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SERVICE DATE - MARCH 5, 1998

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33472

FUN TRAINS, INC.—OPERATION EXEMPTION—  
LINES OF CSX TRANSPORTATION, INC.  
AND FLORIDA DEPARTMENT OF TRANSPORTATION

Decided: February 24, 1998

In a notice of exemption under 49 CFR 1150, Subpart D—Exempt Transactions, served and published October 23, 1997 (62 FR 55317), Fun Trains, Inc. (Fun Trains), a noncarrier, was authorized to operate an excursion rail passenger service between milepost 1034 at Hialeah, FL, and milepost 793.5 at Poinciana, FL. Fun Trains proposes to operate over 241 miles of rail lines pursuant to trackage rights granted by the CSX Transportation, Inc. (CSXT), and the Florida Department of Transportation (FDOT). The transaction was scheduled to be consummated on October 1, 1997.

Concurrent with the filing of the notice of exemption, Fun Trains filed a motion to dismiss the proceeding for lack of jurisdiction, asserting that the proposed intrastate excursion rail passenger service is not subject to the Board's jurisdiction. On October 15, 1997, the United Transportation Union (UTU) replied, opposing the motion. We will grant the motion and dismiss this proceeding for lack of jurisdiction.

BACKGROUND

Fun Trains and its corporate parent, First American Railways, Inc. (First American), entered into agreements with CSXT and FDOT that granted Fun Trains exclusive overhead trackage rights over their rail lines to operate a privately funded excursion passenger train to be known as the "Florida Fun Train" for a 5-year term with an option to renew for another 5 years.<sup>1</sup> Fun Trains' operating rights are subject to: (1) National Rail Passenger Corporation's (Amtrak) rights to operate intercity rail passenger service; (2) the Tri-County Commuter Rail Authority (TCRA) rights to operate publicly funded passenger service; (3) the rights of others to operate high speed passenger service; and (4) CSXT's rights to run freight service over the lines. Amtrak will supply the locomotives and crews used for Fun Trains' operations.

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<sup>1</sup> Copies of the trackage rights agreement with CSXT, dated October 31, 1996, and the operating agreement with FDOT, dated January 6, 1997, were submitted into the record by Fun Trains on October 10, 1997. Fun Trains certified that it served copies of both agreements on UTU on December 2, 1997.

Fun Trains proposes to provide one-way and round trip entertainment service between Hollywood and the Poinciana, FL area, to offer deluxe coach accommodations, food and beverage service, and to provide onboard entertainment for tourists traveling between the Orlando Disney World area and southeastern Florida. Fun Trains states that it will not attempt to compete with Amtrak or TCRA, and will not provide service between intermediate points to compete with Amtrak or TCRA. No joint ticketing arrangements will be available between Fun Trains and any other carrier.

In its motion to dismiss, Fun Trains contends that we do not have jurisdiction over its proposed operations, citing Napa Valley Wine Train, Inc.—Pet. for Declaratory Order, 7 I.C.C.2d 954, 960-65 (1991) (Napa), and Magner-O’Hara Scenic Railway—Operation—In the State of Michigan, Finance Docket No. 29161 (ICC served May 12, 1981), aff’d sub nom., Magner-O’Hara Scenic Ry. v. ICC, 692 F.2d 441 (6th Cir. 1982) (Magner-O’Hara). Fun Trains asserts that its operations are not sufficiently linked to, and part of, the interstate system to be deemed “interstate commerce.” Fun Trains claims that its operations would be totally intrastate and would not interchange or connect to interstate rail carriers. Fun Trains also notes that, although many of its potential riders will be tourists traveling in interstate commerce, their journeys will not be continuous. The number of customers who will connect directly with Amtrak is expected to be minimal. Allegedly, Fun Trains will market its service for travelers and tourists who are looking for transportation that is “entertainment oriented.” Assertedly, Fun Trains will not provide local service and will not seek nontourist customers seeking transportation between Hollywood and Orlando. Finally, Fun Trains states that it has no plans to provide interstate rail freight service on this or any other rail line.

UTU contends that, unlike Magner-O’Hara and Napa where the carriers proposed to operate with their own crews and equipment, Fun Trains proposes to use Amtrak crews, which are subject to the Rail Passenger Service Act (RPSA). UTU claims that finding that the transaction is outside the Board’s jurisdiction would disrupt the treatment of these crews and locomotives. UTU asserts further that Fun Trains did not submit copies of the agreements with its motion. UTU also asserts that Fun Trains did not disclose other factors, including whether it could restrict CSXT’s freight service, or control dispatching and maintenance, and whether it could force CSXT to abandon freight service. UTU maintains that it is unclear whether CSXT has transferred its common carrier rights and obligations to Fun Trains.

#### DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10501(a)(2)(A), we have jurisdiction over transportation by rail carriers between a place in “a State and a place in the same or another State as part of the interstate rail network.” As noted, our predecessor, the Interstate Commerce Commission (ICC), determined that it did not have jurisdiction over wholly intrastate rail passenger service where that service was not part of the interstate rail passenger network. See Napa and Magner-O’Hara, supra. On the other hand, the ICC has determined that it had jurisdiction over a railroad lying wholly within one state if the railroad participates in the movement of passengers from one state to another under common

arrangements with connecting carriers, i.e., by means of through ticketing,<sup>2</sup> or when the railroad participates in the movement of freight in interstate or foreign commerce.<sup>3</sup> There is no indication here that Fun Trains' operations will be sufficiently linked to or will be part of interstate commerce. Fun Trains states that it will not participate in through passenger operations or common carrier arrangements with Amtrak and it will not transport freight in interstate commerce.

We are not persuaded by UTU's argument that we should assert jurisdiction here because Amtrak will supply crews and equipment for Fun Trains' operations. Our authority under the RPSA is quite limited; see 49 U.S.C. 24301(c)(1)(A)-(E). Our primary role is prescribing reasonable terms and compensation for Amtrak's use of facilities of and receipt of facilities from rail carriers or regional transportation authorities. 49 U.S.C. 24308. Because we lack general authority over Amtrak's routes and services, 49 U.S.C. 23401(c)(1)(C), we have no authority to regulate Amtrak's use of employees or equipment. The fact that Amtrak employees who provide service to Fun Trains are subject to the RPSA does not provide a basis for our asserting jurisdiction.

UTU expresses a concern that Fun Trains could control operations on CSXT and FDOT trackage. However, the agreements, which Fun Train submitted into the record and served on UTU, show that CSXT has not transferred its common carrier obligations to Fun Trains. Fun Trains' operations will be subject to CSXT's control, on both CSXT and FDOT trackage. CSXT will control dispatching and operations of Fun Trains and its safety and operating rules will apply to Fun Trains' operations. CSXT will also be responsible for track maintenance. The agreements specify that Fun Trains' operations would not interfere with CSXT's freight operations or with Amtrak's intercity passenger operations. There is nothing in the agreements that would enable Fun Trains to force CSXT to abandon the line or restrict CSXT's freight operations. Thus, the agreements show that CSXT will continue to control operations on its lines and FDOT lines after Fun Trains commences operations.

The record supports finding that Fun Trains' operations are not subject to our jurisdiction. Accordingly, we will dismiss this proceeding for lack of jurisdiction.

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

It is ordered:

1. The motion to dismiss is granted. This proceeding is dismissed for lack of jurisdiction.

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<sup>2</sup> See ICC v. Capital Transit Co., 338 U.S. 289 (1949).

<sup>3</sup> See Historic Railroads, Inc.—Acquisition and Operation, 347 I.C.C. 369 (1974) and Durango & S.N.G.R. Co.—Acquisition and Operation, 363 I.C.C. 292 (1979).

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2. This decision is effective on the date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams  
Secretary