

SERVICE DATE – OCTOBER 9, 2007

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34975

MARYLAND TRANSIT ADMINISTRATION—PETITION FOR DECLARATORY ORDER

Decided: October 5, 2007

By a petition filed on December 22, 2006, the Maryland Transit Administration (MTA) requests a declaratory order to confirm that its 1990 acquisition of a 14.22-mile line of railroad between Baltimore and Cockeysville, MD, known as the Cockeysville Industrial Track (CIT), did not require agency approval under 49 U.S.C. 10901 because common carrier rights and obligations were not transferred to, or assumed by, MTA by virtue of its acquisition of the CIT. On January 11, 2007, Mr. James Riffin (Riffin) and CNJ Rail Corporation (CNJ) filed reply comments. As discussed below, a declaratory order will be issued granting MTA's request for a determination that authorization from the Board's predecessor, the Interstate Commerce Commission (ICC), was not required for MTA's 1990 acquisition of the CIT.

PRELIMINARY CONSIDERATIONS

In a decision served on March 30, 2007 (March 30 decision), the Board directed MTA to file supplemental information to explain MTA's seemingly inconsistent descriptions of the CIT in its petition.<sup>1</sup> The Board also directed MTA to address allegations that portions of the CIT may have been sold, salvaged or blocked. The Board stated that it needed this information before it could evaluate the merits of MTA's petition. On April 20, 2007, MTA filed a response to the Board's March 30 decision. On May 11, 2007, Riffin filed supplemental comments in reply to MTA's response, in which he reiterates some of his prior allegations, raises new issues, and argues that MTA's responses are incomplete. We disagree with Riffin's claim that we need more information to address the issues presented in this case.

First, MTA responds to the Board's direction to explain the apparent discrepancy in its descriptions of the CIT. MTA explains that the CIT is 14.22 miles long, but between mileposts 0.0 and 15.4, because milepost 0.0 was moved 1.18 miles up the line when Calvert Station (the location of the original milepost 0.0) was demolished in 1947. This adequately responds to our

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<sup>1</sup> In its petition, MTA stated that the line is 14.22 miles in length, but also described the CIT as being between milepost 0.0 (more or less) and milepost 15.4 (more or less), suggesting, without more information, a distance of approximately 15.4 miles.

concern about the apparent inconsistency between the line's length and its corresponding mileposts.

Second, in response to the Board's directive to provide a description of, and explanation for, any sale or salvage of any portion of the CIT since MTA acquired the CIT in 1990, MTA states that it has taken no action that would prevent the freight operator from fulfilling its common carrier obligation over the CIT. Addressing the allegations that it has sold or salvaged a portion of the CIT, MTA describes changes it has effected to improve light passenger rail service, including the replacement of track and installation of a second track, but states that it otherwise has not sold or salvaged any portion of the CIT.

Concerning Riffin's specific allegations that, in 1995, MTA sold a portion of the CIT to Maryland Specialty Wire, Inc. (Specialty Wire), MTA explains that the track conveyed was a private industrial spur that comes within the right-of-way of the CIT. Riffin argues that the deed identifies the property as a rail line. However, Riffin fails to show that, even if it is a rail line, it is part of the rail line that is the CIT. MTA's engineer, head archivist and historian states that MTA has not sold any portion of the CIT that was part of the active rail line.<sup>2</sup> He also states that the rail and siding adjacent to Specialty Wire still exists and that, if required, the track could be rehabilitated in one month.<sup>3</sup> The sale to Specialty Wire appears to be a sale of private track or industrial track, which would not, under former 49 U.S.C. 10907(b), have required agency approval, and there is no evidence that the sale has interfered with freight rail service over the CIT at any time. Thus, MTA has addressed satisfactorily the Board's request for supplemental information regarding sale or salvage of portions of the CIT since 1990.

Third, in response to the Board's directive to provide a description of, and explanation for, any and all obstacles that could potentially inhibit freight rail service on any portion of the CIT, MTA describes six alterations to facilities affecting the CIT that it has made or permitted. They include removal of switches and siding, paving over a crossing and other tracks leading to a former shipper depot, and removal of an overpass. MTA states that all but one of these alterations could be restored readily, if necessary, the exception being the removal of track and a rail overpass to correct a danger to motor vehicles from flooding at York Road, at the request of the Maryland State Highway Administration (MSHA).

MTA's engineer further explains that the segment of track north of the removed overpass had been removed prior to MTA's acquisition and that there were no shippers north of the overpass at the time.<sup>4</sup> As a result, MTA permitted the overpass to be removed and permitted MSHA to reconfigure the street below to remove the dangerous condition. Thus, MTA has

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<sup>2</sup> See MTA Response, Exh. I, ¶9 (verified statement of Robert L. Williams).

<sup>3</sup> Id.

<sup>4</sup> See MTA Response, Exh. I, ¶7.

adequately addressed the Board's concerns about possible obstacles to rail freight service on the CIT.

Finally, the Board sought from MTA a detailed map of the CIT, between milepost 0.0 and milepost 15.4, showing any out-of-service sections of the line. MTA filed detailed maps showing that the CIT remains intact and available for rail freight service, except as discussed above.

Additionally, MTA filed a letter dated August 21, 2007, requesting expedited consideration of this matter, to which Riffin filed a reply on September 7, 2007. In his reply, Riffin states that he supports MTA's request for expedition, but objects to several statements made by MTA in support of its request. Riffin's reply will be considered along with his previous comments to the extent that his arguments are relevant to this proceeding.<sup>5</sup>

In his supplemental comments (including his September 7, 2007 reply), Riffin contends that there are additional obstacles to freight service that MTA has not addressed.<sup>6</sup> However, his allegations do not justify seeking additional information from MTA. Therefore, the merits of MTA's petition are addressed below.

## BACKGROUND

MTA is a modal administration of the Maryland Department of Transportation acting for and on behalf of the State of Maryland. On May 1, 1990, pursuant to an "Agreement of Sale," MTA acquired the CIT from Consolidated Rail Corporation (Conrail) to construct, operate, and maintain a light rail transit service to be used as part of the Central Light Rail Line between downtown Baltimore, Timonium, and Glen Burnie, MD. The Agreement of Sale and the deed reserved to Conrail a perpetual, assignable, exclusive freight operating easement over the CIT, so that Conrail could fulfill its common carrier obligation to provide freight rail service to present and future customers.<sup>7</sup> Along with the Agreement of Sale, Conrail agreed to exercise its rights under the easement in accordance with an Operating Agreement, dated March 29, 1990, between MTA and Conrail (Operating Agreement).

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<sup>5</sup> In his reply, Riffin indicates that he has sought informal assistance from the Board's Office of Compliance and Consumer Assistance, with what he describes as a service problem.

<sup>6</sup> Riffin makes several new arguments that go to the merits of this proceeding or to support a specific request for discovery. Those arguments will be discussed below, where appropriate.

<sup>7</sup> Conrail also retained several parcels that it continued to use for freight operations, including the "Conrail Flexi-Flo Facility" and the "Cockeysville Industrial Park Track," for which it required an easement over the CIT to access them.

The Operating Agreement sets forth the terms by which MTA and Conrail, and its assigns, are to share use of the CIT in perpetuity. It limits rail freight usage of the CIT track to specified hours but establishes a process for adjusting these operating windows.

The Operating Agreement provides that MTA will be responsible for general repair and maintenance for the CIT track. MTA is obligated to make changes or improvements to the track at Conrail's request, for which Conrail would reimburse MTA. MTA also may perform track changes on its own initiative, but only if such changes do not affect the railroad's common carrier rights and obligations. MTA has utilized its right to make improvements by moving and double-tracking portions of the CIT.

Under the Operating Agreement, MTA and Conrail agreed that MTA would assume control over the dispatch of trains. The Operating Agreement, however, requires that the trains and equipment of each party be operated in the most economical and efficient manner of movement for all traffic, except that light rail service is to be given preference at all times other than during the designated exclusive freight service hours. The Operating Agreement also expressly provides that none of its provisions shall be construed as interfering with the ability of the railroad to provide common carrier freight service to the extent it can be done without undue interference with MTA's reasonable operating and maintenance requirements. Furthermore, in the Operating Agreement, MTA agreed that it would attempt to schedule its maintenance to be consistent with the freight service needs of the railroad's customers.

In 1999, Norfolk Southern Railway Company (NSR) succeeded to Conrail's interest in the CIT when it acquired control of certain assets of Conrail, including the assignable freight easement and Operating Agreement.<sup>8</sup> After serving the CIT for 2 years, NSR filed a petition for exemption to abandon its freight operating rights over a majority of the CIT. The Board denied its petition without prejudice to NSR's refiling, on grounds that issues were raised that had not been adequately addressed by the parties, including, among other things, potential discrepancies in NSR's description of a portion of the CIT. See Norfolk Southern Railway Company—Abandonment Exemption—in Baltimore County, MD, STB Docket No. AB-290 (Sub-No. 237X), slip op. at 4-5 (STB served Apr. 3, 2006). In that decision, the Board also raised the question of whether ICC authorization for the sale of the CIT to MTA should have been sought at the time of the sale. Id. at 4.

By its petition, MTA is seeking confirmation that ICC approval of its 1990 purchase of the CIT was not required. MTA asserts that its purchase of the CIT did not constitute acquisition of a line of railroad subject to the Board's jurisdiction under 49 U.S.C. 10901. According to

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<sup>8</sup> See CSX Corp. et al.—Control—Conrail Inc. et al., 3 S.T.B. 196 (1998); CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company—Control and Operating Leases/Agreements—Conrail Inc. and Consolidated Rail Corporation, STB Finance Docket No. 33388 (Sub-No. 94) (STB served Nov. 7, 2003).

MTA, because it has not acquired the contractual rights necessary to conduct or control common carrier freight rail operations on the line, it has not become a rail carrier providing transportation subject to the Board's jurisdiction.

## DISCUSSION

Under 5 U.S.C. 554(e) and 49 U.S.C. 721, we may issue a declaratory order to terminate a controversy or remove uncertainty in a case that relates to the subject matter jurisdiction of the Board. The Board has broad discretion to determine whether to issue a declaratory order. See Intercity Transp. Co. v. United States, 737 F.2d 103 (D.C. Cir. 1984); Delegation of Authority—Declaratory Order Proceedings, 5 I.C.C.2d 675 (1989). It is appropriate to issue a declaratory order to provide clarification on the question presented here: whether regulatory approval was required for MTA to acquire the CIT in 1990.

As a general rule, a person, including a state agency, that acquires an active rail line assumes a common carrier obligation to provide rail service on the line following the change in ownership. 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. 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). The Board's authorization is not required, however, when the common carrier rights and obligations that attach to the line will not be transferred. See Maine, DOT—Acq. Exemption, ME Central R. Co., 8 I.C.C.2d 835, 836-37 (1991).

Perpetual Easement. In general, a purchaser of a rail line will not be found to have acquired common carrier rights or obligations over the line if the selling rail carrier retains a perpetual and exclusive easement to provide freight service over the rail line and certain other conditions are met. Under the Agreement of Sale and the deed, Conrail retained a permanent, exclusive, and assignable freight operating easement over the CIT, which is now NSR's. However, the issue of whether a freight railroad has retained a perpetual easement for the continuation of freight service does not, by itself, resolve this matter. Rather, the Board also takes into account other factors that can affect a rail carrier's ability to continue to meet its common carrier obligation, such as the operating agreement between the purchasing party and the freight railroad. Here, pursuant to the Operating Agreement, MTA obtained substantial control over certain aspects of rail operations over the CIT, including hours of freight operation, repair and maintenance of the track, dispatch of trains, and improvements to the track. Whether the type of control that MTA acquired effectively transferred NSR's common carrier obligation on the line to MTA is examined below.

Specified Hours for Freight Operations. The Operating Agreement includes specific time periods for exclusive freight use. In similar situations, the Board has found that common carrier obligations were not transferred. See Metro Regional Transit Authority—Acquisition Exemption—CSX Transportation, Inc., STB Finance Docket No. 33838, slip op. at 3 (STB served Oct. 10, 2003) (Metro). Moreover, the Operating Agreement provides that the freight

carrier is permitted to expand the freight operating window if new business develops along the CIT. The Board has held that such arrangements adequately prevent undue interference with freight operations. See Sacramento-Placerville Transportation Corridor Joint Powers Authority—Acquisition Exemption—Certain Assets of Southern Pacific Transportation Company, STB Finance Docket No. 33046, slip op. at 2 (STB served Oct. 28, 1996) (Sacramento-Placerville).

Maintenance of the Line. Under the Operating Agreement, MTA is responsible for general maintenance of the CIT. It is obligated to maintain the track at a level sufficient to support safe freight operations at speeds ranging from 10 to 25 miles per hour during maintenance and improvements. The freight railroad has the right to inspect MTA's maintenance of the CIT. The Board has held that similar maintenance arrangements did not cause a transfer of common carrier rights or obligations to the purchasing governmental agency. In Metro at 3, the Board found that, where the freight railroad had a right to inspect the transit authority's maintenance activities, its responsibility for track maintenance of the shared line did not create a common carrier obligation. See also Sacramento-Placerville, slip op. at 2.

Management of the Line and Dispatching. Under the Operating Agreement, MTA controls and dispatches NSR freight trains on the CIT and must do so in compliance with the Northwestern Operating Rules Advisory Committee. The Board has held that similar shared operating agreements that vest control of dispatching with the public agency do not transfer common carrier rights and obligations. See New Mexico Department of Transportation—Acquisition Exemption—Certain Assets of BNSF Railway Company, STB Finance Docket No. 34793, slip op. at 1 (STB served Feb. 6, 2006) (NMDOT); Metro-North Commuter Railroad Company—Acquisition and Operation Exemption—Line of Norfolk Southern Railway Company and Pennsylvania Lines LLC, STB Finance Docket No. 34293, slip op. at 2-3 (STB served May 13, 2003) (Metro-North); Sacramento-Placerville, slip op. at 1-2; Los Angeles County Transportation Commission—Petition for Exemption—Acquisition from Union Pacific Railroad Company, STB Finance Docket No. 32374 et al., slip op. at 3 (STB served July 23, 1996) (LACTC) (finding that dispatching control has less importance in its own right than it has as a means of enforcing the service priorities accorded under the operating agreement). Additionally, under the Operating Agreement, MTA's management of the CIT must be structured in such a manner as to minimize delays to the freight rail carrier.

Improvements to the Line. The Operating Agreement grants MTA the right to make changes to the CIT, which MTA has done by moving and adding track. However, the Operating Agreement also expressly states that it does not allow MTA's improvements to "affect" the freight operator's rights and abilities to meet its common carrier obligation. Moreover, these improvement provisions are not unusual, as commuter agencies must be able to address changes in population and provide safe track for their ridership. In Metro-North, slip op. at 2-3, the Board found that the right to make improvements did not give, by the terms of the agreement, the commuter agency "sufficient rights to materially interfere with ... freight operations." Id. at 3.

Priority of Passenger Operations. The Operating Agreement provides that light rail service will be given preference at all times outside the exclusive freight service hours. The Board has found that priority arrangements do not trigger transfer of common carrier obligations to the commuter authorities, as long as the freight railroad retains a reasonable opportunity to provide service. See LACTC, slip op. at 2.<sup>9</sup> Here, MTA is obligated to accord the freight railroad every reasonable accommodation in order for the freight railroad to maintain its traffic on the CIT. The Operating Agreement also provides that nothing in it should be construed as interfering with the ability of Conrail, and now NSR, to provide common carrier service to both present and future customers, to the extent this can be done without undue interference with MTA's reasonable operating and maintenance requirement.

Abandonment of the Line. The Operating Agreement requires the freight railroad to seek abandonment if it ceases using the CIT track for rail service for 60 consecutive months. In LACTC, slip op. at 3, the Board held that a similar provision had "no effect on [the freight railroad's] ability to meet its common carrier obligations." While the Operating Agreement here requires the freight railroad actually to file for abandonment (if the condition for seeking abandonment is met), the Board would still have to authorize the abandonment. Thus, this provision does not transfer or terminate NSR's common carrier rights and obligations.

In his comments, Riffin argues that MTA's acquisition required regulatory approval because a number of physical changes have created interruptions to freight service. In its supplemental evidence, MTA addresses the alleged interruptions and demonstrates that it has made no sale or salvage of any portion of the CIT that would interfere with or inhibit freight rail service (except for the removal of an unused overpass to eliminate a flooding hazard to motor vehicles at the request of MSHA). Moreover, the record includes no formal complaints of freight service interruptions caused by virtue of MTA's purchase of the CIT or its control over aspects of CIT usage.

In short, the record, as supplemented in response to the March 30 decision, shows that MTA acquired only the physical assets of the CIT in 1990 and that MTA has not taken action since the time of the acquisition to conduct, control or interfere with common carrier freight operations on the line. Nor has MTA held itself out as a common carrier performing freight rail service. Here, freight operations are very limited, and MTA has submitted evidence to show that

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<sup>9</sup> In an earlier decision, the ICC held that the common carrier obligation did transfer in a transaction that included a priority arrangement. See Orange County Transp.—Exempt.—Atchison, T. & SF. Ry. Co., 10 I.C.C.2d 78 (1994). However, in that case, the shared use agreement required that "access for [freight] service must be 'reasonable' and cannot 'more than minimally' interfere with passenger service." Id. at 84. The Board found that the commuter priorities were so extensive as to reduce the value of the permanent easement. Id. Here, NSR has an exclusive operating window, and MTA is obligated not to interfere with freight service and to provide every reasonable opportunity for freight service.

its acquisition of the CIT has not unduly impaired the freight railroad's ability to continue to provide freight rail service. MTA also has shown that there is sufficient flexibility in the Operating Agreement to accommodate any future increase in rail freight traffic. Thus, MTA did not become a rail carrier subject to the Board's jurisdiction by virtue of its 1990 acquisition of the CIT, or transactions it has taken since that time, and MTA's 1990 acquisition of the CIT did not require ICC authorization.

Finally, Riffin requests that the Board institute a further declaratory order proceeding and allow it to seek discovery. However, the information presented here is similar to the information presented in prior cases, and MTA has answered the questions about some of its statements in its petition. Therefore, there is no need to institute a further proceeding or to permit discovery. Moreover, the Board maintains jurisdiction to address any complaint that NSR is failing to fulfill its common carrier obligation, because of NSR's own actions or any actions taken by MTA.

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

It is ordered:

1. The request for a declaratory order is granted, as discussed above. All other requests for relief are denied.
2. This decision is effective on its service date.

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

Vernon A. Williams

Secretary