

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35128

THE PORT OF SEATTLE—ACQUISITION EXEMPTION—CERTAIN ASSETS OF BNSF
RAILWAY COMPANY

Decided: October 23, 2008

On June 4, 2008, the Port of Seattle (the Port), a noncarrier, filed a verified notice of exemption¹ under 49 CFR 1150.31 to acquire from BNSF Railway Company (BNSF) approximately 14.45 miles of rail line (the Line), including right-of-way, track, and other property and physical assets, extending between approximately milepost 23.80, north of Woodinville, and approximately milepost 38.25, in Snohomish, in King County and Snohomish County, WA.² Simultaneously, the Port filed a motion to dismiss the notice, asserting that the transaction is not subject to the Board's jurisdiction because the Port will not become a common carrier as a result of the transaction. The motion is unopposed. We will grant the motion to dismiss.

¹ The Port initially submitted the notice of exemption on May 28, 2008, but the notice was not docketed until June 4, 2008, when the Port submitted the appropriate filing fee. Because the Board could not process the notice until it received the filing fee, June 4 was the official filing date. The notice was served and published in the Federal Register on June 20, 2008 (73 FR 35202).

² The Port will also acquire BNSF's right-of-way, track, and other property and physical assets of the line extending between the southern endpoint of the Line at milepost 23.80 and milepost 23.45 and of the Redmond Spur, which connects with the Line at milepost 23.80 and extends between milepost 0.00 and approximately milepost 7.30 in Redmond, WA. Pursuant to a separate agreement, BNSF will also donate to the Port the right-of-way, track, and other property and physical assets of the line that extends between milepost 23.45 and milepost 5.00 in Renton, WA. BNSF stated in its notice of exemption in this proceeding that it would file for Board approval or an exemption to abandon these rights-of-way and track before selling or donating them to the Port. BNSF has subsequently filed for authorization: (a) through a notice of exemption, in STB Docket No. AB-6 (Sub-No. 463X), to abandon the Redmond Spur; (b) through a notice of exemption, in STB Docket No. AB-6 (Sub-No. 464X), to abandon the portion of line from milepost 5.00 to milepost 10.60; and (c) through a petition for exemption, in STB Docket No. AB-6 (Sub-No. 465X), to abandon the portion of line from milepost 11.25 to milepost 23.80. BNSF abandoned the portion of line between milepost 10.60 and milepost 11.25 in March 2008, pursuant to authorization obtained in STB Docket No. AB-6 (Sub-No. 453X).

The Port, a municipal corporation of the State of Washington, states that it is acquiring the Line and related improvements to preserve it as a rail and transportation corridor and that it will not seek or acquire the rights necessary, or hold itself out as willing or able, to conduct or control freight common carrier service. The Port states that it is party to a Purchase and Sale Agreement with BNSF, which provides that BNSF will retain the exclusive easement to conduct freight operations on the Line.

The parties to the transaction do not contemplate continued involvement by BNSF. According to the Port, BNSF will convey simultaneously with the closing of the transaction the reserved freight easement to a third-party operator pursuant to a Freight Easement Sale Agreement. The third-party operator will secure separate Board approval or an exemption to conduct common carrier freight service on the Line before the freight easement is conveyed. The Port and the third-party operator will enter into an Operations and Maintenance Agreement (O&M Agreement) governing maintenance, capital improvements, and day-to-day operations on the Line.

The Port submitted copies of two draft quitclaim deeds and a substantially complete O&M Agreement.³ The quitclaim deed between the Port and BNSF excepts and reserves an exclusive easement for rail freight purposes for BNSF and its successors and assigns. The quitclaim deed between BNSF and the third-party operator conveys all of BNSF's right, title, and interest in the reserved freight easement to the third-party operator and its successors and assigns. The quitclaim deed between the Port and BNSF incorporates by reference sections 6 and 7 of the Purchase and Sale Agreement, and the quitclaim deed between BNSF and the third-party operator incorporates by reference sections 6 and 7 of the Freight Easement Sale Agreement. Sections 6 and 7 of each of those agreements discuss or govern the condition of the property being conveyed and the related environmental obligations, respectively, and extend to the successors and assigns of BNSF and the third-party operator.

The O&M Agreement grants a 10-year term to the third-party operator and an additional 10-year term if it is not in default with any of the O&M Agreement's material terms or conditions. Additionally, the O&M Agreement grants the third-party operator an unfettered right to abandon or discontinue freight rail service and permits it to assign its rights under the agreement subject to the written consent of the Port, which may not be unreasonably denied, delayed, or conditioned. The O&M Agreement further specifies that the third-party operator will have the exclusive right and obligation to provide freight rail service and/or excursion rail service, and that neither the Port nor any other person or entity will be permitted to provide any type of rail freight service unless the rights are appropriately assigned. Additionally, the O&M Agreement provides that the third-party operator will have general maintenance responsibilities; the right to construct improvements; and exclusive authority to manage, direct, and control all activities on the Line. Also, the O&M Agreement directs the Port and the third-party operator to establish a Coordination Committee consisting of at least two representatives of each party to

³ The Port attached copies of the quitclaim deeds and the O&M Agreement to its motion as Exhibits A, B, and C, respectively.

serve as a forum to share information, discuss matters of interest, and resolve any issues that arise under the O&M Agreement.

According to the Port, these agreements clearly demonstrate that it will not conduct rail freight operations on the Line or hold itself out to provide common carrier rail service and, therefore, that the transaction does not require Board authorization. In support, the Port cites the following cases: Maine, DOT—Acq. Exemption, ME Central R. Co., 8 I.C.C.2d 835 (1991) (State of Maine); Los Angeles County Transportation Commission—Petition for Exemption—Acquisition from Union Pacific Railroad Company, STB Finance Docket No. 32374 (STB served July 23, 1996); State of Georgia, Department of Transportation—Acquisition Exemption—Georgia Southwestern Railroad, Inc., STB Finance Docket No. 33876 (STB served July 7, 2000); State of Georgia, Department of Transportation—Acquisition Exemption—South Carolina Central Railroad, Inc., STB Finance Docket No. 34057 (STB served Apr. 30, 2002); and State of Wisconsin Department of Transportation—Petition for Declaratory Order, STB Finance Docket No. 34181 (STB served Aug. 1, 2002) (State of Wisconsin).

DISCUSSION AND CONCLUSIONS

The question at issue here is whether our regulatory approval is required for the Port to acquire the Line, including the right-of-way, track, and other property and physical assets. The acquisition of an active rail line and the common carrier obligation that goes with it ordinarily requires Board approval under 49 U.S.C. 10901, if the acquiring entity is a noncarrier, including a state. See Common Carrier Status of States, State Agencies, 363 I.C.C. 132, 133 (1980), aff'd sub nom. Simmons v ICC, 697 F.2d 326 (D.C. Cir. 1982). But when a carrier selling a rail line retains a permanent easement to permit it to continue to provide common carrier freight service, or, as here, transfers that easement to a third-party operator, we have typically declined to assert our jurisdiction. See State of Maine, 8 I.C.C.2d at 836-37.

In determining the Port's status, we will look to whether the third-party operator has obtained a permanent easement and sufficient interest and control over the Line to permit it to carry out the common carrier obligation. We will also examine whether the Port is acquiring sufficient power over the operation of the Line so as to constitute an acquisition of a "railroad line" under 49 U.S.C. 10901(a)(3). See Southern Pac. Transp Co.—Aban.—L.A. County, CA, 9 I.C.C.2d 385, 388 (1993).

In this instance, BNSF is transferring the right-of-way and fixed assets to the Port, and the freight easement and common carrier obligation to the third-party operator. Aside from the fact that the third-party operator is as yet undesignated, this arrangement mirrors the arrangement that the Interstate Commerce Commission addressed in South Orient Railroad Company, Ltd.—Acquisition Exemption—Line of The Atchison, Topeka and Santa Fe Railway Company, Finance Docket No. 31971, slip op. at 4 (ICC served Sept. 2, 1992). There, The Atchison, Topeka and Santa Fe Railway Company transferred the physical assets of a rail line to one party and the common carrier rights and obligations to another. That differs from the more typical State of Maine case where the transferor retains the common carrier obligation and transfers the right-of-way and fixed assets. But the principle is the same: as long as the transferor retains, or the third-

party transferee obtains, the common carrier rights and obligations along with sufficient contractual rights to meet those obligations, the acquisition of the right-of-way is not a transaction requiring Board authorization.

And here, although the identity of the third-party operator is as yet unknown, it appears that nothing in the draft quitclaim deeds or the O&M Agreement—the only documents submitted to us—gives the Port the ability to interfere unduly with the transferee’s ability to carry out the common carrier obligation. The draft quitclaim deed between BNSF and the third-party operator appears to grant the third-party operator an exclusive and permanent freight easement to conduct rail freight operations over the Line. See Motion, Exhibit B. The draft quitclaim deed between the Port and BNSF recites that BNSF reserves an “exclusive easement for freight purposes” and that the easement will be transferred to the third-party operator. See Motion, Exhibit A. The Port does not indicate, nor does the draft quitclaim deed suggest, that the exclusive freight easement retained by BNSF is anything other than permanent.

The O&M Agreement sets forth the respective rights and obligations of the Port and the third-party operator. See Motion, Exhibit C. Specifically, the O&M Agreement provides that the third-party operator will be the exclusive provider of rail freight service on the Line, see O&M Agreement, Section 2; will have sufficient power over the operation and maintenance of the Line to avoid any undue interference by the Port, see O&M Agreement, Sections 3 and 5; and will have an unconditional right to abandon or discontinue service, see O&M Agreement, Section 12.2. The O&M Agreement also grants the third-party operator a 10-year term, which can be extended for an additional 10 years, see O&M Agreement, Section 12.1. And while the third-party operator may not assign the freight easement without obtaining the Port’s written approval, the O&M Agreement states that the Port’s approval may not be unreasonably denied, see O&M Agreement, Section 12.5.

It is not uncommon for a public entity such as the Port, that seeks to acquire the physical assets of a rail line to use or preserve for rail freight and commuter service, to play a role in the subsequent assignment of the freight easement or to limit the term of the rail carrier that will operate the line.⁴ Nothing in the record suggests that these contract provisions, which are intended to ensure the proper operation of the Line, will enable the Port to interfere unreasonably with the third-party operator’s ability to fulfill the common carrier obligation for the Line.

We also note that the O&M Agreement allows the Port to permit certain transportation uses of the Line, including commuter rail service, and requires the third-party operator to

⁴ See, e.g., State of Vermont–Acquisition Exemption–Certain Assets of Boston and Maine Corporation, STB Finance Docket No. 33830, slip op. at 3 (STB served June 8, 2000) (operating agreement gave the acquirer of an exclusive freight easement a 6-month period to operate the line and denied it the right to assign its interest without the line owner’s approval) and North Carolina Ports Authority–Acquisition Exemption–North Carolina Ports Railway Commission, STB Finance Docket No. 34258, slip op. at 4-5 (STB served October 31, 2002) (operating agreement gave the acquirer of a permanent exclusive freight easement a 5-year term with the right to negotiate an extension).

cooperate with the Port's permitted users to ensure the accommodation of such transportation uses. Unlike other transactions by public entities involving the shared use of lines for commuter and freight operations, the O&M Agreement does not include any windows or restrictions on the third-party operator's ability to provide rail freight service.⁵ Instead, the O&M Agreement provides that any shared uses may not be inconsistent with the third-party operator's rights nor interfere materially with its obligation to operate rail freight service on the Line.

These provisions are adequate to demonstrate that the third-party operator will be able to fulfill the common carrier obligation for the Line. See, e.g., State of Wisconsin, slip op. at 3. Nevertheless, we will hold the parties to their assurances to refrain from interfering materially with the third-party operator's right and obligation to provide rail freight service. See, e.g., Metro Regional Transit Authority–Acquisition Exemption–Certain Assets of Akron Barberton Cluster Railway Company, STB Finance Docket No. 34338, slip op. at 2 (STB served July 11, 2003); State of Georgia, Department of Transportation–Acquisition Exemption–Line of Central of Georgia Railroad Company, STB Finance Docket No. 33688, slip op. at 2 (STB served Apr. 14, 1999).

Because the Port will acquire only the Line's right-of-way, track, and other property and physical assets, it will not as a result of the transaction become a rail carrier subject to Board jurisdiction. Under these circumstances, this transaction does not require Board action, and we will not exercise jurisdiction over it. We will dismiss the Port's notice of exemption and discontinue this proceeding. And because the parties have not yet designated the third-party operator and have not yet signed the O&M Agreement, this decision granting the Port's motion to dismiss is conditioned on the parties' making no material changes to the draft quitclaim deeds and O&M Agreement upon execution.⁶

Whether the O&M Agreement terminates prematurely or at the end of its 10- or 20-year term, the third-party operator may not abandon or discontinue operations over the Line, voluntarily or otherwise, without prior Board authorization. And any modification to the O&M Agreement, or any subsequent agreement, that expands the Port's power or control over the Line in a way that would hamper the third-party operator's ability to fulfill the common carrier obligation would trigger the need for the Port to obtain acquisition authority from the Board at that time.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

⁵ See, e.g., Utah Transit Authority–Acquisition Exemption–Union Pacific Railroad Company, STB Finance Docket No. 35008 et al. (STB served July 23, 2007) (addressing whether a freight operating window, so as not to interfere with commuter service, was sufficient for the freight railroad to fulfill its common carrier obligations).

⁶ If for some reason the third-party transfer is not completed, BNSF will retain the common carrier obligation until it obtains appropriate authority either to cease operations or to transfer the operating authority to another carrier.

It is ordered:

1. The Port's motion to dismiss the verified notice of exemption in this proceeding is granted.
2. The proceeding is dismissed.
3. This decision will be effective on its service date.

By the Board, Chairman Nottingham, Vice Chairman Mulvey, and Commissioner Buttrey.

Anne K. Quinlan
Acting Secretary