

SERVICE DATE – NOVEMBER 30, 2021

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36544

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 Virginia Passenger Rail Authority (VPRA), does not need Board authority to acquire certain real property and trackage on a rail line owned by CSX Transportation, Inc. The Board therefore grants VPRA’s motion to dismiss its petition seeking that authority.

Decided: November 30, 2021

In this decision, the Board grants the motion of the Commonwealth of Virginia, a noncarrier acting by and through its Virginia Passenger Rail Authority (VPRA), to dismiss its petition for exemption to acquire certain real property rights and trackage owned by CSX Transportation, Inc. (CSXT), 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 the proposed transaction would not constitute the acquisition of a rail line under 49 U.S.C. § 10901 and therefore does not require Board authority because CSXT would be selling only the physical assets of the rail line. A third-party freight carrier would hold a permanent and exclusive freight rail operating easement, subject to CSXT’s retained limited overhead trackage rights, to fulfill the freight rail common carrier obligation on the line, and the purchaser, VPRA, would not be able to unduly interfere with freight rail service.

BACKGROUND

On September 28, 2021, 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 certain real property and trackage on approximately 164.22 miles of rail line owned by CSXT, located between approximately milepost 276.0 in the town of Clifton Forge in Allegheny County, and milepost 111.78 in the town of Doswell in Hanover County, all in the Commonwealth of Virginia. These real property rights and trackage are referred to as “Segment 3.” Concurrently, VPRA filed a motion to dismiss the petition, contending that the proposed transaction does not

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).

require Board authorization under the agency's State of Maine precedent. The motion is unopposed.²

VPRA states that it has reached an agreement with CSXT, pursuant to which CSXT would convey to VPRA all of its rights, title, and interest in Segment 3 by quitclaim deed (Segment 3 Deed).³ (Mot. to Dismiss 3.)⁴ According to VPRA, the objective of the Segment 3 Sale is to facilitate the expansion of passenger rail service on Segment 3. (Pet. 5.)

VPRA states that Buckingham Branch Railroad Company (BBRC), a Class III carrier, has leased a rail line, which includes Segment 3, from CSXT since 2004, subject to CSXT's retention of limited overhead trackage rights on the leased line. (Mot. to Dismiss 3); see also Buckingham Branch R.R.—Lease—CSX Transp., Inc., FD 34495 (STB served Nov. 5, 2004) (authorizing lease). VPRA states that, prior to closing on the Segment 3 Sale, CSXT and BBRC plan to convert BBRC's leasehold interest to a permanent, exclusive freight rail operating easement (Segment 3 BBRC Freight Easement).⁵ (Mot. to Dismiss 3-4.)⁶ According to VPRA, when the Segment 3 BBRC Freight Easement transaction is consummated, the BBRC lease would be terminated with respect to Segment 3, and a new CSXT-BBRC operating agreement governing BBRC's operations on Segment 3 (Segment 3 Operating Agreement)⁷ would take effect. (Mot. to Dismiss 4.)

² On November 15, 2021, VPRA filed a supplement in response to a Board decision served on November 10, 2021, requesting that VPRA clarify the contractual provision(s) addressing the circumstances under which it could assume responsibility for dispatching Segment 3 and the protocols or other provisions that would govern such dispatching responsibility. See Commonwealth of Va.—Acquis. Exemption—Certain Assets of CSX Transp., Inc., FD 36544, slip op. at 2 (STB served Nov. 10, 2021).

³ A draft Segment 3 Deed is included as Exhibit A to VPRA's motion to dismiss.

⁴ The conveyance of Segment 3 from CSXT to VPRA will be referred to herein as the "Segment 3 Sale."

⁵ A draft Segment 3 BBRC Freight Easement Agreement is included as Exhibit D to VPRA's motion to dismiss.

⁶ On September 2, 2021, in Buckingham Branch Railroad—Acquisition & Operation Exemption with Interchange Commitment—CSX Transportation, Inc., Docket No. FD 34495 (Sub-No. 1), BBRC filed a verified notice of exemption to acquire the Segment 3 BBRC Freight Easement. VPRA states that, if BBRC has not acquired the Segment 3 BBRC Freight Easement prior to CSXT and VPRA's closing on the Segment 3 Sale, CSXT would retain a permanent and exclusive easement for its freight rail rights on Segment 3 until the Segment 3 BBRC Freight Easement is conveyed to BBRC or a third party pursuant to Board authorization. (Mot. to Dismiss 4 n.7.) If that occurs, VPRA further states that it would file a revised Segment 3 Deed showing CSXT's retained easement and a copy of the CSXT-BBRC Lease Agreement. (Id.)

⁷ A draft Segment 3 Operating Agreement is included as Exhibit E to VPRA's motion to dismiss.

According to VPRA, the Segment 3 Sale would be subject to the Segment 3 BBRC Freight Easement and CSXT's retained limited overhead trackage rights, which would encompass the entirety of the common carrier rights and obligations associated with Segment 3. (*Id.* at 4-5.) VPRA states that the Segment 3 Sale would also be subject to the statutory and contract rights of the National Railroad Passenger Corporation, also known as Amtrak. (*Id.* at 5.)

According to VPRA, the Segment 3 Sale also would be governed by the Comprehensive Rail Agreement (CRA) and the Joint Operating and Maintenance Agreement (JOMA) between CSXT and VPRA.⁸ (Mot. to Dismiss 5.) VPRA states that the JOMA gives VPRA the right to operate passenger trains on Segment 3 and provides the terms for such operations. (*Id.*) According to VPRA, new passenger operations on Segment 3 are conditioned on an analysis of safety and any necessary infrastructure improvements and shall not unreasonably interfere with BBRC's and CSXT's freight operations. (*Id.*)

VPRA states that BBRC has dispatched Segment 3 under the lease with CSXT, and, under the draft Segment 3 Operating Agreement, BBRC would continue to dispatch Segment 3 unless BBRC and VPRA agree to a different dispatching arrangement. (*Id.* at 5 & n.16.) According to VPRA, the agreements among VPRA, CSXT, and BBRC ensure that any potential dispatching by VPRA of Segment 3 would not unduly interfere with freight traffic. (VPRA Suppl. 1.) In addition, VPRA states that BBRC has operated, maintained, and improved the line, including Segment 3, since the inception of the lease with CSXT, and that BBRC would continue to do so under the Segment 3 Operating Agreement. (Mot. to Dismiss 6.)

VPRA seeks expedited consideration and requests that the Board issue a decision granting the motion to dismiss on or before November 30, 2021, to allow the consummation of the Segment 3 Sale in accordance with the project timelines established by the parties. (*Id.* at 8.)

DISCUSSION AND CONCLUSIONS

The question at issue here is whether the Board's authority is required for VPRA to acquire Segment 3 under the proposed transaction. The acquisition of an active rail line and the

⁸ The Board reviewed draft versions of the CRA and the JOMA between CSXT and the Commonwealth of Virginia, acting by and through its Department of Rail and Public Transportation (DRPT), in Commonwealth of Virginia—Acquisition Exemption—Certain Assets of CSX Transportation, Inc., Docket No. FD 36441. In that proceeding, the Board granted DRPT's motion to dismiss a petition for exemption to acquire a portion of CSXT's right-of-way between Washington, D.C., and Petersburg, Va., finding that the transaction was consistent with State of Maine. See Commonwealth of Va.—Acquis. Exemption—Certain Assets of CSX Transp., Inc., FD 36441 (STB served Dec. 14, 2020). On April 6, 2021, in Docket No. FD 36441, DRPT filed final versions of the CRA and the JOMA. VPRA explains that it succeeded by assignment to all the rights, responsibilities, and obligations of DRPT related to the transaction with CSXT in Docket No. FD 36441, including DRPT's rights and obligations under the CRA and the JOMA; thus, the CRA and JOMA govern the parties' relationships here as well. (Mot. to Dismiss 2 n.1 & 5 n.12.) The final versions of the CRA and the JOMA are included as Exhibits B and C, respectively, to VPRA's motion to dismiss.

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 (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;⁹ 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.—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).

As noted, under State of Maine, the Board has permitted transactions to proceed without a Board license or exemption where a third-party freight carrier would hold the easement, rather than the selling freight carrier retaining the easement, provided that sufficient contractual rights and protections are transferred to the third-party freight carrier to carry out the common carrier obligation without undue interference from the noncarrier owner of the line. See, e.g., Santa Cruz Cnty. Reg'l Transp. Comm'n, FD 35653, slip op. at 3; Wis. Dep't of Transp.—Pet. for Declaratory Ord.—Rail Line in Sheboygan Cnty., Wis., FD 35195, slip op. at 3 (STB served Apr. 22, 2009); Port of Seattle—Acquis. Exemption—Certain Assets of BNSF Ry., FD 35128, slip op. at 3-4 (STB served Oct. 27, 2008).

Here, the Board finds that, under State of Maine, the transaction as proposed does not require Board approval. BBRC, which has operated on Segment 3 pursuant to a lease with CSXT since 2004, has recently been authorized to acquire from CSXT the Segment 3 BBRC Freight Easement. See Buckingham Branch R.R.—Acquis. & Operation Exemption with Interchange Commitment—CSX Transp., Inc., FD 34495 (Sub-No. 1) (STB served Sept. 28, 2021). The terms of the draft Segment 3 BBRC Freight Easement Agreement provide that it would be permanent, (see Mot. to Dismiss, Ex. D at 6-7), and exclusive, (see id., Ex. D at 2), as required under State of Maine. See Mass. Dep't of Transp., FD 35312, slip op. at 12; V&S Ry., FD 35459, slip op. at 10 n.14. Under the draft Segment 3 Deed, CSXT would convey its interest

⁹ The freight rail easement need only be “exclusive” in the sense that “the carrier holding the easement [must] remain as the exclusive common carrier for that rail line, at least vis-à-vis the noncarrier acquiring the underlying rail assets.” V&S Ry., LLC—Pet. for Declaratory Ord.—R.R. Operations in Hutchinson, Kan., FD 35459, slip op. at 10 n.14 (STB served July 12, 2012). It is not inconsistent with State of Maine principles for additional freight carriers other than the easement holder to use the line as well, such as via overhead trackage rights with the easement holder. See, e.g., Metro. Council—Pet. for Declaratory Ord., FD 36178, slip op. at 5 & n.8 (STB served Aug. 23, 2018).

in Segment 3 to VPRA subject to both the Segment 3 BBRC Freight Easement and CSXT's limited overhead trackage rights on Segment 3.¹⁰ (See Mot. to Dismiss, Ex. A at 4 & 7.) In addition, the draft Segment 3 Deed provides that VPRA shall use Segment 3 only for passenger rail purposes and shall not use Segment 3 for freight rail purposes. (See id., Ex. A at 8-9.) The first element of the State of Maine inquiry—a freight carrier's retention of a permanent, exclusive freight rail easement and the common carrier obligation—therefore is satisfied.

Furthermore, the relevant agreements do not allow VPRA to unduly interfere with common carrier freight rail service on Segment 3. For example, the JOMA provides that “[n]othing in this Agreement shall . . . alter, modify or diminish BBRC's common carrier obligation or CSXT's residual common carrier obligation to serve current and future freight customers on Segment 3.” (Mot. to Dismiss, Ex. C § 3.3.) The JOMA also permits VPRA to operate additional passenger trains on Segment 3, but conditions such additional passenger operations upon an analysis of safety and necessary infrastructure and requires that such operations “be subject to and not unreasonably interfere with BBRC's and CSXT's right to satisfy an applicable common carrier obligation.” (See id., Ex. C § 6.2.1 & 6.2.1(i).) The JOMA further stipulates that any additional passenger operations on Segment 3 are subject to the Segment 3 BBRC Freight Easement. (See id., Ex. C § 6.2.1(ii).)

In addition, the draft Segment 3 Operating Agreement provides that BBRC would be responsible for maintaining Segment 3 in the condition necessary to permit railroad freight operations comparable to those in place at the start of BBRC's lease with CSXT, and to at least the Federal Railroad Administration track class standards existing at the start of BBRC's lease with CSXT. (See Mot. to Dismiss, Ex. E § 8(a).)

As to dispatching, the Board has observed that dispatching control has less importance in its own right than it has as a means of enforcing the parties' agreed-upon service priorities. Accordingly, if the operating agreement considered as a whole, together with other applicable agreements, is not likely to impair freight service, the passenger operator's control over dispatching should not by itself create such an obstacle, as such control would merely be used to implement the parties' service arrangements. See Commonwealth of Va., FD 36441, slip op. at 6; 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 draft Segment 3 Operating Agreement provides that, after closing on the Segment 3 Sale, BBRC would continue to be responsible for dispatching Segment 3, unless BBRC and VPRA agree to a different dispatching arrangement. (See Mot. to Dismiss, Ex. E § 8(b).) If BBRC and VPRA agreed that VPRA would assume responsibility for dispatching Segment 3, such dispatching would be subject to the previously discussed provisions of the JOMA providing that VPRA's ownership of Segment 3 is subject to BBRC's and CSXT's common carrier freight obligations. (See Mot. to Dismiss, Ex. C §§ 3.3, 6.2.1; see also Mot. to Dismiss, Ex. E § 26(c) (providing that passenger rail service on Segment 3 shall not unreasonably

¹⁰ As noted, CSXT's overhead trackage rights do not render the easement nonexclusive. “A transaction can satisfy the State of Maine inquiry even when another entity holds overhead trackage rights on the line.” See Metro. Council, FD 36178, slip op. at 5 & n.8 (collecting cases).

interfere with BBRC's and CSXT's common carrier freight obligations).) These arrangements demonstrate that VPRA would not be able to unduly interfere with common carrier freight service on Segment 3.

Based on this record and the draft documents submitted,¹¹ the Board finds that the proposed transaction is consistent with State of Maine, and that VPRA's acquisition of Segment 3 is not the acquisition of a rail line under 49 U.S.C. § 10901(a)(4). Because BBRC would hold the Segment 3 BBRC Freight Easement, and CSXT would retain limited overhead trackage rights, and because the terms of the relevant agreements would protect BBRC and CSXT against undue interference with their common carrier freight service, 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. Accordingly, the Board will grant VPRA's motion to dismiss the petition for exemption and dismiss this proceeding.

It is ordered:

1. VPRA's motion to dismiss the petition for exemption is granted and the proceeding is dismissed.
2. VPRA is directed to file final versions of the Segment 3 Deed, the Segment 3 BBRC Freight Easement Agreement, and the Segment 3 Operating Agreement once they are finalized.
3. This decision is effective on its service date.

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

¹¹ As noted, see supra notes 3, 5 & 7, VPRA has submitted draft versions of the Segment 3 Deed, the Segment 3 BBRC Freight Easement Agreement, and the Segment 3 Operating Agreement. 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. Dep't. of Transp., FD 35312, slip op. at 15. VPRA will be directed to submit final versions of these documents once they are finalized. See id. The Board's conclusion that the proposed transaction does not require Board authorization under 49 U.S.C. § 10901 will remain in effect, however, unless and until the Board issues an order to the contrary.