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SERVICE DATE – AUGUST 16, 2024

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36785

CITY OF CHARLOTTE, N.C.—ACQUISITION EXEMPTION—  
NORFOLK SOUTHERN RAILWAY COMPANY

Digest:<sup>1</sup> The Board finds that the City of Charlotte, N.C. (the City), does not need Board authority to acquire certain rail assets owned by Norfolk Southern Railway Company. The Board therefore grants the City’s motion to dismiss its notice seeking such authority.

Decided: August 16, 2024

In this decision, the Board grants the motion of the City of Charlotte, N.C. (the City), a noncarrier, to dismiss its verified notice of exemption to acquire from Norfolk Southern Railway Company (NSR) an approximately 29.04-mile segment of rail line. Pursuant to the line of precedent beginning with Maine, Department of Transportation—Acquisition & Operation Exemption—Maine Central Railroad (State of Maine), 8 I.C.C.2d 835 (1991), the Board finds that the proposed transaction would not constitute the acquisition of a rail line under 49 U.S.C. § 10901 because NSR would be selling only the physical assets of the rail line while retaining a permanent and exclusive freight rail operating easement to fulfill the freight rail common carrier obligation, and the City would not be able to unduly interfere with NSR’s ability to provide freight rail service pursuant to the agreements between the City and NSR. The proposed transaction therefore does not require authority from the Board.

BACKGROUND

On June 10, 2024, the City filed a verified notice of exemption under 49 C.F.R. § 1150.41 to acquire NSR’s right, title, and interests in the right-of-way, track, and related physical assets (the Assets) of an approximately 29.04-mile segment of NSR’s O Line extending from milepost O-0.04 in Charlotte, Mecklenburg County, N.C., to milepost O-29.08 in Mooresville, Iredell County, N.C. (the O Line Segment).<sup>2</sup> Concurrently, the City filed an

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<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol’y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

<sup>2</sup> Notice of the exemption was served and published in the Federal Register on June 26, 2024 (89 Fed. Reg. 53,474).

unopposed motion to dismiss the notice, asserting that the proposed transaction does not require Board authority under the Board’s State of Maine precedent.<sup>3</sup>

According to the City, NSR has conducted freight operations over the O Line Segment “for decades.” (Mot. to Dismiss 2.) On March 24, 2024, NSR and the City entered into an agreement under which the City will acquire the Assets from NSR, and NSR will retain an exclusive, permanent easement to provide freight rail service over the O Line Segment. (Id. at 1-2.)

The City states that the purchase and sale agreement will ensure the City’s access to the O Line Segment for a planned expansion of its commuter rail operations—known as the Charlotte Area Transit System (CATS)—to communities north of the City. (Id. at 4.) “The acquisition of the Assets is part of Charlotte’s larger goal to expand transit services, support regional growth, and to provide related environmental, quality-of-life, and safety benefits.” (Id.) The City states that it and NSR have negotiated a comprehensive rail agreement (CRA) in addition to the purchase and sale agreement, and that both documents protect NSR’s retained easement interests, which will be reflected in deeds “that will be duly recorded upon effectuation of the proposed transfer of the Assets.” (Id. at 2; see also id., Ex. B (draft non-warranty deeds), Ex. C (purchase and sale agreement), Ex. D (draft CRA).) The City explains that NSR will continue providing common carrier freight service over the Assets and will coordinate its future freight operations with CATS pursuant to the CRA. (Mot. to Dismiss 2.)

The City maintains that its acquisition does not involve a transfer of any common carrier obligation and is not subject to the Board’s jurisdiction. (Id. at 10-11.) It asserts that NSR’s retained freight rail easement will terminate only if NSR obtains authorization to discontinue service or abandon the easement from the Board. (Id. at 11.) The City further states that it is not acquiring the Assets for freight rail operations and that it cannot hold itself out as a common carrier of freight. (Id. at 9-10.) The City explains that after a transition period, which ends upon the commencement of commuter rail service, it will assume maintenance responsibilities over the Assets and that it will either assume dispatching obligations or pay NSR to take over dispatching, as provided in the agreement. (Id. at 10-11.) According to the City, its obligations will not unreasonably interfere with NSR’s freight rail operations because the purchase and sale agreement and CRA “have specific terms expressly protecting NSR’s freight service in nearly every facet of the proposed transaction, including maintenance and infrastructure, train dispatching, operations, and capital expansion.” (Id. at 13.)

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<sup>3</sup> Redacted versions of the draft non-warranty deeds, purchase and sale agreement, and comprehensive rail agreement (CRA) are attached to the motion to dismiss as Exhibits B, C, and D, respectively. Unredacted versions of the documents have been filed under seal. Material changes to the terms of these documents could result in the Board’s finding that the alterations constitute a new transaction independently subject to Board review under the agency’s State of Maine line of precedent. See Mass. Dep’t of Transp.—Acquis. Exemption—Certain Assets of CSX Transp., Inc. (Mass. Dep’t of Transp. 2010), FD 35312, slip op. at 15 (STB served May 3, 2010), aff’d sub nom. Bhd. of R.R. Signalmen v. STB, 638 F.3d 807 (D.C. Cir. 2011). The City will be directed to submit final versions of these documents no later than seven days after they are executed. See id.

The City seeks expedited consideration and requests that the Board act on the motion to dismiss in a decision effective on or before August 16, 2024, to allow the parties to close on the proposed transaction no later than September 9, 2024.

### DISCUSSION AND CONCLUSIONS

The question here is whether the Board’s authority is required for the City to acquire the Assets under the proposed transaction. The acquisition of an active rail line by a noncarrier and the common carrier obligation that goes with it ordinarily requires Board approval. For acquisitions by a noncarrier, the standard for approval is set forth at 49 U.S.C. § 10901, even if the acquiring entity is a state. See Mass. Dep’t of Transp.—Acquis. Exemption—Certain Assets of CSX Transp., Inc., FD 35892, slip op. at 3 (STB served Mar. 19, 2015); see also Common Carrier Status of States, State Agencies & Instrumentalities, & Pol. Subdivisions, 363 I.C.C. 132, 133 (1980), aff’d sub nom. Simmons v. ICC, 697 F.2d 326 (D.C. Cir. 1982). However, under the Board’s State of Maine line of precedent, a noncarrier’s acquisition of an ownership interest in the physical assets of a rail line (such as track or right-of-way) does not constitute the sale of a rail line within the meaning of 49 U.S.C. § 10901, provided that the arrangement establishes that: (1) the selling freight rail carrier retains a permanent freight rail operating easement that is exclusive with respect to the noncarrier, together with the common carrier obligation on the line; and (2) the terms of the sale would protect the carrier from undue interference with the provision of common carrier freight rail service. See State of Maine, 8 I.C.C.2d at 836-37; see also Santa Cruz Cnty. Reg’l Transp. Comm’n—Pet. for Declaratory Ord., FD 36213, slip op. at 2-3 (STB served Oct. 24, 2018); Mass. Dep’t of Transp. 2010, FD 35312, slip op. at 4-5; Cent. Puget Sound Reg’l Transit Auth.—Acquis. Exemption—Certain Assets of City of Tacoma in Pierce Cnty., Wash., FD 35812 (STB served Feb. 5, 2015) (holding that ownership of “the line” can refer to a permanent, exclusive freight rail easement plus sufficient control over its operation to carry out the common carrier obligation without undue interference, rather than ownership of the physical railroad property itself).

The Board concludes that it is appropriate to grant the City’s State of Maine motion to dismiss. Under the quitclaim deed and the purchase and sale agreement, NSR will convey its interest in the Assets to the City but retain a permanent and exclusive freight railroad operating easement over the O Line Segment. (Mot. to Dismiss, Ex. B at 2, 7, Ex. C art. 5.) The City will not obtain any right to operate freight service on the O Line Segment, and the quitclaim deed and purchase and sale agreement include language specifically stating that the City has no right to serve present or future shippers. (Id., Ex. B at 2, 7, Ex. C art. 5 (requiring the deed to state that “[the City] acknowledges [NSR’s] retained rights, and [the City] neither has nor will have any right to serve present and future shippers . . .”).) The first element of the State of Maine inquiry—that the selling carrier retains an exclusive, permanent easement to provide common carrier freight service—is therefore satisfied.

Under State of Maine, the Board must also determine if the City’s ownership of the Assets would allow it to unduly interfere with common carrier freight service. The Board has considered the relevant agreements governing the transaction and concludes that they do not allow the City to unduly interfere with common carrier freight rail service over the O Line Segment. The CRA states that “NSR shall have the sole and absolute discretion, in keeping with applicable federal law and regulation,” to seek abandonment or discontinuance of its freight rail

service operations over some or all of the easement. (Id., Ex. D art. 19.1.) It also says that NSR will have the right to perform freight rail service at levels it deems appropriate and that “NSR’s rights shall include the right to expand, modify, discontinue or abandon freight service as is reasonable or necessary to respond to market demands and conditions.” (Id., Ex. D art. 4.2(c)-(d).)<sup>4</sup>

In addition, the City states that it will inspect and maintain the O Line Segment following the transition period in which NSR will retain those responsibilities. (Id. at 14; id., Ex. D arts. 7.1-7.2.) The City has committed to doing so without interfering with NSR’s freight operations. (Mot. to Dismiss 14.) The Board has previously found that a city assuming responsibility for track maintenance, by itself, does not constitute an acquisition of a rail line requiring Board authorization. See Va. Port Auth.—Acquis. Exemption—Norfolk & Portsmouth Belt Line R.R., FD 35532, slip op. at 4 (STB served Aug. 1, 2011). Following the transition period, NSR will reserve the right to inspect the track, request maintenance or repairs, and even make repairs itself in the event the City does not. (Mot. to Dismiss, Ex. D art. 7.2.)

As for dispatching, the CRA states that NSR will retain that responsibility until the transition period ends. The City will then either assume control of dispatching or elect to have NSR continue to do it as a paid service. (Mot. to Dismiss, Ex. D art. 6.1.) The Board has observed in other State of Maine cases that dispatching control has less importance in its own right than as a means of enforcing the parties’ agreed-upon service priorities. See L.A. Cnty. Transp. Comm’n—Pet. for Exemption—Acquis. from Union Pac. R.R., FD 32374 et al., slip op. at 4 (STB served July 23, 1996) (explaining that if the operating agreement considered as a whole and the surrounding circumstances “are not likely to impair freight service, the passenger operator’s control over dispatching will not by itself create an obstacle,” as the control would merely implement the parties’ service arrangements); see also Va. Passenger Rail Auth.—Acquis. & Operation of Certain Assets of Norfolk S. Ry. in Montgomery & Roanoke Cntys., & the Cities of Salem & Roanoke, Va., FD 36588, slip op. at 5 (STB served May 31, 2022). Here, the CRA states that if the City elects to take control of dispatching, its procedures must not interfere with freight rail service or NSR’s common carrier obligation. (Mot. to Dismiss, Ex. D art. 6.1.) Accordingly, under the terms of the CRA, which includes a dispatching preference for commuter rail service, (see id.), the City would not be able to unduly interfere with common carrier freight service on the Line.

Based on this record and the documents submitted, the Board finds that the proposed transaction is consistent with State of Maine and that the City’s acquisition of the Assets is not an acquisition of a rail line under 49 U.S.C. § 10901(a)(4). NSR will retain an exclusive, permanent freight rail easement over the O Line Segment, and its ability to provide service over the O Line Segment will not be unreasonably impaired by the City’s purchase and ownership. Additionally, the terms of the relevant agreements will protect NSR against undue interference with its common carrier freight rail obligations. Acquisition of the Assets by the City will not cause it to become a rail carrier on the O Line Segment, and the proposed transaction does not

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<sup>4</sup> The CRA also contemplates potential excursion services by the City and includes language stating that the City that may not unreasonably interfere with NSR’s freight service. (Mot. to Dismiss, Ex. D, art. 4.1(a)(iii).)

require Board authorization under 49 U.S.C. § 10901.<sup>5</sup> Accordingly, the Board will grant the City's motion to dismiss the notice of exemption and dismiss this proceeding.

It is ordered:

1. The City's motion to dismiss the notice of exemption is granted, and the proceeding is dismissed.
2. The City is directed to file final versions of the non-warranty deeds and the CRA within seven days of execution.
3. This decision is effective on its service date.

By the Board, Board Members Fuchs, Hedlund, Primus, and Schultz.

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<sup>5</sup> As noted above, the CRA provides for the possibility of excursion services by the City. The Board notes that although it finds that the transaction does not require Board authority, the Board continues to have jurisdiction over rail property even where it concludes, as here, that it does not have regulatory authority over a proposed transaction involving that property. See Reg'l Transp. Dist.—Acquis. Exemption—Union Pac. R.R. in Adams, Denver, & Jefferson Cntys., Colo., FD 35394, slip op. at 2 n.5 (STB served Dec. 21, 2010); see also Mass. Dep't of Transp. 2010, FD 35312, slip op. at 3 n.4 (explaining that although a State of Maine transaction may not require Board approval, the agency continues to have jurisdiction over the rail property); Fla. Dep't of Transp.—Acquis. Exemption—Certain Assets of CSX Transp., Inc., FD 35110, slip op. at 2 n.3 (STB served Dec. 15, 2010) (same). Accordingly, if any party desires to operate rail service that is subject to the Board's jurisdiction, that party would need to obtain the relevant authority from the Board. See, e.g., Am. Orient Express Ry. v. STB, 484 F.3d 554, 557 (D.C. Cir. 2007) (affirming the Board's finding that it has jurisdiction over the operations of a passenger rail carrier). But see 49 U.S.C. §§ 5302(15) (defining "public transportation"), 10501(c)(2) (providing that, absent certain exceptions, the Board lacks jurisdiction over public transportation provided by a local government authority), 24301(c) (providing that most of subtitle IV does not apply to Amtrak). Notably, the Board often grants exemptions from subtitle IV of title 49 of the U.S. Code for passenger services. See Am. Rocky Mountaineer, LLC—Pet. for Exemption from 49 U.S.C. Subtitle IV, FD 36468 (STB served May 28, 2021); Great Canadian Railtour Co.—Pet. for Exemption from 49 U.S.C. Subtitle IV, FD 35851 (STB served June 3, 2015); Pullman Sleeping Car Co.—Pet. for Exemption from 49 U.S.C. Subtitle IV, FD 35738 (STB served Feb. 5, 2015); Metro N. Commuter R.R.—Acquis. Exemption—the Maybrook Line, FD 32639 et al. (ICC served Jan. 13, 1995). Here, it is not clear whether any passenger service to be operated by the City over the O Line Segment would be subject to the Board's jurisdiction and it would be premature to require that the City seek Board approval of any such service now.