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Before the
Surface Transportation Board

Finance Docket No. 35252

**REGIONAL TRANSPORTATION DISTRICT
- ACQUISITION EXEMPTION -
THE UNION PACIFIC RAILROAD COMPANY
IN THE COUNTIES OF ADAMS, BOULDER,
BROOMFIELD AND WELD, COLORADO**

**MOTION OF
REGIONAL TRANSPORTATION DISTRICT
TO DISMISS THE NOTICE OF EXEMPTION**

Dated: August 24, 2009

Communications with respect to this document
should be addressed to:

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**MOTION OF
REGIONAL TRANSPORTATION DISTRICT
TO DISMISS THE NOTICE OF EXEMPTION**

The Regional Transportation District (“RTD”), a political subdivision of the State of Colorado organized under Title 32, Article 9 of the Colorado Revised Statutes, hereby files this Motion to Dismiss its concurrently filed Verified Notice of Exemption (“NOE”) in this proceeding. RTD submits that the transaction described in the NOE will not result in the transfer of any rights or obligations to RTD that will prevent the seller, the Union Pacific Railroad Company (“UPRR”) from fulfilling its freight common carrier obligations on this line. As a result, the NOE should be dismissed.

RTD’s purpose in acquiring the line of railroad commonly known as the Boulder Industrial Lead located in the Counties of Adams, Boulder, Broomfield and Weld, Colorado and including the Lakeside Spur in Boulder, County, CO, from UPRR is to develop commuter rail service in the Denver metropolitan area pursuant to the FasTracks plan adopted by RTD’s board of directors on April 22, 2004. UPRR retains an exclusive freight easement over the line, *see* Quitclaim Deed, a copy of which is attached to the NOE as Exhibit E to Exhibit 3, and will continue to provide all common carrier rail freight service on the line. A Shared Use Agreement

between RTD and UPRR will assure that UPRR can continue to fulfill all current and reasonably foreseeable rail freight needs. A copy of the Shared Use Agreement is attached to the NOE as Exhibit F to Exhibit 3.

Because RTD will not acquire any rights or obligations that implicate the existing freight common carrier operations that remain attached to the property covered by the NOE, RTD will not become a rail carrier providing transportation subject to the jurisdiction of the Board. RTD 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 RTD’s acquisition of the physical assets of the Boulder Industrial Lead is not a transaction subject to the Board’s jurisdiction under 49 U.S.C. § 10901. Accordingly, RTD’s NOE in this proceeding should be dismissed.

I. FACTS

RTD is a political subdivision of the State of Colorado and has purchased the Boulder Industrial Lead from the UPRR. This line of railroad will be used in developing the FasTracks commuter rail system to serve the Denver metropolitan area. The rail line being purchased from UPRR is located in the Counties of Adams, Boulder, Broomfield and Weld, Colorado, and extends from MP 0.2 to approximately MP 33.17, including the Lakeside Spur in Boulder County. A map of the Boulder Industrial Lead is shown on Exhibit 1 to the NOE.

The documents that describe the transaction are attached to the NOE as Exhibits 2 and 3. Specifically, the FasTracks Project Property Transfer and Railroad Relocation Agreement is attached to the NOE as Exhibit 2. This is the document that provides the framework for the series of four transactions that UPRR and RTD will undertake in the coming months. The Boulder Industrial Lead transaction, which is the subject of this proceeding, is described in

Addendum A to that Agreement, which was executed by the parties on June 25, 2009. A copy of Addendum A, including the Exhibits thereto, is attached to the NOE as Exhibit 3. Addendum A includes, *inter alia*: Exhibit E thereto, the Quitclaim Deeds that include a reservation for UPRR of an exclusive, perpetual railroad easement for the purpose of permitting UPRR to continue providing freight service on the line; and Exhibit F thereto, the Shared Use Agreement that will govern the operations, rights and obligations of each on the Boulder Industrial Lead following the transaction.

UPRR is retaining an easement that provides it with the exclusive right to provide freight service over the Boulder Industrial Lead. UPRR's right will not be affected by this transaction. UPRR previously received and exercised authority from this Board to discontinue service over a 12.21-mile segment of the line being acquired by RTD, from MP 18.79, near Eagle Mine in Weld County, to MP 31.0, near Valmont in Boulder County. *Union Pac. R. Co. – Discontinuance Exemption – In Weld and Boulder Counties, CO*, STB Docket No. AB-33 (Sub-No. 182X) (Service Date Oct. 19, 2001); *Union Pac. R. Co. – Notice of Consummation, Union Pac. R. Co. – Discontinuance Exemption – In Weld and Boulder Counties, CO*, STB Docket No. AB-33 (Sub-No. 182X) (Filed Mar. 12, 2002). Therefore, although UPRR has no current common carrier obligation over the discontinued segment, it retains the right to reactivate the segment and provide service. Additionally, an existing lease between UPRR and BNSF Railway (“BNSF”) under which BNSF leases a one-mile segment of the subject line from UPRR from MP 32.0 to MP 33.0 at Valmont to provide service to an asphalt plant, will remain in full force and effect. *Burlington N. R. Co. – Lease Exemption – Union Pac. R. Co.*, STB Finance Docket No. 32857 (Service Date May 7, 1996). Accordingly, pursuant to the terms and conditions of the

railroad easement, UPRR will retain all present and inchoate rights to provide freight rail service over the line.

RTD has acquired no right to operate freight service on the line, will acquire none, and is in fact prevented from using any portion of the trackage for freight rail purposes pursuant to the terms and conditions of its agreements with UPRR. Furthermore, RTD is authorized by statute to operate mass transportation services only and cannot lawfully conduct freight operations.

These agreements confirm that RTD will acquire neither the right nor the obligation to provide freight service on the Boulder Industrial Lead. The Transfer Agreement and Quitclaim Deeds specifically provide that UPRR will retain an exclusive easement over the entire Boulder Industrial Lead for the purpose of fulfilling its rights as a common carrier freight railroad.

Transfer Agreement (NOE Exhibit 2) Article 3, p. 10; Addendum A (NOE Exhibit 3), Exhibit E thereto at pp. E-3 – E-4.

The form of the FasTracks Project Shared Use Agreement, attached to Addendum A as Exhibit F (the “Shared Use Agreement”) (NOE, Exhibit 3, Exhibit F thereto), confirms that all common carrier obligations over the Boulder Industrial Lead remain vested in UPRR and that RTD may not take any action on the line that will prevent UPRR from “... perform[ing] its obligations as a common carrier, meet[ing] its then-existing commitments to its customers and other third parties, and ... avoid[ing] disruption to, UP’s freight rail operations through the Property or anywhere else on UP’s rail system.” Shared Use Agreement, § 1.2.4 (NOE Exhibit 3, Exhibit F thereto at p. F-15). RTD has no discretion regarding UPRR’s operating authority; the Shared Use Agreement specifies that UPRR alone may “file for abandonment or discontinuance authority, as appropriate, for all or any portion of the Lead upon written notice to RTD that UP[RR] intends to seek such authority.” *Id.*, § 5.2 (NOE Exhibit 3, Exhibit F thereto

at p. F-22). The Shared Use Agreement recognizes that RTD has acquired the Boulder Industrial Lead and the right to conduct passenger service on the line, and it establishes a “Freight Operating Window” between the hours of 12:01 a.m. through and including 5:00 a.m. local Denver time each Wednesday for UPRR’s operations over the line. *Id.*, § 1.2.4 (NOE Exhibit 3, Exhibit F thereto at p. F-15).

Currently, UPRR serves only one shipper on this line, Atlas Roofing Corporation (“Atlas”). Atlas currently receives service irregularly but no more often than one day per week. In the past year it has shipped or received a total of 43 carloads. A typical operation to serve Atlas constitutes a delivery of two cars and a pick up of two cars. *See* Verified Statement of George R. Hix, attached hereto as Exhibit A.

The Shared Use Agreement provides that following the transaction, the Boulder Industrial Lead trackage will be divided into two categories: exclusively freight portions and a shared use portion. Prior to construction of the improvements that will be required to accommodate both freight and RTD’s commuter operations, UPRR will continue to dispatch the entire line. Shared Use Agreement, § 1.2.4 (NOE Exhibit 3, Exhibit F thereto at p. F-15). Following completion of that construction, UPRR will retain the exclusive right and obligation to control freight operations on and maintain and repair the freight-only track located between (a) MP 0.2 and the Control Point at MP 1.15, and (b) MP 32 and the end of the line near MP 33.17, and RTD will assume dispatching all rail traffic on the remainder of the line. *Id.* Freight operations on the shared use facilities between MP 1.15 and MP 32 will be limited to the Freight Operating Window enumerated above. *Id.* Atlas is currently the only customer on the line, and UPRR currently plans to operate only between MP 1.15 and 8.2 to serve that customer. Even though UPRR retains the right to operate freight service on the shared use facilities between MP

8.2 and MP 32, UPRR has received discontinuance authority from this Board for that segment, and there are no active freight customers between MP 8.2 and MP 32 at this time.

The Shared Use Agreement also provides that RTD may construct improvements of shared facilities, but must first receive approval of its initial designs, plans and specifications for such construction from UPRR. Shared Use Agreement, § 4.1.3 (NOE Exhibit 3, Exhibit F thereto at pp. F-19 - F-20). Prior to the date that construction of the FasTracks improvements begins, UPRR will exercise exclusive control over and responsibility for the maintenance and repair of the line segments between MP.2 and MP 1.15, between MP 32 and the end of the line near MP 33.17, and the Shared Use Facilities (MP 1.15 – MP 8.2). *Id.*, §3.2.1 (NOE Exhibit 3, Exhibit F thereto at p. F-17). After the closing date, RTD will assume responsibility for maintenance of the line between MP 8.2 and MP 32, which is the portion of the line on which UPRR has no active freight service at this time. After RTD begins constructing its improvements on the Shared Use Facilities, it will assume responsibility for maintenance of the line between MP 1.15 and MP 8.2. *Id.*

II. DISCUSSION

The agreements attached to the Notice of Exemption confirm that RTD is acquiring none of the rights and obligations that are essential to provide freight service on the Boulder Industrial Lead. UPRR retains the sole right to provide that service, and RTD will not be able to interfere with UPRR'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 jurisdiction.

A. Application of *State of Maine*

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, however, 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 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). 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).

The Board recently addressed how *State of Maine* and its progeny have been applied in the context of shared freight and commuter use, where a state agency acquires a rail line from a freight railroad and the line will be used for both continuing freight service and for new commuter or passenger rail service:

To balance the development of mass transit with the retention of freight rail service, the freight carrier need not necessarily retain full control. Instead, the Board examines in each case whether the agreements between the parties continue to give the freight carrier the ability to conduct its existing and reasonably foreseeable freight operations so that it can satisfy its common carrier obligation.

While the freight carrier must continue to have a permanent easement or its equivalent to provide freight service, the public agency acquiring the right-of-way and track may negotiate terms and conditions with the freight carrier necessary to provide reliable commuter service or protect the agency's investment so long as such terms and conditions do not unreasonably interfere with freight rail service. Thus, 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 the service needs of freight shippers. Likewise, 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.

Maryland Transit Administration – Petition for Declaratory Order, STB Finance Docket No. 34975, slip op. at 4-5 (Service Date Sept. 19, 2008) (internal citations omitted). *Accord*, *Wisconsin Dept. of Transp. – Petition for Declaratory Order – Rail Line in Sheboygan Cty., WI*, STB Finance Docket No. 35195 (Service Date April 20, 2009) (holding that WisDOT's acquisition of physical assets comprising a rail line but not the freight easement was consistent with the transaction described in *State of Maine* and therefore did not require Board authorization under 49 U.S.C. § 10901).

The Board should conclude that this transaction, like the transaction described in *Maryland Transit Administration* above, does not involve the transfer of common carrier obligations and hence, Board jurisdiction does not apply.

B. General Provisions

UPRR will retain a perpetual, exclusive easement to conduct rail freight operations on the Boulder Industrial Lead, and this easement will not terminate unless and until UPRR obtains and exercises abandonment authority from the Board. *See* Quitclaim Deeds (NOE Exhibit 3, Exhibit

E thereto) at pp. E-3-4. RTD has no right to use any portion of the Boulder Industrial Lead for freight rail operations. *Id.* Because RTD will not hold itself out as a common carrier and because it will have neither the right nor the ability to provide freight service on the Boulder Industrial Lead, its acquisition of the line does not involve a transfer of any common carrier obligation and is not subject to the Board's jurisdiction. *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).

UPRR may transfer the freight easement to another carrier subject only to RTD's review of the financial viability of the proposed assignee to give RTD a level of comfort that the freight service operator on the property it owns will be able to fulfill its obligations to provide that service on the line. *See* Quitclaim Deed (NOE Exhibit 3, Exhibit E thereto) at p. E-4. The Board has held that, "[i]t is not uncommon for a public entity . . . that seeks to acquire the physical assets of a rail line to use or preserve for rail freight and commuter service [] to play a role in the subsequent assignment of the freight easement. . . ." *Port of Seattle*, slip op. at 3. Consistent with this Board's precedent, the contractual provisions allowing RTD to consent to certain easement transfers does not unreasonably interfere with UPRR's ability to fulfill its common carrier obligation on the Boulder Industrial Lead.

C. Operating Window

As discussed above, the Shared Use Agreement provides for a Freight Operating Window for UPRR during which it provides service to Atlas, its only freight shipper on the Boulder Industrial Lead. The Board has consistently held that discrete operating windows for passenger and freight service are acceptable where they are adequate to allow the freight carrier to serve the needs of freight shippers. *See Maryland Transit Admin.*, slip op. at 5; *Washington County, OR* –

Acquisition Exemption – Certain Assets of Union Pacific RR Co., STB Finance Docket No. 34810, slip op. at 3 (Service Date April 11, 2007). As demonstrated by the Verified Statement of George R. Hix, attached to this Motion as Exhibit A, the 5-hour Freight Operating Window available to UPRR once per week is more than adequate to serve the needs of Atlas Roofing. Currently, UPRR serves Atlas with just 2 freight car loads approximately 20 times per year. *Id.* Furthermore, in the event that Wednesdays become unsuitable for UPRR or Atlas, UPRR may change the day of the weekly Freight Operating Window with 48 hours' notice to RTD. Shared Use Agreement, § 1.2.4 (NOE Exhibit 3, Exhibit F thereto at p. F-15).

D. Dispatching

Pursuant to the Shared Use Agreement, UPRR will continue to dispatch the entire line prior to construction of the improvements that will be required to accommodate both freight and RTD's commuter operations. Following completion of that construction, RTD will dispatch all trains on the line. *Id.* at § 1.2.3 (NOE Exhibit 3, Exhibit F thereto at p. F-15). According to the Board:

Dispatching control has less importance in its own right than it has as a means of enforcing the service priorities accorded under the operating agreement. If the operating agreement considered as a whole and the circumstances surrounding it are not likely to impair freight service, the passenger operator's control over dispatching will not by itself create such an obstacle, because the latter merely implements the former.

Los Angeles Cty. Transp. Comm'n – Petition for Exemption – Acquisition from Union Pacific R.R. Co., STB Finance Docket No. 34374, slip op. at 3 (Service Date July 23, 1996). In this instance, given the terms and conditions that establish the mutually acceptable Freight Operating Window on the Boulder Industrial Lead, UPRR will continue to be able to provide adequate freight service to its customer, Atlas. RTD's control over dispatching will not interfere with UPRR's operations.

E. Maintenance

RTD may not change any aspect or feature of any of the tracks or facilities used for freight operations without securing the concurrence of UPRR and without ensuring that the change does not prevent UPRR from fulfilling its freight common carrier obligations. Shared Use Agreement, § 4.1.3 (NOE Exhibit 3, Exhibit F thereto at p. F-19). Prior to the date that construction of the FasTracks improvements begins, UPRR will exercise exclusive control over and responsibility for the maintenance and repair of the line segments between MP.2 and MP 1.15, between MP 32 and the end of the line near MP 33.17, and the Shared Use Facilities (MP 1.15 – MP 8.2). *Id.*, §3.2.1 (NOE Exhibit 3, Exhibit F thereto at p. F-17). After the closing date, RTD will assume responsibility for maintenance of the line between MP 8.2 and MP 32, which is the portion of the line on which UPRR has no active freight service at this time. After RTD begins constructing its improvements on the Shared Use Facilities, it will assume responsibility for maintenance of the line between MP 1.15 and MP 8.2. *Id.*

As this Board noted in *Maryland Transit Administration*, a public agency's acquisition of maintenance obligations while a freight railroad continues operating on a line does not place that agency within the Board's jurisdiction. *Maryland Transit Administration*, slip op. at 4-5. Here, as detailed above, the Shared Use Agreement is replete with obligations on the part of RTD to ensure that it maintains the track to a level that is consistent with UPRR's ability to continue providing the very limited freight service it currently operates on the Shared Use Facilities.

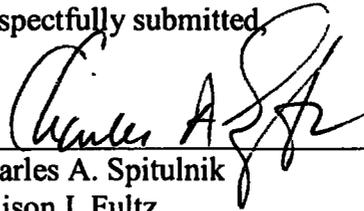
III. CONCLUSION

Consistent with prior Board rulings, RTD is acquiring sufficient interests to permit it to conduct and implement 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. 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, RTD respectfully requests that the Board dismiss RTD's concurrently filed Notice of Exemption in this proceeding because it does not describe a transaction within the Board's jurisdiction.

Respectfully submitted,



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Counsel for the Regional Transportation District

Dated: August 24, 2009

A

Exhibit A

Verified Statement of George R. Hix

[attached hereto]

**Before the
Surface Transportation Board**

Finance Docket No. 35252

**REGIONAL TRANSPORTATION DISTRICT
- ACQUISITION EXEMPTION -
THE UNION PACIFIC RAILROAD COMPANY
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**VERIFIED STATEMENT OF
GEORGE R. HIX**

1. My name is George R. Hix, and I am Senior Business Manager at the Union Pacific Railroad Company ("UPRR"), a position I have held for 8 years. I am submitting this Verified Statement in support of the Motion of the Regional Transportation District ("RTD") to Dismiss the Notice of Exemption it filed in this proceeding.
2. I have been employed by UPRR for 35 years. Prior to my current position, I was Senior Business Director - 6 years, Product Manager 2 years, Market Analyst 2 years, Tariff Publishing Officer 2 years and also held various Officer and Union positions with the Missouri Kansas and Texas Railroad for 15 years.
3. In my current position, my responsibilities include servicing the needs and developing new business with existing Union Pacific Customers as well as developing new business opportunities with companies that would like to locate on rail. As a result, I am directly familiar with the UPRR's freight operations and facilities in the Denver, Colorado, area, including the operations on the Boulder Industrial Lead.
4. The Boulder Industrial Lead was constructed by UPRR as a branch to connect two main lines and has been in operation since 1909. In 1996, UPRR leased a one-mile segment of the

line, from MP 32.0 to MP 33.0 at Valmont, CO, to Burlington Northern Railroad Company (now BNSF Railway). UPRR retained the residual common carrier obligation over this portion of the line. The lease with BNSF Railway remains in effect. In 2001, UPRR sought authority from the Surface Transportation Board to discontinue service over a portion of the line from MP 18.79 near Eagle Mine, CO, to MP 31.0 near Valmont, CO. UPRR exercised its discontinuance authority over this segment in 2002. The segment subject to the BNSF Railway lease and the discontinued segment were included in the transfer of the Boulder Industrial Lead to RTD.

5. Pursuant to a perpetual, exclusive railroad easement, UPRR has retained all of its right and interest relating to the provision of freight rail service over the entirety of the line conveyed to RTD. UPRR has retained its right to provide freight rail service, will continue to provide freight rail service and will continue to fulfill its common carrier obligations pursuant to the terms and conditions of the easement.

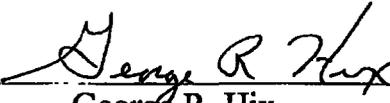
6. Currently, UPRR serves only one shipper on this line, Atlas Roofing Corporation ("Atlas"). Atlas currently receives service irregularly but no more often than one day per week. In the past year it has shipped or received a total of 43 carloads.

7. A typical operation to serve Atlas constitutes a delivery of 2 cars and a pick up of 2 cars.

8. UPRR and RTD have entered into a Shared Use Agreement to govern their respective uses of the corridor between MP 1.15 and MP 8.2. Under the Shared Use Agreement, UPRR will conduct its freight service from 12:01 AM through and including 5:00 AM local Denver time each Wednesday, and has the right to unilaterally elect to change its window of operations to a different day of the week. The 5-hour freight operating window available to UPRR once per week under the terms and conditions of UPRR's Shared Use Agreement with RTD is more than adequate to serve the needs of Atlas, and UPRR can easily serve Atlas within this window.

9. In my opinion, based on my familiarity with the service UPRR currently provides on the Boulder Industrial Lead and with the arrangements UPRR and RTD have made for UPRR's continued operation of freight service on that line, RTD's acquisition of the line will not prevent UPRR from providing service to Atlas.

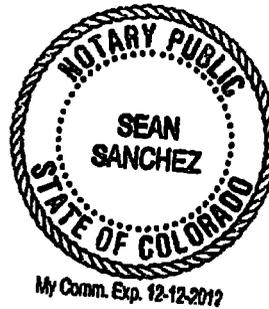
10. Further, Affiant sayeth not.


George R. Hix

Subscribed and sworn to before me
this 20th day of July, 2009.


Notary Public

My commission expires: 12/12/2012



Certificate of Service

I hereby certify that I have this day caused a copy of the foregoing Motion to Dismiss of the Regional Transportation District to be served by first class mail, properly addressed and with postage prepaid, upon the following parties of record to this proceeding:

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Charles A. Spitulnik

Dated: August 24, 2009