

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35991

THE ATLANTA DEVELOPMENT AUTHORITY D/B/A INVEST ATLANTA AND  
ATLANTA BELTLINE, INC.—VERIFIED PETITION FOR A DECLARATORY ORDER

Decided: June 7, 2016

The Atlanta Development Authority d/b/a Invest Atlanta (the Authority) and Atlanta BeltLine, Inc. (ABI) (collectively, the Atlanta Parties), noncarriers, have filed a verified petition for declaratory order requesting that the Board confirm the regulatory status of a line of railroad known as the Northeast Quadrant (the Line) and settle certain issues with respect to transfers of the Line's underlying real estate that at one time was owned by Norfolk Southern Railway Company (NSR). The Line is located in Fulton County, Ga.<sup>1</sup>

Specifically, the Atlanta Parties seek a declaratory order from the Board issuing three findings. First, the Atlanta Parties request that the Board find that the acquisition of the underlying real estate from NSR, a rail carrier, by Ansley North Beltline, LLC, Ansley South Beltline, LLC, Piedmont Beltline, LLC, North Avenue Beltline, LLC, Corridor Beltline, LLC, and Corridor Edgewood, LLC (collectively, the Mason Entities), all noncarriers, did not require Board approval pursuant to Maine, Department of Transportation—Acquisition & Operation Exemption—Maine Central Railroad (State of Maine), 8 I.C.C.2d 835 (1991), and therefore the absence of Board approval is not a basis for voiding the transaction. Second, the Atlanta Parties request that the Board find that, because the Mason Entities' acquisition of the Line did not require Board approval, the subsequent acquisitions of the Line from the Mason Entities (including the acquisition by the Authority) did not require Board approval, and therefore the absence of Board approval is not a basis for voiding the transaction. Finally, the Atlanta Parties request that the Board find that it has no continuing jurisdiction over the portion of the Line lying south of the Montgomery Ferry Road Bridge because NSR consummated abandonment of that

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<sup>1</sup> As explained below, the description of the Line varies across the filings submitted to date. The initial petition describes the Line as being from Milepost DF 633.10 to Milepost DF 636.56. However, on January 28, 2016, the Atlanta Parties filed a supplement to the verified petition for declaratory order noting that those mileposts describe a portion of the Line south of the Montgomery Ferry Road Bridge. The supplement discusses a portion of the Line north of the Montgomery Ferry Road Bridge but does not provide mileposts or a length for that segment. As set forth below, the Board seeks clarification from the parties to remove any uncertainty with respect to the physical description of the Line at issue.

portion in Norfolk Southern Railway—Abandonment Exemption—In Fulton County, Ga., Docket No. AB 290 (Sub. No. 210X) (consummation notice filed Oct. 22, 2010), and therefore the Board need not approve any future conveyance of real estate underlying that portion of the Line.<sup>2</sup>

On January 27, 2016, Cynthia Vick, Gordon B. Ragan, Jr., Jane G. Powell, Loran M. Powell, Elizabeth A. Albert, Michael Loving, Dawn Smith, Roderick Smith, Robin Tubbs, Jason Godwin, Steven R. Green, Stacey E. Clay, Sandy Flores, Christopher Draper, Dennis Sabo, Jr., Laura M. Shepard, Angela Fox, Hannibal Heredia, Patricia S. Jones, Jay Jones, Donna M. Fitzmaurice, Patrick J. Fitzmaurice, Samantha C. Bontrager, Dewayne M. Bontrager, Molly Taylor, Josh B. Taylor, Thomas R. Markovic, Megan Cochard, Matthew R. Cochard, Amanda K. Sapra, Neil K. Sapra, Margaret N. Corbett, Nicolas Albano, Eric Bymaster, Fulton D. Lewis, III, S. Neil Rhoney, Tom Philpot, Anna L. Lentz, Kurt Lentz, Lee S. Prince, Louise P. Mulherin, Jeff Culley, Mary Lou B. Saye, Earl Saye, and Alan B. Patricio (collectively, the Flagler Owners), filed in opposition to the Atlanta Parties' petition.<sup>3</sup> The Flagler Owners argue that the conveyance of the Line from NSR to the Mason Entities was subject to 49 U.S.C. § 10901(a)(4) and thus required Board approval. The Flagler Owners argue that since no § 10901 authority was sought, the Board should deny the Atlanta Parties' petition and instead issue a declaratory order finding that the conveyance of the Line from NSR to the Mason Entities is of no effect or force.

The Flagler Owners request an oral hearing under 49 C.F.R. § 1112.10 and the opportunity to conduct cross examination of certain witnesses regarding the conveyances of the Line and the intended use of the Line. Additionally, the Flagler Owners request that the Board establish a procedural schedule for discovery under 49 C.F.R. § 1114.21(a), particularly because the Atlanta Parties' petition does not provide any detail concerning, or copies of, the purchase and sale, use, or continuing operating agreements between NSR and the Mason entities.

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<sup>2</sup> In the January 28, 2016 supplement to the verified petition, the Atlanta Parties state that since its initial filing, the Authority has determined that the portion of the Line north of Milepost DF 633.10 near the Montgomery Ferry Road Bridge was not included in the abandonment NSR consummated in October 2010. Therefore, the Atlanta Parties assert that NSR retains an exclusive freight rail operating easement and associated operating rights over the north segment of the Line. The request for declaratory order described in this decision reflects the information regarding the abandoned and active sections of the Line set out in the supplement.

<sup>3</sup> The Atlanta Parties assert in their supplement that the portion of the Line adjacent to the Flagler Owners' property is north of the Montgomery Ferry Road Bridge, and that NSR retains an exclusive freight rail operating easement and associated operating rights over that segment of the Line.

On February 8, 2016, the Atlanta Parties filed a motion for leave to file a reply, and a surreply, to the Flagler Owners' January 27, 2016 opposition.<sup>4</sup> The Atlanta Parties argue that the request for an oral hearing does not comply with the Board's procedural rules, that an oral hearing is unnecessary to resolve any material fact, and that a procedural order for discovery would subject this proceeding to needless delay, as all relevant documents are already in the record.

On March 14, 2016, NSR filed comments supporting the Atlanta Parties' petition, arguing that Board authority was not required for NSR's sale of real property to the Atlanta Parties' predecessors-in-interest.<sup>5</sup> NSR states that it retains its common carrier obligation over the northernmost segment of the Line,<sup>6</sup> and that this segment of the Line abuts the properties of the Flagler Owners.

On May 13, 2016, the Atlanta Parties filed a second supplement to their verified petition for a declaratory order, wherein the Atlanta Parties reiterate their request for expedited consideration and their position that the Board needs no additional information in order to issue a decision on their request for a declaratory order. The Atlanta Parties also inform the Board that they filed an action in state court seeking injunctive relief and damages in connection to the alleged encroachments by the Flagler Owners on a "portion of the subject corridor over which NSR retains active common carrier rights." The Flagler Owners filed in opposition to the second supplement on May 19, 2016, reiterating their argument for an oral hearing and discovery, and arguing that the pending state court action is irrelevant to the consideration of expedited review.

On May 24, 2016, the Atlanta Parties filed a motion for leave to file a reply, and a surreply, to the Flagler Owners' May 19, 2016 opposition.<sup>7</sup> The Atlanta Parties argue that the Board does not have jurisdiction over the state property law issues in the ongoing state court action, and that here the Board is being asked to confirm the regulatory status of the Line.

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<sup>4</sup> In the interest of compiling a more complete record, we will accept the Atlanta Parties' surreply. See City of Alexandria, Va.—Pet. for Declaratory Order, FD 35157, slip op. at 2 (STB served Nov. 6, 2008) (allowing a reply to a reply "(i)n the interest of compiling a full record"). The Atlanta Parties' pleading primarily responds to the Flagler Owners' request for discovery and an oral hearing, issues that were initiated in the Flagler Owners' reply. Thus, responding to those new issues is arguably not replying to a reply.

<sup>5</sup> NSR requests the Board's leave, pursuant to 49 C.F.R. § 1117.1, to late-file its comments. The Board will accept the filing in the interest of compiling a more complete record.

<sup>6</sup> NSR's statement that the northernmost segment of the Line is between milepost 636.56 and milepost 637.40 is inconsistent with the descriptions of the Line by the Atlanta Parties, and appears to be in error.

<sup>7</sup> In the interest of compiling a more complete record, we will accept the Atlanta Parties' surreply. See supra note 4.

The Board's State of Maine line of precedent holds that the sale of the physical assets of a rail line by a carrier to a state or other public agency does not constitute the sale of a rail line within the meaning of § 10901 when the selling carrier retains: (1) a permanent, exclusive freight rail operating easement giving it the right and common carrier obligation to provide freight rail service on the line; and (2) sufficient control over the line to carry out common carrier operations. Wis. Dep't of Transp.—Petition for Declaratory Order, FD 35455, slip op. at 3 (STB served Nov. 10, 2011); Fla. Dep't of Transp.—Acquis. Exemption—Certain Assets of CSX Transp., Inc., FD 35110, slip op. at 5 (STB served Dec. 15, 2010). When the seller retains the common carrier obligation and control over freight rail service, Board precedent holds that the purchaser of only the physical assets of a line does not become a carrier for purposes of § 10901(a)(4). For a transaction to fall within that precedent, however, the terms of the sale must ensure that the selling carrier can continue to provide common carrier freight rail service without undue interference by the purchaser. Mass. Dep't of Transp.—Acquis. Exemption—Certain Assets of CSX Transp., Inc., FD 35312, slip op. at 5 (STB served May 3, 2010), aff'd sub nom. Bhd. of R.R. Signalmen v. STB, 638 F.3d 807 (D.C. Cir. 2011).

Consistent with State of Maine and its progeny, the Board will look at the terms of the sales at issue here in order to resolve this matter. The Atlanta Parties have already submitted the deeds conveying the underlying real estate, and argue that “all of the documentation relevant to this matter is in the record.” However, the Board generally also looks at the sales and operating agreements for the transaction, as those documents may contain terms of the sale pertaining to the State of Maine criteria.<sup>8</sup> Accordingly, the Board directs the Atlanta Parties to submit any and all sales and operating agreements, and other related agreements, if any, pertaining to those transactions for which they have requested a Board determination by June 15, 2016. The Flagler Owners have not demonstrated why discovery or an oral hearing and cross examination are necessary for the Board's consideration of the terms of the sales, and therefore the Board denies the Flagler Owners' requests.

Finally, to remove any uncertainty with respect to the physical description of the Line, the Board will direct the Atlanta Parties and NSR to clarify, using mileposts: (1) the total length of the Line; (2) the length of the Line north of the Montgomery Ferry Road Bridge; (3) the length of the Line south of the Montgomery Ferry Road Bridge; and (4) the length of the Line adjacent to the Flagler Owners' property, by June 15, 2016. The Board will also direct the Atlanta Parties and NSR to include a map (in color, if possible) clearly identifying the above information.

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<sup>8</sup> See Mass. Dep't of Transp.—Acquis. Exemption—Certain Assets of Housatonic R.R., Docket No. FD 35866, slip op. at 5 (STB served Dec. 24, 2014) (determining that State of Maine criteria were not met after review of the operating and sales agreements showed transfer of passenger rights that might require Board approval).

It is ordered:

1. The Atlanta Parties are directed to submit copies of any and all operating agreements, and other related agreements, if any, pertaining to those transactions for which they have requested a Board determination by June 15, 2016.

2. The Flagler Owners' requests for a procedural schedule and discovery, and for an oral hearing and cross examination, are denied.

3. The Atlanta Parties' motions for leave to file replies to the Flagler Owners' January 27, 2016 and May 19, 2016 oppositions are granted.

4. NSR's request for leave to late-file its comments is granted.

5. The Atlanta Parties and NSR are directed to clarify, using mileposts: (1) the total length of the Line; (2) the length of the Line north of the Montgomery Ferry Road Bridge; (3) the length of the Line south of the Montgomery Ferry Road Bridge; and (4) the length of the Line adjacent to the Flagler Owners' property, by June 15, 2016. The Atlanta Parties and NSR are directed to include a map (in color, if possible) clearly identifying the above information.

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

By the Board, Rachel D. Campbell, Director, Office of Proceedings.