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SERVICE DATE – DECEMBER 24, 2014

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35866

MASSACHUSETTS DEPARTMENT OF TRANSPORTATION—ACQUISITION
EXEMPTION—CERTAIN ASSETS OF HOUSATONIC RAILROAD COMPANY, INC.

Digest:¹ The Massachusetts Department of Transportation (MassDOT) does not need Board authorization to acquire certain physical railroad assets from Housatonic Railroad Company, Inc. (HRRC) and Maybrook Railroad Company (MRC), because under the proposed transaction, HRRC would retain the legal obligation to provide freight rail service and MassDOT would not be able to interfere unreasonably with that service. However, the Board requires additional information in order rule on the motion to dismiss with respect to MassDOT's proposed acquisition of passenger rights and whether MRC is a necessary party to this proceeding. MassDOT is directed to submit the additional information the Board describes in this decision within 30 days of the service date of this decision.

Decided: December 24, 2014

The Board is granting in part the motion filed by the Massachusetts Department of Transportation (MassDOT) to dismiss its notice of exemption filed in this proceeding to acquire physical assets and passenger rights currently belonging to Housatonic Railroad Company, Inc. (HRRC) and Maybrook Railroad Company (MRC). We find that 49 U.S.C. § 10901 does not apply to the sale of the physical assets and right-of-way here. However, the Board is unable to determine, based on the record before it, whether § 10901 applies to the transfer of passenger rights involved in this transaction. The Board, therefore, directs MassDOT to file supplemental evidence, as specified below, within 30 days of the service date of this decision in order to allow the Board to fully consider and rule on the passenger rights issue.

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).

BACKGROUND

On October 16, 2014, MassDOT filed a verified notice of exemption under 49 C.F.R. § 1150.31 to acquire from HRRC and MRC certain railroad assets, including the railroad right-of-way and track (collectively, the Railroad Assets), comprising the “Berkshire Line,” which passes through western Massachusetts, extending from approximately milepost 50.0 at the Massachusetts-Connecticut border at Sheffield, Mass., to a connection with CSX Transportation, Inc., at approximately milepost 86.3 at Pittsfield, Mass. (the Line). Simultaneously, MassDOT filed a motion to dismiss the notice, asserting that the transaction does not require Board authorization because MassDOT would not become a common carrier as a result of the transaction. MassDOT requests that the Board expeditiously review and act upon the motion, so that the underlying transaction may be consummated as soon as possible but, in any event, before December 31, 2014.

MassDOT states that the acquisition of the Railroad Assets is intended to facilitate the Commonwealth’s long-term plans to restore regional passenger service linking the New York City metropolitan area, and the Northeast Corridor megalopolis generally, with the Berkshire region of western Massachusetts. MassDOT states that MRC owns the land that comprises the right-of-way and the bridges and “line side structures” along the Line and that HRRC owns the track, track material, and other railroad property on the right-of-way. According to MassDOT, HRRC possesses the common carrier rights over the Line and currently operates over it.

MassDOT asserts that in this transaction it would acquire the physical assets and right-of-way from MRC and HRRC, and that HRRC would retain an exclusive, irrevocable, perpetual, assignable, divisible, licensable, and transferable freight rail operations easement (the Freight Easement), which would allow HRRC to serve current and future freight customers, as well as interchange with all current and future freight carriers whose lines connect with this Line. MassDOT also states that it would acquire neither the right nor the ability to provide railroad common carrier service and would be contractually precluded from unduly interfering with HRRC’s provision of freight common carrier service over the Railroad Assets. MassDOT asserts that it will enter into an operating agreement with HRRC, which would, among other things, govern capital improvements, maintenance, and day-to-day railroad operations over the Railroad Assets (the Operating Agreement).² This Operating Agreement contemplates the commencement of passenger service by MassDOT or its third-party designee at some future date, after MassDOT has completed the necessary construction and upgrades.

² In its motion to dismiss, MassDOT states that there is an operating agreement between the Massachusetts Bay Transportation Authority, MassDOT, and HRRC. Mot. to Dismiss 15. The parties named in and the signatories to the agreement provided as Exhibit C to the motion to dismiss, however, are MassDOT and HRRC.

Notice of the exemption was served and published in the Federal Register on October 31, 2014 (79 Fed. Reg. 64,883). On November 7, 2014, the Board received comments from the Brotherhood of Railroad Signalmen and the Brotherhood of Maintenance of Way Employees Division/IBT (collectively, the Unions). Although the Unions state that they continue to oppose the State of Maine doctrine on which MassDOT relies in its motion to dismiss, see Me. Dep't of Transp.—Acquis. & Operation Exemption—Me. Cent. R.R. (State of Maine), 8 I.C.C. 2d 835 (1991), they do not oppose the transaction here because HRRC would continue to be responsible for maintenance-of-way, signal, and dispatch work for the line being conveyed.

For the reasons discussed below, the Board grants the part of MassDOT's motion to dismiss related to MassDOT's acquisition of the physical railroad assets and requests additional information from MassDOT regarding its acquisition of passenger rights.

DISCUSSION AND CONCLUSIONS

MassDOT's motion to dismiss raises two issues. The first is whether our regulatory approval is required for MassDOT to acquire the track, right-of-way, and other physical assets comprising the Berkshire Line, where HRRC would retain a permanent, exclusive, and irrevocable easement to conduct common carrier freight rail operations. The second issue is whether our regulatory approval is required for MassDOT to acquire passenger rights over the Line and over certain rail lines in Connecticut.

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 the carrier selling the physical assets comprising a rail line retains an exclusive, permanent easement to permit it to continue to provide common carrier freight service and has sufficient control over the line to carry out its common carrier obligations, the Board (and its predecessor agency, the Interstate Commerce Commission) typically has found that authorization is not required and that ownership of the line remains with the selling carrier for purposes of § 10901(a)(4). See State of Maine, 8 I.C.C. 2d. at 836-37; Mich. Dep't of Transp.—Acquis. Exemption—Certain Assets of Norfolk S. Ry., FD 35606, slip op. at 3 (STB served May 8, 2012); Mass. Dep't of Transp.—Acquis. Exemption—Certain Assets of CSX Transp., Inc., FD 35312, slip op. at 6 (STB served May 3, 2010), aff'd sub nom. Bhd. of R.R. Signalmen v. STB, 638 F.3d 807 (D.C. Cir. 2011).

Acquisition of the Physical Railroad Assets. As noted above, HRRC would retain an exclusive, permanent Freight Easement to allow it to serve current and future freight customers, as well as interchange with all current and future freight carriers whose lines connect with the Line at issue here. Pursuant to the Operating Agreement, HRRC's rights can be terminated permanently only pursuant to a Board abandonment proceeding. Furthermore, as long as HRRC

remains the exclusive user of the Line, HRRC would be responsible for dispatching, maintenance, and inspection, subject to agreed-upon track upkeep standards. There are also safeguards in the Operating Agreement to protect HRRC's Freight Easement over the Line after MassDOT commences passenger rail service and HRRC is no longer the exclusive user of the Line.

Because HRRC would continue to have sufficient access to the physical assets to conduct its freight operations, we are satisfied that this transaction would not impact HRRC's ability to continue to fulfill its common carrier obligations. Upon review of the terms of the transaction, the Board is also satisfied that MassDOT's acquisition of the physical railroad assets is consistent with the State of Maine precedent. No Board authorization, therefore, is required for MassDOT's purchase of the physical railroad assets, and the motion to dismiss will therefore be granted with respect to the sale of the physical assets at issue.³

Acquisition of Passenger Rights by MassDOT. Under 49 U.S.C. § 10501(a)(2)(A), the Board has jurisdiction over transportation by rail carriers (including passenger rail carriers) (1) between a place in a state and a place in another state, and (2) between a place in a state and another place in the same state, as long as that intrastate transportation is carried out as "part of the interstate rail network." Cal. High-Speed Rail Auth.—Construction Exemption—in Merced, Madera & Fresno Cntys., Cal. (California High-Speed Rail), FD 35724, slip op. at 11 (STB served June 13, 2013); DesertXpress Enters., LLC—Pet. for Declaratory Order (DesertXpress), FD 34914 (STB served May 7, 2010). In California High-Speed Rail, the Board found that a 65-mile passenger rail line within the state of California was part of the interstate rail network due in large part to its "extensive interconnectivity with Amtrak." Id. at 12. In DesertXpress, the Board found that DesertXpress's construction and operation of a proposed 200-mile interstate passenger system, over which DesertXpress would provide interstate common carrier rail transportation between a place in California and a place in Nevada, was within the Board's jurisdiction under § 10501 and required Board authorization under § 10901.

³ In its motion to dismiss, MassDOT states that, because its planned passenger service will not take place until the future, the 2014 Operating Agreement "may have to evolve to reflect emerging circumstances that cannot now be readily anticipated," Mot. to Dismiss 17, and that "it expects that the particulars of the 2014 Operating Agreement may (and, indeed, should) be revisited and adjusted over the years," id. at 27. The Board's determination with respect to the transfer of the physical railroad assets extends only to the agreements and transaction as presented in this motion to dismiss, and, depending on the nature of the changes to those agreements, the transaction could result in MassDOT requiring Board authorization. To the extent that any changes to the agreements or transaction could potentially unduly interfere with HRRC's ability to provide common carrier freight service, MassDOT is required to file those amendments with the Board.

Based on the information before the Board, we are unable to determine whether § 10901 applies to MassDOT's proposed acquisition of passenger rights. Specifically, the nature of the passenger rights that MassDOT would be acquiring and MassDOT's intended use of those passenger rights are not fully explained. In its filing, MassDOT expresses its intent to restore regional passenger train service linking the New York City metropolitan area and the Northeast Corridor megalopolis generally with the Berkshire region of western Massachusetts,⁴ a service that appears to be interstate in nature. The Railroad Assets that MassDOT is acquiring for the purposes of providing future passenger service appear to extend all the way to the Massachusetts-Connecticut border with no rail station present at that location. Further, MassDOT explicitly contemplates "inter-state coordination" in connection with the establishment of its passenger service.⁵ Finally, the agreements that MassDOT provides with its motion to dismiss also expressly reference a "HRRC Passenger Operating Rights Transfer Document" and state that MassDOT acquired passenger rights in Connecticut in the "Passenger Operating Rights Transfer Document."⁶

It appears that, based on the information MassDOT has provided, MassDOT may be acquiring passenger rights in connection with the proposed transaction that are part of the interstate rail network and, therefore, require Board authorization. MassDOT has not demonstrated that the passenger rights would allow only "mass transportation provided by a local government authority," see 49 U.S.C. § 10501(c)(2)(A), or otherwise fall within an exception to the Board's jurisdiction. See e.g., N.J. Ass'n of R.R. Passengers—Pet. for Declaratory Order—Princeton Branch, FD 35745 (STB served July 25, 2014). Therefore, the Board directs MassDOT to file the supplemental information requested below by January 23, 2014.

⁴ See Mot. to Dismiss 5, 16. Additionally, while MassDOT states that regularly-scheduled passenger train service will not start until the first phase of improvements to the Line is complete, section 3.2(b)(ii) of the Operating Agreement provides MassDOT with the right to occasionally use the Line to transport passengers in connection with civil, sports, or other events. It is not clear whether the occasional use would be purely intrastate or would also include events located outside of Massachusetts.

⁵ Id. at 16.

⁶ See Mot. to Dismiss, Ex. A (Section 3.2 of the Purchase and Sale Contract); Ex. C (Introduction and Recitals of the 2014 Operating Agreement). MassDOT, however, did not include any of the documents that purportedly transfer passenger rights in Massachusetts and Connecticut to MassDOT in its filings with the Board.

We direct MassDOT to file supplemental information clearly explaining the nature of the passenger rights that it proposes to acquire in connection with this transaction and why the transfer of those passenger rights does not require Board authorization under 49 U.S.C. § 10901. We will make a final determination based on the supplementary information submitted.

Necessity of MRC as a Party to the Proceedings. In its motion to dismiss, MassDOT contends that MRC is not a rail carrier for purposes of the present transaction and, therefore, is not an essential party to the notice of exemption. MassDOT asserts that MRC acquired its interest in the subject property from HRRC in 2013 and that it did not acquire any common carrier rights in that transaction. See Housatonic R.R., Maybrook R.R., & Housatonic Transp. Co.—Intra-Corporate Family Transaction Exemption (Housatonic—Transaction Exemption), FD 35723 (STB served Mar. 22, 2013). The Board, however, has insufficient information to make a determination as to whether MassDOT is required to include MRC as a party to this proceeding as it relates to the transfer of passenger rights.

In Housatonic—Transaction Exemption, HRRC, MRC and Housatonic Transportation Company sought an exemption for an intra-corporate family transaction, in which HRRC would transfer a “rail line” to MRC that HRRC would continue to operate.⁷ In the 2013 proceeding, HRRC and MRC filed an operating agreement providing that, in the transfer of a “railroad line” from HRRC to MRC, HRRC would retain only its common carrier freight service obligations.⁸ The release deed between HRRC and MRC in connection with that transaction, which was provided to the Board as part of the present proceeding, states that MRC received all of HRRC’s right, title, and interest in the property, with the exception of (1) all rail, ties, anchors, tie plates, switch timbers, turnouts and signals affixed to the property and (2) HRRC’s retained perpetual and exclusive common carrier *freight* operating rights.⁹ Neither the release deed nor the operating agreement from the 2013 proceeding expressly addresses the transfer of passenger service rights.¹⁰ The agreements, however, transfer all rights and property other than those

⁷ The notice of exemption described MRC as a “non-operating’ rail carrier.” Verified Notice of Exemption 1, Housatonic R.R., Maybrook R.R., & Housatonic Transp. Co.—Intra-Corporate Family Transaction Exemption, FD 35723 (filed Mar. 7, 2013).

⁸ Id. at Ex. B.

⁹ Mot. to Dismiss Ex. A.

¹⁰ MassDOT’s filings in the current proceeding indicate that passenger rights over the Line exist. If such rights were part of the 2013 transaction, however, it was not disclosed to the Board during the 2013 proceeding and, therefore, was not considered in the Board’s decision to issue the verified notice of exemption, served and published in the Federal Register on March 22, 2013 (78 Fed. Reg. 17,763). To the extent that any passenger rights were conveyed in the 2013 proceeding, the verified notice of exemption does not cover the transfer of such rights.

expressly listed, and passenger rights are not expressly listed as exempted, suggesting that the passenger rights were transferred to MRC. In addition, while MassDOT describes MRC in its motion to dismiss as a “railroad asset-owning company” that lacks the right to provide common carrier service over the Line,¹¹ the parties to the 2013 proceeding described MRC as a “‘non-operating’ rail carrier.” Housatonic—Transaction Exemption, slip op. at 2.

Based on the information available to date, it is not possible to determine whether MRC received any passenger rights from HRRC in the 2013 proceeding. As a result, the Board cannot determine whether MRC is a necessary party to this proceeding involving the transfer of passenger rights. Supplemental information clarifying the 2013 transaction is, therefore, required in order for the Board to make that determination, and the Board requests that MassDOT obtain documentation clarifying the 2013 transaction from HRRC and MRC and file that supplemental information with the Board no later than 30 days from the service date of this decision.

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

It is ordered:

1. The motion to dismiss the notice filed by MassDOT is granted, in part, as described above.
2. MassDOT is directed to file by January 23, 2014, the supplemental information described in this decision.
3. This decision will be effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman.

¹¹ Id. at 6.