

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35154

CITY OF CHICAGO–PETITION FOR DECLARATORY ORDER–
CHERRY AVENUE BRIDGE

Decided: August 4, 2008

On June 16, 2008, the City of Chicago, IL (City) filed a petition for declaratory order, asking us to determine that it will not become a common carrier as a result of purchasing the Cherry Avenue Bridge (Bridge) from the Chicago Terminal Railroad (CTM).¹ The Bridge, which crosses the North Branch Canal of the Chicago River near the intersection of W. North Avenue and N. Kingsbury Street in Chicago, is currently used by CTM to provide freight service to industries located on Goose Island. Under the proposed transaction, CTM would retain a permanent, exclusive easement for providing all rail service over it. Exercising our discretionary authority under 49 U.S.C. 721 and 5 U.S.C. 554(e), we will issue a declaratory order to remove uncertainty in this matter.

BACKGROUND

In its petition, the City states that it has adopted a plan for redeveloping a former industrial area on Goose Island. The City states that it is proposing to purchase the Bridge and associated air rights from CTM for \$1.00. The City indicates that it intends to refurbish and maintain the Bridge, which is one means of access to Goose Island, and install a walkway for pedestrians and cyclists. According to the City, CTM would retain a permanent, exclusive easement to provide all common carrier rail service over the Bridge and would retain the responsibility for maintaining its track and right-of-way leading to the Bridge as well as all track and rail-related appliances on the Bridge.

With its petition for declaratory order, the City has submitted copies of the documents relating to the transaction. These include: (1) an Ordinance authorizing the City to purchase the

¹ CTM became a class III shortline railroad in 2006 when it acquired 4.5-miles of rail line, known as the C&E Line, including the Bridge. See Chicago Terminal Railroad–Acquisition and Operation Exemption–Soo Line Railroad Company d/b/a/ Canadian Pacific Railway, STB Finance Docket No. 34968 (STB served Dec. 22, 2006). CTM is controlled by Iowa Pacific Holdings, LLC (IPH) and its wholly owned subsidiary, Permian Basin Railways, Inc. See Iowa Pacific Holdings, LLC and Permian Basin Railways, Inc.–Continuance in Control Exemption–Chicago Terminal Railroad, STB Finance Docket No. 34967 (STB served Dec. 22, 2006).

Bridge and associated air rights; (2) a Real Estate Sales Agreement between IPH, CTM and the City; (3) the Rail Line Easement Agreement between IPH, CTM and the City; and (4) the Operating Agreement between CTM and the City, delineating the respective rights and obligations of the parties.

According to the City, the transaction documents are structured to ensure that the City would not become a railroad common carrier. The City indicates that the overriding purpose of the transaction is to preserve and improve the historically significant Bridge linking Goose Island with the rest of the City and to enable pedestrians and cyclists to use the Bridge. The transaction documents specify that CTM will be the only entity providing common carrier rail service over the Bridge, and that the carrier will have an unrestricted right of access to the railroad line together with sufficient interest in and control over the property to fulfill its common carrier obligations. The City is obligated to maintain, repair and replace the Bridge (other than the rails, ties and trackbed) at the City's expense in a way that enables CTM to operate in its normal and customary manner and in compliance with federal regulations. The documents prohibit the City from interfering with CTM's operations or providing or operating rail service, or holding itself out as a railroad common carrier. The City will be required to coordinate all joint use, maintenance, improvement, and inspection activity with CTM and avoid any interference with railroad operations and maintenance activities, including any aspect of rates, services, train frequency and schedules. In the event of termination of service, the documents specify that CTM's common carrier and rail service obligation continues until CTM or a third party obtains discontinuance or abandonment authority from the Board.

In support of its position that it would not become a common carrier after acquiring the Bridge, the City cites Maine, DOT-Acq. Exemption, Me. Central R. Co., 8 I.C.C.2d 835 (1991) (State of Maine), Wisconsin Department of Transportation-Petition for Declaratory Order, STB Finance Docket No. 34623 (STB served Dec. 23, 2004), and Georgia Department of Transportation-Petition for Declaratory Order, STB Finance Docket No. 34665 (STB served Apr. 14, 2005).

DISCUSSION AND CONCLUSIONS

The question here is whether the City would become a common carrier by acquiring the Bridge, which, if so, would require the Board's regulatory approval of the transaction.² 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, even if the acquiring entity is a noncarrier, including a state. See Common Carrier Status of States, State Agencies, 363 I.C.C. 132, 133

² As the City points out, a bridge used by a railroad is a facility that is included within the definition of the term "railroad" in 49 U.S.C. 10102(6)(A). See Albany Bridge Company, Inc.-Acquisition and Operation Exemption-South Carolina Central Railroad Company, Inc., d/b/a Georgia Great Southern Division, Finance Docket No. 32207 (ICC served Jan. 13, 1993).

(1980), aff'd sub nom. Simmons v. ICC, 697 F.2d 326 (D.C. Cir. 1982). Our authorization is not required, however, when only the physical assets will be conveyed and the common carrier rights and obligations that attach to the line will not be transferred. See State of Maine, 8 I.C.C.2d at 836-37. The Board examines in each case whether, once the transaction takes effect, the freight carrier will have sufficient access to conduct its existing and reasonably foreseeable freight operations so that it can satisfy its common carrier obligation.³ A transaction will not result in common carrier obligations being imposed on a noncarrier if it does not unduly impair the carrier's ability to provide service.

We find that this transaction is consistent with State of Maine and its progeny. It is similar to other transactions in which a government entity acquires the property from a carrier, but the selling carrier retains the common carrier obligation to provide rail service. For example, in State of Wisconsin Department of Transportation–Petition for Declaratory Order, STB Finance Docket No. 34181 (STB served Aug. 1, 2002) (which involved the shared use of the line for commuter and freight service), and State of Vermont–Acquisition Exemption–Certain Assets of Newport and Richford Railroad Company, Northern Vermont Railroad Company Incorporation and Canadian American Railroad Company, STB Finance Docket No. 34294 (STB served May 22, 2003) (which involved an acquisition to prevent the loss of freight service), state agencies acquired real estate, trackage and other physical assets from a rail carrier, while the rail carrier retained the common carrier obligation to provide service. Here, the City is acquiring the physical assets of the Bridge—not an entire rail line—while CTM is retaining the unrestricted common carrier obligation to provide rail service over the Bridge.

The record shows that CTM is not transferring common carrier rights or obligations and that the City will not hold itself out as a common carrier performing rail freight service. Rather, the City will acquire the Bridge in order to preserve and improve this historically significant link between Goose Island and the rest of the City. CTM will retain all common carrier rights and obligations, and the City will grant a perpetual easement to CTM to allow the carrier to continue to conduct rail freight operations on the property. And the record shows that the City will not be able to prevent or impede CTM from fulfilling the common carrier obligations it is retaining. Unlike other transactions by public entities involving shared use of the rail line for commuter and freight operations, the easement and operating agreement here do not include any windows or other restrictions on CTM's ability to provide freight rail service.⁴ Rather, the sale of the

³ See Washington County, OR–Acquisition Exemption–Certain Assets of the Union Pacific Railroad Company, STB Finance Docket No. 34810 et al., slip op. at 2 (STB served Apr. 11, 2007).

⁴ See, e.g., Utah Transit Authority–Acquisition Exempt.–Union Pacific Railroad Company, STB Finance Docket No. 35008 et al. (STB served July 23, 2007) (addressing whether operating window for freight operations so as not to interfere with commuter service were sufficient for freight railroad to fulfill its common carrier obligations).

Bridge to the City should assist in the preservation of freight rail service to industries located on Goose Island because the City will be assuming the cost of rehabilitating and maintaining this structure. Therefore, we conclude that the City will not become a rail carrier subject to our jurisdiction as a result of the transaction and that the transaction does not require Board authorization.

Finally, the City has requested expedited consideration of its petition, with a decision effective on or before August 15, 2008, so that it can begin to refurbish the Bridge during good weather. To accommodate this request, we will make our decision effective on its service date.

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

It is ordered:

1. The City's petition for declaratory order is granted as discussed in this decision.
2. 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