

31611  
EB

SERVICE DATE - MARCH 6, 2001

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33889

STATE OF TEXAS (ACTING BY AND THROUGH THE TEXAS DEPARTMENT OF  
TRANSPORTATION)—ACQUISITION EXEMPTION—WEST TEXAS & LUBBOCK  
RAILROAD COMPANY, INC.

Decided: March 2, 2001

On June 16, 2000, the State of Texas (acting by and through the Texas Department of Transportation) (Texas or the State), a noncarrier, filed a verified notice of exemption under 49 CFR 1150.31 to acquire the right-of-way underlying a rail line (old rail line) from West Texas & Lubbock Railroad Company, Inc. (WTLR). The old rail line is located between milepost 7.2 and milepost 1.1, in Lubbock, TX, a distance of approximately 6.1 miles. Notice of the exemption was served by the Board and published in the Federal Register on July 5, 2000 (65 FR 41520). Texas acquired the old rail line as part of a plan for highway construction in Lubbock. On January 19, 2001, the State filed a motion to dismiss the notice on the grounds that the acquisition is not subject to the Board's jurisdiction and consummation of the transaction did not render the State a common carrier. The motion to dismiss will be granted.

BACKGROUND

In 1989, the State entered into an agreement with the City of Lubbock (City) to upgrade U.S. Highway 82 in downtown Lubbock to a controlled access highway. In order to accommodate the construction of the highway, it became necessary to relocate the old rail line, which was directly adjacent to the existing U.S. Highway 82. On February 12, 1991, the State and City entered into an agreement whereby the City, among other things, was responsible for relocating the old rail line and effecting the conveyance of the corridor underlying the old rail line from its prior owner, the Seagraves, Whiteface, and Lubbock Railroad Corporation (SWKR), to the State.<sup>1</sup>

On March 8, 1991, the City and SWKR entered into an agreement for the relocation of a portion of the SWKR railroad and for construction of the highway in Lubbock (relocation agreement). Pursuant to the relocation agreement, SWKR agreed to convey to the State all of SWKR's right, title and interest in the real property underlying the old rail line in exchange for the

---

<sup>1</sup> It appears that the relocation agreement was modified on two separate occasions—on June 5, 1991, and on May 30, 1997.

City conveying to SWKR fee title to a new right-of-way (new rail line) that would enable SWKR to connect with The Atchison, Topeka and Santa Fe Railroad Company (ATSF) in Lubbock.<sup>2</sup> The relocation agreement specified several conditions to be met before SWKR was obligated to convey the title to the real property underlying the old rail line to the State. The City: (1) had to locate an alternative route that was subject to SWKR's approval, (2) had to take all actions necessary to relocate SWKR's operations from the old rail line to the new rail line, and (3) was responsible for obtaining all necessary approvals for the abandonment of the old rail line and the construction and operation of the new rail line.<sup>3</sup> The relocation agreement provided that SWKR's conveyance of the real property underlying the old rail line to the State was to occur only upon completion of the construction of the new rail line and the simultaneous conveyance of that new rail line to SWKR. The relocation agreement provided SWKR with the option of salvaging the old rail line facilities.

On June 28, 2000, the relocation agreement was further modified to reflect that: (1) WTLR is the new owner of the old rail line; (2) WTLR is to obtain trackage rights from BNSF between the point of interchange of the new rail line and the BNSF line, on the one hand, and, on the other, the current point of interchange between the old rail line and the BNSF line in downtown Lubbock;<sup>4</sup> (3) WTLR is to convey the right-of-way underlying the old rail line by

---

<sup>2</sup> Texas says that the old rail line had been used primarily for overhead movements linking rail customers in the outlying communities with the ATSF main line in downtown Lubbock. ATSF has subsequently been merged into The Burlington Northern and Santa Fe Railway Company (BNSF).

<sup>3</sup> According to the State, at the time the relocation agreement was entered into in 1991, there were a few active rail shippers located on the old rail line, and the City contemplated that there would be a need to obtain abandonment authority on behalf of SWKR for the old rail line and construction and operating authority for the new rail line. Texas indicates that, by 1996, all rail shippers located on the old rail line had either relocated or stopped using rail service. The State notes that, upon completion of the construction of the new rail line by the City and State, SWKR's successor, WTLR, will relocate its operations to the new rail line, WTLR's easement over the old rail line will terminate, and the old rail line will become surplus and be deemed abandoned. The State asserts that the relocation and abandonment will not affect service to shippers and that construction of the new rail line will not alter the competitive situation in Lubbock. Texas contends that the abandonment of the old rail line and the construction of the new rail line are not subject to the Board's jurisdiction under Denver & R.G.W.R. Co.—Jt. Proj.—Relocation Over BN, 4 I.C.C.2d 95, 97-99 (1987).

<sup>4</sup> Because the relocation project as presently contemplated includes the granting of trackage rights by BNSF to WTLR, State indicates that WTLR will shortly be filing a notice of exemption under 49 CFR 1180.2(d)(5) to invoke the class exemption for joint relocation projects.

quitclaim deed to the State; and (4) WTLR retains the right to salvage the old rail line facilities after the relocation project is completed.

Pursuant to a conveyance agreement dated June 28, 2000, the State acquired from WTLR, by quitclaim deed, all of WTLR's interest in the real property underlying the old rail line. WTLR retained the exclusive rail freight easement that is to remain in effect until all of the obligations pursuant to the relocation agreement and amendment are met, the Board has approved the discontinuance of the rail operations over the old rail line, and the easement is transferred to the new rail line. Until WTLR is able to relocate its rail operations to the new rail line, it retains the property rights and exclusive right and obligation to conduct common carrier freight operations over the old rail line. The conveyance agreement provides that the State has the right to relocate certain utilities on the old rail line, but only if the work does not endanger or interfere with, hinder, interrupt or delay the operations of WTLR. However, WTLR has the exclusive right to maintain the old rail line until its operations are relocated to the new rail line.

According to the State, because it acquired the right-of-way and real property underlying the old rail line in order to accommodate the freeway construction in Lubbock and has not held itself out as willing or able to provide common carrier rail service over the old rail line, the transaction is outside the Board's jurisdiction under Maine, DOT--Acq. Exemption, Me. Central R. Co., 8 I.C.C.2d 835 (1991) (State of Maine).

#### DISCUSSION AND CONCLUSIONS

The State's motion to dismiss will be granted and the proceeding discontinued. The primary issues here are whether we must exercise jurisdiction over the proposed transfer of the rail right-of-way from WTLR (a rail carrier) to the State (a noncarrier), and whether the State will become a regulated common carrier. It is well established that when a noncarrier, including a state, acquires a line that has not been abandoned, it must seek our approval under section 10901.<sup>5</sup> 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).

"[T]he fundamental test for determining whether a party is a common carrier is whether there has been a holding out to the public as a common carrier . . . ." See Status of Bush Universal, Inc., 342 I.C.C. 550, 564 (1973). In the typical sale of a non-abandoned rail line, the new owner is presumed to succeed the former owner in assuming the obligation to ensure that service continues over the line. However, we have recognized that such rail lines may be sold, under certain limited circumstances, without imposing a service obligation on the new owner. Here, as in State of Maine, and other Interstate Commerce Commission cases, no common

---

<sup>5</sup> Where a state obtains property approved for abandonment, that transaction is exempt under 49 CFR 1150.22. Where the line has already been abandoned pursuant to our authorization, we have no further jurisdiction over the disposition of the property.

carrier rights or obligations are being transferred. The State has acquired the old right-of-way from the WTLR for the sole purpose of constructing a controlled access highway in Lubbock. Pursuant to the quitclaim deed, WTLR has maintained the exclusive easement which will permit it to conduct any necessary freight railroad operations on the old rail line. The easement also includes a right of entry over the property by WTLR's employees, agents or representatives in order to maintain the old rail line. The transaction does not involve the transfer of common carrier rights or obligations, and the State will not become a common carrier. The exclusive easement retained by WTLR ensures for it the right to continue to conduct freight operations on the old rail line sufficient to fulfill its obligations as a common carrier.<sup>6</sup> On the basis of representations made by the State and our review of the various agreements submitted into the record, we will grant the relief sought by the State.

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

It is ordered:

1. The State's motion to dismiss the verified notice of exemption is granted.
2. The proceeding is discontinued.
3. This decision is effective on its date of service.

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

Vernon A. Williams  
Secretary

---

<sup>6</sup> While the State has addressed the issue of the Board's jurisdiction over the abandonment of the old rail line and the construction of the new rail line to accommodate the construction of the controlled access highway, it has not specifically sought a ruling on that aspect of the transaction. The Board has jurisdiction over the abandonment or construction components of a relocation project only where the removal of track affects service to shippers or the construction of new track involves expansion into new territory. See City of Detroit v. Canadian National Ry. Co., et al., 9 I.C.C.2d 1208 (1993), aff'd sub nom. Detroit/Wayne County Port Authority v. ICC, 59 F.3d 1314 (D.C. Cir. 1995).