

**Before the  
Surface Transportation Board**

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**Finance Docket No. 35812**

**CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY  
– ACQUISITION EXEMPTION –  
CERTAIN ASSETS OF CITY OF TACOMA  
IN PIERCE COUNTY, WASHINGTON**

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**MOTION OF  
CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY  
TO DISMISS THE NOTICE OF EXEMPTION**

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Dated: April 15, 2014

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The Central Puget Sound Regional Transit Authority (“Sound Transit”), a regional transit authority established under the laws of the State of Washington, hereby files this Motion to Dismiss its concurrently filed Verified Notice of Exemption (“NOE”) in this proceeding. Sound Transit submits that the transaction described in the NOE will not result in the transfer of any freight common carrier rights or obligations to Sound Transit, and will not alter, prevent or in any way impact the ability of City of Tacoma, through its Department of Public Utilities, d/b/a Tacoma Rail (the “City” or “Tacoma Rail”), to fulfill its freight common carrier obligations on this line. As a result, the NOE should be dismissed.

Sound Transit intends to acquire the physical assets and associated right-of-way comprising an approximately one mile segment of the rail line commonly known as Mountain Division located approximately between East D Street and the BNSF mainline near the Port of Tacoma in the City of Tacoma, Pierce County, Washington, Milepost 1.0 to Milepost 1.99 (the “Tacoma Dome Segment” or “Segment”) in order to continue to operate its Sounder commuter rail service over the Segment, and to initiate capital improvements associated with its Sounder

Commuter Rail Project. Tacoma Rail will retain a permanent, exclusive freight rail easement and will continue to provide all common carrier rail service on the Segment.

Because Sound Transit will not acquire any rights or obligations that implicate the existing freight common carrier operations on the segment affected by the transaction described in the NOE, Sound Transit will not become a rail carrier providing transportation subject to the regulatory authority of this Board. Sound Transit therefore seeks a determination pursuant to *State of Maine, DOT – Acquisition and Operation Exemption – Maine Central R. Co.*, 8 I.C.C. 2d 835 (1991) (“*State of Maine*”) and related case law that Sound Transit’s acquisition of the physical assets of the Tacoma Dome Segment is not a transaction subject to the Board’s jurisdiction under 49 U.S.C. § 10901. Accordingly, Sound Transit’s NOE in this proceeding should be dismissed.

## I. FACTS

Sound Transit is a Washington regional transit authority that operates the Sounder commuter rail service, which serves Pierce, King, and Snohomish counties. The City is a Washington municipal corporation. The City acquired the Segment from the Chehalis Western Railroad (“Chehalis Western”), a private railroad<sup>1</sup> owned by the Weyerhaeuser Corporation, which in turn had acquired the Segment from the bankrupt Chicago, Milwaukee, St. Paul and Pacific Railroad (“Milwaukee Railroad”) in 1980.<sup>2</sup> In 1998, Tacoma Public Utilities, a

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<sup>1</sup> See ICC Office of Proceedings Opinion Letter from Jane Mackall, Director of Proceedings, to Deborah A. Phillips dated April 29, 1987 (informal opinion concluding that Chehalis Western, a prior operator on the Mountain Division, never became a common carrier because it only provided service to its parent company, the Weyerhaeuser Corporation, and never held itself out as a common carrier).

<sup>2</sup> Although Sound Transit has been unable to locate any I.C.C. decision or bankruptcy court filing specifically authorizing abandonment of the Mountain Division before or upon acquisition by the Weyerhaeuser Corporation, subsequent I.C.C. history indicates that service was formally abandoned on the Mountain Division. See *Chehalis Western R.R. Co. – Exemption from 49 U.S.C. Subtitle IV*, I.C.C. Finance Docket No. 30680 (Service Date Aug. 29, 1985) (“After Milwaukee Road abandoned service on the line described above, Chehalis acquired the involved track.”). Based on the available record of the bankruptcy court and ICC handling of the Milwaukee Railroad bankruptcy, and the disposition of similar lines located in the Pacific Northwest portion of that railroad’s system, it appears highly likely that the Segment was approved for abandonment by the bankruptcy court. See *In the Matter of*

subdivision of the City of Tacoma, sought and was granted an exemption from the Board to operate over the Mountain Division, including the Tacoma Dome Segment.<sup>3</sup> A map of the Tacoma Dome Segment, which is located near the Port of Tacoma in the City of Tacoma, Pierce County, Washington, is shown on Exhibit 1 to the NOE.

Sound Transit's Sounder service currently operates on the Tacoma Dome Segment pursuant to a commuter rail operating agreement with the City. The City and Sound Transit have determined that acquisition of the Tacoma Dome Segment by Sound Transit instead of continued use under the Commuter Rail Agreement provides greater advantages to both parties. The Segment will continue to be used for Sound Transit's Sounder commuter rail service, and will be incorporated into Sound Transit's Sounder Commuter Rail Project, a capital improvement project aimed at alleviating major area congestion and safety concerns.

In order to effect this transaction, the City and Sound Transit are in the final stage of negotiating a Purchase and Sale Agreement and Joint Use Agreement for the Tacoma Dome Segment, attached to the NOE as Exhibit 2, and Exhibit 3, respectively. Pursuant to these agreements, after Sound Transit acquires the Tacoma Dome Segment, Tacoma Rail will retain the exclusive, permanent right to operate freight service on the Segment to all existing and new customers. Purchase and Sale Agreement, Sec. 9; Joint Use Agreement, Sec. 2.1.A(1). Sound Transit will acquire no right or obligation to provide freight service on the Tacoma Dome

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*Chicago, Milwaukee, St. Paul and Pacific R.R. Co.*, 641 F.2d 482, 483-84, 488 (7th Cir. 1981) (affirming bankruptcy court authorization of abandonment of a Milwaukee Railroad line in Montana and sale to a private carrier); *In the Matter of Chicago, Milwaukee, St. Paul and Pacific R.R. Co.*, 658 F.2d 1149, 1163, 1168 (7th Cir. 1981) (noting that the Milwaukee Railroad bankruptcy court was vested with abandonment authority, and that the bankruptcy court's authorization of sale to a non-carrier constituted authorization for abandonment). The City would not have required Board authority to acquire the Segment in 1995 if the Segment had previously been abandoned, and would have been exempted from requiring Board authority if the Segment were approved for abandonment. *See* 49 C.F.R. § 1150.22. In any event, the City of Tacoma Department of Public Utilities, now d/b/a Tacoma Rail, acquired an exemption for operation of the Segment 1998 in Finance Docket No. 33666, so the common carrier obligation on the Segment is already vested in Tacoma Rail. *See infra* n. 3.

<sup>3</sup> *Belt Line Division of Tacoma Public Utilities – Operation Exemption - In Pierce, Thurston and Lewis Counties, WA*, STB Finance Docket No. 33666 (Service Date Oct. 30, 1998).

Segment, and is acquiring the property for the purpose of providing wholly intrastate passenger commuter rail operations.

Tacoma Rail's existing common carrier rights and obligations will not be affected by this transaction. Pursuant to the Joint Use Agreement, Sound Transit will be responsible for dispatching, Joint Use Agreement, Sec. 2.1.A(3), maintenance of way, Sec. 2.4, and will be granted priority in scheduling, Sec 2.1.A(2); however, the Joint Use Agreement also provides that Tacoma Rail retains the exclusive right to provide freight service to all existing and new customers, Sec. 2.1.A(1), and that "dispatch protocols will be prepared and implemented to allow the City to move its freight [t]rains through the Tacoma Dome Segment without undue delay, provided it is safe to do so and does not interfere with passenger trains", Sec. 2.1.A(2)). Additionally, Sound Transit's proposed capacity improvements on the Segment will be designed to provide freight access to existing Tacoma Rail freight customers equivalent to currently existing freight access, and that the parties will work together to minimize the impact of construction of capacity improvements on freight service. Joint Use Agreement, Sec. 3.3.B. Tacoma Rail may request improvements to the rail infrastructure for freight service as long as those improvements do not materially affect passenger train operations, and the Joint Use Agreement provides a process for development of such projects. Joint Use Agreement, Sec. 3.3.D. Tacoma Rail is also entitled to inspect the Segment and audit any aspect of Sound Transit's performance of its duties and obligations under the Joint Use Agreement. Joint Use Agreement, Sec. 3.7.A. Finally, Tacoma Rail may transfer or assign the freight easement, subject to Sound Transit's review and reasonable approval. Joint Use Agreement, Sec. 10.9. All of the terms of the Joint Use Agreement are expressly incorporated by reference into the deed for the

Segment as covenants. Quit Claim Deed (Tacoma Rail Mountain Division), Sec. (1) (Exhibit E to the Purchase and Sale Agreement, Exhibit 2 to the NOE).

## II. DISCUSSION

The agreements attached to the Notice of Exemption confirm that Sound Transit is not acquiring any right or obligation to provide freight service on the Tacoma Dome Segment. Instead, the City's Department of Public Utilities, d/b/a Tacoma Rail, retains the sole right to continue to provide common carrier freight service. Sound Transit will not be able to interfere with Tacoma Rail's ability to fulfill its common carrier obligations on the line. The NOE should be dismissed because the transaction does not involve the transfer of any rights that would implicate this Board's regulatory authority.

This Board has consistently determined that it need not assert jurisdiction over a transaction involving a line of railroad when the buyer has no intention or ability to assume freight operation and is not acquiring assets or rights that would "disenable . . . [the seller] from meeting its common carrier obligation." *State of Maine*, 8 I.C.C. 2d at 837. Citing *State of Maine*, this Board has reiterated that "[o]ur authorization is not required . . . when only the physical assets will be conveyed and the common carrier rights and obligations that attach to the line will not be transferred." *Utah Transit Authority – Acquisition Exemption – Certain Assets of Union Pacific R. Co.*, STB Finance Docket No. 34170, slip op. at 2 (Service Date May 22, 2002). A basic requirement of such cases is that the selling freight railroad retain, at a minimum, a permanent easement that permits it to continue to provide common carrier freight service. *The Port of Seattle – Acquisition Exemption – Certain Assets of BNSF Railway Company*, STB Finance Docket No. 35128, slip op. at 3 (Service Date Oct. 27, 2008); *Mass. Dep't of Transp. – Acquisition Exemption – Certain Assets of CSX Transp., Inc.*, STB Finance Docket No. 35312,

slip op. at 9 (Service Date May 3, 2010) (“*MassDOT*”), *aff’d sub nom. Bhd. of R.R. Signalmen v. STB*, 638 F.3d 807 (D.C. Cir. 2011). Beyond that, the relevant inquiry is whether the freight railroad has sufficient property and contract rights to conduct freight operations, and whether the line’s new owner has the right or ability to materially or unreasonably interfere with the railroad’s freight operations. *See, e.g., Metro Regional Transit Auth. – Acquisition Exemption – CSX Transportation, Inc.*, STB Finance Docket No. 33838, slip op. at 4 (Service Date Oct. 10, 2003); *New Jersey Transit – Acquisition Exemption – Certain Assets of Conrail*, 4 S.T.B. 512, 514 (2000).

In the context of shared freight and passenger rail use, the acquiring public entity “may negotiate terms and conditions with the freight rail carrier necessary to provide reliable commuter rail passenger service or protect its investment, consistent with the *State of Maine* doctrine, so long as such terms and conditions do not unreasonably interfere with freight rail service.” *Fla. Dep’t of Transp. – Acquisition Exemption – Certain Assets of CSX Transp., Inc.*, STB Finance Docket No. 35110, slip op. at 19 n.17 (Service Date Dec. 15, 2010) (“*FDOT*”); *MassDOT*, slip op. at 9. In *MassDOT*, the Board listed some of the additional rights and responsibilities that public agencies may acquire through the acquisition without incurring a common carrier obligation:

- (1) [T]he public agency that owns the right-of-way and track may have some role in approving the transfer of the easement to another carrier, because Board approval is required for such a transfer;
- (2) the easement or the operating agreement may restrict freight operations to specific parts of the day, provided that the window for exclusive freight operations is adequate to satisfy freight shippers’ service needs; and
- (3) the public agency may assume responsibility for maintaining the line and dispatching freight operations if the operating procedures are reasonable and do not discriminate against freight service, and if the freight carrier has the right to inspect and to request prompt repair of any track defects.

*MassDOT*, slip op. at 9-10 (footnoted citations omitted). The Board has also explained that while the transfer of dispatching and track maintenance responsibilities to a non-carrier in a *State of*

*Maine* transaction is permitted, such a transfer may not “be used for the primary purpose of circumventing the railway labor laws.” *FDOT*, slip op. at 10.

Here, Sound Transit has acquired no more than what the Board has stated is permitted in a *State of Maine* transaction. Although Sound Transit will assume dispatching and maintenance of way responsibilities, Joint Use Agreement, Sec. 2.1A(3), 2.4, Tacoma Rail has retained a permanent, exclusive, transferrable easement for the operation of freight service, along with guarantees that prevent Sound Transit from interfering with Tacoma Rail’s common carrier obligation. The Joint Use agreement spells out the Tacoma Rail’s exclusive right and obligation to provide freight service to all existing and new customers, Sec. 2.1.A(1), and prohibits Sound Transit from unduly delaying Tacoma Rail’s ability to move freight trains through the Segment, Sec. 2.1.A(2). Sound Transit is furthermore prohibited from interfering with the level of service previously provided by Tacoma Rail to existing freight customers through the design of capacity improvements on the Segment. Joint Use Agreement, Sec. 3.3.B. The Joint Use Agreement allows Tacoma Rail to request improvements and provides procedures for responding to requests, Sec. 3.3.D, and allows Tacoma Rail to audit and inspect Sound Transit’s work and records, Sec. 3.7.A. The provisions of the Joint Use Agreement are expressly incorporated by reference into the deed for the Segment as covenants, ensuring the continuity of these reserved rights and guarantees. Quit Claim Deed (Tacoma Rail Mountain Division), Sec. (1) (Exhibit E to the Purchase and Sale Agreement, Exhibit 2 to the NOE).

In short, the transaction will not affect Tacoma Rail’s “ability to conduct its existing and reasonably foreseeable freight operations.” Accordingly, because Sound Transit will not hold itself out as a common carrier, and because it will have no right to provide freight service on the Tacoma Dome Segment, its acquisition of the Segment does not involve a transfer of any

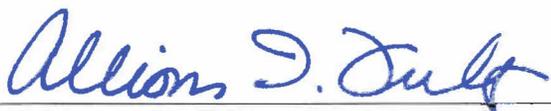
common carrier obligation and is not subject to the Board's regulatory authority. *Central Puget Sound Regional Transit Auth. – Acquisition Exemption – BNSF Railway Co.*, STB Finance Docket No. 34747, slip op. at 2 (Service Date Nov. 18, 2005). As a result, the Board should conclude that this transaction, like the transactions described in *MassDOT* and *FDOT* above, does not involve the transfer of common carrier obligations and hence, the Board's regulatory oversight does not apply.

### **III. CONCLUSION**

Consistent with prior Board rulings, Sound Transit is acquiring sufficient interests to permit it to conduct and implement passenger commuter transit operations but insufficient interests to allow it to conduct freight operations on its own or to impede the freight railroad's ability to fulfill its common carrier obligations. Furthermore, Tacoma Rail will continue its existing freight operations on the Segment unimpeded by Sound Transit's operations. As a result, the Board should conclude that it need not assert jurisdiction over the transaction. Accordingly, this Motion to Dismiss should be granted.

WHEREFORE, and in view of all of the foregoing, Sound Transit respectfully requests that the Board dismiss Sound Transit's concurrently filed Notice of Exemption in this proceeding because it describes a transaction that is excepted from the exercise of the Board's regulatory authority.

Respectfully submitted,



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Transit District

Dated: April 15, 2014

**Certificate of Service**

I hereby certify that I have this day caused a copy of the foregoing Motion to Dismiss of the Central Puget Sound Regional Transit Authority to be served by first class mail, properly addressed and with postage prepaid, upon the following:

City of Tacoma  
c/o Real Property Services  
3628 South 35th Street  
Tacoma, WA 98409

Tacoma Rail  
2601 SR 509 N Frontage Road  
Tacoma, WA 98421

  
Allison I. Fultz

Dated: April 15, 2014