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SERVICE DATE – MARCH 27, 2013

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35638

NEW JERSEY TRANSIT CORPORATION—ACQUISITION EXEMPTION—NORFOLK  
SOUTHERN RAILWAY COMPANY

Digest:<sup>1</sup> The New Jersey Transit Corporation does not need Board authorization to acquire certain assets of the Orange Industrial Track in Essex County, New Jersey. The seller, Norfolk Southern Railway Company, will retain the legal obligation and ability to provide freight rail service and NJ Transit will not be able to interfere unreasonably with that service.

Decided: March 26, 2013

In this decision, the Board grants the motion of the New Jersey Transit Corporation (NJ Transit) to dismiss its notice of exemption filed 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 freight rail operating 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 October 1, 2012, NJ Transit, an instrumentality of the State of New Jersey and a noncarrier, filed a verified notice of exemption under 49 C.F.R. § 1150.31 to acquire from Norfolk Southern Railway Company (NSR) a portion of the property commonly known as the “Orange Industrial Track” in Essex County, N.J., from milepost 8.616 to milepost 9.905 (the Line). Simultaneously, NJ Transit filed a motion to dismiss the notice, asserting that because NSR will retain a perpetual, exclusive freight rail operating easement and NJ Transit will not acquire any rights or obligations that would prevent NSR from fulfilling its common carrier obligations, the transaction does not require Board authorization under 49 U.S.C. § 10901. The motion is unopposed.

Accompanying its notice of exemption, NJ Transit filed the Exchange Agreement between NJ Transit and NSR, the Orange Industrial Track Quitclaim Deed, the Second

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<sup>1</sup> 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. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

Operating Agreement for the Orange Industrial Track, and excerpts from the 1984 Trackage Rights Agreement (collectively, the agreements).<sup>2</sup> NJ Transit states that the Exchange Agreement provides for the transfer of the physical assets of the Line from NSR to NJ Transit in exchange for a portion of the NJ Transit-owned “Secaucus Track” from milepost 4.02 to milepost 4.980, in Hudson County, N.J.<sup>3</sup> The Quitclaim Deed transfers to NJ Transit NSR’s interests in the tracks, land, and other rail property of the Line, *except that* NSR will retain an “exclusive, perpetual, transferable, assignable, and irrevocable retained rail freight rights” on the Line.<sup>4</sup> The Second Operating Agreement references and modifies the 1984 Trackage Rights Agreement and together they govern the operating relationship between NJ Transit and NSR.

NJ Transit states that it is acquiring the Line to ensure access to a maintenance facility to support NJ Transit’s light rail operations.<sup>5</sup> Because NSR would retain an exclusive, perpetual, transferable, assignable, and irrevocable freight rail operating easement, NJ Transit asserts that the transaction, like the transaction in Maine Department of Transportation—Acquisition & Operation Exemption—Maine Central Railroad (State of Maine), 8 I.C.C. 2d 835 (1991), does not involve the transfer of the common carrier obligation.<sup>6</sup> NJ Transit also states that its ownership of the Line will not interfere with, or in any way impair, NSR’s ability to provide freight rail service on the Line or the remainder of the Orange Industrial Track.<sup>7</sup> Consequently, NJ Transit argues that, under State of Maine and related Board precedent, its acquisition of the physical assets of a portion of the Orange Industrial Track, including fee title subject to the reservation of a freight rail operating easement in NSR, does not require Board authorization under 49 U.S.C. § 10901 and should be dismissed.<sup>8</sup>

## DISCUSSION AND CONCLUSIONS

The question at issue here is whether our regulatory authority is required for NJ Transit to acquire the physical assets of the Line where NSR retains a permanent, exclusive, and irrevocable freight easement to conduct freight rail operations. The acquisition of an active rail

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<sup>2</sup> The Trackage Rights Agreement, originally between NJ Transit and Consolidated Rail Corporation, became effective on October 1, 1984. Notice, Ex. 2. Here, NSR is the successor-in-interest to Consolidated Rail Corporation, and the Trackage Rights Agreement is referenced and supplemented in the Second Operating Agreement. See Mot. 3.

<sup>3</sup> Mot. 2; Notice, Ex. 3 at 1, 3.

<sup>4</sup> Mot. 3 (citing Quitclaim Deed).

<sup>5</sup> Id. at 2.

<sup>6</sup> Mot. 4-6.

<sup>7</sup> Id. at 2, 8.

<sup>8</sup> Mot. 2.

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, including a state, is a noncarrier. See Common Carrier Status of States, State Agencies & Instrumentalities, & Political Subdivisions (Common Carrier Status of States), 363 I.C.C. 132, 133 (1980), aff'd sub nom. Simmons v. ICC, 697 F.2d 326 (D.C. Cir. 1982). But when the carrier selling a rail line retains an exclusive, permanent easement to permit it to continue to provide common carrier freight service and has sufficient control over the line to carry out its common carrier obligations, the Board (and its predecessor agency, the Interstate Commerce Commission (ICC)) typically has found that Board (or ICC) authorization is not required, and that ownership of the line remains with the selling carrier for purposes of § 10901(a)(4). See State of Maine, 8 I.C.C. 2d at 836-37; State of Mich. Dep't of Trans.—Acquis. Exemption—Certain Assets of Norfolk S. Ry. (Mich. DOT), FD 35606, slip op. at 3 (STB served May 8, 2012); Mass. Dep't of Trans.—Acquis. Exemption—Certain Assets of CSX Transp., Inc. (Mass. DOT), FD 35312, slip op. at 6 (STB served May 3, 2010) aff'd sub nom. Bhd. of R.R. Signalmen v. STB, 638 F.3d 807 (D.C. Cir. 2011).

As the Board has observed, there are sound policy reasons for allowing the selling rail carrier to retain a permanent freight rail operating easement over a rail line while permitting a state entity to purchase the physical assets of the line. See Mass. DOT, slip op. at 7. One important reason is “to remove obstacles which might inhibit States from acquiring lines so that service can be continued.” State of Maine, 8 I.C.C. 2d at 837 n.7 (quoting Common Carrier Status of States, 363 I.C.C. at 137). A State of Maine transaction can serve to ensure long-term freight service and also facilitate intrastate commuter operations. See Mass. DOT, slip op. at 7. The transaction here will allow NSR to expand a railroad yard and NJ Transit to ensure continued access to a maintenance facility. These operations thus will support continued freight rail service and intrastate commuter operations, consistent with State of Maine precedent.

Under State of Maine, the key question is whether the transaction documents give the new owner of the physical railroad assets the ability to prevent the rail carrier that retains the freight operating easement from meeting its common carrier obligations on the Line. Mass DOT, slip op. at 8. In making this determination in this case, we will look to whether NSR has retained (1) a permanent, irrevocable, and exclusive freight rail operating easement, and (2) sufficient interest and control over the Line to permit it to carry out its common carrier obligation. Wis. Dep't of Transp.—Petition for Declaratory Order—Rail Lines in Almena, Cameron, & Rice Lake, Barron Cnty., Wis., FD 35455, slip op. at 3 (STB served Nov. 10, 2011).

In making our determination, we will examine the relevant agreements to determine whether there are any impediments to the continuation of common carrier freight service by NSR on the Line being transferred to NJ Transit. We also examine whether NJ Transit is acquiring an amount of control over common carrier freight rail operations on the Line that would rise to the level of constituting an acquisition of a “railroad line” under 49 U.S.C. § 10901(a)(4). See Port of Seattle—Acquis. Exemption—Certain Assets of BNSF Ry., FD 35128, slip op. at 3 (STB served Oct. 27, 2008). The Board has previously held that, under State of Maine, 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 R.R.—Acquis. Exemption—Certain Assets of Union Pac. R.R. (San Benito), FD 35225, slip op. at 5 (STB served June 23, 2011); and Fla. Dep’t of Transp.—Acquis. Exemption—Certain Assets of CSX Transp., Inc. (Fla. DOT), FD 35110, slip op. at 10 (STB served Dec. 15, 2010), pet. to reopen denied (STB served June 22, 2011). Here, NJ Transit is assuming control of maintenance and dispatching for passenger and freight rail service over the Line for the purpose of improving passenger service while also maintaining freight rail service.<sup>9</sup> The parties clearly intend that NJ Transit shall not be able to conduct these activities in a manner that unreasonably interferes with NSR’s ability to provide common carrier rail service.<sup>10</sup> The arrangement is consistent with the Board’s State of Maine precedent and does not require our licensing authority.

Easement Permanence. The Exchange Agreement reserves for NSR “[a] perpetual, irrevocable, exclusive easement for Freight Service (including trackage rights) which does not unreasonably interfere with commuter operations but provides NS access and operating rights sufficient to fulfill NS’s common carrier obligation . . . .”<sup>11</sup> The transaction will not cause NSR to transfer its common carrier obligation or permit NJ Transit to hold itself out as providing freight service.<sup>12</sup>

The Exchange Agreement requires NSR to “commence an abandonment proceeding to terminate its common carrier obligation on the Orange Industrial Track before the . . . Board” following four consecutive years of non-use of the easement for the revenue movement of freight traffic.<sup>13</sup> The Board has held that a similar provision had “no effect on [the freight railroad’s] ability to meet its common carrier obligations.” L.A. Cnty. Transp. Comm’n—Petition for Exemption—Acquis. from Union Pac. R.R., FD 32374 et al., slip op. at 3 (STB served July 23, 1996); see also Md. Transit Auth.—Petition for Declaratory Order (MTA), FD 34975, slip op. at 7 (STB served Oct. 9, 2007) (finding that a requirement in a State of Maine transaction that a common carrier seek abandonment after a specified period of time did not terminate or transfer the carrier’s rights or obligations), reconsideration denied (STB served Sept. 19, 2008). Here, we similarly find that this provision has no effect on the railroad’s ability to meet its common carrier obligation, which continues unless and until the Board were to authorize its abandonment. As with any abandonment, the Board would consider whether the public convenience and

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<sup>9</sup> Mot. 7.

<sup>10</sup> The operating procedures outlined by the parties have been in place for nearly 30 years, apparently functioning without issue. Mot. 8.

<sup>11</sup> Notice, Ex. 3 at 4.

<sup>12</sup> Mot. 3-4.

<sup>13</sup> Notice, Ex. 3 at 4. NSR has not operated over the Line since March 2009. Mot. Ex. A ¶ 6. Regardless of when the four year period begins to run, this does not change our State of Maine analysis because the Board would still be required to authorize the abandonment.

necessity permit or require the abandonment at that time. The Quitclaim Deed also states that NSR's rights "shall terminate upon receiving proper authorization to abandon such service."<sup>14</sup> We are satisfied that this freight easement retained by NSR is permanent because, under the agreement, freight service can be terminated only through obtaining Board authority to abandon service.<sup>15</sup>

Ability to Provide Freight Service. The Second Operating Agreement provides that NSR shall have the right to access and use the Orange Industrial Track at any time upon 48 hours' notice to NJ Transit.<sup>16</sup> Although the agreements do not provide a freight operating window, the Trackage Rights Agreement makes clear that NJ Transit's "right shall not be exercised in a manner which would unreasonably interfere" with NSR's trackage rights.<sup>17</sup>

In State of Maine cases involving shared access by passenger commuter rail and freight rail systems, the parties generally provide for an operating window in which freight rail operations have priority or exclusive access to the line. However, an operating window is not necessary at this time under the facts of this case. NSR has not provided service to any shippers over the Line since March 2009; any operating window agreed to today would be merely hypothetical and not based on NSR's current needs. Should it become necessary in the future for NJ Transit and NSR, or NSR's successor, to identify and agree upon operating windows, any operating agreement must protect NSR or its successor from undue interference with its common carrier duties. See Mich. DOT, slip op at 5.

We conclude that the proposed transaction is consistent with State of Maine and that the acquisition of the Line by NJ Transit 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 with NJ Transit protect NSR against undue interference with its common carrier freight rail obligation, the acquisition will not cause NJ Transit 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 NJ Transit's motion and dismiss its notice of exemption and dismiss this proceeding.

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

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<sup>14</sup> Notice, Ex. 4.

<sup>15</sup> Id.

<sup>16</sup> Notice, Ex. 5 at 3-4.

<sup>17</sup> Notice, Ex. 2 at 9.

It is ordered:

1. NJ Transit'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 Begeman, and Commissioner Mulvey.