

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34953

MIDTOWN TDR VENTURES LLC—ACQUISITION EXEMPTION—AMERICAN  
PREMIER UNDERWRITERS, INC., THE OWASCO RIVER RAILWAY, INC., AND  
AMERICAN FINANCIAL GROUP, INC.

Decided: June 7, 2007

On November 7, 2006, Midtown TDR Ventures LLC (Midtown), a noncarrier, filed a verified notice of exemption under 49 CFR 1150.31 to acquire a 156-mile of rail line, known as the Harlem-Hudson Line (Line), and certain properties at Grand Central Station (together, Subject Properties) from American Premier Underwriters, Inc. (APU),<sup>1</sup> a noncarrier, APU's wholly owned subsidiary, The Owasco River Railway, Inc. (Owasco), a noncarrier, and APU's parent, American Financial Group, Inc., a noncarrier (collectively, Sellers). Simultaneously, Midtown filed a motion to dismiss its notice of exemption, asserting that the transaction is not subject to Board jurisdiction because Midtown will not become a common carrier as a result of the transaction.

BACKGROUND

Midtown states that, pursuant to a Purchase Agreement, it was to acquire the Sellers' fee ownership of the physical assets associated with the Subject Properties, but would not acquire any trackage or freight rights associated with the Subject Properties. According to Midtown, the common carrier rights and obligations were previously transferred to Metropolitan Transportation Authority (MTA) by APU and Owasco under a pre-existing long-term lease (MTA lease). Under the MTA lease, trackage rights were previously granted to CSX Transportation, Inc., and the Delaware and Hudson Railway Company, Inc., both of which will continue freight operations on the Line.

In support of the motion to dismiss, Midtown submitted the Purchase Agreement between itself and Sellers, the MTA lease, and the two trackage rights agreements. The Purchase Agreement states that Midtown will step into the shoes of APU and Owasco with regard to the MTA lease, as lessor.

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<sup>1</sup> According to Midtown, APU is successor by merger to The New York & Harlem Railroad Company (NY&H).

## DISCUSSION

At issue here is whether the Board's regulatory approval is required for Midtown to acquire the fee ownership of the Line, where other entities continue to hold the trackage rights through the operation of a lease. The acquisition of an active rail line and the common carrier obligation that goes with it ordinarily require Board approval under 49 U.S.C. 10901, even if the acquiring entity is a noncarrier. See Common Carrier Status of States, State Agencies, 363 I.C.C. 132, 133 (1980), aff'd sub nom. Simmons v. ICC, 697 F.2d 326 (D.C. Cir. 1982). However, the Board will not exercise its jurisdiction where no common carrier rights or obligations are transferred with the line. See Maine, DOT—Acq. Exemption, ME Central R. Co., 8 I.C.C.2d 835, 836-37 (1991) (State of Maine). In order for a State of Maine exception to apply, the contractual rights retained by the remaining carriers must be unconditional and permit no inferences with or influence over the carriers' rail operations by the entering party. See Missouri River Bridge Co.—Acquisition Exemption—Certain Assets of Chicago, Central & Pac. R.R., Finance Docket No. 32384, 1994 WL 61756 (ICC served Mar. 3, 1994); Southern Pacific Transp. Co.—Abandonment, 8 I.C.C.2d 495, 508 (1992) (SPT Abandonment).

In prior decisions, the Board has determined that rights acquired by a noncarrier could be so extensive that the noncarrier would acquire control of the rail line, and therefore the obligations and rights of a common carrier. See, e.g., Orange County Transp.—Exempt.—Atchison, T. & S.F. Ry. Co. 10 I.C.C.2d 78 (1994); SPT Abandonment, reconsidered and clarified, Southern Pac. Transp. Co.—Abandonment—L.A. County, CA, 9 I.C.C.2d 385 (1993). In those instances, the common carrier rights retained by the carriers were not unconditional and without interference, thus placing the transactions at issue within the Board's authority to approve or disapprove.

Based on the record in this proceeding, the Board does not have enough information about the status of the common carrier rights and obligations on the Line to determine whether Midtown, upon purchase of the Subject Property, obtained, or will obtain rail carrier status. Midtown has not accounted for the possible common carrier obligations held by one of the Sellers, NY&H, which Midtown indicates operated on the Line. Because questions still remain as to the status of the parties with respect to the common carrier obligation, the following additional information is requested from Midtown.

1. Midtown should provide information as to whether Sellers conveyed any and all common carrier obligations they held exclusively to MTA through the MTA lease and held no common carrier rights or obligations at the time they entered into the Purchase Agreement with Midtown.
2. Midtown should include in their additional information a detailed explanation of the common carrier obligation held by NY&H while operating on the Line at any point in time and when those rights were discontinued.

3. Midtown should also provide the default terms of the MTA lease, showing whether the lease creates a substantial limitation on the rights of MTA, its transferees or assignees, to operate as common carriers on the Line (including a copy of any and all default provisions).

Midtown should submit the above additional information by July 9, 2007. Midtown's supplemental information must be confined to the issues discussed here; Midtown may not use the supplemental submissions as an opportunity to address other issues in the case. The request for information here should not be construed as a final resolution of any issue set forth in 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. Midtown is directed to submit the supplemental information set forth in this decision. The supplemental information is due by July 9, 2007.
2. This decision is effective on its date of service.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams  
Secretary