

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35606

STATE OF MICHIGAN DEPARTMENT OF TRANSPORTATION—ACQUISITION
EXEMPTION—CERTAIN ASSETS OF NORFOLK SOUTHERN RAILWAY COMPANY

Digest:¹ The State of Michigan Department of Transportation (MDOT) does not need Board authorization to acquire certain assets of a rail line in Wayne, Washtenaw, Jackson, Calhoun and Kalamazoo Counties, Mich. The seller, Norfolk Southern Railway Company, will retain the legal obligation to provide freight service and MDOT will not be able to interfere unreasonably with that service. Therefore, MDOT will not be considered a rail carrier under Federal law.

Decided: May 3, 2012

In this decision, the Board grants the motion of the State of Michigan Department of Transportation (MDOT) to dismiss the notice of exemption filed by MDOT in this proceeding. We find that 49 U.S.C. § 10901 does not apply to this sale of the physical assets of a rail line to a state agency because the selling rail carrier will retain an exclusive, perpetual easement to fulfill its freight rail common carrier obligations on the rail line, and the purchaser cannot unduly interfere with the freight rail service.

BACKGROUND

On March 30, 2012, MDOT, a noncarrier, filed a notice of exemption under 49 C.F.R. § 1150.31 to acquire from Norfolk Southern Railway Company (NSR) certain right-of-way and trackage extending from (1) approximately milepost 7.60 at Townline in Wayne County, Mich. to approximately milepost 119.60 at CP Baron in Calhoun County, Mich., a distance of approximately 112.0 miles; and (2) approximately milepost 121.39 in Gord, Calhoun County, to approximately milepost 145.60 in Kalamazoo, Kalamazoo County, Mich., a distance of approximately 24.21 miles (collectively, the Line).² MDOT states that it is acquiring the

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

² According to the notice of exemption, NSR would not transfer to MDOT certain real property and personal property otherwise part of the Line, including Wayne Yard and Willow Run Yard.

physical assets of the Line in order to facilitate significant improvements on the Line, with funds from two Federal Railroad Administration (FRA) grants under its High-Speed Intercity Passenger Rail Program, totaling more than \$346 million, for high-speed intercity passenger rail service to be provided by the National Railroad Passenger Corporation (Amtrak), while allowing NSR to provide freight rail service. MDOT states that NSR will retain “an exclusive, irrevocable, perpetual, assignable, divisible, licensable, and transferable freight operations easement,” which will allow NSR to continue to meet all of its common carrier freight rail obligations on the Line.

MDOT filed a motion to dismiss the notice of exemption, asserting that, under Maine Department of Transportation—Acquisition & Operation Exemption—Maine Central Railroad, 8 I.C.C.2d 835 (1991) (State of Maine), the proposed transaction does not require Board authorization under 49 U.S.C. § 10901, because MDOT will not become a common carrier as a result of the transaction. MDOT also argues that Board precedent subsequent to State of Maine permits MDOT to control the dispatching and maintenance duties to ensure reliable and efficient passenger rail service without harming freight operations. See Va. Port Auth.—Acquis. Exemption—Norfolk & Portsmouth Belt Line R.R., FD 35532 (STB served Aug. 1, 2011) (VPA); San Benito R.R.—Acquis. Exemption—Certain Assets of Union Pac. R.R., FD 35225 (STB served June 23, 2011) (San Benito); and Fla. Dept. of Transp.—Acquis. Exemption—Certain Assets of CSX Transp., Inc., FD 35110 (STB served Dec. 15, 2010) (FDOT). MDOT seeks expedited action and requests that the Board rule on its motion to dismiss no later than May 31, 2012, so that it can begin construction of the capital improvements on the Line as soon as possible.

THE TRANSACTION

Pursuant to a Purchase and Sale Agreement (PSA) with NSR, MDOT will acquire the Line to facilitate improvements for Amtrak’s existing intercity passenger rail service between Kalamazoo and Dearborn, Mich., while allowing NSR to provide common carrier freight rail service to current and future customers on the Line. MDOT will acquire NSR’s right, title and interest in the right-of-way, trackage and other physical assets (such as signboard and fiber optics) associated with the Line, subject to NSR’s retained “exclusive, irrevocable, perpetual, assignable, divisible, licensable, and transferable freight operations easement.” MDOT will use the funds from two FRA grants to acquire and upgrade the Line to enable Amtrak to operate 110-mph high-speed passenger trains in its Wolverine service across the Chicago-Detroit-Pontiac corridor. NSR currently operates approximately four through-trains, two to seven days per week, and six local trains, five to seven days per week, over the Line. In addition, MDOT states that Amtrak’s Wolverine service currently operates three daily round trips on the Chicago-Detroit-Pontiac corridor, and its Blue Water service (serving the Chicago-Port Huron corridor) operates one daily round-trip using the Kalamazoo-Battle Creek portion of the Line.

A Joint Operating Agreement (JOA) between NSR and MDOT will govern capital improvements, maintenance, and dispatching, reserving to NSR the exclusive right to operate

freight service over the Line. MDOT states that, pursuant to the JOA, MDOT will upgrade the Line west of Ypsilanti, Mich., to allow both high-speed passenger and freight rail service. Additionally, MDOT will double-track the Line east of Ypsilanti, with high-speed passenger trains using the south track, and freight rail trains using the north track. The proposed improvements will also include construction of two cross-overs to be used for freight rail service. The JOA will require MDOT to maintain the Line to certain standards, and MDOT will bill NSR quarterly for those maintenance services. NSR will have the right to assume maintenance of the Line should MDOT fail to meet its maintenance obligations, pursuant to the default provisions of the JOA. The terms of the JOA state that NSR will initially provide dispatching services until the proposed improvements are complete. Upon completion of the improvement project, MDOT will be responsible for dispatching both passenger and freight rail service through a contractor, which will initially be Amtrak. After this initial period, MDOT will be free to transfer dispatching responsibilities to a different contractor.³ MDOT states that the JOA will take effect upon the closing of the proposed transaction.

DISCUSSION AND CONCLUSIONS

The question at issue here is whether our regulatory approval is required for MDOT to acquire the Line, where NSR retains a permanent, exclusive, and irrevocable easement to conduct common carrier freight rail operations. The acquisition of an active rail line and the common carrier obligation that goes with it ordinarily requires Board approval. Where the acquiring entity is a noncarrier, the standard for approval is set out in 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). However, State of Maine and its progeny hold that the sale of the physical assets of a rail line by a carrier to a state or other public agency does not constitute the sale of a railroad line within the meaning of § 10901 when the selling carrier: (1) retains a permanent, exclusive freight rail operating easement giving it the right and common carrier obligation to provide freight rail service on the line; and (2) has sufficient control over the line to carry out its common carrier operations. When the seller retains the common carrier obligation and control over freight rail service, the Board has determined that ownership of the railroad line remains with the selling carrier for purposes of § 10901(a)(4). For a transaction to fall within this exception, however, the terms of the sale must protect the selling carrier from undue interference by the purchaser or third-party designee in the provisioning of common carrier freight rail service. Mass. Dep't. of Transp.—Acquis. Exemption—Certain Assets of CSX Transp., FD 35312, slip op. at 5 (STB served May 3, 2010) (MassDOT), aff'd sub nom. Bhd. of R.R. Signalmen v. STB, 638 F.3d 807 (D.C. Cir. 2011). Too much control over the freight rail carrier will result in MDOT becoming a rail carrier itself. Therefore, the Board looks to whether NSR would obtain a permanent, exclusive freight

³ Ex. A at 4.

easement and would have sufficient interest in and control over the Line to permit it to carry out its common carrier freight rail obligation.

The parties' agreements provide that MDOT will acquire the Line, while NSR will retain an exclusive, irrevocable, perpetual, assignable, divisible, licensable, and transferable freight easement over the Line in order to provide common carrier freight rail operations. NSR will not transfer its common carrier obligation to MDOT, and MDOT will not hold itself out as a common carrier performing freight rail service. However, the issue of whether the railroad has retained an exclusive easement for the continuation of freight rail service does not, by itself, resolve the matter. The Board also takes into account the relevant agreements to determine whether there are undue impediments to the continuation of common carrier freight rail service. MassDOT, slip op. at 12. As discussed below, it appears that the terms of the PSA and JOA do not allow MDOT to unduly interfere with NSR's ability to carry out its common carrier freight rail obligation.

As part of MDOT's planned improvements, after the acquisition of the Line, MDOT will construct a double-tracked mainline east of Ypsilanti. The JOA provides that NSR will conduct freight rail operations on the northern track and that the southern track will be used exclusively for passenger rail and commuter rail service.⁴ However, the JOA allows MDOT to use portions of the northern track for meets and passes of passenger rail service, and it allows NSR to access the southern track in the event of an emergency, or for required maintenance on the northern track, as the dispatcher reasonably determines.⁵ The JOA also provides for two universal cross-overs to be constructed at or in the vicinity of milepost 21.7 and milepost 9.8. These cross-overs will allow NSR to serve existing or future customers located south of the mainline track.

According to the JOA, NSR should use "commercially reasonable efforts" to serve any new customers south of the southern mainline track at locations where they can be served by existing turn-outs. While that provision could be viewed as a burden on NSR's ability to provide freight rail service, that section also states that the provision is not to be interpreted as requiring NSR to perform any act that it reasonably demonstrates would constitute a violation of its common carrier freight rail obligation.⁶ We are satisfied that the construction of a double-tracked mainline east of Ypsilanti will not interfere with NSR's ability to fulfill its common carrier obligation. Here, the northern track will generally be used for freight rail service and NSR will have the right to cross over the southern track and access the southern track in certain circumstances to ensure continued freight rail service.

⁴ Ex. A at 10.

⁵ Ex. A at 11.

⁶ Ex. A at 9.

According to the JOA, dispatching responsibilities will transfer from NSR to a contractor of MDOT, once the planned construction is complete. The JOA states that dispatching will occur in accordance with the provisions of the JOA, ensuring that the dispatcher will use sound dispatching principles, taking into account the needs of both freight and passenger rail service.⁷ MDOT also notes that the dispatcher will be responsible for ensuring that the double-tracked mainline is dispatched in accordance with the uses specified in the JOA and will not be allowed to expand such uses. MDOT's control of dispatching will not impair or interfere with NSR's freight rail service.

The JOA further provides that MDOT will be responsible for track maintenance, but that NSR shall pay for maintenance of freight property to be kept in FRA Class I condition.⁸ The JOA states that MDOT will bill NSR for such services each calendar quarter. In the event MDOT fails to fulfill its maintenance obligation, NSR may provide for maintenance as it deems reasonable for freight rail service. This arrangement of maintenance obligations will allow NSR to continue to meet fully its common carrier obligation to provide freight rail service on the Line.

The Board has noted that placing dispatching and maintenance control in the hands of the acquiring noncarrier may be allowed when there is a legitimate business justification. See San Benito, slip op. at 4; FDOT, slip op. at 10. Here, MDOT is assuming control of dispatching and maintenance to improve high-speed passenger rail service while also preserving freight rail service. The transfer of dispatching responsibilities to MDOT's contractor will occur when MDOT completes its planned construction of a double-tracked mainline east of Ypsilanti and upgrades on the Line to accommodate high-speed passenger rail service. Like FDOT, MDOT is a public agency acquiring the Line to improve Amtrak's passenger rail service. Under these circumstances it is reasonable to place dispatching and maintenance responsibilities with MDOT (or MDOT's contractor) rather than NSR. FDOT, slip op. at 10. The Board is satisfied that this transaction is not being used to circumvent the railway labor laws, because there are legitimate business justifications for MDOT's assumption of the maintenance and dispatching duties.

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

⁷ Ex. A at 10, 23.

⁸ Ex. A at 16.

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

It is ordered:

1. MDOT'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 Begeman.