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SERVICE DATE - LATE RELEASE OCTOBER 31, 2002

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34258

NORTH CAROLINA STATE PORTS AUTHORITY  
-ACQUISITION EXEMPTION-  
NORTH CAROLINA PORTS RAILWAY COMMISSION

Decided: October 31, 2002

On October 1, 2002, the North Carolina State Ports Authority (SPA or petitioner), a noncarrier, filed a verified notice of exemption under 49 CFR 1150.31(a)(1) to acquire from the North Carolina Ports Railway Commission (PRC), a nonoperating railroad, certain right-of-way, trackage, and other rail assets located at the port terminals in Wilmington and Morehead City, NC. Concurrently, SPA filed a motion to dismiss the notice, asserting that the transaction is not subject to Board jurisdiction because it will not become a common carrier as a result of the transaction. We will grant the motion to dismiss.

At Wilmington, SPA proposes to acquire the following rail lines (Wilmington Lines), totaling approximately 18 miles: (1) the Front Street Spur, from the east line of Third Street at CSX Rail Valuation Station 91+37.3 and extending generally in a northerly direction to CSX Rail Valuation Station 56+39; (2) the New River Spur, from CSX Rail Valuation Station 0+00 (also known as Rail Valuation Station 86+20) on the Front Street Spur at the west line of Second Street and extending generally in a southerly direction to CSX Rail Valuation Station 185+00; and (3) the line from the north entrance to the Port of Wilmington at Transit Road, near its intersection with Burnett Blvd., to the south entrance to the Port, at River Road near its intersection with Shipyard Blvd., including classification yards and all railroad tracks at the Port (but excluding crane rails).

At Morehead City, SPA proposes to acquire the following rail lines (Morehead Lines), totaling approximately 4.87 miles: (1) the Beaufort & Morehead Railway, Inc. (BMRI) Track from the connection with the Norfolk Southern Railway Company (Atlantic & East Carolina Railway) at milepost 0.0 in Morehead City to milepost 0.87 at Gallants Channel near Morehead City, in Carteret County, NC, serving the intermediate stations of Marsh Island, Radio Island and Beaufort Team Track; and (2) all of PRC's yard and interchange tracks.

## BACKGROUND

SPA is an agency of the State of North Carolina that was established to, among other things, operate, develop and promote harbors and seaports. PRC is a state agency that was established to own and operate rail assets at the ports owned and operated by SPA. PRC currently owns the Wilmington Lines and the Morehead Lines.<sup>1</sup>

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<sup>1</sup> PRC acquired these lines through a series of transactions dating back to 1980. In 1980, our predecessor, the Interstate Commerce Commission (ICC), authorized PRC to acquire and operate rail lines at port terminals in Wilmington and Morehead City. North Carolina Ports Railway Commission – Acquisition and Operation in New Hanover and Carteret Counties, NC, Docket No. 29423 (ICC served Dec. 29, 1980). In 1986, PRC contracted with Wilmington Terminal Railroad Inc. (WTR) to operate rail service at Wilmington and with Carolina Rail Services, Inc. (CRS) to operate rail service at Morehead City. See Carolina Rail Services, Inc.–Exemption–Acquisition and Operations and Trackage Rights–The Ports Railway Commission of the State of North Carolina, Finance Docket No. 30908 (ICC served Oct. 1, 1986); Wilmington Terminal Railroad, Inc.–Operation Exemption–Wilmington, NC, Finance Docket No. 30910 (ICC served Oct. 1, 1986). The ICC subsequently determined that PRC had a residual common carrier obligation to provide service on these lines, but on its own motion then exempted PRC, under former 49 U.S.C. 10505 (now 49 U.S.C. 10502), from the requirements of 49 U.S.C. Subtitle IV. That exemption, which is subject to revocation at any time, extended only to PRC. See North Carolina Ports Railway Commission–Petition for Declaratory Order or Prospective Abandonment Exemption, Finance Docket No. 31248 (ICC served Sept. 30, 1988). In 1993, PRC purchased the Front Street Spur and New River Spur in Wilmington and leased them to WTR. North Carolina Ports Railway Commission–Purchase and Operation Exemption–CSX Transportation Inc., Line in North Carolina; Wilmington Terminal Railroad, L.P.–Lease and Operation Exemption–North Carolina Ports Railway Commission, Finance Docket No. 32345 and Finance Docket No. 32345 (Sub-No. 1) (ICC served Nov. 17, 1993). In 1995, PRC acquired control of BMRI, North Carolina Ports Railway Commission–Acquisition of Control Exemption– Beaufort & Morehead Railway, Inc., Finance Docket No. 32735 (ICC served Dec. 22, 1995), and subsequently filed a notice of exemption to acquire and operate over .87 miles of BMRI Track in 1999. North Carolina Ports Railway Commission d/b/a Beaufort & Morehead Railway– Acquisition and Operation Exemption–Beaufort & Morehead Railway, Inc., STB Finance Docket No. 33826 (STB served Dec. 2, 1999). In January 2002, PRC leased the .87 miles of track back to BMRI, and PRC ceased operating on this portion of the Morehead Lines. Beaufort & Morehead Railway, Inc.–Acquisition and Operation Exemption–North Carolina Ports Railway Commission d/b/a Beaufort & Morehead Railway, STB Finance Docket No. 34151 (STB served Jan. 18, 2002).

On September 20, 2002, the State of North Carolina enacted legislation, SB 1115, An Act to Modify the Current Operations Appropriations Act of 2001 and to Make other Changes in the Budget Operation of the State (Act). The Act abolishes PRC and transfers all of PRC's assets to SPA. These include PRC's interests in the right-of-way, trackage, and other physical assets of the Wilmington Lines and the Morehead Lines. SPA will also acquire all of the stock of the BMRI. The Act, however, prohibits SPA from operating a railroad or from becoming a common carrier subject to Board jurisdiction.

SPA states that, simultaneously with the transfer of PRC's assets to SPA, PRC will transfer the full common carrier obligation to provide service over the Wilmington Lines to WTR and over the Morehead Lines to CRS<sup>2</sup> and will convey to those carriers permanent easements to operate and maintain those lines.<sup>3</sup> SPA will also enter into operating agreements with WTR and CRS to conduct the rail operations on the lines.<sup>4</sup>

SPA indicates that it will not acquire the right or obligation to conduct any rail operations on the lines and will not hold itself out to provide common carrier service. SPA, however, states that under the agreements it retains the right to select a different operator at the termination of the 5-year operating agreement (or if WTR or CRS defaults) and to require those carriers to assign their easements and contracts to use the line to any successor, and to require those carriers to cease operating on the lines. Under the agreements, WTR and CRS are also required to obtain SPA's consent to the grant of any rights to a third party that affects the physical assets (such as the creation of a lien or the grant of an easement or a right to operate over the lines).

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<sup>2</sup> CRS and WTR have filed notices of exemption under 49 CFR 1150.41(a)(1) to acquire the easements and operate on the lines, in STB Finance Docket No. 34256, Carolina Rail Service, LLC—Acquisition and Operation Exemption—North Carolina Ports Railway Commission and North Carolina State Ports Authority, and STB Finance Docket No. 34257, Wilmington Terminal Railroad L.P.—Acquisition and Operation Exemption—North Carolina Ports Railway Commission and North Carolina State Ports Authority. CRS has also filed a notice of exemption under 49 CFR 1150.41(a)(1) to acquire BMRI's operating authority in STB Finance Docket No. 34268, Carolina Rail Service, LLC—Acquisition and Operation Exemption—Beaufort & Morehead Railway, Inc. The notices will be served and published separately.

<sup>3</sup> SPA submitted copies of the easement agreements to be conveyed by PRC to WTR and CRS.

<sup>4</sup> SPA submitted copies of its proposed operating agreements with WTR and CRS.

SPA asserts that the transaction is outside the Board's jurisdiction, citing Maine, DOT-Acq. Exemption, ME. Central R. Co., 8 I.C.C.2d 835 (1991) (State of Maine), and subsequent cases. SPA states that it is acquiring the rail assets from PRC but is not acquiring any of the rights and concurrent obligations to provide common carrier service over the Wilmington Lines and Morehead Lines. SPA states that the easement agreements and operating agreements will enable WTR and CRS to provide unrestricted common carrier rail service over the lines.

On October 15, 2002, certain current and former officers (Protestants) of PRC and BMRI submitted a pleading in opposition to SPA's motion to dismiss. Protestants argue that the precedents established in such cases as State of Vermont-Acquisition Exemption-Certain Assets of Boston and Maine Corporation, Finance Docket No. 33830 (STB served June 8, 2000) (State of Vermont) and State of Maine are not applicable here because the rail carriers assuming the common carrier obligations are not assuming an unfettered obligation to provide service. Instead, they point out, the common carrier obligations of WTR and CRS may be extinguished in 5 years or less. In both State of Vermont and State of Maine, Protestants claim, the critical finding by the agency was that the railroad retained a permanent, unconditional easement enabling it to conduct its operations. Protestants argue that, unlike the current situation, the railroads involved there retained a permanent common carrier obligation and could not simply walk away from the rail operations after a specified contractual period expired. Further, they argue that, by granting only a 5-year easement term with an ability to renegotiate any extension, SPA retains a measure of control over the operations that is inconsistent with its claim that it will not become a common carrier. SPA responded to Protestants' pleading on October 21, 2002.<sup>5</sup>

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<sup>5</sup> On October 25, 2002, Protestants submitted a letter requesting that SPA's response be stricken from the record on the grounds that it was an impermissible reply to a reply, and also because it had not been served on them. We will deny Protestants' request. Protestants have not shown or even alleged that they would be disadvantaged by our consideration of the reply. Nor has SPA failed to serve the Protestants. One of the signatories to Protestants' letter is a Vice-Chairman of PRC, while another is currently a Board Member. SPA certified that it served a copy of its response on PRC. Protestants were therefore made aware of SPA's submission and were not disadvantaged by any failure to serve them individually.

## DISCUSSION AND CONCLUSIONS

The question here is whether our regulatory approval is required for the proposed transfer of PRC's lines to SPA. The acquisition of an active rail line and the common carrier obligation that goes with it ordinarily requires Board approval under 49 U.S.C. 10901, if the acquiring entity is a noncarrier, or under 49 U.S.C. 10902 or 11323, if the acquiring entity is already a carrier. Under the circumstances involved here, however, this transaction does not require Board action, and we will not exercise jurisdiction over it.

The evidence of record shows that, although SPA is acquiring PRC's rail assets, it is not assuming the common carrier obligation to provide service on the lines. Contrary to Protestants' assertions, there will be a complete assumption of the common carrier obligations to provide service over these lines by WTR and CRS. Although the agreements entered into between these carriers and SPA provide for the possibility of replacement carriers, notwithstanding the terms of the agreements, WTR and/or CRS will continue to have a common carrier obligation until we permit that obligation to be transferred to other carriers or the lines to be abandoned. And, just as in State of Vermont (where there was an initial limited term easement of only 6 months granted to the rail carrier), WTR and CRS will be able to operate their respective lines without interference by SPA.<sup>6</sup> The evidence shows that the full common carrier obligation for the lines will be transferred directly from PRC and BMRI to WTR and CRS, under exclusive rail easements, enabling those carriers to operate and maintain the lines. In addition, the operating agreements between SPA and WTR and CRS grant those carriers exclusive rights to operate trains, locomotives, cars and equipment with their own crews over the line and require that the carriers control and manage their rail operations and assume the full common carrier obligation for their rail lines. As noted, regardless of the terms of the agreements, we must authorize that obligation to be transferred to other carriers, or WTR and/or CRS to abandon the lines, before either of them may stop service, which means that the common carrier obligation will remain intact, regardless of actions that SPA may take in the future, unless and until abandonment authority is granted. Finally, SPA is statutorily barred from providing common carrier rail service, and will not hold itself out to provide rail service. For these reasons, we will grant the relief requested by SPA and dismiss its notice of exemption.

SPA has requested expedited consideration of its motion to dismiss. The petitioner explains that the Act requires that the transfer be consummated by November 20, 2002, subject to an opinion

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<sup>6</sup> Also, as in State of Vermont, SPA will retain limited rights with respect to the selection of possible successor operators over the lines. The retention of these limited rights is not inconsistent with our determination that the state agency will not become a common carrier and that we do not need to exercise jurisdiction over the transaction. SPA's acquisition of those rights does not amount to acquisition of control within the meaning of the Interstate Commerce Act, as amended.

by the State Attorney General about SPA's status, which is required within 45 days of the Act's effective date. SPA requests Board action by November 1, 2002, to assist the Attorney General in rendering an opinion. To accommodate SPA's request, we will make this decision effective on its service date.

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

It is ordered:

1. Protestants' request that SPA's reply filed October 21, 2002, be stricken is denied.
2. SPA's motion to dismiss its notice of exemption is granted.
3. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Burkes.

Vernon A. Williams  
Secretary