

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35866

MASSACHUSETTS DEPARTMENT OF TRANSPORTATION—ACQUISITION
EXEMPTION—CERTAIN ASSETS OF HOUSATONIC RAILROAD COMPANY, INC.

Digest:¹ In a previous decision, the Board granted in part Massachusetts Department of Transportation’s motion to dismiss its notice of exemption to acquire certain physical assets and right-of-way from Housatonic Railroad Company, Inc., and Maybrook Railroad Company and requested supplemental information related to the proposed acquisition of passenger rights. In this decision, the Board is denying the remainder of that motion. The Board finds that the proposed acquisition of passenger rights would require Board authorization. The Board also finds that Maybrook Railroad Company is not a necessary party to the proceeding.

Decided: May 21, 2015

In this decision, the Board is denying Massachusetts Department of Transportation’s (MassDOT) motion to dismiss its notice of exemption with respect to its acquisition of passenger rights from Housatonic Railroad Company, Inc. (HRRC). In a prior decision, served on December 24, 2014, the Board granted MassDOT’s motion to dismiss the notice of exemption to the extent that it related to the acquisition of the physical assets of the HRRC line. Here, we find that Board authority under 49 U.S.C. § 10901 would be required for the remaining component of that transaction: the transfer of passenger rights. We also find that Maybrook Railroad Company (MRC) is not a necessary party to this proceeding.

BACKGROUND

On October 16, 2014, MassDOT filed a verified notice of exemption under 49 C.F.R. § 1150.31 to acquire from HRRC and MRC certain railroad assets, including the railroad right-of-way and track, comprising the “Berkshire Line,” which extends from approximately milepost

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).

50.0 at the Massachusetts-Connecticut border at Sheffield, Mass., to a connection with CSX Transportation, Inc., at approximately milepost 86.3 at Pittsfield, Mass. (the Line). Simultaneously, MassDOT filed a motion to dismiss its notice of exemption, asserting that the transaction does not require Board authorization under Maine Department of Transportation—Acquisition & Operation Exemption—Maine Central Railroad, 8 I.C.C. 2d 835 (1991), because MassDOT would not become a common carrier as a result of the transaction. Additionally, in its motion to dismiss, MassDOT asserted that MRC was not an essential party to this proceeding because MRC owns only the land comprising the railroad right-of-way, and the transfer of that real estate interest is not subject to the Board’s jurisdiction.

Notice of the exemption was served and published in the Federal Register on October 31, 2014 (79 Fed. Reg. 64,883). On November 7, 2014, the Board received comments from the Brotherhood of Railroad Signalmen and the Brotherhood of Maintenance of Way Employees Division/IBT.

In a decision served December 24, 2014 (the December Decision), the Board granted, in part, MassDOT’s motion to dismiss its notice of exemption, finding that § 10901 would not apply to the sale of the physical assets and right-of-way of the Line. In the same decision, the Board found that it was unable to determine, based on the information provided, whether § 10901 would apply to MassDOT’s proposed acquisition of passenger rights, and whether MRC is a necessary party to the proceeding. The Board directed MassDOT to file supplemental information, describing its acquisition and intended use of the passenger rights and clarifying whether MRC acquired any passenger rights when it acquired its interests in the Line from HRRC in 2013.

MassDOT filed supplemental information in support of its motion to dismiss on January 23, 2015 (the January Filing). In its filing, MassDOT states that it intentionally excluded its acquisition of passenger rights from the verified notice of exemption. MassDOT requests that the Board, therefore, find that the December Decision dismissed MassDOT’s verified notice of exemption in its entirety. In the alternative, MassDOT requests that the Board allow MassDOT to withdraw the acquisition of passenger rights from the verified notice of exemption. Additionally, MassDOT provided with its January Filing a letter from HRRC and MRC, dated January 20, 2015, in which HRRC and MRC confirm that MRC did not acquire any railroad operating rights in the 2013 transaction.

For the reasons discussed below, the Board denies the remaining part of MassDOT’s motion to dismiss its notice of exemption, which relates to MassDOT’s proposed acquisition of passenger rights. The Board also finds that MRC is not a necessary party to this proceeding.

DISCUSSION AND CONCLUSIONS

In its January Filing, MassDOT requests that the Board find that the December Decision dismissed MassDOT’s verified notice of exemption in its entirety because MassDOT “did not

seek, and does not seek, to include within the scope of its [verified notice of exemption] the authority under federal law to provide interstate, common carrier passenger service.”² We will deny this request, as explained below.

A party is required to inform the Board of the entire transaction, and the Board approves or disapproves the transaction as a whole. Central Ill. R.R.—Lease & Operation Exemption—Lines of Burlington N. & Santa Fe R.R. at Chicago, Cook Cnty. Ill., FD 33960, slip op. at 3 (STB served Nov. 22, 2000) (“The fact that part of the track may be exempt spur is irrelevant, because part of the track is main line for which authority must be sought, and the transaction before the Board is a single lease.”). Here, MassDOT seeks to acquire MRC’s and HRRC’s collective right, title, and interest in the Line, which includes not only the physical assets and the right-of-way, but also the passenger rights over the Line. Consistent with Board precedent, we will consider the entire transaction in ruling on MassDOT’s motion to dismiss its notice of exemption.

The Board must first determine, based on the information before it, whether the contemplated passenger service would be subject to the Board’s jurisdiction. Under 49 U.S.C. § 10501(a)(2)(A), the Board has jurisdiction over: (1) transportation by rail carrier between a place in a state and a place in another state; and (2) transportation by rail carrier that is between a place in a state and another place in the same state, as long as that intrastate transportation is carried out as part of the interstate rail network. DesertXpress Enters.—Pet. for Declaratory Order (DesertXpress), FD 34914 (STB served May 7, 2010). MassDOT concedes in its January Filing that the contemplated passenger service on this line would likely be interstate and non-commuter in nature.³ Indeed, MassDOT explicitly states that it is contemplating future use of passenger rights in Connecticut, which it has acquired or will acquire in a separate transaction,⁴ and that it intends to restore regional passenger service between western Massachusetts and New

² Supplemental Info. in Supp. of Mot. to Dismiss 4.

³ Id. at 7.

⁴ MassDOT notes in its January Filing that it has decided not to seek Board authority at this time to acquire passenger rights in Connecticut “in light of the distant time horizon for the initiation of passenger service.” Id. Because the Connecticut passenger rights are not conveyed as part of the transaction before the Board in this proceeding, see Mot. to Dismiss 54, this decision does not encompass the transfer of those rights. However, the analysis employed by the Board in this decision would apply to the transfer of the passenger rights in Connecticut, and MassDOT should consider this decision when it decides whether to obtain Board approval for the acquisition of those rights.

York City.⁵ As a result, the passenger service contemplated by MassDOT would be interstate and subject to the Board’s jurisdiction under § 10501.

MassDOT states in its January Filing that it is not seeking Board authority for its passenger operations at this time because it intends to keep the passenger rights “dormant for the foreseeable future.”⁶ MassDOT contends that it would not become a rail common carrier for passenger service until it exercises its passenger rights over the Line pursuant to Board authority. Under 49 U.S.C. § 10901(a)(4), however, a noncarrier may not *acquire* a railroad line without prior Board approval. See also 49 C.F.R. § 1150.1 (“Noncarriers require Board approval under section 10901 to construct, acquire or operate a rail line in interstate commerce.”); Union Pac. R.R., Iowa Interstate R.R., Red Giant Oil Co., and Midwest Walnut Co. of Iowa—Acquis. and Discontinuance of Serv. Exemption—in Council Bluffs, Iowa, FD 35220, slip op. at 4 (STB served Sept. 22, 2010). It is irrelevant whether MassDOT intends to exercise its passenger rights by operating immediately. MassDOT is required to obtain Board approval for its acquisition of passenger rights even if it chooses not to exercise those rights until some future date.

Under the terms of the proposed transaction, MassDOT also intends to use these passenger rights to occasionally transport passengers in connection with civic, sports, or other events (Occasional Use). MassDOT states in its January Filing that its Occasional Use of the Line is not expected to cross state lines. As described, MassDOT’s Occasional Use of the Line would not be subject to the Board’s jurisdiction under 49 U.S.C. § 10501(a)(2)(A) because the Occasional Use would be intrastate and, based on the information before the Board, not part of the interstate network.⁷

⁵ Supplemental Info. in Supp. of Mot. to Dismiss 7; Mot. to Dismiss 5, 16, 28, 54.

⁶ Supplemental Info. in Supp. of Mot. to Dismiss 10.

⁷ MassDOT’s Occasional Use of the Line would not be excepted from the Board’s jurisdiction as mass transportation provided by a local government authority as MassDOT contends. Mass transportation means “transportation services described in [49 U.S.C. § 5302(a)] that are provided by rail.” 49 U.S.C. § 10501(c)(1)(B). The only type of transportation defined under § 5302 is “public transportation,” which includes (with some exceptions) “*regular*, continuing shared-ride surface transportation services that are open to the general public or open to a segment of the general public defined by age, disability, or low income.” 49 U.S.C. § 5302(14) (emphasis added); N.J. Ass’n of R.R. Passengers—Pet. for Declaratory Order—Princeton Branch, FD 35745, slip op. at 4 (STB served July 25, 2014). Here, MassDOT states in its January Filing that its Occasional Use of the Line would be “*non-regularly-scheduled* service.” Supplemental Info. in Supp. of Mot. to Dismiss 8 (emphasis added). As such, the Occasional Use would not qualify as mass transportation because it does not satisfy the definition of public transportation. Therefore, if MassDOT’s Occasional Use of the Line were to

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Should MassDOT proceed with the transaction as it is currently structured, however, MassDOT would become a common carrier subject to the Board's jurisdiction due to its acquisition of passenger rights for interstate passenger service.⁸ If MassDOT does not wish to become a common carrier, it may excise the acquisition of passenger rights from the transaction.⁹ If MassDOT does so, no further Board decision would be necessary. See, e.g., Wis. Dep't of Transp.—Pet. for Declaratory Order—Rail Lines in Almena, Cameron, & Rice Lake, Barron Cnty., Wis., FD 35455 (STB served Nov. 10, 2011) (addressing whether Board authorization was required following restructuring of proposed transaction).

Necessity of MRC as a Party to the Proceedings. In the December Decision, the Board requested supplemental information to determine whether MRC is a necessary party to this

(. . . continued)

cross state lines, the Occasional Use would be subject to the Board's jurisdiction under 49 U.S.C. § 10501(a)(2)(A).

⁸ A railroad wishing to terminate its obligation to provide common carrier service over a line may seek abandonment authority from the Board.

⁹ In its January Filing, MassDOT requests that the Board allow it to withdraw the acquisition of passenger rights from its verified notice of exemption. Supplemental Info. in Supp. of Mot. to Dismiss 4-5, 12-13. MassDOT cites three Board decisions in support of its request; however, in each of these cases, the partial withdrawal was the result of a change in the underlying transaction. See, e.g., Am. Surface Lines—Acquis. & Operation Exemption—Mikrut Properties, FD 35741 (STB served Nov. 26, 2013) (allowing the notice filer to partially withdraw its notice of exemption after the filer decided not to consummate the transaction with respect to a specific track segment); CSX Transp.—Aban. in Vermillion Cnty., Ill., AB 55 (Sub-No. 193) (Served Aug. 28, 1989) (granting CSX leave to partially withdraw its abandonment application with respect to a specific track segment so CSX could preserve rail service for a party opposing the abandonment); Ala. Great S. R.R.—Discontinuance Exemption—In Saint Bernard Parish, La., AB 290 (Sub-No. 323X) (STB served Dec. 17, 2013) (granting the railroad's request to modify the grant of authority from abandonment to discontinuance after the railroad decided not to abandon the line). None of these cases support MassDOT's request to modify the scope of its verified notice of exemption without MassDOT also modifying the scope of the underlying transaction. Consistent with Board precedent, MassDOT would be required to excise the acquisition of passenger rights from the *transaction*, not just the notice, in order to avoid becoming a common carrier. In the event that MassDOT has consummated the transaction prior to the issuance of this decision, MassDOT is directed to notify the Board if MassDOT intends to excise the acquisition of passenger rights from the transaction, and indicate its timeframe for doing so.

proceeding. Specifically, the Board requested that MassDOT obtain documentation clarifying whether MRC received any passenger rights when it acquired its interests in the Line from HRRC. See Housatonic R.R., Maybrook R.R., & Housatonic Transp. Co.—Intra-Corporate Family Transaction Exemption (Housatonic—Transaction Exemption), FD 35723 (STB served Mar. 22, 2013). Attached to its January Filing, MassDOT filed a letter, dated January 20, 2015, in which HRRC and MRC confirm that no passenger rights were transferred from HRRC to MRC. HRRC and MRC state in the letter that “[t]he 2013 transaction between HRRC and MRC was intended to be a real estate transaction No railroad operating rights of any sort were transferred or intended to be transferred to MRC. The parties to the 2013 transaction did not intend for MRC to assume any common carrier status as a consequence of the transaction, and they endeavored to structure the terms of the transaction accordingly.”¹⁰

Based on the information provided, MRC is not a necessary party to this proceeding. In Florida Central Railroad—Abandonment Exemption—in Lake County, Fla. (Florida Central), AB 319 (Sub-No. 2X) (served June 7, 1993), the Board’s predecessor, the Interstate Commerce Commission (ICC), exempted from the prior approval requirements of 49 U.S.C. § 10903-04 the abandonment of railroad line, where the owner possessed only a right-of-way interest in the railroad line. The ICC stated that, “[t]he owner of the right-of-way underlying a rail line may dispose of its interests therein without the Commission’s approval or exemption.” Id. at 2. Here, MRC similarly possesses only a right-of-way underlying the Line. In accordance with Florida Central, MRC may dispose of that interest without Board prior approval. MRC, therefore, is not a necessary party to this proceeding.

It is ordered:

1. The remainder of MassDOT’s motion to dismiss its notice of exemption is denied.
2. MRC is not a necessary party to the proceeding.
3. This decision will be effective on its service date.

By the Board, Acting Chairman Miller and Vice Chairman Begeman.

¹⁰ Supplemental Info. in Supp. of Mot. to Dismiss 18.