

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35905

CITY OF WOODINVILLE, WASH.—PETITION FOR DECLARATORY ORDER

Digest:¹ The City of Woodinville does not need Board authorization to acquire from the Port of Seattle the physical assets of approximately 2.58 miles of rail line in King County, Wash., because the city would not acquire the right or legal obligation to provide freight rail service, nor would the city be in a position to unduly interfere with freight operations.

Decided: October 6, 2015

On May 29, 2015, the City of Woodinville (the City), a noncarrier, filed an amended petition for declaratory order asking the Board to declare that the City's acquisition of the land and physical assets of an approximately 2.58-mile line of railroad owned by the Port of Seattle (the Port) does not require Board authorization under 49 U.S.C. § 10901 and would not cause the City to become a "rail carrier" within the meaning of 49 U.S.C. § 10102(5). For the reasons discussed below, we will grant the petition.

BACKGROUND

The City, a political subdivision of the State of Washington, and a noncarrier, has entered into an Amended and Restated Real Estate Purchase and Sale Agreement (PSA) with the Port, a municipal corporation of the State. Pursuant to the PSA, the City would acquire the land and physical assets of a 2.58-mile line of railroad (the Line) located approximately between milepost 23.8 and milepost 26.38, primarily in the City with a small portion located in the neighboring City of Bothell, in King County, Wash. (King County), but would not acquire the common carrier right or obligation with respect to the Line.²

The Port acquired these assets from BNSF Railway Company (BNSF) in 2008, pursuant to the Board's decision in Port of Seattle—Acquisition Exemption—Certain Assets of BNSF Railway (Port of Seattle), FD 35128, slip op. at 5 (STB served Oct. 27, 2008). In that decision,

¹ 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).

² Am. Pet. 2-3.

the Board held that the Port's acquisition of the land and physical assets at issue would not cause the Port to become a rail carrier under § 10102(5) because that transaction comported with the line of cases beginning with Maine, Department of Transportation—Acquisition & Operation Exemption—Maine Central Railroad (State of Maine), 8 I.C.C. 2d 835 (1991).³ Specifically, the Board found that, as a result of that transaction, BNSF would retain an exclusive freight rail easement, and the Port would not become a rail carrier subject to Board jurisdiction. Port of Seattle, slip op. at 3, 5. Through a series of subsequent transactions, the freight easement and operating rights were conveyed to Eastside Community Rail (ECR).⁴

Here, the City argues that, because it is proposing to purchase the Port's interest, and the land and physical assets to be acquired by the City would remain subject to the retained freight rail easement and Operations & Maintenance Agreement (O&M Agreement) filed in Port of Seattle, the City likewise would not acquire any common carrier rights.⁵ Along with its PSA, the City submitted copies of a Partial Assignment and Assumption of Operations and Maintenance Agreement⁶ and an Executed Copy of the O&M Agreement.

In its original petition filed on February 3, 2015, the City had proposed to enter into two related agreements with the Port. One agreement was for the purchase of the land and physical assets comprising the 2.58-mile Line. The other agreement was for the purchase of “ancillary” parcels of property located adjacent to the Line that “did not have any railroad facilities on them,” and that were “not being used for railroad operations.”⁷ In a filing dated February 18, 2015, King County requested that the Board extend the time period for replies to the City's petition. King County indicated that it wanted to consider and discuss with the parties certain issues that pertained to the “ancillary” parcels of land. On March 6, 2015, the City filed a letter with the Board requesting that this proceeding be held in abeyance so that the City could restructure its proposed transaction with the Port. By decision served on March 9, 2015, the request for abeyance was granted and the City filed its amended petition on May 29, 2015.

³ For a discussion of the Board's State of Maine standard see Florida Department of Transportation—Petition for Declaratory Order—Rail Line of CSX Transportation, Inc. Between Riviera Beach & Miami, Florida, FD 35783, slip op. at 6-7 (STB served Oct. 1, 2014).

⁴ BNSF sold its previously retained interests in the Line, including its exclusive freight rail easement, to GNP Rly. Inc. (GNP). GNP Rly Inc.—Acquis. & Operation Exemption—BNSF Ry., FD 35213 (STB served Feb. 13, 2009). Thereafter, ECR acquired, among other things, the lease and operating rights that GNP had acquired from BNSF. Eastside Cmty. Rail—Acquis. & Operation Exemption—GNP RLY, Inc., FD 35692 (STB served Nov. 23, 2012). Shortly thereafter, Ballard Terminal Railroad Company, LLC, was authorized to lease the Line from ECR and operate over it. Ballard Terminal R.R.—Lease Exemption—Line of Eastside Cmty. Rail, FD 35730 (STB served Apr. 18, 2013).

⁵ Am. Pet. 7.

⁶ The City explains that its transaction would be subject to a partial assignment and assumption because the City would not acquire the entire rail line that is subject to the O&M Agreement, but only the portion located in King County. (Am. Pet. 4-5.)

⁷ Original Pet. 4.

On June 18, 2015, ECR filed a reply to the amended petition in which it argues that the City's transaction, as originally proposed, would have partitioned the right-of-way and unilaterally terminated nearly three-fourths of the width of ECR's permanent freight easement over the existing 100-foot wide railroad corridor.⁸ According to ECR, although the City has now revised its proposal, the City has not provided any assurance that the partitioning of ECR's railroad right-of-way nevertheless would not take place at a later date.⁹ Specifically, ECR expresses concerns regarding Section 12.12 of the parties' O&M Agreement, which states in pertinent part:

This Agreement is made for the benefit of the Corridor and shall run with the land, except that any parcel transferred by the Port to an unaffiliated person or entity for purposes other than rail operations or trail use that does not contain any facilities used in connection with the rail operations intended by this Agreement shall be deemed removed from the Corridor or Port Property as applicable.¹⁰

ECR maintains that Section 12.12 allows the Port (and the proposed future owner, the City) to unilaterally terminate large portions of its permanent freight easement.¹¹ Specifically, ECR interprets Section 12.12 as granting the landlord the unfettered power to "dictate what parts of rail common carrier rights-of-way remain available for railroad purposes and what parts are converted for other uses."¹² According to ECR, Section 12.12 is inconsistent with the State of Maine principles that govern acquisitions of rail lines by public entities wishing to remain noncarriers.¹³ Thus, ECR requests that any grant of the amended petition be subject to the condition that the City may not terminate any part of ECR's permanent rail freight easement on the Line without the consent of ECR or further order of the Board.¹⁴

On July 1, 2015, the City filed a reply to ECR's June 18 reply. The City objects to ECR's request that, as a condition to granting this petition for declaratory order, the Board require the City to seek ECR's consent or, in the alternative, Board authorization prior to a sale of any "ancillary" parcels of land. The City states that ECR's proposed condition would give ECR rights that are not included in the existing, negotiated O&M Agreement to which ECR is a party.¹⁵ According to the City, it has acknowledged that only parcels unnecessary for current or "reasonably foreseeable" future freight rail service could be sold as ancillary parcels under

⁸ ECR Reply 1.

⁹ Id.

¹⁰ Am. Pet. Attach. 2.

¹¹ ERC Reply 9.

¹² Id. at 7, 9.

¹³ Id.

¹⁴ Id. at 10.

¹⁵ City Surreply 3.

Section 12.12 of the O&M Agreement.¹⁶ The City also argues that the terms of the O&M Agreement were “approved” by the Board when the Port acquired the Line in 2008, and again when the Board “approved” (without objection of ECR or any other party) the sale of the connecting line, and the partial assignment of the O&M Agreement, to Snohomish County in Snohomish County, Washington—Petition for Declaratory Order (Snohomish), FD 35830 (STB served Mar. 5, 2015).¹⁷ Additionally, the City points to procedures contained in the O&M Agreement that are available for resolution of any disputes. Thus, the City argues the Board should find that the proposed transaction, including the existing O&M Agreement, comports with State of Maine without conditions or changes.

In a filing submitted on July 21, 2015, ECR responded to the City’s July 1 surreply. Among other things, ECR questions the City’s motivation for seeking acquisition of the 2.58-mile Line and asserts that it is the City’s intention to appropriate three-fourths of the width of the right-of-way for bridge and roadway expansion projects.¹⁸ ECR reiterates that the City’s intended use is contrary to State of Maine principles and to a “supposedly permanent rail freight easement.”¹⁹

In the interest of compiling a more complete record, we will accept the surreplies submitted by the City and ECR on July 1, 2015 and July 21, 2015, respectively. See City of Alexandria, Va.—Pet. for Declaratory Order, FD 35157, slip op. at 2 (STB served Nov. 6, 2008) (allowing reply to reply “[i]n the interest of compiling a full record”).

DISCUSSION AND CONCLUSIONS

Exercising our discretionary authority under 49 U.S.C. § 721 and 5 U.S.C. § 554(e), we will issue a declaratory order to remove uncertainty in this matter. Based on our review of the transaction documents, we find that the City would step into the Port’s shoes with respect to ownership of the land and physical assets of the Line, and as such, the City would not become a rail carrier and the transaction does not require Board approval.

ECR is concerned that there is potential for the Port or the City to use Section 12.12 of the O&M Agreement to interfere with ECR’s ability to perform common carrier service over the Line. ECR’s concern is that, because the City’s original petition indicated that significant portions of the right-of-way would be deemed “ancillary,” the City might rely on Section 12.12

¹⁶ City Surreply 4; see also Original Pet. 9 n.6.

¹⁷ Although the City refers to the Board’s 2008 and 2015 decisions as having “approved” those transactions, no approvals were issued. Rather, the Board found in those decisions that the proposed transaction would not be an acquisition of a line of railroad that would require Board authorization under 49 U.S.C. § 10901 or cause the Port or the County to become a rail carrier under the Interstate Commerce Act.

¹⁸ ECR Surreply 2.

¹⁹ Id.

to unilaterally deem certain necessary portions of the right-of-way “ancillary” in the transaction as presently structured.

We will assume that the City made the changes to its transaction in good faith and that it does not intend to invoke Section 12.12 to unreasonably interfere with ECR’s ability to carry out its common carrier obligation. Regardless of the City’s intent, the Board already determined in Port of Seattle that nothing in the O&M Agreement (including Section 12.12) would give the Port the ability to interfere unduly with ECR’s ability to carry out the common carrier obligation on the Line. Port of Seattle, slip op. at 4 (finding that the quitclaim deed granted the third-party operator an exclusive and permanent freight easement). As written, Section 12.12 does not undermine ECR’s operating authority because this provision indicates that only parcels *not used for rail operations or trail use*, and that *do not contain any facilities used in connection with rail operations*, would potentially be subject to transfer. Further, the City acknowledges that only parcels unnecessary for current or “reasonably foreseeable” future freight rail service could be sold as ancillary parcels under Section 12.12. Nevertheless, to ensure that there is no misunderstanding, the Board reiterates that neither the Port nor the City may materially interfere with ECR’s right and obligation to provide rail freight service on the Line. See Port of Seattle, slip op. at 5. In addition, ECR may petition the Board to take further action should it experience undue interference in its ability to perform common carrier duties over the Line—including an attempt by the Port or the City to use Section 12.12 to convey a parcel needed for current or future rail service.

Thus, we find here that the proposed transaction would not be an acquisition of a railroad line that would require Board authorization under 49 U.S.C. § 10901, or an exemption under 49 U.S.C. § 10502, and would not cause the City to become a rail carrier under the Interstate Commerce Act.

It is ordered:

1. The City’s July 1, 2015 surreply and ECR’s July 21, 2015 surreply are accepted into the record.
2. The City’s petition for declaratory order is granted, as discussed above.
3. This decision will be effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Miller.