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SERVICE DATE – FEBRUARY 12, 2008

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34953

MIDTOWN TDR VENTURES LLC–ACQUISITION EXEMPTION–AMERICAN PREMIER  
UNDERWRITERS, INC., THE OWASCO RIVER RAILWAY, INC., AND AMERICAN  
FINANCIAL GROUP, INC.

Decided: February 11, 2008

On November 7, 2006, Midtown TDR Ventures LLC (Midtown), a noncarrier, filed a verified notice of exemption under 49 CFR 1150.31 to acquire certain assets related to Grand Central Terminal in New York, NY, and a 156-mile line of rail, known as the Harlem-Hudson Line (the Line) (which accesses the Grand Central Terminal) (collectively, Properties), from American Premier Underwriters, Inc. (APU),<sup>1</sup> APU's wholly owned subsidiary, The Owasco River Railway, Inc., and APU's parent, American Financial Group, Inc. (collectively, Sellers). The Harlem-Hudson Line extends from milepost 0.0 at Grand Central Terminal in New York City to milepost 5.2 at Mott Junction in the Bronx, New York City. At Mott Junction, the line diverges in two directions, with one line running north to milepost 75.7 at Poughkeepsie, NY, and a second line proceeding east to milepost 11.8 at Woodlawn Junction, where it then heads north to milepost 82.0 at Wassaic, NY. Notice of the filing was served and published in the Federal Register on December 7, 2006 (71 FR 71026-27).

Simultaneously with the filing of its notice of exemption, Midtown filed a motion to dismiss this proceeding, asserting that the transaction should not be subject to Board jurisdiction because the transaction will not result in Midtown's becoming a rail common carrier. On August 8, 2007, Midtown provided supplemental information on the transaction concerning the common carrier rights and obligations on the Line, as directed by the Board in a decision served on June 8, 2007. After receiving Midtown's supplemental information, the Board now has sufficient information to determine that Midtown will not become a rail common carrier as a result of the transaction. Accordingly, the motion to dismiss will be granted.

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<sup>1</sup> According to Midtown, APU was formerly known as Penn Central Corporation (Penn Central), and, under a 1976 plan of reorganization, Penn Central emerged from bankruptcy with a significant interest in some of the Properties, but without any rail carrier obligations or rights with regard to the Line. Midtown also states that APU is successor by merger to The New York & Harlem Railroad Company, which also owned some of the Properties, but, according to Midtown, never owned any operating rights on the Harlem-Hudson Line.

## BACKGROUND

Midtown states that it intends to acquire the Properties and to develop them for non-rail use, as well as to use the transferable air rights emanating from the Grand Central Terminal lot and an adjacent lot for office building development. Midtown states that it will acquire a fee simple interest in the Harlem-Hudson Line, subject to an existing long-term lease to Metropolitan Transportation Authority (MTA), which grants MTA exclusive control over the Harlem-Hudson Line until February 28, 2274 (MTA lease). Midtown will take the place of the Sellers as lessors in the MTA lease. Midtown states that, because the lease will remain in place following Midtown's acquisition of the Properties, the Harlem-Hudson Line will remain under MTA's exclusive control.

Freight rail service over the Harlem-Hudson Line is provided pursuant to trackage rights agreements into which MTA has entered with CSX Transportation, Inc. (CSXT), and the Delaware and Hudson Railway Company, Inc. (D&H), with MTA as the lessee of the Harlem-Hudson Line and CSXT and D&H as the holders of the common carrier obligation.<sup>2</sup> Midtown claims that, like the MTA lease, the CSXT and D&H trackage rights agreements will remain in place following the consummation of the subject transaction, and will be unaffected by this transaction.

In its supplemental filing, Midtown represents that Sellers never had any obligation to provide freight rail service over the Harlem-Hudson Line, never conducted any freight rail operations over the Harlem-Hudson Line, and never had any involvement with that Line, except as noncarrier fee owners. Thus, Midtown contends that it would not acquire any rail common carrier obligation with respect to the Harlem-Hudson Line by virtue of its purchase of the Properties. According to Midtown, because it does not have any right to control freight rail service on the Hudson-Harlem Line and will not hold itself out as willing or able to provide freight rail service over it, Midtown's fee ownership of the Line does not make it a rail common carrier.<sup>3</sup>

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<sup>2</sup> CSXT succeeded to Conrail's trackage rights, which Conrail acquired under a 1991 trackage rights agreement with MTA. CSXT's succession was as a consequence of the transaction approved by the Board in CSX Corp. et al.—Control—Conrail, Inc. et al., 3 S.T.B. 196 (1998). D&H acquired its trackage rights from CSXT in Delaware and Hudson Railway Company, Inc.—Trackage Rights Exemption—CSX Transportation, Inc. and New York Central Line LLC, STB Finance Docket No. 33771 (STB served July 8, 1999) (D&H-CSXT Transaction). A trackage rights agreement between MTA's subsidiary, Metro-North Commuter Railroad Company, and D&H was entered in conjunction with the D&H-CSXT Transaction, on June 21, 1999.

<sup>3</sup> Midtown cites a number of cases in support of its position. See, e.g., Maine, DOT—Acq. Exemption, ME. Central R. Co., 8 I.C.C.2d 835 (1991) (State of Maine); 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);  
(continued . . .)

## DISCUSSION AND CONCLUSION

The acquisition of an active rail line and of 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. 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). Board authorization is not required, however, when the common carrier rights and obligation that attach to the line will not be transferred. See State of Maine, 8 I.C.C.2d at 836-37.

The record shows that the Sellers previously have transferred any and all of their common carrier rights or obligations with respect to the Harlem-Hudson Line to MTA under the MTA lease and could not have transferred common carrier rights or obligations to Midtown. Moreover, Midtown explains that it did not receive any such rights or obligations pursuant to the purchase of the Properties and states that it will not hold itself out as a common carrier performing freight rail service. Thus, notwithstanding Midtown's purchase of the Harlem-Hudson Line, the common carrier rights and obligations on the Harlem-Hudson Line have continued to be held by MTA under the MTA lease and CSXT and D&H under trackage rights agreements.

Although past cases similar to this one typically have involved trackage rights provided through permanent easements, the long duration and exclusivity embodied in the MTA lease and the trackage rights held by CSXT and D&H indicate that the common carrier rights and obligations remain with MTA, CSXT and D&H.<sup>4</sup> The trackage rights of CSXT and D&H specifically are protected under the MTA lease, which incorporates a number of protections for the common carriers on the Harlem-Hudson Line, including the right of MTA's assignees and sublessors to continue to operate over the Harlem-Hudson Line even if MTA defaults under the MTA lease and the right of MTA, and assignees or sublessors that MTA may designate, to make additions, enlargements, improvements and repairs at any time on the Harlem-Hudson Line. Moreover, the trackage rights are not subject to termination without Board authority. See Thompson v. Texas Mexican Ry., 328 U.S. 134, 147-48 (1946). Thus, CSXT and D&H, through their trackage rights agreements with MTA, will retain all common carrier rights and obligations with respect to freight rail operations. Under these circumstances, the Board finds that Midtown will not become a rail carrier subject to the Board's jurisdiction as a result of this transaction and,

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(. . . continued)

Utah Transit Authority—Acquisition Exemption—Line of Union Pacific Railroad Company, Finance Docket No. 32186 (ICC served Dec. 31, 1992); Missouri River Bridge Company—Acquisition Exemption—Certain Assets of Chicago, Central & Pacific Railroad Company, Finance Docket No. 32384 (ICC served Mar. 3, 1994).

<sup>4</sup> See The Town of Corinth, NY—Acquisition and Operation Exemption—Canadian Pacific Railway, STB Finance Docket No. 34803 (STB served Mar. 9, 2006); State of Washington, Department of Transportation—Acquisition Exemption—Palouse River and Coulee City Railroad, Inc., STB Finance Docket No. 34609 (STB served May 3, 2005).

therefore, that this transaction does not require Board authorization. Accordingly, Midtown's notice of exemption will be dismissed and this proceeding will be discontinued.

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

It is ordered:

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

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

Anne K. Quinlan  
Acting Secretary