

SERVICE DATE – SEPTEMBER 11, 2020

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36351

CALIFORNIA HIGH-SPEED RAIL AUTHORITY
—ACQUISITION EXEMPTION—
PENINSULA CORRIDOR JOINT POWERS BOARD

Decided: September 11, 2020

California High-Speed Rail Authority (CHSRA), a Class III railroad, filed a verified notice of exemption pursuant to 49 C.F.R. § 1150.41 to acquire “a permanent non-exclusive easement for the purpose of conducting future rail operations” over approximately 50.94 miles of rail line owned by the Peninsula Corridor Joint Powers Board (PCJPB), located between San Francisco, Cal., at milepost 0.00, and Lick, Cal., at milepost 50.94 (the Corridor). (Verified Notice 2.) CHSRA states that “the easement only grants CHSRA with a property right in the Corridor” and that such “property right does not include the right to operate intercity passenger trains” in the Corridor. CHSRA states that Union Pacific Railroad Company (UP) currently holds the “exclusive right to operate intercity passenger trains in the Corridor” and that CHSRA is presently in discussions with UP to transfer those rights to CHSRA. (*Id.* at 3.)

The notice of exemption process is an expedited means of obtaining Board authorization in certain classes of transactions, defined in the Board’s regulations, which ordinarily do not require extensive regulatory scrutiny. Thus, notices of exemption are intended to be used for routine and non-controversial cases. *See, e.g., N.E. Interchange Ry.—Lease & Operation Exemption—Line in Croton-on-Hudson, N.Y.*, FD 34734 (STB served Nov. 18, 2005). Where a verified notice raises too many unanswered questions, the Board will reject it. *See Perry Cnty. R.R.—Operation Exemption—Uniontown, Ala.*, FD 36296 (STB served June 7, 2019); *FPN-USA, Inc.—Operation Exemption—Tijuana-Tecate Shortline*, FD 35155, slip op. at 3 (STB served Aug. 8, 2008).

CHSRA states that, through this notice, it would acquire only “ownership of a recognized property right” with no rights to operate in the Corridor. (Verified Notice 4.) CHSRA cites Board precedent to support its claim that this acquisition of a property easement is subject to 49 U.S.C. § 10902 and 49 C.F.R. § 1150.41.¹ (Verified Notice 3 n.5.) It is true that, as the cases

¹ *See Port of Pend Oreille—Acquis. & Operation Exemption—Burlington N. & Santa Fe Ry.*, FD 33561 (STB served Oct. 23, 1998); *Portland & W. R.R.—Acquis. & Operation Exemption—Union Pac. R.R.*, FD 34792 (STB served Nov. 24, 2006); *Portland & W. R.R.—Acquis. & Operation Exemption—Burlington N. & Santa Fe Ry.*, FD 33424 (STB served

cited by CHSRA indicate, the acquisition of a rail operating easement—that is, an easement granting the easement holder the right to conduct rail service over the property at issue—has been found to qualify as an acquisition of a rail line under § 10902, as there is a longstanding understanding that the Board’s acquisition authority can apply to interests in rail lines that are less than fee simple ownership.² Indeed, the cases cited by CHSRA authorized the acquisition of operating easements and operations pursuant to those easements.³ But whether the transaction qualifies as the acquisition of a rail line subject to the Board’s licensing authority depends on the nature of the interest acquired in that transaction. For example, it is hard to conceive of how the acquisition of an easement for subsurface utilities would amount to a rail line acquisition; on the other hand, under the Board’s “State of Maine” precedent, the acquisition of the physical assets of a rail line may or may not, depending on the circumstances, amount to a rail line acquisition subject to the Board’s licensing authority.⁴

Here, in contrast to the cases CHSRA cites, it does not appear that the easement in question would allow for the provision of rail operations such that it would constitute a rail line, the acquisition of which is subject to the Board’s licensing authority under § 10902. Although CHSRA refers to the easement as “a permanent non-exclusive easement for the purpose of conducting future rail operations,” (Verified Notice 2), CHSRA goes on to state that the easement it plans to acquire “only grants CHSRA with a property right in the Corridor” and “does not include the right to operate intercity passenger trains” (or, apparently, any other trains) in the Corridor. (*Id.* at 3). CHSRA does not fully explain the nature of the property right it seeks to acquire and whether that interest amounts to a rail line subject to the Board’s licensing authority. Nor does CHSRA fully explain how the transaction for which it seeks authority is consistent with the requirements of § 1150.43. For example, § 1150.43(d) requires a verified notice of exemption to identify the operator of the property. Here, the verified notice merely

July 6, 1998); Eastside Cmty. Rail, LLC—Acquis. & Operation Exemption—GNP RLY Inc., FD 35692 et al. (STB served Dec. 13, 2018).

² Cf. Md. Transit Admin.—Pet. for Declaratory Order, FD 34975, slip op. at 5 (STB served Oct. 9, 2007) (stating that while the acquisition of a rail line and the common carrier obligation that goes with it ordinarily requires Board approval, the Board’s authorization is not required when the physical assets of a rail line are transferred but the common carrier rights and obligations that attach to the line will not be transferred).

³ The fact that operating authority accompanied acquisition authority in all of those cases is consistent with the Board’s findings, in the freight context, that a grant of acquisition authority would impose an obligation to provide service upon reasonable request. See, e.g., Norfolk & W. Ry.—Acquis. Exemption—Consol. Rail Corp., FD 32957, slip op. at 1, n.2 (STB served Aug. 15, 1996); City of Austin—Acquis.—S. Pac. Transp. Co., FD 30861, slip op. at 1-2 (ICC served Nov. 4, 1986).

⁴ See, e.g., Mass. Dep’t of Transp.—Acquis. Exemption—Certain Assets of CSX Transp., Inc., FD 35312 (STB served May 3, 2010), aff’d sub nom. Brotherhood of R.R. Signalmen v. STB, 638 F.3d 807 (D.C. Cir. 2011).

states that PCJPB does not conduct freight operations over the Corridor—nothing regarding who will provide operations. (Verified Notice 5.)⁵

For these reasons, the verified notice will be rejected. This rejection is without prejudice to CHSRA filing for Board authority in the future, if necessary, as long as CHSRA addresses the issues described herein.⁶

It is ordered:

1. CHSRA's verified notice of exemption is rejected.
2. This decision is effective on the date of service.

By the Board, Allison C. Davis, Director, Office of Proceedings.

⁵ Additionally, § 1150.43(f) requires “[a] map that clearly indicates *the area to be served*,” (emphasis added), and § 1150.43(c) requires a statement that an agreement has been reached or details about when an agreement will be reached. Here, the verified notice states that the specific rights granted to CHSRA are governed by the easement and a Project Management and Funding Agreement, for which the parties have an agreement in principle, and a Shared Use Agreement that is to be negotiated that will govern the respective rights and obligations of the Parties with respect to future passenger operations. (Verified Notice 5.) But CHSRA also states that it is in discussions with UP regarding transferring the right to operate (*id.* at 3), and there are no details about when that will be completed and therefore when any Shared Use Agreement would be reached.

⁶ It appears that the Corridor here may ultimately be part of CHSRA's statewide California High-Speed Train System. See Cal. High-Speed Rail Auth.—Constr. Exemption—in Merced, Madera & Fresno Cntys., Cal., FD 35724, slip op. at 4 (STB served June 13, 2013). Given the issues that have arisen since the Board's 2013 decision, should CHSRA file for authority in the future, it should explain how this transaction currently relates to the larger project.