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SERVICE DATE – AUGUST 4, 2014

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35812

CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY—ACQUISITION EXEMPTION—CERTAIN ASSETS OF CITY OF TACOMA IN PIERCE COUNTY, WASH.

Decided: August 1, 2014

On April 15, 2014, the Central Puget Sound Regional Transit Authority (Sound Transit), a noncarrier, filed a verified notice of exemption under 49 C.F.R. § 1150.31 to acquire from the City of Tacoma the physical assets and right-of-way of an approximately one-mile segment of rail line, commonly known as the Mountain Division, located approximately between milepost 1.0, at the BNSF Railway Company mainline near the Port of Tacoma, and milepost 1.99, at East D Street in the City of Tacoma, Pierce County, Wash. (the Tacoma Dome Segment).¹ Simultaneously, Sound Transit filed a motion to dismiss the notice, asserting that the transaction is not subject to the Board's jurisdiction because Sound Transit will not become a common carrier as a result of the transaction.

In this decision, the Board will direct Sound Transit and Tacoma Rail to submit additional information related to the proposed transaction in order to reach a determination on Sound Transit's motion to dismiss the notice of exemption. The Board will also direct that Tacoma Rail notify affected shippers of the proposed transaction and verify to the Board that it has done so. Finally, the Board will allow those affected shippers the opportunity to file comments related to the proposed transaction.

BACKGROUND

Sound Transit is a Washington regional transit authority that operates the Sounder commuter rail service that serves Pierce, King, and Snohomish Counties. Its commuter service currently operates on the Tacoma Dome Segment pursuant to an operating agreement with the City of Tacoma (City). The City, through its department of Public Utilities, operates Tacoma Rail, a Class III rail carrier,² over the Tacoma Dome Segment.

¹ Notice of the exemption was served and published in the Federal Register on May 1, 2014 (79 Fed. Reg. 24,811).

² See Belt Line Div. of Tacoma Pub. Utils.—Operation Exemption—in Pierce, Thurston & Lewis Cntys., Wash., FD 33666 (STB served Nov. 6, 1998).

Sound Transit intends to acquire the physical assets and associated right-of-way from the City in order to continue its commuter operations over the Tacoma Dome Segment and to initiate capital improvements associated with its commuter rail service. Sound Transit states that Tacoma Rail would retain a permanent, exclusive freight rail easement and would continue to provide all common carrier rail service to existing and new customers on the line pursuant to a Purchase and Sale Agreement and Joint Use Agreement for the Tacoma Dome Segment. Sound Transit states that it would not become a rail carrier subject to the regulatory authority of the Board because it would not acquire any rights or obligations that implicate existing freight common carrier operations on the Tacoma Dome Segment. Sound Transit therefore seeks a determination from the Board that its acquisition transaction is not subject to the Board's jurisdiction under 49 U.S.C. § 10901.

In support, Sound Transit submitted unexecuted drafts of the Purchase and Sale Agreement and the Joint Use Agreement. Pursuant to those agreements, Tacoma Rail would retain an exclusive, permanent right to operate service on the segment to all existing and new customers after Sound Transit acquires the Tacoma Dome Segment. In particular, under the Joint Use Agreement: (1) Sound Transit and Amtrak trains would have priority over freight operations; (2) Sound Transit or its contractor would dispatch the Tacoma Dome Segment, preparing and implementing dispatching protocols that would "allow the City to move its freight [t]rains through the Tacoma Dome Segment without undue delay when it is safe and does not interfere with passenger [t]rains"; (3) Sound Transit would be responsible for maintenance of way of the Tacoma Dome Segment; (4) Sound Transit's proposed capacity improvements would be designed to provide freight access to existing Tacoma Rail freight customers equivalent to currently existing freight access; and (5) Tacoma Rail may transfer or assign the freight easement, subject to Sound Transit's review and reasonable approval.

DISCUSSION AND CONCLUSIONS

The question presented by Sound Transit's motion is whether the Board's regulatory approval is required for Sound Transit to acquire the Tacoma Dome 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, 135 (1980), aff'd sub nom. Simmons v. ICC, 697 F.2d 326 (D.C. Cir. 1982). However, the Board will not exercise its jurisdiction where no common carrier rights or obligations are transferred with the line. See Maine, Dep't of Transp.—Acquis. & Operation Exemption—Me. Cent. R.R., 8 I.C.C. 2d 835, 836-37 (1991).

In prior decisions, the agency has addressed the issue of whether rights acquired by a noncarrier were so extensive that the noncarrier had acquired control of the rail line, and therefore the obligations and rights of a common carrier. See, e.g., Orange Cnty. Transp. Auth.—Acquis. Exemption—Atchison, Topeka & Santa Fe Ry., 10 I.C.C. 2d 78 (1994); S. Pac. Transp. Co.—Aban. Exemption—L.A. Cnty., Cal., 8 I.C.C. 2d 495 (1992), reconsidered and clarified, 9 I.C.C. 2d 385 (1993). Here, however, the Board does not have enough information about Tacoma Rail's current and future freight operations to make a determination as to whether

Tacoma Rail will maintain control of the Tacoma Dome Segment and continue to be able to fulfill its common carrier obligation.

Sound Transit has offered general statements regarding the acquisition's impact on freight rail service but provides no specific evidence regarding Tacoma Rail's existing and future freight operations and how the needs of the shippers it serves would be met during normal operations, and during the planned capital improvements. In order to assess whether Tacoma Rail would have the ability to adequately meet the needs of its shippers, additional information pertaining to Tacoma Rail's freight operations is needed, including: (1) the number of trains that Tacoma Rail currently operates and is projected to operate over the Tacoma Dome Segment; and (2) information regarding any exclusive operating window for freight operations. Further, there is no evidence that affected shippers have been advised of the transaction and have had the opportunity to express their views on it. This information is needed before the Board can reach a determination on the motion to dismiss.

Accordingly, the Board will direct Sound Transit and Tacoma Rail to submit the information described above by August 25, 2014. The Board will also direct Tacoma Rail to serve a copy of this decision on all shippers for which it has provided service in the past two years, and to certify to the Board that it has done so within five days of the service date of the decision. The shippers may submit comments to the Board by September 3, 2014.

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

It is ordered:

1. Sound Transit and Tacoma Rail are directed to provide the information as described above by August 25, 2014.
2. Tacoma Rail is directed to serve a copy of this decision on all shippers for which it has provided service in the past two years, and to certify that it has done so within five days of the service date of this decision.
3. The shippers may submit comments by September 3, 2014.
4. This decision will be effective on its service date.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.