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SERVICE DATE - FEBRUARY 15, 2000

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33786

NEW JERSEY TRANSIT CORPORATION—ACQUISITION EXEMPTION—
CERTAIN ASSETS OF CONSOLIDATED RAIL CORPORATION

Decided: February 11, 2000

Through a transaction that was the subject of a notice of exemption under 49 CFR 1150–Subpart D–Exempt Transactions, which was served and published on January 7, 2000 (65 FR 1226), the New Jersey Transit Corporation (NJ Transit) proposed to acquire from Consolidated Rail Corporation (Conrail) certain physical assets of a 31.83-mile rail line, known as the Bordentown Secondary Track, between Camden (Milepost 1.07) and Trenton, NJ (Milepost 32.9). Consummation of the transaction was expected to occur on or after December 15, 1999, the effective date of the exemption. Concurrent with its filing of the verified notice invoking the exemption, NJ Transit filed a motion to dismiss the notice of exemption, asserting that the transaction is not subject to the Board’s jurisdiction. We will grant the motion to dismiss.

BACKGROUND

NJ Transit, which is an instrumentality of the State of New Jersey, stated that, after it acquired the line, it would construct and operate a light rail transit system on the line. The Purchase and Sale Agreement (Purchase Agreement) indicates that NJ Transit will acquire: (1) Conrail’s right, title and real estate interest in the line, together with all buildings, improvements, fixtures and appurtenances; and (2) certain leases, easements, licenses, permits, privileges, trackage rights and other agreements pertaining to the line. The Purchase Agreement further provides that Conrail will continue to operate freight service over the line on behalf of Norfolk Southern Railroad Company (NSR) and CSX Transportation, Inc. (CSXT), under the terms of the South Jersey Shared Assets Area Operating Agreement (SAAOA) among Conrail, NSR and CSXT.¹ Conrail also will retain the right to assign or grant trackage or operating rights to third parties.²

¹ We approved the SAAOA in CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company—Control and Operating Leases/Agreements—Conrail Inc. and Consolidated Rail Corporation, STB Finance Docket No. 33388 (STB served July 23, 1998).

² A copy of the draft Purchase Agreement was submitted as Exhibit A to NJ Transit’s motion to dismiss.

NJ Transit stated that it and Conrail would also enter into an Operations and Maintenance Agreement (Operating Agreement) that will establish the operating rights, maintenance responsibilities, and financial arrangements for operations over the Bordentown Secondary Track.³ Under the Operating Agreement, NJ Transit will have a Passenger Operating Window to have exclusive and unlimited access to operate light rail passenger service on the line: (1) between the hours of 6:00 a.m. and 10:00 p.m., seven days a week; and (2) from 10:00 p.m. Saturday to 6:00 a.m. Sunday. The Operating Agreement provides that NJ Transit may request Conrail's approval to use the line for passenger service for special events or to perform maintenance during Conrail's Freight Operating Window.

The Operating Agreement further specifies that Conrail will have exclusive and unlimited access to operate freight rail service during the Freight Operating Window between 10:00 p.m. and 6:00 a.m., 6 days a week, beginning Sunday at 10:00 p.m. and concluding Saturday at 6:00 a.m. Conrail may also request emergency access to use the line as a detour route for overhead traffic in the event of a failure of the Delair Bridge.⁴ Conrail is also permitted to use the line for overhead traffic when it is unable to use rail facilities between the Delair Bridge and Pavonia yard. Conrail may also request scheduling of freight service between 10:00 p.m. on Saturday and 6:00 a.m. on Sunday, during what is normally the Passenger Operating Window under the Operating Agreement.

Under the Operating Agreement, NJ Transit will be responsible for dispatching and operating control of all trains on the line. NJ Transit will be liable for damages to Conrail for any neglect or abuse of dispatching that unreasonably interferes with or constrains Conrail's ability to serve customers during the Freight Operating Window.

NJ Transit is also responsible for all maintenance on the line. NJ Transit, however, may not conduct maintenance and track inspections during Conrail's Freight Operating Window or interfere with Conrail's freight operations. Conrail has the right to step in and maintain the line at NJ Transit's expense, if NJ Transit does not maintain the main track to Federal Railway Administration Class 2 standards, or if maintenance conducted by NJ Transit unreasonably interferes with Conrail operations.

DISCUSSION AND CONCLUSIONS

The question here is whether our regulatory approval is required for the proposed transfer of Conrail's Bordentown Secondary Track to NJ Transit. The acquisition of an active rail line and the

³ A copy of the draft Operating Agreement was submitted as Exhibit B to NJ Transit's motion to dismiss.

⁴ The Purchase Agreement indicates that the Delair Bridge crosses the Delaware River between New Jersey and Pennsylvania and is used by NJ Transit and Conrail.

common carrier obligation that goes with it ordinarily requires Board approval under 49 U.S.C. 10901. But when a carrier selling rail assets—track, ties, and underlying real estate—retains the right to continue providing rail service, we have declined to assert our jurisdiction.⁵ We have typically declined to find jurisdiction when the seller retains a permanent easement to permit it to continue to provide freight common carrier service. In making a determination here, we will look to whether Conrail has retained a permanent easement and whether it has sufficient interest and control over the line to permit it to carry out its common carrier obligation.

The Purchase Agreement specifies that NJ Transit will acquire certain real property, but that it “neither has nor will have any right, to serve present and future rail freight shippers” and that Conrail has reserved for itself an “exclusive, perpetual, transferable, assignable and irrevocable retained freight easement” in the line to serve present and future rail shippers. Conrail also has retained the right to assign freight operating rights to third parties.

Through the Purchase Agreement, NJ Transit will acquire the property and contract rights needed to establish its light rail transit system on the line. However, NJ Transit will not have sufficient property or contract rights to interfere with Conrail freight operations. No rail common carrier rights or obligations are being transferred to NJ Transit. The Purchase Agreement preserves Conrail’s property and contract rights to continue conducting freight operations on the line.

The Freight Operating Window prescribed in the Operating Agreement should afford Conrail ample time to meet its rail carrier obligations. NJ Transit will not be permitted to access or use the line during the Freight Operating Window except upon prior approval of Conrail. The Operating Agreement contains this and several other provisions that protect Conrail’s freight service. These provisions ensure that NJ Transit’s light rail operations will not interfere with Conrail’s freight railroad operations and that NJ Transit’s control of dispatching and maintenance will not impede Conrail’s ability to continue rail freight operations on the line.

We see no basis for finding that our approval is required for the transaction or finding that NJ Transit will become a rail carrier under our jurisdiction. After NJ Transit acquires the physical assets of the Bordentown Secondary Track, Conrail will continue to provide rail common carrier freight service over the line. The record shows that NJ Transit does not intend to provide freight rail service. Nor does the record show that NJ Transit intends to or can improperly interfere with or impede the ability of Conrail to provide freight rail service.

⁵ See City of Charlotte, North Carolina—Acquisition Exemption—Certain Assets of the North Carolina Railroad Company, STB Finance Docket No. 33529 (STB served Feb. 24, 1998); Consolidated Rail Corporation—Petition for Declaratory Order—C&P Dock, STB Finance Docket No. 33296 (STB served Dec. 13, 1996); and Maine, DOT—Acq. Exemption, ME. Central R. Co., 8 I.C.C.2d 835 (1991).

Accordingly, we will grant the motion to dismiss the notice of exemption.⁶

NJ Transit has requested expedited consideration of its motion to dismiss to enable it to proceed with construction of the light rail system and avoid delays that would result in significant expenditures of public monies. To accommodate NJ Transit's request, we will make the exemption effective upon service of this decision. Because we have received no comments in opposition to the proposed acquisition or the motion to dismiss, we do not anticipate that any party will seek to stay the effect of this order.

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

It is ordered:

1. NJ Transit's motion to dismiss its notice of exemption is granted.
2. This decision is effective on its service date.

By the Board, Chairman Morgan, Vice Chairman Burkes, and Commissioner Clyburn.

Vernon A. Williams
Secretary

⁶ In a letter filed January 18, 2000, Conrail states that, even though this transaction is not subject to Board jurisdiction, it has reached voluntary agreements with the Brotherhood of Maintenance of Way Employes and the Brotherhood of Railroad Signalman to provide economic benefits equivalent to those contained in New York Dock Ry.—Control—Brooklyn Eastern Dist., 360 I.C.C. 60 (1979).