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SERVICE DATE – AUGUST 16, 2024

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36784

VIRGINIA PASSENGER RAIL AUTHORITY—
ACQUISITION AND OPERATION OF CERTAIN ASSETS OF NORFOLK SOUTHERN
RAILWAY COMPANY IN FAIRFAX AND PRINCE WILLIAM COUNTIES,
AND THE CITIES OF MANASSAS PARK, MANASSAS, AND ALEXANDRIA, VA.

Digest:¹ The Board finds that the Virginia Passenger Rail Authority (VPRA), a political subdivision of the Commonwealth of Virginia, does not need Board authority to acquire certain real property, track, and other improvements on a rail line owned by Norfolk Southern Railway Company (NSR) or to obtain an easement for passenger rail purposes on a connecting NSR rail line. The Board therefore dismisses VPRA's petition seeking such authority.

Decided: August 16, 2024

In this decision, the Board dismisses a petition for exemption filed by the Virginia Passenger Rail Authority (VPRA), a political subdivision of the Commonwealth of Virginia, to acquire certain real property, track, and other improvements owned by Norfolk Southern Railway Company (NSR) and to obtain a passenger rail easement on a connecting NSR rail line, all in the Commonwealth of Virginia. 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 VPRA's acquisition of the physical assets of NSR's line would not constitute the acquisition of a rail line under 49 U.S.C. § 10901 because NSR would retain a permanent and exclusive freight rail operating easement to fulfill the freight rail common carrier obligation on the line, and VPRA would not be able to unduly interfere with freight rail service. The Board also finds that VPRA's acquisition of a passenger rail easement over a connecting segment of NSR line does not require Board approval under § 10901. Therefore, the overall transaction does not require Board authority.

BACKGROUND

On June 6, 2024, VPRA filed a petition under 49 U.S.C. § 10502 for exemption from the prior approval requirements of 49 U.S.C. § 10901 to acquire from NSR (1) the land, tracks, and other improvements between approximately MP 10.76, in Alexandria, Va., and MP 32.75, in

¹ 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).

Manassas, Va. (the Manassas Line); (2) the land, tracks, and other improvements between approximately MP 9.25 and MP 10.76, all in Alexandria (the Seminary Passage)²; and (3) a passenger rail operating easement on the lines between approximately MP 32.75 and MP 33.6, all in Manassas (the Manassas Segment). The Manassas Line and the Seminary Passage are collectively referred to in this decision as the Line. Concurrently with the petition, VPRA filed a motion to dismiss the petition, arguing that the proposed transaction does not require Board authorization under State of Maine. The motion is unopposed.

According to the draft Comprehensive Rail Agreement (CRA) attached as Exhibit A³ to the petition for exemption,⁴ VPRA's acquisition of real property, track, and other improvements on the Line would occur by quitclaim deed. (Pet., Ex. A §§ 5.3, 5.4.) The terms of the acquisition would reserve for NSR an "exclusive, perpetual, irrevocable, assignable, divisible, licensable and transferable" easement to provide freight railroad service on the Line. (Id., Ex. A §§ 5.3(e), 5.4(e).) NSR would have the right to provide freight service on the Line at levels it deems to be appropriate, (id., Ex. A § 8.3(c)), and the agreement provides that passenger service on the Line shall not unreasonably interfere with freight rail operations, (id., Ex. A §§ 8.1(a), 8.3(b)). The CRA would also give NSR the right to "expand, modify, discontinue or abandon freight service as is reasonable or necessary to respond to market demands and conditions." (Id., Ex. A § 8.3(d).) VPRA states that it would have the right to take over dispatching on the Line.

² VPRA states that the Manassas Line and the Seminary Passage are contiguous corridors and could be combined as a single conveyed territory, but they are treated separately because the Seminary Passage acquisition is contingent on availability of funding and might be preceded by a passenger rail operations easement on the same property. (Mot. to Dismiss 2 n.2; Pet., Ex. A §§ 2.1(b), 9.1.) According to VPRA, this easement would be for passenger rail purposes only, and VPRA's use of the easement would not unreasonably interfere with NSR operations, including operations under the freight easement addressed above. (Mot. to Dismiss 2 n.2; Pet., Ex. A §§ 9.1, 9.2.) VPRA adds that Section 9.1 of the Comprehensive Rail Agreement also includes the possibility that VPRA would assign its right to acquire the Seminary Passage to Virginia Railway Express (VRE), but VPRA's motion to dismiss does not seek a jurisdictional determination with respect to VRE's potential acquisition of the Seminary Passage. (See Mot. to Dismiss 2 n.2.)

³ While VPRA refers to the CRA attachment as Exhibit A, (see, e.g., Pet. 2 n.2), it does not seem to be labeled as Exhibit A. Regardless, this decision refers to the CRA as Exhibit A.

⁴ VPRA filed an unredacted version of the draft CRA under seal. According to VPRA, "[p]ublic and confidential versions of the final CRA and other governing agreements and conveyance documents, all of which will be in accord with the draft CRA in all respects pertaining to STB jurisdiction, will be filed with the Board promptly after they are finalized and executed." (Mot. to Dismiss 2 n.1.) 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). VPRA will be directed to submit final versions of these documents no later than seven days after they are executed. See id.

(Mot. to Dismiss 5; Pet., Ex. A § 14.1.) According to VPRA, its dispatching would be subject to criteria established in the CRA, which include sound dispatching principles, with the dispatcher giving due regard to the needs of freight and passenger carriers and their respective customers and a dispatching preference for intercity passenger trains. (Mot. to Dismiss 5-6.)

Pursuant to the CRA, VPRA may install new tracks or other railroad infrastructure on the Line, provided that any such infrastructure (and its construction and use) does not unreasonably interfere with operation under the freight easement. (*Id.* at 3; Pet., Ex. A §§ 5.3(e), 5.4(e).) The CRA also permits VPRA to relocate the freight easement provided that any such relocation does not unreasonably interfere with freight operations. (Mot. to Dismiss 3; Pet., Ex. A §§ 5.3(e), 5.4(e).)

VPRA states that, for at least a two-year period after closing, NSR would perform maintenance on the Line. (Mot. to Dismiss 6.) VPRA further states that it would review and approve maintenance budgets and pay for maintenance costs, but NSR could perform maintenance without VPRA approval or above the approved budget amounts (at VPRA's expense) if necessary to fulfill its common carrier obligation or to meet Federal Railroad Administration track standards. (Mot. to Dismiss 6; Pet., Ex. A § 15.1(b)(ii).) After that period, VPRA would be responsible for maintenance of the Line, but NSR would have the right to provide maintenance as "reasonable and necessary" for its freight rail service. (Pet., Ex. A § 15.2(b)-(c).) If at any time NSR "requires rerailling, wrecking service or wrecking train service," NSR would be responsible for providing it. (*Id.*, Ex. A § 17.1.) Additionally, VPRA and NSR would form a performance managers committee, comprising at least two representatives from each party, which would meet quarterly to discuss and resolve issues. (Mot. to Dismiss 6-7; Pet., Ex. A § 22.1.)

Additionally, VPRA would purchase from NSR a passenger rail easement over the Manassas Segment. (Mot. to Dismiss 2-4; Pet., Ex. A § 2.1(a).) The easement would connect with the Manassas Line and permit passenger trains to traverse NSR's Manassas Yard. (Mot. to Dismiss 3.) According to VPRA, the easement would be for passenger rail purposes only, and VPRA's use of the easement may not unreasonably interfere with NSR operations, including operations under the freight easement referenced above. (*Id.* at 3-4.)

VPRA seeks expedited consideration and requests that the Board grant the motion to dismiss in a decision effective on or before August 16, 2024, to allow the parties to close on the proposed transaction on September 5, 2024. (*Id.* at 10.)

DISCUSSION AND CONCLUSIONS

The question at issue here is whether the Board's authority is required for VPRA to acquire the real estate and physical assets of the Line and a passenger rail easement over the Manassas Segment. The Board finds that neither aspect of the transaction as proposed requires Board approval.

Sale of the Line. The acquisition of an active rail line and the corresponding common carrier obligation 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 (or transfers to another carrier) 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.

Here, the Board finds that, under State of Maine, the proposed sale of the Line does not require Board approval. Under the CRA, NSR would convey its interest in the Line by quitclaim deed but would reserve an “exclusive, perpetual, irrevocable, assignable, divisible, licensable and transferable” freight railroad easement on the Line. (Pet., Ex. A §§ 5.3(e), 5.4(e).) The CRA also provides that NSR would have “in its sole and absolute discretion but, subject to securing any necessary regulatory approval, the right to formally discontinue, pursuant to federal law,” its use of the Line. (Id., Ex. A § 30.1 (stating that, should NSR obtain approval for abandonment or exemption from such approval, NSR “shall have the sole and absolute discretion to exercise any approval” received).) In addition, the CRA states that VPRA shall use the Line only for passenger rail purposes and shall not use the Line for freight rail purposes. (Id., Ex. A § 5.5; see also id., Ex. A §§ 8.1(a), 8.3(a).) Therefore, the Board is satisfied that NSR would retain an exclusive and permanent freight rail easement and the common carrier obligation on the Line, as required under State of Maine. See Va. Passenger Rail Auth.—Acquis. & Operation of Certain Assets of Norfolk S. Ry. in Montgomery & Roanoke Cntys., & the Cities of Salem & Roanoke, Va. (VPRA 2022), FD 36588, slip op. at 4 (STB served May 31, 2022); Mass. Dep't of Transp. 2010, FD 35312, slip op. at 12.

Furthermore, the record before us demonstrates that VPRA would not be able to unduly interfere with common carrier freight rail service on the Line. Under the CRA, passenger rail service on the Line may not unreasonably interfere with NSR's freight rail service, (Pet., Ex. A §§ 8.1(a), 8.3(b)), subject to a contractual dispatching preference for intercity passenger trains, (Mot. to Dismiss 5-6). The CRA also states that NSR shall have the right to perform freight rail service at a level that NSR deems to be appropriate, (Pet., Ex. A § 8.3(c)), and that NSR shall have “the right to expand, modify, discontinue or abandon freight service as is reasonable or necessary to respond to market demands and conditions,” (id., Ex. A § 8.3(d)).

In addition, NSR would continue to perform maintenance for at least a two-year period after closing. (Id., Ex. A § 15.1(b).) Although maintenance plans would be subject to VPRA's approval and paid for by VPRA, VPRA could not withhold approval where NSR determines that maintenance is necessary to fulfill its common carrier obligations or to ensure that the Line meets the FRA track classification approved by VPRA. (Id., Ex. A § 15.1(b)(ii), (iv).) After the initial two-year period, VPRA would be responsible for maintenance of the Line. (Id., Ex. A

§ 15.2(b).) However, this responsibility, by itself, does not result in a transfer of common carrier rights or obligations to VPRA. See VPRA 2022, FD 36588, slip op. at 5; Va. Port Auth.—Acquis. Exemption—Norfolk & Portsmouth Belt Line R.R., FD 35532, slip op. at 4 (STB served Aug. 1, 2011) (noting that the responsibility for track maintenance alone does not constitute an acquisition of a rail line requiring Board authorization). NSR would have the right to provide “reasonable and necessary” maintenance for its freight rail service, and it would continue to be responsible for any rerauling or wrecking service. (Pet., Ex. A §§ 15.2(c), 17.1.) Through the performance managers committee, NSR would also be able to discuss with VPRA any issues relating to operations on the Line. (Id., Ex. A § 22.1.) These CRA provisions will ensure that the Line is maintained to standards required for NSR to fulfill its common carrier freight obligation. See VPRA 2022, FD 36588, slip op. at 5; L.A. Cnty. Transp. Comm’n—Pet. for Exemption—Acquis. from Union Pac. R.R., FD 32374 et al., slip op. at 4-5 (July 23, 1996) (finding that track maintenance performed by a local transit authority, which was acquiring certain property interests from a rail carrier under State of Maine, was “not likely to cause problems for freight shippers”).

Under the CRA, VPRA would have the right to take over dispatching on the Line. (Pet., Ex. A § 14.1.) 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, FD 32374 et al., slip op. at 4 (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 VPRA 2022, FD 36588, slip op. at 5. Here, the CRA provides that passenger rail service shall not unreasonably interfere with freight rail operations. (See Pet., Ex. A § 8.3(b).) Furthermore, VPRA’s dispatching would be subject to criteria established in the CRA, which include sound dispatching principles, with the dispatcher giving due regard to the needs of freight and passenger carriers and their respective customers. (Id., Ex. A § 14.1). Accordingly, under the terms of the CRA, which includes a dispatching preference for intercity passenger rail, (see Mot. to Dismiss 5-6), VPRA would not be able to unduly interfere with common carrier freight service on the Line.

Based on the record, the Board finds that the proposed sale of the Line is consistent with State of Maine and that the transaction does not constitute the acquisition of a rail line under 49 U.S.C. § 10901(a)(4). Because NSR would retain an exclusive and permanent freight rail easement over the Line, and the terms of the CRA will protect NSR against undue interference with its common carrier freight rail obligation, the acquisition would not cause VPRA to become a rail carrier. Under these circumstances, the proposed transaction does not require Board authorization under 49 U.S.C. § 10901.⁵ Therefore, as to the sale of the Line, the Board will grant VPRA’s motion to dismiss the petition for exemption.

⁵ 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, &

Passenger Rail Easement. The passenger rail easement over the Manassas Segment, as noted above, would connect with the Manassas Line and permit passenger trains to traverse NSR's Manassas Yard. (Mot. to Dismiss 3; Pet., Ex. A § 2.1(a).) VPRA states that the easement would be for passenger rail purposes only, and VPRA's use of the easement may not unreasonably interfere with NSR operations, including operations under the freight easement referenced above. (Mot. to Dismiss 3-4.)

As the Board held in VPRA 2022, although State of Maine itself applies where a state or other public entity seeks to acquire "the physical assets of a rail line," the principles underlying State of Maine support the Board's finding here that VPRA's acquisition of the passenger rail easement does not require Board approval. VPRA 2022, FD 36588, slip op. at 6. Here, as in VPRA 2022, no common carrier rights or obligations are being transferred. See id.; State of Maine, 8 I.C.C.2d at 837. Rather, under the proposed transaction, NSR would retain its rights and obligations as to freight rail transportation, and the CRA shows that VPRA would not conduct freight operations. (Pet., Ex. A §§ 5.3(e), 5.4(e), 5.5); see Mass. Dep't of Transp. 2010, FD 35312, slip op. at 7. The CRA also protects NSR against unreasonable interference with its common carrier freight service. (See Pet., Ex. A §§ 2.1(a), 8.1(a), 8.3(b).) Consequently, the proposed acquisition does not require Board authorization under 49 U.S.C. § 10901, and the Board will dismiss the petition for exemption as to the passenger rail easement. See VPRA 2022, FD 36588, slip op. at 7.⁶

Jefferson Cntys., Colo., FD 35394, slip op. at 2 n.5 (STB served Dec. 21, 2010); see also Mass. Dep't of Transp.—Acquis. Exemption—Certain Assets of CSX Transp., Inc., FD 35312, slip op. at 3 n.4 (STB served May 3, 2010), aff'd sub nom. Bhd. of R.R. Signalmen v. STB, 638 F.3d 807 (D.C. Cir. 2011) (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 VPRA or another 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).

⁶ As also noted above, VPRA states that the Seminary Passage acquisition is contingent on availability of funding and might be preceded by a passenger rail easement on the same property. (Mot. to Dismiss 2 n.2; Pet., Ex. A §§ 2.1(b), 9.1.) The CRA provides the same

Acquisitions Not Included in VPRA's Request for a State of Maine Determination.

VPRA states that its acquisition of certain contractual passenger rail operating rights under the CRA does not require Board exemption or approval under 49 U.S.C. § 10901. (Mot. to Dismiss 4-5; Pet., Ex. A § 8.1(a)(i)-(ii), (v).) VPRA notes that the new contractual passenger rail operating rights would be subject to NSR operating rules and the terms of the CRA, including that NSR's use of the lines covered by the contractual passenger rail operating rights shall not be diminished by the CRA and may not unreasonably interfere with freight rail operations, and a dispatching preference for intercity passenger trains. (Mot. to Dismiss 5-6; Pet., Ex. A § 8.1(a), (d).)

Similarly, VPRA would acquire other land, tracks, and other improvements under the CRA; VPRA states that this land either does not include track and improvements, or the included track and improvements constitute spur or side tracks within the meaning of 49 U.S.C. § 10906. (See Mot. to Dismiss 4; Pet., Ex. A § 2.1(b)(vii)-(xv).) The CRA provides that any construction activities and use of this other acquired land, track, and improvements will not unreasonably interfere with NSR operations, including operations under the freight easement. (Pet., Ex. A § 2.1(b)(vii), (x), (xiii).)

Finally, under the CRA, NSR would reacquire from VPRA the right, title, and interest in real property, equipment, fixtures, and improvements between a point just east of the connection of the Salem Crossovers (at or about MP V-250.9304) and Christiansburg at MP V-279.0, all in the Commonwealth of Virginia (the V-Line). (Pet. 4; id., Ex. A §§ 2.2, 4.7, 5.7.) When VPRA acquired the physical assets of the V-Line from NSR in 2022, the Board held that that transaction did not require Board authorization under § 10901, on State of Maine grounds. VPRA 2022, FD 36588, slip op. at 4. VPRA states that NSR's reacquisition of the V-Line's physical assets also does not require Board approval. (Pet. 4.)

The CRA provisions cited above adequately guard against unreasonable interference with freight rail operations with respect to the acquisition of passenger operating rights and other property. As VPRA notes, these acquisitions are not part of VPRA's request for a State of Maine determination, and the Board does not otherwise rule on them here.

For the reasons addressed above, the Board will dismiss this proceeding.

It is ordered:

1. VPRA's motion to dismiss is granted, and the petition for exemption is dismissed as addressed above.

protections against unreasonable interference with freight rail service regarding the Seminary Passage passenger rail easement as it does in reference to the Manassas Segment passenger rail easement. (See Pet., Ex. A §§ 2.1(a), 9.2.) Based on the provisions cited above, NSR would retain its rights and obligations as to freight rail transportation, and VPRA would not be permitted to conduct freight operations. VPRA's possible acquisition of the Seminary Passage passenger rail easement would therefore also not require Board authorization, and the petition for exemption will be dismissed to the extent it relates to this potential easement.

2. VPRA is directed to file final versions of the CRA and other governing agreements and conveyance documents no later than seven days after they are executed.

3. This decision is effective on its service date.

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