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SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35353

VFRC, LLC–ACQUISITION EXEMPTION–UNION PACIFIC RAILROAD COMPANY

Decided: February 28, 2011

On February 22, 2010, VFRC, LLC (VFRC), a noncarrier, filed a verified notice of exemption under 49 C.F.R. § 1150.31 to acquire certain physical assets of a rail line and the underlying right-of-way from Union Pacific Railroad Company (UP), between milepost 682.25, near Greenberry, Or., and milepost 687.6, near Corvallis, Or. (the Line), a distance of approximately 5.35 miles. The notice was served and published in the Federal Register on March 10, 2010 (75 Fed. Reg. 11,224).

Subsequently, on June 30, 2010, VFRC filed the instant motion to dismiss its notice. VFRC asserts that the Board does not have regulatory authority over the transaction and that the transaction's consummation did not render VFRC a common carrier.

BACKGROUND

The Line was embargoed in June 2007. To restore rail service, Venell Farms, Inc. (Venell), the only shipper on the Line, formed VFRC to acquire the Line's physical assets. To that end, VFRC entered into an agreement on May 20, 2010, with UP, whereby VFRC agreed to acquire by quitclaim deed UP's right, title, and interest in UP's right-of-way underlying the Line, together with any track, ties, ballast, other track materials, signals, switches, bridges, culverts and other personal property, fixtures and improvements on the right-of-way.[1] Because neither Venell nor VFRC wished to become a common carrier, UP retained what the quitclaim deed describes as a permanent, exclusive easement for the purpose of conducting freight rail operations on the Line. As part of the overall agreement, UP then transferred that easement to the Albany & Eastern Railroad Company (AERC).[2]

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[1] A copy of the quitclaim deed was submitted as Exhibit B of the Line Sale Contract attached to VFRC's motion to dismiss.

[2] AERC also acquired Willamette & Pacific Railroad's (WPRR) operating rights and obligations with respect to the Line. UP and WPRR retained limited overhead trackage rights over the Line. See Albany & E. R.R.–Acquisition and Operation Exemption–Union Pac. R.R., FD 35355 (STB served Mar. 10, 2010).

VFRC states that it entered into an operating agreement with AERC, which "permits AERC to utilize the physical assets of the Line in exercising the rights and obligations conveyed by the Freight Easement." VFRC motion at 5.[3]

In the motion to dismiss its notice, VFRC claims that it acquired only the physical assets underlying the Line. VFRC further claims that it did not acquire either the right or the obligation to provide common carrier rail service, and that it will not hold itself out to provide, and is incapable of providing, such service. VFRC states that AERC possesses the easement to provide freight service on the Line. Therefore, VFRC argues that the transaction does not require Board authorization and that its motion to dismiss should be granted. In support, VFRC cites Maine–Acquisition and Operation Exemption–Maine Central Railroad, 8.I.C.C.2d 835 (1991) (State of Maine), and a number of cases in which the Board found that the transfer of rail assets did not involve the transfer of a common carrier obligation.

DISCUSSION AND CONCLUSION

The question presented is whether the Board's regulatory approval is required for VFRC to acquire the assets of the Line, including the right-of-way, track, and physical assets. The acquisition of an active rail line and the common carrier obligation that goes with it ordinarily requires Board approval. Where the acquiring entity is a noncarrier, the standard for approval is set out in 49 U.S.C. § 10901. However, State of Maine and its progeny find that the sale of the physical assets of a rail line by a carrier to a state or other public agency does not constitute the sale of a railroad line within the meaning of 49 U.S.C. § 10901 when the selling carrier retains a permanent, exclusive freight operating easement and has sufficient control over the line to carry out its common carrier operations. When the seller does so, it retains the common carrier obligation on the line, as well as the rights of a common carrier. The terms of the sale must protect the seller from undue interference by the purchaser with the provision of common carrier freight rail service. See Mass. Dept. of Transp.—Acquisition Exemption—Certain Assets of CSX Transp., FD 35312 (STB served May 3, 2010).

The same standard has applied in the limited number of cases where, as here, the easement has been acquired by a non-public third party. Therefore, in determining VFRC's status, the agency will look to whether AERC has obtained a permanent easement and has sufficient interest in and control over the Line to permit it to carry out the common carrier obligation.

Here, there is a problem that could disqualify VFRC from invoking the State of Maine precedent. As noted above, a State of Maine transaction requires the seller to retain, or a third party (here, AERC) to acquire, a permanent easement to operate over the line. However,

[3] A copy of the freight easement deed was submitted as Exhibit 4 to VFRC's motion to dismiss. A copy of the operating agreement was submitted as Exhibit 2 to VFRC's motion to dismiss.

language in the parties' operating agreement suggests that AERC has not been granted a permanent easement. Section 15 of the operating agreement reads in part: "At the expiration of the Initial Term [9 years] or a Renewal Term [5 years each] of this Agreement pursuant to Section 13, or upon termination of this Agreement pursuant to Section 14, AERC shall immediately assign the Freight Easement to an entity chosen by VFRC." These sections of the operating agreement vest significant control in the hands of VFRC, given its broad rights to terminate AERC's operations. See S. Pac. Transp.–Aban. Exemption–L.A. Cnty., Cal., 9 I.C.C.2d 385, 388 (1993); L.A. Cnty. Transp. Comm'N--Petition for Exemption—Acquis. from Union Pac. R.R., STB Finance Docket No. 32374 (STB served July 23, 1996).

VFRC has made a significant effort to restore service over the Line, and, in furtherance of that goal, may submit a modified operating agreement by May 2, 2011 that removes or revises the language that suggests that AERC does not have a permanent easement to operate the Line. Alternatively, the Board will render a decision based on the existing record.

If VFRC desires assistance in addressing the concerns raised in this decision, the Board's Office of Public Assistance, Governmental Affairs and Compliance may be contacted at (202) 245-0238.

It is ordered:

1. VFRC may submit a modified operating agreement by May 2, 2011.

2. This decision is effective on its service date.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.