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SERVICE DATE - FEBRUARY 24, 1998

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33529

CITY OF CHARLOTTE, NORTH CAROLINA—ACQUISITION EXEMPTION—
CERTAIN ASSETS OF THE NORTH CAROLINA RAILROAD COMPANY

Decided: February 11, 1998

Through a transaction that was the subject of a notice of exemption under 49 CFR 1150-Subpart D—Exempt Transactions, served on December 29, 1997, and published on December 30, 1997 (62 FR 67936), the City of Charlotte, NC (the City), proposes to acquire from the North Carolina Railroad Company (NCR) a 1.1-mile line of railroad, which is located between 2nd Street and 12th Street in Charlotte, Mecklenburg County, NC. The City states that it is purchasing the line to construct and operate a passenger rail transit system. The transaction was scheduled to be consummated after December 18, 1997, the effective date of the exemption. Concurrent with its filing of the verified notice invoking the exemption, the City filed a motion to dismiss the notice of exemption for lack of jurisdiction, asserting that the transaction is not subject to the Board's jurisdiction. We will grant the motion to dismiss.

BACKGROUND

The City is acquiring the line subject to a preexisting lease between NCR and the Norfolk Southern Railway Company (NS), whereby NS had provided all rail service on the line.¹ The City states that, under the proposed Purchase Agreement, it will acquire substantially all of NCR's right, title and interest in the physical assets of the line. The parties will also enter into an agreement by deed that transfers NCR's interest to the City, but retains for NCR an exclusive rail freight operating easement on the line.² Under these agreements, NS will assertedly continue all of its existing rights and obligations to provide rail service, and NCR will allegedly retain its residual common carrier obligation. The parties state, however, that the City will obtain no rights or ability to conduct freight rail operations or provide freight service on the line.

¹ The lease was executed in 1895 by NCR and Southern Railway Company (NS's predecessor). See Norfolk Southern Railway Company and Atlantic and East Carolina Railroad Company—Lease and Operation Exemption—North Carolina Railroad Company, Finance Docket No. 32820 (ICC served Dec. 22, 1995).

² The City submitted copies of the proposed Purchase Agreement and deed, as exhibits to its motion to dismiss.

The City notes that no freight operations have been conducted on the line for over two years, and that no future freight operations are anticipated. The City expects that NS and NCRR will shortly seek authority under 49 U.S.C. 10903 for NS to discontinue service and NCRR to abandon the line, thus terminating their common carrier obligations. While the City will obtain an option to acquire the NCRR's freight easement, it states that it is unlikely that it would elect to exercise that option, considering that NCRR intends to abandon the line.

The City asserts that the Purchase Agreement and deed show that, after the transaction is consummated, it will not conduct freight operations or hold itself out to the public to provide freight service.

DISCUSSION AND CONCLUSIONS

The question presented here is whether our regulatory approval is required for the proposed transfer of the NCRR's line to the City. 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. We have declined to assert jurisdiction over the transfer of a right-of-way or other fixed assets to an entity when the railroad retains a permanent, unconditional easement to perform all of the common carrier freight operations over the line.³ In making a determination here, we will look to whether NCRR retained a permanent, unconditional easement and whether it has sufficient interest and control over the line so that it cannot be prevented from carrying out its common carrier obligation.

Under the proposed Purchase Agreement, the City will acquire certain real property and track, but will not acquire the property and other contractual rights necessary to conduct freight operations or control common carrier freight operations on the line. The Purchase Agreement also specifies that property to be transferred is subject to the prior lease with NS. The deed transferring the property states that NCRR will retain "a perpetual, exclusive easement over an[d] across the real property . . . which is conveyed by this Deed . . . for the purposes of providing common carrier rail freight service to or from or along any of the Property." These documents show that NCRR will retain the property and contractual rights as lessor of the line and that NS will, in turn, retain all rights necessary to meet its common carrier obligation as lessee.

After acquiring the physical assets of the line, the City will not acquire any right or ability to provide or control rail freight transportation. Nor does it not appear that the City could unreasonably interfere or interrupt any freight rail operations by NS. Moreover, no freight service is

³ See Southwest Ohio Regional Transit Authority—Acquisition Exemption—Certain Assets of The Indiana & Ohio Railway Company, STB Finance Docket No. 33524 (STB served Dec. 24, 1997); Consolidated Rail Corporation—Petition for Declaratory Order—C&P Dock, STB Finance Docket No. 33296 (STB served Dec. 13, 1996); Los Angeles County Transportation Commission—Petition for Exemption—Acquisition from Union Pacific Railroad Company, Finance Docket No. 32374 (STB served July 23, 1996); and Maine, DOT—Acq. Exemption, ME. Central R. Co., 8 I.C.C.2d 835 (1991).

currently being performed on the line, none is expected in the future, and the parties say that NCRR and NS will seek Board authority to abandon and discontinue service.

We see no basis for finding that our approval is required for the transaction or finding that the City will become a rail carrier under our jurisdiction. After the City acquires the physical assets of the right-of-way, NS may continue to provide rail common carrier freight service over the line and NCRR will continue to have the residual common carrier obligation. The record shows that the City does not intend to provide freight rail service. Nor does the record show that the City intends to interfere with or impede the ability of NS and NCRR to provide service if requested.

Accordingly, we will grant the motion to dismiss the notice of exemption.

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

It is ordered:

1. The City's motion to dismiss its notice of exemption is granted.
2. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary