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SERVICE DATE – DECEMBER 14, 2020

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36441

COMMONWEALTH OF VIRGINIA—ACQUISITION EXEMPTION—CERTAIN ASSETS
OF CSX TRANSPORTATION, INC.

Digest:¹ The Board finds that the Commonwealth of Virginia, acting by and through its Department of Rail and Public Transportation (DRPT), does not need Board authority to acquire a portion of a rail right-of-way owned by CSX Transportation, Inc., in Washington, D.C., and Virginia. The Board therefore grants DRPT's motion to dismiss its petition seeking that authority.

Decided: December 14, 2020

In this decision, the Board grants the motion of the Commonwealth of Virginia, a noncarrier acting by and through its Department of Rail and Public Transportation (DRPT), to dismiss its petition for exemption to acquire certain real property rights and trackage owned by CSX Transportation, Inc. (CSXT), in Washington, D.C., and the Commonwealth of Virginia. The Board finds that 49 U.S.C. § 10901 does not apply to the proposed acquisition because CSXT is only selling a portion of the right-of-way along the rail line and will retain a permanent and exclusive freight rail operating easement on the portion being sold that will enable it to fulfill its freight rail common carrier obligation, and it will retain ownership of the remainder of the right-of-way. As a result, the purchaser, DRPT, will not be able to unduly interfere with CSXT's ability to provide freight rail service, and no authority for the acquisition is required from the Board.

BACKGROUND

On September 29, 2020, DRPT filed a petition under 49 U.S.C. § 10502 for exemption from the prior approval requirements of 49 U.S.C. § 10901 to acquire a lateral, approximately 50% portion of rail line right-of-way owned by CSXT between Washington, D.C., and Petersburg, Va. Concurrently, DRPT filed a motion to dismiss the petition, contending that the proposed transaction does not require Board authorization under Maine, Department of Transportation—Acquisition & Operation Exemption—Maine Central Railroad (State of Maine), 8 I.C.C.2d 835 (1991). The motion is unopposed.

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 Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

According to the draft Comprehensive Rail Agreement (CRA) and the draft Joint Operating and Maintenance Agreement (JOMA) filed as Exhibits A and B, respectively, to DRPT's motion,² the CSXT line at issue (the Line) is referred to as the "RF&P Corridor" and extends from CSXT milepost at CFP 112.2 at L'Enfant Plaza in Washington, D.C., to CSXT milepost A 29.04 in the City of Petersburg, Va. (Mot. to Dismiss, Ex. A, Ex. A at A-8 to A-9; *id.*, Ex. B art. 1.) DRPT states that the Line's right-of-way (ROW) is approximately 100 feet wide, with variances, and that, under the proposed transaction, DRPT would acquire a right-of-way approximately 50 feet wide, with variances at particular locations.³ (Mot. to Dismiss 4.) Under the CRA, CSXT ultimately will convey its interest in the DRPT ROW to DRPT by a quitclaim deed that will reserve to CSXT a permanent and exclusive freight railroad operating easement on the DRPT ROW to service existing and future freight shippers.⁴ (*Id.* at 2, 4.) DRPT states that it will also acquire from CSXT operating rights to permit National Railroad Passenger Corporation (Amtrak) intercity service and commuter rail service⁵ on the CSXT ROW. (*Id.* at 2.) DRPT further states that, because of CSXT's retained permanent and exclusive freight railroad operating easement and other limitations in the deed, DRPT will not obtain any rights to provide freight rail service or admit others to provide freight rail service on the DRPT ROW.⁶ (*Id.* at 5.) In addition, DRPT states that it anticipates that, in the future, the Virginia Rail Passenger Authority, which was created by legislation enacted by the Commonwealth of Virginia that became effective July 1, 2020, will succeed by assignment to all of the rights,

² DRPT states that once the CRA and JOMA are finalized, it will file the final versions under seal and redacted versions in the public docket. See *infra* note 14.

³ The lateral, 50% width of the Line to be acquired by DRPT will be referred to as the "DRPT ROW"; the portion of the Line to be retained by CSXT will be referred to as the "CSXT ROW." The draft CRA and the draft JOMA refer to the DRPT ROW as "Segment 1." (See Mot. to Dismiss, Ex. A art. 4.1(a); *id.*, Ex. B art. 1.) The CSXT ROW is referred to as the "Retained RF&P Corridor" in the draft CRA, (*id.*, Ex. A, Ex. A at A-8), and the "CSXT-Retained Portion of the RF&P Corridor" in the draft JOMA, (*id.*, Ex. B art. 1).

⁴ According to DRPT, at closing, CSXT will grant DRPT a permanent passenger railroad easement on the DRPT ROW and will convey ownership of certain stations, platforms, and passenger facilities. (*Id.* at 4 n.6.) Thereafter, the parties will complete survey work and prepare valuation maps depicting the property to be conveyed to DRPT, and the passenger easement will convert to a full conveyance of all of CSXT's right, title, and interest in the DRPT ROW, subject to CSXT's permanent and exclusive freight railroad operating easement. (*Id.*; see also *id.*, Ex. A art. 4.2.1.)

⁵ According to DRPT, commuter rail service is provided by Virginia Railway Express (VRE). (Mot. to Dismiss 3 & n.5.)

⁶ DRPT states that the CRA also includes DRPT's acquisition of CSXT's interest in an abandoned railroad right-of-way between Petersburg, Va. and Ridgeway, N.C., which DRPT argues is not subject to the Board's jurisdiction. (Mot. to Dismiss 5 n.9.) DRPT states that it plans to acquire noncarrier rights on the CSXT rail corridor between Doswell and Clifton Forge, Va., but that it has not yet reached an agreement with CSXT with respect to that rail corridor. (*Id.*)

responsibilities, and obligations of DRPT in relation to the transaction with CSXT. (Id. at 1 n.1; see also id., Ex. A art. 1.6.)

DRPT states that, after the transaction's expected closing date of December 15, 2020, CSXT will continue to provide common carrier freight rail service on the Line and will continue to dispatch and maintain the Line. (Mot. to Dismiss 3, 5.) In addition, DRPT states that CSXT, Amtrak, and VRE trains will be authorized to operate on all track on the Line, regardless of property or track ownership. (Id. at 5.)

According to DRPT, after closing, there will be a series of capital improvements to the Line in four phases over a period of more than 10 years, which will create additional freight and passenger rail network capacity.⁷ (Id. at 3, 5.) After the planned construction program is completed, to the extent feasible, CSXT and DRPT will dedicate the CSXT ROW to freight rail service and the DRPT ROW to passenger rail service, with the goal of establishing side-by-side freight and passenger operations on separate, dedicated trackage and related infrastructure and facilities at frequencies and schedules to be determined by the parties. (Id. at 3, 7.) DRPT explains that if complete separation of freight and passenger traffic is not feasible, some passenger service might remain on the CSXT ROW and/or some freight rail service might be conducted on the DRPT ROW. (Id. at 3-4.)

DRPT explains that, with limited exceptions,⁸ all of the new track and facilities will be available for both freight and passenger use regardless of ownership of the improvements or the underlying property, until either complete separation of freight trains and passenger trains (Complete Separation) or maximum feasible separation of freight trains and passenger trains (Maximum Feasible Separation) can be accomplished. (Id. at 6; see also id., Ex. B art. 3.6.1 (defining Complete Separation and Maximum Feasible Separation).) According to DRPT, once Complete Separation or Maximum Feasible Separation is established, DRPT and CSXT's use of each other's property will be limited by article 4 of the JOMA. (Mot. to Dismiss 6.)

Under article 3.6 of the JOMA, once the Phase 4 improvements are completed, either DRPT or CSXT may provide written notice as to when it believes the parties may commence either Complete Separation or Maximum Feasible Separation. (Mot. to Dismiss, Ex. B art. 3.6.) DRPT states that even if Complete Separation is feasible, the Phase 4 improvements will include crossovers and other infrastructure necessary to enable VRE and Amtrak trains and CSXT freight trains to operate over any part of the Line (regardless of ownership of property or track) during limited emergencies, construction, repairs, or maintenance; where necessary for CSXT to reach a shipper; or in limited instances for DRPT to reach passenger facilities. (Mot. to Dismiss 7; see also id., Ex. B art. 4.1.)

⁷ DRPT explains that, after each phase of work, DRPT will have the right to admit additional Amtrak and VRE trains. (Mot. to Dismiss 3, 6.)

⁸ Under the agreements, CSXT will only have the right to use a new two-track rail bridge span crossing the Potomac River between Washington, D.C., and Arlington, Va., and a flyover track to be constructed at Franconia, Va. (once they are ready for operations) during emergencies, during planned outages of the CSXT ROW, and when necessary to reach a shipper. (Mot. to Dismiss 6; see also id., Ex. B art. 3.3.)

As capital improvements are completed, DRPT will have the right to assume responsibility for dispatching and maintaining the DRPT ROW.⁹ (Mot. to Dismiss 3.) DRPT explains that its dispatching will be subject to dispatch protocols, which will be set forth in an exhibit to the JOMA and which are intended to permit freight and passenger trains to enter safely and efficiently onto the existing and future trackage and other infrastructure on the Line (without regard to ownership) and to allow for optimization of passenger service and freight service. (*Id.* at 6-7; *see also id.*, Ex. B art. 5.2.1.) In addition, once the improvements are completed, DRPT states that each party will be responsible for maintaining its respective portion of the Line pursuant to the defined maintenance standards. (Mot. to Dismiss 8; *see also id.*, Ex. B arts. 7.3 & 7.5.) DRPT states that CSXT will continue to operate, maintain, and dispatch the CSXT ROW.¹⁰ (Mot to Dismiss 7.)

DRPT seeks expedited consideration and requests that the Board issue a decision granting the motion to dismiss on or before December 15, 2020, to allow the consummation of the transaction and to allow the pre-construction planning and preliminary construction to proceed in the first quarter of 2021. (*Id.* at 12.)

DISCUSSION AND CONCLUSIONS

The question at issue here is whether the Board's authority is required for DRPT to acquire the DRPT ROW under the proposed transaction. The acquisition of an active rail line and the common carrier obligation that goes with it ordinarily requires Board approval. For acquisitions by a noncarrier, the standard for approval is set out 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); *Common Carrier Status of States, State Agencies & Instrumentalities, & Political 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, exclusive freight rail operating easement, 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.*

⁹ DRPT states that, once the Phase 2 improvements are completed, DRPT will have the right to assume dispatching and maintenance responsibilities for the segment of the DRPT ROW between Washington, D.C., and Alexandria, Va., (Mot. to Dismiss 6), which is located north of Alexandria-Fredericksburg Interlocking at CSXT milepost CFP 104.3, (*see id.*, Ex. B arts. 1 & 5.2). Once DRPT and CSXT begin operating under Complete Separation or Maximum Feasible Separation, DRPT will have the right to take over dispatching and maintenance responsibilities on the rest of the DRPT ROW. (Mot. to Dismiss 7-8 & n.17; *see also id.*, Ex. B art. 3.6.)

¹⁰ DRPT states that CSXT will be required to maintain the entire length of any crossovers between shared property lines on the Line, and the cost of such maintenance will be divided equally between CSXT and DRPT. (Mot. to Dismiss 8 n.18; *see also id.*, Ex. B art. 7.3.)

Comm’n—Pet. for Declaratory Order, FD 36213, slip op. at 2-3 (STB served Oct. 24, 2018); Mass. Dep’t of Transp.—Acquis. Exemption—Certain Assets of CSX Transp., Inc., FD 35312, slip op. at 4-5 (STB served May 3, 2010), aff’d sub nom. Bhd. of R.R. Signalmen v. STB, 638 F.3d 807 (D.C. Cir. 2011).

Here, DRPT acknowledges that complete separation of freight and passenger traffic ultimately might not be feasible and that CSXT may need to use the DRPT ROW to fulfill its common carrier obligation (and has reserved a freight rail easement over it for that purpose).¹¹ Therefore, the Board will analyze the transaction under State of Maine.

The Board finds, under State of Maine, that the transaction as proposed does not require Board approval. Under the draft CRA, CSXT will convey its interest in the DRPT ROW by quitclaim deed but reserve to itself a permanent and exclusive freight railroad operating easement.¹² (Mot. to Dismiss 4; see also id., Ex. A arts. 4.2.1 & 4.11(a).) Moreover, CSXT will also retain ownership of its own separate but adjacent right-of-way along the Line—an even stronger property interest in the corridor than reserving an easement over the transferred property. See Reg’l Transp. Dist.—Acquis. Exemption—Union Pac. R.R. in Adams, Denver, & Jefferson Cntys., Colo., FD 35394, slip op. at 4 (STB served Dec. 21, 2010) (concluding, under State of Maine, that a commuter rail authority did not need Board approval to acquire portions of a rail carrier’s right-of-way running adjacent to portions of the right-of-way retained by the rail carrier). In addition, DRPT will not obtain any rights to provide freight rail service or admit others to provide freight rail service on the DRPT ROW. (Mot. to Dismiss 5; see also id., Ex. A art. 4.11(b).) The first element of the State of Maine inquiry therefore is satisfied.

Furthermore, the relevant agreements do not allow DRPT to unduly interfere with CSXT’s continuation of common carrier freight rail service. After DRPT acquires the DRPT ROW, CSXT will continue to have the right to operate on the Line, (Mot. to Dismiss 5; see also id., Ex. B art. 3.3), including within its own, retained CSXT ROW, and the terms of the JOMA stipulate that nothing in that agreement will alter, modify, or diminish CSXT’s right to fulfill its common carrier obligation to serve current and future freight customers on the Line, (see id., Ex. B art. 3.3). Prior to Complete Separation or Maximum Feasible Separation, CSXT will continue to be responsible for dispatching and maintaining the Line, except to the extent DRPT elects to assume responsibility for dispatching and maintaining the segment of the DRPT ROW between Washington, D.C., and Alexandria, Va. (Mot. to Dismiss 6-8; see also id., Ex. B arts. 5 & 7.) Once Complete Separation or Maximum Feasible Separation is in place, and each party is responsible for dispatching and maintaining its respective portion of the Line, CSXT will still be able to conduct operations on the CSXT ROW, as well as on the DRPT ROW to the extent Complete Separation was not achieved; during emergencies; during construction, repairs, or maintenance of the CSXT ROW; or when necessary to reach a shipper. (Mot. to Dismiss 7;

¹¹ Cf. Sacramento Reg’l Transit Dist.—Pet. for Declaratory Order Regarding Carrier Status, FD 33796 (STB served July 5, 2000).

¹² According to DRPT, a copy of the form of quitclaim deed, which will include the CSXT-retained permanent and exclusive freight railroad operating easement, will be filed after it is finalized. (Mot. to Dismiss 4 n.7.) See infra note 14.

see also id., Ex. B art. 4.1.) These arrangements demonstrate that DRPT will not be able to unduly interfere with CSXT's common carrier obligation for freight service on the Line.

To the extent CSXT must use the DRPT ROW to fulfill its common carrier obligation, DRPT's control of dispatching and maintenance on that portion of the Line will also not unduly interfere with CSXT's provision of freight service. The Board has observed that dispatching control has less importance in its own right than it has as a means of enforcing service priorities, and that an operating agreement should be considered as a whole to determine if it is likely to impair freight service. See Mass. Dep't of Transp., FD 35312, slip op. at 10; 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). Here, the parties' goal is to work towards more complete separation of freight and passenger traffic on the Line, and ultimately to allow freight and passenger traffic to operate, to the extent feasible, side by side on separate, dedicated tracks. (Mot. to Dismiss 3-4, 7; see also id., Ex. A art. 1.2.2.) Because the parties plan for freight and passenger operations to be operated on separate track, except in specific, limited circumstances, DRPT's dispatching is unlikely to impair CSXT's common carrier freight service.¹³ In any event, under the JOMA, DRPT's dispatching will be subject to dispatch protocols that allow for optimization of passenger service and freight service and that can only be modified upon the mutual agreement of the parties. (Mot. to Dismiss 6-8; see also id., Ex. B art. 5.2.1.)

As to maintenance, the Board has found that the 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). Under the JOMA, DRPT must maintain the track and facilities on the DRPT ROW either to the level required by law for the applicable track use or to meet CSXT engineering standards. (See Mot. to Dismiss 5 n.10; see also id., Ex. B art. 7.5.) CSXT will be responsible for maintaining the entire length of the crossovers that cross shared property lines on the DRPT ROW, subject to 50 percent reimbursement from DRPT. (See Mot. to Dismiss 8 n.8; see also id., Ex. B art. 7.3.) These maintenance requirements will ensure that the DRPT ROW is maintained to standards required for CSXT to fulfill its common carrier freight obligation.

The Board has also noted that placing dispatching and maintenance control in the hands of the acquiring noncarrier may be allowed when there is a legitimate business justification. See Fla. Dep't of Transp.—Pet. for Declaratory Order—Rail Line of CSX Transp., Inc. Between Riviera Beach & Miami, Fla., FD 35783, slip op. at 8 (STB served Oct. 1, 2014); San Benito R.R.—Acquis. Exemption—Certain Assets of Union Pac. R.R., FD 35225, slip op. at 4 (STB served June 23, 2011). Here, the planned capital improvements to create additional freight and passenger capacity on the Line and the parties' goal to establish the greatest possible separation of freight and passenger traffic provide a legitimate business justification for giving DRPT control of dispatching and maintaining the DRPT ROW.

¹³ Although DRPT may begin dispatching the segment of the DRPT ROW between Washington, D.C., and Alexandria, Va., after the completion of the Phase 2 improvements, and before the parties begin operating under Complete Separation or Maximum Feasible Separation, that segment will be already separated from CSXT's track between Washington, D.C., and Alexandria, Va. (See Mot. to Dismiss, Ex. D.)

Based on this record and the draft documents submitted,¹⁴ the Board finds that the proposed transaction is consistent with State of Maine, and that DRPT's acquisition of the DRPT ROW is not the acquisition of a rail line under 49 U.S.C. § 10901(a)(4). Because CSXT will retain an exclusive, permanent freight rail easement over the DRPT ROW, as well as retain ownership of the parallel and adjacent CSXT ROW, and because the terms of the relevant agreements will protect CSXT against undue interference with its common carrier freight rail obligation, the acquisition will not cause DRPT to become a rail carrier. Under these circumstances, the proposed transaction does not require Board authorization under 49 U.S.C. § 10901. Accordingly, the Board will grant DRPT's motion to dismiss the petition for exemption and dismiss this proceeding.

It is ordered:

1. DRPT's motion to dismiss the petition for exemption is granted and the proceeding is dismissed.
2. DRPT is directed to file final versions of the CRA and the JOMA and a copy of the form of deed, once they are finalized.
3. This decision is effective on its service date.

By the Board, Board Members Begeman, Fuchs, and Oberman.

¹⁴ As noted, see supra notes 2 & 12, DRPT has submitted draft transactional documents and states that it will submit final versions of these documents to the Board. Material changes to the terms of these documents may result in the Board finding that the alterations constitute a new transaction that is subject to State of Maine review. See Mass. Dept. of Transp., FD 35312, slip op. at 15. DRPT is directed to submit final versions of these documents once they are finalized. See id.