

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35252

REGIONAL TRANSPORTATION DISTRICT—ACQUISITION EXEMPTION—
UNION PACIFIC RAILROAD COMPANY IN ADAMS, BOULDER, BROOMFIELD, AND
WELD, COLO.

Decided: June 25, 2010

On August 24, 2009, the Regional Transportation District (RTD), a noncarrier, filed a verified notice of exemption under 49 C.F.R. § 1150.31 to acquire from Union Pacific Railroad Company (UP) approximately 32.97 miles of rail line (the Line), extending from milepost 0.2 (north of Denver) to milepost 33.17, including the Lakeside Spur (Boulder County), in the Counties of Adams, Boulder, Broomfield, and Weld, Colo. Simultaneously, RTD filed a motion to dismiss the notice, asserting that, because RTD will not acquire any rights or obligations that would prevent UP from fulfilling its freight common carrier obligations, the transaction is not subject to the Board’s jurisdiction under 49 U.S.C. § 10901.¹ The motion is unopposed. We will grant the motion to dismiss.

RTD, a political subdivision of the State of Colorado, states that it is acquiring the Line for the purpose of developing commuter rail service in the Denver metropolitan area and that it will not seek or acquire the rights necessary to conduct or control freight common carrier service. RTD states that UP will retain an exclusive freight easement over the Line and will continue to provide all freight common carrier service.

RTD submitted a copy of its proposed transactions, entitled “FasTracks Project Property Transfer and Railroad Relocation Agreement” (FasTracks plan), including copies of the quitclaim deed and Shared Use Agreement.² The FasTracks plan outlines the transactions to take place between RTD and UP in order to construct commuter rail service. These transactions

¹ While RTD uses the term “jurisdiction,” in fact it may only seek a finding that the Board does not have regulatory authority over the proposed transaction. The Board will continue to have jurisdiction over rail property even if it concludes, as discussed below, that it does not have regulatory authority over a proposed transaction. See Friends of the Aquifer, City of Hauser, Idaho, Hauser Lake Water Dist., Cheryl L. Rodgers, Clay Larkin, Kootenai Env’tl. Alliance, R.R. & Clearcuts Campaign, 5 S.T.B. 880, 883-84 (2001).

² RTD attached copies of the FasTracks plan (Attach. 2), the quitclaim deed, and Shared Use Agreement (Attach. 3, Exs. E and F, respectively) to its notice of exemption.

involve the relocation and modification of certain rail lines and railroad facilities to accommodate both passenger and freight rail service. The quitclaim deed between RTD and UP excepts and reserves a perpetual, exclusive easement for rail freight purposes for UP, its successors, and assigns. The quitclaim deed incorporates by reference the Shared Use Agreement, which provides for the responsibilities and rights of the parties once RTD has acquired the Line.

UP's current service over the Line is limited and service over a 12.21-mile segment of the Line has been discontinued.³ UP serves one shipper on the Line, Atlas Roofing Corporation (Atlas). RTD states that UP will continue to serve Atlas pursuant to the terms of the Shared Use Agreement.⁴ Additionally, BNSF leases a 1-mile segment of the Line (milepost 32.0 to milepost 33.0) from UP. See Burlington Northern R.R.—Lease Exemption—Union Pacific R.R., FD 32857 (STB served May 7, 1996). RTD states that the terms of this lease agreement will remain in full force and effect.

According to RTD, the Fastracks plan and Shared Use Agreement demonstrate that it is acquiring none of the rights and obligations that are essential to providing freight service and that UP retains the sole right to provide service on the Line. RTD asserts that these transactions, like Maine—Acquisition and Operation Exemption, Maine Central Railroad, 8 I.C.C.2d 835 (1991) (State of Maine), do not involve the transfer of common carrier obligations, and therefore, it argues that the transactions are not subject to the Board's jurisdiction. RTD also cites Maryland Transit Administration—Petition for Declaratory Order, Docket No. FD 34975 (STB served Sept. 19, 2008) (MTA 2008 Decision) in support of its argument that the agreements between the freight carrier and the public agency acquiring the right-of-way may allow commuter service so long as the terms and conditions do not unreasonably interfere with freight rail service.

DISCUSSION AND CONCLUSIONS

The question at issue here is whether our regulatory approval is required for RTD to acquire the Line, where UP retains an exclusive, perpetual easement to conduct freight rail operations. 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). But when a carrier selling a rail line retains an exclusive, perpetual easement to permit it to continue to provide common carrier freight service, we typically have found that our authorization is not

³ In a previous proceeding, Union Pacific Railroad—Discontinuance Exemption—In Weld and Boulder Counties, Colo., AB 33 (Sub-No. 182X) (STB served Oct. 19, 2001), the Board authorized UP to discontinue service over the 12.21-mile segment of the Line between milepost 18.79 and milepost 31.0. This discontinuance does not affect the nature of the proposed transaction and UP would retain the right to restart service over this segment.

⁴ In the past year Atlas shipped or received a total of 43 carloads from UP. This service consisted of no more than one pick-up or delivery per week. See Motion at 5.

required and that the state does not acquire a common carrier obligation. See State of Maine, 8 I.C.C.2d at 836-37; Mass. Dep't of Transp.—Acquis. Exemption—Certain Assets of CSX Transp., Inc., FD 35312 (STB served May 3, 2010) (discussed and affirmed the legality of State of Maine precedent).

Exclusive Freight Easement. In this case, the transactions set forth in the FasTracks plan allow UP to retain an exclusive freight easement over the Line and continue to provide freight rail service. UP's quitclaim deed reserves a perpetual, exclusive easement over the Line for freight rail operations subject to the terms of the Shared Use Agreement.⁵ However, the issue of whether the railroad has retained an exclusive freight easement for the continuation of freight service does not, by itself, resolve this matter. The Board also takes into account other factors, such as the operating agreement between the purchasing party and the freight railroad. Md. Transit Admin.—Petition for Declaratory Order, FD 34975, slip op. at 5 (STB served Oct. 9, 2007) (MTA 2007 Decision). Here, RTD has control over certain aspects of rail operations, such as hours of freight operations and repair and maintenance of track. But, as discussed further below, it appears that nothing in the quitclaim deed or the Shared Use Agreement gives RTD the ability to interfere unduly with UP's ability to carry out its common carrier obligation.

Freight Operating Window. The freight operating window over the shared portion of the Line does not interfere with UP's ability to provide common carrier service. Pursuant to the Shared Use Agreement, once commuter service begins, UP will conduct freight rail service during the freight operating window over the shared portion of the Line, between milepost 1.15 and milepost 8.2.⁶ The Shared Use Agreement states that the freight operating window is between 12:01 a.m. and 5:00 a.m. every Wednesday; however, upon 48 hours' prior notice to RTD, UP may change the operating window to a different day of the week.⁷ The Shared Use Agreement provides for adjustments to the freight rail operating schedule and that such schedule adjustments are "subject to timing constraints and other conditions as UP may impose in its sole discretion in order that it may at all times perform its obligations as a common carrier, meet its then-existing commitments to its customers and other third parties..."⁸ The Board has found that agreements like this one that reasonably restrict freight operations to specific times in order to accommodate reliable commuter service are permissible. See MTA 2008 Decision; MTA 2007 Decision; Utah Transit Auth.—Acquis. Exemption—Union Pac. R.R., FD 35008 (STB served July 23, 2007) (UTA). Like the proceedings involving MTA, the freight operations are very limited and RTD has submitted evidence to show that its acquisition of the Line has not unduly impaired UP's ability to continue to provide freight rail service. See MTA 2007 Decision, slip op. at 7-8. Further, the Shared Use Agreement provides for adjustments to the operating schedule, to ensure that UP can fulfill its common carrier obligations to Atlas.

⁵ See RTD's notice of exemption, Attach. 3, Exs. E & F.

⁶ See Shared Use Agreement at 1.2.4.

⁷ See id. at 1.1 & 1.2.4.

⁸ See id. at 1.2.4.

Maintenance of the Line. Under the Shared Use Agreement, once construction of the commuter rail system commences, RTD will have the responsibility to maintain the shared portion of the line at a Class II level.⁹ RTD will also assume responsibility for maintaining the portion of the Line between milepost 8.2 and milepost 32, which is the portion on which UP currently has no active freight service. The maintenance arrangements provide the non-maintaining party with procedures to ensure that the Line is maintained and repaired as needed. The Shared Use Agreement provides that, if the maintaining party receives notice of a failure to fulfill a maintenance obligation and does not cure it within 30 days after the receipt of such notice, the non-maintaining party may perform such maintenance obligations and shall be entitled to full reimbursement for the costs and expenses from the maintaining party.¹⁰ These provisions do not cause a transfer of common carrier rights or obligations to RTD. The Board has found in other cases that the responsibility for track maintenance does not constitute an acquisition of a railroad line requiring Board authorization. See UTA; N. M. Dep't of Trans.—Acquis. Exemption—Certain Assets of BNSF Ry., FD 34793 (STB served Feb. 6, 2006). Notwithstanding the sale of physical assets, the freight carrier continues to hold the common carrier obligation. A failure by the new owner of the physical assets of the line to maintain them adequately would not excuse the freight carrier from satisfying its obligation to provide service on reasonable request.

Abandonment of the Line. The Shared Use Agreement also states that UP will have the sole freight operating authority unless it has received and exercised abandonment authority from the Board.¹¹ The terms of the Shared Use Agreement state that UP may file for abandonment or discontinuance authority from the Board for all or any portion of the Line.¹² The terms of the Shared Use Agreement also state that UP is required to seek abandonment authority for any section of the Line that is contiguous to another section of the segment which is subject to abandonment authority and has not been used for freight rail service for 3 or more consecutive years. This requirement is consistent with freight rail needs, particularly given that the Board would still have to authorize any abandonment or discontinuance.¹³

Based on this record, we find that the proposed transaction is consistent with State of Maine, and that the acquisition of the railroad assets by RTD is not the acquisition of a railroad line under 49 U.S.C. § 10901(a)(4). Because UP will retain an exclusive freight easement, and the terms of the transaction will protect UP against undue interference with its common carrier obligation, the acquisition will not cause RTD to become a rail carrier. Under these

⁹ See id. at Section 3.1.1 & 3.2.1.

¹⁰ See id. at Section 3.2.2.

¹¹ See id. at Section 5.1.

¹² See id. at Section 5.2.

¹³ See 49 C.F.R. § 1152.50(b) (establishing class exemptions from the abandonment and discontinuance of service requirements of 49 U.S.C. § 10903 for rail lines that have been out of service for 2 years).

circumstances, the proposed transaction does not require Board authorization under 49 U.S.C. § 10901. We will dismiss RTD's notice of exemption and discontinue this proceeding.

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

It is ordered:

1. RTD's motion to dismiss the verified notice of exemption in this proceeding is granted.
2. The proceeding is dismissed.
3. This decision will be effective on its service date.

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