

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35440

STATE OF MAINE—PETITION FOR DECLARATORY ORDER

Decided: December 29, 2010

Digest:¹ Maine DOT does not need Board authorization to acquire the real estate and tracks on a portion of a rail line currently owned by the St. Lawrence & Atlantic Railroad Company. Although Maine DOT may acquire physical assets, it will not acquire the legal obligation to provide freight service, which will remain with the seller or its successor freight operator, nor will Maine DOT be in a position to interfere unreasonably with freight operations. Maine DOT's prospective passenger operating rights over another portion of the line also will not interfere with freight operations and do not require Board authorization at this time.

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 therein between Maine DOT and the St. Lawrence & Atlantic Railroad Company (SLR) are not subject to the Board's regulatory authority, and that the State will not be subject to the Board's regulatory authority as a carrier, under State of Maine—Acquisition and 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

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

Assets of St. Lawrence & Atlantic Railroad, FD 35018 (STB served Sept. 13, 2007) (2007 Decision) and State of Maine.

On December 10, 2010, the Board directed Maine DOT and SLR to file additional information on the proposed passenger operating rights over the Northern Segment. State of Maine—Petition for Declaratory Order, FD 35440 (STB served Dec. 10, 2010). Maine DOT filed supplemental information and comments on December 20, 2010. SLR did not submit a responsive filing. Exercising our discretionary authority under 49 U.S.C. § 721 and 5 U.S.C. § 554(e), we will issue a declaratory order to remove uncertainty in this matter.

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.

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 extended an additional 17 miles north. 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 terms of the Option Agreement, and the draft quitclaim deed appended to the Option Agreement, Maine DOT would acquire the Middle Segment, subject to SLR's retention of an exclusive and perpetual freight rail easement. The 2007 Operating Agreement would apply to the Middle Segment. Under the 2007 Operating Agreement: (1) SLR will retain the exclusive right and obligation to provide freight rail service over the Middle Segment, without restriction or interference of any kind by Maine DOT; (2) Maine DOT will have no right to assume any obligation to provide common carrier freight rail service on the Middle Segment; (3) Maine DOT will have the ability to upgrade the Middle Segment at its expense, in a manner that coordinates with the ability of SLR to provide freight rail service and minimizes interference with such service; and (4) SLR may make changes or improvements required for its freight rail operations.

The 2007 Operating Agreement also provides that Maine DOT must give SLR 1 year's notice before initiating passenger rail service over the Middle Segment. After passenger service begins, freight rail operations will take place only between 11 p.m. and 4:30 a.m. on such days as SLR designates in its schedule. Maine DOT states that this freight window will allow SLR to meet its common carrier obligations to handle overhead traffic to and from the segment acquired in the 2007 transaction and will allow for the handling of additional on-line and overhead traffic,

if and when such traffic develops. Currently, Maine DOT states that there are no customers on the Middle Segment, and that the only freight traffic handled over the segment is overhead traffic to and from one customer in Portland, Me.²

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 rail 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 for maintenance of the line. 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.”

In its supplemental information and comments, Maine DOT describes the existing and currently planned passenger rail services occurring in Maine. The Maine Eastern Railroad (MER) provides seasonal passenger excursion and tourist service between Rockland and Brunswick, Me., on a segment of Maine DOT’s line acquired in the 1991 State of Maine transaction (between Hardings, Me., and Brunswick). When Amtrak expands its current Boston-Portland service to Brunswick, it will also use a portion of this 1991 line segment. Amtrak would cross the Middle Segment at Yarmouth, but no stop is currently planned there. Maine DOT is not aware of any current arrangements for joint or through ticketing between Amtrak and MER at their future common Brunswick terminus. Repairs to a bridge between Back Cove and Casco Bay would be necessary prior to initiation of any commuter rail service into Portland.

The State is in the process of completing a Statewide Rail Plan that will evaluate the freight and passenger rail system in Maine. Other than the above-described services, Maine DOT states that there is no passenger rail service currently provided, or planned for the near future, over the remainder of the 1991 line segment, or over the line segment that Maine DOT acquired under the 2007 Decision. Maine DOT states that it is still studying potential passenger rail service over the Middle and Northern Segments. It also states that no interstate passenger rail service (including high-speed passenger rail service) is under consideration in the near future on the segment acquired under the 2007 Decision, or the Middle or Northern Segments at issue here. Maine DOT states that if passenger rail service provided in the future were subject to the

² Maine DOT states that a copy of its petition, and supplemental information and comments, has been served on this 1 active shipper, B&M Beans.

Board's jurisdiction, the operator of such service would be responsible for obtaining any necessary authority from the Board.

Maine DOT explains that SLR will play no role in planning, marketing, or providing passenger rail service over the Middle and Northern Segments, other than its control over all rail operations on the Northern Segment.

DISCUSSION AND CONCLUSION

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 of the Middle Segment and to acquire operating rights to provide passenger rail service over the Northern Segment.

The Middle Segment. 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, even if the acquiring entity is a noncarrier, including a state. 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, Board authority is not required where no common carrier rights or obligations are transferred with the physical assets on the line. See State of Maine, 8 I.C.C.2d at 836-37. To determine whether common carrier rights or obligations have been transferred, the Board examines whether the rights acquired by a noncarrier are so extensive that the noncarrier has acquired control of the rail line. See, e.g., Orange Cnty. Transp. Auth.—Acquis. Exemption—The Atchison, Topeka & Santa Fe Ry., 10 I.C.C. 2d 78 (1994); S. Pac. Transp. Co.—Aban. Exemption—Los Angeles Cnty., Cal., 8 I.C.C. 2d 495 (1992), recons. denied, 9 I.C.C. 2d 385 (1993) (Southern Pacific).

We find that the transaction involving the Middle Segment is consistent with State of Maine and its progeny. The record shows that SLR is not transferring common carrier rights or obligations and that Maine DOT will not hold itself out as a common carrier performing freight rail service. The terms of the draft quitclaim deed expressly reserve for SLR, its successors, and permitted assignees a perpetual, exclusive easement over the Middle Segment for the purposes of conducting its freight rail business and fulfilling the common carrier freight rail obligation. Moreover, Maine DOT's operation and management of the Middle Segment would be governed by the terms of the 2007 Operating Agreement, which the Board examined in the 2007 Decision. Under the 2007 Operating Agreement, Maine DOT expressly declines to assume any obligation to provide common carrier freight rail service on the Middle Segment. The terms of the 2007 Operating Agreement also state that Maine DOT may upgrade the line, but any upgrades shall be conducted in a manner so as not to interfere unreasonably with freight operations. SLR has the right to design and construct changes and/or additions to the line for its freight rail operations and will continue to have sufficient access to the line. Maine DOT cannot force SLR to abandon its freight rail operations. Further, we note that Board approval would be required for SLR to transfer its permanent freight rail easement to a new freight rail operator. Therefore, no Board

authorization is required for Maine DOT to acquire the Middle Segment, subject to SLR retaining a freight rail easement.

The Northern Segment. Unlike the transaction covering the Middle Segment, Maine DOT seeks to acquire assignable passenger rail operating rights over the Northern Segment, which SLR will continue to own. SLR will continue to control all rail operations over the Northern Segment: under the draft Passenger Operating Agreement, all operations on the line will be subject to SLR's operating rules; Maine DOT staff (or that of a passenger service operator) must be qualified by SLR; SLR will dispatch all trains on the line; SLR will maintain and repair the line at its own expense; and SLR must approve scheduling of passenger rail service provided by Maine DOT.³ Therefore, Maine DOT will not be in a position to unreasonably interfere with common carrier freight rail service on the Northern Segment.

In their agreements, Maine DOT and SLR define broadly the passenger rail service that Maine DOT would acquire the rights to provide. But there is no evidence in the record at this time that exercise of these passenger rail operating rights would fall within the Board's jurisdiction over transportation.⁴ Maine DOT's current passenger rail service plans do not contemplate, for example, the provision of service beyond state lines, either on its own or by through ticketing arrangements with another carrier. However, Maine DOT is studying its options at this time, and its plans are undefined. We emphasize that, as concrete plans for passenger rail service materialize, it will be incumbent upon the appropriate party or parties to determine whether Board authority is required and seek that authority as needed.⁵

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

³ Additionally, SLR has reserved the right to operate, or authorize a third party to operate, passenger rail service over the line, as long as such service can be accommodated with that provided by Maine DOT.

⁴ See, e.g., 49 U.S.C. § 10501(a) (Board has jurisdiction between a place in a state and a place in the same or another state as part of the interstate rail network); DesertXpress Enters., LLC—Petition for Declaratory Order, FD 34914 (STB served May 7, 2010) (DesertXpress).

⁵ See, e.g., DesertXpress, slip op. at 3 (Board found that DesertXpress would need to seek Board authorization under 49 U.S.C. § 10901 to construct and operate); Mass. Dep't of Transp.—Acquis. Exemption—Certain Assets of CSX Transp., Inc., FD 35312, slip op. at 15 (STB served May 3, 2010) (future arrangements hampering freight rail common carrier obligation require state to obtain Board acquisition authority).

It is ordered:

1. Maine DOT's petition for declaratory order is granted as discussed in this decision.
2. This decision will be effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Nottingham.