

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35532

VIRGINIA PORT AUTHORITY—ACQUISITION EXEMPTION—
NORFOLK AND PORTSMOUTH BELT LINE RAILROAD COMPANY

Digest:¹ The Virginia Port Authority (VPA) does not need Board authorization to acquire approximately 1.18 miles of real estate and rail tracks of a rail line in the City of Norfolk, Va. Although VPA is acquiring the physical assets of the rail line, it will not acquire the legal obligation to provide freight rail service to customers on the line. The seller, Norfolk and Portsmouth Belt Line Railroad Company, will retain the legal obligation to provide freight service, and VPA will not be able to interfere unreasonably with that service. Therefore, VPA will not be considered a rail carrier under Federal law.

Decided: August 1, 2011

On June 21, 2011, the Virginia Port Authority (VPA), a political subdivision of the Commonwealth of Virginia that is a noncarrier, filed a verified notice of exemption under 49 C.F.R. § 1150.31 to acquire from Norfolk and Portsmouth Belt Line Railroad Company (NPBL) approximately 1.18 miles of certain physical assets of a rail line and the associated right-of-way (ROW), beginning at a point on NPBL's track known as West Junction and running westward across Hampton Boulevard to a point of connection with VPA track, located on Sewell's Point in the City of Norfolk, Va. (the Line). Simultaneously, VPA filed a motion to dismiss the notice, asserting that, because VPA will not acquire any rights or obligations that would prevent NPBL from fulfilling its freight common carrier obligations, the transaction does not require Board authorization. VPA also requests that the Board rule on its motion on or before August 1, 2011, so that VPA can meet certain deadlines affecting the purchase of the Line and the receipt of grant funds. The motion is unopposed. We will grant the motion to dismiss.

NPBL, which is owned by Norfolk Southern Corporation (NSR) and CSX Corporation, commenced operations in 1998. It performs freight rail service and terminal switching operations over its 36 miles of track. NPBL currently interchanges traffic with NSR, CSX Transportation, Inc., the Bay Coast Railroad, and the Chesapeake and Albemarle Railroad, and serves approximately 24 industries located in the cities of Norfolk and Portsmouth. NPBL owns

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. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

the Line located on Sewell's Point in the City of Norfolk (Sewell's Point Property), which is adjacent to Norfolk International Terminals (NIT), one of several marine facilities owned by VPA. VPA states that NPBL does not oppose its motion to dismiss the notice of exemption.

VPA states that it is acquiring the Line to enhance the operations of NIT by expanding train assembly and movement capacity, improving railroad access and routing, and increasing operating efficiency. VPA asserts that a key component of its infrastructure enhancement project is the construction of a rail yard on the Sewell's Point Property. Accordingly, it seeks to purchase the Sewell's Point Property, including the stated rail assets. VPA states that it is the recipient of grant funds from the Virginia Department of Rail and Public Transportation for the construction of the rail yard, including construction of a side track for NPBL to conduct "run-around operations." VPA states that NPBL will retain a permanent, exclusive, and irrevocable freight easement over the Line and will continue to provide freight common carrier service, and that VPA will not seek or acquire the rights necessary to conduct or control freight common carrier service.

VPA submitted final drafts of its proposed agreements, including copies of the Real Estate Purchase Agreement (Purchase Agreement), a deed, and an Operating Agreement with NPBL.² The Purchase Agreement reserves a permanent, irrevocable, exclusive and assignable freight operating easement and associated ROW for NPBL and provides that the purchaser (VPA) does not have the intention or any right to provide service as a common carrier. The Operating Agreement, which provides for the responsibilities and rights of the parties, contains the same reservation and acknowledgment regarding freight common carriage and states that VPA will be responsible for maintaining and dispatching the Line in coordination with NPBL. The deed between VPA and NPBL also contains the same reservation and acknowledgement and incorporates by reference the Operating Agreement.

According to VPA, the agreements demonstrate that it is acquiring none of the rights to provide freight service, and that NPBL retains the exclusive right to provide common carrier freight rail service on the Line. VPA asserts that these agreements, like Me., Dep't of Transp.—Acquis. & Operation Exemption—Me. Cent. R.R., 8 I.C.C.2d 835 (1991) (State of Maine), do not involve the transfer of common carrier obligations, and therefore, it argues that the transaction does not require Board authorization. VPA also cites the following cases in support of its argument: L.A. County Transp. Comm'n—Petition for Exemption—Acquis. from Union Pac. R.R., FD 32374 (STB served July 23, 1996); Ga., Dep't of Transp.—Acquis. Exemption—Ga. Sw. R.R., FD 33876 (STB served July 7, 2000); The Port of Seattle—Acquis. Exemption—Certain Assets of BNSF Ry., FD 35128 (STB served Oct. 27, 2008); and Mass. Dep't of Transp.—Acquis. Exemption—Certain Assets of CSX Transp., Inc., FD 35312 (STB served May 3, 2010) (Mass DOT), aff'd sub nom. Bhd. of R.R. Signalmen v. STB, 638 F.3d 807 (D.C. Cir. 2011).

² VPA attached copies of the Purchase Agreement, the deed, and Operating Agreement (Exs. B, C, and D, respectively) to its motion to dismiss the notice of exemption.

DISCUSSION AND CONCLUSIONS

The question at issue here is whether our regulatory approval is required for VPA to acquire the Line and the associated ROW, where NPBL retains a permanent, exclusive, and irrevocable freight easement to conduct freight rail operations. 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, including a state, is a noncarrier. See Common Carrier Status of States, State Agencies & Instrumentalities, & Political Subdivisions, 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 an exclusive, permanent easement to permit it to continue to provide common carrier freight service, we typically have found that our authorization is not required, and that the state does not acquire a common carrier obligation. See State of Maine, 8 I.C.C.2d at 836-37; Mass DOT, slip op. at 6.

As the Board has observed, there are sound policy reasons for allowing the selling rail carrier to retain a permanent freight rail easement over a rail line while permitting a state entity to purchase the physical assets of the line. See Mass DOT, slip op. at 7. The main reason is “to remove obstacles which might inhibit States from acquiring lines so that service can be continued.” State of Maine, 8 I.C.C.2d at 837 n.7. In many cases following State of Maine, a public transportation agency bought property to facilitate its ability to provide transportation services in the public interest.³ Here, VPA is seeking to acquire the Line to increase the capacity and efficiency of one of its marine terminals, NIT, a purpose important for continued freight rail service and consistent with State of Maine precedent.

In this case, the parties’ agreements allow NPBL to retain a permanent, irrevocable, and exclusive freight easement over the Line and to continue to provide freight rail service. NPBL is not transferring its common carrier obligation to VPA, and VPA will not hold itself out as a common carrier performing freight rail service. However, the issue of whether the railroad has retained an exclusive freight easement for the continuation of freight service does not, by itself, resolve the matter. The Board also takes into account the relevant agreements to determine whether there are any impediments to the continuation of common carrier freight service. Mass DOT, slip op. at 12. As discussed further below, it appears that nothing in the Purchase Agreement, deed, or Operating Agreement gives VPA the ability to interfere unduly with NPBL’s ability to carry out its common carrier obligation.

As part of the planned infrastructure enhancement project, VPA will be constructing a rail yard on the Sewell’s Point Property that will connect to NPBL’s main line to enhance operations and increase capacity of NIT. VPA states that the new rail yard will enhance and improve NPBL’s operations. Under the Operating Agreement, VPA agrees to construct a side track and make it available to NPBL on a 24 hour, 7 days a week basis so that NPBL can provide freight rail service to its customers.⁴ Under the Operating Agreement, VPA states that the

³ See Mass DOT, slip op. at 6.

⁴ Ex. D at Section 4.

designated side track may vary from time to time, but that VPA will make reasonable efforts to keep the designated siding clear and will not unduly interfere with NPBL's "run-around operations." The Operating Agreement also requires NPBL to provide a minimum of 6 hours advance notice when it will be operating over the designated track in order to ensure that it is clear.⁵ We are satisfied that the provisions in the agreement for the side track will allow NPBL to continue to provide freight service, and that VPA's construction project on the Sewell's Point Property will not interfere with NPBL's ability to fulfill its common carrier obligation.

According to the Operating Agreement, VPA will be responsible for maintaining the Line to applicable Federal Railroad Administration (FRA) standards.⁶ VPA is responsible for maintaining the Line to FRA standards at VPA's expense, including replacing rail, checking and correcting rail gauge, adding ballast and various other maintenance activities.⁷ The Operating Agreement further provides that, if VPA fails to maintain the track, NPBL shall provide notice and VPA shall have 48 hours to implement corrective action. If VPA fails to make the needed repairs within the 48-hour period, NPBL may make or cause to be made the needed repairs at VPA's expense.⁸ These provisions do not cause a transfer of common carrier rights or obligations to VPA. The Board has found that the responsibility for track maintenance by itself, does not constitute an acquisition of a railroad line requiring Board authorization. See Utah Transit Auth.—Acquis. Exemption.—Union Pac. R.R., FD 35008 (STB served July 23, 2007); N.M. Dep't of Transp.—Acquis. Exemption—Certain Assets of BNSF Ry., FD 34793 (STB served Feb. 6, 2006).

The Operating Agreement states that, in addition to maintaining the Line, VPA will dispatch it.⁹ The Board has observed that dispatching control has less importance in its own right than it has as a means of enforcing service priorities, and that an operating agreement should be considered as a whole to determine if it is likely to impair freight service. Mass DOT, slip op. at 10. Here, the Operating Agreement states that VPA will dispatch the Line in coordination with NPBL and subject to NPBL's easement to conduct rail freight operations. Because VPA's dispatching will not impair or interfere with NPBL's freight service, it is permissible under State of Maine precedent.

The Board has also noted that placing dispatching and maintenance control in the hands of the acquiring noncarrier may be allowed when there is a legitimate business justification for doing so. See Fla. Dep't of Transp.—Acquis. Exemption—Certain Assets of CSX Transp., Inc., FD 35110 (STB served June 22, 2011). In this case, VPA's planned infrastructure enhancement

⁵ Id.

⁶ Ex. D at Section 7.

⁷ Id.

⁸ Id.

⁹ The Operating Agreement states that use of the Line is also subject to operating rights of NSR, pursuant to an operating rights agreement between NPBL and NSR's predecessor. Ex. D at Section 3.

project to expand and improve the operations of NIT offers a legitimate business justification for giving it control over maintenance and dispatch on the Line.

Based on this record, we find that the proposed transaction is consistent with State of Maine, and that the acquisition of the railroad assets and the associated ROW by VPA is not the acquisition of a railroad line under 49 U.S.C. § 10901(a)(4). Because NPBL will retain a permanent, irrevocable, and exclusive freight easement, and the terms of the relevant agreements will protect NPBL against undue interference with its common carrier obligation, the acquisition will not cause VPA to become a rail carrier. Under these circumstances, the proposed transaction does not require Board authorization under 49 U.S.C. § 10901. We will dismiss VPA's notice of exemption and discontinue this proceeding.

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

It is ordered:

1. VPA'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 Elliott, Vice Chairman Begeman, and Commissioner Mulvey.