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SEC

SERVICE DATE – LATE RELEASE JUNE 20, 2007

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35018

STATE OF MAINE—ACQUISITION EXEMPTION—CERTAIN ASSETS
OF ST. LAWRENCE & ATLANTIC RAILROAD COMPANY

Decided: June 20, 2007

On May 7, 2007, the State of Maine, acting by and through its Department of Transportation (Maine DOT), a noncarrier, filed a verified notice of exemption under 49 CFR 1150.31 to acquire from St. Lawrence & Atlantic Railroad Company (SLR) certain right-of-way and trackage, totaling approximately 11 miles, in Cumberland County, ME. The rail line (Subject Line) extends between milepost 1.74 at Deering and milepost 12.163 south of the diamond crossing at Yarmouth Junction.¹ Simultaneously, Maine DOT filed a motion to dismiss the notice, asserting that the transaction is not subject to the Board's jurisdiction because Maine DOT will not become a common carrier as a result of the transaction.

According to Maine DOT, SLR is a Class III carrier that currently operates over the Subject Line, serving five customers on request, with service on average occurring about four times a month. There is no overhead traffic at present. Maine DOT adds that SLR has represented to it "that the negotiated 'window' for its freight operations will be more than adequate to provide service to its customers and discharge its common carrier obligations."

Maine DOT states that, pursuant to a purchase and sale agreement (P&S agreement), it will acquire SLR'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. According to Maine DOT, this transaction is not subject to Board jurisdiction because no common carrier rights or obligations are being transferred by SLR or are being assumed by Maine DOT. Maine DOT states that the reason for this transaction is that it intends to initiate passenger rail service on the Subject Line in the future.

In support of the motion to dismiss, Maine DOT submitted an amended P&S agreement dated December 29, 2006, an operating agreement, and a draft quitclaim deed from SLR to Maine DOT. The P&S agreement provides that SLR will transfer and

¹ Notice of the exemption was served and published in the Federal Register on May 18, 2007 (72 FR 28095).

convey its right-of-way, trackage, and other physical assets to Maine DOT; that SLR will, at closing, deliver a deed that excepts and reserves to SLR a perpetual and exclusive easement for purposes of providing common carrier freight rail service on the Subject Line; and that, as a condition precedent to closing, the parties will enter into an operating agreement.

Pursuant to the draft operating agreement: (1) SLR will retain the exclusive right and obligation to provide freight rail service on the Subject Line, without restriction or interference of any kind by Maine DOT; (2) Maine DOT will have no right or assume any obligation to provide common carrier freight rail service on the Subject Line; (3) Maine DOT will have the ability to upgrade the Subject Line at its expense, in a manner that coordinates with the ability of SLR to provide freight rail service and minimizes interference with such service; (4) SLR may make changes or improvements required for its freight operations; and (5) Maine DOT must give SLR at least one year's prior notice if it wishes to begin passenger rail service.

In that event, the operating agreement also states, at subsection 2.3(d), that Maine DOT will use its best efforts to select a new freight railroad operator that is willing to accept assignment of SLR's freight easement and attendant common carrier obligations. Moreover, if Maine DOT is able to select a new operator, and if SLR and the new operator can negotiate mutually acceptable terms and conditions for the coordination of operations on the Subject Line, SLR will assign the easement to the new operator and will terminate operations. If a new operator cannot be selected or agreement reached between SLR and the new operator, Maine DOT and SLR will jointly operate on the Subject Line. The operating agreement also provides that, after passenger service begins, freight operations will take place only between 11 p.m. and 4:30 a.m. on such days as SLR designates in its schedule.

The question presented by Maine DOT's petition is whether the Board's regulatory approval is required for Maine DOT to acquire the Subject Line. 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, even if the acquiring entity is a noncarrier, including a state. See Common Carrier Status of States, State Agencies, 363 I.C.C. 132, 135 (1980), aff'd sub nom. Simmons v. ICC, 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) (State of Maine).

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 SLR's current and future freight service to make a determination as to whether SLR will maintain control of the Subject Line and continue

to be able to fulfill its common carrier obligation. Two areas are of particular concern: (1) SLR's ability to adequately meet the needs of its shippers after the start up of passenger operations, and (2) whether SLR's easement is, in fact, "perpetual and exclusive."

As to the former, the Board must decide whether the rights that Maine DOT 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 more specific evidence of SLR's existing operations and the needs of the shippers it is serving, the Board cannot determine whether the time slots reserved to SLR after the startup of passenger operations will significantly affect freight operations. While the operating agreement limits SLR to providing freight service only between the hours of 11 p.m. and 4:30 a.m. on designated days, Maine DOT has offered in this regard only a conclusory statement from SLR that the transaction will not unreasonably restrict or constrain it from discharging its common carrier obligation. Nothing more has been submitted to the Board specifically explaining how SLR will continue to be able to provide adequate service to its shippers. There is no evidence that affected shippers have been advised of the restrictions and have had the opportunity to express their views on them. This information is needed before the Board can reach a determination on the motion to dismiss.

Additionally, according to Board precedent, Maine DOT and SLR must demonstrate that the latter will retain a permanent and unconditional easement as the freight operator on the line to ensure that nothing in this transaction would disenable SLR from meeting its common carrier obligation. See State of Maine, at 837. However, in subsection 2.3(d), the operating agreement discusses a replacement freight operator and appears to contradict the statement by Maine DOT in its submission to the Board and in subsection 2.1(a) of the operating agreement that SLR will retain the right and obligation to provide freight rail service in the form of an exclusive, permanent easement. The Board must ensure that the operating agreement does not provide a means by which Maine DOT can compel SLR to relinquish its easement or otherwise affect SLR's ability to provide freight service. Consequently, SLR will be required to provide information to explain this discrepancy before the Board can reach a determination on the merits of this petition.

Accordingly, SLR must, within 15 days of the service date of this decision: (1) submit an explanation as to how it will continue to fulfill its common carrier obligation to its shippers once passenger operations begin, and (2) explain the above discrepancy regarding the permanency of SLR's freight easement. SLR will also be directed to serve a copy of this decision on all shippers for which it has provided service in the past two years, and to certify to the Board that it has done so within 5 days of the service date of the decision. The shippers may submit comments to the Board on the proposed freight operating window 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. SLR 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 passenger operations begin and to explain the above noted discrepancy regarding the permanency of SLR's freight easement.

2. SLR is directed to serve a copy 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 within 5 days of the service date of this decision.

3. The shippers will have 15 days from the service date of this decision to submit comments.

4. This decision will be effective on its service date.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary