

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34810

WASHINGTON COUNTY, OR
– ACQUISITION EXEMPTION –
CERTAIN ASSETS OF THE UNION PACIFIC RAILROAD COMPANY

STB Finance Docket No. 34791

TRI-COUNTY METROPOLITAN TRANSPORTATION DISTRICT OF OREGON
– ACQUISITION EXEMPTION –
CERTAIN ASSETS OF WASHINGTON COUNTY, OR

Decided: November 27, 2006

On October 25, 2006, Washington County, OR (County), a noncarrier, filed a verified notice of exemption under 49 CFR 1150.31 to acquire from Union Pacific Railroad Company (UP) certain right-of-way and trackage, totaling approximately 5 miles, between Tigard and Beaverton, in Washington County. Simultaneously with County's notice, Tri-County Metropolitan Transportation District of Oregon (TriMet),¹ a noncarrier, filed a verified notice of exemption under 49 CFR 1150.31 to acquire County's interests in the Subject Line. Concurrently with their notices, County and TriMet also filed a joint motion to dismiss the notices, asserting that the transactions are not subject to Board jurisdiction because neither of them will become a common carrier as a result of the transactions.

BACKGROUND

County states that, pursuant to a purchase and sale agreement, it will acquire UP's right, title and interest in the right-of-way, trackage and other physical assets associated with the Subject Line, but will not acquire the right or obligation to conduct any rail freight operations thereon. UP will retain an exclusive, permanent easement for freight operations, but will transfer the easement to Portland & Western Railroad, Inc. (P&W), which will conduct freight operations

¹ TriMet is a municipal corporation that provides public transportation for three counties in the Portland, OR metropolitan area.

on the Subject Line.² TriMet states that, pursuant to a quitclaim deed, it will acquire the County's right, title and interest in the right-of-way, trackage and other physical assets associated with the Subject Line, but will not acquire the right or obligation to conduct any rail freight operations thereon. TriMet states that it intends to provide passenger rail service on the line.

In support of the motion to dismiss, County and TriMet submitted a quitclaim deed from UP to County and a draft shared use agreement (the Agreement) between TriMet and P&W. The Agreement provides: (1) P&W will continue to operate as the sole provider of freight rail service pursuant to an easement that will be granted by UP; (2) TriMet intends to provide passenger rail service on the Subject Line, subject to P&W's exclusive rights to provide freight rail service thereon; and (3) P&W will provide dispatching, maintenance, administrative, and other services to TriMet. The Agreement also states that "the parties recognize that TriMet's operation of passenger rail service on the Subject Line will more than insignificantly increase P&W's liability risk and interfere with P&W's freight rail operation and its ongoing construction and maintenance activities."

County and TriMet maintain that their respective acquisitions will not constitute acquisitions of a railroad line subject to the Board's jurisdiction because neither of the parties will acquire the property and contractual rights necessary to conduct or control common carrier freight rail operations on the line.

DISCUSSION

The question here is whether the Board's regulatory approval is required for County to acquire the Subject Line from UP, and in turn, whether such approval is required for TriMet to acquire the Subject Line from County. The acquisition of an active rail line and the common carrier obligation that goes with it ordinarily require Board approval under 49 U.S.C. 10901, even if the acquiring entity is a noncarrier. See Common Carrier Status of States, State Agencies, 363 I.C.C. 132, 133 (1980), aff'd sub nom. Simmons v. I.C.C., 697 F.2d 326 (D.C. Cir. 1982). However, the Board will not exercise its jurisdiction where no common carrier rights or obligations are transferred with the line. See Maine, DOT – Acq. Exemption, Me. Central R. Co., 8 I.C.C.2d 835, 836-37 (1991).

In prior decisions, the agency has addressed the issue of whether rights acquired by a noncarrier were so extensive that the noncarrier had acquired control of the rail line, and therefore the obligations and rights of a common carrier. See, e.g., Orange County Transp. – Exempt. – Atchison, T. & SF. Ry. Co. 10 I.C.C.2d 78 (1994); Southern Pacific Transp. Co. – Abandonment, 8 I.C.C.2d 495 (1992), reconsidered and clarified, 9 I.C.C.2d 385 (1993) (SP Abandonment). Here, however, the Board does not have enough information about P&W's current and future freight service to make a determination as to whether P&W will maintain control of the Subject Line and continue to be able to fulfill its common carrier obligation.

² P&W currently provides freight rail service on the Subject Line pursuant to a lease with UP. On October 27, 2006, P&W filed a notice to acquire UP's easement. STB Finance Docket No. 34792, Portland & Western Railroad, Inc. – Acquisition and Operation Exemption – Union Pacific Railroad Company.

The Agreement states, at page 19, subsection (g), that TriMet intends to operate passenger service on the Subject Line Monday through Friday from 5:30 a.m. to 9:30 a.m., from 11:30 a.m. to 1:00 p.m., and from 3:30 p.m. to 7:30 p.m. The Board must decide whether the rights that TriMet has acquired “. . . are so extensive that [it] necessarily incurs an obligation to exercise these rights as a common carrier” SP Abandonment, 9 I.C.C.2d at 387-88. In that decision, the agency went on to observe that “the greater the control by the buyer, the more likely the entity is subject to regulation” Id. at 388. Without evidence of P&W’s existing operations and the needs of the shippers it is serving, the Board cannot determine whether the time slots that TriMet has reserved to itself significantly affect freight operations. Moreover, although the Board assumes that P&W will be able to operate at all other times, it is unclear from the Agreement the extent to which P&W will be permitted to use the Subject Line for its freight operations. County and TriMet have generally stated in their motion to dismiss that the transactions will not have any effect on current or future freight rail operations, but nothing has been submitted to the Board specifically explaining how P&W will continue to be able to provide service to its shippers. This additional information is needed before the Board can reach a determination on the joint motion to dismiss.

Accordingly, P&W must submit an explanation within 15 days of the service date of this decision as to how it will continue to fulfill its common carrier obligation to its shippers once the Agreement’s terms take effect. P&W will also be directed to serve a copy of this decision within 5 days of the service date of this decision on all shippers for which it has provided service in the past two years, and to certify that it has done so. The shippers may submit comments regarding the Agreement to the Board within 15 days of 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. P&W is directed to submit a statement within 15 days from the service date of this decision as to how it will continue to fulfill its common carrier obligation once the shared use agreement’s terms take effect.
2. P&W is directed to serve a copy of this decision within 5 days of its service date on all shippers for which it has provided service in the past two years, and to certify that it has done so.
3. The shippers will have 15 days from the service date of this decision to submit comments regarding the shared use agreement.

4. This decision is effective on its service date.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary