

SURFACE TRANSPORTATION BOARD<sup>1</sup>

DECISION

Finance Docket No. 32835

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES AND SOO LINE  
SYSTEM DIVISION, BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

v.

CP RAIL SYSTEM D/B/A SOO LINE RAILROAD COMPANY  
AND PLAZA-MAKOTI EQUITY ELEVATOR

Decided: May 28, 1997

The Brotherhood of Maintenance of Way Employees and Soo Line System Division, Brotherhood of Maintenance of Way Employees (BMWE or complainants) filed a complaint on December 6, 1995, alleging that respondents CP Rail System and the Soo Line Railroad Company (CP/Soo)<sup>2</sup> sold a 4-mile rail line between Plaza and Prairie Junction, ND (Plaza line) to Plaza-Makoti Equity Elevator (Plaza-Makoti) without our approval or exemption. BMWE contends that the sale is subject to our jurisdiction under 49 U.S.C. 10901 and that CP/Soo's failure to obtain approval or exemption of the transfer violated the Interstate Commerce Act.<sup>3</sup> Respondents CP/Soo and Plaza-Makoti replied. For the reasons outlined below, we find that the Plaza line is a line of railroad, not an exempt spur, but that its sale to Plaza-Makoti does not require the exercise of our jurisdiction under 49 U.S.C. 10901.

BACKGROUND

The Plaza line is a stub-ended 4-mile line consisting of 60-pound rail and terminating at Plaza, ND. Although it was constructed in 1906 as part of CP/Soo's intended westward rail expansion, no track extension beyond Plaza took place. Instead, CP/Soo in 1914 installed a "we" 4 miles east of Plaza at Prairie Junction, ND, where CP/Soo's through traffic was and is now routed. According to complainants, Plaza, ND is listed as an open and prepay station in the *Official Railroad Station List*, March 15, 1996, and CP/Soo has repeatedly included the Plaza line on its System Diagram Map (SDM) filed with the Board.

The sole shipper on the line is Plaza-Makoti Equity Elevator (Plaza-Makoti) located at Plaza. The elevator annually ships between 500 to 800 carloads of grain via CP/Soo on an as-needed basis. In January 1995, the elevator offered to purchase the line from CP/Soo in order to

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<sup>1</sup> The ICC Termination Act of 1995 (ICCTA) abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). This decision relates to a proceeding that was pending with the ICC prior to the ICCTA, and to functions that are subject to our jurisdiction pursuant to 49 U.S.C. 11101 (common carrier obligation) and 49 U.S.C. 11701 (investigate complaints). Therefore, this decision applies the law in effect prior to the ICCTA, and citations are to the former sections of the statute, unless otherwise indicated. See section 204(b)(1) of the ICCTA.

<sup>2</sup> The Soo Line Railroad Company is operated as part of CP Rail System. Defendants will be jointly described as CP/Soo.

<sup>3</sup> In the complaint, BMWE states that, as a result of CP/Soo's unauthorized line transfer, four BMWE members each lost the opportunity to work 53 days (424 man-hours each) on CP/Soo.

upgrade the track so that it could handle grain shipments in high capacity hopper cars.<sup>4</sup> In May 1995, CP/Soo sold the line to Plaza-Makoti for \$105,000, subject to a permanent trackage easement enabling CP/Soo to continue rail service for the elevator and any new shipper locating on the line. The agreement purported to give CP/Soo "the right to abandon its common carrier obligation" on the line and the option to continue to use its trackage easement. Under this arrangement, Plaza-Makoti and any new shippers on the line would pay for the line's maintenance costs. CP/Soo reserved the right to repurchase the line should the elevator wish to terminate the agreement.

BMW contends that the Plaza line fails to qualify for the spur track exemption in former 49 U.S.C. 10907(b) (now 49 U.S.C. 10906) because the 4-mile line was once part of CP/Soo's main line. According to complainants, the line is a line of railroad as confirmed by its inclusion in CP/Soo's SDM and by Plaza, ND continuing to be shown as a CP/Soo station for shipper purposes. BMW argues that, while only one shipper is presently located on the line, both the shipper and CP/Soo contemplate that additional shippers will eventually use the line.

CP/Soo and Plaza-Makoti contend that the line is a spur and, therefore, that its sale is not subject to our jurisdiction. CP/Soo indicates that it removed Plaza as an official station in its system in 1986 and has designated the 4-mile line as "yard trackage" in its tariff rules. CP/Soo, contending that BMW places undue emphasis on the SDM listing of the trackage, explains that the designation should not be viewed as dispositive because it was intended to provide full disclosure to the public.

According to CP/Soo, because the track in question is a spur, the railroad has no continuing common carrier obligation to provide rail service over the track. CP/Soo adds that, even if we find that the track is a line of railroad, the transaction is not subject to regulation because the railroad's common carrier obligation has not been affected.<sup>5</sup> The carrier argues that, if a common carrier obligation is found to exist over the line, the rights it retained in the sale to Plaza-Makoti permit it to perform such an obligation without impairment.

#### DISCUSSION AND CONCLUSIONS

There is no single test to decide whether a line is an exempt spur.<sup>6</sup> In determining the status of a railroad track, we consider its use, history, and physical characteristics.<sup>7</sup> CP/Soo contends that the track's short, stub-ended layout, its light-weight rail and poor condition, and other aspects of its use and history demonstrate that it is a spur, rather than a line of railroad. According to CP/Soo, these characteristics indicating that this is a spur outweigh the inadvertent designation of the line on its SDM and listing of Plaza as an open and prepay station.<sup>8</sup>

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<sup>4</sup> Plaza-Makoti indicates that, prior to its purchase of the Plaza Line, the line could not handle high-capacity grain cars and had been red flagged many times due to soft bed conditions. The shipper states that the line's poor condition caused it to suffer economic hardship and competitive disadvantage.

<sup>5</sup> To support its alternative position, CP/Soo cites *Maine, DOT--Acq. Exemption, ME. Central R. Co.*, 8 I.C.C.2d 835 (1991) (*Maine, DOT*).

<sup>6</sup> *Texas & Pac. Ry. v. Gulf, Etc. Ry.*, 270 U.S. 266 (1926).

<sup>7</sup> *Illinois Commerce Com'n v. ICC*, 779 F.2d 1270 (7th Cir. 1985); *CNW--Aban. Exemp.-- In McHenry County, IL*, 3 I.C.C.2d 366 (1987), *rev'd on other grounds, Illinois Commerce Com'n v. ICC*, 879 F.2d 917 (D.C. Cir. 1989); and *Nicholson v. ICC*, 711 F.2d 364 (D.C. Cir. 1983) (*Nicholson*).

<sup>8</sup> See *Leelanau Transit Co. Abandonment, Northport Branch*, 307 I.C.C. 95, 102 (1959) (agency stations located on trackage was evidence of a rail line, rather than a spur); *but see, Valley Feed Company v. Greater Shenandoah Valley Development Company*, No. 41068 (ICC served Dec. 21, 1995) (absence of trackage in a carrier's SDM indicated that it was an exempt spur).

While the subject line has many of the physical characteristics of a spur,<sup>9</sup> we believe that what is dispositive here is that CP/Soo listed Plaza, ND as an open and prepay station in the *Official Railroad Station List* as recently as March 1996, repeatedly included the line in its SDM filed with the ICC, and has structured its agreement with Plaza-Makoti so as to permit it to serve other shippers. This reflects a holding out inconsistent with finding the line to be an exempt spur. Although CP/Soo may now consider the line a spur, the railroad has clearly designated the line an official CP/Soo rail line over the years. Because it was once a rail line, the carrier's reduced or ceased freight service and its treatment of the line as a spur does not, in and of itself, effect a conversion so as to unilaterally divest us of jurisdiction over its disposition.<sup>10</sup> Based on the evidence, we find that the 4-mile Plaza trackage is not an exempt spur, but rather a line of railroad subject to our abandonment and construction and operation regulation.

The remaining issue is whether CP/Soo's line sale to Plaza-Makoti requires our approval under 49 U.S.C. 10901 or an exemption under 49 U.S.C. 10505. The typical line acquisition includes the transfer of property interest sufficient to permit the buyer to provide, or at least control, freight transportation for compensation. Such a sale would include the transfer of the carrier's common carrier obligation to the buyer. But the acquisition of the physical assets of a rail line does not necessarily require the exercise of our jurisdiction and does not always make the buyer a common carrier. In *Maine, DOT, supra*, the ICC declined to assert jurisdiction over the sale of a rail line to a state agency on the grounds that the selling railroad retained a permanent and unconditional easement allowing it to continue to provide freight service and the transaction would not interfere with the railroad's ability to fulfill its common carrier obligation.

More recently, in *Los Angeles County Transportation Commission--Petition for Exemption--Acquisition from Union Pacific Railroad Company*, Finance Docket No. 32374 (STB served July 23, 1996), a local transit authority acquired rail lines from Union Pacific Railroad Company (UP) to establish commuter rail service in the Los Angeles area. UP retained a rail freight easement that gave priority to commuter operations. The easement required UP's service to be conducted in a manner that minimized disruption with commuter operations, and UP's right to conduct competitive or time-sensitive service applied only during periods other than scheduled commuter service. We found that the acquisition did not require our approval because the low volume of freight traffic and other provisions of the easement agreement made it unlikely that freight operations would be unduly affected by the commuter rail priority.<sup>11</sup>

Plaza-Makoti's line acquisition is subject to a permanent trackage easement that permits CP/Soo to continue rail service for the elevator and any new shipper locating on the line. Under the agreement, Plaza-Makoti would own the line and maintain it, but CP/Soo would serve it and any other shipper desiring service. CP/Soo has also reserved the right to repurchase the line should the elevator wish to terminate the agreement. These factors demonstrate that the railroad's common carrier obligation will not be affected or impaired by the sale of the underlying assets.

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<sup>9</sup> The line is stub-ended and has frequently been out of service due to its poor condition and light-weight rail. The shipper, Plaza-Makoti, initiated the line's sale to rehabilitate it.

<sup>10</sup> See *Vermont & VT Ry--Discontinuance--Crittenden Co. VT*, 3 I.C.C.2d 903, 907 (1987), *aff'd Preseault v. ICC*, 853 F.2d 145 (2d Cir. 1988), *Preseault v. ICC*, 494 U.S. 1 (1990) (reaffirming the exclusive and plenary authority of the ICC to regulate abandonments); and *The Atchison, Topeka and Santa Fe Railway Co.--Abandonment Exemption--In Lyon County, KS*, Docket No. AB-52 (Sub-No. 71X) (ICC served June 17, 1991) (downgrading of rail service over a rail line does not divest the ICC of abandonment jurisdiction).

<sup>11</sup> See also *Sacramento-Placerville Transportation Corridor Joint Powers Authority--Acquisition Exemption--Certain Lines of Southern Pacific Transportation Company*, STB Finance Docket No. 33046 (STB served Oct. 28, 1996), where the Board dismissed the proceeding after finding that preexisting freight service would not be unduly affected by the purchaser's commuter operations on jointly shared tracks.

CP/Soo's sale agreement purports to give CP/Soo the right to abandon its common carrier obligation and the option to continue using the line for its own use via the reserved easement. It is not entirely clear what this reservation of right to abandon means. In any event, we note that, if CP/Soo wishes to abandon service over the line at some point in the future, it will need to obtain our approval or an exemption for the abandonment. Viewed in the light of agency precedent and the circumstances here, the transaction does not require us to exercise jurisdiction over it. CP/Soo has retained, through the permanent easement, the right and ability to carry out its common carrier obligation and Plaza-Makoti is a noncarrier that will not hold itself out to provide rail freight transportation. Because the sale transaction effects no change in CP/Soo's common carrier obligation, neither our approval nor exemption was required for the transaction to go forward. Accordingly, the complaint will be denied.

In *Maine, DOT*, the ICC observed that determinations of this sort are based on the specific facts of a transaction and cautioned that "any similar transactions should likewise be submitted \* \* \* in advance, together with a copy of the agreement between the railroad and the entity acquiring its right-of-way, for a jurisdictional determination." *Id.*, at 838. CP/Soo should have taken that approach here. It evidently did not do so because it viewed the line as a spur. Because this position is understandable, we will not penalize CP/Soo or Plaza-Makoti under the circumstances for acting on the erroneous assumption without first seeking an ICC ruling. However, we caution CP/Soo to seek an agency determination in advance in the future.

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

*It is ordered:*

1. BMW's complaint is denied. The Plaza line is a line of railroad, but the sale of assets at issue here does not require Board approval or an exemption from either 49 U.S.C. 10903 or 49 U.S.C. 10901.
2. This decision is effective 30 days after the service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams  
Secretary