

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35314

MASSACHUSETTS COASTAL RAILROAD, LLC—ACQUISITION—
CSX TRANSPORTATION, INC.

Decided: March 29, 2010

This decision authorizes, under provisions of the Interstate Commerce Act (the Act) at 49 U.S.C. 11323-24, Massachusetts Coastal Railroad, LLC (Mass Coastal) to acquire a permanent rail freight easement on approximately 33 miles of the rail lines owned by CSX Transportation, Inc. (CSXT) in Massachusetts. Collectively, Mass Coastal and CSXT will be referred to as Applicants. Upon consummating the proposed acquisition, Mass Coastal would replace CSXT as the only rail carrier providing freight service on these lines.

The permanent rail freight easement is on CSXT's "South Coast Lines," consisting of: (1) the New Bedford Subdivision, which is 18.40 miles between milepost QN 13.40 at Cotley Junction and milepost QN 31.80 at New Bedford; (2) the Fall River Subdivision, which is 14.20 miles between milepost QNF 0.00 at Myricks and milepost QNF 14.20 at the Fall River, Massachusetts – Rhode Island state line; and (3) 0.08 miles of the North Dartmouth Industrial Track between milepost QND 0.00 and milepost QND 0.08, a total distance of approximately 32.68 miles.

BACKGROUND

Mass Coastal is a Class III rail carrier operating approximately 58.5 miles of freight lines in Massachusetts. CSXT, a Class I rail carrier, owns and operates about 21,000 miles of rail lines in the United States, nearly entirely east of the Mississippi River, and in Canada. Applicants executed a Purchase and Sale Agreement of Permanent Freight Easement (the Agreement), to be effective May 14, 2010, by which Mass Coastal will purchase CSXT's permanent rail freight easement in the South Coast Lines.

CSXT currently provides service between Cotley Junction and New Bedford 3 days per week and between Cotley Junction and Fall River 2 days per week. Mass Coastal states that it will continue service at that level and increase the frequency as traffic growth warrants. Mass Coastal anticipates handling about 1,900 carloads annually during the first 2 years it operates these lines.

Related Proceedings. In STB Finance Docket No. 35312, the Massachusetts Department of Transportation (MassDOT) filed a verified notice of exemption to acquire from CSXT the real

estate, track, and materials in the South Coast Lines, among other property interests in other rail lines. As part of that transaction, CSXT would retain a permanent rail freight easement over all of these lines (MassDOT Transaction).¹ Concurrently, MassDOT filed a motion to dismiss its notice of exemption pursuant to our State of Maine line of cases² on the ground that the Board lacks jurisdiction over the MassDOT Transaction because MassDOT would not acquire a common carrier obligation on the rail assets it would purchase. The motion to dismiss will be the subject of a future decision in STB Finance Docket No. 35312.

In a second related proceeding, STB Finance Docket No. 35314 (Sub-No. 1X), CSXT filed a verified notice of exemption to grant Mass Coastal certain overhead trackage rights to enable Mass Coastal to connect the South Coast Lines to its existing lines (Trackage Rights Transaction).³ The notice of exemption became effective on December 24, 2009.

Prior Decision. In a decision issued on December 21, 2009, the Board accepted the application in this proceeding, found that Mass Coastal's proposed transaction to acquire CSXT's permanent rail freight easement would be a "minor" transaction under 49 U.S.C. 11324(d) and 49 CFR 1180.2(c),⁴ and established a procedural schedule.

Opposition and Response. The Brotherhood of Railroad Signalmen and Brotherhood of Maintenance of Way Employees Division/IBT (the Unions) jointly filed a comment in opposition to the application. The Unions represent nationally certain categories of rail workers on all

¹ See Massachusetts Department of Transportation—Acquisition Exemption—Certain Assets of CSX Transportation, Inc., STB Finance Docket No. 35312 (STB served Dec. 10, 2009). The parties contemplate closing that sale on May 14, 2010, concurrently with closing Mass Coastal's acquisition of CSXT's permanent rail freight easement as proposed in this proceeding.

² Maine, DOT—Acq. Exemption, Me. Central R. Co., 8 I.C.C.2d 835 (1991).

³ The trackage rights are on CSXT's Middleboro Subdivision: (1) between Mass Coastal's interchange tracks at Taunton, MA, at approximately milepost QN 11.6, and milepost QN 13.4, a distance of approximately 1.8 miles; and (2) between milepost QNB 13.3 and Mass Coastal's interchange tracks at Middleboro, MA, at approximately milepost QNB 20.4, a distance of about 7.1 miles, for a total distance of approximately 8.9 miles. See Massachusetts Coastal Railroad, LLC—Trackage Rights Exemption—CSX Transportation, Inc., STB Finance Docket No. 35314 (Sub-No. 1X) (STB served Dec. 10, 2009). The parties likewise contemplate consummating the Trackage Rights Transaction on May 14, 2010, although the exemption became effective on December 24, 2009.

⁴ That regulation divides transactions requiring Board authorization under 49 U.S.C. 11323 into four categories: major, significant, minor, and exempt.

Class I railroads, including CSXT. Mass Coastal and CSXT separately filed replies to the Unions' comment.

DISCUSSION AND CONCLUSIONS

The Unions argue that this acquisition is unlawful because the Act does not contemplate the existence, or the transfer between carriers, of a permanent rail freight easement. Instead, according to the Unions, this acquisition and the related MassDOT Transaction must be restructured as: (1) the sale of CSXT's entire interests in the South Coast Lines to MassDOT; and (2) MassDOT either (a) leasing the South Coast Lines to Mass Coastal or (b) granting Mass Coastal trackage rights over these lines. The crux of the Union's argument is that the Board cannot approve the transaction because an operating easement "is a fabricated concept that does not exist under the [Interstate Commerce Act]."⁵ To address this argument, we will first examine whether a rail freight easement is a rail carrier's "property" that may be transferred to a different carrier.

Rail Freight Easements as Property of a Rail Carrier within the Meaning of Section 11323. The Unions argue that the term "rail freight easement" is not found in any provision of the Act, including section 11323. The term "property," however, is used in section 11323 when Board authorization is required for one carrier to "purchase, lease, or contract to operate property of another rail carrier." 49 U.S.C. 11323(a)(2) (emphasis added). Although "property" is not defined in the Act,⁶ we have no doubt that a rail carrier's property may include operating easements in addition to other types of easements.⁷

The Board has consistently treated rail freight easements as rail carrier property that cannot be transferred or abandoned without Board authorization. For example, Conrail's rail properties—including its retained rail freight easement on the Northeast Corridor—were

⁵ Unions' Comment at 4.

⁶ Congress included relatively few definitions in the Interstate Commerce Act, leaving it to the agency's "informed judgment" to fill in the interstices. See Western Coal Traffic League v. STB, 216 F.3d 1168, 1177 (D.C. Cir. 2000), quoting Nat'l Motor Freight Traffic Ass'n v. ICC, 590 F.2d 1180, 1185 (D.C. Cir. 1978).

⁷ For example, right-of-way easements have played a longstanding and integral role in the creation of the national rail system. See, e.g., Jeffery M. Heftman, Railroad Right-of-Way Easements, Utility Apportionments, and Shifting Technological Realities, 2002 U. Ill. L. 1401, 1407 (after 1875, railroad expansion occurred through private negotiation for right-of-way easements). No one could seriously argue that the absence of any reference to right-of-way easements in the statute means that such easements are not property for purposes of the Act.

acquired by two other rail carriers pursuant to the Conrail control transaction.⁸ Similarly, the agency has treated a freight operating easement, standing alone, as part of a rail line that cannot be abandoned without prior approval.⁹ More recently, by publishing a notice of exemption, the Board permitted a rail carrier to acquire a different carrier's exclusive rail freight easement over a rail line in Oregon.¹⁰ In that case, Portland & Western Railroad, Inc. formerly had leased the rail line and filed a notice of exemption to instead acquire the permanent, exclusive rail freight operating easement from the rail carrier owner, Union Pacific Railroad Company. Similarly, the Board permitted a noncarrier, Pacific Sun Railroad, LLC, to acquire by lease and to operate over a 21.2-mile reserved freight rail easement of carrier BNSF Railway Company in California¹¹

The Board's interpretation of a freight easement as rail carrier property subject to Board jurisdiction has a solid grounding in property law. An easement creates a nonpossessory right to enter and use land in the possession of another and obligates the possessor not to interfere with the uses authorized by the easement. Restatement (Third) of Property (Servitudes) §1.2 (2000). A freight rail easement gives the holder the right to conduct freight railroad operations on the specified railroad tracks for the purpose of providing common carrier rail freight service to all of its customers. Salt Lake City S. R.R. v. State Tax Comm'n, 1999 UT 90, 987 P.2d 594, 597-98 (Utah 1999) (Salt Lake). As explained in Salt Lake, the freight easement there constituted an interest in the designated land and railroad tracks and gave the easement holder the exclusive right to make use of the land and trackage for freight railroad operations. The court went on to explain that, although it is a nonphysical right, a freight operating easement gives the holder the right to use and occupy the physical property involved and constitutes an interest in real property that has intrinsic value. Id.

The use of rail freight easements is well established in the industry. Rail freight easements are an integral part of the arrangements between Amtrak, freight railroads, and

⁸ See CSX Corp. et al.—Control—Conrail Inc. et al., 3 S.T.B. 196, 296 (1998) (Conrail Transaction) (approving the acquisition of control of Conrail and the division of its assets among CSXT and related corporations and Norfolk Southern Railway Company and related corporations).

⁹ Canadian National Railway Company—Trackage Rights Exemption—Bangor and Aroostook Railroad Company and Van Buren Bridge Company, STB Finance Docket No. 34014, slip op. at 9 (STB served June 25, 2002); Waterloo Railway Company—Adverse Abandonment—Lines of Bangor and Aroostook Railroad Company and Van Buren Bridge Company in Aroostook County, Maine, STB Docket No. AB-124 (Sub-No. 2), slip op. at 2, aff'd sub nom. Howard v. STB, 389 F.3d 259 (1st Cir. 2004).

¹⁰ Portland & Western Railroad, Inc.—Acquisition and Operation Exemption—Union Pacific Railroad Company, STB Finance Docket No. 34792 (STB served Nov. 24, 2006).

¹¹ Pacific Sun Railroad, L.L.C.—Lease and Operation Exemption—BNSF Railway Company, STB Finance Docket No. 35173 (STB served Oct. 3, 2008).

commuter lines in the Northeast Corridor. The Regional Rail Reorganization Act of 1973 (3R Act) established the Consolidated Rail Corporation (Conrail) to assume the assets, routes, and services of several bankrupt railroads in the Northeast. The 3R Act “set the stage” for the National Railroad Passenger Corporation (Amtrak) to take over rail rights-of-way, tracks, and facilities on the Northeast Corridor.¹² Subsequently, in the Railroad Revitalization and Regulatory Reform Act of 1976 and the Amtrak Improvement Act of 1976, Congress appropriated funds for Amtrak to acquire Northeast Corridor property from Conrail under the “Final System Plan.”¹³ Significantly, Amtrak did not acquire the rights or obligation to provide freight service in the Northeast Corridor. Rather, the selling rail carriers retained freight rail easements over the lines.¹⁴ Thus, for over 30 years, freight service over the Northeast Corridor has been provided pursuant to rail freight easements.¹⁵ Those rail freight easements have been transferred among carriers as valid and enforceable property interests.¹⁶ No court has even suggested otherwise.

The transaction at issue here would convey from CSX to Mass Coastal the exclusive, perpetual right to provide common carrier freight rail service over the South Coast Lines. This is a type of transaction—the change in control of common carrier freight operations caused by the transfer of the permanent easement—that is covered by section 11323.

In the related MassDOT Transaction, the Unions challenge the longstanding statutory interpretation that the Board lacks regulatory authority under section 10901 over the sale to a state agency of all the physical assets of a rail line when the selling carrier retains the complete common carrier obligation on the line. In this regard, the Unions ask us to overturn State of

¹² Congressional Budget Office, Study: The Past and Future of U.S. Passenger Rail Service, Sept. 2003, at p. 9, available at: www.cbo.gov.

¹³ Id.

¹⁴ See Se. Pa. Transp. Auth. v. ICC, 644 F.2d 238, 242 (3d Cir. 1981) (Conrail transferred to Amtrak a main rail line and certain contiguous rail properties “but retained operating easements for [Conrail’s] freight service and for its operation of subsidized commuter passenger service”); Providence and Worcester R.R. v. Nat’l R.R. Passenger Corp., 239 F. Supp.2d 207, 208 n.1 (D. Conn. 2002) (In an agreement, a rail carrier of freight “retained a perpetual easement to conduct railroad operations over all portions of railroad that it conveyed to Amtrak”).

¹⁵ Even earlier, in 1965, a predecessor of the Penn Central Railroad sold the physical assets of Boston-area rail lines to the Massachusetts Bay Transportation Authority while it retained an exclusive freight operating easement. See In re Penn Central Transp. Co., 341 F. Supp. 815 (E.D. Pa. 1972).

¹⁶ See, e.g., Conrail Transaction, 3 S.T.B. at 373 (describing the transfer of Conrail’s rights on the Northeast Corridor).

Maine and its progeny. The challenge to State of Maine directly pertains to the related proceeding concerning the MassDOT Transaction, in which the parties—including the Unions in the current case—have fully briefed the issue.¹⁷ In a future, separate decision concerning MassDOT’s motion to dismiss in the related STB Finance Docket No. 35312, we will address the State of Maine issue. We need not resolve that issue here because CSXT could transfer a freight operating easement over the South Coast Lines to Mass Coastal regardless of the outcome of the other case.

In view of the Board’s longstanding interpretation of rail carrier “property” to include a transferrable rail freight easement, we will now address the merits of Mass Coastal’s application to acquire CSXT’s permanent rail freight easement.

Statutory Standard. For minor transactions, 49 U.S.C. 11324(d) directs the Board to approve a rail carrier’s application to acquire another carrier’s property unless it finds that: (1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and (2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

In assessing transactions subject to section 11324(d), our primary focus is on the anticipated anticompetitive effects, if any. We must grant the application unless there will be adverse competitive effects that are both “likely” and “substantial.” And, even if there will be likely and substantial anticompetitive impacts, we may not disapprove the transaction unless those likely and substantial anticompetitive impacts outweigh the transportation benefits and cannot be mitigated through conditions.¹⁸

This acquisition is not likely to have substantial adverse competitive effects. Mass Coastal would replace CSXT as the sole carrier providing rail service to shippers located on the lines. This one-for-one replacement generally would not reduce competition because shippers would have the same number of carriers available after the acquisition by Mass Coastal as before. In addition, there are no interchange commitments in the Agreement between CSXT and Mass Coastal. Thus, after the acquisition, Mass Coastal would be able to freely interchange traffic with both the Bay Colony Railroad (north of New Bedford) and CSXT (near Taunton).

We are concerned that one provision in the Agreement has the potential to be used in an anticompetitive fashion. Paragraph 10 states that the freight easement “may only be transferred or assigned by [Mass Coastal] pursuant to the Release Deed for the Line granted by [CSXT] to

¹⁷ In the related proceeding concerning the MassDOT Transaction, another union, American Train Dispatchers Association, also challenges the State of Maine line of cases.

¹⁸ Fortress Investment Group, LLC, et al.—Control—Florida East Coast Railway, LLC, STB Finance Docket No. 35031, slip op. at 4 (STB served Sept. 28, 2007).

the Commonwealth of Massachusetts acting through [MassDOT].” The Release Deed for the line has not yet been executed, but there is a draft of the Release Deed in the related proceeding concerning the MassDOT Transaction.¹⁹ In turn, the draft Release Deed provides that future transfers of the freight easement will be governed by Exhibit D to the Release Deed: “Provisions Relating to Transfer of CSXT South Coast Easement.” These provisions state that a holder of the easement on the South Coast Lines, such as Mass Coastal, may transfer the benefit of the easement to a third party that meets “transferee standards” that were not included in the record and may not yet have been executed.

To avoid the potential for the parties agreeing to transferee standards that could restrain competition, we will condition approval of Mass Coastal’s acquisition of the freight easement by requiring the parties to provide a copy of the final Release Deed and the applicable transferee standards to the Board within 15 days of execution of the Release Deed and the standards. We reserve the post-approval right to require the parties to amend the standards to address any anticompetitive issues the Board might identify. See 49 U.S.C. 11327 (Board has authority to supplement orders made under sections 11322-26). With this condition, the acquisition is not likely to substantially lessen competition, to create a monopoly, or to restrain trade in freight surface transportation in any region of the United States.

Having found no likelihood of an anticompetitive effect from this transaction, we need not address whether the public interest outweighs any such effect. Nevertheless, we note that Mass Coastal contends that the transaction would further the public interest by improving the service provided to shippers on the South Coast Lines. As a shortline, Mass Coastal expects to respond more quickly and devote more attention to local and smaller shippers than can a large rail carrier. Mass Coastal states that it will continue to provide the same frequency of service on the South Coast Lines as CSXT has provided and will provide more frequent service if traffic growth justifies expanded service. Based on our competition analysis, we will approve the transaction, as conditioned.

Employee Protection. Under 49 U.S.C. 11326(a), we must impose employee protective conditions on our approval of the transaction. The appropriate conditions are those set out in New York Dock Ry.—Control—Brooklyn Eastern Dist., 360 I.C.C. 60, aff’d, New York Dock Ry. v. United States, 609 F.2d 83 (2d Cir. 1979).

Environmental Impacts. No party has contested Applicants’ statement that environmental documentation is not required because there will be no operational changes that would exceed the thresholds established in 49 CFR 1105.7(e)(4) or (5) for requiring environmental review and there will be no action that would normally require environmental documentation. Nor has there been a challenge to Applicants’ position that an historic report is

¹⁹ See STB Finance Docket No. 35312, MassDOT Motion to Dismiss filed Nov. 24, 2009, at Exhibit I.

not required because Mass Coastal will operate the South Coast Lines and would require further Board approval to discontinue or abandon any service. Applicants state that there are no plans to dispose of or alter properties subject to Board jurisdiction that are 50 or more years old. Accordingly, we find that this proceeding is “categorically excluded” from the need for an environmental review under the National Environmental Policy Act of 1969, see 49 CFR 1105.6(c)(2)(i), and that formal environmental review is not warranted in this case.

We find:

1. As conditioned, Mass Coastal’s acquisition of CSXT’s rail freight easement in the South Coast Lines will not substantially lessen competition, create a monopoly, or restrain trade in freight surface transportation in any region of the United States.

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

It is ordered:

1. Mass Coastal’s acquisition of CSXT’s permanent, exclusive rail freight easement in the South Coast Lines is approved, subject to the conditions for the protection of railroad employees set out in New York Dock Ry.—Control—Brooklyn Eastern District Terminal, 360 I.C.C. 60, aff’d, New York Dock Ry. v. United States, 309 F.2d 83 (2d Cir. 1979), and the requirement that the parties submit to the Board a copy of the final Release Deed for the South Coast Lines and the “transferee standards” that will govern future transfers of the permanent, exclusive rail freight easement in the South Coast Lines, within (a) 15 days of the execution of the Release Deed and transferee standards or (2) April 13, 2010, whichever occurs later.

2. This decision shall be effective on April 28, 2010.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Nottingham.