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SERVICE DATE – DECEMBER 21, 2010

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35394

REGIONAL TRANSPORTATION DISTRICT—ACQUISITION EXEMPTION—
UNION PACIFIC RAILROAD COMPANY IN ADAMS, DENVER, AND JEFFERSON
COUNTIES, COLO.

Digest:¹ Regional Transportation District (RTD), a political subdivision of the State of Colorado, is purchasing 2 segments of railroad property owned by Union Pacific Railroad Company (UP). Because UP will continue to provide freight rail service over its own lines, and RTD will only provide commuter rail service, which will not interfere with UP's freight rail service, the proposed transaction does not require Board approval.

Decided: December 20, 2010

BACKGROUND

Regional Transportation District (RTD) is a political subdivision of the State of Colorado created for the purpose of developing commuter rail service in the Denver metropolitan area. To that end, on June 25, 2009, RTD executed the FasTracks Project Property Transfer and Railroad Relocation Agreement (Transfer Agreement), which created a general framework for RTD to develop mass transit by acquiring rail corridors and physical assets of railroads operating in the area.²

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).

² This is the third in a series of related transactions executed for the purpose of developing commuter rail service in and around Denver. See Reg'l Transp. Dist.—Acquis. Exemption—Union Pac. R.R. in Adams, Boulder, Broomfield, and Weld, Colo., FD 35252 (STB served June 29, 2010) (dismissing RTD's notice of exemption to acquire from Union Pacific Railroad Company the physical assets of a line of railroad, where UP would retain its common carrier obligations and RTD would not acquire any rights that would prevent UP from fulfilling those obligations); see also Reg'l Transp. Dist.—Acquis. Exemption—BNSF Ry. in Jefferson County, Colo., FD 35358 (STB served Mar. 19, 2010) (publishing notice of exemption for RTD to acquire a 9.55-mile segment of BNSF's right-of-way, with BNSF retaining an exclusive freight easement).

On August 4, 2010, RTD filed a verified notice of exemption under 49 C.F.R. § 1150.41 to acquire from Union Pacific Railroad Company (UP) certain physical assets and associated rights-of-way comprising an approximately 40-foot wide segment of each of 2 rail lines totaling approximately 11.18 miles in length: (1) a portion of the Limon Subdivision extending approximately 8.96 miles, from milepost 628.50, in Adams County, Colo., to milepost 637.46 in the City and County of Denver, Colo. (the East Corridor Segment); and (2) a portion of the Moffat Tunnel Subdivision extending approximately 2.22 miles, from milepost 4.28, in the City and County of Denver, to milepost 6.50, in Jefferson County, Colo. (the Gold Line Segment) (collectively, the RTD rights-of-way).³ UP will retain the remaining width of each right-of-way. As a result, following the transaction, in each corridor UP and RTD will own separate but adjacent and parallel rights-of-way. UP will continue to operate freight rail service over its own tracks on its retained rights-of-way, while RTD will provide commuter rail service over its own tracks on the RTD rights-of-way.⁴

When RTD filed its notice of exemption in this transaction, it concurrently filed a motion to dismiss the notice, asserting that, because RTD will not acquire any rights or obligations that would prevent UP from fulfilling its freight common carrier obligations, the transaction is not subject to the Board's jurisdiction under 49 U.S.C. § 10901.⁵ According to RTD, the Agreements demonstrate both that RTD is acquiring none of the rights and obligations that are

³ RTD states that it will also acquire UP's interest in discrete parcels not integral to UP's existing freight operations at 5 locations along UP's Limon, Greeley, and Moffat Tunnel Subdivisions for access, private roadway crossings, and similar purposes ancillary to RTD's use of the lines. In addition, UP will grant RTD 4 aerial easements over UP's lines for rail or pedestrian crossovers. RTD and UP are also concluding the negotiation of an exchange of property to accommodate the relocation of UP's lead accessing its Burnham Shop in the City and County of Denver.

⁴ RTD submitted a copy of the agreements governing its proposed transactions (collectively, the Agreements). The Agreements include: (1) the Transfer Agreement; (2) Addenda C and D to the Transfer Agreement, which address RTD's acquisition of the East Corridor Segment and the Gold Line Segment, respectively, and include copies of the relevant quitclaim deeds; (3) the Relocation and Construction Agreement for the East Corridor Segment (Relocation Agreement); and (4) Operations Agreements for both segments. The Relocation Agreement addresses the relocation of UP's current track on the East Corridor Segment to accommodate separate but adjacent tracks for RTD and UP. On the Gold Line Segment, RTD notes that no relocation of UP's line will be necessary; UP will continue to operate on its own track on the portion of the corridor that it will retain, and RTD will construct a separate but adjacent track on the right-of-way that it will acquire, over which RTD will conduct commuter rail operations.

⁵ While RTD uses the term "jurisdiction," in fact it may only seek a finding that the Board does not have regulatory authority over the proposed transaction. The Board will continue to have jurisdiction over rail property even if it concludes, as discussed below, that it does not have regulatory authority over a proposed transaction. See Friends of the Aquifer, 5 S.T.B. 880, 883-84 (2001).

essential to providing freight service and that UP retains the sole right to provide service on the lines. RTD asserts that these transactions, like Maine—Acquisition and Operation Exemption, Maine Central R.R., 8 I.C.C.2d 835 (1991) (State of Maine), do not involve the transfer of common carrier obligations, and therefore, the transactions are not subject to the Board’s jurisdiction. RTD also cites Maryland Transit Administration—Petition for Declaratory Order, FD 34975 (STB served Sept. 19, 2008) (MTA 2008 Decision) in support of its argument that the agreements between the freight carrier and the public agency acquiring the right-of-way may allow commuter rail service, as long as the terms and conditions do not unreasonably interfere with freight rail service. The motion is unopposed. We will grant the motion to dismiss.

DISCUSSION AND CONCLUSIONS

The question here is whether our regulatory approval is required for RTD to acquire the RTD rights-of-way, where UP retains its own adjacent rights-of-way over which it will continue 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 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).

However, when a carrier selling the physical assets of a rail line to a state entity retains a property interest—usually, a permanent, unconditional freight rail operating easement—sufficient to permit it to continue to provide common carrier freight service without interference from the state entity, we typically have found that the transaction does not constitute the sale of a railroad line within the meaning of 49 U.S.C. § 10901, which means that our authorization is not required and the state does not acquire a common carrier obligation. See State of Maine, 8 I.C.C.2d at 836-37; Mass. Dep’t of Transp.—Acquis. Exemption—Certain Assets of CSX Transp., Inc., FD 35312 (STB served May 3, 2010) (discussing the State of Maine precedent).

Acquisition of Physical Assets Only. Under the Agreements, RTD will acquire only certain physical assets of the rights-of-way. Because of these provisions, and because the Agreements provide for UP to retain its own tracks on its own, retained rights-of-way parallel and adjacent to the RTD rights-of-way, the Agreements effectively prohibit RTD from unduly interfering with UP’s common carrier rights and obligations. Rather, they ensure that UP will retain those rights and obligations.

UP’s Retained Property Interest. In this case, RTD does not specifically assert that the quitclaim deeds reserve for UP a perpetual, exclusive freight rail operating easement over the lines that RTD will construct on the RTD rights-of-way.⁶ Instead, once commuter service

⁶ The quitclaim deeds do include what is referred to as a “Railroad Facilities Easement.” See Notice of Exemption, Ex. 3 at F-5, Ex. 4 at F-4. However, the extent and nature of those easements is not clear, and nowhere in the notice of exemption or the motion to dismiss does RTD discuss those provisions or rely on them in support of its State of Maine analysis. Indeed, RTD notes that “[n]o operating easement will be necessary over the property RTD will acquire

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begins, UP will retain ownership of and conduct freight rail service over its own rights-of-way and tracks, which will be separate from, but adjacent to, the RTD rights-of-way and tracks.⁷ Retaining ownership of its own separate but adjacent lines is a stronger property interest than merely reserving an easement over the transferred property. Because UP will be able to continue to operate over its own tracks, an easement over the RTD rights-of-way would not be necessary here; the likelihood of interference with common carrier operations is less than in situations where the freight rail carrier only retains an easement. Additionally, as discussed further below, it appears that nothing in the quitclaim deeds or the Agreements gives RTD the ability to interfere unduly with UP's ability to carry out its common carrier obligation.

Priority of Freight Service. In deciding whether a transaction meets the requirements of our State of Maine line of cases, the Board takes into account not just the property interest retained by the seller but also other factors, such as the terms of the operating agreement between the purchasing party and the freight railroad. Md. Transit Admin.—Petition for Declaratory Order, FD 34975, slip op. at 5 (STB served Oct. 9, 2007) (MTA 2007 Decision). Here, the Agreements state that RTD's rights are subject to and subordinate to UP's common carrier rights and obligations.⁸ The Agreements are designed so that they prohibit RTD from conducting freight operations⁹ and from assigning any rights to do so to any third party.¹⁰ The Agreements also provide that UP's ability to conduct rail operations over its own tracks takes precedence over any work to be done on behalf of RTD on the RTD rights-of-way.¹¹ Finally, all of RTD's plans for construction of its lines are subject to UP's approval.¹² These provisions, all of which give priority to UP's freight common carrier operations over RTD's commuter rail operations, will ensure that UP can fulfill its common carrier obligations.

Operations, Dispatching, and Maintenance of the Lines. As noted above, under the Agreements, once construction of the commuter rail system commences, RTD and UP will conduct distinct operations on separate but adjacent and contiguous tracks on their own rights-of-way. On the Gold Line Segment, UP will continue to operate on its current track.¹³ On the East Corridor Segment, UP's track will be relocated to accommodate RTD's line.¹⁴ According to the

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because UP will continue to operate over its own track on its own property and RTD will occupy the adjacent, but separate, property, which will have been carved out of UP's right-of-way." Motion To Dismiss at 6.

⁷ See Motion to Dismiss at 5.

⁸ See Notice of Exemption, Ex. 3 at H-7, Ex. 4 at H-7.

⁹ See Notice of Exemption, Ex. 2 at 26, Ex. 3 at F-5, Ex. 4 at F-4.

¹⁰ See id., Ex. 3 at H-13, Ex. 4 at H-16.

¹¹ See id., Ex. 3 at D-35, Ex. 4 at D-40.

¹² See id., Ex. 3 at D-8, Ex. 4 at D-8.

¹³ See id. at 2.

¹⁴ See id. at 2.

Agreements, UP and RTD are also each responsible for dispatching¹⁵ and maintenance¹⁶ of their own rail corridors.

The Board has found that agreements that govern operations of freight and commuter rail lines are permissible even when the freight and commuter rail operations take place over the same track, and the passenger rail carrier, rather than the freight rail carrier, is responsible for track maintenance. See MTA 2007 Decision; see also MTA 2008 Decision: Utah Transit Auth.—Acquis. Exemption—Union Pac. R.R., FD 35008 (STB served July 23, 2007) (UTA). Here, because UP and RTD will each conduct separate operations, dispatching, and maintenance over their own tracks, the likelihood of interference with UP's common carrier obligations is even less than in the MTA 2007 Decision, the MTA 2008 Decision, and UTA.

Relocation of East Corridor Segment. The terms of the Relocation Agreement apportion the design work between RTD and UP.¹⁷ However, according to the Relocation Agreement, all design work will be subject to UP's approval.¹⁸ The Relocation Agreement also discusses the sharing of construction operations between the parties,¹⁹ with RTD bearing the cost of the relocation of the East Corridor Segment.²⁰ Finally, the Agreements state that UP will not transfer the East Corridor Segment to RTD until the relocation of its line is complete and operational.²¹

Based on this record, we find that the proposed transaction is consistent with State of Maine and that the acquisition of the railroad assets by RTD is not the acquisition of a railroad line under 49 U.S.C. § 10901(a)(4). Because UP will retain its own rights-of-way and track separate from RTD's, and because the terms of the transaction will protect UP against undue interference with its common carrier obligation, the acquisition will not cause RTD 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 RTD'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.

¹⁵ See id., Ex. 6 at 6, Ex. 7 at 6.

¹⁶ See id., Ex. 6 at 6, Ex. 7 at 6.

¹⁷ See id., Ex. 5 at 6.

¹⁸ See id., Ex. 5 at 7.

¹⁹ See id., Ex. 5 at 10.

²⁰ See id., Ex. 5 at 10.

²¹ See id., Ex. 2 at 27.

It is ordered:

1. RTD'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 Mulvey, and Commissioner Nottingham.