

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35440

STATE OF MAINE—PETITION FOR DECLARATORY ORDER

Decided: December 10, 2010

On October 26, 2010, the State of Maine, acting by and through its Department of Transportation (Maine DOT), filed a petition for declaratory order, requesting a determination that the transactions described herein between Maine DOT and the St. Lawrence & Atlantic Railroad Company (SLR) are not subject to the Board’s regulatory authority, and that Maine DOT will not be subject to the Board’s regulatory authority as a carrier, under State of Maine—Acquisition & Operation Exemption—Maine Central Railroad, 8 I.C.C.2d 835 (1991) (State of Maine). Under the proposed transaction, Maine DOT would acquire from SLR: (1) the physical assets and the associated rights-of-way along 13.807 miles of rail line between milepost 12.163, at Yarmouth, Cumberland County, Me., and milepost 25.97 at the line between New Gloucester, Cumberland County, Me., and Auburn, Androscoggin County, Me. (the Middle Segment); and (2) “passenger operating rights” for an operator to be designated by Maine DOT, over a 3.59-mile segment in Auburn, between milepost 25.97 and milepost 29.56 (the Northern Segment). Under the proposed transaction, SLR would retain a permanent, exclusive easement for providing freight rail service over the Middle Segment and would retain ownership of the Northern Segment. In support of its position that it would not become a common carrier as a result of these transactions, Maine DOT cites State of Maine—Acquisition Exemption—Certain Assets of St. Lawrence & Atlantic Railroad, FD 35018 (STB served Sept. 13, 2007) (2007 Decision) and State of Maine.

BACKGROUND

This transaction is an extension of a 2007 transaction under which Maine DOT purchased from SLR 11 miles of right-of-way and tracks in Cumberland County, Me. for future passenger service (2007 transaction). The Board – after examining the terms of the purchase and sale agreement, the operating agreement, and the draft quitclaim deed – determined that SLR would have sufficient access and rights to fulfill its common carrier obligations and found that Board authorization was not required for Maine DOT to acquire the right-of-way and trackage.¹

At the time of the 2007 transaction, SLR granted to Maine DOT an option to acquire additional trackage and passenger rail operating rights so that future passenger service could be

¹ See 2007 Decision.

extended an additional 17 miles north.² The 2007 transaction and the option were structured so that Maine DOT could acquire passenger rail operating rights between Portland, Me., and Auburn, Me., in 2 phases as funding became available. On October 20, 2010, Maine DOT gave formal notice to SLR to exercise the option.

Under the Option Agreement and the draft Passenger Operating Agreement appended to the Option Agreement, for the Northern Segment, SLR would retain ownership of the segment, along with the right and obligation to provide freight service. SLR would grant Maine DOT assignable passenger rail operating rights over the Northern Segment. Under the draft Passenger Operating Agreement, passenger rail service would be subject to the exclusive control and management of SLR. SLR would also be responsible for dispatching all trains on the Northern Segment and maintenance of the line.

The question presented by Maine DOT's petition is whether the Board's regulatory approval is required for Maine DOT to acquire the physical assets on the Middle Segment and to acquire operating rights to provide passenger rail service over the Northern Segment. In the Passenger Operating Agreement, Maine DOT and SLR define the "Passenger Rail Service" that Maine DOT would be permitted to operate over the Northern Segment as "the operation of passenger trains of any kind, including without limitation trains providing regularly-scheduled service for the transportation of commuters or intercity passengers and trains as to which tourism, entertainment or recreation, rather than transportation between origins and destinations, is the primary purpose; provided that such passenger trains comply with any FRA safety requirements applicable to the Line."³ Because Maine DOT and SLR define passenger rail service broadly, and because Maine DOT's passenger rail service plans may have progressed since its transactions in 1991⁴ and 2007, the Board does not have enough information about these passenger rail operations to make a determination as to whether they would require Board authorization.

The Board does not have jurisdiction over intrastate transportation that is not part of the interstate rail network. 49 U.S.C. § 10501(a)(2)(A); see DesertXpress Enters., LLC—Petition for Declaratory Order, FD 34914 (STB served May 7, 2010). It also does not have jurisdiction over mass transportation provided by a local governmental authority. 49 U.S.C. § 10501(c)(2).

² Maine DOT included a copy of the "Option Agreement to Purchase Rail Line and Passenger Operating Rights" (Option Agreement) with its petition.

³ Maine DOT Pet. for Decl. Order, Att. 2, Option Agrmt, Exh. E, Passenger Operating Agrmt, Section 1.

⁴ In State of Maine, Maine DOT sought to acquire the physical assets of a rail line as part of its plans to develop a mass transit (now called mass transportation) system. 8 I.C.C.2d at 835.

Maine DOT proposes to operate passenger trains “of any kind,” including services that may fall outside the Board’s jurisdiction. Before the Board can make a determination as to whether or not any of the passenger rail operating rights proposed here are within its jurisdiction,⁵ it needs specific information about the nature of the operations contemplated by Maine DOT.

Accordingly, Maine DOT and SLR must submit the following information:

1. A description of any passenger rail service presently provided by Maine DOT, SLR, Amtrak, or any other carrier over the lines acquired by Maine DOT through the 1991 and 2007 transactions⁶; and the proposed timing of Maine DOT’s future initiation of various types of passenger rail service, including any interstate services.
2. Maps showing, and a description of, where Maine DOT’s passenger rail service connects and will connect to the passenger rail network in Maine, the Northeast U.S., and Canada; and a description of whether joint ticketing arrangements, continuous travel, other common arrangements with connecting carriers, or direct physical connections or interchanges will be available between Maine DOT and other carriers providing passenger rail service or providers of other modes of passenger transportation, and how and to whom the services will be marketed.⁷
3. A description of excursion, tourist, entertainment, recreational passenger rail service; commuter rail passenger transportation; intercity or interstate passenger rail transportation (including high-speed passenger rail service) that Maine DOT proposes to provide.
4. A description of what role SLR plays and will play in planning, marketing, and providing Maine DOT’s passenger rail service in light of SLR’s retention of the exclusive control and management of passenger rail service over the Northern Segment.⁸

⁵ See, e.g., American Orient Express Ry.—Petition for Declaratory Order, FD 34502, slip op. (STB served Dec. 29, 2005); aff’d sub nom. American Orient Express Ry. v. STB, 484 F.3d 554 (D.C. Cir. 2007).

⁶ See 2007 Decision; State of Maine.

⁷ See, e.g., Cape Cod & Hyannis R.R.—Exemption From 49 U.S.C. Subtitle IV, FD 30859 (ICC served Aug. 25, 1986) (because of through ticketing from points out of state, rail transportation of passengers within Massachusetts was interstate transportation).

⁸ See Maine DOT Pet. for Decl. Order, Att. 2, Option Agrmt, Exh. E, Passenger Operating Agrmt, Sections 3 & 4.

In light of the request for expedited consideration, Maine DOT and SLR will be required to submit this information by December 20, 2010.

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

It is ordered:

1. Maine DOT and SLR are directed to submit the requested information described above pertaining to the passenger rail operating rights by December 20, 2010.
2. Maine DOT and SLR are directed to serve this decision on B&M Beans, and to certify that they have done so, by December 15, 2010.
3. Any other parties interested in this proceeding may submit comments by December 20, 2010.
4. Any replies to the information submitted by Maine DOT, SLR, and any other parties are due by December 28, 2010.
5. This decision will be effective on its service date.

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