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SERVICE DATE - JUNE 8, 2000

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33830

STATE OF VERMONT—ACQUISITION EXEMPTION—CERTAIN ASSETS OF
BOSTON AND MAINE CORPORATION

Decided: June 1, 2000

On December 3, 1999, the State of Vermont (Vermont), acting through its Agency of Transportation, filed a verified notice of exemption under 49 CFR 1150.31 to acquire from Boston and Maine Corporation (B&M) and Springfield Terminal Railway Company (STR) approximately 40 miles of rail line (the Berlin Branch or Line) between milepost 123 in White River Junction and milepost 163 in Wells River, VT.¹ The transaction was scheduled to be consummated on or after December 10, 1999. Vermont concurrently filed a motion to dismiss the verified notice of exemption. Vermont states that it will not acquire, and has no interest in acquiring, the freight service easement (the exclusive right and obligation to conduct freight operations) and, as a consequence, contends that the transaction is not subject to the Board's jurisdiction. We will grant the motion to dismiss.

BACKGROUND

Vermont entered into a purchase and sale agreement with B&M and STR to acquire B&M's right, title, and ownership interest, and STR's leasehold interest, in the right-of-way, track, and other physical assets of the Berlin Branch.² Vermont did not want to incur a common carrier obligation to provide rail service over the line.³ The transaction was therefore structured

¹ The notice of exemption was served and published at 64 FR 7119 on December 20, 1999.

² Rail operations over the Berlin Branch have been minimal. According to Vermont, STR has been serving a single shipper at Wilder, approximately 2 miles north of White River Junction. Otherwise there have been no rail operations north of Wilder for several years.

³ Vermont states that it may already have a residual common carrier obligation with respect to a prior line purchase, citing Boston and Maine Corporation—Abandonment

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to ensure that the freight service easement would be conveyed to Green Mountain Railroad Corporation (GMRC), a Class III common carrier, and its successors. This conveyance was the subject of a notice of exemption filed in Green Mountain Railroad Corporation—Acquisition and Operation Exemption—Certain Rights of Boston and Maine Corporation, STB Finance Docket No. 33829 (STB served Dec. 20, 1999).

Following the consummation of the transaction and conveyance of the freight service easement, Vermont and GMRC were to enter into an agreement (the operating agreement). The freight service easement confers on GMRC all existing rights and obligations with respect to rail freight service. The operating agreement is described below.⁴

Vermont states that it lacks the power to control GMRC's operations and will be precluded from providing, or holding itself out to provide, rail freight service after the transaction is consummated. Additionally, Vermont states that its ownership of the right-of-way and track will not be used to interrupt or interfere unreasonably with GMRC's operation of the Line as long as GMRC provides service and carries out its other obligations.

DISCUSSION AND CONCLUSIONS

Typically, the transfer of an active rail line and the related common carrier obligation require 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 a carrier. But we have no need to exercise jurisdiction over the transfer of just a right-of-way and fixed assets if the transferor retains an easement that allows it to comply fully with the common carrier obligation to provide rail freight service.⁵ The issue presented in cases involving the transfer of a right-of-way and fixed assets is

³(...continued)

Exemption—Rensselaer County, NY, Docket No. AB-32 (Sub-No. 64X) (STB served Feb. 6, 1996) (line purchase under the offer of financial assistance procedures of 49 U.S.C. 10904).

⁴ Draft copies of the purchase and sale agreement, freight easement, and operating agreement were attached as Exhibits A, B, and C, respectively, of Vermont's motion to dismiss.

⁵ See, e.g., Maine, DOT—Acq. Exemption, ME. Central R. Co., 8 I.C.C.2d 835 (1991) (State of Maine); Consolidated Rail Corporation—Petition for Declaratory Order—C&P Dock, STB Finance Docket No. 33296 (STB served Dec. 13, 1996); Sacramento-Placerville Transportation Corridor Joint Powers Authority—Acquisition Exemption—Certain Assets of Southern Pacific Transportation Company, STB Finance Docket No. 33046 (STB served Oct. 28, 1996); and Los Angeles County Transportation Commission—Petition for Exemption—Acquisition from Union Pacific Railroad Company, Finance Docket No. 32374 et (continued...)

whether regulatory approval from us is needed. The answer depends on whether the transferor has retained sufficient interest and control over the line to allow it to fulfill its common carrier obligation.

In this instance, the right-of-way and fixed assets are being transferred to one entity (Vermont), and the freight easement and common carrier obligation are being transferred to another entity (GMRC). In South Orient Railroad Company, Ltd.—Acquisition and Operation Exemption—Line of The Atchison, Topeka and Santa Fe Railway Company, Finance Docket No. 31971 (ICC served Sept. 2, 1992) (South Orient), slip op. at 4, the Interstate Commerce Commission recognized that this result is not materially different from the more typical State of Maine case, where the transferor retains the common carrier obligation and transfers the right-of-way and fixed assets. See also State of Georgia, Department of Transportation—Acquisition Exemption—Line of Central of Georgia Railroad Company, STB Finance Docket No. 33690 (STB served June 23, 1999) (Georgia); and Chattooga and Chickamauga Railway Company—Acquisition and Operation Exemption—Line of Central of Georgia Railroad Company, STB Finance Docket No. 33691 (STB served Jan. 6, 1999).

The purchase and sales agreement at issue here appears to grant an acquirer, here GMRC, an exclusive easement to conduct railroad freight operations over, and perform maintenance on, the Berlin Branch. Unlike South Orient and Georgia, however, the operating agreement grants GMRC an easement for a period of 6 months to operate the Berlin Branch. The operating agreement specifies, among other things, that: (1) Vermont may extend GMRC's freight service easement beyond the initial 6-month period, if GMRC consents; (2) GMRC must cooperate fully in transferring the freight service easement to the successor designated by Vermont; (3) Vermont may terminate GMRC's right to operate the Berlin Branch in the event of a substantial failure to perform, or default, on GMRC's part;⁶ and (4) GMRC may not grant access to, or assign its interest in, the Berlin Branch, to others without Vermont's approval.

We will grant the motion to dismiss. The evidence shows that Vermont will not operate the Berlin Branch and that GMRC and its successors have been given an exclusive easement to operate the Berlin Branch as rail freight common carriers.⁷ The evidence demonstrates that

⁵(...continued)
al. (STB served July 23, 1996).

⁶ Under Section 12 of the operating agreement, Vermont may terminate the use of the Berlin Branch if GMRC or a successor fails to perform in a substantial manner and continues in default for a 30-day period after written notice is given.

⁷ Under Section 14 of the operating agreement, designated successors would acquire
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GMRC and its successors will be able to operate the Berlin Branch without interference or interruption, as long as they provide rail service and carry out their other obligations. Furthermore, Vermont is acquiring neither the right nor the obligation to provide service over the Berlin Branch. However, before GMRC may stop service (in the absence of a successor carrier chosen by Vermont), abandonment authority must be obtained from the Board.

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

It is ordered:

1. Vermont's motion to dismiss the verified notice of exemption it filed in this proceeding is granted.
2. The proceeding is discontinued.
3. This decision is effective 30 days after its service date.

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

Vernon A. Williams
Secretary

⁷(...continued)
GMRC's exclusive easement to provide rail freight service.