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SERVICE DATE - DECEMBER 24, 1997

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33524

SOUTHWEST OHIO REGIONAL TRANSIT AUTHORITY—ACQUISITION  
EXEMPTION—CERTAIN ASSETS OF THE INDIANA & OHIO RAILWAY COMPANY

Decided: December 22, 1997

In a notice of exemption under 49 CFR 1150, Subpart D—Exempt Transactions, served and published on December 11, 1997 (62 FR 65306), the Southwest Ohio Regional Transit Authority (SORTA) proposes to acquire the 9.84-mile Blue Ash Line from the Indiana & Ohio Railway Company (I&O). The Blue Ash Line, which is located northeast of Cincinnati, runs between milepost 49.6, north of McCullough Yard, and milepost 39.76, near Fields-Ertel Road, in Hamilton County, OH. The transaction is scheduled to be consummated before December 31, 1997. Concurrently, SORTA filed a motion to dismiss the proceeding for lack of jurisdiction, asserting that the transaction is not subject to the Board's jurisdiction. We will grant the motion to dismiss.

BACKGROUND

SORTA states that it is a political subdivision of the State of Ohio and was formed to establish an expanded public transit system for southwest Ohio, including Hamilton County, OH (which includes the City of Cincinnati). SORTA states that it proposes to enter into a "Purchase and Sale Agreement" to acquire substantially all of I&O's right, title and interest in the Blue Ash Line to allow for the construction and operation of a passenger rail transit system. The parties also intend to execute a deed that transfers I&O's property interest in the line to SORTA and reserves for I&O a permanent and exclusive easement by which it will be able to conduct common carrier freight operations and freight service on the line.<sup>1</sup> The parties will also enter into an "Operating Agreement," which specifies the terms and conditions for freight and passenger operations for the Blue Ash line.<sup>2</sup>

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<sup>1</sup> Rail freight traffic on the Blue Ash Line was approximately 2,645 cars in 1995, 2563 cars in 1996 and 1,612 cars in the first nine months of 1997. There are currently 15 active shippers on the line.

<sup>2</sup> SORTA submitted copies of the Purchase and Sale Agreement, Deed, and Operating Agreement as exhibits to its motion to dismiss.

The Operating Agreement provides that I&O will operate freight service on the line during a designated, contiguous 5-hour "Freight Operating Period" between 10:00 P.M. and 6:00 A.M. on each day from Sunday evening to Friday morning. SORTA will establish the Freight Operating Period in its sole discretion and may change it on 15 days' notice for any particular day. SORTA will have exclusive use of the right-of-way for passenger service during a "Passenger Operating Period" consisting of the remaining 19 hours, each Monday through Friday, inclusive, and for 24 hours on Saturday and at least 22 hours on Sunday. During the Passenger Operating Period, the I&O will not be authorized to operate trains or conduct freight rail service over the right-of-way without special permission from the dispatcher. Before passenger operations are to be commenced, I&O will maintain and repair the line. Afterwards SORTA will have the exclusive right to conduct passenger operations and to maintain and repair the line. If SORTA does not maintain the line, I&O has the right to maintain the line.

The Operating Agreement further provides that, after passenger operations are commenced, SORTA will manage the Blue Ash Line. However, I&O will direct and control its operations during the Freight Operating Period. Before passenger operations commence, I&O will dispatch all trains. After passenger operations begin, SORTA will dispatch all freight and passenger trains. The agreement indicates that SORTA may not operate passenger service over the line during the Freight Operating Period without permission from the dispatcher. The agreement also specifies that passenger rail service will have priority over freight operations. SORTA also has the right to construct one or more tracks or make other improvements to allow light rail or other means of passenger transportation. SORTA is further required to designate tracks for I&O to use for freight service during and after redesign and construction of track.

SORTA asserts that these agreements show that it will not conduct freight operations or hold itself out to the public as willing to provide freight service. Assertedly, I&O will retain the property and contractual rights to continue freight operations within the designated Freight Operating Period, ensuring continued service to shippers.

SORTA certified that it served copies of its notice of exemption and motion to dismiss on all shippers located on the line and other interested persons.

#### DISCUSSION AND CONCLUSIONS

The question presented here is whether our regulatory approval is required for the proposed transfer of the I&O's Blue Ash Line to SORTA. The acquisition by a noncarrier entity 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, however, 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.<sup>3</sup> In making a determination here, we will look to whether I&O has retained a sufficient interest and control over the line so that it may continue to carry out its common carrier obligation.

The proposed agreement transferring I&O's interest in the Blue Ash Line specifies that I&O "desires to retain an easement over the Blue Ash Line limited to the exclusive purpose of providing rail freight service . . . along the Blue Ash Line . . . , it being the intention of the parties that I&O remain, and that SORTA not become, the rail carrier subject to the ICC Termination Act of 1995 . . . ." In addition, the deed recites that I&O "reserves for itself . . . a perpetual, exclusive easement over and across the Property . . . for the purpose of providing common carrier rail freight service to or from or along any part of the Property . . . ."

The Operating Agreement does not appear to unreasonably restrict I&O's rail operations. Nor does the agreement impede I&O's ability to perform rail freight common carrier service. The agreement establishes a Freight Operating Period that apparently is sufficient in frequency and duration for I&O to continue to meet its common carrier obligation to provide service to shippers. The people in the best position to make that determination are the shippers who depend on the I&O for service. All 12 shippers on the line have been served with a copy of the motion to dismiss. None has objected.<sup>4</sup> We may reasonably rely on the acquiescence of those who rely on the I&O for service in finding that these agreements do not impede I&O's common carrier obligation to provide rail service over the Blue Ash Line.

After passenger service begins, SORTA will be responsible for maintenance and dispatching on the Blue Ash Line and passenger service will take priority over freight service. SORTA will also have authority to construct new track. However, the parties have negotiated other terms in the agreement that are designed to provide that I&O's freight operations will not be impaired or obstructed.

We see no basis for finding that our approval is required for the transaction or that SORTA will become a rail carrier under our jurisdiction. After SORTA acquires the right-of-way, I&O will continue to provide rail common carrier freight service to shippers on the Blue Ash Line within the

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<sup>3</sup> See Consolidated Rail Corporation—Petition for Declaratory Order—C&P Dock, STB Finance Docket No. 33296 (STB served Dec. 13, 1996); Sacramento-Placerville Transportation Corridor Joint Powers Authority—Acquisition Exemption—Certain Assets of Southern Pacific Transportation Company, STB Finance Docket No. 33046 (STB served Oct. 28, 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).

<sup>4</sup> Fibre Glass Evercoat Company, Inc., a shipper on the line, filed a protest, which it subsequently withdrew.

designated Freight Operating Period. During that period, I&O will direct and continue to provide its own freight service, as it is required to do absent its obtaining abandonment authority. The record clearly shows that SORTA does not intend to provide freight rail service. Nor do the agreements interfere with or impede I&O's service obligations to shippers to continue to provide freight service.

Accordingly, we will grant the motion to dismiss.

SORTA has requested expedited handling of its motion to dismiss so the transaction can be consummated on or before December 31, 1997. To accommodate this request, this decision will be effective on the date of service.

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

It is ordered:

1. SORTA'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