring mechanical vegetation management along the entire length of the ROW (the Tentative Decision would have allowed use of chemicals in the ROW outside of Hudson Watershed Protection Districts); and ordering that this condition requiring mechanical vegetation management in the ROW be incorporated into any agreement between Eversource and DCR for ongoing vegetation management within the ROW (the Tentative Decision merely directed that "Eversource should endeavor to incorporate the same provision in" any such agreement).

[8] We further note that the Project location is consistently referred to as the "inactive" MTBA ROW by Eversource (in its filings with EFSB, MEPA and elsewhere), as well as the SJC, Land Court and EFSB. *Town of Sudbury v. MBTA*, 485 Mass. 774, 775, 776 (2020); *Town of Sudbury v. MBTA*, 2018 WL 4700410, *1, 3, n.3 (Mass. Land Court September 28, 2018). The SJC ad STB have both found that "the ROW has been inactive as a rail line for over forty years." *Town of Sudbury*, 485 Mass. at 776.

REGULATORY FRAMEWORK AND BACKGROUND

The country's railroads were at one time regulated under the Interstate Commerce Act (the "ICA"). *Grafton and Upton R. Co. v. Town of Milford*, 337 F.Supp.2d 233, 237-38 (D. Mass. 2004). The ICA established the Interstate Commerce Commission ("ICC") as the federal regulatory agency for railroads, with exclusive jurisdiction over discontinuance and abandonment of railroads. *Id.*; see also *Matter of Boston and Maine Corp.*, 596 F.2d 2, 5 (1st Cir. 1979). The STB is the successor agency to the ICC – the ICC was abolished on January 1, 1996, pursuant to the ICC Termination Act of 1995, under which many of the ICC's functions and responsibilities were transferred to the STB.

As is relevant to the question at hand:

> The STB has authority over the construction, operation, and abandonment of most railroad lines in the United States. A railroad cannot abandon or discontinue use of its rail line without STB approval. A railroad seeking to abandon its right-of-way must file either a standard abandonment application pursuant to 49 U.S.C. § 10903, or seek an exemption under 49 U.S.C. § 10502. If the railroad requests abandonment under the standard abandonment procedure of § 10903, the STB will grant the abandonment if it finds that "the present or future public convenience and necessity require or permit the abandonment or discontinuance." Under the exemption procedure, the railroad must submit certain certifications and the STB will publish a notice of the exemption in the Federal Register. Abandonment is authorized within thirty days after publication unless stayed. Rail carriers must file a notice with the STB that they have consummated abandonment. When a railroad abandons a line through one of these procedures, federal regulatory jurisdiction ends and state property law then controls the disposition of the right-of-way.

Capreal, Inc. v. United States, 99 Fed. Cl. 133, 135-136 (2011) (citations omitted); see also *National Ass'n of Reversionary Property Owners v. STB*, 158 F.3d 135, 137 (D.C. Cir. 1998).

"The word 'abandon' has a precise meaning in this regulatory scheme. An abandoned railroad corridor is one that is no longer used for rail service and is removed from the national transportation system." *Nat'l Ass'n of Reversionary Prop. Owners v. Surface Transp. Bd.*, 158 F.3d 135, 137, n. 1 (D.C. Cir. 1998) (citing *Preseault v. ICC*, 494 U.S. 1, 5-6, n. 3 (1990)).

On the other hand, a rail "line that is no longer in use, but has not been officially abandoned, may be reactivated later and is termed 'discontinued.' " *Id.* "A discontinuance allows a rail carrier to 'cease operating a line for an indefinite period while preserving the rail corridor for possible reactivation of service,' while abandonment removes the line from the national rail system and terminates the railroad's common carrier obligation for the line." *Chicago Coating Co., LLC v. U.S.*, 892 F.3d 1164, 1165 (Fed. Cir. 2018) (quoting *Preseault*, 494 U.S. at 5 n.3).

Thus, when reviewing the use or proposed use of a discontinued rail line, the fundamental issue that the STB considers is whether that use would be "inconsistent with the reactivation of rail service in the future." *Decision*, STB Docket No. FD 36493, p. 5 (citations omitted).[9]

Here, rail service within the ROW has at least been "discontinued" by a federal court. In response to an application filed by B&M for a certificate of public necessity and convenience to permit the abandonment of the line, ICC issued a report on March 26, 1980 recommending approval of B&M's discontinuance application.[10] ICC Docket No. AB-32 (Sub-No. 7F). Approval of discontinuance was subsequently granted by the United States District Court, Senior District Judge Frank J. Murray, in an October 3, 1980 Memorandum and Order. *In the Matter of Boston and Maine Corporation, Debtor*, No. 70-250-M (D. Mass. Oct. 3, 1980).

SURFACE TRANSPORTATION BOARD DECISION

As noted above, the STB recently issued its Decision denying PSI's Petition for a Declaratory Order that the MBTA rail line within the ROW has not been abandoned, and that the easements granted by MBTA to Eversource and DCR unlawfully interfere with the potential reactivation of rail service. Although the STB exercised its discretion and declined to issue a Declaratory Order (and therefore did not directly address the question of whether rail service within the ROW has been abandoned), the Decision provides valuable insight into MBTA's position on the ROW's status, as well as the STB's view of the question.[11]

As characterized by the Decision, MBTA argued that "there has been no demand for service since service ceased approximately 40 years ago", which is consistent with the SJC's statement that "the ROW has been inactive as a rail line for over forty years." *Decision*, STB Docket No. FD 36493, p. 3; *Town of Sudbury*, 485 Mass. at 776. MBTA also argued that it "never acquired a common carrier obligation with respect to the" ROW and that "although the decisions by the ICC and the District Court in 1980 were framed in terms of discontinuance, those decisions were intended to remove the Line from the national rail system and the ICC's jurisdiction." *Decision*, STB Docket No. FD 36493, p. 3. MBTA further argued that, even if the STB were to find that rail service in the ROW "has not been abandoned, MBTA would simply obtain abandonment authority under class exemption procedures for lines that have been without service for two years or more … ." *Id.*

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[9] It is worth noting that the United States Congress has specifically identified multi-use trails as an appropriate and desirable "interim use" of inactive or discontinued railroad rights-of-way. The National Trails System Act, 16 U.S.C. § 1247(d), directs the STB to encourage state and local agencies and private interests to establish recreational trails along inactive rail lines to "preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use … if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes." See also 49 U.S.C. § 10906.

[10] As noted above, B&M retained freight service rights pursuant to the December 24, 1976 Indenture with MBTA.

[11] The STB made clear that it would not issue a Declaratory Order because "PSI has no interest in the integrity of the rail system or the provision of rail service … or even a claimed property interest in the rail line … ." *Id.* at 4. The STB further stated that PSI "should not be allowed to use a statute designed to define the limits of rail regulation and preserve the integrity of the interstate rail system … in an effort to prevent a public use of property that has been approved by relevant state agencies." *Id.*

The Decision strongly suggests that, even if rail service has not been abandoned, the STB sees no conflict between the Project and possible reactivation of rail service within the ROW. The STB stated that "the types of actions taken or planned by MBTA – granting easements for a trail and subsurface utilities in the right-of-way and removing track – are not generally inconsistent with the reactivation of rail service in the future." *Decision*, STB Docket No. FD 36493, pp. 4-5 (citations omitted). The STB further pointed to the fact that the easements in question reserve MBTA's right to operate rail service within the ROW as support for its conclusion that "there is no indication that MBTA could not reactivate rail service if required to do so." *Id.* at p. 5, n. 6. The Decision cites prior STB rulings determining that similar uses – including easements for utilities and trails, and removal of tracks – would not prevent or interfere with future reactivation of rail lines.[12] *Id.* at 5.

The STB also rejected PSI's argument that a Declaratory Order was needed to clarify the status of rail service within the ROW as discontinued or abandoned, because PSI is not an affected landowner and "it is not clear how any existing uncertainty regarding the status of the Line has any effect on the ability of such landowners to protect their property interests." *Id.* at 5.

Finally, STB denied the Town of Sudbury's request for issuance of a notice of interim trail use/rail banking ("NITU") because it lacked authority to do so where MBTA had not sought permission to abandon rail service in the ROW; furthermore, MBTA had stated that it would not consent to negotiate for an agreement with the Town (or any other party) for rail banking, which would be necessary for STB to issue a NITU. *Id.* at 6 (citing 49 CFR 1152.29(c), (d); *Citizens Against Rails to Trails v. STB*, 267 F.3d 1144, 1152 (D.C. Cir. 2001)).

CONCLUSION

Rail service within the ROW has been formally discontinued, if not abandoned, since 1980. Either way, the ROW has been inactive for more than forty years. The STB has credited MBTA's assertion that there is no demand or plan to reactivate rail service within the ROW.

We have found no support for the argument that work proposed within a discontinued railroad right of way is illegal, unless that work or project would prevent future reactivation of rail service. To the contrary, "discontinuance allows a rail carrier to 'cease operating a line for an indefinite period while preserving the rail corridor for possible reactivation of service' … ." *Chicago Coating Co.*, 892 F.3d at 1165 (quoting *Preseault*, 494 U.S. at 5 n.3). Thus, a discontinued rail line may be used in a manner that is not "inconsistent with the reactivation of rail service in the future." *Decision*, STB Docket No. FD 36493, p. 5 (citations omitted).

Here, the Project fits squarely within the types of use typically allowed – and, with respect to the multi-use trail, favored by the U.S. Congress – for discontinued rail corridors not in active use. Indeed, STB has stated that the Project is "not generally inconsistent with the

[12] The Decision also lists a number of cases where state actions were found invalid because they would prevent reactivation of rail service, or would harm parties with an interest in continuing or restoring service. *Id.* at p. 4, n. 5.

reactivation of rail service in the future" and "there is no indication that MBTA could not reactivate rail service if required to do so." *Decision*, STB Docket No. FD 36493, pp. 4-5, n. 6.

If the Town has a property interest within the ROW which may be threatened by the Project, or has an interest in seeing rail service reactivated within the ROW which would be made impossible by the Project, you could consider petitioning STB for an Order. We have not investigated whether the Town has any such claim(s), so offer no opinion on their existence, or relative strength or weakness. We would, however, stress that STB has already signaled that, in its view, the Project would not impede future reactivation of rail service within the ROW.

Similarly, Hudson residents holding property interests within the ROW which they believe to be threatened by the Project could seek legal counsel to investigate whether a legal remedy available to them. Again, we have not investigated the existence or validity of any such claims, so offer no opinion.

Please do not hesitate to contact us should you have any questions.

Very truly yours,

Luke H. Legere

cc: Aldo Cipriano, Hudson Town Counsel

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SERVICE DATE – FEBRUARY 2, 2022

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36493

PROTECT SUDBURY INC.—PETITION FOR DECLARATORY ORDER

Digest:[1] The Board in its discretion declines Protect Sudbury Inc.'s request for a declaratory order finding that a railroad line in Sudbury, Mass., has not been abandoned and that easement agreements related to the line are void.

Decided: February 1, 2022

On March 11, 2021, Protect Sudbury Inc. (PSI), filed a petition for a declaratory order asking the Board to find that a rail line in Sudbury, Mass., owned by the Massachusetts Bay Transportation Authority (MBTA) has not been abandoned and that easements MBTA has granted on the line for trail use and electric power transmission unlawfully interfere with the potential reactivation of rail service and are therefore void. For the reasons explained below, PSI's petition will be denied.

BACKGROUND

PSI is a non-profit organization located in Sudbury, whose "primary objective is to prevent all power lines along the MBTA rail line that runs through the town and to prevent above-ground power lines anywhere in Sudbury." (Pet. 2.) According to PSI, the rail line at issue here (the Line) was part of a branch line called the Central Massachusetts Railroad Division operated by the Boston and Maine Corporation (B&M). (Id. at 4.) PSI states that the Line runs from milepost B23/N81 to milepost B27/N86 and is now a portion of the Mass Central Rail Trail. (Id.) PSI explains that B&M entered bankruptcy in 1970 and in the bankruptcy proceeding the trustees of B&M granted to MBTA ownership of the physical assets of the Line but reserved an easement allowing B&M to continue freight transportation on the Line. (Id. at 4-5.)

PSI states that in 1979, B&M filed an application to abandon two branch lines that included the Line, but the Board's predecessor, the Interstate Commerce Commission (ICC), found that B&M could not abandon the branch lines because MBTA rather than B&M owned them and recommended to the United States District Court for the District of Massachusetts that

[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 Pol'y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

discontinuance authority be granted instead.[2] (Id. at 6 (citing Meserve, Aban. Between Waltham N., Berlin, & Marlboro, Mass., AB 32 (Sub-No. 7F) (ICC served Apr. 1, 1980).) PSI states that in In re Boston and Maine Corp., No. 70-250-M (D. Mass., Oct. 3, 1980), the District Court issued an order that followed the ICC's recommendation and granted B&M discontinuance authority. (Pet. 6.) PSI asserts that there has been no rail service on the Line since that order. (Id. at 7.)

According to PSI, on December 30, 2010, MBTA and the Massachusetts Department of Conservation and Recreation (DCR) entered into a trails-use agreement for the Line. (Id.) PSI claims that a trail now runs through the right-of-way of the Line and that under the agreement, MBTA may continue to utilize the rail corridor for rail transportation purposes but any portion so utilized in connection with third-party transactions must continue to provide for the continuity of the rail-trail corridor. (Id. at 7, 16.)

PSI states that on June 9, 2017, MBTA entered into an agreement with an energy company called Eversource Energy (Eversource) for an easement to allow Eversource to install a new 115 kv subsurface electric transmission line along the rail right-of-way for approximately 8.63 miles, including the right-of-way for the Line. (Id. at 7.) According to PSI, the easement reserves to MBTA the right to install, operate, repair, and maintain transportation/rail infrastructure within the easement area provided that such rights will not unreasonably interfere with Eversource's use of the easement for its purposes. (Id.) PSI asserts that installation of the subsurface transmission line would result in the removal of all tracks and a substantial portion of the ballast on the Line. (Id. at 17.) PSI and the Town of Sudbury attempted to stop installation of the power line by challenging in state court, and as a matter of state administrative law, issuance of a permit by the Massachusetts Department of Public Utilities. (MBTA Supp. 2.) The Supreme Judicial Court of Massachusetts (SJC) recently issued an opinion upholding the issuance of the permit. (Id.) The Town of Sudbury also separately challenged in state court the legality of the agreement between MBTA and Eversource, contending that the agreement was barred by the state law "prior public use" doctrine. The SJC upheld the lower court's decision dismissing the Town's claims. (Id.; see also MBTA Reply 3.)

PSI argues that the issues it raises are ripe for review by the Board. (Pet. 9.) PSI claims that guidance from the Board regarding the status of the Line is necessary so that landowners with property abutting the Line can determine what legal avenues are available to protect their property interests. (Id.) PSI further argues that Meserve was wrongly decided in holding that B&M had to seek discontinuance authority rather than abandonment authority and is inconsistent with subsequent cases that have allowed carriers in situations similar to B&M's to seek abandonment authority, and that the Board must act to resolve this inconsistency. (Id. at 9-13.) In addition, PSI claims that the easements granted by MBTA would prohibit the reactivation of rail service and that under Board precedent the Board must void these easements to ensure that rail service can be reactivated in the future. (Id. at 10, 17-18.)

[2] According to PSI, section 17(a) of the Milwaukee Railroad Restructuring Act, Pub. L. No. 96-101, 93 Stat. 736 (1979), transferred jurisdiction over B&M abandonments and discontinuances from the ICC to the District Court. (Pet. at 6.)

In response, MBTA argues that PSI's petition should be denied as premature. (MBTA Reply 5.) MBTA asserts that since PSI has not asserted any interest in service over the Line and there has been no demand for service since service ceased approximately 40 years ago, there is no reason for the Board to issue a declaratory order. (Id.) MBTA further argues that it never acquired a common carrier obligation with respect to the Line, and, although the decisions by the ICC and the District Court in 1980 were framed in terms of discontinuance, those decisions were intended to remove the Line from the national rail system and the ICC's jurisdiction. (Id. at 6-10.) Finally, MBTA argues that, if the Board were to find that the Line has not been abandoned, MBTA would simply obtain abandonment authority under class exemption procedures for lines that have been without service for two years or more and PSI therefore would still fail to prevent installation of the power line. (Id. at 11.)

On October 20, 2021, the Town of Sudbury (the Town) filed a reply to PSI's petition requesting that, in order to preserve an existing rail-trail, the Board issue a notice of interim trail use/rail banking (NITU) should the Board determine that the Line is abandoned. (Town Reply 1.)

DISCUSSION AND CONCLUSIONS

The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321 to issue a declaratory order to eliminate controversy or remove uncertainty. See Bos. & Me. Corp. v. Town of Ayer, 330 F.3d 12, 14 n.2 (1st Cir. 2003); Delegation of Auth.—Declaratory Ord. Proc., 5 I.C.C.2d 675 (1989). For the reasons explained below, the Board, in its discretion, will decline to issue a declaratory order here.

The Board has exclusive jurisdiction over transportation by rail carrier. 49 U.S.C. § 10501(a) & (b). In § 10501(b), Congress adopted a broad preemption provision, which serves as the basis for PSI's request.[3] As the Board has explained, preemption under 10501(b) "is broad enough to preclude all state and local regulation that would prevent or unreasonably interfere with railroad operations." Norfolk S. Ry.—Pet. for Declaratory Ord., FD 35196, slip op. at 3 (STB served Mar. 1, 2010). The Board has noted, "the core purpose of this provision is to ensure the free flow of interstate commerce, particularly by preventing a patchwork of differing regulations across states." Ass'n of Am. R.R.s—Pet. for Declaratory Ord., FD 36369, slip op. at 2 (STB served Dec. 30, 2020) (and cases cited therein). PSI, however, has no interest in or relationship to rail transportation. PSI does not seek to provide rail service, nor is it a shipper seeking rail service, nor is it a landowner seeking a determination concerning its possible rights in the rail corridor. Rather, PSI acknowledges that its goal is to prevent the installation of power lines in the rail corridor and in the Town of Sudbury generally, even though such installation has been permitted by the Massachusetts Department of Public Utilities with that permitting decision upheld by the highest court in Massachusetts.

[3] PSI does not explicitly frame the issue in terms of preemption, but its request that the Board find that easement agreements governed by state law are void appears to be, in effect, a request for a finding of preemption.

Exercising its broad discretion, the Board issues declaratory orders to remove uncertainty or address controversies concerning rail transportation issues within its jurisdiction, including whether certain activities would unreasonably interfere with rail service and would therefore be preempted under § 10501(b). Here, however, PSI has no interest in the integrity of the rail system or the provision of rail service, which is what § 10501(b) is designed to protect. Because PSI has no interest in rail service, or even a claimed property interest in the rail line, it is unnecessary for the Board to determine the extent to which preemption might apply.[4] Under the circumstances present in this case, a party should not be allowed to use a statute designed to define the limits of rail regulation and preserve the integrity of the interstate rail system where it has no interest in those purposes, particularly in an effort to prevent a public use of property that has been approved by the relevant state agencies. Such a legal maneuver risks abuse of the Board's statute and processes. The Board also need not address the issue of whether the Line was abandoned. Apparently, PSI seeks a determination that the Line was not abandoned only because such a determination is necessary for the Board to reach the preemption question, which is, in effect, the issue raised by PSI.

PSI's arguments as to why the Board should issue a declaratory order are unpersuasive. PSI argues that the Board must act to void the easements entered into by MBTA because they make reactivation of rail service on the Line impossible and, under Board precedent, state actions that prevent reactivation of a rail line subject to Board jurisdiction are precluded. PSI cites statements from many cases to support its preemption argument, but these cases either involved restrictions that were found void in order to protect parties with a real interest in continuing or restoring rail service or simply contain dicta generally addressing limits on contractual or other restrictions of rail service.[5] Moreover, the types of actions taken or planned by MBTA—

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[4] This decision should not be interpreted to suggest that the Board will only rule on the merits of a petition for a declaratory order regarding preemption filed by entities involved in rail transportation or with an interest in rail property. For example, the Board may be willing to issue a declaratory order where an interest group or a group of citizens has legitimate concerns about the potential effects on the environment of rail transportation activities, provided that the matter is within the Board's jurisdiction. However, in this case, petitioner's only stated concern is to prevent the installation of power lines in a right-of-way and, to attain that end, it has argued that such installation would interfere with rail operations despite having no legitimate interest in those operations or their effects. The Board will not entertain petitioner's request for declaratory relief under these circumstances.

[5] Union Pac. R.R.—Pet. for Declaratory Ord., FD 34090, slip op. at 2-3 (STB served Nov. 9, 2001) (finding any agreement with the carrier that permitted city, in response to reactivation, to terminate carrier's rights over the line and require it to remove tracks was void); New Orleans Terminal Co. v. Spencer, 366 F.2d 160, 162-63 (5th Cir. 1966) (finding city could not enforce ordinance directing railroad to remove tracks when line was in service and within the ICC's jurisdiction); R.R. Ventures, Inc.—Aban. Exemption—Between Youngstown, Ohio & Darlington, Pa. in Mahoning & Columbiana Cntys., Ohio, & Beaver Cnty., Pa., AB 556 (Sub-No. 2X) et al., slip op. at 3 (STB served Jan. 7, 2000) (finding terms of agreement were void as they unreasonably interfered with a party's efforts to restore service on a line); Hanson Nat. Res. Co.—Non-Common Carrier Status—Pet. for Declaratory Ord., FD 32248 (ICC served Dec. 5,

granting easements for a trail and subsurface utilities in the right-of-way and removing track—are not generally inconsistent with the reactivation of rail service in the future.[6] See, e.g., Jie Ao—Pet. for Declaratory Ord., FD 35539, slip op. at 7 (STB served June 6, 2012) (stating that an "easement does not take railroad property outright, and it is often possible for an easement that crosses over, under, or across a right-of-way, to co-exist with active rail operations without necessarily interfering with the latter"); Lincoln Lumber—Pet. For Declaratory Ord., FD 34915, slip op. at 3 (STB served Aug. 13, 2007) (finding permanent easement for underground storm sewer running along the entire length of the right-of-way would not necessarily prevent or unreasonably interfere with railroad operations); BNSF Ry.—Pet. for Declaratory Ord., FD 35164 et al., slip op. at 5-6 (STB served May 7, 2010) (stating that "[a] carrier may even remove track on a line over which it has a common carrier obligation, as long as no shipper seeks service and the carrier is prepared to restore the track should it receive a reasonable request for service"); Roaring Fork R.R. Holding Auth.—Aban. Exemption—in Garfield, Eagle & Pitkin Cntys., Colo., AB 547X, slip op. at 3 (STB served May 21, 1999) (denying a request to issue a cease and desist order with respect to an easement for a grade crossing and an easement for trail purposes over a portion of the right-of-way because these were "ordinary activities, fully consonant with the usual operations of a railroad" and placed "no burden upon maintaining transportation services").

1994) (finding purchaser was not common carrier but noting that any contractual restrictions that unreasonably interfere with common carrier operations are void); United States v. Balt. & Ohio R.R., 333 U.S. 169, 177-78 (1948) (holding that owner of track could not by contract compel railroads to operate in a way which violates the Interstate Commerce Act); Nat'l Wildlife Fed'n v. ICC, 850 F.2d 694, 703-04 (D.C. Cir. 1988) (stating that state laws are subject to the ICC's authority and "a state may not require a railroad to cease operations over a right-of-way") (internal citations omitted). The remaining cases PSI cites do not involve preemption or voiding contractual agreements as incompatible with the Interstate Commence Act and, thus, do not support PSI's assertion of preemption here. See Maumee & W. R.R.—Pet. for Declaratory Ord.—CSX Transp., Inc., Crossing Rts. at Defiance, Ohio, FD 34527 (STB served May 9, 2007); Wis. Dep't of Transp.—Aban. Exemption—in Winnebago Cnty., Wis., AB 343 (Sub-No. 2X) et al. (ICC served July 13, 1993).

[6] Even if the Board were to examine its preemption claims, PSI does not explain how the easements would interfere with the reactivation of rail service. With respect to the trail easement, PSI simply states that MBTA can use the corridor for rail purposes but that "any portion so utilized in connection with third-party transactions will continue to provide for the continuity of the rail-trail corridor." (Pet. 16.) It is not clear how this would prevent reactivation of rail service. With respect to the utility easement, PSI points to certain provisions of the easement as indicative of MBTA's "intent to eliminate the possibility of rail service reactivation." (Pet. 17.) However, as noted above, the easements contain provisions providing for MBTA's right to operate rail service on the Line. If MBTA intended to prevent the reactivation of rail service, presumably it would not have included such provisions. In any event, the Board will not issue a declaratory order based on inferences regarding MBTA's intent with respect to a hypothetical reactivation of rail service brought by a party with no interest in such service where there is no indication that MBTA could not reactivate rail service if required to do so.

PSI further argues that the ICC and the Board have been inconsistent in determining whether discontinuance or abandonment authority is appropriate for carriers in situations similar to B&M's in 1979, and that a declaratory order is needed to clarify this issue for the rail industry. But PSI does not represent the rail industry, nor does it have any interest in determining what type of authority was or may be necessary for carriers in situations similar to B&M in 1979. Ultimately, any such uncertainty need not be addressed here and can be addressed if a future case arises involving a carrier in a situation similar to B&M's seeking to end service.

PSI also argues that Board guidance on the status of the Line is needed so that landowners with property abutting the Line can determine what legal avenues are available to protect their property interests. However, PSI has not identified itself as a landowner with a potential property interest in the rail corridor, nor does it assert that it represents any such landowners. See, e.g., 14500 Ltd. LLC—Pet. for Declaratory Ord., FD 35788 (STB served June 15, 2014) (addressing preemption issue where party asserted state property law claims concerning rail yard property); Jie Ao, FD 35539 (deciding, in part, preemption issue where parties asserted state property law claims concerning railbanked rail line). Moreover, it is not clear how any existing uncertainty regarding the status of the Line has any effect on the ability of such landowners to protect their property interests.

The Board will also deny the Town's request for issuance of a NITU. Under the Board's regulations, NITUs are issued in proceedings where Board authority to abandon a line is sought, whether via application, petition for exemption, or notice of exemption. See 49 C.F.R. § 1152.29(b)-(d); Limiting Extensions of Trail Use Negotiating Periods Rails-to-Trails Conservancy—Pet. for Rulemaking, EP 749 (Sub-No. 1) et al., slip op. at 3-4 (STB served June 6, 2019). This declaratory order proceeding is not such a case. Moreover, in any event, on November 8, 2021, MBTA filed a reply to the Town's NITU request stating that it does not consent to negotiate for an interim trail use/railbanking agreement with the Town or any other party. The Board cannot issue a NITU without such consent. See, e.g., 49 C.F.R. § 1152.29(c), (d); Citizens Against Rails-to-Trails v. STB, 267 F.3d 1144, 1152 (D.C. Cir. 2001) (explaining that 16 U.S.C. § 1247(d) (the Trails Act) does not permit the Board to compel conversion to a trail where the railroad does not consent).

For the reasons discussed above, the petition for declaratory order and the request to issue a NITU will be denied.

It is ordered:

1. The petition for declaratory order is denied, as explained above.

2. The request for issuance of a NITU is denied.

3. This decision is effective on its service date.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz.