

Before the
Surface Transportation Board

AUG 4 2010

Finance Docket No. 35394

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REGIONAL TRANSPORTATION DISTRICT
– ACQUISITION EXEMPTION –
CERTAIN ASSETS OF UNION PACIFIC RAILROAD COMPANY
IN ADAMS, DENVER, AND JEFFERSON COUNTIES, COLORADO

MOTION OF
REGIONAL TRANSPORTATION DISTRICT
TO DISMISS THE NOTICE OF EXEMPTION

Dated: August 4, 2010

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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 or in any way impact the ability of the seller, the Union Pacific Railroad Company (“UP”) to fulfill its freight common carrier obligations on this line. As a result, the NOE should be dismissed.

RTD’s purpose in acquiring from UP (a) a portion of the “Limon Subdivision” extending approximately 8.96-miles from MP 628.50 in Adams County, Colorado, to MP 637.46 in the City and County of Denver (the “East Corridor Segment”), and (b) a portion of the “Moffat Tunnel Subdivision” extending approximately 2.22 miles from MP 4.28 in the City and County of Denver to MP 6.50 in Jefferson County, Colorado (the “Gold Line Segment”), 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. RTD will acquire only a portion of the full width of

UP's existing corridor, UP will retain its interest in the remainder of the line and will continue to provide all common carrier rail freight service on the line.

Because RTD will not acquire any rights or obligations that implicate the existing freight common carrier operations on the corridors affected by the transactions described in the NOE, RTD will not become a rail carrier providing transportation subject to the regulatory authority of this 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 East Corridor Segment and Gold Line Segment 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 will purchase the physical assets and associated rights-of-way on the East Corridor Segment and Gold Line Segment from UP. This corridor will be used in developing the FasTracks commuter rail system to serve the Denver metropolitan area. The rail lines being purchased from UP are located in the Counties of Adams, Denver and Jefferson, Colorado, and comprise a total of approximately 11.18 miles of rail corridor. A map of the East Corridor Segment purchase area is shown on Exhibit 1-A to the NOE and a map of the Gold Line Segment purchase area appears as Exhibit 1-B to the NOE.

The documents that describe the transaction are attached to the NOE as Exhibits 2, 3 and 4. Specifically, the FasTracks Project Property Transfer and Railroad Relocation Agreement is attached to the NOE as Exhibit 2. This document provides the framework for the series of four transactions that UP and RTD has begun to undertake. RTD’s acquisition of the Boulder Industrial Lead was completed in 2009 pursuant to a Notice of Exemption, and this Board

granted RTD's Motion to Dismiss the Acquisition Exemption on June 25, 2010. *Regional Transportation District – Acquisition Exemption – The Union Pacific Railroad Company – In the Counties of Adams, Boulder, Broomfield and Weld, Colorado*, STB Finance Docket No. 35252 (Service Date Jun. 25, 2010). Copies of near-final drafts of the documents governing RTD's acquisition of the East Corridor Segment and Gold Line Segment, Addenda C and D, including the Exhibits thereto, are attached to the NOE as Exhibits 3 and 4, respectively.

UP's existing freight common carrier right will not be affected by this transaction. UP will continue to operate on the portion of the corridors not being conveyed to RTD, and RTD will have no ability to take any action that will affect UP's ability to provide service in those corridors. On the Limon Subdivision, to the extent any relocation of UP track or facilities is required to accommodate the construction of RTD's East Corridor facilities and preserve UP's existing operations, RTD will be required to perform such relocation work and UP will commence operations over the relocated line before RTD takes title. On the Moffat Tunnel Subdivision, UP will continue to operate on its existing track. UP and RTD will each operate within its own corridor and control its own dispatching and maintenance, with no physical or functional connection between the East Corridor Segment or the Gold Line Segment and UP's adjacent, contiguous property. As necessary, UP and RTD intend to grant easements to one another for utility crossings and access. Accordingly, UP will retain all of its present rights to provide freight rail service over the lines.

RTD will acquire no right to operate freight service on the line, 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 UP. 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 East Corridor Segment and Gold Line Segment. Transfer Agreement (NOE Exhibit 2), at Sec. 11.2.3; Addendum C (NOE Exhibit 3), at Sec. 6.1; Addendum D (NOE Exhibit 4), at Sec. 6.1. Each of UP and RTD will operate separately in generally parallel, contiguous corridors. Operations Agreement – Limon and Greeley Subdivisions / Gold Line (NOE Exhibit 6), at Recital B; Operations Agreement – Moffat Tunnel Subdivision / East Corridor (NOE Exhibit 7), at Recital B.

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 East Corridor Segment and Gold Line Segment. UP retains all portions of its existing corridor not being conveyed to RTD, and retains the sole right to provide common carrier freight service. RTD will not be able to interfere with UP'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.

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 . . . 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). 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).

Here, UP has retained more than an easement. It retains its ownership of that portion of the corridors that it will use to provide its freight service. RTD will operate on a contiguous rail line in an adjacent corridor but the parties will share no track. There is no opportunity for RTD to interfere with UP's operation on UP's retained track, and no opportunity for UP to operate on RTD's track.

As a result, the rationale for dismissing the NOE here is even more compelling than in circumstances where a transit operator acquires and plans to use a track that the freight railroad seller will continue to use for freight service. 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.

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 County, 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).

There is no doubt here that the UP retains “the ability to conduct its existing and reasonably foreseeable freight operations.” It will be the sole user of the track, and will maintain and dispatch it. 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, the Board's regulatory oversight does not apply.

B. General Provisions

UP will retain its existing interest in all portions of the Limon, Greeley and Moffat Tunnel Subdivisions not being conveyed to RTD. No operating easement will be necessary over the property RTD will acquire because UP will continue to operate over its own track on its own property and RTD will occupy the adjacent, but separate, property, which will have been carved out of UP's right-of-way. RTD has no right to use any portion of the East Corridor Segment or Gold Line Segment for freight rail operations or to grant operating rights to any party other than UP. Transfer Agreement (NOE Exhibit 2), at Sec. 11.2.3. 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 East Corridor Segment and Gold Line Segment, its acquisition of the lines 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).

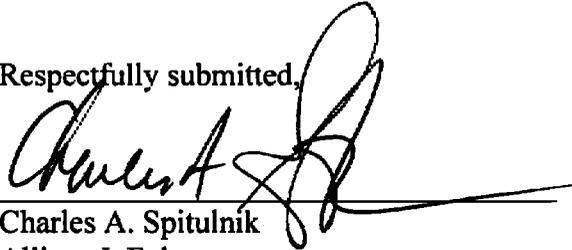
UP and RTD will each maintain its own corridor (NOE Exhibits 7 and 8, Sec. 2.2) and will perform its own dispatching (NOE Exhibits 7 and 8, Sec. 2.3).

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. Furthermore, UP will continue its existing operations on its own property. 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 describes a transaction that is excepted from the exercise of the Board's regulatory authority.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Charles A. Spitulnik", with a long horizontal flourish extending to the right.

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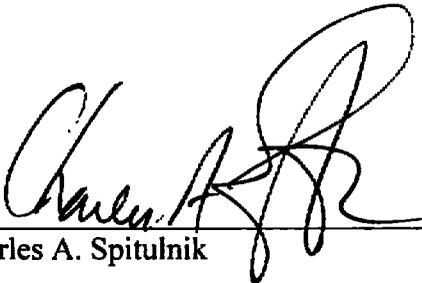
Dated: August 4, 2010

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:

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Dated: August 4, 2010